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Takings and Threes: The Supreme Court's 2004-2005 Term

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TAKINGS AND THREES: THE SUPREME COURT'S 2004–2005 TERM

Marla E. Mansfield*

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I. INTRODUCTION

Folk sayings have a certain attractiveness, yet they can also be down-right confusing. For example, consider the saying "Bad things come in threes," with its variants announcing that "deaths" or "accidents" come in the same number. Nevertheless, a Google search for the phrase "saying" and "threes" also generates this response: "Good things come in threes." For lawyers, occasionally the United States Supreme Court decides takings cases in "threes," creating a trilogy to consider.[1] One

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1. For example, consider the 1987 "trilogy" of *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), *First English Evangelical Lutheran Church of Glendale v. County of L.A.*, 482 U.S. 304 (1987), and *Keystone Bituminous Coal Assn. v. DeBenedictis*, 480 U.S. 470 (1987). *See also* Carol M. Rose, *The Story of* Lucas*: Environmental Land Use Regulation Between Developers and the Deep Blue Sea*, in *Environmental Law Stories* 237, 255–56 (Richard J. Lazarus & Oliver A. Houck eds., Foundation Press 2005); Marla E.

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such trilogy was decided in 2005: *Lingle v. Chevron U.S.A., Inc.*,[2] *Kelo v. City of New London*,[3] and *San Remo Hotel, Ltd. Partnership v. City and County of San Francisco.*[4] Whether or not this particular "threesome" is good or bad depends on perspective. None of the three, however, actually changed precedent.[5] Takings law will continue to evolve as it had in the past, which is primarily on an *ad hoc* basis.

Nevertheless, some in the popular press have responded as if the Supreme Court had greatly altered private property protections this Term. The *Kelo* case has generated the most of this type of publicity.[6] Unlike *Lingle* and *San Remo*, in *Kelo* the government exercised eminent domain power openly; that is, the case does not determine whether a "taking" of private property occurred, or whether compensation was due to a private party.[7] The City of New London, through a development corporation, physically took title to lands the plaintiffs had owned, and offered them compensation.[8] The issue, therefore, was whether the acquisition was within the confines of the government's eminent domain power.[9]

The analytical starting point is the Fifth Amendment, which provides in part that "private property [shall not] be taken for public use, without just compensation."[10] Although the wording only directly requires compensation as a prerequisite, from early on, courts have interpreted the Amendment as limiting the exercise of eminent domain to instances of "public use," albeit with differences of opinion about the term's definition.[11] In *Kelo*, the public would not have access to all the lands condemned.[12] New London had assembled land for the public purpose of economic stimulation pursuant to a master

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Mansfield, *Regulatory Takings, Expectations and Valid Existing Rights*, 5 J. Mineral L. & Policy 431, pt. II(C) (1989–1990); Joseph L. Sax, *Property Rights in the U.S. Supreme Court: A Status Report*, 7 UCLA J. Envtl. L. & Policy 139 (1988). For an early reference to the 2004–2005 cases as a "trilogy," see John D. Echeverria, Lingle, *Etc.: The U.S. Supreme Court's 2005 Takings Trilogy*, 35 Envtl. L. Rptr. 10577 (2005).

2. 125 S. Ct. 2074 (2005).

3. 125 S. Ct. 2655 (2005).

4. 125 S. Ct. 2491 (2005).

5. In *Lingle*, the U.S. Supreme Court disavowed some dicta that other courts had transmuted into a separate takings test, namely that a takings exists when a government action fails to substantially forward a public interest. 125 S. Ct. at 2087 (disavowing dicta from *Agins v. City of Tiburon*, 447 U.S. 255 (1980)). Nevertheless, because the dicta was not the law of the *Agins* case, the *Lingle* decision actually retained existing Supreme Court precedent. *See id.* at 2083 (stating *Lingle* was the "first opportunity" to consider the dicta as a "freestanding takings test").

6. *See* William Yardley, *After Eminent Domain Victory, Disputed Project Goes Nowhere*, 155 N.Y. Times A1 (Nov. 21, 2005) (discussing the lack of development on the site and concluding that the unpopularity of the decision has hindered zeal to construct improvements). A November 5, 2005 Westlaw search in the "United States Papers" database for the word "Kelo"—restricted to the date of July 2005 and filtering out duplicates—brought up 351 documents.

7. *Kelo*, 125 S. Ct. at 2658.

8. *Id.* at 2658–60.

9. *See id.* at 2658.

