

IN THE NAME OF ECONOMIC DEVELOPMENT: REVIVING “PUBLIC USE” AS A LIMITATION ON THE EMINENT DOMAIN POWER IN THE WAKE OF *KELO V. CITY OF NEW LONDON*

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I. INTRODUCTION

Imagine that you are unexpectedly informed that your cherished home or family-run business has been selected as the perfect site for a new hotel, office park, or automobile plant. That new hotel, office park, or automobile plant is predicted to create hundreds, maybe even thousands, of new jobs and generate thousands, possibly millions, more dollars in tax revenues. Essentially, your state or local government has determined that, in its opinion, someone else can put your property to a better, more productive use. Although your home or business may be priceless to you, it nonetheless cannot compete with a corporate giant in terms of tax revenue, job creation, and other economic benefits. Your well-maintained home or business is not blighted by any stretch of the imagination—it poses no threat to human safety or health. Rather, it is merely located in an area targeted by your city for economic development. Consequently, the

government condemns your home or business, and upon payment of some amount of just compensation, your property is handed over to another private entity. The bulldozers move in and a newer, more profitable entity is erected on the site where your home or business once stood. Your home, your neighborhood, and your business are gone—all in the name of economic development.

The situation described above is not a far-fetched scenario. Rather, this is illustrative of the controversial issue facing state and local governments across the country: the legitimacy of using eminent domain as an instrument for economic development.

The legal question surrounding this controversy focuses on whether “economic development” is in fact a valid public use that satisfies the requirements of the Fifth Amendment Takings Clause. In its recent decision of *Kelo v. City of New London*,¹ the United States Supreme Court recently answered this question in the affirmative. Consequently, in the wake of *Kelo*, city and state governments across the country are essentially free to force Americans to surrender their property to private developers and corporations that can utilize the land in a more profitable manner.

This Note explores the evolution of economic development in the context of the eminent domain power, its problems, and its future after *Kelo*. Part II of this Note discusses the evolution of public use in general and then focuses more specifically on two prior United States Supreme Court cases that drastically eroded the boundaries of public use, thus laying the foundation for today’s economic development rationale for eminent domain. Part III reviews the expansion of economic development eminent domain in the state courts and then turns to the United States Supreme Court’s *Kelo* decision. Part IV makes a case for unconstitutionality by distinguishing the public use of economic development from other accepted public uses. Part V highlights various problems of the economic development rationale, and Part VI discusses state court limitations on economic development takings. Finally, Part VII turns to the future of economic development in the aftermath of *Kelo* and appeals to Congress and state legislatures to take action to limit this misuse of the eminent domain power.

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

II. THE FOUNDATION OF THE ECONOMIC DEVELOPMENT EMINENT DOMAIN RATIONALE

A. *Evolving Notions of “Public Use”*

Few, if any, powers are as “despotic”² as the eminent domain power bestowed upon the federal and state government by the Takings Clause of the United States Constitution³ and parallel provisions found in state constitutions.⁴ Simply put, eminent domain is the government’s power to take a citizen’s private property for public use⁵ without the owner’s consent.⁶ Although “[a] man’s home may be his castle . . . that does not keep the Government from taking it.”⁷

2. Vanhorne’s Lessee v. Dorrance, 2 U.S. (2 Dall.) 304, 311 (1795).

3. See U.S. CONST. amend. V (“[N]or shall private property be taken for public use, without just compensation.”). The Fifth Amendment is applicable to the states through the Fourteenth Amendment. *Chi., Burlington & Quincy R.R. v. Chicago*, 166 U.S. 226, 233–34 (1897).

4. See ALA. CONST. art. I, § 24; ALASKA CONST. art. I, § 18; ARIZ. CONST. art. II, § 17; ARK. CONST. art. II, § 22; CAL. CONST. art. I, § 19; COLO. CONST. art. II, §§ 14–15; CONN. CONST. art. I, § 11; DEL. CONST. art. I, § 8; FLA. CONST. art. X, § 6; GA. CONST. art. I, § 3, ¶ 1; HAW. CONST. art. I, § 20; IDAHO CONST. art. I, § 14; ILL. CONST. art. I, § 15; IND. CONST. art. I, § 21; IOWA CONST. art. I, § 18; KAN. CONST. art. XII, § 4; KY. CONST. § 13; LA. CONST. art. I § 4; ME. CONST. art. I, § 21; MD. CONST. art. III, §§ 40–40A; MASS. CONST. pt. I, art. X; MICH. CONST. art. X, § 2; MINN. CONST. art. I, § 13; MISS. CONST. art. III, § 17; MO. CONST. art. I, §§ 26–28; MONT. CONST. art. II § 29; NEB. CONST. art. I, § 21; NEV. CONST. art. I, § 8; N.H. CONST. pt. 1, art. 12; N.J. CONST. art. I, ¶ 20; N.M. CONST. art. 2, § 20; N.Y. CONST. art. I, § 7; N.C. CONST. art. I, § 19; N.D. CONST. art. I, § 16; OHIO CONST. art. I, § 19; OKLA. CONST. art. II, §§ 23–24; OR. CONST. art. I, § 18; PA. CONST. art. I, § 10; R.I. CONST. art. I, § 16; S.C. CONST. art. I, § 13; S.D. CONST. art. VI, § 13; TENN. CONST. art. I, § 21; TEX. CONST. art. I, § 17; UTAH CONST. art. I, § 22; VT. CONST. ch. I, art. 2; VA. CONST. art. I, §§ 6, 11; WASH. CONST. art. I, § 16; W. VA. CONST. art. III, § 9; WIS. CONST. art. I, § 13; WYO. CONST. art. I, §§ 32–33; see also 2A NICHOLS ON EMINENT DOMAIN § 7.01[1] (Julius L. Sackman ed., 3d ed. 2004). Additionally, eminent domain authority is often delegated to municipal and public service corporations. 2A NICHOLS ON EMINENT DOMAIN, *supra*, § 7.01[1].

5. The term “public use,” as used in the Fifth Amendment Takings Clause, has been broadly interpreted by the United States Supreme Court to mean “public purpose” or “public benefit.” See discussion *infra* Part II.B.3.a.

6. See 2A NICHOLS ON EMINENT DOMAIN, *supra* note 4, § 7.01[1]. The eminent domain power has been declared an “inherent attribute of sovereignty” and is restricted only by the limitations placed upon it by constitutional and statutory provisions. *Id.*

7. *Kelo v. City of New London*, 843 A.2d 500, 574 (Conn. 2004) (Zarella, J., concurring in part and dissenting in part) (quoting *Hendler v. United States*, 952 F.2d 1364, 1371 (Fed. Cir. 1991)), *aff’d*, 125 S. Ct. 2655 (2005).

That is not to say, however, that the eminent domain power is without restraint. Realizing that individual liberty largely depends upon property ownership, the framers of the United States Constitution wisely placed two conditions on the government's exercise of this awesome power:⁸ (1) private property may only be taken for public use; and (2) just compensation must be paid to the owner of such property.⁹ Together, these two requirements were intended to protect "the security of Property," by ensuring stable property ownership and promoting fairness and justice by preventing "excessive, unpredictable, or unfair use of the government's eminent domain power."¹⁰

Of these two constitutional conditions, the public use requirement has arguably posed the greatest challenge to legal minds. The elusive concept of public use has significantly evolved throughout history and is still incapable of precise definition.¹¹ This amorphous concept has also evolved greatly over time.¹² In recent years, it has also come under considerable scrutiny as the meaning of public use has been stretched to its breaking point by some courts and state legislatures.¹³

Historically, the concept of public use had humble origins and was construed quite narrowly by requiring that taken land be for the use of the general public.¹⁴ Under this narrow interpretation of public use, eminent

8. James W. Ely, Jr., *Can the "Despotic Power" Be Tamed? Reconsidering the Public Use Limitation on Eminent Domain*, PROB. & PROP., Nov.-Dec. 2003, at 31, 32 (explaining that the constitutional framers "believed that security of property rights was necessary for the enjoyment of individual liberty" and, consequently, it is not surprising that they restricted the eminent domain power by adding the just compensation and public use requirements).

9. See U.S. CONST. amend. V ("[N]or shall private property be taken for public use, without just compensation."). Most state constitutions have similar provisions. See *supra* note 4 and accompanying text.

10. *Kelo*, 125 S. Ct. at 2672 (O'Connor, J., dissenting) (quoting 1 RECORDS OF THE FEDERAL CONVENTION OF 1787, at 302 (M. Farrand ed., 1934)) (describing the purposes of the public use and the just compensation requirements).

11. See 2A NICHOLS ON EMINENT DOMAIN, *supra* note 4, § 7.02 (discussing various interpretations of public use).

12. *Id.* § 7.02[6].

13. See Ely, *supra* note 8, at 31 (describing the controversy surrounding economic development eminent domain).

14. See 2A NICHOLS ON EMINENT DOMAIN, *supra* note 4, § 7.02[2] (noting the narrow definition of public use interpreted the phrase to require that the public actually use, or have the opportunity to use, the taken property); Mary Massaron Ross, *Public Use: Does County of Wayne v. Hathcock Signal a Revival of the Public Use Limit to the Taking of Private Property?*, 37 URB. LAW. 243, 246-47 (2005) (comparing the narrow and broad interpretations of public use).

domain was traditionally exercised to assemble land for highways,¹⁵ bridges,¹⁶ public buildings,¹⁷ public parks,¹⁸ and public utilities.¹⁹ This narrow view also included situations where condemned property was conveyed to a private entity that was duty-bound to keep it open to all users. A typical example is a railroad corporation that is subject to the common carrier obligation of universal and nondiscriminatory service to the public.²⁰

It was not until the early twentieth century when the boundaries of public use began to erode and the concept was construed more broadly to encompass the notions of “public purpose” or “public benefit.”²¹ This new interpretation permitted a greater variety of situations to fulfill the public use mandate of the Takings Clause. A familiar example is urban renewal, which permitted condemnation of slums and substandard property in order to benefit the public welfare.²² Following the adoption of this broad approach to public use, however, eminent domain began to be utilized for more questionable purposes in situations where public utility did not so clearly outweigh the benefit to private individuals or entities.²³

15. 26 AM. JUR. 2D *Eminent Domain* § 67 (2004).

16. *Id.* § 54.

17. *Id.* §§ 57, 59.

18. *Id.* § 73.

19. *Id.* § 61.

20. *Kelo v. City of New London*, 125 S. Ct. 2655, 2673 (2005) (O'Connor, J., dissenting); *see also* 13 AM. JUR. 2D *Carriers* § 2 (2005) (defining the duties of common carriers).

21. Gideon Kanner, *Is the “Public Use” Pendulum Reaching the End of Its Swing?*, in LAND USE INSTITUTE: PLANNING, REGULATION, LITIGATION, EMINENT DOMAIN, AND COMPENSATION 709, 711–13 (ALI-ABA Course of Study, Aug. 22–24, 2002), available at SH018 ALI-ABA 709 (Westlaw) (describing the United States Supreme Court’s equation of public use with public “benefit” or “purpose”); Peter J. Kulick, Comment, *Rolling the Dice: Determining Public Use in Order to Effectuate a “Public-Private Taking”—A Proposal to Redefine “Public Use,”* 2000 LAW REV. MICH. ST. U. DETROIT C.L. 639, 647–49 (2000) (same).

22. *See infra* Part II.B.1.

23. *See Ely, supra* note 8, at 31 (stating that the government has used eminent domain to encourage economic development); Kulick, *supra* note 21, at 640–42, 649–61 (same); *see also* Dean Starkman, *Cities Use Eminent Domain to Clear Lots for Big-Box Stores*, WALL ST. J., Dec. 8, 2004, at B1 [hereinafter Starkman, *Big-Box Stores*] (explaining how many cities are using eminent domain power to give land to big-box retailers such as Home Depot Inc., Kmart Holding Corp., and Wal-Mart Stores Inc.); Dean Starkman, *Take and Give: Condemnation Is Used to Hand One Business Property of Another*, WALL ST. J., Dec. 2, 1998, at A1 [hereinafter Starkman, *Take and Give*] (indicating that many state and local governments condemn a business property and then give it to another business).

Governments increasingly began seizing the private property of one person to give to another private party, usually a developer or a corporation, that allegedly could use the property in a manner that would create more wealth for the community.²⁴ This phenomenon has generally been termed “eminent domain for economic development.”²⁵

As this expansive notion of public use has become more accepted, the ability of the public use requirement to keep the exercise of the eminent domain power in check has all but vanished as the line between the private and public use of property has become almost indistinguishable in the eyes of many courts, legislatures, and local governments around the country. Over the past fifty years, federal and state jurisprudence has steadily chipped away almost all significance of the public use requirement by ever-so-greatly expanding its interpretation.²⁶ Any lingering significance has undoubtedly been laid to rest by the recent United States Supreme Court decision in *Kelo* in which the Court expanded the interpretation of public use beyond acceptable boundaries to permit the taking of private property for private use in the name of economic development.²⁷

“Economic development” refers to increased tax revenues, job creation, and a general positive effect on the economy.²⁸ In recent years, the concept of economic development has been touted by local governments and approved by the United States Supreme Court and numerous state courts as a public use sufficient to satisfy the public use requirement of the Takings Clause in the federal and various state constitutions.²⁹ This doctrine, however, is riddled with problems—not only

24. Dana Berliner, *Public Use, Private Use—Does Anyone Know the Difference?*, in INVERSE CONDEMNATION AND RELATED GOVERNMENT LIABILITY 789, 792–93 (ALI-ABA Course of Study, Apr. 22–24, 2004), available at SJ052 ALI-ABA 789 (Westlaw); Ely, *supra* note 8, at 31; Roy Whitehead, Jr. & Lu Hardin, *Government Theft: The Taking of Private Property to Benefit the Favored Few*, 15 GEO. MASON U. CIV. RTS. L.J. 81, 81–84 (2004); Rachel A. Lewis, Note, *Strike That, Reverse It: County of Wayne v. Hathcock: Michigan Redefines Implementing Economic Development Through Eminent Domain*, 50 VILL. L. REV. 341, 342–43 (2005).

25. Lewis, *supra* note 24, at 342–44.

26. See *infra* Parts II.B–III.

27. *Kelo v. City of New London*, 125 S. Ct. 2655, 2661–69 (2005).

28. *Id.* at 2665 (recognizing that the city’s economic development plan will provide new jobs, increased tax revenue, and other appreciable benefits to the community); Ely, *supra* note 8, at 31.

29. See, e.g., *Kelo*, 125 S. Ct. at 2658–61 (indicating that eminent domain exercised for economic development is a public use); *Poletown Neighborhood Council v. City of Detroit*, 304 N.W.2d 455, 463 (Mich. 1981) (per curiam) (same), *overruled by* *County of Wayne v. Hathcock*, 684 N.W.2d 765 (Mich. 2004).

is eminent domain in the name of economic development prone to misuse, but the proffered benefits flowing from these takings are often too uncertain and indirect to justify the enormous loss shouldered by property owners.³⁰ If increased taxes and more jobs are satisfactory justifications for the invocation of eminent domain, then, under the banner of economic development, all property is at risk of being taken for the benefit of another private owner that can create more employment opportunities and generate more tax revenue.³¹ For example, a church will always generate fewer taxes than a Costco,³² and a small family business will always provide fewer jobs than a large national chain.³³ A city may choose to replace a Motel 6 with a more profitable Ritz Carlton.³⁴ Or, it might resolve to demolish an entire community of thousands of homes, churches, and businesses in order to create a single manufacturing plant for a corporate giant.³⁵ Essentially, under the banner of economic development, all property is up for grabs as long as the professed new use provides some general stimulation of the local community's economic condition. But just how did the use of eminent domain for such an alarming purpose come about? The answer lies in the Supreme Court's previous public use holdings in *Berman v. Parker*³⁶ and *Hawaii Housing Authority v. Midkiff*.³⁷

B. Paving the Way for Economic Development Takings

The convergence of the landmark decisions of *Berman* and *Midkiff* left three distinct marks on modern public use jurisprudence and consequently set the stage for today's controversial use of eminent domain in the name of economic development.³⁸

30. See *infra* Parts IV–V.

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

32. See *Cottonwood Christian Ctr. v. Cypress Redevelopment Agency*, 218 F. Supp. 2d 1203, 1228 (C.D. Cal. 2002) (noting that most churches are tax-exempt, non-profit organizations).

33. See *Bailey v. Myers*, 76 P.3d 898, 901 (Ariz. Ct. App. 2003) (noting the government's argument that building a large retail center in place of a small family-owned business would benefit the public by creating more jobs).

34. Transcript of Oral Argument at 20–21, *Kelo*, 125 U.S. 2655 (2005) (No. 04-108).

35. E.g., *Poletown Neighborhood Council v. City of Detroit*, 304 N.W.2d 455, 457 (Mich. 1981) (per curiam) (condemning an entire neighborhood in order to build a General Motors factory), *overruled by* *County of Wayne v. Hathcock*, 684 N.W.2d 765 (Mich. 2004).

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

37. *Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229 (1984).

