Kelo v. City of New London: New Jersey's Take on Takings

The Honorable Peter G. Sheridan[*]

INTRODUCTION

The United States Supreme Court set off a firestorm of controversy last summer when it permitted condemnation of homes in the Fort Trumbull area of New London, Connecticut.[1] In broad terms, *Kelo v. City of New London* stands for the seemingly innocuous proposition that the government may condemn a property for economic development purposes.[2] Justice O'Connor's dissent lit up the newspapers with her conclusion that "[n]othing is to prevent the State from replacing any Motel 6 with a Ritz Carlton, any home with a shopping mall, or any farm with a factory."[3] She found that there was no longer any reasonable "constraint" upon the use of eminent domain.[4]

The average American was jolted by the decision because American families believe that their homes are sacrosanct[5] ("a man's home is his castle"), and vitally important because they are a major asset to the family. In basic civics courses, Americans learn that private property interests are protected from the government's reach except in extraordinary circumstances.[6] In addition, Americans take pride in

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

[2] *Id.* at 2668–69.

[3] *Id.* at 2676 (O'Connor, J., dissenting).

[4] *Id.* at 2673 (O'Connor, J., dissenting). Justice O'Connor believes that the result of the *Kelo* decision is to delete "for public use" from the Takings Clause. *Id.* at 2671 (O'Connor, J., dissenting).

[5] *See* Jon Gertner, *Chasing Ground*, N.Y. TIMES MAGAZINE, Oct. 16, 2005, at 46, 52; *see generally* Jesse Holland, *New London Woman Asks Congress to Step Into Eminent Domain Case*, NEWSDAY.COM, Sept. 21, 2005 (on file with author).

[6] Property rights were recognized far before the birth of the United States, but the Constitution secures them for certain. Madison said "[g]overnment is instituted to protect property of every sort. . . . This being the end of government, that alone is a just government, which impartially secures to every man, whatever is his own." James Madison, *Property*, NAT'L GAZETTE, Mar. 29, 1792, *reprinted in* 14 PAPERS OF

their homes and their communities. Most Americans are unaware of the broad reach of the power of eminent domain. They do not realize that government may uproot a family for economic development purposes. One Congressperson summed up the feelings of most citizens by referring to the implications of the *Kelo* decision as "the most un-American thing that can be done."[7] This sentiment conflicts with the need for redevelopment in many American cities.

Kelo was another split decision (5–4), which has become commonplace in recent years due to the differing constitutional views of the Justices.[8] Rather than settling the law of eminent domain, the split decision has stimulated a lively debate over its boundaries and basic foundations. At least twenty-five states are considering legislative initiatives to curb the use of eminent domain because of the *Kelo* decision.[9] With a new Chief Justice at the helm, and another new member recently appointed, the issue will in all probability be relitigated before the Supreme Court of the United States.[10] Due to the public outcry, the decision has resuscitated a narrower definition of the phrase "for public use," which at least one legal commentator had pronounced dead more than fifty years ago![11]

This paper will examine the public use requirement in light of the *Kelo* decision, with particular emphasis in Part II on its effect on

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JAMES MADISON 266 (R. Rutland et al. eds., 1983).

[7] Kenneth R. Harney, *Eminent Domain Ruling Has Strong Repercussions*, WASH. POST, July 23, 2005, at F01.

[8] *See The Miers Blunder*, WALL ST. J., Oct. 21, 2005, at A14. This editorial in the Wall Street Journal labeled the *Kelo* decision as an "evisceration of private property rights." *Id.*

[9] *See* Ted Mann, *Lawmakers to Review Eminent Domain Proposals*, THE DAY, Sept. 28, 2005 (on file with author) (noting that Connecticut is among the twenty-five states where state legislators have introduced bills to curb use of eminent domain); *see also* William Murphy, *Discussing Seizures of Private Land*, NEWSDAY, Sept. 21, 2005, at A24 (explaining how the *Kelo* decision should not affect New York City's seizure of private land).

[10] *See* Shannon P. Duffy, *Suit Against Philadelphia to Test Reach of* Kelo *Decision*, N.J. L.J., Oct. 10, 2005, at 78 (reporting that a suit was instituted in Pennsylvania contending that a condemnation of land for use as a driveway for Federal Express does not meet *Kelo* standards).

[11] Note, *The Public Use Limitation on Eminent Domain: An Advance Requiem*, 58 YALE L.J. 599, 614 (1949) [hereinafter *Public Use Limitation*]. In this note, the author concludes that:

> The Supreme Court has repudiated the doctrine of public use. Most state courts have arrived at the same conclusion, although rarely with so much directness. Doubtless the doctrine will continue to be evoked nostalgically in dicta and may even be employed authoritatively in rare, atypical situations. Kinder hands, however, would accord it the permanent interment in the digests that is so long overdue.

Id. at 614.

New Jersey, and whether the dissent has invigorated a backlash that may limit the government's exercise of its eminent domain power in the future.

I. *KELO* GENERALLY

A. Background

The Fifth Amendment of the United States Constitution permits the government to take private property for public use, so long as reasonable compensation is paid.[12] The Takings Clause simply states: "[N]or shall private property be taken for public use without just compensation."[13] The right of a sovereign to take private property can trace its roots at least as far back as formalized government,[14] but the public use limitation has been applied differently over the years. Eminent domain was rarely invoked in the early years of the United States because there was plenty of land and natural resources. It was employed for only two reasons: the construction of roads and the operation of gristmills.

In the early nineteenth century the public use limitation was read liberally and applied broadly in order to justify a taking for the public "good" or as a public "necessity."[15] At that time, many states allowed gristmill owners to construct dams in rivers in order to generate power for the mill. The laws provided that the property owners whose lands flooded as a result of the dam would be compensated for the loss. Although the mill was privately owned, the condemnation was justified as a "great advantage to the public."[16]

As time passed, the mill acts were deemed to cover unintended applications that had minimal public impact, such as manufacturing

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[12] U.S. CONST. amend. V. The Fifth Amendment states in full:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Id.

[13] *Id.*

[14] *Public Use Limitation*, *supra* note 11, at 600 n.5.

[15] *Id.* at 601. *See also* Lawrence Berger, *The Public Use Requirement in Eminent Domain*, 57 OR. L. REV. 203 (1977).

[16] Berger, *supra* note 15, at 206.

facilities.[17] Some courts frowned upon the broad application of the mill acts. With the advent of the railroad, courts became increasingly concerned that "the public benefit standard would allow virtually unlimited invasions into the rights of private property."[18] Accordingly, the courts imposed a narrower, more literal test: a taking could be justified only if the property taken was *actually used* by the public or if the public had the right to use the taken property.[19]

This narrower standard flourished in the mid-eighteen hundreds. However, in the latter half of the century, the proclivity of state and federal governments to employ eminent domain grew exponentially due to the needs of industrialized America and the expansion into the western United States.[20] Condemnation was necessary for construction of railroads in the West,[21] designation of battleground memorials,[22] irrigation of arid lands,[23] and protection of mining rights,[24] among other things. At that time, some states gradually returned to the broader rule, which permitted government to take land if a public benefit—as opposed to actual use by the public—existed. The result was a hodge-podge of different rulings throughout the states.

Surprisingly, it was not until the waning years of the eighteenth century that the Supreme Court began to exercise its authority to review takings.[25] In 1897, the Fifth Amendment was applied to the States by virtue of the Due Process Clause of the Fourteenth Amendment.[26] With the Supreme Court weighing in, the interests of progress and the western expansion prevailed. The use-by-the-public test was abandoned, and the public purpose or benefit test[27] was rein-

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[17] *Public Use Limitation*, *supra* note 11, at 604.

[18] Berger, *supra* note 15, at 208.

[19] *Id.*

[20] *Public Use Limitation*, *supra* note 11, at 601; *see also* Kelo v. City of New London, 125 S. Ct. 2655, 2662 (2005); S.W. Ill. Dev. Auth. v. Nat'l City Envtl., 710 N.E.2d 896, 900 (Ill. App. Ct. 1999).

[21] Mo. Pac. Ry. Co. v. Nebraska, 164 U.S. 403 (1896).

[22] United States v. Gettysburg Elec. Ry. Co., 160 U.S. 668 (1896).

[23] Fallbrook Irrigation Dist. v. Bradley, 164 U.S. 112 (1896); Clark v. Nash, 198 U.S. 361 (1905).

[24] Improvement Co. v. Slack, 100 U.S. 648 (1880).