10. U.S. Const. amend. V.

11. *See* David A. Dana & Thomas W. Merrill, *Property: Takings* 192–94 (Foundation Press 2002) (tracing interpretation as foreclosing purely private takings despite some early commentators avowing that the term is merely descriptive of the eminent domain power). For a modern rendition of the dual requirements, see *Brown v. Legal Foundation of Washington*. 538 U.S. 216, 231–32 (2003) (stating "the taking must be for a 'public use' and 'just compensation' must be paid to the owner" (footnote omitted)).

12. *Kelo*, 125 S. Ct. at 2659. Some of the land in the overall plan would be placed in a park, employed as roads, or provide waterfront public access. *Id.* Other land would be developed for offices, residences, and hotels. *Id.*

plan, but private parties would implement the plan, and obtain long-term leases to the property.[13] The Connecticut Supreme Court upheld the exercise of eminent domain,[14] noting that it had construed "public use" as encompassing "public advantage."[15] States have split on the issue of whether this is the proper interpretation of particular *state* constitutions with similar provisions.[16]

Interpreting the federal Constitution,[17] the Supreme Court similarly had not required that the public retain title to the property, or even generally have access to the condemned land. For example, it upheld state statutes allowing private parties to condemn rights-of-ways across other private lands for the transportation of water.[18] The Court opined that state legislatures knew best what was needed for the public in their particular venues.[19] More recently, the Supreme Court unanimously upheld two exercises of eminent domain in which private parties would benefit and gain title from the condemnations. In the first, *Berman v. Parker*,[20] Congress authorized condemnation for urban redevelopment in the District of Columbia.[21] The condemnation of a private, non-blighted department store was approved, even though a private business would succeed to the land.[22] The second case involved the State of Hawaii. In *Hawaii Housing Authority v. Midkiff*,[23] the Court approved a statute designed to counter an oligopoly in land ownership, which had led to residential development pursuant to ground leases rather than sales of land in fee.[24] Lessees in a subdivision could request the state housing authority to condemn land; title would go to the private party, not the state.[25] As in *Berman*, the Supreme Court was deferential to the legislative determination of "public use," conflating the term with "public purpose," which it held "coterminous with the scope of a sovereign's police powers."[26]

Given this precedent, it is not surprising that the Supreme Court upheld New London's activities.[27] The majority, in an opinion by Justice Stevens, underscored the

13. *See id.* at 2659–60, 2660 n. 4.

14. *Kelo v. City of New London*, 843 A.2d 500 (Conn. 2004), *aff'd*, 125 S. Ct. 2665.

15. *See id.* at 574.

16. All states except North Carolina have parallel state constitutional provisions against takings. Dana & Merrill, *supra*, n. 11, at 2. Perhaps the best-known of the state court decisions is that of Michigan. *See Poletown Neighborhood Council v. City of Detroit*, 304 N.W.2d 455 (Mich. 1981), *overruled*, *County of Wayne v. Hathcock*, 684 N.W.2d 765 (Mich. 2004); *see also infra*, at pt. II(2)(c).

17. *See Chi., Burlington & Quincy R.R. Co. v. Chi.*, 166 U.S. 226, 238–39 (1897) (holding the Fifth Amendment applicable to the states pursuant to the Fourteenth Amendment).

18. *Clark v. Nash*, 198 U.S. 361 (1905). *See also Fallbrook Irrigation Dist. v. Bradley*, 164 U.S. 112 (1896).

19. *Clark*, 198 U.S. at 368. *See also U.S. v. Gettysburg Elec. Ry. Co.*, 160 U.S. 668 (1896) (upholding Congress's power to determine what is a public use or purpose).

20. 348 U.S. 26 (1954).

21. *Id.* at 28.

22. *Id.* at 31, 33, 36.

23. 467 U.S. 229 (1984) (Justice Marshall took no part in the decision).

24. *Id.* at 232–33.

25. *Id.* at 233–34.

26. *Id.* at 240.

27. Perhaps the more surprising aspect of the case is that four Justices dissented from the opinion—that is, until the identities of the four are revealed, namely, Chief Justice Rehnquist, Justice O'Connor, Justice Scalia, and Justice Thomas. Echeverria, *supra* n. 1, at 10585–86 (arguing that *Kelo* is most remarkable for being so closely divided).