38. See Kulick, *supra* note 21, at 649–53 (describing the impact of the *Berman*

1. Berman v. Parker

The United States Supreme Court ushered in a new era of public use jurisprudence in 1954 with its landmark decision in *Berman*, which upheld the constitutionality of eminent domain for “urban renewal”—an attempt to revitalize inner-city neighborhoods by removing slums and eliminating blight.³⁹ The setting for *Berman* was Washington, D.C., in the 1950s when Congress had determined that a large area of the city had fallen into a general slum state.⁴⁰ The city’s blighted conditions posed a real danger to public health and safety—survey evidence revealed that of the dwellings in the condemned area, 64% were beyond repair, 58% had outside toilets, 60% had no baths, 29% lacked electricity, and 84% lacked central heating.⁴¹ In order to remedy the problem, Congress enacted the District of Columbia Redevelopment Land Act of 1945 by which Congress made a legislative determination that slums and blighted neighborhoods “are injurious to the public health, safety, morals, and welfare.”⁴² The Act also empowered the city’s redevelopment agency to take the city’s slums and blighted properties⁴³ through eminent domain and subsequently convey them to a private developer.⁴⁴ The private developer in turn would revitalize the city by constructing new residential and commercial structures which the developer, and not the government, would lease or sell for its own profit.⁴⁵

and *Midkiff* decisions on takings jurisprudence); *infra* Part III; see also *Kelo*, 125 S. Ct. at 2685–87 (Thomas, J., dissenting) (criticizing the *Berman* and *Midkiff* precedents and describing how they have facilitated takings for economic development).

39. See *Berman*, 348 U.S. at 28–31 (explaining how ridding the community of slums, blight, disease, and crime serves a public purpose).

40. *Id.* at 28.

41. *Id.* at 30.

42. *Id.* at 28. Congress further declared that the acquisition of property and “leasing or sale thereof for redevelopment” by private entities is a public use. *Id.* at 29–30 (quoting the District of Columbia Redevelopment Act of 1945, Pub. L. No. 79-592, ch. 736, § 2, 60 Stat. 790, 791 (1946)).

43. *Id.* at 28. The Act did not define either “slum” or “blight”; however, it did define “substandard housing conditions” as those that are “detrimental to the safety, health, morals, or welfare of the inhabitants” due to “lack of sanitary facilities, ventilation, or light, . . . dilapidation, overcrowding,” or “faulty interior arrangement.” *Id.* at 28 n.1 (quoting § 3(r), 60 Stat. at 792).

44. *Id.* at 29–30.

45. See *id.* (explaining that the Redevelopment Act permitted the municipal agency to acquire private property by eminent domain and then later transfer it to private redevelopment organizations). Although it was argued that this was merely a project “taking from one businessman for the benefit of another businessman,” the Court nonetheless held that “the means of executing the project are for Congress and

The owner of a department store located in an area slotted for condemnation challenged the city's redevelopment plan arguing that, contrary to the Fifth Amendment, the purpose of the taking was private and not public because the property was being transferred to a private entity and would ultimately be put to private use.⁴⁶ The Court, however, unanimously upheld the taking as constitutional, deferring to Congress's declaration that redevelopment of slums and blighted neighborhoods by private enterprise was a public purpose.⁴⁷

2. Hawaii Housing Authority v. Midkiff

Thirty years later, *Berman's* broad holding was bolstered by the Court in *Midkiff*. At issue in *Midkiff* was Hawaii's vast concentration of land ownership in the hands of only a few private individuals.⁴⁸ Legislative findings showed that in the mid-1960s, 47% of the state's land was owned by only seventy-two private individuals while the state and federal governments owned another 49%.⁴⁹ The Hawaii legislature determined that this land distribution "was responsible for skewing the State's residential fee simple market, inflating land prices, and injuring the public tranquility and welfare."⁵⁰ Thousands of homeowners were forced "to lease, rather than buy, the land underneath their homes."⁵¹ The government's solution to this skewed residential property market was the Land Reform Act of 1967.⁵² In order to rid the state of the land oligopoly⁵³ and its related "social and economic evils," the Act created a system of condemning the estates of large landowners and transferring the properties to their existing lessees.⁵⁴

The Ninth Circuit Court of Appeals found that the transfers authorized by the Act violated the Public Use Clause because the primary benefit accrued not to the public, but to the individual lessees who were enabled to purchase the property.⁵⁵ The United States Supreme Court,

Congress alone to determine, once the public purpose has been established." *Id.* at 33.

46. *Id.* at 31, 33.

47. *Id.* at 33-35.

48. *Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229, 232 (1984).

49. *Id.*

50. *Id.*

51. *Id.* at 242.

52. *Id.* at 233; Haw. Rev. Stat. §§ 516-1 to -83 (1993 & Supp. 2004).

53. The land oligopoly was a remnant of Hawaii's Polynesian feudal land system. *Midkiff*, 467 U.S. at 232.

54. *Id.* at 233.

55. *Midkiff v. Tom*, 702 F.2d 788, 789 (9th Cir. 1983) (stating that the Act was

however, was untroubled by the fact that the Act compelled the transfer of property from one citizen to another.⁵⁶ Deferring to the legislature's proclamation that regulation of the land oligopoly was a valid public use, the Court unanimously upheld Hawaii's condemnation scheme as valid under *Berman*.⁵⁷

3. *The Legacy of Berman and Midkiff*

As recognized by many scholars, the *Berman-Midkiff* duo marked a turning point in eminent domain jurisprudence.⁵⁸ *Berman* eroded many significant boundaries of the public use requirement, permitting public use to expand to a breadth never before realized.⁵⁹ *Midkiff* then buttressed the jurisprudential shift established in *Berman* and signaled that the modern conception of public use is here to stay.⁶⁰ The public use legacy of *Berman* and *Midkiff* is threefold: (1) the equation of public use with public purpose;⁶¹ (2) the approval of private individuals or entities as transferees of condemned land;⁶² and (3) extreme judicial deference to the legislature's determination of public purpose.⁶³

a. *A Modern Public Use Formula: "Public Use" Equals "Public Purpose."* *Berman* and *Midkiff* materially altered the terrain of eminent domain by equating public use with public purpose, as defined by the

"a naked attempt on the part of the state of Hawaii to take the private property of A and transfer it to B solely for B's private use and benefit"), *rev'd sub nom. Midkiff*, 467 U.S. 229.

56. See *Midkiff*, 467 U.S. at 243–44 ("The mere fact that property taken outright by eminent domain is transferred in the first instance to private beneficiaries does not condemn that taking as having only a private purpose.").

57. *Id.*

58. See, e.g., Whitehead & Hardin, *supra* note 24, at 649–53 (stating that the broad conception of public use spawned from the *Berman* and *Midkiff* decisions); Steven E. Buckingham, Comment, *The Kelo Threshold: Private Property and Public Use Reconsidered*, 39 U. RICH. L. REV. 1279, 1298–1305 (2005) (describing the dramatic expansion of the scope of eminent domain marked by the *Berman* and *Midkiff* decisions).

59. See Alice M. Noble-Allgire, *Property Scholars Take Up Eminent Domain*, PROB. & PROP., Mar.–Apr. 2004, at 11, 11–12 (discussing how the *Berman* Court applied a broad definition to public use, equating it to public purpose).

60. See 2A NICHOLS ON EMINENT DOMAIN, *supra* note 4, § 7.01[1] (noting that after *Midkiff*'s expansive definition of public use, "[p]ractically any acquisition meets the public use test" so long as it in some way furthers the public welfare).

61. See *infra* Part II.B.3.a.

62. See *infra* Part II.B.3.c.

63. See *infra* Part II.B.3.b.

legislature.⁶⁴ This new interpretation significantly broadened the scope of conceivable conditions capable of satisfying the Fifth Amendment's Public Use Clause.⁶⁵ A legal right of use or access by the public was no longer required; nor must the condemned property be subsequently owned by the government or another public entity that uses it to serve a public function.⁶⁶ Rather, this modern notion of eminent domain clearly indicates that a more abstract and indirect public advantage may satisfy the Public Use Clause.⁶⁷ The eminent domain calculus arising out of the *Berman-Midkiff* duo was the following: as long as a legitimate public benefit outweighs any incidental private benefit, property rights will be trumped by the government's right to exercise its eminent domain power.⁶⁸

The *Berman* Court used this formula to reject a property owner's claim that the redevelopment plan contravened the Public Use Clause.⁶⁹ The owner argued there was no valid public use because not only did the plan call for the transfer of his land to a private non-governmental entity, it also permitted the land to be privately used to fulfill a developer's own profit-making motive.⁷⁰ The Court, however, found no violation of the

64. See *Berman v. Parker*, 348 U.S. 26, 35 (1954). In replying to Berman's argument that urban renewal does not constitute a public use within the meaning of the Fifth Amendment, the Court responded in terms of the seemingly broader concept of public purpose. For example, the Court stated in its conclusion that "[o]nce the question of the public purpose has been decided, the amount and character of land to be taken for the project . . . rests [with] the legislative branch." *Id.* at 35-36; see also *Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229, 241 (1984) (stating that "where the exercise of the eminent domain power is rationally related to a conceivable public purpose, the Court has never held a compensated taking to be proscribed by the Public Use Clause"); Noble-Allgire, *supra* note 59, at 12 (noting that under the Court's broader public purpose definition, it has held that "condemnation power extends to any purpose permitted under the legislature's police power").

65. Scott Bullock, *Narrow 'Public Use'*, NAT'L L.J., Aug. 16, 2004, at 23 (explaining that "[t]he effect of [the *Berman*] decision was to essentially read the public-use limitation out of the U.S. Constitution").

66. See *Midkiff*, 467 U.S. at 244 (holding that the "government does not itself have to use property to legitimate the taking; it is only the taking's purpose, and not its mechanics, that must pass scrutiny under the Public Use Clause").

67. See 2A NICHOLS ON EMINENT DOMAIN, *supra* note 4, § 7.02[3] (describing the broad definition of public use as requiring only a public advantage).

68. See generally *Midkiff*, 467 U.S. at 244-45; *Berman*, 348 U.S. at 32-33.

69. See *Berman*, 348 U.S. at 35 (stating that if owners were allowed to continually resist redevelopment programs based on claims that their "property was not being used against the public interest, integrated plans for redevelopment would suffer greatly").

70. See *id.* at 33 (arguing that the redevelopment project was "a taking from one businessman for the benefit of another businessman").

Fifth Amendment because a valid public purpose was at stake.⁷¹ It reasoned that the public purpose to be served in this redevelopment plan was not the private use for which the condemned land would eventually be used; rather, it was the act of slum elimination itself which would benefit the public by ridding it of unhealthy and dangerous living conditions.⁷² Thus, any private benefit that ensued after the realization of this public benefit was incidental to the larger public purpose.⁷³

A similar provision was echoed in *Midkiff*, which found that the Public Use Clause does not proscribe an exercise of eminent domain that is rationally related to a conceivable public purpose.⁷⁴ The public purpose asserted in *Midkiff* was dismantling the land oligopoly and serving the public good by creating affordable housing markets.⁷⁵ Though the individual transferees would benefit as well, the public benefit dominated the private benefit.

b. *Maximum Deference, Minimum Rationality.* Perhaps the most dangerous aspect of the *Berman-Midkiff* duo is the extreme judicial deference owed to legislative determinations of public purpose under the Public Use Clause. In each case, the Court found that the eminent domain power extended to any purpose falling under the legislature's police power⁷⁶—public safety, health, morality, aesthetics, peace and quiet, law and order, and the public welfare in general.⁷⁷ The Court also

71. In replying to Berman's argument that urban renewal does not constitute a public use within the meaning of the Fifth Amendment, the Court responded in terms of the seemingly broader concept of public purpose. The Court noted that ridding the city of substandard housing conditions is a legitimate object of the state's eminent domain power. *Id.* at 32–33. The Court stated in its conclusion that “[o]nce the question of the public purpose has been decided, the amount and character of land to be taken for the project . . . rests [with] the legislative branch.” *Id.* at 35–36.

72. See *id.* at 32–35 (reasoning that the redevelopment area must be condemned to rid the community of “[m]iserable and disreputable housing conditions” that “suffocate the spirit” of the community and to stop the “cycle of decay” and “prevent the birth of future slums”). The Court's emphasis on these threats to human health, safety, and spirit caused by these housing conditions insinuates that it is the act of the slum and blight elimination that will relieve the public of these hazards. See *id.* at 32–33; see also *infra* Part IV.A. (discussing the taking itself as a public use).

73. See *Berman*, 348 U.S. at 33–34 (concluding that the public benefit “may be as well or better served through an agency of private enterprise”).

74. *Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229, 241 (1984).

75. *Id.* at 241–43.

76. *Id.* at 240 (“The ‘public use’ requirement is thus coterminous with the scope of a sovereign's police powers.”); *Berman*, 348 U.S. at 32–33.

77. See *Berman*, 348 U.S. at 32–33 (describing the scope of the police power).

acknowledged the extreme breadth of the police power.⁷⁸ The effect of this declaration was essentially “to make the Court’s review of what constitutes a public use simply an inquiry of what Congress thought was a public purpose.”⁷⁹ Even the Court suggested that public purpose is essentially defined as anything the legislature declares as such: “[t]he definition [of public use] is essentially the product of legislative determinations . . . when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive.”⁸⁰

The Court also clearly stated that only a minimal hurdle must be cleared by the legislature—as long as its exercise of the eminent domain power is rationally related to any conceivable public purpose, its determination will stand.⁸¹ The Court’s judicial acquiescence was further evidenced by its enunciation that the legislature itself is free to define public use “‘unless the [alleged public] use be palpably without reasonable foundation.’”⁸²

The Court additionally emphasized the deference to be afforded the legislature by recognizing that “‘the legislature, not the judiciary, is the main guardian of the public needs to be served by social legislation.’”⁸³ All things considered, the Court reserved for itself an exceptionally narrow role in evaluating whether the government’s eminent domain power is in fact exercised in furtherance of a purpose that is genuinely public enough to satisfy the Public Use Clause.⁸⁴

c. *Private Transferees.* *Berman* and *Midkiff* solidified the principle

78. See *Midkiff*, 467 U.S. at 240; *Berman*, 348 U.S. at 32–33.

79. *Whitehead & Hardin*, *supra* note 24, at 87.

80. *Berman*, 348 U.S. at 32. In this passage, the Court is equating the power to define public use with the police power, thus exemplifying the breadth of judicial deference that is owed to a legislative determination that a condemnation serves a public purpose. In describing the scope of the police power, the Court notes that “[a]n attempt to define its reach or trace its outer limits is fruitless.” *Id.* Also note that the *Midkiff* Court, as part of its holding, suggested that state legislatures are entitled to as much deference as the United States Congress. *Midkiff*, 467 U.S. at 244.

81. *Midkiff*, 467 U.S. at 241. The Court more specifically noted that the question was not whether in fact the Land Reform Act would accomplish its objectives; rather, constitutionality turns only upon whether the “[l]egislature *rationally could have believed* that the [Act] would promote its objective.” *Id.* at 242 (alteration in original) (quoting *W. & S. Life Ins. Co. v. State Bd. of Equalization*, 451 U.S. 648, 671–72 (1981)).

82. *Id.* at 241 (quoting *United States v. Gettysburg Elec. R.R.*, 160 U.S. 668, 680 (1896)).

83. *Id.* at 239 (quoting *Berman*, 348 U.S. at 32).

84. See *Berman*, 348 U.S. at 32.

that following a condemnation, the transfer of private property to another private entity does not necessarily affect the constitutionality of the taking.⁸⁵ Essentially, once it has been determined that a project's purpose is within the authority of the legislature, it is up to the legislature to determine the means by which such purpose is to be executed.⁸⁶ As long as those means are not irrational, the Court will not second-guess the wisdom of the legislature's choice.⁸⁷

In *Berman*, even though private property was to be taken by the government and subsequently transferred to another private, nongovernmental entity, that did not undermine the validity of the taking.⁸⁸ The Court noted that, after all, it cannot be said that "public ownership is the sole method of promoting the public purposes of community redevelopment projects."⁸⁹ It recognized that "eminent domain is merely the means to the end" and, in the case of *Berman*, one of the means legitimately chosen was "the use of private enterprise for redevelopment of the area."⁹⁰

Midkiff went further and held that even if property taken by eminent domain is in the first instance transferred to a private entity and the government never possesses the property, it is nonetheless a constitutional taking as long as a legitimate public purpose is identified.⁹¹ Thus, an outright transfer to a private beneficiary does not make it an unconstitutional taking for private purposes.⁹² In *Midkiff* the Court found that Hawaii's Land Reform Act could successfully and rationally advance its public purpose without imposing the necessity that the State take actual possession of the land.⁹³ In essence, the legitimacy of the taking is determined by whether "the taking's purpose, and not its mechanics . . . pass scrutiny under the Public Use Clause."⁹⁴

85. See *Midkiff*, 467 U.S. at 243–44; *Berman*, 348 U.S. at 33.

86. *Berman*, 348 U.S. at 33.

87. *Midkiff*, 467 U.S. at 242–43.

88. *Berman*, 348 U.S. at 33–34.

89. *Id.* at 34.

90. *Id.* at 33.

91. See *Midkiff*, 467 U.S. at 242–44 (rejecting the appeals court's conclusion that *Berman* required the "government [to] possess and use property at some point during a taking" in order to be constitutional).

92. See *id.* at 243–44.

93. *Id.* at 244.