[25] *S.W. Ill. Dev. Auth.*, 710 N.E.2d at 900; *Public Use Limitation*, *supra* note 11, at 599–600; *see also* Strickley v. Highland Boy Gold Mining Co., 200 U.S. 527 (1906); *Kelo*, 125 S. Ct. at 2681 (Thomas, J., dissenting) (noting that the "use of the eminent domain power was sparse at the time of the founding").

[26] Chicago, Burlington & Quincy R.R. Co. v. Chicago, 166 U.S. 226, 233–34 (1897); *Kelo*, 125 S. Ct. at 2658 n.1; *see also S.W. Ill. Dev. Auth.*, 710 N.E.2d at 899.

[27] *Kelo*, 125 S. Ct. at 2662 (noting that "when this Court began applying the Fifth Amendment to the States at the close of the 19th century, it embraced the broader

stated. One court called the public purpose standard a "more natural interpretation" of the Takings Clause.[28] Under the public purpose test, the government may take property if it has shown a legitimate governmental reason or advantage. In determining what constitutes a valid public benefit or purpose, the courts will ordinarily defer to the will of the legislature. As a result, the list of public uses has grown significantly. Hence, in the early twentieth century, most courts abandoned the "actual use" standard because it was too difficult to define,[29] and adopted the public purpose test instead.[30]

Despite the broader public purpose view, the case law continued to cling to certain rubrics regarding the restrictions on the use of eminent domain. Generally, the government could neither condemn private property to give it to another private individual,[31] nor could it

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and more natural interpretation of public use as 'public purpose'").

Underlying the majority and dissenting opinions, there is a basic disagreement about the extent to which the Constitution protects private property interests from government interference. The Takings Clause may be a mere twelve words, but to Justice O'Connor "[i]t is against all reason and justice" for a people to entrust a legislature with the power to "take[] property from A and give[] it to B." *Id.* at 2671 (O'Connor, J., dissenting) (quoting Calder v. Bull, 3 U.S. 386 (1798)). Justice Thomas believes that "the law of the land . . . postpone[s] even public necessity to the sacred and inviolable rights of private property." *Id.* at 2677 (Thomas, J., dissenting) (quoting WILLIAM BLACKSTONE, 1 COMMENTARIES ON THE LAWS OF ENGLAND 134–35 (1765)).

Justice Stevens, on the other hand, sees the legal precedent in the historical context of the takings clause much differently. He notes that as far back as colonial times, the state legislature enacted, and courts upheld, economic development takings in the so-called mill acts. *Id.* at 2681. These laws allowed operators of gristmills to dam rivers in order to produce power for mill operations, such as grinding corn. If the uplands flooded as a result of the damming, then just compensation was required. To Justice Stevens, a taking is permitted if there is a public benefit. *Id.* at 2662 n.8. *See generally* Berger, *supra* note 15, at 204 (noting that these opposing views are both legitimate because "the origin of the Public Use requirement in America is perhaps more obscure" and that the "rival" requirement of actual use (narrow view) or public benefit (liberal view) have conflicted for centuries); Nathan Alexander Sales, Note, *Classical Republicanism and the Fifth Amendment's "Public Use" Requirement*, 49 DUKE L.J. 339, 340–41 (1999) (noting that although legal scholars tend to side with Stevens's view, the real issue is whether private property rights outweigh the general welfare of the public at large).

[28] *Kelo*, 125 S. Ct. at 2662 (citing Fallbrook Irrigation Dist. v. Bradley, 164 U.S. 112, 158–64 (1896)).

[29] *See* Strickley v. Highland Boy Gold Mining Co., 200 U.S. 527, 531 (1906) (observing the inadequacy of use-by-the-general-public as a universal test and applying the public purpose test); *see also* 2 NICHOLS ON EMINENT DOMAIN § 7.2 (2002); *see generally* County of Essex v. Hindenlang, 114 A.2d 461, 466 (N.J. Super. Ct. App. Div. 1955).

[30] *See Kelo*, 125 S. Ct. at 2662; *see also* Fallbrook Irrigation Dist. v. Bradley, 164 U.S. 112, 158–64 (1896).

[31] *See* Mo. Pac. Ry. Co. v. Nebraska, 164 U.S. 403 (1896); Haw. Hous. Auth. v. Midkiff, 467 U.S. 229, 241 (1984); *Kelo*, 125 S. Ct. at 2669; *S.W. Ill. Dev. Auth.*, 710

take property where the taking favored a "private party, with only incidental or pretextual public benefits."[32] With these caveats, the law remained generally the same for the next century. Then came *Kelo*. In *Kelo*, the issue was whether privately owned land could be taken and conveyed to another private party for economic development purposes where the only public benefits—revitalization of a neighborhood—were intangible.[33]

B. Kelo v. City of New London

New London, Connecticut was in an economic freefall in the early 1990s because the Navy closed its undersea warfare center located at Fort Trumbull. Unemployment in New London was twice the rate of the rest of the state.[34] In 1990, Connecticut declared New London to be a distressed city.[35] In January 1998, New London reactivated the New London Development Corporation to spur economic development within the Fort Trumbull area.[36] About a year later, a pharmaceutical company committed to constructing a $300 million research facility immediately adjacent to the Fort Trumbull area to take advantage of the tax incentives available to distressed cities. The development district included 115 privately owned properties and thirty-two acres previously occupied by the naval facility.[37] The development plan included a waterfront conference hotel, pedestrian river

N.E.2d at 901 (voiding a taking because it "involve[d] the taking of property from one private party and the immediate transfer to another private party, whose interest in the property [was] solely to earn greater profit").

[32] *Kelo*, 125 S. Ct. at 2669 (Kennedy, J., concurring). One New Jersey court has stated the rule to mean if "a condemnation is commenced for an apparently valid public purpose, but the real purpose is otherwise, the condemnation may be set aside." Casino Reinvestment. Dev. Auth. v. Banin, 727 A.2d 102, 103 (N.J. Super. Ct. Law Div.1998); *see also* Wilmington Parking Auth. v. Land with Improvements, 521 A.2d 227 (Del. 1986); Atlantic City v. Cynwyd Invs., 689 A.2d 712, 721 (N.J. 1997).

[33] As Justice Stevens acknowledged:

> Two polar propositions are perfectly clear. On the one hand, it has long been accepted that the sovereign may not take the property of *A* for the sole purpose of transferring it to another private party *B*, even though *A* is paid just compensation. On the other hand, it is equally clear that a State may transfer property from one private party to another if future "use by the public" is the purpose of the taking. . . . Neither of these propositions, however, determines the disposition of this case.

Kelo, 125 S. Ct. at 2661.

[34] *Id.* at 2658.

[35] *Id.*

[36] *Id.* at 2659. The City of New London and the New London Development Corporation are collectively referred to as "city" to the extent possible.

[37] *Id.*

walk, eighty new residences, and a Coast Guard museum. Additionally, the plan called for development of 90,000 square feet of office and research space. Finally, the marina area would be renovated and a 2.4-acre site, known as parcel 4A, would be used to support the adjacent state park.[38] The Development Corporation successfully negotiated with all property owners except fifteen private homeowners. In November 2000, the New London Development Corporation instituted condemnation proceedings to acquire the remaining fifteen lots.[39]

The affected homeowners form a very sympathetic group. Susette Kelo had substantially renovated her pink house, which she purchased in 1997.[40] She "prize[d]" her beautiful waterfront views.[41] Another petitioner, Wilhemena Dery, was born in her Fort Trumbull home in 1918, and had lived there her entire life.[42] Her husband had lived in the house since their marriage sixty years ago, and their son lived in the house next door.[43] In all, the nine petitioners owned fifteen properties in the redevelopment area—four in the section designated for office and research and eleven in the park support area.[44] There was no allegation that the properties were blighted or otherwise in poor condition. The properties were to be leased to a developer for one dollar per year if the developer agreed to develop the line according to the development plan.[45] The rationale for condemnation was that the homeowners' lots were located within the redevelopment sector, which would act "as a catalyst to the area's [economic] rejuvenation."[46]

Responding to the condemnation suit, the landowners claimed that the takings violated the public use restriction of the Fifth Amendment. More particularly, they argued that the city was confiscating their property to give it to another private citizen and that these takings were not a "'public' [use] for purposes of the Fifth

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[38] *Id.* The term "park support" drew criticism from the dissent. Justice O'Connor remarked that "Parcel 4A is slated, mysteriously, for 'park support'" and that "[a]t oral argument, [the city] conceded the vagueness of this proposed use . . . ." *Kelo*, 125 S. Ct. at 2672 (O'Connor, J., dissenting) (internal citations omitted).