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Court's limited holding: it merely held that there was no per se constitutional infirmity with a condemnation for economic development that resulted in a private party's use.[28] The affirmation of the New London condemnations was therefore fact-dependent. The particular case was not an example of condemning the land of A to give to B because there was an overall land-development plan and the identity of the private party that would develop the property was unknown at the time of the condemnation.[29] Nevertheless, although the majority upheld the particular exercise of eminent domain, the opinion noted that condemnations for economic development are not necessarily good public policy, and that legislatures could put limits on the eminent domain power if politically warranted.[30] The dissenting opinion by Justice O'Connor cautioned that those who lose their property to condemnation, however, are often those with the least political power.[31]

Historically, redevelopment plans most frequently have displaced individuals either poor, of color, or both.[32] This article proposes a response to the dilemma of fairness in condemnation in practice. Condemnations could proceed for economic development, especially when difficult land assemblage might be necessary, but "just compensation" would require more than fair market value of the property condemned when the government moves away from "core" condemnation aims, such as for public buildings, parks, roads, reservoirs, and other direct "uses" of property. This could be done either judicially or legislatively.

The key to varying the level of compensation for some condemnations is the central position of reasonable expectations to a definition of property rights. All property in the United States is held subject to the possibility that government may use

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28. Justice Kennedy joined the majority opinion, which reflects his distaste for per se categorical decisions in takings cases. *See* Marla E. Mansfield, Tahoe-Sierra *Returns* Penn Central *to the Center Track*, 38 Tulsa L. Rev. 263, 284 (2002). Nevertheless, Justice Kennedy also concurred in *Kelo* to express his belief that governmental action could be invalidated in an appropriate case even employing a rational relationship test. *Kelo*, 125 S. Ct. at 2669 (Kennedy, J., concurring).

29. *Kelo*, 125 S. Ct. at 2661–62, 2661 n. 6. The hypothetical transfer of land from A to B was discussed in dicta in *Calder v. Bull*. 3 U.S. 386, 388–89 (1798). According to the dicta, such a transfer could not be done constitutionally. *Id.* The case, however, actually dealt with whether or not a statute directing a court to re-open a particular case was an *ex post facto* law. *Id.* The Supreme Court concluded that the prohibition against *ex post facto* laws related to criminal law, not civil laws. *Id.* at 390–91.

30. *Kelo*, 125 S. Ct. at 2668. This would be through state law limitations on local or state use of eminent domain. *Id.*; *see* David Scharfenberg, *Yes, Towns Can Seize Lands, But Aren't There Limits*, Westchester Wkly. Desk 1 (Feb. 5, 2006), in 155 N.Y. Times (Feb. 5, 2006) (three states have passed legislation and twenty-seven are considering legislation limiting or clarifying condemnations); *see also* H.R. 4128, 109th Cong. (Nov. 3, 2005) (limiting states and municipalities from using eminent domain for economic development if they have received any federal economic development funds in the fiscal year; passed by the House 476 to 38). For examples illustrating a proposed petition initiative in Oklahoma for limitations on the use of eminent domain, see Okla. Sec. of State, *Initiative/Referendum: List of State Question No. 727*, http://www.sos.state.ok.us/documents/Questions/727.pdf (last accessed Nov. 20, 2005); Okla. Sec. of State, *Initiative/Referendum: List of State Question No. 728*, http://www.sos.state.ok.us/documents/Questions/728.pdf (last accessed Nov. 20, 2005); Okla. Sec. of State, *Initiative/Referendum: List of State Question No. 729*, http://www.sos.state.ok.us/documents/Questions/729.pdf (last accessed Nov. 20, 2005).

31. *Kelo*, 125 S. Ct. at 2677 (O'Connor, J., dissenting). Justice O'Connor would construe precedents to limit condemnations for economic development that result in private use to those undertaken to right an existing wrong, such as blight or an oligopoly. *Id.* at 2674. Justice Thomas, however, would declare the precedents wrong and implement what he discerns as the "original meaning" of the phrase, and require actual use by the public of the lands condemned. *Id.* at 2678 (Thomas, J., dissenting).

32. *Id.* at 2686–87 (Thomas, J., dissenting).

the eminent domain power, but expectations about the dimension of such eminent domain power may enter into the compensation calculation. This adjustment of compensation imports elements of the regulatory taking calculus. The so-called *Penn Central* test employs an *ad hoc* appraisal of factors, namely, the nature of the governmental purpose, the degree of impact on the regulated, and the interference with the claimant's reasonable, investment-backed expectations.[33] Determining whether more than fair market value is required would similarly look to the impacted party's reasonable-investment bound expectations. The other factors more appropriately help decide if condemnation is available at all.