94. *Id.*

4. *The Impact*

Critics of modern day economic development takings argue that the impact of these two landmark decisions was to create “an open invitation to irresponsible government entities to take property for the favored few.”⁹⁵ Indeed, it did not take long for governmental and private entities alike to seize upon this opportunity. As the federal government endorsed the expansive view of the Public Use Clause, numerous states followed suit in their own jurisdictions.⁹⁶ Private property was suddenly quite vulnerable, given that any public purpose, advantage, or benefit could conceivably satisfy the requirement of public use, and legislatures were free from any meaningful judicial scrutiny.⁹⁷ Ultimately, *Berman* and *Midkiff* paved the way for the epidemic of abusive economic development eminent domain proceedings that has since plagued many states.⁹⁸

In the wake of these two decisions, two major trends emerged as state courts largely removed themselves from reviewing exercises of eminent domain. First, relying on *Berman*’s endorsement of eminent domain for urban renewal of slums and blighted property, legislative determinations of “blight” quickly expanded beyond property posing health and safety hazards, as in *Berman*, to encompass perfectly normal working and middle class neighborhoods, which were taken merely because private developers, conspiring with local governments, desired to acquire them for their own projects.⁹⁹ Take, for example, the community of Lakewood, Ohio, a suburb of Cleveland that dates back over 100 years.¹⁰⁰ The city’s West End—described as a “cute neighborhood” with a “vibrant business community” and over 1,200 residents—was targeted by the city council as the site for a

95. Whitehead & Hardin, *supra* note 24, at 86–87.

96. See *supra* Part III.A.1–2.

97. See *supra* Part II.B.3.

98. See Whitehead & Hardin, *supra* note 24, at 85–90 (stating that today’s abusive economic development takings stem in part from the *Berman* and *Midkiff* decisions).

99. Bullock, *supra* note 65, at 23; see also, e.g., DANA BERLINER, INST. FOR JUSTICE, PUBLIC POWER, PRIVATE GAIN: A FIVE-YEAR, STATE-BY-STATE REPORT EXAMINING THE ABUSE OF EMINENT DOMAIN 1 (2003), http://www.castlecoalition.org/report/pdf/ED_report.pdf [hereinafter PUBLIC POWER] (documenting numerous examples of such condemnations). Eminent domain exercised under questionable blight designations are beyond the scope of this Note.

100. See Patricia E. Salkin & Lora A. Lucero, *Community Redevelopment, Public Use, and Eminent Domain*, 37 URB. LAW. 201, 218–21 (2005). See generally 60 Minutes: *Eminent Domain: Being Abused?* (CBS television broadcast July 4, 2004) (transcript available at <http://www.cbsnews.com/stories/2003/09/26/60minutes/main575343.shtml>) [hereinafter 60 Minutes Report].

new upscale shopping center, movie theater, and condominiums that would generate tax revenue for the city.¹⁰¹ In order to institute its condemnation power against the homeowners that refused to sell, the city designated the area as blighted.¹⁰² The blight designation, however, applied to any home that did not have “two bathrooms, three bedrooms, an attached two car garage, central air-conditioning[.]” or a home or yard that did not meet minimum size requirements.¹⁰³ These conditions are all a far cry from those of the *Berman* neighborhood, major portions of which were beyond repair and lacked electricity, heat, and indoor toilets and baths.¹⁰⁴ Given Lakewood’s liberal notion of blight, over 90% of the city’s homes fit the blight designation, including the homes of the mayor and all city council members that voted to approve the blight designation.¹⁰⁵

Next, governments altogether “skip[ped] the charade of declaring an area [as] blighted” and instead recklessly extended the *Berman* rationale by pronouncing economic development as a new instrument for instituting the power of eminent domain.¹⁰⁶ Armed with this new tool, many states traded homes and businesses in exchange for future increases in taxes, jobs, and other economic intangibles by transferring condemned property, designated as neither a slum nor blighted, to a private developer, retailer, or other profit-generating entity.¹⁰⁷ The alleged public purpose for these shocking condemnations was the indefinite and speculative economic benefits that would eventually accrue to the public from the new owner’s more productive use of the land.¹⁰⁸

101. Salkin & Lucero, *supra* note 100, at 218–29; *60 Minutes Report*, *supra* note 100.

102. Ohio law requires that in order for eminent domain to be used for redevelopment projects, the condemned property must be blighted. *See generally* OHIO REV. CODE ANN. §§ 303.28–.30, .33, .38 (LexisNexis 2003).

103. Salkin & Lucero, *supra* note 100, at 219; *see also 60 Minutes Report*, *supra* note 100.

104. *Berman v. Parker*, 348 U.S. 26, 30 (1954). For a more detailed description of the dire property conditions of the *Berman* redevelopment area, see Part II.B.1.

105. Salkin & Lucero, *supra* note 100, at 219; *60 Minutes Report*, *supra* note 100. Lakewood residents later succeeded in placing a referendum on a March 2004 ballot that allowed voters to decide whether to keep the West End neighborhood’s blight status—and residents overwhelmingly voted to remove the blight designation. Salkin & Lucero, *supra* note 100, at 220, 222.

106. Bullock, *supra* note 65, at 23.

107. Berliner, *supra* note 24, at 791–93.

108. *Id.* at 792; *see also, e.g., Poletown Neighborhood Council v. City of Detroit*, 304 N.W.2d 455, 459 (Mich. 1981) (per curiam) (indicating that the public purpose on which the eminent domain taking in this case was based was economic development benefiting the community at large), *overruled by County of Wayne v.*

While the United States Supreme Court had allowed for the use of eminent domain as a means to clear blighted properties in *Berman* in 1954, it was not until the Court's recent ruling in June 2005—*Kelo v. City of New London*—that the Court approved the taking of non-blighted property for the purpose of generating higher tax revenues and other forms of economic development.¹⁰⁹ Economic development takings, however, began long before *Kelo* and will continue long into the future unless Congress or state governments take action to stop the misuse of the government's most awesome and destructive power. The justification of eminent domain in the name of tax revenues and other incidental and indistinct economic benefits is the most broad and dangerous expansion of the condemnation power yet.

III. THE EXPANSION OF "PUBLIC USE" TO ACCOMMODATE PRIVATE ECONOMIC DEVELOPMENT

A. *The State Economic Development Revolution*

1. *The Birth of the Modern Economic Development Takings Doctrine: Poletown Neighborhood Council v. City of Detroit*¹¹⁰

Eminent domain's economic development theory owes its roots to the notorious case of *Poletown Neighborhood Council v. City of Detroit*, which arose in the context of an economic crisis within the state of Michigan, particularly the city of Detroit, whose economic lifeblood was the struggling automobile industry.¹¹¹ The high cost of doing business in the state, along with the automobile industry's financial difficulties brought by overseas competitors, created an exodus of car manufacturers to the more economically friendly climate of the Sunbelt states.¹¹² The unemployment rate was 14.2% statewide and 18% within Detroit.¹¹³

The city was already suffering from fiscal distress and high

Hathcock, 684 N.W.2d 765 (Mich. 2004).

109. *Kelo v. City of New London*, 125 S. Ct. 2655, 2664–69 (2005).

110. *Poletown Neighborhood Council v. City of Detroit*, 304 N.W.2d 455 (Mich. 1981) (per curiam), *overruled by* *County of Wayne v. Hathcock*, 684 N.W.2d 765 (Mich. 2004).

111. *Id.* at 465 (Ryan, J., dissenting).

112. *Id.*

113. *Id.*

unemployment when it was hit with another devastating blow: General Motors (GM), a major employer of the city population, announced a shutdown of its two aging Detroit manufacturing plants and the resultant loss of thousands more jobs.¹¹⁴ In order to stay competitive, GM planned to construct new state-of-the-art manufacturing facilities and, like other manufacturers, considered relocating to the Sunbelt.¹¹⁵ Nonetheless, GM approached the city with an offer to build its new facility within the community, provided that a suitable location could be found.¹¹⁶ Specifically, GM required a rectangular tract of land encompassing 450–500 acres of land with freeway and long-haul railroad line access.¹¹⁷ Given the specificity of these site requirements, it was clear to both GM and the city that neither a “green field” nor any existing open locations would be suitable unless the city acquired, by condemnation if necessary, the requisite land within GM’s stated timeframe.¹¹⁸ Ultimately, it was determined that the only feasible location for the new GM facility was the site of the Poletown neighborhood.¹¹⁹ If the project went forward, 3,438 people would be displaced and 1,176 structures would be destroyed.¹²⁰ Thus, as “a city with its economic back to the wall,”¹²¹ Detroit was required to make a choice: protection of the homes and businesses of 3,000 of its residents or furtherance of big business.¹²² It chose the latter, in hopes that GM would resuscitate the dying community.¹²³

Several of the affected Poletown residents filed suit, declaring that the taking of their homes was for a private, not public, use.¹²⁴ Despite the breadth of its decision, the *Poletown* majority eagerly upheld the taking.¹²⁵ Public use, the court reasoned, “changes with changing conditions of society,”¹²⁶ and in this time of economic struggle, the public benefit of

114. *Id.* at 466–67.

115. *Id.* at 466.

116. *Id.* at 466–67.

117. *Id.* at 460, 467.

118. *Id.* at 467.

119. *Id.* at 470.

120. *Id.* at 464 n.15 (Fitzgerald, J., dissenting).

121. *Id.* at 467 (Ryan, J., dissenting).

122. *See id.* at 457–58 (majority opinion) (characterizing the issue as whether economic development via a private entity is a justifiable reason to condemn private property). The city of Detroit acted through the Detroit Economic Development Corporation. *Id.* at 457.

123. *See id.* at 458.

124. *Id.*

125. *Id.* at 460.

126. *Id.* at 457 (quoting *Hays v. Kalamazoo*, 25 N.W.2d 787, 790 (1947)).

creation of an industrial park to alleviate and prevent unemployment and fiscal distress dominated the “incidental” private benefit that would accrue to GM.¹²⁷ Hence, the doctrine of economic development was born: non-blighted property could legitimately be taken for private use when taxes, jobs, and other economic stimuli were at stake.

The *Poletown* court applied a heightened standard of review to the taking: if the public benefit of tax revenues, job creation, and a general contribution to the economy is not speculative or marginal, but rather clear and significant, then an owner’s non-blighted property must yield to the greater public need.¹²⁸ The court’s finding of a clear and significant public purpose related to the fact that loss of the GM plant would have been devastating to the community—not only would it have eliminated thousands of plant jobs, but also the supporting automotive design, manufacturing, and sales businesses, as well as millions of dollars in tax revenues.¹²⁹ This would inevitably lead to a dwindling industrial base and population loss as well.¹³⁰ Conversely, accommodating GM’s plan to stay in Detroit would provide over 6,000 jobs and a \$15 million increase in tax dollars.¹³¹ Essentially, GM’s new use of the property was expected to indirectly boost the local economy. The fact that GM itself would benefit from this project was of no consequence to the court because once the public purpose was demonstrated, any incidental private purpose involved was essentially irrelevant.¹³²

Despite the ease with which the majority upheld economic development as a legitimate means to employ eminent domain, the dissenters fiercely argued that the majority’s economic benefit rationale was, in fact, a giant leap from prior Michigan precedent.¹³³ In his dissent,

127. *Id.* at 459. *But see infra* Part IV (discussing why the opposite is actually true in economic development takings—that is, the public benefit is incidental to the private benefit).

128. *Poletown*, 304 N.W.2d at 459–60. The court qualified its decision by noting that not every economic development condemnation will be constitutional simply because it may provide some jobs or increase tax revenues. *Id.* at 459. Some type of “substantial proof” that the public is the primary beneficiary is required to sustain the taking as constitutional. *Id.* Note that the “clear and significant” test utilized by the *Poletown* court was much stricter than the lenient rational basis review the United States Supreme Court applied to economic development takings years later in *Kelo*. *See infra* Part III.B.

129. *Poletown*, 304 N.W.2d at 467 (Ryan, J., dissenting).

130. *Id.*

131. *Id.*

132. *Id.* at 459–60 (majority opinion).

133. *See id.* at 462 (Fitzgerald, J., dissenting) (“Our approval of the use of

Justice Fitzgerald explained that, historically, eminent domain was limited to situations in which the public or government directly used the land or in which the private recipient of land would use it to serve the public.¹³⁴ He then acknowledged that some courts, including Michigan at times, went further than the historical norm by permitting public purpose, rather than public use, to satisfy the Public Use Clause.¹³⁵ The dissenters acknowledged that economic development takings were similar to slum clearance condemnations because they both often result in the transfer of the taken property to a private entity.¹³⁶ The distinguishing factor, however, was that by the very nature of economic development takings, the public purpose is incidental to and dominated by the private benefit.¹³⁷ The *Poletown* dissenters therefore declared that, despite the compelling nature of the economic strife plaguing the community, the taking still fell outside of constitutional boundaries.¹³⁸

As for the impact of *Poletown*, Justice Ryan eerily foreshadowed the future in his dissent: “[t]he reverberating clang of its economic, sociological, political, and jurisprudential impact is likely to be heard and felt for generations.”¹³⁹ Indeed, this ominous prediction proved telling—the aftermath of *Poletown* manifested itself in the form of an economic development frenzy that spread throughout the country. The decision signaled to other states a green light to take on their own economic development projects with the aid of eminent domain.¹⁴⁰

eminent domain power in this case takes this state into a new realm of takings of private property; there is simply no precedent for this decision in previous Michigan cases.”).

134. *Id.* at 463.

135. *Id.* at 463–64; *see also supra* Part II.B.3.a (discussing the United States Supreme Court’s equation of public use with public purpose).

136. *Poletown*, 403 N.W.2d at 462 (Fitzgerald, J., dissenting) (stating that “[t]he city places great reliance on a number of slum clearance cases here and elsewhere in which it has been held . . . the property taken is . . . transferred to private parties”).

137. *Id.*; *see also infra* Part IV (discussing the distinctions between economic development takings and those based on other public purposes).

138. *Poletown*, 304 N.W.2d at 462–65 (Fitzgerald, J., dissenting); *id.* at 481–82 (Ryan, J., dissenting).

139. *Id.* at 464 (Ryan, J., dissenting).

140. *See generally* Whitehead & Hardin, *supra* note 24, at 82 (describing how the eminent domain power is “gravely abused all over America”); Starkman, *Big-Box Stores*, *supra* note 23 (criticizing local governments’ use of eminent domain); Starkman, *Take and Give*, *supra* note 23 (same); PUBLIC POWER, *supra* note 99, at 2 (documenting over 10,000 condemnations that resulted in the transfer of private property to another private party from January 1, 1998, through December 31, 2002).

2. *State and Local Governments Follow in Poletown's Footsteps*

The *Poletown* decision did not go unnoticed. Hungry for more wealth, jobs, and taxes, state and local governments around the country followed *Poletown's* lead and seized private property for economic development purposes.¹⁴¹

The North Dakota Supreme Court, citing the *Poletown* decision, gave the nod of approval to economic development takings in a case where the city of Jamestown condemned private property for the construction of a supermarket after negotiations between the developer and property owners stalled.¹⁴² The city alleged that the public benefits flowing from the project would include the creation of more full-time jobs and competition in the grocery store business, an increase in the city's wage base, and an incentive for more people to visit the city's downtown area.¹⁴³

The Supreme Court of Kansas likewise gave the go-ahead for economic development takings, approving the taking of private property for the construction of an industrial park that would house a Target distribution center.¹⁴⁴ The projected public purposes were the creation of employment opportunities, expansion of the community's tax base, and an overall positive effect on the local economy.¹⁴⁵ The International Speedway Corporation also received the Kansas Supreme Court's seal of approval to construct the Kansas International Speedway, which would become a major tourism area.¹⁴⁶

Reminiscent of *Poletown* was the Mississippi Legislature's resolution to condemn twenty-three acres of a minority neighborhood and transfer it to Nissan Corporation for the construction of an automobile manufacturing

141. See sources cited *supra* note 140.

142. *City of Jamestown v. Leever's Supermarkets, Inc.*, 552 N.W.2d 365, 367–68 (N.D. 1996). Although approving economic development as a valid public use, the court remanded the case for a determination of whether the specific taking at issue was primarily for a public, not private, purpose. *Id.* at 374–75.

143. *Id.* at 369–71.

144. *Gen. Bldg. Contractors, L.L.C. v. Bd. of Shawnee County Comm'rs*, 66 P.3d 873, 883–84 (Kan. 2003).

145. *Id.* at 875–76, 883 (Kan. 2003) (“[T]he development of an industrial park . . . fits within the valid public purpose of encouraging economic development. . . . [Therefore,] [t]he public purpose test is clearly met.”); see also PUBLIC POWER, *supra* note 99, at 79–80 (discussing how a district court judge in Shawnee County allowed the City of Topeka to employ its eminent domain powers to acquire the desired property for the new Target distribution center).

146. *State ex rel. Tomasic v. Unified Gov't*, 962 P.2d 543, 549, 564 (Kan. 1998); see also PUBLIC POWER, *supra* note 99, at 79 (providing a brief description of the case).

plant.¹⁴⁷ The 2000 “Nissan Act” authorized the state to dedicate funds to the proposed Nissan plant.¹⁴⁸ It also conferred on the Mississippi Major Economic Impact Authority (MMEIA) the power to assemble land for the Nissan facility through eminent domain.¹⁴⁹ After homeowners challenged the condemnation, the MMEIA acknowledged that the project was viable even without the challengers’ property.¹⁵⁰ But, MMEIA nonetheless proceeded with the condemnations because it was concerned about “the message it would send to other companies if [it was] unable to do” what it promised.¹⁵¹ Apparently, MMEIA wanted to prove to future developers that the next time MMEIA promised to condemn property for private use, it could deliver the promised land.¹⁵² The Mississippi trial court found against the homeowners, but before the Mississippi Supreme Court could rule on the case, the State dropped the condemnation proceedings.¹⁵³

In Merriam, Kansas, a state court approved the condemnation of a lot housing a used car dealership so that the neighboring BMW dealership could expand and add a Volkswagen franchise.¹⁵⁴ In an attempt to ward off the condemnation, William Gross, the owner of the condemned site, offered to turn his property into the home of a Mitsubishi dealership.¹⁵⁵ The city refused his offer, explaining that the BMW dealership would generate the most tax revenue for the city.¹⁵⁶ The city took Gross’s property and sold it to the neighboring BMW dealership for the exact

147. Timothy Sandefur, *A Gleeful Obituary for Poletown Neighborhood Council v. Detroit*, 28 HARV. J.L. & PUB. POL’Y 651, 674–75 (2005); PUBLIC POWER, *supra* note 99, at 115.