[39] *Id.* at 2660.

[40] *Id.*

[41] *Id.* Ms. Kelo prefers to refer to her house as a cottage. *See* The Cottage Coalition, http://www.cottagecoalition.org (last visited Aug. 11, 2006).

[42] *Kelo*, 125 S. Ct. at 2672.

[43] *Id.* at 2660.

[44] *Id.*

[45] *Id.* at 2660 n.4.

[46] *Id.* at 2659.

Amendment."[47]

After a seven-day trial dominated by testimony of experts, including planners and urbanologists, the trial court issued a mixed decision.[48] The court prohibited the taking of the properties that were within the park support area, but allowed condemnation of lots within the office and research section.[49] On appeal, the Supreme Court of Connecticut upheld the city's right to condemn all the properties.[50] The court, relying on a Connecticut statute that authorized the use of eminent domain to acquire land for an economic development project, held that such a taking for economic development purposes is a "public use" and in the "public interest."[51] In essence, the Supreme Court of Connecticut found that the taking was reasonably necessary to achieve the city's intended public use—revitalization of the Fort Trumbull area.[52] The state's highest court held the use of the land designated for park support was "sufficiently definite" to satisfy the Takings Clause.[53]

Interestingly, three justices disagreed.[54] They opined that a heightened standard of judicial scrutiny was necessary to justify takings for economic development purposes.[55] These justices found that the plan was intended to serve a valid public use, but the takings in this instance were unconstitutional because the city had failed to show by "clear and convincing evidence" that the economic benefits of the development plan were achievable.[56]

C. United States Supreme Court Majority Opinion

The Supreme Court of the United States granted the homeowners' petition for a writ of certiorari. Justice Stevens, writing for the majority, acknowledged that a sovereign may neither take the property of one person for the sole purpose of transferring it to another, nor may it take property under the pretext of a public purpose when

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[47] *Id.* at 2672 (O'Connor, J., dissenting).

[48] Kelo v. City of New London, No. 557299, 2002 Conn. Super LEXIS 789 (Conn. Super. Ct. Mar. 13, 2002).

[49] *Id.* at 341.

[50] Kelo v. City of New London, 843 A.2d 500 (Conn. 2004).

[51] *Id.* at 512.

[52] *Kelo*, 125 S. Ct. at 2672.

[53] *Id.* at 2661 (citing *Kelo*, 843 A.2d at 574).

[54] *Kelo*, 843 A.2d at 574 (Zarella, J., joined by Sullivan, C.J., and Katz, J., concurring in part and dissenting in part).

[55] *Id.* at 587–92.

[56] *Id.* at 578, 588.

the actual purpose is to bestow a private benefit.[57] However, the majority upheld the taking because it was part of a statutory scheme which promoted a social good. In applying the facts in *Kelo* to the case law, Justice Stevens found that the takings were part of a "carefully considered development plan" to revitalize the economy of New London.[58] In such an instance, the Court, following judicial precedent, deferred to the state legislature's determination of what constitutes the public good rather than substitute its own judgment.

To support that conclusion, the majority traced the evolution of the meaning of the term "public use" through its prior rulings. Its inquiry commenced with the case of *Fallbrook Irrigation District v. Bradley*,[59] where the Court abandoned the use-by-the-public test in favor of a "more natural interpretation of public use as 'public purpose.'"[60] Justice Stevens explained that *Fallbrook* was in lockstep with the states, which at the time had "either circumvented the 'use by public test' when necessary or abandoned it completely."[61]

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[57] *Kelo*, 125 S. Ct. at 2661–62.

[58] *Id.* at 2661 (internal citations omitted).

[59] 164 U.S. 112 (1896). In *Fallbrook*, the California legislature enacted a comprehensive statutory scheme to irrigate arid lands. *Id.* at 151–52. The Fallbrook Irrigation District is a legislatively created district to bring water to arid lands so that they could be cultivated. *Id.* at 151. It assessed all property holders within the irrigation district a fee based upon its costs to develop and provide water to the arid properties. *Id.* at 153. Bradley's property was included within the District, but Bradley refused to pay the assessment because she contended that she received no benefit from the irrigation. *Id.* at 156. Pursuant to the statutory scheme, Fallbrook had the right to levy upon Bradley's land due to non-payment. *Id.* at 159. Accordingly, Fallbrook followed the statutory process and awarded a deed to a third party. *Fallbrook*, 164 U.S. at 159. Bradley sued to enjoin the levy arguing that it was tantamount to a taking and that there was no public use justifying the same. *Id.* at 159. She argued that the irrigation of arid land did not benefit the public but only served other private landowners who could not cultivate their lands, and as a result, the taking did not meet the used-by-the-public test. *Id.* at 156.

On that issue, the Court opined that resolution depended upon whether the irrigation district fit within the meaning of public use. *Id.* at 158–59. The Court held that whether a public use exists largely depends upon the facts and circumstances surrounding the particular matter. *Id.* at 160. The Court found "to irrigate [land] and thus to bring into possible cultivation" large masses of land is a 'public purpose' and a 'matter of public interest.'" *Id.* at 161. Accordingly, *Fallbrook* set a precedent for many irrigation districts which aimed to cultivate about three million acres in the emerging West. The fact that only a limited number of landowners benefited from the irrigation was not "fatal" to the statutory scheme. *Fallbrook*, 164 U.S. at 161. Without substantial explanation, Justice Peckham invoked the words "public use," "public purpose," and "public interest" interchangeably, obviously assenting to a broad interpretation of public use. *Id.* at 161–62.

[60] *Kelo*, 125 S. Ct. at 2662.

[61] *Id.* at 2662 n.8; *see generally* Philip Nichols, *The Meaning of Public Use in the Law of Eminent Domain*, 20 B.U. L. REV. 615, 619–24 (1940).

The death knell for the use-by-the-public test sounded several years later in a case where mining interests were at stake. In *Strickley v. Highland Boy Gold Mining Co.*,[62] land was condemned to accommodate an aerial bucket owned by a mining company.[63] In order to connect the mining operations at the mountaintop to a rail depot in the valley, the line for the bucket had to cross privately owned land.[64] Since Utah statutes authorized the use of eminent domain for the construction of "tramways . . . to facilitate . . . the working of mines,"[65] and the Utah Supreme Court upheld the same as a valid public purpose, Justice Holmes concluded that the Constitution "does not require us to say that they are wrong."[66] He emphasized that the use-by-the-public test was inadequate,[67] and as long as the legislature of the state expressed a reasonable public purpose to support the taking, then the taking was consistent with the Fifth Amendment.[68] Since that time, the narrow use-by-the-public test has been "consistently rejected" by the Court.[69]

For the next fifty years after *Strickley*, the law of eminent domain remained relatively consistent, despite two world wars and the Great Depression. In 1954, however, the Court expanded the government's power again. In *Berman v. Parker*,[70] the Court confronted two issues: (1) whether Congress could condemn an entire area, rather than a

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[62] 200 U.S. 527 (1906).

[63] *Id.* at 529.

[64] The facts of the case were undisputed. The mining company constructed "an aerial bucket line" to transport ore about two miles down from a mountain top to a railroad depot. *Id.* at 529. Strickley had a placer mine interest in land which the aerial line traversed. *Id.* at 529–30. At the time of condemnation, the mining company could not locate Strickley to negotiate an easement, so it paid monies into court. *Id.* at 530. Strickley did not object during construction of the aerial bucket line. *Id.*

[65] *Strickley*, 200 U.S. at 530.

[66] *Id.* at 531. In a later case, Justice Holmes said the decision of the legislature "is entitled to deference until it is shown to involve an impossibility." Old Dominion Land Co. v. United States, 269 U.S. 55, 66 (1925).

[67] *Strickley*, 200 U.S. at 531. *Strickley* can be factually distinguished from *Kelo*. In *Strickley*, the taking involved air rights over a small swatch of property. *Id.* at 529–30. Although the case does not precisely state as much, there was no substantial interference with Strickley's use of his land. *Kelo*, however, involved a taking that removed people from their homes. *Kelo*, 125 S. Ct. at 2686 (Thomas, J., dissenting). Although Thomas's dissent in *Kelo* does limit the breadth of the ruling in *Strickley*, it does not factually distinguish it. *See id.* at 2683–84 (Thomas, J., dissenting).

[68] *Strickley*, 200 U.S. at 531–32.