The *Kelo* case offers the potential to blend regulatory takings analysis with eminent domain theory. The remaining two takings cases from the 2004–2005 Supreme Court Term directly invoke regulatory takings doctrine. In the first, *Lingle*, Hawaii passed a law limiting the amount oil companies could charge as rent to independent dealers who leased stations from the companies.[34] The Ninth Circuit found the statute to be a taking because it purportedly would not meet its goal.[35] The Supreme Court, however, found a taking could not be declared simply because a statute failed to "'substantially advance legitimate state interests.'"[36] Dicta from an earlier case inappropriately insinuated that this formulation was a test for takings, one which was met independently of any other analysis.[37] The third case, *San Remo*, involved procedure, namely, whether there is an exception to the federal full faith and credit statute[38] so as to allow a claimant to re-litigate whether a violation of the federal Constitution has transpired after a state court has ruled on the matter.[39] The Supreme Court refused to except situations where takings precedents may have forced the plaintiff into state court.[40]

Neither *Kelo* nor the other two takings cases decided this Term alter takings law in themselves. Greater examination of all three cases forms the bulk of this article. Part II explores the *Kelo* decision in detail, including its background, the holdings of the Supreme Court, and the reasoning of the dissenting and concurring opinions. This Part also includes a section putting *Kelo* in the context of some state and federal court opinions. The *Kelo* case was clearly not one of judicial activism in which the Supreme Court *discovered* a new way to destroy private property rights. It was unquestionably within both federal and state precedent. Nevertheless, this Part concludes with a section proposing a modified compensation formula in order to address the sense of unfairness that arises when private property is condemned for economic development in which other private parties benefit.

The remainder of the article explores the other two cases, albeit in less detail, and concludes that takings law has not been steered off course this Term. Part III of the

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33. *See Penn C. Transp. Co. v. N.Y.C.*, 438 U.S. 104 (1978).
34. *Lingle*, 125 S. Ct. at 2078.
35. *See id.* at 2079–80 (citing *Chevron U.S.A., Inc. v. Cayetano*, 224 F.3d 1030 (9th Cir. 2000)).
36. *Id.* at 2077–78 (quoting *Agins*, 447 U.S. at 260).
37. *Id.* at 2078 (citing *Agins*, 447 U.S. 255).
38. 28 U.S.C. § 1738 (2000).
39. *San Remo*, 125 S. Ct. at 2495.
40. *Id.*

article deals with the *Lingle* and *San Remo* decisions. Part IV concludes that the three cases do not modify the Supreme Court's tendency to judge takings in an *ad hoc* manner. Justice Kennedy, author of two concurrences in these three opinions, continues to be central to the debate as he espouses a distaste of per se rules.[41] Because of this, any so-called private property rights revolution has not congealed.[42]

II. *KELO* AND THE REQUIREMENT OF "PUBLIC USE" IN CONDEMNATIONS

A. The Background of Kelo

1. Facts

As is often the case in the law, how facts are phrased can often presage the legal conclusion. This is especially true in condemnation cases, where private landowners are pitted against the plans of governmental agencies. In the *Kelo* case, only some facts can be stated without controversy. First, the City of New London had higher unemployment than the remainder of Connecticut.[43] The 1996 closing of a naval facility exasperated the problems of the city.[44] Therefore, the announcement that Pfizer Pharmaceuticals would build a research center in New London was welcome news.[45] Two months later, a development corporation began investigating ways to capitalize on the move.[46] What followed was either the actions of an unelected group[47] attempting to benefit Pfizer and other private parties, or a carefully vetted[48] scheme for public improvement.

Activity centered in the Fort Trumbull area, which is on a peninsula jutting into the Thames River.[49] Fort Trumbull included, in addition to private property, the Naval Undersea Warfare Center, which had occupied thirty-two acres of land.[50] The State of Connecticut established the Fort Trumbull State Park on eighteen of the acres the Navy had previously used.[51] A redevelopment plan conceived by the New London Development Corporation ("NLDC"), a private non-profit corporation established to

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41. *See* Mansfield, *supra* n. 28, at 284 (detailing Justice Kennedy's position against per se rules in past cases).

42. *See* Oliver A. Houck, *More Unfinished Stories:* Lucas, Atlantic Coalition, *and* Palila/Sweet Home, 75 U. Colo. L. Rev. 331, 343–44 (2004) (recounting the "property rights" movement); Rose, *supra* n. 1, at 254–57 (encapsulating Justice Rehnquist and the Supreme Court since *Penn Central*).