148. PUBLIC POWER, *supra* note 99, at 115.

149. *Id.* at 115.

150. Sandefur, *supra* note 147, at 675; David Firestone, *Black Families Resist Mississippi Land Push*, N.Y. TIMES, Sept. 10, 2001, at A20.

151. The director of the Mississippi Development Authority stated the following to the *New York Times*:

It’s not that Nissan is going to leave if we don’t get that land . . . [w]hat’s important is the message it would send to other companies if we are unable to do what we said we would do. If you make a promise to a company like Nissan, you have to be able to follow through.

Firestone, *supra* note 150.

152. *See* PUBLIC POWER, *supra* note 99, at 116.

153. *Id.*

154. *See* Starkman, *Take and Give*, *supra* note 23; PUBLIC POWER, *supra* note 99, at 79.

155. PUBLIC POWER, *supra* note 99, at 79.

156. *Id.*

amount of just compensation received by Gross; it also gave the BMW dealer over a million dollars in tax-increment financing to aid the expansion of the facility.¹⁵⁷

Other attempts to take advantage of the economic development doctrine include Donald Trump's attempt to persuade a New Jersey development agency to condemn several parcels of land for the construction of a casino parking lot and green space¹⁵⁸ and an Arizona city's attempt to condemn a local brake service business for a national Ace Hardware store.¹⁵⁹ These are only several examples of how homeowners and small business owners have been cannibalized by eager local and state governments and hungry corporate giants. A 2003 report by the Institute for Justice recorded nearly 10,000 actual or threatened condemnations for private use from 1998 through 2002, many of which were carried out in the name of economic development.¹⁶⁰

As abusive economic development takings became more commonplace, the phenomenon eventually gained national attention and public criticism.¹⁶¹ The issue then reached its zenith when the United States Supreme Court agreed to take sides on the economic development controversy in the case of *Kelo v. City of New London*.¹⁶²

157. *Id.*

158. *Casino Reinvestment Dev. Auth. v. Banin*, 727 A.2d 102, 106 (N.J. Super. Ct. Law Div. 1998). Trump's plan was defeated. The court found that there were no definite requirements as to the future use of the land in question, and, accordingly, the private benefit to Trump would outweigh the public benefit. *Id.* at 110–11.

159. *Bailey v. Myers*, 76 P.3d 898, 899–900 (Ariz. Ct. App. 2003). The Arizona Appellate Court, however, found the taking unconstitutional because the public benefit was not substantially greater than the private benefit, as required under the state constitution when private ownership results from an exercise of eminent domain. *Id.* at 899–904.

160. PUBLIC POWER, *supra* note 99, at 2.

161. *E.g.*, STEVEN GREENHUT, ABUSE OF POWER: HOW THE GOVERNMENT MISUSES EMINENT DOMAIN 239–48 (2004) (explaining how the media got involved and took a stand against eminent domain); Starkman, *Big-Box Stores*, *supra* note 23 (criticizing local governments' use of eminent domain); Starkman, *Take and Give*, *supra* note 23 (same); PUBLIC POWER, *supra* note 99, at 1–2 (documenting over 10,000 "filed or threatened" condemnations of private property from January 1, 1998, through December 31, 2002).

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

B. *The High Court's Approval of Economic Development Takings: Kelo v. City of New London*

The setting of the *Kelo* case is New London, Connecticut—an old whaling community and former manufacturing hub located at the junction of the Thames River and Long Island Sound.¹⁶³ The Fort Trumbull neighborhood of New London is located on a peninsula that juts out into the Thames River.¹⁶⁴ Situated upon this riverfront is an old Victorian house that Susette Kelo calls home.¹⁶⁵ Purchased nearly ten years ago, Susette has made extensive improvements to the house.¹⁶⁶ To Susette, her home and its picturesque view of the Thames was priceless.¹⁶⁷ Wilhelmina Dery lived just a block away from Susette.¹⁶⁸ Wilhelmina's house was originally purchased in 1901 by her family, which moved from Italy only twenty years earlier.¹⁶⁹ From the time of her birth in 1918, Wilhemina has lived in this home.¹⁷⁰ Her husband has resided there since the couple wed fifty-nine years ago.¹⁷¹ Even the Derys' son grew up in this home.¹⁷²

Susette Kelo and Wilhelmina Dery's hometown of New London was a town desperate for economic revival.¹⁷³ Since the 1970s, it had endured serious economic decline.¹⁷⁴ A state agency had declared the city a distressed municipality by 1990, and in 1996 the community lost a major employer when the federal government shut down the Naval Undersea Warfare Center.¹⁷⁵ The city's statistics were staggering: it suffered an unemployment rate of 7.6%, nearly twice that of the state; its population was at its lowest point since 1920; and, although local property taxes were the city's main source of funding, 54% of New London was tax-exempt.¹⁷⁶

163. Brief of Respondents at 1, *Kelo v. City of New London*, 125 S. Ct. 2655 (2005) (No. 04-108), 2005 WL 429976, at *1.

164. *Id.* at 1, 2005 WL 429976, at *1.

165. Brief of Petitioners at 2, *Kelo*, 125 S. Ct. 2655 (No. 04-108), 2004 WL 2811059, at *2.

166. *Id.* at 2, 2004 WL 2811059, at *2.

167. *Id.* at 2–3, 2004 WL 2811059, at *2–3.

168. *Id.* at 2, 2004 WL 2811059, at *2.

169. *Id.* at 1–2, 2004 WL 2811059, at *1–2.

170. *Id.* at 1–2, 2004 WL 2811059, at *1–2.

171. *Id.* at 2, 2004 WL 2811059, at *2.

172. *Id.* at 2, 2004 WL 2811059, at *2.

173. Brief of Respondents, *supra* note 163, at 1–2, 2005 WL 429976, at *1–2.

174. *Id.* at 2, 2005 WL 429976, at *2.

175. *Kelo v. City of New London*, 125 S. Ct. 2655, 2658 (2005).

176. *Id.*; Brief of Respondents, *supra* note 163, at 1–2, 2005 WL 429976, at *1–2.

In an effort to combat the city's status as a distressed municipality, state and local officials launched a serious attempt to spark the local economy. In 1998, the State Bond Commission approved bonds to support economic development planning activities in New London, particularly for the Fort Trumbull area.¹⁷⁷ The New London Development Corporation (NLDC)¹⁷⁸ was designated to oversee the revitalization project.¹⁷⁹ In 1998, good news arrived for the city—Pfizer, Inc., an international pharmaceutical giant, announced its plan to construct a \$300 million research facility on a New London site adjacent to Fort Trumbull.¹⁸⁰ Hoping to capitalize on the new business that the Pfizer facility would bring with it, the NLDC created an economic development plan for a ninety-acre portion of the Fort Trumbull neighborhood, which would adjoin the new Pfizer site.¹⁸¹

The NLDC's municipal development plan (MDP) was approved by the city council in 2000.¹⁸² The city also armed the NLDC with the authority to purchase property within the development area or acquire it through eminent domain.¹⁸³ The MDP encompassed seven parcels.¹⁸⁴ Parcel 1 called for a waterfront hotel and conference center, marina, and public riverwalk that would stretch across the development area.¹⁸⁵ Parcel 2 was designated the future site of eighty new residences and a United States Coast Guard Museum.¹⁸⁶ Parcel 3 would host research and development office space.¹⁸⁷ Parcel 4A was designated as space for park support.¹⁸⁸ The precise meaning of park support, however, was unclear from witness testimony during trial.¹⁸⁹ Parcel 4B included a renovated

177. *Kelo v. City of New London*, No. 557299, 2002 WL 500238, at *2 (Conn. Super. Ct. Mar. 13, 2002), *aff'd in part, rev'd in part*, 843 A.2d 500 (Conn. 2004), *aff'd*, 125 S. Ct. 2655 (2005).

178. The NLDC is a private corporation that is "not elected by popular election or directly controlled by the political process." *Id.* at *2, *10–11 (internal quotation marks omitted).

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

180. *Id.*

181. *Id.*

182. *Id.*

183. *Id.* at 2660.

184. *Id.* at 2659.

185. *Id.*

186. *Id.*

187. *Id.*

188. *Id.*

189. Brief of Petitioners, *supra* note 165, at 4, 2004 WL 2811059, at *4.

marina and the final piece of the public riverwalk.¹⁹⁰ Parcels 5, 6, and 7 were slotted “for office and retail space, parking, and, water-dependent commercial uses.”¹⁹¹ The economic benefits stemming from this development project were predicted to be substantial: the creation of thousands of jobs, an increase of nearly \$1 million in annual property tax revenue, extensive improvements to the city’s infrastructure, and the creation of additional public recreational opportunities.¹⁹²

The NLDC was successful in negotiating the purchase of most real estate in the Fort Trumbull MDP area.¹⁹³ It had also selected Corcoran Jennison, a private developer, for the project.¹⁹⁴ In negotiations with the NLDC, Corcoran Jennison agreed that it would lease several of the development parcels for one dollar per year for a term of ninety-nine years, and in turn it would develop the leased property and select tenants for the project.¹⁹⁵

New London’s economic overhaul was right on track, except for one problem—Susette Kelo and the Dery family, along with several other neighborhood residents, refused to give up their homes.¹⁹⁶ Consequently, in November 2000, the NLDC initiated condemnation proceedings against the stubborn property owners.¹⁹⁷ The NLDC made no allegations that any of the properties were blighted or otherwise in substandard condition; rather, they sought condemnation merely because their properties were located within the development area.¹⁹⁸ In December 2000, a total of nine petitioners owning fifteen properties located in parcels 3 and 4A filed suit to save their homes and investment properties.¹⁹⁹

The Connecticut Superior Court took a deferential stance to the state legislature’s determination that economic development was a public use,²⁰⁰

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

191. *Id.*

192. Brief of Respondents, *supra* note 163, at 8, 2005 WL 429976, at *8.

193. *Kelo*, 125 S. Ct. at 2660.

194. *Kelo v. City of New London*, 843 A.2d 500, 540 (Conn. 2004), *aff’d*, 125 S. Ct. 2655 (2005).

195. Brief of Petitioners, *supra* note 165, at 6, 2004 WL 2811059, at *6.

196. *Kelo*, 125 S. Ct. at 2660.

197. *Id.*

198. *Id.*

199. *Id.*

200. *Kelo v. City of New London*, No. 557299, 2002 WL 500238, at *29 (Conn. Super. Ct. Mar. 13, 2002), *aff’d in part, rev’d in part*, 843 A.2d 500 (Conn. 2004), *aff’d*, 125 S. Ct. 2655 (2005).

finding that it was indeed a sufficient public use to satisfy both the State and Federal Takings Clause.²⁰¹ Citing *Poletown* as an example, the court explained the following:

[E]minent domain may be used to help a private enterprise if the primary goal of the taking leads to a project that will eventually promote the public welfare or advantage. Economic development will certainly do that and is especially needed in economically distressed areas which are, because of that very condition, less likely to attract development money from capital markets without government assistance.²⁰²

The Connecticut Superior Court did, however, grant permanent injunctive relief to the petitioners residing on parcel 4A²⁰³ due to the lack of a clearly identified future use for the land encompassed by that parcel.²⁰⁴ Given this ambiguity, it was uncertain whether the condemnation was necessary for the project, and, consequently, whether the taking would serve a future public use.²⁰⁵ The superior court ruled against the parcel 3 property owners, but did grant them a temporary injunction until the case was resolved in the appellate courts.²⁰⁶

On appeal the Connecticut Supreme Court also upheld economic development as a valid public use under the state and federal constitutions.²⁰⁷ It did, however, reverse the lower court with respect to the grant of permanent injunctive relief to the parcel 4A landowners, finding the condemnations legitimate despite the fact that the city had not yet

201. *Id.* at *32–33.

202. *Id.* at *32 (quotation omitted).

203. *Id.* at *74–76.

204. *Id.* at *112.

205. *Id.* at *51, *76 (explaining that “if it is not necessary to take particular property under the guise of accomplishing a public purpose, the taking in any real sense cannot be for a public use”).

206. *Id.* at *112.

207. *Kelo v. City of New London*, 843 A.2d 500, 536 (Conn. 2004), *aff’d*, 125 S. Ct. 2655. The Connecticut constitution provides that “[t]he property of no person shall be taken for public use without just compensation therefore.” CONN. CONST. art. I, § 11. The court refused to give more than minimal scrutiny to the legislature’s determination of public use and expressly rejected *Poletown*’s heightened scrutiny standard. *Kelo*, 843 A.2d at 528 n.39. The court focused heavily on the fact that the record was absent of any indication that the city or the NLDC was “‘motivated by a desire to aid particular private entities.’” *Id.* at 540 (quoting *Kelo*, 2002 WL 500238, at *43).

committed to definite development plans.²⁰⁸ The dissent, however, sharply criticized the majority for establishing a precedent that amounted to nothing more than a “Field of Dreams”²⁰⁹ test:

[I]f the enabling statute is constitutional, if the plan of development is drawn in good faith and if the plan merely states that there are economic benefits to be realized, that is enough. Thus, the test is premised on the concept that “if you build it, [they] will come,” and fails to protect adequately the rights of private property owners.²¹⁰

In a desperate last attempt to save their homes, the Fort Trumbull residents appealed their cause to the country’s highest court.²¹¹ On September 28, 2004, the United States Supreme Court granted certiorari to decide the following question: “[w]hat protection does the Fifth Amendment’s public use requirement provide for individuals whose property is being condemned, not to eliminate slums or blight, but for the sole purpose of ‘economic development’ that will perhaps increase tax revenues and improve the local economy?”²¹²

The answer was not what Susette Kelo and the Dery family had hoped—not even the Fifth Amendment’s Public Use Clause was strong enough to stop the bulldozers from razing their homes. As Justice Sandra Day O’Connor explained in her dissent: the effect of the Court’s decision was “to wash out any distinction between private and public use of property.”²¹³

1. *Majority Opinion*

In the five-to-four decision, the majority acknowledged the hardship that the condemnations would place on the Fort Trumbull residents, but nonetheless approved New London’s use of eminent domain in the name

208. *Kelo*, 843 A.2d at 573–74.

209. The famous line from the movie *Field of Dreams* is, “[i]f you build it, they will come.” *FIELD OF DREAMS* (Universal Studios 1989).

210. *Kelo*, 843 A.2d at 602 (Zarella, J., concurring in part and dissenting in part) (second alteration in original). Justice Zarella argued that because the terms of the development agreement were uncertain, it was impossible to know whether the public interest would be primarily, if at all, served by the condemnations. *Id.* He would have required “clear and convincing” evidence that the agreement’s anticipated public benefits were “reasonably ensured.” *Id.*

211. Petition for Writ of Certiorari, *Kelo v. City of New London*, 125 S. Ct. 2655 (2005) (No. 04-108), 2004 WL 1659558.

212. *Id.* at i, 2004 WL 1659558, at *i.

213. *Kelo*, 125 S. Ct. at 2671 (O’Connor, J., dissenting).

of economic development. The majority began its analysis by noting two perfectly clear polar propositions.²¹⁴ On one hand, government is definitely prohibited from taking “the property of *A* for the sole purpose of transferring it to another private party *B*, even though *A* is paid just compensation.”²¹⁵ It is equally clear that, on the other hand, the government may take property from one private party to give to another if the property will actually be used by the public in the future—a typical example is condemnation for a railroad subject to common carrier duties.²¹⁶ The majority believed that the situation at hand fell somewhere in between these two polar propositions.²¹⁷

The majority then emphasized the broad interpretation of public use adopted by the Court many years ago that rejected any literal requirement of actual public use.²¹⁸ It then relied on *Berman* and *Midkiff* to stress the broad latitude owed to the legislature in determining what particular public needs justify the invocation of the condemnation power.²¹⁹ Connecticut state and local officials decided that the Fort Trumbull “area was sufficiently distressed to justify a program of economic rejuvenation”—that decision, the Court held, was entitled to its deference.²²⁰ The anticipated public benefits recognized by the majority included job creation, increased tax revenue, and the general coordination of “a variety of commercial, residential, and recreational uses of land” which are anticipated to “form a whole greater than the sum of its parts.”²²¹ The majority reiterated the *Midkiff* maxim that “only the taking’s purpose, and not its mechanics” is what “matters in determining public use.”²²²

The majority also focused on the motive of the city. Finding that the development plan was “not adopted ‘to benefit a particular class of identifiable individuals,’” the majority was satisfied that the city’s intent was to benefit the public and not a private entity.²²³ The majority also stressed the comprehensive character of the economic development plan at

214. *Id.* at 2661 (majority opinion).

215. *Id.*

216. *Id.*

217. *Id.*

218. *Id.* at 2663; *see also supra* Part II.B.3.a.

219. *Kelo*, 125 S. Ct. at 2663–64; *see also supra* Part II.B.3.c.

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

221. *Id.*

222. *Id.* at 2664 (quoting *Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229, 244 (1984)).