[69] *Kelo*, 125 S. Ct. at 2663; *see also* William B. Stoebuck, *A General Theory of Eminent Domain*, 47 WASH. L. REV. 553 (1972). Professor Stoebuck muses: "Perhaps the public use doctrine still has enough vitality that someone might argue it as an objection to an *excess* condemnation, but with hardly an expectation of success." *Id.* at 590 (emphasis added).

[70] 48 U.S. 26 (1954).

specific lot, because the area was blighted; and (2) whether Congress could authorize conveyance of the disgorged property to another private party for redevelopment.[71] In *Berman*, there was expert testimony that 64.3% of the houses within the redevelopment area were beyond repair, that 82.2% had no wash basins, and that 83.8% lacked heat.[72] Berman owned a department store within the redevelopment area.[73] He objected to the condemnation of his property because it was commercial, whereas the major object of the law was to redevelop residential property.[74] He also argued that his store was in a state of good repair and not in need of redevelopment.[75] Berman argued that no public purpose was served by the condemnation of his property, especially since the findings of blight exclusively related to residential property.[76]

The Court disagreed. Justice Douglas analyzed the case in terms of police powers, and found that it was "fruitless" to define the reach or "outer limits" of police power.[77] Justice Douglas reasoned that the legislature, not the judiciary, properly determines the public interest

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[71] *Id.*

[72] The federal legislation did not define what constitutes a slum or a blighted area, but it did set forth the meaning of substandard housing. *Id.* at 28 n.1. There are two major issues when condemning blighted zones: (1) the taking of property from one private person and giving it to another; and (2) redevelopment that is not used by the public, like a park or road. Some states, recognizing the issues, specifically provide for use of condemnation to deal with blight. In 1947, some seven years before the *Berman* decision, New Jersey adopted a new constitution which declared that redevelopment of blighted areas is a "public purpose and public use." N.J. CONST. art. VIII, § 3. The section states in full:

> Blighted areas, clearance, replanning, development or redevelopment; tax exemption of improvements; use, ownership, management and control of improvements:
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> (1) The clearance, replanning, development or redevelopment of blighted areas shall be a public purpose and public use, for which private property may be taken or acquired. Municipal, public or private corporations may be authorized by law to undertake such clearance, replanning, development or redevelopment; and improvements made for these purposes and uses, or for any of them, may be exempted from taxation, in whole or in part, for a limited period of time during which the profits of and dividends payable by any private corporation enjoying such tax exemption shall be limited by law. The conditions of use, ownership, management and control of such improvements shall be regulated by law.

Id.

[73] *Berman*, 348 U.S. at 31.

[74] *Id.*

[75] *Id.*

[76] *Id.*

[77] *Id.* at 32.

and is the guardian of public needs.[78] The Justice noted that this principle does not have any exceptions, including whether the exercise of the power of eminent domain may be employed.[79] In applying that standard, Justice Douglas noted that Congress decided to attack "blighted parts of the community on an area rather than on a structure-by-structure basis."[80] Since there were rational planning and health principles supporting the legislative plan, the Court would not second-guess Congress.[81]

Justice Stevens seized upon *Berman* as the underpinning of the *Kelo* decision.[82] He reasoned that the legislature declared a legitimate public purpose and articulated a comprehensive plan of redevelopment. Accordingly, Justice Stevens concluded, as in *Berman*, that the exercise of the power of eminent domain was appropriate.[83] In other words, the use of condemnation is "coterminous" with the exercise of police powers.[84] Similarly to *Berman*, the *Kelo* court found that redevelopment need not be on a piecemeal basis, and the Court would defer to the legislature with regard to whether the area must be planned as a whole rather than on a parcel-by-parcel approach.[85] To the majority, the argument that property cannot be taken in order to convey it to another private party is flawed.[86] Justice Stevens endorsed Justice Douglas's rationale in *Berman* that Congress determines the public good and may rightfully conclude that "the public end may be . . . better served through an agency of private enterprise."[87]

In addition to *Berman*, Justice Stevens relied upon *Hawaii Housing Authority v. Midkiff*[88] for support.[89] Justice Stevens opined that *Midkiff* stood for the proposition that eminent domain may be em-

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[78] *Id.*

[79] *Berman*, 348 U.S. at 33. Justice Douglas declared that "[o]nce the object is within the authority of Congress, the means by which it will be attained is also for Congress to determine." *Id.* at 34.

[80] *Id.*

[81] *Id.* at 34–35. Relying on the expert testimony that the entire area needed redesigning in order to assure diversification of uses, Justice Douglas found that "diversification in future use is . . . within congressional power." *Id.* at 35.

[82] Kelo v. City of New London, 125 S. Ct. 2655, 2673 (2005).

[83] *Id.* at 2663. Justice Stevens noted that when reviewing whether a public purpose exists, the Court has "defined that concept broadly, reflecting our longstanding policy of deference to legislative judgments in this field." *Id.*

[84] Haw. Hous. Auth. v. Midkiff, 467 U.S. 229, 240 (1984).

[85] *Kelo*, 125 S. Ct. at 2665.

[86] *Id.* at 2676.

[87] *Id.* at 2666 (quoting Berman v. Parker, 348 U.S. 26, 33–34 (1954)).

[88] 467 U.S. 229 (1984).

[89] *Kelo*, 125 S. Ct. at 2674.

ployed liberally as a tool to correct a social wrong.[90] *Midkiff* presented very extraordinary facts. The issue was whether the Public Use Clause prohibited the State of Hawaii from taking title in real property from lessors and transferring it to lessees in order to eliminate the concentration of fee simple ownership in the State.[91] Factually, the state and federal government owned forty-nine percent of the land within Hawaii, and another forty-seven percent was owned by seventy-two private landowners.[92] The legislature found that such concentration of ownership skewed the real estate market and inflated prices to the detriment of the public.[93] Accordingly, the legislature enacted a detailed process that required, under certain circumstances, that properties of lessors be expropriated, and that the lessees take fee simple title.[94] The lessors owned the property on which lessees constructed their dwellings. The lessors would not convey the land to the homeowners, effectively preventing working class persons from acquiring real property. As in *Fallbrook* and *Berman*, there was a comprehensive statutory scheme detailing the reasons for condemnation and a specific statutory scheme to implement the statute. In addition, the statute had a clear public purpose: to correct the manipulation of the real estate prices by an oligopoly.[95]

Justice O'Connor, writing for the unanimous *Midkiff* Court, found that the public purpose test was satisfied because the statute corrected "the perceived social and economic evils of a land oligopoly" similar to laws enacted by the original colonies.[96] In dicta, she further noted that "one person's property may not be taken for the benefit of another private person without a justifying public purpose,"[97] but in her view, the purpose of the Hawaii statute was sufficient to warrant condemnation.

In *Kelo*, Justice Stevens cites *Midkiff* for the proposition that "[i]t is only the taking's purpose, and not its mechanics," that matters in

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[90] *Id.* at 2661.

[91] *Midkiff*, 467 U.S. at 232–33.

[92] *Id.* The concentration of ownership was the remnant of a "feudal land tenure system" that existed for centuries prior to statehood. *Id.* at 232.

[93] *Id.* at 244.

[94] *Id.* at 233–34.

[95] *Compare* Fallbrook Irrigation Dist. v. Bradley, 164 U.S. 112 (1896) (California statute establishing irrigation district), *with* Berman v. Parker, 348 U.S. 26 (1954) (federal statute creating redevelopment area), *and Midkiff*, 467 U.S. 229 (Hawaii law ordaining housing authority).

[96] *Midkiff*, 467 U.S. at 241–42. In fact, dismantling oligopolies is a "classic exercise" of police power according to Justice O'Connor. *Id.* at 242.

[97] *Id.* at 241 (quoting Thompson v. Consol. Gas Corp., 300 U.S. 55, 80 (1937)).

determining public use,[98] and because breaking up a real estate oligopoly is a bona fide public purpose, then condemnation is an appropriate tool to achieve the legislative purpose. Similarly in *Kelo*, because economic development is a permissible public purpose, the condemnation was authorized. In conclusion, Justice Stevens found nothing inconsistent in allowing government to condemn property for the purpose of economic development so long as it is pursuant to "a comprehensive redevelopment plan" which, by its very terms, contemplates that "the legal rights of all interested parties" would be considered.[99]

The majority found no reason to impose a new standard to deal with economic development takings. In fact, the Court rebuffed two tests proffered by petitioners: a bright line test and a heightened scrutiny test. The bright line test simply prohibits property from being taken for economic development purposes, while the heightened scrutiny test requires that the condemning authority show with reasonable certainty that the public benefit will occur.[100] The majority cast aside a bright line test because there is "no principled way of distinguishing economic development from [other takings]."[101] The majority also dismissed the heightened level of review (reasonable certainty that public benefits would in fact occur), believing that it would impede redevelopment because "judicial approval" would be postponed until success of a project becomes likely.[102] To the majority, the only recourse for the petitioners and future property owners evicted for economic development purposes lies with the legislature, which has the authority to curtail the use of eminent domain by statute.[103]

D. Justice Kennedy's Concurrence

Justice Kennedy's concurring opinion states that a taking may be justified so long as there is a rational relationship between the public purpose and the property seized. In other words, Justice Kennedy argues that a taking should be upheld as consistent with the Public Use Clause of the Fifth Amendment so long as it is rationally related

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[98] Kelo v. City of New London, 125 S. Ct. 2655, 2664 (2005) (quoting *Midkiff*, 467 U.S. at 244).

[99] *Id.* at 2668.

[100] *Id.* at 2667–68.

[101] *Id.* at 2665.

[102] *Id.* at 2668.

[103] *Id.* (stating that "nothing in our opinion precludes any State from placing further restrictions on its exercise of the takings power").

to the stated public purpose.[104] The Justice acknowledges that a taking should be struck down if it is clearly intended to favor a particular private party over another, or only an incidental public benefit exists. In those instances, Justice Kennedy would find that no rational relationship existed between the taking and the public use. To Justice Kennedy, economic development taking should be subject to the same test as economic regulations under the Due Process and Equal Protection Clauses: the rational relationship test. To him, this test would protect against arbitrary governmental action.

Justice Kennedy's opinion seemingly responded to the dissent of three members of the Connecticut Supreme Court, who opined that a higher scrutiny test should be applied to economic development takings. According to their view, the government had the burden of proving by "clear and convincing" evidence that a public benefit existed, which would be something more than an undocumented intangible benefit.[105] Justice Kennedy's analysis rejects this higher level of scrutiny.[106] Comparing the standard of the dissenting Connecticut justices to Justice Kennedy's standard, the takings in *Kelo* would be void in the former instance, but employing Justice Kennedy's more relaxed standard, the takings would be upheld.

E. Justice O'Connor's Dissent

The dissenters, rallying to preserve private property rights, did not mince words in their bitter criticism of the majority's reasoning. Justice O'Connor found that intangible or incidental public benefits often associated with economic development, such as increased tax revenues, more jobs, and improved aesthetics, are insufficient predicates to justify condemnation.[107] To say otherwise is to "wash out any distinction between private and public use of property—and thereby effectively to delete the words 'for public use' from the Takings Clause of the Fifth Amendment."[108] Quoting Alexander Hamilton and James Madison in her defense of private property rights, Justice O'Connor declared that the public use requirement of the Fifth Amendment imposes a basic limitation on the government.[109] In her

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[104] *Kelo*, 125 S. Ct. at 2669 (Kennedy, J., concurring).

[105] Kelo v. City of New London, 843 A.2d 500, 588 (Zarella, J., concurring in part and dissenting in part).

[106] *Kelo*, 125 S. Ct. at 2669 (Kennedy, J., concurring).

[107] *Id.* at 2675 (O'Connor, J., dissenting). Justice O'Connor states in part that "the trouble with economic development takings is that private benefit and incidental public benefit are . . . merged . . . ." *Id.* at 2675 (O'Connor, J., dissenting).

[108] *Id.* at 2671 (O'Connor, J., dissenting).

[109] *Id.* at 2672 (O'Connor, J., dissenting). Hamilton believed that one of the great

view, private property rights prevail over eminent domain unless the condemnation fits within one of three categories of takings.[110]

The three categories of takings are harmonious with the Public Use Clause. Two of the three areas are uncontroversial. First, the sovereign may take private property for public ownership for such things as roads.[111] Second, the sovereign may transfer private property from one person to another private party, so long as the property is used by the public, such as with common carriers like railroads and with public utilities like water, gas, and electric companies.[112] The third category is novel: the sovereign may take private property if "the extraordinary, precondemnation use of the targeted property inflict[s] affirmative harm on society."[113] *Berman* and *Midkiff* fall within this third category. In *Berman*, the harm was blight resulting from "extreme poverty," and in *Midkiff* it was an oligopoly emanating from the "extreme wealth" of a few to the detriment of the public at large.[114]

Having established the extraordinary-harm-to-the-public standard, Justice O'Connor viewed the broad language in *Berman* and *Midkiff* as "errant."[115] She declared that the language, which states that the "public use requirement is coterminous with the scope of a sovereign's police powers," was unnecessary to decide those cases.[116] She explained that the language was not "put to a constitutional test," and *Kelo* demonstrated why the "police power and 'public use' cannot always be equated."[117] In short, Justice O'Connor's analysis distinguished *Berman* and *Midkiff* on the extraordinary-harm-to-the-public theory and limited them by declaring some of the key language to be

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aims of government is to secure property of citizens. *Id.* (O'Connor, J., dissenting). Similarly, Madison wrote a "just government" is one "which *impartially* secures to every man, whatever is his *own*." *Kelo*, 125 S. Ct. at 2677 (quoting James Madison, *Property*, NAT'L GAZETTE, Mar. 29, 1792, *reprinted in* 14 PAPERS OF JAMES MADISON 266 (R. Rutland et al. eds., 1983)).

[110] *Id.* at 2673 (O'Connor, J., dissenting).

[111] *Id.* (O'Connor, J., dissenting).

[112] *Id.* (O'Connor, J., dissenting).

[113] *Id.* at 2674 (O'Connor, J., dissenting).

[114] *Id.* (O'Connor, J., dissenting). Justice O'Connor's social harm standard is novel. There does not appear to be a case or legal scholar who has analyzed *Berman* or *Midkiff* in such a fashion prior to this decision.

[115] *Kelo*, 125 S. Ct. at 2675 (O'Connor, J., dissenting). Justice O'Connor authored the majority opinion in *Midkiff*. The recharacterization of the language of that case as "errant" suggests that Justice O'Connor has reconsidered her position with regard to private property rights and the government's ability to disgorge them.

[116] *Id.* at 2676 (O'Connor, J., dissenting).

[117] *Id.* at 2675 (O'Connor, J., dissenting).

"errant" and "unnecessary."[118] In short, according to Justice O'Connor, economic development takings, without a showing of extraordinary harm, cannot withstand constitutional protection afforded property owners.

F. Justice Thomas's Dissent

Where Justice O'Connor attempted to distinguish the case law upon which the majority relied, Justice Thomas concluded that the case law should be reconsidered. He recommended that the Public Use Clause cases be revisited and that the Court return to the standard "that the government may take property only if it actually uses or gives the public a legal right to use the property."[119] He viewed the public use phrase as an expressly enumerated liberty which limits the authority of government over the individual.[120] This liberty is on par with other individual rights secured by the Fifth Amendment (e.g., double jeopardy, the right against self-incrimination, and due process of law). As such, Justice Thomas argued that the Court should not construe "public use" in a manner that undermines private property rights by interpreting the clause broadly. Accordingly, Justice Tho-

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[118] *Id.* (O'Connor, J., dissenting).

[119] *Id.* at 2686 (Thomas, J., dissenting). Revisiting the early case law is appropriate in Justice Thomas's view because prior holdings could have been more narrowly drawn in a manner consistent with the used-by-the-public test. For example, regarding the Supreme Court decision in Fallbrook Irrigation Dist. v. Bradley, 164 U.S. 112 (1896) (fitting within the public purpose test (to cultivate arid lands)), Justice Thomas argued for the used-by-the-public test because "similarly situated members of the public . . . had a right to use it." *Kelo*, 125 S. Ct. at 2683 (Thomas, J., dissenting). Similarly, in Strickley v. Highland Boy Gold Mining Co., 200 U.S. 527 (1906), which upheld a taking to construct an aerial bucket, the use fell within the used-by-the-public test because "the plaintiff [was] a carrier for itself and others" and therefore, it was for a protected class. *Kelo*, 125 S. Ct. at 2684 (Thomas, J., dissenting) (quoting *Strickley*, 200 U.S. at 531–32). In addition, Justice Thomas argued that the case establishing that the courts will defer to a legislature in determining public purpose should have been decided on the used-by-the-public test. *Id.* at 2679 (Thomas, J., dissenting). In United States v. Gettysburg Electric Railway Co., 160 U.S. 668 (1896), the issue was whether the government could condemn land for the purpose of building a battlefield memorial. Since the government was actually using the property, there was no need for the Court to gratuitously add that "when the legislature has declared the use or purpose to be a public one, its judgment will be respected by the courts, unless the use be palpably without reasonable foundation." *Kelo*, 125 S. Ct. at 2684 (Thomas, J. dissenting) (quoting *Gettysburg Elec. Ry.* 160 U.S. at 680).