223. *Id.* at 2662 (quoting *Midkiff*, 467 U.S. at 245).

issue and “the thorough deliberation that preceded its adoption,”²²⁴ suggesting that a plan not so “carefully formulated”²²⁵ or “executed outside the confines of an integrated development plan” might require a more searching review.²²⁶ Justice Kennedy’s concurrence also noted that a standard of review more stringent than required by *Berman* and *Midkiff* may be appropriate in some economic development takings, such as when “the risk of undetected impermissible favoritism of private parties is so acute that a presumption . . . of invalidity is warranted” or when the proffered benefits are too “trivial or implausible.”²²⁷ Finding no illegitimate purpose in the case at hand,²²⁸ the Court was satisfied with a mere rational basis review.²²⁹

A bright-line rule that economic development does not constitute a valid public use was rejected by the majority, finding that the promotion of economic development was a traditional and long accepted function of the government.²³⁰ It also argued that there was “no principled way of distinguishing economic development from the other public purposes that” the Court has recognized in the past, such as the elimination of slums and blight in *Berman* and the destruction of the land oligopoly in *Midkiff*.²³¹ A reasonable certainty test was also rejected by the Court because requiring proof that the expected public benefits will actually materialize would be a significant impediment to development plans and a great departure from the deferential precedent set by *Berman* and *Midkiff*.²³²

The majority did find that the public use requirement would still prohibit takings in at least two situations. First, the taking of property for

224. *Id.* at 2665.

225. *Id.*

226. *Id.* at 2667 (noting that although such an “unusual exercise of government power would certainly raise a suspicion that a private purpose was afoot,” such cases “can be confronted if and when they arise”).

227. *Id.* at 2670 (Kennedy, J., concurring). In her dissent, Justice O’Connor criticized Justice Kennedy for failing to set forth any indication as to what a court should look for in “ferreting out” private takings or how a court should conduct such an inquiry. *Id.* at 2675 (O’Connor, J., dissenting).

228. *Id.* at 2662 (majority opinion).

229. *Id.* at 2667 (“When the legislature’s purpose is legitimate and its means are not irrational, our cases make clear that empirical debates over the wisdom of takings—no less than debates over the wisdom of other kinds of socioeconomic legislation—are not to be carried out in the federal courts.” (quoting *Hous. Auth. v. Midkiff*, 467 U.S. 229, 242 (1984))).

230. *Id.* at 2665.

231. *Id.*

232. *Id.* at 2667–68.

the purpose of benefiting a private party would not constitute a public use.²³³ Second, the taking of property under the pretext of a public purpose, such as economic development, when the actual purpose is to confer a private benefit would be forbidden by the Public Use Clause.²³⁴

2. *The Dissent*

The majority's "perverse result" did not sit well with the dissenters.²³⁵ Justice O'Connor lashed out at the majority for casting a specter of condemnation that, in the aftermath of its decision, would loom over all private property.²³⁶

First, O'Connor distinguished the very nature of the purpose underlying the *Kelo* taking with those of *Berman* and *Midkiff*.²³⁷ *Berman* and *Midkiff*, she argued, "were true to the principle underlying the Public Use Clause"—the precondemnation uses of the property in both *Midkiff* and *Berman* were actually inflicting an affirmative harm on society, and, by condemning them, the harm was remedied.²³⁸ In *Kelo*, however, the condemnation itself provided no benefit to the public.²³⁹ The public benefit of economic development, she found, was incidental to the private taking.²⁴⁰

Both O'Connor and Thomas also argued that when testing the constitutionality of a taking, the police power and public use cannot always be considered coterminous.²⁴¹ In *Berman* and *Midkiff*, the equation of these two concepts was appropriate, because it just so happened that the purposes at stake were not only within the police power, but also an actual public use.²⁴² This proposition, she argued, does not hold true in the *Kelo* case—economic development surely falls within the police power, but does not fall under the umbrella of public use, as the public benefits are merely

233. *Id.* at 2661. The problem, however, is that with economic development takings, the public and private benefits are so interrelated it is often difficult to tell which one is paramount. See discussion *infra* Part IV.

234. *Kelo*, 125 S. Ct. at 2661.

235. See *id.* at 2677 (O'Connor, J., dissenting).

236. *Id.* at 2676.

237. *Id.* at 2673–75; see also *infra* Part IV.

238. *Kelo*, 125 S. Ct. at 2674–75.

239. *Id.*

240. *Id.* at 2675.

241. *Id.*; *id.* at 2686 (Thomas, J., dissenting).

242. See *id.* at 2675 (O'Connor, J., dissenting) (citing *Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229, 240 (1984); *Berman v. Parker*, 348 U.S. 26, 32 (1954)).

incidental to the private benefits.²⁴³

O'Connor also criticized the majority's motive test as a means of identifying an illegitimate private taking.²⁴⁴ The problem with economic development condemnations, she noted, "is that private benefit and incidental public benefit are, by definition, merged and mutually reinforcing. . . . [F]or example, any boon for Pfizer or the plan's developer is difficult to disaggregate from the promised public gains in taxes and jobs."²⁴⁵ Because they are so interdependent, it is extremely difficult to isolate an intent to benefit the public from an intent to benefit a private party—this is because they can be one and the same. She also criticized the Court for its failure to provide any guidance to courts as to how they can successfully ferret out condemnations whose purpose is to benefit a private transferee.²⁴⁶

Justice Thomas also took aim at the Court's broad conception of public use.²⁴⁷ He argued that the current equation of public purpose and public use was divorced from the original meaning of the text and urged the Court to return to the more narrow and literal reading of the Public Use Clause: "the government may take property only if it actually uses or gives the public a legal right to use the property."²⁴⁸ Surely, public use means at least this. Such a test would ensure that a taking was in fact put to public use. In light of the Court's prior holdings in *Berman* and *Midkiff*, however, a return to such a narrow view is unlikely.

IV. DISTINGUISHING ECONOMIC DEVELOPMENT FROM OTHER PUBLIC PURPOSES

Kelo was the Court's opportunity to add some bite to the Public Use Clause. Instead, the five-justice *Kelo* majority gutted its constitutional significance and, as the dissent explained, effectively "delete[d] the words 'for public use' from the Takings Clause of the Fifth Amendment."²⁴⁹ In the *Kelo* majority opinion, Justice Stevens argued that there was "no principled way of distinguishing" economic development from other public purposes recognized by the Court, particularly those it upheld in *Berman*

243. *See id.* at 2674–75.

244. *Id.* at 2676.

245. *Id.* at 2675–76.

246. *Id.* at 2675.

247. *See id.* at 2677 (Thomas, J., dissenting).

248. *Id.* at 2686.

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

and *Midkiff*, and, consequently, there was no reason to treat it differently than the rest.²⁵⁰ That, however, was a misguided conclusion. To the contrary, private economic development is distinguishable in many important respects from how the Court has defined public use in the past, even when taking into account the broad interpretation adopted in *Berman* and *Midkiff*.²⁵¹ These distinctions are in fact sufficient to warrant different treatment and an ultimate finding that economic development falls outside the constitutional realm of public use. These distinctions all point to the conclusion that in economic development takings, the public benefit is not paramount to the private benefit and thus runs afoul of the Court's own public use calculus employed in *Berman* and *Midkiff*.²⁵² Given the inherent differences between economic development takings and those based on other public purposes, the Court could have sensibly reconciled its previous *Berman* and *Midkiff* holdings with a determination in *Kelo* that eminent domain in the name of economic development is inconsistent with the Takings Clause. The Court should have seized upon these distinctions in order to finally place a principled limitation on the scope of public use and resurrect public use boundaries.

A. *The Taking Itself As a Public Use*

The first distinction between economic development takings and those premised on other public purposes is the source from which the public benefit flows.²⁵³ When eminent domain is exercised for traditional public purposes, such as roads or utilities, the taking directly results in an immediate public benefit because the property is put to public use or government ownership.²⁵⁴ The taking itself converted it to actual public use or service and, therefore, produced a public benefit.

Even when public use was equated with public purpose or public benefit, the *Berman* and *Midkiff* takings still directly resulted in public

250. *Id.* at 2665–66 (majority opinion).

251. *See infra* Part IV.A–D.

252. *See supra* Part II.B.3.a.

253. *Compare* *Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229, 239–45 (1984) (finding the public purpose was to divide the land oligopoly in order to serve the public good by developing affordable housing), *and* *Berman v. Parker*, 348 U.S. 26, 33 (1954) (finding the public purpose was to redevelop private property for “urban renewal,” an attempt to remove slums), *with Kelo*, 125 S. Ct. at 2668–69 (finding the city’s economic revitalization plan served a public purpose).

254. *See generally Kelo*, 125 S. Ct. at 2673 (O’Connor, J., dissenting) (describing traditional uses of eminent domain that result in use by or service to the public).

benefits.²⁵⁵ The eradication of blight and slums in *Berman* was accomplished contemporaneously with the government's condemnation of the redevelopment area.²⁵⁶ The condemnation itself immediately rid the public of health and safety hazards.²⁵⁷ No further action was required to accomplish the goal of promoting the public welfare—the public use accrued to the public at the moment the government took the land and before it was transferred to a private entity.²⁵⁸ Similarly, the dissolution of the land oligopoly in *Midkiff* was instantly accomplished by the very act of transferring the condemned property from the wealthy landowners to the lessees—this was true regardless of its proposed future use.²⁵⁹ Essentially, the public benefit flowed directly from the taking itself and not from any other event occurring thereafter.²⁶⁰ Because the future use of the property was irrelevant to the accomplishment of the public purpose, the public benefit was clearly paramount and any secondary benefit conferred on a private entity from subsequent use of the land was incidental.²⁶¹

In her dissent in *Kelo*, Justice O'Connor framed this distinction in terms of affirmative harm.²⁶² In both *Berman* and *Midkiff* the precondemnation use of the taken property actually “inflicted affirmative harm on society—in *Berman* through blight resulting from extreme poverty and in *Midkiff* through oligopoly resulting from extreme wealth.”²⁶³ In each case, a legislative body had determined that in order to prevent future injury to the public it was necessary to terminate the harmful precondemnation property use.²⁶⁴ Justice O'Connor pointed out that in each case “a public purpose was realized when the harmful use was eliminated” and concluded that it was inconsequential that the property

255. See *supra* Part II.B.3.a.

256. See *Kelo*, 125 S. Ct. at 2674–75 (O'Connor, J., dissenting) (citing *Berman*, 348 U.S. at 28–29).

257. *Id.*

258. *Id.*

259. See *id.* (citing *Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229, 232 (1984)).

260. See *id.*

261. Cf. *Daniels v. Area Plan Comm'n*, 306 F.3d 445, 462 (7th Cir. 2002) (noting that the taking in that case was different from *Midkiff* in that the public would not necessarily be benefited by the taking alone); *Poletown Neighborhood Council v. City of Detroit*, 304 N.W.2d 455, 462 (Mich. 1981) (Fitzgerald, J., dissenting) (stating that some courts find that the public use should be determined at the time of the taking, even if some conceivable public benefit may accrue from the condemnation in the future), *overruled by* *County of Wayne v. Hathcock*, 684 N.W.2d 765 (Mich. 2004).

262. See *Kelo*, 125 S. Ct. at 2674 (O'Connor, J., dissenting).

263. *Id.*

264. *Id.*

was subsequently transferred over to private use because the *Berman* and *Midkiff* “taking[s] directly achieved a public benefit.”²⁶⁵

Condemnations for the purpose of economic development, however, do not themselves benefit the public. Instead, they are merely a stepping stone to the ultimate realization of the anticipated public purpose. When non-blighted property is condemned for the purpose of economic development, no public benefit directly and immediately accrues to the community—there is neither a simultaneous removal of public harm, such as deleterious living conditions or land oligopoly, nor a contemporaneous grant of public benefit. Economic stimulus—the justification of the taking—will only indirectly accrue in the future, after the taking and once the private party has (successfully and profitably) put the property to private use.²⁶⁶ An intermediate stage of development and the accumulation of commerce and industry is necessary before taxes will increase, jobs will be produced, and the economy will be revitalized.²⁶⁷ Therefore, the taking itself does not render a public benefit sufficient to satisfy the Public Use Clause.

As Justice O'Connor pointed out in her *Kelo* dissent: the city of New London did “not claim that Susette Kelo’s and Wilhelmina Dery’s well-maintained homes are the source of any social harm.”²⁶⁸ Therefore, the taking itself could not have created a public benefit unless one were to

adopt [] the absurd argument that any single-family home that might be razed to make way for an apartment building, or any church that might be replaced with a retail store, or any small business that might be more lucrative if it were instead part of a national franchise, is inherently harmful to society.²⁶⁹

Only in such case would the taking of Susette Kelo’s Victorian home fit with prior precedent. In economic development takings, it is the future private use to which the taken land will eventually be put, rather than the

265. *Id.*

266. *See Poletown*, 304 N.W.2d at 462 (Fitzgerald, J., dissenting) (“[O]nly through the acquisition and use of the property by General Motors [will] the public purpose of promoting employment . . . be achieved.” (internal quotation marks omitted)); *see also infra* Parts IV.B–C.

267. *See Poletown*, 304 N.W.2d at 461 (Fitzgerald, J., dissenting) (noting that “[t]he city attache[d] great importance to the explicit legislative findings . . . that it [was] necessary [for the community] to encourage industry in order to revitalize the economy”).

268. *Kelo*, 125 S. Ct. at 2675 (O'Connor, J., dissenting).

269. *Id.*

act of condemnation, that is the source of the proffered public benefits.²⁷⁰ The primary beneficiary of the condemnation itself is the private interest that gains the use of the land.²⁷¹

B. “Trickle-Down” Benefits

The *Kelo* property owners argued that permitting economic development takings blurs the line between public and private takings.²⁷² This stems from the fact that public benefits realized from a private economic development taking are merely byproducts of the private entity’s benefits. Economic development takings proceed on the theory that the transfer of property from one private party to another private interest—which is neither a legitimate object of the eminent domain power nor a public benefit in and of itself—will subsequently create “trickle-down” benefits for the general public.²⁷³ According to *Kelo*, these public benefits, which are merely positive offshoots of the private beneficiary’s use of the property, are sufficient to satisfy the Public Use Clause.²⁷⁴

It is well settled that a government’s pursuit of a public purpose that may benefit private parties does not render a taking invalid.²⁷⁵ For example, in *Midkiff*, the land transfer conferred a large benefit on the lessees that were finally enabled to purchase their home.²⁷⁶ The key, however, is that in a taking such as those at issue in *Midkiff*, the public benefit was dependent upon the taking itself—as soon as the property was condemned, the oligopoly was eliminated.²⁷⁷ Realization of the public benefit was dependent upon the government’s actions and was not

270. County of Wayne v. Hathcock, 684 N.W.2d 765, 784 (Mich. 2004).

271. *Id.*

272. *Kelo*, 125 S. Ct. at 2666.

273. Brief of Petitioners, *supra* note 165, at 12–13, 2004 WL 2811059, at *12–13; Brief of Property Rights Foundation of America, Inc. as Amicus Curiae Supporting Petitioners at 7–8, *Kelo*, 125 S. Ct. 2655 (No. 04-108), 2004 WL 1900737, at *7–8 [hereinafter Brief of Property Rights Foundation].

274. *See Kelo*, 125 S. Ct. at 2664–65 (noting that even though the city officials were not removing blight, the taking was valid because the area was in need of “economic rejuvenation”).

275. *See supra* Part II.B.3.a.

276. *See Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229, 232–34 (1984) (noting that the Hawaii Housing Authority (HHA) may sell the land to tenants, and that the tenants would acquire fee simple title); *see also supra* Part II.B.2.

277. *See Midkiff*, 467 U.S. at 232–34 (describing the process by which the HHA acquired the rights and title in the property after condemnation).

contingent on the subsequent private use.²⁷⁸

To the contrary, in an economic development taking, any public benefit achieved by an economic development taking is ultimately derivative and dependent upon the future success of the private entity to which the condemned land was transferred.²⁷⁹ The efforts of a private party, and not the government, determines when and if a public purpose will be served from the taking.²⁸⁰ In *Poletown*, only when GM successfully pursued its profit-making motives would its private use of the condemned site lead to the creation of jobs and economic stimulation of the local community.²⁸¹ If the private transferee did not succeed in its business venture, then no public purpose would materialize from the taking.

This inherent attribute of economic development condemnations troubled Justice O'Connor. In her *Kelo* dissent, she described the public benefits accruing from a private economic development taking as secondary, incidental, and mere positive side-effects of the private benefit.²⁸² It is indeed difficult to reconcile this troublesome aspect of economic development condemnation with the Public Use Clause. When the public purpose derived from a taking is merely a fortuitous side-effect of the subsequent private use, it is difficult to see how the public benefit is paramount to the private benefit.²⁸³

278. See *id.* at 242 (finding that condemnation would remedy the market failure by making properties available to willing buyers).

279. Brief of Petitioners, *supra* note 165, at 26, 2004 WL 2811059, at *26; Brief of Property Rights Foundation, *supra* note 273, at 7–8, 2004 WL 1900737, at *7–8.

280. Brief of Property Rights Foundation, *supra* note 273, at 7–8, 2004 WL 1900737, at *7–8.

281. See discussion *supra* Part III.A.1.

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

283. This reasoning led a *Poletown* dissenter to find economic development takings unconstitutional: "It is only through the acquisition and use of the property by General Motors that the public purpose of promoting employment can be achieved. Thus, it is the economic benefits of the project that are incidental to the private use of the property." *Poletown Neighborhood Council v. City of Detroit*, 304 N.W.2d 455, 462 (Mich. 1981) (Fitzgerald, J., dissenting) (internal quotation marks omitted), *overruled by* *County of Wayne v. Hathcock*, 684 N.W.2d 265 (Mich. 2004); see also *Daniels v. Area Plan Comm'n*, 306 F.3d 445, 462 (7th Cir. 2002) (stating that because the public benefit "will not materialize absent any promised commercial development of the [property]," the developer, and not the county, is therefore the primary beneficiary of the condemnation, and not the county).