Justice Thomas saw no alternative for cases like *Berman* and *Midkiff* but to reconsider them. He argued that the public purpose test, as enunciated in those cases, "cannot be applied in a principled manner" because "no coherent principle limits what could constitute a valid public use." *Id.* at 2686 (Thomas, J., dissenting). Accordingly, the cited precedent in *Kelo* obliterates an enumerated right of an individual against government interference. *Id.* (Thomas, J., dissenting).

[120] *See id.* at 2678 (Thomas, J., dissenting).

mas concluded that the Court should not defer to the legislative findings of what constitutes a "public use" when an enumerated right of an individual is at stake because the courts have long been recognized by the public as the protectors of enumerated rights.

The *Kelo* decision has triggered a groundswell of opposition. In one way, it is difficult to understand the outcry because the public has long supported policies to rejuvenate our cities. On the other hand, the thought that some bureaucrat may unilaterally dispossess homeowners of their property is rather unsettling. As a result, Congress has conducted hearings on the decision. In early November 2005, the House of Representatives passed a bill that prohibited the use of federal funds on any projects where property is condemned for economic development purposes.[121] Hence, there may be a legislative solution. However, since condemnation is primarily a tool of state and local government, it is worthwhile to review the laws and policies in New Jersey, which is a microcosm of most of the industrialized states.

II. *KELO*'S APPLICATION TO NEW JERSEY EMINENT DOMAIN

A. New Jersey Condemnation

New Jersey is often considered a bedroom community for those working in New York City and Philadelphia. It is the most densely populated state in the country, at 1165 persons per square mile.[122] The population is denser than India (914 persons per square mile) and Japan (835 persons per square mile).[123] According to some planners, New Jersey may be the "first fully built-out state in the country."[124] It stands to reason that in New Jersey, as large tracts of land capable of development dwindle, there will be increasing pressure to redevelop the state's deteriorated industrial areas. Developers are already interested, and cities including Newark, Bayonne, Camden, Perth Amboy, and Asbury Park all have redevelopment areas. Developers often require the assistance of the government, through eminent domain, to assemble the land necessary for a redevelopment project. Accordingly, the impact of the *Kelo* decision on New Jersey will be almost immediate.

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[121] *See* Private Property Rights Protection Act of 2005, H.R. 4128, 109th Cong. (2005).

[122] Gertner, *supra* note 5, at 46, 52.

[123] *Id.*

[124] *Id.*

*B. New Jersey Law Pre-*Kelo

Similar to the federal Constitution, the New Jersey Constitution provides that "private property shall not be taken for public use without just compensation."[125] Unlike the United States Constitution, New Jersey's constitution specifically provides that the redevelopment of blighted areas is "a public purpose and public use, for which private property may be taken or acquired."[126] Prior to *Kelo*, the case law liberally authorized the use of eminent domain. In fact, legal practice books did not even pay lip service to a narrow reading of public use. The law was so well-settled that the practice series merely stated "that full payment [must] be made for any private property taken for a *public purpose*."[127]

In New Jersey, the right of the government to take property in furtherance of the common good is beyond peradventure. In 1938, New Jersey Supreme Court Justice Heher declared that the public welfare was of "prime importance," and the squelching of property rights was "a negligible loss" considering the benefit to the community.[128] More specifically, he stated:

> The state possesses the inherent authority—it antedates the constitution—to resort, in the building and expansion of its community life, to such measures as may be necessary to secure the essential common material and moral needs. The public welfare is of prime importance; and the correlative restrictions upon individual rights—either of person or of property are incidents of the social order, considered a negligible loss compared with the resul-

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[125] N.J. CONST. art. I, § 20. Section 20 states: "Private property shall not be taken for public use without just compensation. Individuals or private corporations shall not be authorized to take private property for public use without just compensation first made to the owners." *Id.*

[126] N.J. CONST. art. VIII, § 3. This provision states that development of a blighted area is a public use and public benefit:

> The clearance, replanning, development or redevelopment of blighted areas shall be a public purpose and public use, for which private property may be taken or acquired. Municipal, public or private corporations may be authorized by law to undertake such clearance, replanning, development or redevelopment; and improvements made for these purposes and uses, or for any of them, may be exempted from taxation, in whole or in part, for a limited period of time during which the profits of and dividends payable by any private corporation enjoying such tax exemption shall be limited by law. The conditions of use, ownership, management and control of such improvements shall be regulated by law.

Id.

[127] 35 N.J. PRACTICE § 10.1 (1999) (emphasis added).

[128] Mansfield & Swelt Inc. v. Town of W. Orange, 198 A. 225, 229 (N.J. 1938); Wilson v. City of Long Branch, 142 A.2d 837, 843 (N.J. 1958).

> tant advantages to the community as a whole.[129]

Obviously, in accord with this broad language, New Jersey adopted the liberal view of what constitutes public use.[130]

In light of this statement, New Jersey courts have not dwelled on the different tests for defining public use. The last time it was at issue was in the mid-1950s, in *County of Essex v. Hindenlang*.[131] In that matter, Judge Goldmann of the Appellate Division analyzed the narrow and liberal tests for determining public use.[132] Rejecting the narrow view, he concluded that Essex County may condemn land to construct a parking lot next to county buildings because the use "is clearly for the public benefit, to the public advantage, and has public utility."[133] Interestingly, however, the decision did not require this analysis because the county was the developer of the lot. Hence, the taking would have aptly fit within the narrower test.

In general terms, New Jersey eminent domain law can be summarized as follows: "[T]he individual must bow to the public welfare and accept just compensation for his deprivation."[134] Public use is satisfied when the taking "tends to enlarge resources, increase the industrial energies and . . . manifestly contribute[s] to the general wel-

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[129] Mansfield & Swelt, 198 A. at 229; Wilson, 142 A.2d at 843.

[130] *See Wilson*, 142 A.2d at 844–45; N.J. Hous. & Mortgage Fin. Agency v. Moses, 521 A.2d 1307, 1311 (N.J. Super. Ct. App. Div. 1987); Tide-Water Co. v. Coster, 18 N.J. Eq. 518 (1866).

[131] 114 A.2d 461 (N.J. Super. Ct. App. Div. 1955).

[132] Judge Goldmann defined the narrow and liberal tests as:

> Courts dealing with problems of eminent domain have generally been reluctant to define the phrase "public use." . . . [T]hey have recognized that the phrase "is incapable of a precise and comprehensive definition of universal application."
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> . . .
>
> Judicial attempts to describe the subjects to which the expression "public use" would apply have proceeded on two different theories. One theory of "public use" limits its application to "use by the public"—public service or employment. . . .
>
> Courts that take the broader and more liberal view in sustaining public rights at the expense of property rights hold that "public use" is synonymous with "public benefit," "public advantage" or "public utility."

Id. at 466–67 (citations omitted).

[133] *Id.* at 468; *see also* Albright v. Sussex County Lake & Park Comm'n., 57 A. 398, 400 (N.J. 1904); State v. Totowa Lumber & Supply Co., 232 A.2d 655, 660 (N.J. Super. Ct. App. Div. 1967) (wherein the court permitted taking of land for an access route which served a single private landowner).