C. Uncertain Public Benefits

The attenuation between the taking itself and the realization of a public use or purpose also means that there is no guarantee that the anticipated development and the corresponding public benefits of tax revenues and jobs will ever materialize.²⁸⁴ Traditional uses of eminent domain generally result in a reasonably foreseeable, if not immediate, public benefit.²⁸⁵ Even the public purpose of eliminating blight in *Berman* was fairly certain to result from the taking—as soon as residents were removed from substandard living conditions and the slum properties were demolished, the public purpose was fulfilled.²⁸⁶

In comparison, the public benefits prognosticated to flow from an economic development taking are more speculative and less certain. Private economic development projects may continue for years or even decades.²⁸⁷ Also, the very nature of the benefits to be realized from these takings—such as generalized economic stimuli—are much more abstract and ill-defined than the building of highways or the elimination of blight.²⁸⁸ Consequently, when property is taken in the name of economic development, it is significantly more uncertain as to how, when, and if a public benefit will be realized.²⁸⁹

In determining whether an economic development taking was legitimate, the *Kelo* appeals court focused on its professed purpose.²⁹⁰ But, whether a private economic development condemnation truly satisfies the public use requirement should depend not only on the project's proffered purpose or goal, but also the "prospect of their achievement."²⁹¹ The prospect of achievement in turn depends upon a variety of nebulous factors

284. Brief of Property Rights Foundation, *supra* note 273, at 7–8, 2004 WL 1900737, at *7–8 (arguing that any public benefit is dependent on the private party).

285. *Kelo v. City of New London*, 843 A.2d 500, 578 (Conn. 2004) (Zarella, J., concurring in part and dissenting in part), *aff'd*, 125 S. Ct. 2655 (2005).

286. *Kelo*, 125 S. Ct. at 2674 (O'Connor, J., dissenting).

287. See *Kelo*, 843 A.2d at 578–79 (Zarella, J., concurring in part and dissenting in part) (noting that the *Kelo* MDP was planned to be "in full force and effect for a period of thirty years").

288. *Id.* at 585.

289. *Id.* at 578–79.

290. *Id.* at 595.

291. *Id.* at 596–600 (arguing that the private party benefiting from the taking should bear the "burden of proving, by clear and convincing evidence, that" an economic development project's predicted benefits will materialize). The prospect of achievement is dependent upon the private party's ability to succeed in its business venture. See discussion *infra* Part IV.B.

such as industry performance,²⁹² real estate market conditions,²⁹³ and other prevailing economic conditions of the community.²⁹⁴ The professed benefits often lag behind the actual act of condemnation, which renders it even more difficult to predict which future factors will affect the project and how they will affect it. Indeed, “the very nature of economic development-type projects is such that their accomplishment [is] based on financial predictions and possibilities that cannot be certain and [is] dependent on equally uncertain competitive factors.”²⁹⁵ The residents of Poletown can attest to this uncertainty and speculation—although GM claimed that its new automobile plant would provide over 6,000 jobs, “at the height of its operations, the plant employed fewer than 3,000 employees.”²⁹⁶

Furthermore, uncertainty is increased when a city or court permits an economic development project to go forward without any definite future plans for land condemned pursuant to the project. In *Kelo*, parcel 4A of the development plan, on which several of the petitioners lived, was vaguely defined as park support—the precise meaning of this purpose was unclear at trial.²⁹⁷ Furthermore, at the time of condemnation, there was no signed agreement between the developer and the NLDC to develop the

292. *E.g.*, *Poletown Neighborhood Council v. City of Detroit*, 304 N.W.2d 455, 459 (Mich. 1981) (per curiam), *overruled by* *County of Wayne v. Hathcock*, 684 N.W.2d 265 (Mich. 2004).

293. *See Kelo*, 843 A.2d at 597 (Zarella, J., concurring in part and dissenting in part) (explaining that the “real estate market at the time of the takings was depressed” and thus there were poor prospects that “the contemplated public use could be achieved with any reasonable certainty”). The dissent expressed doubt that it would even be economically feasible to undertake the project, as it was difficult for the city to compete with other nearby cities in the market for biotechnology industry office space. *Id.*

294. *See, e.g., id.* at 585, 597–98. The dissent noted that in most economic development takings cases, the economic climate was very positive, as in *Southwestern Illinois Development Authority v. National City Environmental, LLC*, 768 N.E.2d 1 (Ill. 2002), in which the city sought to take private property in order to expand an already thriving business. *Kelo*, 843 A.2d at 600 (Zarella, J., concurring in part and dissenting in part). On the other hand, the economic conditions of New London were depressed, thus making it even less likely that the project could be successful. *Id.* at 599–600.

295. *Id.* at 580 (alterations in original) (quotation omitted).

296. Lewis, *supra* note 24, at 355–56.

297. Brief of Petitioners, *supra* note 165, at 4, 2004 WL 2811059, at *4; *see also Kelo v. City of New London*, No. 557299, 2002 WL 500238, at *74–75 (Conn. Super. Ct. Mar. 13, 2002) (noting the lack of a clearly identified future use for the land in parcel 4A), *aff’d in part, rev’d in part*, 843 A.2d 500 (Conn. 2005), *aff’d*, 125 S. Ct. 2655 (2005).

homeowner's property.²⁹⁸ The absence of a specific plan or binding agreement makes it "impossible to determine whether future development of the area primarily will benefit the public or even benefit the public at all."²⁹⁹

The Fifth Amendment conditions the government's exercise of eminent domain on public use.³⁰⁰ But, when all is said and done, if no measurable public benefit ever materializes from an economic development taking, then one may wonder how it differs from the theft of one person's property for the benefit of another.

D. *A Case for Unconstitutionality*

These three interrelated characteristics³⁰¹ of economic development takings distinguish them from those based on other public purposes. They fail to fit the description of even the broadest public purposes the Court had recognized prior to *Kelo*—urban renewal in *Berman*³⁰² and oligopoly elimination in *Midkiff*.³⁰³ Although the Court had previously required that public benefits exceed private benefits in a taking,³⁰⁴ this public use calculus does not hold up in the case of economic development. All three of the attributes that distinguish economic development takings from others signal that the private use, rather than the public use, is paramount. To ignore these differences is to obliterate the line between public and private use of property and to warp them into one: "if predicted (or even guaranteed) positive side-effects are enough to render transfer from one private party to another constitutional, then the words 'for public use' do not realistically exclude *any* takings, and thus do not exert any constraint on the eminent domain power."³⁰⁵ The approval of eminent domain in the

298. *Kelo*, 843 A.2d at 596 (Zarella, J., concurring in part and dissenting in part). The developer and NDLC had engaged in significant negotiations prior to the condemnations. *Id.*

299. *Id.*

300. See U.S. CONST. amend. V (stating "private property [shall not] be taken for public use, without just compensation").

301. See *supra* Part IV.A–C.

302. See *Berman v. Parker*, 348 U.S. 26, 35 (1954) (holding that property may be taken for redevelopment).

303. See *Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229, 231–32 (1984) (holding that taking with just compensation "to reduce the concentration of ownership of fees simple" does not violate the Takings Clause).

304. See *supra* Part II.B.3.a.

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

name of economic development parts with previous notions of public use and contravenes the Fifth Amendment command that private property shall be taken for public—not private—use.

V. INHERENT PROBLEMS IN THE ECONOMIC DEVELOPMENT RATIONALE

Economic development condemnation blurs the distinction between public use and private benefit,³⁰⁶ and, for this reason, it inevitably raises concerns that the eminent domain power will be abused to further private interests at the expense of the public good.³⁰⁷ When these abuses do occur, uncertainty exists regarding who is the driving force: local government officials who seek to better their community or private interest groups who dangle tax dollars and jobs in front of development-starved city officials.³⁰⁸ In addition to falling outside the acceptable realm of public use, the eminent domain economic development rationale is riddled with problems—not only is it prone to misuse by private interests and local and state governments, it also negatively affects the institution of private property ownership.

A. Private Interest Group Capture of the Eminent Domain Power

Critics have argued “that the beneficiaries of a relaxed public use standard are often powerful and wealthy special interests capable of convincing the state to use its power to displace residents from their homes and businesses,”³⁰⁹ and that eminent domain for economic development places the mighty condemnation power “in the hands of the private corporation” and transforms the municipality into its conduit.³¹⁰ Such arguments stem from the fact that as the concept of public use has broadened, its ability to stand as any significant barrier to the capture of the eminent domain power by private interest groups has shrunk.³¹¹ The

306. See *id.* at 2671.

307. See Jennifer Maude Klemetsrud, Note, *The Use of Eminent Domain for Economic Development*, 75 N.D. L. REV. 783, 811 (1999).

308. GREENHUT, *supra* note 161, at 189.

309. See Donald J. Kochan, “Public Use” and the Independent Judiciary: *Condemnation in an Interest-Group Perspective*, 3 TEX. REV. L. & POL. 49, 52 (1998).

310. Poletown Neighborhood Council v. City of Detroit, 304 N.W.2d 455, 481 (Mich. 1981) (Ryan, J., dissenting), *overruled by* County of Wayne v. Hathcock, 684 N.W.2d 765 (Mich. 2004).

311. See generally Kochan, *supra* note 309, at 78–91 (stating that special interest groups will be able to influence legislation more readily than private individuals).

concern is that as eminent domain for economic development becomes more accepted, some private parties may rely more on the government, rather than entrepreneurial spirit, to acquire private land for their latest projects.³¹²

Commentators suggest that economic development takings will have the deleterious effect of encouraging “interest group capture” of the government’s condemnation power.³¹³ Interest group capture describes the phenomenon that individuals or interest groups will use the political process to receive goods from the government at a lower cost than they would otherwise be forced to pay in a competitive free market situation.³¹⁴ When a private interest seeks property for its private use, the “good” is the eminent domain power³¹⁵—land acquisition through eminent domain is often less costly and more efficient than assembling the land on the open market.³¹⁶ Furthermore, when public use is broadly interpreted to encompass takings for economic development, the scope of permissible governmental activities increases; and, consequently, the range of goods available to an interest group expands.³¹⁷

When these goods are available, the interest group has an incentive to expend resources to acquire them.³¹⁸ In the economic development context, this means that a private entity will seek out a municipality that is willing to give it “an opportunity to obtain the land without putting [it]self at the mercy of the market.”³¹⁹ Essentially, embracing eminent domain as a means to realize economic development has the detrimental effect of encouraging competition among interest groups for the capture of the condemnation power.³²⁰

The eminent domain power, when used for economic development, is an attractive commodity to private interests for several reasons: cost, speed, and durability. When private interests gain the ability to shortcut the open market by capturing the eminent domain power, however, it can have the detrimental effect of decreasing open market negotiation.

312. *Id.* at 85–91.

313. *Id.* at 78–91; Kulick, *supra* note 21, at 671–73.

314. Kochan, *supra* note 309, at 78–91.

315. *See id.* (describing the costs associated with “purchasing” legislative action, such as eminent domain power).

316. *See infra* Part V.A.1–2.

317. Kochan, *supra* note 309, at 78–79.

318. *See id.* at 79–80 (describing “rent-seeking” behavior).

319. *Id.* at 83.

320. *Id.* at 78–83.

1. *Cost*

Private interests may get a price break at the expense of landowners by foregoing a private transaction in favor of a condemnation proceeding.³²¹ The constitutionally mandated just compensation for the taking of private property is often less than the purchase price the property would have brought on the open market.³²² Take for example, the deal struck between the New York Times Co. and a development agency, Empire State Development Corp. (ESDC), to acquire real estate in Times Square for a new highrise skyscraper to house its company headquarters.³²³ The land acquisition cost to be incurred by the company was expected to be \$84.94 million, even though the land's estimated value was \$100 million.³²⁴ The acquisition cost paid by the New York Times Co. amounted to approximately \$62 per square foot of land—compared to the \$130 per square foot price paid in a private transaction for a neighboring tract of land.³²⁵

Additionally, some local governments are willing to give private interests big bargains on their development projects.³²⁶ As part of its deal, the New York Times Co. agreed to lease the condemned property from the ESDC for a term of ninety-nine years.³²⁷ Embedded in the lease, however, was an option for the New York Times Co. to buy the land for nominal

321. *Id.* at 85 (noting that private negotiations are often more costly than convincing the government to condemn).

322. Berliner, *supra* note 24, at 793; see Jennifer J. Kruckeberg, Note, *Can Government Buy Everything?: The Takings Clause and the Erosion of the "Public Use" Requirement*, 87 MINN. L. REV. 543, 579 (2002) (stating that if private entities had to pay compensation that was equal to fair market value for condemned land, they would have less incentive to capture the government's eminent domain power).

323. *In re W. 41st St. Realty LLC*, 744 N.Y.S.2d 121, 124 (N.Y. App. Div. 2002). See generally PUBLIC POWER, *supra* note 99, at 146–48 (providing a brief description of the issues involved in the taking); 60 Minutes Report, *supra* note 100 (same). The ESDC's condemnation was premised on the public purpose of blight removal. *In re W. 41st St. Realty*, 744 N.Y.S.2d at 125–26. The Times Square area was designated as a redevelopment area in the early 1980s. *Id.* at 124. Although the blight status was never removed, the project's opponents argued that urban blight had been eliminated from Times Square long before the New York Times Co. moved in. *Id.*

324. Gideon Kanner, *Feeding 'Times'*, NAT'L. L.J., Jan. 7, 2002, at A29.

325. *Id.* The New York Times Co. explained that the price difference was due to the fact that the neighboring parcel was in better condition than the property it was acquiring. *Id.* However, the real estate advisor for the New York Times Co. still approximated the value of the condemned property to be around \$90 per square foot. *Id.*

326. See, e.g., *id.*

327. *Id.*

consideration after only twenty-nine years.³²⁸ Furthermore, the agreement provided that the corporation could recoup its development costs through rent concessions—a figure that could be as high as \$29 million.³²⁹ Also consider the California city that was willing to pay a \$3.8 million condemnation award to a property owner in order to sell that same property to Costco for \$1.³³⁰

2. *Speed*

Condemnation is also fast—a private party can quickly obtain title to a large tract of land in a one-time transfer.³³¹ Alternatively, on the open market, the private party would have incurred large transaction costs in bargaining with the owners of each individual parcel comprising the desired tract of land.³³² Therefore, rather than painstakingly acquiring the land parcel by parcel through private negotiation, the condemnation power swiftly and simultaneously transfers these parcels to the private interest with diminished cost.³³³

3. *Durability*

The condemnation power's attractiveness as a commodity is further increased because the transaction is unlikely to be subject to any searching judicial scrutiny. The *Kelo* standard of extreme judicial deference to legislative determinations of public use render it improbable that an economic development taking will be invalidated on the ground that it is for private use.³³⁴ The United States Supreme Court's acknowledgement in *Midkiff* and *Kelo* that a court's review will be satisfied by any conceivable public purpose is especially noteworthy.³³⁵ This language suggests that in

328. *Id.*

329. *Id.*

330. 99 Cents Only Stores v. Lancaster Redevelopment Agency, 237 F. Supp. 2d 1123, 1126 (C.D. Cal. 2001).

331. Kochan, *supra* note 309, at 85.

332. *See id.* at 85–86 (noting that when the city of Detroit condemned a large number of land parcels at once for GM, the transaction costs of bargaining with each individual land owner were significantly reduced).

333. *See generally id.* at 85–86 (stating that condemnations make the acquisition process easier and also less expensive than private negotiations).

334. *See supra* Part III.B.1 (discussing the majority's minimal review of the city's claim that economic development is a valid public purpose).

335. *Kelo v. City of New London*, 125 S. Ct. 2655, 2669 (2005) (Kennedy, J., concurring) (“This Court has declared that a taking should be upheld as consistent with the Public Use Clause, U.S. Const., Amdt. 5., as long as it is ‘rationally related to a

searching for a rational basis to uphold the taking, a court “can supply a purpose the legislature itself missed,”³³⁶ thereby increasing the odds that it will not be struck down. A private interest is less likely to expend resources to capture the benefit of the eminent domain power if it does not believe that it will be successful.³³⁷ But when legislatures and governments encourage economic development takings, and the courts are unwilling or unable to scrutinize them, the deal is very “durable.”³³⁸

4. *Free Market Negotiation*

When municipalities are inclined to invoke eminent domain on behalf of a developer, there is little, if any, incentive for the developer to enter into any good faith negotiations with property owners for a fair market price.³³⁹ Private negotiations for land acquisitions will generally be more costly than persuading the government to condemn property.³⁴⁰ Additionally, if a land owner refuses to sell at the offered purchase price, the free market provides no method for forcing the owner off the land.³⁴¹ This holdout phenomenon, however, is too easily remedied when the private interest group has access to the condemnation power.³⁴² Consider the case of *Bailey v. Meyers*,³⁴³ in which an Ace Hardware store owner admittedly went directly to the city, rather than first negotiating with a local auto repair shop owner, to gain the shop owner’s property located on a profitable commercial intersection.³⁴⁴ Also consider the New York Times

conceivable public purpose.” (quoting *Hous. Auth. v. Midkiff*, 467 U.S. 229, 241 (1984)); *Midkiff*, 467 U.S. at 241 (“[W]here the exercise of the eminent domain power is rationally related to a conceivable public purpose, the Court has never held a compensated taking to be proscribed by the Public Use Clause.”).

336. RICHARD A. EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* 162 (1985).

337. Kochan, *supra* note 309, at 82.

338. *Id.* at 52.

339. See, e.g., *Sw. Ill. Dev. Auth. v. Nat’l City Envtl., L.L.C.*, 768 N.E.2d 1, 4 (Ill. 2002) (“[I]nitially, [the corporation] made no offer to purchase the land. Instead, [it] asked SWIDA to exercise its . . . eminent domain powers . . .”).

340. Kochan, *supra* note 306, at 85–86.

341. *Id.* at 86. Holdout problems occur when the property owners know that their land is only valuable if the private interest can acquire a large tract, and thus demand an above-market price for their property. *Id.* at 86–87.

342. *Id.* at 87.

343. *Bailey v. Meyers*, 76 P.3d 898 (Ariz. Ct. App. 2003).

344. *Id.* at 899; see also *GREENHUT*, *supra* note 161, at 192 (discussing the factual history of the *Bailey* case).

Co.'s Times Square project.³⁴⁵ The project required ten properties to be razed for the construction of the new building.³⁴⁶ The New York Times Co., however, never even made an attempt to buy those properties from the landowners before it struck its deal with the ESDC.³⁴⁷

Essentially, once a private interest is able to capture the condemnation power, the incentive to find a mutually agreeable solution is substantially diminished. Conversely, “[i]nnovative bargaining alternatives will only emerge . . . when access to a cheaper alternative is unavailable. The less ready the government is to intervene by way of eminent domain . . . the more likely the parties will learn how to craft solutions.”³⁴⁸

B. *Eminent Domain for Sale*

The interest group capture phenomenon assumes that at least some local governments or their respective development agencies will be willing to lend out their eminent domain power. Indeed, state and local governments (or their respective development agencies empowered with eminent domain authority) may in fact have incentives to dole out their eminent domain power to such an extent that private ambitions, rather than public benefits, are the primary objective.³⁴⁹

When private interests dangle big tax dollars and scores of jobs in front of a city starving for an economic boost, the city may be tempted to take the bait. Acting on the mere hope of a better economic tomorrow, the city might eagerly condemn property on behalf of, and on terms controlled by, the private entity.³⁵⁰

345. See *supra* Part V.A.1.

346. PUBLIC POWER, *supra* note 99, at 147.

347. *Id.*

348. Kochan, *supra* note 309, at 89.

349. Berliner, *supra* note 24, at 793–94; see also PUBLIC POWER, *supra* note 99, at 4 (noting that cities use eminent domain “in order to lure or reward favored developers,” even if it means condemning “perfectly fine areas”).

350. See, e.g., *Poletown Neighborhood Council v. City of Detroit*, 304 N.W.2d 455, 467–68 (Mich. 1981) (Ryan, J., dissenting), *overruled by* *County of Wayne v. Hathcock*, 684 N.W.2d 765 (Mich. 2004). *Poletown* explains that when the public is in need of an “economic boost,” “[t]he abstract right [of an individual] to make use of his own property in his own way is compelled to yield to the general comfort and protection of community.” *Id.* at 459 (per curiam) (alterations in original) (quoting *People ex rel. Detroit & Howell R.R. v. Salem Twp. Bd.*, 20 Mich. 452, 480–81 (1870)). The dissent described Detroit as “a city with its economic back to the wall” when GM approached the city with its proposal to build a new plant that was represented to maintain 6,150 jobs and generate \$15 million in new property taxes. *Id.* at 467 (Ryan,

The eminent domain power may also be utilized as a recruiting tool or a means of “competing” with other cities for economic development. A municipality may be able to entice large developers or tax-generating corporations to its city by offering the promise to condemn a site for its newest project.³⁵¹ For example, in the case of *Southwestern Illinois Development Authority v. National City Environmental, L.L.C.*,³⁵² a state development agency, SWIDA, actually “advertised that for a fee, it would condemn land at the request of private developers for the private use of developers.”³⁵³ Furthermore, SWIDA entered into a contract with the developer “to condemn whatever land may be desired . . . by [the developer].”³⁵⁴ SWIDA eventually reached a deal with a racetrack facility to condemn the property of a metal recycling center, which employed nearly 100 people, so that the company could establish open-field parking (available to the public for a fee), rather than build a feasible, yet more costly multilevel parking garage on its own land.³⁵⁵ The Illinois Supreme Court found that SWIDA was essentially acting as a default broker of land for private developers seeking to avoid the time, negotiation, cooperation, and expense involved in a transaction in the open real estate market.³⁵⁶ Indeed, when the city goes to such lengths to show its willingness to invoke its condemnation power for private parties, it is dubious that the public benefit is the paramount purpose.³⁵⁷

Overall, the approval of economic development as a public purpose gives a state or municipality increased opportunities to misuse its condemnation power and correspondingly fewer checks on its enthusiasm for economic development projects.³⁵⁸ When a city is disposed to misuse its eminent domain power, private interests can wield vast power.³⁵⁹ Those that can boast the biggest tax dollars and job opportunities have an especially great ability to influence a municipality to exercise the

J., dissenting).

351. Ely, *supra* note 8, at 31.

352. Sw. Ill. Dev. Auth. v. Nat'l City Envtl., L.L.C., 768 N.E.2d 1 (Ill. 2002).

353. *Id.* at 10 (internal quotation marks omitted).

354. *Id.* (internal quotation marks omitted).

355. *Id.* at 4–6.

356. *Id.* at 10–11.

357. *See id.* at 11 (stating that SWIDA's actions “blur the lines between a public use and a private purpose”).

358. *See generally id.* (stating “[t]he initial, legitimate development of a public project does not justify condemnation for any and all related business expansions”).

359. *See generally id.* (stressing the importance of exercising the power of eminent domain “with restraint, not abandon”).

condemnation power in their favor.

A prime example of how much power a private entity can wield over the eminent domain power is *99 Cents Only Stores v. Lancaster Redevelopment Agency*,³⁶⁰ in which the city of Lancaster, California, admitted that condemnation proceedings were initiated only in an effort to appease the retail giant, Costco.³⁶¹ After the 99 Cents Only Store moved into a vacant property next to Costco, an anchor business in a prestigious shopping center, Costco immediately threatened to relocate its store to another city unless Lancaster could meet its expansion needs.³⁶² Costco rejected all of the city's suggested expansion sites, and demanded to expand into the space occupied by its competitor, the 99 Cents Only Store.³⁶³ When no mutually agreeable deal could be negotiated, the city set out to acquire the space by eminent domain.³⁶⁴ Disturbingly, the city stated that "it was willing to go to any lengths—even so far as condemning commercially viable, unblighted real property—simply to keep Costco within the city's boundaries."³⁶⁵ In fact, the city was ready to transfer the property to Costco for a mere \$1³⁶⁶ until the court intervened and concluded that the city's "condemnation efforts rest on nothing more than the desire to achieve the naked transfer of property from one private party to another. . . . In short, the *very reason* that Lancaster decided to condemn 99 Cents' [property] interest was to appease Costco."³⁶⁷

Also consider the *Poletown* case—"what General Motors wanted, General Motors got."³⁶⁸ After informing the city of Detroit that it intended to close its manufacturing facilities, GM offered to build a new facility within the city so long as a suitable site could be found.³⁶⁹ Not only did GM

360. *99 Cents Only Stores v. Lancaster Redevelopment Agency*, 237 F. Supp. 2d 1123 (C.D. Cal. 2001).

361. *Id.* at 1129.

362. *Id.* at 1126.

363. *Id.*

364. *Id.*

365. *Id.* at 1129. Lancaster was interested in retaining Costco for its "anchor tenant" status. *Id.* at 1126. Costco generated significant tax revenue for the city: Costco produced more than \$400,000 a year in sales taxes, while the 99 Cents Only Store produced less than \$40,000. GREENHUT, *supra* note 161, at 201.

366. *99 Cents Only Stores*, 237 F. Supp. 2d at 1126.

367. *Id.* at 1129.

368. *Poletown Neighborhood Council v. City of Detroit*, 304 N.W.2d 455, 470 (Mich. 1981) (Ryan, J., dissenting), *overruled by* *County of Wayne v. Hathcock*, 684 N.W.2d 765 (Mich. 2004).

369. *Id.* at 460 (Fitzgerald, J., dissenting).

conceive of the project, select the site, and set deadlines, but, “cognizant of its immense political and economic power,”³⁷⁰ GM also made other demands for tax abatements and infrastructure upgrades.³⁷¹ In the end, GM got a steal: the city turned over the site to GM for a mere \$8 million, despite the project’s projected public cost of \$200 million.³⁷²

C. *Disregard for the Institution of Private Property Ownership*

Although municipalities and developers often have nothing to lose under these economic development schemes, the private property owners located in the midst of an economic development area have everything to lose—their homes, their livelihood, and their neighborhood, in addition to their homes’ immeasurable sentimental value. Constitutionally mandated just compensation is unlikely to be enough to remedy the loss of their property.³⁷³ The dispossession may ruin the economic expectations a person has in their property, such as long-term business plans, or it may devastate personal, noneconomic interests that are simply irreplaceable, like the pride, history, and memory that attaches to a piece of property that has been in a family for decades or even centuries.³⁷⁴ Overall, “property may represent more than money because it may represent things that money can’t buy—place, position, relationship, roots, community, solidarity, status . . . and security.”³⁷⁵

One of the most troublesome aspects of eminent domain is that it singles out a particular property owner to bear large personal costs for the sake of the general community—the government “deprives on an asymmetrical basis.”³⁷⁶ When economic development is the driving force,

370. *Id.* at 467 (Ryan, J., dissenting).

371. *See id.* at 468–70. Justice Ryan stated that a letter from GM to the city, to which eight pages of “site criteria requirements” was attached, clearly demonstrated the “control being exercised over the condemnation project by General Motors.” *Id.* at 468 n.6, 469.

372. *Id.* at 469.

373. Thomas W. Merrill, *The Economics of Public Use*, 72 CORNELL L. REV. 61, 82–84 (1986) (stating that just compensation fails to compensate for subjective losses); Micah Elazar, Comment, “*Public Use*” and the Justification of Takings, 7 U. PA. J. CONST. L. 249, 255 (2004) (noting that just compensation may not adequately compensate for economic and intangible interests).

374. *See* Elazar, *supra* note 373, at 255–56 (describing “the imperfectly fungible nature of property”).

375. *Id.* (quoting Frank I. Michelman, *Property as a Constitutional Right*, 38 WASH. & LEE L. REV. 1097, 1112 (1981)).

376. Elazar, *supra* note 373, at 254.

eminent domain “places the burden of aiding industry on the few, who are likely to have limited power to protect themselves from the excesses of legislative enthusiasm for the promotion of industry.”³⁷⁷ These disproportionate burdens grow more unfair as the social benefits expected to accrue from the property transfer grow more remote, indirect, and uncertain.³⁷⁸ Such is the case of economic development takings in which the anticipated benefits are only indirectly related to the taking itself and are dependent upon the financial health of an independent, private entity that cannot guarantee a certain amount of jobs or tax dollars.³⁷⁹ Just how great of a burden must property owners endure in return for speculative or nominal gains in the general economy?

Critics also warn that the fallout of eminent domain in the name of economic development will not be random.³⁸⁰ Justice O'Connor warned that the beneficiaries of economic development condemnation will be “citizens with disproportionate influence and power in the political process, including large corporations and development firms.”³⁸¹ The whole notion of economic development is to replace low-income residents and low-tax businesses with those able to generate more income and taxes.³⁸² Consequently, the victims of the *Kelo* fallout will be those with the fewest resources and the least political clout.³⁸³

If a government agency can decide property ownership solely upon its view of who would put that property to more productive or attractive use, the inalienable right to own and enjoy property to the exclusion of others will pass to a privileged few who constitute society's elite. The rich may not inherit the earth, but they most assuredly will inherit the means to acquire any part of it they desire.³⁸⁴

377. *Poletown Neighborhood Council v. City of Detroit*, 304 N.W.2d 455, 463 (Mich. 1981) (Fitzgerald, J., dissenting), *overruled by* *County of Wayne v. Hathcock*, 684 N.W.2d 765 (Mich. 2004).

378. See Elazar, *supra* note 373, at 265–66 (explaining that “[i]t is doubtful that any marginal improvement in public welfare . . . can always justify the imposition of harms as serious as the dispossession of homes and businesses” (footnote omitted)).

379. See *supra* Part IV.

380. *Kelo v. City of New London*, 125 S. Ct. 2655, 2677 (2005) (O'Connor, J., dissenting).

381. *Id.*

382. See *supra* Part II (discussing the rationale of economic development takings).

383. See *supra* Part II.

384. *Sw. Ill. Dev. Auth. v. Nat'l City Envtl., L.L.C.*, 710 N.E.2d 896, 906 (Ill. App. Ct. 1999) (Kuehn, J., concurring), *aff'd*, 768 N.E.2d 1 (Ill. 2002), *and abrogated by*

This result is certainly inconsistent with the letter and spirit of the Takings Clause and the institution of property ownership. A “just government,” wrote founding father James Madison, would “*impartially* secure[] to every man, whatever is his *own*.”³⁸⁵ Conversely, it “is not a just government, nor is property secure under it, where the property which a man has in his personal safety and personal liberty, is violated by arbitrary seizures of one class of citizens for the service of the rest.”³⁸⁶

D. *Insecurity of Property Rights*

In economic development projects, large national or international businesses are favored over small local businesses and family residences.³⁸⁷ After all, any home will generate fewer tax revenues than a Costco, and a mom-and-pop business will always provide fewer jobs than an industrial park.³⁸⁸ This necessarily begs the question: is any property safe?

According to Justice O’Connor, the answer is no—she warned that under the theory of *Kelo*, nearly all property is at risk of condemnation.³⁸⁹ The approval of economic development as a valid public use seriously diminishes the security of property ownership.³⁹⁰ Once state and local legislative bodies are free to determine that a different commercial, industrial, or residential use of property will create larger public benefits than its current use, then logically, “no homeowner’s [or businessperson’s] property, however productive or valuable to its owner, is immune from

Dept. of Transp. *ex rel.* People v. 151 Interstate Rd. Corp., 810 N.E.2d 1 (Ill. 2004), as modified upon denial of reh’g (2004).

385. *Kelo*, 125 S. Ct. at 2677 (O’Connor, J., dissenting) (citing James Madison, *Property*, NAT’L GAZETTE, Mar. 29, 1792, reprinted in JAMES MADISON, WRITINGS at 515 (1999)).

386. MADISON, *supra* note 385, at 516.

387. PUBLIC POWER, *supra* note 99, at 4.

388. *Id.* at 7; see also *Kelo*, 125 S. Ct. at 2676–77 (O’Connor, J., dissenting) (arguing that the majority’s decision gives the government the right to take property from those with fewer resources and give it to those with more, which likely includes corporations and developers).

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

390. See *id.* (warning that the Court’s decision could result in property being taken for any reason that could be “more prosperous” for the city); *Poletown Neighborhood Council v. City of Detroit*, 304 N.W.2d 455, 464 (Mich. 1981) (Fitzgerald, J., dissenting) (“[T]here is virtually no limit to the use of condemnation to aid private businesses.”), overruled by *County of Wayne v. Hathcock*, 684 N.W.2d 765 (Mich. 2004); Klemetsrud, *supra* note 307, at 810 (stating that the effect of economic development takings, like that in the *Poletown* case, “creates an increased threat to the institution of private property”).

condemnation for the benefit of other private interests that will put it to a ‘higher’ use.”³⁹¹ Because there are few, if any, property owners who can say with certainty that they do, in fact, make the most productive use of their land, there is little restraint on the eminent domain power under the *Kelo* economic development rationale.³⁹²

VI. THE RETREAT: STATE COURTS LIMIT ECONOMIC DEVELOPMENT TAKINGS

Though the Public Use Clause has been nearly invisible to many courts for the last fifty years, all hope is not lost. For some state courts, the Public Use Clause still casts a flicker of constitutional substance on the law of eminent domain.³⁹³ Recognizing the unconstitutional nature and inherent problems of economic development takings discussed previously in Parts IV–V, these courts have curbed the ability of state and local governments to condemn property in exchange for taxes, jobs, and economic stimuli.³⁹⁴ This may be a signal that the tide is turning as state courts are willing to revisit the public use limitation on eminent domain.³⁹⁵

A. *The Demise of Poletown: County of Wayne v. Hathcock*³⁹⁶

In the 2004 case of *County of Wayne v. Hathcock*, the Michigan Supreme Court was again presented “with a clash of two bedrock principles of our legal tradition: the sacrosanct right of individuals to

391. *Poletown*, 304 N.W.2d at 464.

392. *See Kelo*, 125 S. Ct. at 2676 (O’Connor, J., dissenting).

393. *See, e.g., City of Little Rock v. Raines*, 411 S.W.2d 486, 494 (Ark. 1967) (holding that a taking for an industrial park did not satisfy the public use requirement); *Baycol, Inc. v. Downtown Dev. Auth.*, 315 So. 2d 451, 458–59 (Fla. 1975) (per curiam) (holding that the construction of a parking garage for a private shopping mall is not public use merely because of economic benefits); *City of Owensboro v. McCormick*, 581 S.W.2d 3, 5–6 (Ky. 1979) (holding that condemnations for private development purposes are not public uses); *Merrill v. City of Manchester*, 499 A.2d 216, 218 (N.H. 1985) (finding direct use by public is required under the New Hampshire Constitution); *Hathcock*, 684 N.W.2d at 784 (ruling the condemnation of private land for a business park project violated the public use requirement because it did not serve the public good); *Karesh v. City Council of the City of Charleston*, 247 S.E.2d 342, 344 (S.C. 1978) (holding that the city cannot condemn and lease property to a developer for a parking garage and convention center project).

394. *See Berliner, supra* note 24, at 794–800 (discussing a number of state court cases that establish a growing trend of courts applying greater scrutiny to government use of eminent domain for private parties).