[134] *See* Wilson v. City of Long Branch, 142 A.2d 837, 843, 856–57 (N.J. 1958) (although property owners showed that their homes were in good repair, they were still subject to declaration of blight).

fare."[135] The reach of the government is so long that the Appellate Division upheld the Housing and Mortgage Finance Agency's taking of a property for development of a shopping center on behalf of a private developer on the basis that the shopping center was a supporting facility to its statutory purpose of home construction.[136]

In fact, it can be argued that in New Jersey the right of the sovereign to take property is upheld unless there is some showing of bad faith. Generally, courts will not interfere with a decision to use eminent domain in the absence of "fraud, bad faith or manifest abuse."[137] For example, in *Casino Reinvestment Development Authority v. Banin*,[138] the Superior court set aside a condemnation by the Casino Reinvestment Development Authority ("CRDA") in furtherance of a casino hotel project by Trump Properties.[139] The condemned property abutted a 360-room hotel project, and the property was allegedly to be used for parking and open space. But the agreement entered between the CRDA and Trump Properties was not so definite. The court found that the agreement was ambiguous because Trump Properties could, under certain circumstances, use the condemned area for other purposes in the future.[140] The court held that the only reasonable conclusion was that the condemnation was to convey the land to Trump Properties without a sound governmental reason. The court held that a condemnation will be set aside if it is commenced "for an apparently valid public purpose, but the real purpose is otherwise."[141]

Similarly, in *Borough of Essex Fells v. Kessler Institute for Rehabilitation*,[142] Judge Fuentes of the Superior court ruled that a taking may be set aside if the municipality acted in bad faith or acted "with a furtive design . . . or ill will."[143] In *Borough of Essex Fells*, the condemnation of land for use as a public park was set aside when the real purpose was shown to be an attempt by the condemnor to exclude development

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[135] Twp. of W. Orange v. 769 Assocs., 800 A.2d 86, 91 (N.J. 2002) (quoting JULIUS L. SACKMAN, 2A NICHOLS' THE LAW OF EMINENT DOMAIN § 7.02 (3d ed. 1990)).

[136] N.J. Hous. & Mortgage Fin. Agency v. Moses, 521 A.2d 1307, 1311 (N.J. Super. Ct. App. Div. 1987) (dismissed on procedural grounds). There was no comprehensive development plan or finding of blight.

[137] *769 Assocs.*, 800 A.2d. at 90.

[138] 727 A.2d 102 (N.J. Super. Ct. Law Div. 1998).

[139] *Id.* at 109.

[140] *Id.* at 110.

[141] *Id.* at 103; *see also* City of Atl. City v. Cynwyd Invs., 689 A.2d 712, 721 (N.J. 1997).

[142] 673 A.2d 856 (N.J. Super. Ct. Law Div. 1995).

[143] *Id.* at 861; *see also* Essex County Improvement Auth. v. RAR Dev. Assocs., 733 A.2d 580, 585 (N.J. Super. Ct. Law Div. 1999).

of a rehabilitation center.[144]

More recently, in *Mount Laurel v. Mipro Homes, L.L.C.*, the Appellate Division upheld Mount Laurel's decision to condemn property to thwart residential development.[145] In that case, the township issued an Open Space Recreation Plan and amended the plan to include a 16.3-acre parcel of land when it became known that the site plan for the property had been altered from an assisted living facility that included units affordable to low- and moderate-income residents, to a plan to construct twenty-three single-family residences.[146] When good faith negotiations to purchase the property proved unsuccessful, the township filed a declaration of taking.[147] The Appellate Division held that the condemnation was for a valid purpose and found no "affirmative showing of fraud, bad faith or manifest abuse."[148]

The court, however, theorized that had Mount Laurel attempted to condemn the property of Mipro's predecessor, which planned an assisted living facility, a finding of abuse of eminent domain power might have been warranted.[149] New Jersey law appears to be more liberal than federal law because *Banin* and *Borough of Essex Fells* appear to shift the burden of proof to the party opposing the condemnation and impose an affirmative duty on landowners to present proof that the taking is not for a public use. This standard requires that landowners show that the condemnor acted in bad faith.

The judiciary's liberal view of condemnation also extends to the New Jersey legislature. The state government has empowered numerous municipalities, counties, and independent authorities to condemn property for economic development and redevelopment reasons. The extent to which the legislature has authorized eminent domain for economic development projects can best be illustrated through the Local Redevelopment and Housing Law ("LRHL").[150]

In New Jersey, any municipality may establish a redevelopment agency pursuant to the LRHL.[151] There are currently eighteen redevelopment agencies. A redevelopment agency established pursuant to the LRHL has condemnation powers.[152] To create a redevelop-

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[144] *Borough of Essex Fells*, 673 A.2d at 858.

[145] 878 A.2d 38 (N.J. Super. Ct. App. Div. 2005).

[146] *Id.* at 43.

[147] *Id.*

[148] *Id.* at 48–49 (quoting Twp. of W. Orange v. 769 Assocs., 800 A.2d 86, 90 (N.J. 2002) (quoting City of Trenton v. Lenzner, 109 A.2d 409, 413 (N.J. 1954)).

[149] *Id.* at 49.

[150] N.J. STAT. ANN. § 40A:12A-1 (West 2006).

[151] *Id.* § 40A:12A-4(c). There are 518 municipalities in New Jersey.

[152] *Id.* § 40A:12A-8(c).

ment agency, the municipality must follow a statutory process which includes an investigation and holding a public hearing on whether the area is in need of redevelopment.[153] In order to designate a redevelopment area, the LRHL requires that one of eight ill-defined reasons exist. These include, but are not limited to, a finding that the generality of buildings are sub-standard, there has been an abandonment of land, or there has been lack of proper utilization.[154] Once the reason, or reasons, have been established through evidence, the municipality may draft a very detailed redevelopment plan.[155] The development plan must address a number of issues, including the displacement of residents. Development may ensue thereafter, including the right to take property pursuant to the plan.[156]

Courts have routinely upheld a municipality's action to create a redevelopment area, so long as it is based on substantial evidence.[157] A finding of one of the eight reasons enumerated in the statute has been ruled to constitute blight as stated in the New Jersey Constitution.[158] As a result, redevelopment agencies have flourished throughout the state. The "relative affluence of the community is irrelevant,"[159] and not every property within the redevelopment area needs to be substandard for an area to qualify for redevelopment.[160] In short, the application of the law is broad, and the standard justifying the creation of a redevelopment agency is easily attainable.

In addition to redevelopment agencies and county improvement authorities,[161] there are other agencies that unexpectedly possess condemnation powers for economic development purposes. For ex-

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[153] *Id.* § 40A:12A-6. More specifically, the statute requires: (a) resolution by the municipality requiring a planning board to investigate whether redevelopment meets statutory criteria; (b) a public hearing to be conducted; (c) notice to landowners; (d) recommendation of delineation of redevelopment area by planning board; (e) municipality may adopt a recommendation based on substantive evidence; and (f) notice to be sent to impacted property owners. *Id.*

[154] *Id.* § 40A:12A-5.

[155] N.J. STAT. ANN. § 40A:12A-7 (West 2006).

[156] *Id.* § 40A:12A-8(c).

[157] Levin v. Twp. Comm. of Bridgewater, 274 A.2d 1, 18 (N.J. 1971).

[158] *See* N.J. CONST. art. VIII, § 3.

[159] Concerned Citizens of Princeton, Inc. v. Borough of Princeton, 851 A.2d 685, 689 (N.J. Super. Ct. App. Div. 2004), *cert. denied*, 182 N.J. 139 (2004) (condemnation was not at issue).

[160] Forbes v. Bd. of Trs. of the Twp. of S. Orange Vill., 712 A.2d 255, 262 (N.J. Super. Ct. App. Div. 1998).

[161] *See* N.J. STAT. ANN. § 40:37A-69 (West 2006). County improvement authorities may condemn land for benefit of the tourist industry and redevelopment of deteriorated areas.

ample, the Port Authority of New York and New Jersey, which was conceived to operate bridges, tunnels, and ports, was granted authority to exercise eminent domain for industrial development.[162] Similarly, the Delaware River Port Authority, whose original purpose was to construct and operate certain bridges, was empowered in the late 1890s to undertake economic development projects and to utilize the power of condemnation.[163] Additionally, the New Jersey Economic Development Authority, which is primarily a financing entity for private companies, may condemn property with the local government's consent on behalf of those private interests.[164] Finally, the New Jersey Educational Facility Authority, which finances capital projects for public and private institutions of higher education, may condemn land, even on behalf of a private institution.[165]

Unequivocally, the policy of the State of New Jersey has been to use eminent domain as a means of fostering economic development and redevelopment. In response to *Kelo*, however, New Jersey courts and the state legislature may reverse this direction.

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[162] *See id.* §§ 32:1-35.72(c)–(d), 32:1-35.85. The Port Authority of New York and New Jersey was conceived in the 1920s to operate ports and bridges. Later, it was authorized by New York and New Jersey to engage in industrial development to prevent the erosion of the tax base and, if necessary, to use eminent domain to accomplish that goal. *Id.*

[163] *See id.* §§ 32:3-6, 13.23. The Delaware River Port Authority originally operated some bridges between New Jersey and Pennsylvania. Later, it was statutorily enabled to undertake economic development projects and exercise eminent domain for so long as it served the "sound economic development of the Port District." *Id.* § 32:3-13.23.