395. *See generally id.*

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

dominion over their private property, on the one hand and, on the other, the state's authority to condemn private property for the commonwealth."³⁹⁷ Specifically, the court was faced with the validity of the public purpose involved in the condemnation of several homeowners' properties for the construction of a 1,300 acre business and technology park, including a conference center, hotel accommodations, and a recreational facility.³⁹⁸

The project was anticipated to create 30,000 jobs, add \$350 million in tax revenues, and generally reinvigorate the struggling local economy by enhancing the image of the community and attracting large businesses.³⁹⁹ Measured by *Poletown* standards, the "Pinnacle Project's" estimated economic benefits clearly would have risen to the level of public use, as these projections were several times greater even than those held to justify the razing of 3,000 homes nearly twenty-five years ago.⁴⁰⁰ The court that spawned one of the most infamous takings cases in the past century, however, took an unexpected turn in *Hatchcock*: it declared *Poletown*'s interpretation of the state takings clause unconstitutional and drastically scaled back the scope of public use under the state constitution.⁴⁰¹ Though the court recognized that the county's behavior was undoubtedly "shaped by *Poletown*'s disregard for constitutional limits" on the eminent domain power,⁴⁰² it declared that a vague economic benefit stemming from a private enterprise could no longer suffice as a constitutional public use.⁴⁰³

To vindicate its constitution, the court sweepingly renounced *Poletown*'s radical economic benefit theory, noting the unfairness of forcing property owners to live under the perpetual threat of a governmental determination that another private party can put their property to better use.⁴⁰⁴ In its place, the court resurrected Justice Ryan's three-part test for private transfers laid out in his *Poletown* dissent.⁴⁰⁵ The

397. *Id.* at 769.

398. *Id.* at 770.

399. *Id.* at 770–71.

400. Compare *id.* at 765, with *Poletown Neighborhood Council v. City of Detroit*, 304 N.W.2d 455, 467 (Mich. 1981) (Ryan, J., dissenting), *overruled by* *Hatchcock*, 684 N.W.2d 765.

401. *Hatchcock*, 684 N.W.2d at 786–87.

402. *Id.* at 787.

403. *Id.* at 786–87.

404. *Id.*

405. *Id.* at 781. The court concluded that this was the proper test after analyzing what "an individual sophisticated in the law at the time of the 1963 Constitution" would consider a proper circumstance for transferring condemned land

transfer of condemned property to a private entity is appropriate only in three distinct contexts: (1) where extreme public necessity requires collective action;⁴⁰⁶ (2) “where property remains subject to public oversight after transfer to a private entity;”⁴⁰⁷ and (3) where property is selected because of “facts of independent public significance” rather than the interests of the private entity to which the property is transferred.⁴⁰⁸ The proffered public use of economic development did not fit into any of these three categories, and the taking was held unconstitutional.⁴⁰⁹ Thus, for Michigan, the *Poletown* era is over, and the economic development theory has been condemned to the history books.

B. Southwestern Illinois Development Authority v. National City
Environmental, L.L.C.

Another example of a state court dramatically restricting the scope of its state’s public use clause is *Southwestern Illinois Development Authority v. National City Environmental, L.L.C.*⁴¹⁰ The Southwestern Illinois Development Authority (SWIDA) was a municipal corporation created to promote development and enhance the general welfare of the state; it was delegated the power to acquire property through eminent domain.⁴¹¹

to a private entity. *Id.* at 783.

406. *Id.* at 781–82. Highways, railroads, canals, and other instrumentalities of commerce fit into this category. *Id.*

407. *Id.* at 781–82, 784. Pipeline and railroad companies are examples of entities falling under this category. *Id.* at 782 & n.61. In *Hathcock*, the court noted that the members of the Pinnacle Project would naturally pursue their own profit-maximizing objectives and there was no oversight mechanism available to ensure that they would continue to benefit the public, namely by contributing to the health of the economy. *Id.* at 784.

408. *Id.* at 782–83 (quoting *Poletown Neighborhood Council v. City of Detroit*, 304 N.W.2d 455, 478 (Mich. 1981) (Ryan, J., dissenting), *overruled by Hathcock*, 684 N.W.2d 765). Slum clearance falls within this category. *Id.* at 783 (citing *In re Slum Clearance*, 50 N.W.2d 340 (1951)). The controlling purpose in condemning blighted properties is to remove unsafe housing, thereby improving the public welfare. *Id.* Any subsequent resale of the land cleared of blight is purely “incidental” to the paramount goal. *Id.* In *Hathcock*, the court found there was nothing about the very act of condemnation of these properties that advanced the public welfare. *Id.* at 784.

409. *Id.* at 784.

410. *Sw. Ill. Dev. Auth. v. Nat’l City Envtl., L.L.C.*, 768 N.E.2d 1, 11 (Ill. 2002) (holding that “[t]he power of eminent domain is to be exercised with restraint, not abandon”). The Illinois constitution states that “[p]rivate property shall not be taken . . . for public use without just compensation as provided by law.” ILL. CONST. art. 1, § 15.

411. *Sw. Ill. Dev. Auth.*, 768 N.E.2d at 3; *see also* Allen Roe, Casenote, *No*

One of SWIDA's projects was the development of the Gateway racetrack.⁴¹² Gateway became very popular and profitable and soon required increased parking capacity to accommodate its patrons.⁴¹³ Accordingly, Gateway sought an approximately 150-acre tract of land belonging to National City Environmental (NCE), a nearby recycling center.⁴¹⁴ Although NCE was not currently using this land, it nonetheless planned to utilize the land in the near future, after its current landfill became full.⁴¹⁵ NCE was not interested in selling the land that would be essential to its future business operations.⁴¹⁶

Gateway then requested that SWIDA exercise its eminent domain power to convey NCE's land to Gateway so that it could construct its parking lot, despite the fact that Gateway could have built a parking garage on its current property, albeit for a much greater cost.⁴¹⁷ SWIDA obliged.⁴¹⁸ The proffered public purposes were greater tax revenues and increased public safety that would result from the elimination of traffic concerns caused by the current parking situation.⁴¹⁹

At issue was whether SWIDA's taking was justified by the expected economic benefits to the community.⁴²⁰ The Illinois Supreme Court found that the public benefits were too insignificant to satisfy the public use requirement.⁴²¹ The court was unmoved by SWIDA's argument "that expan[sion] of Gateway's facilities through the taking of NCE's property would allow it to grow and prosper and contribute to positive economic growth in the region."⁴²² It found that "incidentally, every lawful business does this."⁴²³ The project's estimated \$14 million increase in Gateway "revenue could potentially trickle down and bring corresponding revenue

Parking: The Public Use Doctrine in Eminent Domain: Southwestern Illinois Development Authority v. National City Environmental, L.L.C., 768 N.E.2d 1 (Ill. 2002), 28 S. ILL. U. L.J. 505, 507 (2004) (recounting the background facts of the case).

412. *Sw. Ill. Dev. Auth.*, 768 N.E.2d at 4.

413. *Id.*

414. *Id.*

415. *Id.*

416. *Id.*

417. *Id.* at 4, 6.

418. *Id.* at 4.

419. *Id.*

420. *Id.*

421. *Id.* at 11.

422. *Id.* at 9.

423. *Id.* (quoting *Gaylord v. Sanitary Dist.*, 68 N.E.2d 522, 586 (Ill. 1903)).

increases to the region,” the court acknowledged.⁴²⁴ This revenue expansion, however, did not justify condemnation of NCE’s property.⁴²⁵ The court determined that SWIDA’s actions were primarily intended to benefit Gateway by allowing Gateway to avoid the open market and achieve its “goals in a swift, economical, and profitable manner.”⁴²⁶ This point was further emphasized by the fact that Gateway feasibly could have built a parking garage on its own existing property rather than on NCE’s property, but once realizing that a parking garage would be substantially more costly than persuading SWIDA to take NCE’s land,⁴²⁷ “Gateway chose the easier and less expensive avenue.”⁴²⁸ Though the court was mindful of the agency’s charge to promote development, the court warned that “these goals must not be allowed to overshadow the constitutional principles that lie at the heart of the power with which SWIDA and similar entities have been entrusted.”⁴²⁹ Although the court did not declare that economic development could never be a public purpose, it nevertheless provided some constraint on the concept of public use by finding that mere incidental trickle-down public benefits would not suffice.⁴³⁰ The court also warned that “[t]he power of eminent domain is to be exercised with restraint, not abandon.”⁴³¹

VII. LOOKING BEYOND *KELO V. CITY OF NEW LONDON*: THE FUTURE OF EMINENT DOMAIN IN THE NAME OF ECONOMIC DEVELOPMENT

The issue of economic development eminent domain for private development struck a nerve with many property owners throughout the nation. The plight of Susette Kelo and her fellow homeowners stirred up national attention—fellow property owners realized that if it could happen in Susette Kelo’s hometown, it could happen anywhere. When Americans learned that five United States Supreme Court Justices believed that the Connecticut city of New London was justified in razing the homes of its

424. *Id.* at 10.

425. *Id.* at 10–11.

426. *Id.*

427. *Id.* at 10. SWIDA was quite open about its willingness to condemn land for private parties—it advertised that for a charge “it would condemn land at the request of private developers for the private use of developers.” *Id.* (internal quotation marks omitted).

428. *Id.*

429. *Id.*

430. *See id.* at 10–11 (discussing the degree of public benefit for a proper use of eminent domain power).

431. *Id.* at 11.

residents for increased taxes, jobs, and an unquantifiable economic uplift, a backlash spread across the country.⁴³² Polls showed that 89% of Americans disapproved of takings for private use, even if it was for the greater public economic good.⁴³³ The public outcry was even enough to derail private development projects that depended upon the use of eminent domain to acquire property.⁴³⁴ At least one outraged citizen has gone so far as to begin the approval process for the construction of a hotel on the property of Justice Souter, a member of the five-justice *Kelo* majority, in order to show him just how *Kelo* can affect homeowners.⁴³⁵

In the aftermath of *Kelo*, the question lingering at the back of every property owner's mind is: "[H]ow can I keep that from happening to me?"⁴³⁶ The answer now is for the states to decide.⁴³⁷ The *Kelo* interpretation of the Public Use Clause sets the minimal constitutional requirements for eminent domain.⁴³⁸ States are free to place tougher constraints on exercises of their own eminent domain power, whether through state eminent domain statutes or constitutional interpretation.⁴³⁹ Justice Stevens made it quite clear that limiting economic development eminent domain was in the hands of state legislatures and Congress.⁴⁴⁰

Many states have indeed heeded Justice Stevens's advice—just three months after the decision, bills proposing to constrict, to varying degrees, the use of eminent domain for private economic development have been introduced in nearly half of the states.⁴⁴¹ Two states—Alabama and Delaware—have already enacted laws restricting economic development

432. See, e.g., Michael Corkery & Ryan Chittum, *Eminent-Domain Uproar Imperils Projects*, WALL ST. J., Aug. 3, 2005, at B1 (discussing the impact of negative publicity associated with eminent domain on development projects).

433. *Id.*

434. *Id.*

435. Op-Ed, *They Paved Paradise*, WALL ST. J., Jun. 30, 2005, at A12. In his press release, an outraged citizen claimed that the New Hampshire city in which Justice Souter resides "will certainly gain greater tax revenue and economic benefits with a hotel on [the land] than allowing Mr. Souter to own the land." *Id.* He intends to call the development the "Lost Liberty Hotel." *Id.*

436. *Id.* (describing the reaction to the *Kelo* case).

437. *Kelo v. City of New London*, 125 S. Ct. 2655, 2668 (2005).

438. *Id.*

439. *Id.*

440. *Id.*

441. For a current listing of all current proposed state legislation on eminent domain, see Castle Coalition, Current Proposed State Legislation on Eminent Domain, <http://www.castlecoalition.org/legislation/states/index.asp> (last visited Nov. 16, 2005).

eminent domain.⁴⁴²

Even Congress has expressed its outrage at the *Kelo* decision by proposing bills to exclude economic development from the term public use. The Protection of Homes, Small Businesses, and Private Property Act of 2005—introduced in the Senate only four days after the *Kelo* ruling—would prohibit economic development eminent domain in all federal exercises of the power.⁴⁴³ It would also constrain state and local governments by prohibiting economic development condemnations in projects funded by federal dollars.⁴⁴⁴ Various House resolutions similarly propose to limit, to varying degrees, economic development eminent domain and the use of federal funds for such takings.⁴⁴⁵

It is yet to be seen just how much protection these proposed bills will provide against economic development condemnations. In drafting statutory limitations on such takings, policymakers must make substantive, and not merely cosmetic, changes to public use law in order to prevent the misuse of eminent domain under the guise of economic development. Great care should be taken in defining what does and does not constitute a valid public purpose.⁴⁴⁶ The term “economic development” itself should be carefully defined.

Furthermore, if blight condemnations pursuant to an urban renewal project are to remain a legitimate object of a state or local government’s eminent domain power, blight criteria must be carefully defined to prevent the creation of an economic development loophole. The recently enacted Alabama statute, for instance, prohibits takings for economic development

442. S.B. 68, 2005 Leg., 1st Spec. Sess. (Ala. 2005); S.B. 217, 143d Gen. Assem., Reg. Sess. (Del. 2005). The Alabama law states in part: “Notwithstanding any other provision of law, a municipality or county may not condemn property for purposes of private retail, office, commercial, industrial, or residential development; or primarily for enhancement of tax revenue . . . however, the provisions of this subsection shall not apply to the use of eminent domain . . . based upon a finding of blight in an area.” Ala. S.B. 68.

443. Protection of Homes, Small Businesses, and Private Property Act of 2005, S. 1313, 109th Cong. § 3 (2005).

444. *Id.*

445. See H.R. 3045, 109th Cong. (2005); H.R. 3315, 109th Cong. (2005); H.R. 3135, 109th Cong. (2005); H.R. 3087, 109th Cong. (2005); H.R. 3083, 109th Cong. (2005).

446. For examples of model state statutes limiting eminent domain, see Castle Coalition, Model Language for State Statutes Limiting Eminent Domain Abuse, http://www.castlecoalition.org/legislation/model/state_statute.asp (last visited Nov. 30, 2005).

but leaves the option of condemnation of blighted property for private use.⁴⁴⁷ In practice, local governments have enjoyed wide discretion in determining blight.⁴⁴⁸ Many states lack quantifiable blight standards like property value, household income, or percentage of vacant buildings.⁴⁴⁹ But if blight is not carefully defined, a city eager to please a new developer or retailer might dubiously stretch the term to encompass perfectly normal property that poses no harm to the community.⁴⁵⁰ This wide discretion and absence of standards means that in some instances blight might not be determined by objective urban conditions, but rather at the behest of private interests.⁴⁵¹ Thus, those areas with the worst conditions may not be home to many urban renewal projects as developers look elsewhere to find the “blight that’s right” for their project.⁴⁵² In such cases, blight condemnations are essentially economic development takings in disguise.

Other statutory provisions that may discourage misuse of eminent domain include: (1) time limits on blight designations; (2) attorney’s fees for condemnees who successfully challenge the legitimacy of a taking;⁴⁵³ and (3) increased procedural safeguards.⁴⁵⁴

Proponents of economic development condemnation might argue that if their city or state restricts such takings, then big corporate interests will simply take their business to another state with more lenient public use standards. Uniformity is key—the more states that limit economic

447. S.B. 68, 2005 Leg., 1st Spec. Sess. (Ala. 2005).

448. Colin Gordon, *Blighting the Way: Urban Renewal, Economic Development, and the Elusive Definition of Blight*, 31 FORDHAM URB. L.J. 305, 320 (2004).

449. *Id.*

450. See Benjamin B. Quinones, *Redevelopment Redefined: Revitalizing the Central City with Resident Control*, 27 U. MICH. J.L. REFORM 689, 730–31 (1994) (describing the risk of “false blight” and the distrust of blight designations).

451. Gordon, *supra* note 448, at 321–22.

452. *Id.* at 322.

453. Castle Coalition, Model Language for State Statutes Limiting Eminent Domain Abuse, http://www.castlecoalition.org/legislation/model/state_statute.asp (last visited Nov. 30, 2005).

454. For example, a Delaware law enacted after *Kelo* requires that eminent domain be exercised

only for the purposes of a recognized public use as described at least 6 months in advance of the institution of condemnation proceedings: (i) in a certified planning document, (ii) at a public hearing held specifically to address the acquisition, or (iii) in a published report of the acquiring agency.

S.B. 217, 143d Gen. Assem., Reg. Sess. (Del. 2005).

development takings, the less private parties will be willing and able to shop around for eminent domain bargains.

Given the United States Supreme Court's unwillingness to second-guess legislative determinations of public use, the fate of the economic development doctrine of eminent domain rests with policymakers. The Court has indicated that this issue is now in the political, not judicial, arena. State legislatures and Congress should take Justice Stevens's advice to heart and enact statutory checks on the *Kelo* ruling—American property owners hang in the balance.

VIII. CONCLUSION

The concept of public use has been stretched beyond the realm of constitutionality by the United States Supreme Court's approval of eminent domain in the name of economic development. Though the Court broadly expanded the scope of public use in *Berman* and *Midkiff*, economic development takings are distinctly separate from other recognized public uses. Such differences all point to the conclusion that the private interest is the primary beneficiary of economic development takings, thus rendering the Fifth Amendment nugatory. The economic development rationale is also plagued with various problems. Such takings are prone to grave misuse by both private interests and state and local government. It also wreaks havoc on the institution of property ownership and the security of American property rights. As the *Kelo* Court made clear, the fate of eminent domain in the name of economic development will be determined by the action, or inaction, of Congress and state legislatures. Strict statutory enactments curbing economic development takings are the only way to secure American property rights and end eminent domain abuse.

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