The Delaware River Basin Authority may "acquire by condemnation" property for any authorized project. *Id.* § 32:11D-100. This includes cooperating with "private agencies." N.J. STAT. ANN. § 32:11D-43 (West 2006). The Delaware River and Bay Authority is now permitted "to acquire (by gift, purchase or condemnation)" "economic development projects . . . at its own initiative," including an industrial park in Salem County. *Id.* § 32:11E-1.

The Casino Reinvestment Development Authority was created in the early 1980s and empowered to exercise eminent domain in Atlantic City because casino gaming was authorized as a unique tool for urban development. *Id.* § 5:12-160, 182.

[164] *See id.* § 34:1B-5(d). The New Jersey Economic Development Authority was created in the 1950s and may exercise eminent domain for almost any type of project with several caveats. The agency must obtain the consent of the municipality where the property is located, and the municipality must not be receiving supplemental school aid, or the municipality must have a population of more than 10,000, according to the most recent federal census. *Id.*

[165] *See id.* §§ 18A:72A-1, 5(g). The Educational Facilities Authority, which largely finances higher education facilities for public and private institutions, may acquire land by condemnation that is reasonably necessary for its projects, including those projects at private institutions.

*C. Post-*Kelo*: Case Law and Legislative Initiative*

Since the *Kelo* decision, the tables have seemingly turned on the condemnors. In the months following the *Kelo* decision, there have been three trial court decisions concerning condemnation. These decisions acknowledged the broad holding of *Kelo*, but found that the condemnor manifestly abused its power, and tossed the condemnation actions. None of the decisions relied on Justice O'Connor's dissent in *Kelo*, but it is obvious that these recent cases break from a long line of precedent that relentlessly ruled in favor of the government's power. Specifically, a taking by the New Jersey Department of Transportation was dismissed because it was based on "contradictory and untrustworthy information," which is startlingly contrary to a strong policy which favors condemnation for roads.[166] In another matter, a municipality was declared to have acted in bad faith.[167] Finally, the condemnation of a trailer park was set aside because there was no substantial evidence of blight.[168] Hence, it appears that the trial courts, through findings of fact rather than groundbreaking laws, have heard the public's criticism of unfettered use of condemnation. Although these cases may be a bellwether of what is to come, it remains to be seen what the policy of the appellate courts will be in the future.

Similarly to the trial courts, the legislature has also reacted. On June 8, 2006, New Jersey Assembly introduced Bill A-3257 ("the bill"). It amends LRHL. It has been passed by the Assembly and is pending before the Senate. To date, the Senate has not taken action on the bill. The legislative purpose of the bill is "to ensure that the use of eminent domain for redevelopment is an absolute last resort."[169] The bill imposes objective criteria to determine whether "blight" exists. Under this legislative proposal, in order to take a residential property, there must be evidence that the redevelopment area consists of

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[166] N.J. Dep't of Transp. v. ADPP Enters., No. L-1426-04 (N.J. Super. Ct. Law Div. June 13, 2005). This case flies in the face of case law because as recently as 2002, the New Jersey Supreme Court acknowledged that a taking for a roadway "is undeniably for a public use." Twp. of W. Orange v. 769 Assocs., 800 A.2d 86, 91 (N.J. 2002) (quoting N. Baptist Church v. Mayor & Common Council of the City of Orange, 22 A. 1004, 1004 (N.J. 1891)).

[167] Order of Dismissal, Twp. of Bloomfield v. 110 Wash. St. Assocs., No. 2318-05 (N.J. Super. Ct. Law Div. 2005), *available at* http://www.njeminentdomain.com/Order%20of%20Dismissal%20-%20Bloomfield.pdf.

[168] LBK Assocs. v. Borough of Lodi, No. 8766-03 (N.J. Super. Ct. Law Div. Oct. 6, 2005), *available at* http://www.njeminentdomain.com/44-3-1792%20LBK%20ASSOCS.%20L.L.C.%20V.%20BOROUGH%20OF%20LODI%2C%20ET%20AL.%3B%20ONE%20OTHE%20CAPTION.PDF.

[169] Assemb. B. 3257, 212th Leg., (N.J. 2006).

properties that are detrimental to the safety, health, and welfare of the community. To prove such detriment there must be a showing of "substantial" health or building code violations at the site or lack of structural integrity.[170] For commercial properties, the standard is more liberal. The objective evidence to warrant use of eminent domain may include "underutilization" of land or structures resulting in property that is "stagnant and not fully productive."[171]

However, the legislature has carved out an exception to the objective criteria. That is, the statute permits that twenty percent of the land mass within the redevelopment zone need not meet the objective tests. As a practical result, whether this bill constitutes any meaningful change in the use of eminent domain is subject to debate. For example, the twenty percent carve-out would mean that most, if not all, *Kelo* plaintiffs would remain subject to eminent domain.[172]The bill may not accomplish much with regard to commercial properties either. As discussed in *Berman v. Parker* above, the condemned parcel was a department store. Under the bill, a commercial property may be condemned if it is "underutilized." Hence, if a municipality determines that a commercial building is not fully productive like the department store in *Berman*, it may be condemned even if it is an ongoing concern.

As the legislature mulls over the bill, there are real-life situations which question whether the bill will meet the legislative objective if enacted. One such case is in Trenton, New Jersey, where recently, a substantial developer wishes to convert an abandoned Champale factory site into eighty-four condominiums.[173] The rub is that the developer is requiring the city to acquire twelve parcels (or a portion of a parcel) that abuts the Champale site. These parcels are small but the homes are well-kept.[174] In all likelihood these homes total less than twenty percent of the land mass in the redevelopment area. Hence, the bill would probably offer no relief to the homeowners because of the carve-out, were it to be enacted.

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[170] *Id.*

[171] *Id.*

[172] In *Kelo*, the 32-acre redevelopment area consisted of 115 privately owned homes and Fort Trumbull Park (18 acres). That means that 115 residences were located on 14 acres (32 acres minus 18 acres). If A-3257 were applicable to *Kelo*, 20% of the 32 acres, or 6.4 acres, need not meet the definition of blight. It stands to reason that since 115 parcels were located on 14 acres, the 15 *Kelo* plaintiffs occupied less than 6.4 acres. Accordingly, under the terms of A-3257, the *Kelo* properties were subject to condemnation.

[173] Eva Loayza, *Condo Plan Upsets Residents*, TRENTON TIMES, October 19, 2006, at A1.

[174] *Id.*

CONCLUSION

But the "development and direction of constitutional law also shift . . . with the Court's changing composition."[175] Since two new Justices, Roberts and Alito, have been appointed since the *Kelo* decision, their "readings of the Constitution" may "differ" from their predecessors.[176] Rather than settle an area of law, *Kelo* has sparked an "ongoing dialogue over the exercise of and limitations" on the use of eminent domain among legislators, political commentators, and the citizenry.[177]

In short, reconsideration could occur. In this area of constitutional law, the Roberts Court could quickly imprint its mark on the relationship between the government and property owners. If this occurs, the Roberts Court has alternatives. First, it may hold the line and uphold *Kelo*. Second, it could adopt Justice O'Connor's theory that economic development takings violate the public use requirement unless some substantial harm to the public can be shown. Third, the Court could adopt a new standard similar to that of the dissenting justices of the Connecticut Supreme Court, wherein a heightened level of scrutiny is imposed to justify economic development takings. Fourth, the Court could follow the enumerated rights argument of Justice Thomas. Finally, the Roberts Court could find a new balance, one that accommodates property rights and the redevelopment needs of worn-out Northeastern industrial areas of bygone years, like New London, Connecticut.

In New Jersey, there are many cities and towns that require redevelopment. In the past, the courts have accommodated the need for redevelopment by liberally permitting condemnation. On the other hand, the number of homeowners, particularly in our urban areas, has been steadily rising. Average folks are afraid that the government may take their single most important investment for little reason. The issue is currently front and center in both the courts and the legislature, and it deserves attention and re-evaluation in light of the present circumstances.

Although the courts and the legislature are empowered to review and revise the use of condemnation, the primary holders of the powers of eminent domain are the appointed and elected officials of redevelopment boards and authorities. These officials must carefully consider their exercise of the eminent domain power, recognizing

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[175] 1 DAVID M. O'BRIEN, CONSTITUTIONAL LAW AND POLITICS, Preface (5th Ed. W.W. Norton & Co. 2003).

[176] *Id.*

[177] *Id.*

the plight of homeowners who may be dispossessed by their actions. Board members should ardently search for creative solutions that accommodate private property rights, hopefully without grinding redevelopment to a halt.