43. *Kelo*, 125 S. Ct. at 2658. In 1998, the City had an unemployment rate of almost double the rest of Connecticut; New London's population had also fallen to its lowest point since 1920. *Id.* The state office of policy and management had designated New London a "'distressed municipality.'" *Kelo*, 843 A.2d at 510.

44. *Kelo*, 843 A.2d at 510.

45. In the Connecticut Court decision, the majority opinion stated Pfizer "now" employed two thousand people. *Id.*

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

47. *Id.* (emphasizing the development corporation was a private non-profit corporation and not an elected body).

48. *Id.* at 2659–60 (detailing the numerous levels of government that reviewed the development plan including the city council and state agencies); *see also id.* at 2661 (citing *Kelo*, 843 A.2d at 536 (calling the plan "carefully considered")).

49. *Id.* at 2659.

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

51. *Id.*

assist the City, included the remainder of the land, as well as 115 private properties.[52] Adjacent to the Fort Trumbull site, the pharmaceutical company, Pfizer, was investing $300 million in a research facility.[53] While there were some communications between Pfizer and the NLDC about Pfizer's desire for hotel space for its business visitors and residential opportunities for its employees, there was no evidence that Pfizer dictated the terms of the development plan.[54]

Rather than catering to Pfizer, the development plan envisioned capitalizing on Pfizer's arrival to rejuvenate the area. More specifically, the plan encompassed seven parcels.[55] A hotel and waterfront conference center, together with restaurant and retail space, would be built on Parcel 1.[56] It would also contain marinas, and be the originating point of a pedestrian "riverwalk."[57] Residential development of eighty new homes would be in Parcel 2, together with public walkways and space for a Coast Guard museum.[58] Parcel 3 was designed to have at least 90,000 square feet of research and development office space.[59] Two functions were assigned to Parcel 4. The 2.4 acre Parcel 4A would support either the adjacent state park or marina, providing parking or retail outlets.[60] A renovated marina would be on Parcel 4B and it would be the terminus of the riverwalk.[61] The remaining three Parcels, numbered 5 through 7, would be used for parking, office and retail space, and commercial activities dependent on water.[62] Six alternate plans were considered.[63] Under the chosen plan, the NLDC would retain title to the properties, leasing them to private developers on ninety-nine year ground leases.[64]

Negotiations enabled the NLDC to acquire most of the tracts.[65] The plaintiffs, however, would not voluntarily sell.[66] When condemnation actions were filed against their tracts, they filed suit challenging the condemnation.[67] They owned property in Parcel 3 and Parcel 4A.[68] Three homes would be destroyed to build the office building

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52. *Id.*
53. *Id.*
54. *Kelo*, 843 A.2d at 538–39.
55. For a description of the parcel uses, see *Kelo*, 125 S. Ct. at 2659; *Kelo*, 843 A.2d at 509–10.
56. *Kelo*, 125 S. Ct. at 2659.
57. *Id.*
58. *Id.*
59. *Id.*
60. *Id.*
61. *Kelo*, 125 S. Ct. at 2659.
62. *Id.*
63. *Kelo*, 843 A.2d at 510.
64. *Id.* When the properties were condemned, the identity of the private developer was unknown. *Kelo*, 125 S. Ct. at 2661 n. 6. During trial, negotiations were ongoing with Corcoran Jennison to lease Parcels 1, 2, and 3 for an annual rental of one dollar. *Kelo*, 843 A.2d at 510. Corcoran Jennison would develop the properties, including marketing and finding tenants. *Id.* The delay in identifying what private party would actually benefit from the project led to widely divergent conclusions. Justice Stevens held that it showed the condemnation was not intended to benefit specific individuals. *Kelo*, 125 S. Ct. at 2661 n. 6. The dissenting justices on the Connecticut Supreme Court saw it as evidence that there was no market for office space in New London, and therefore the intended public benefits would not come to fruition. *Kelo*, 843 A.2d at 596–98 (Zarella, J., dissenting in part and concurring in part).
65. *Kelo*, 125 S. Ct. at 2660.
66. *See id.*
67. *Id.*
68. *Id.*

on Parcel 3, but the meeting place of a private cultural organization, the Italian Dramatic Club, would remain.[69] None of the plaintiffs' properties were blighted; the homes of Susette Kelo and Wilhelmina Dery were "well-maintained,"[70] and only condemned because of their location in the planned development area.[71]

The development plan, therefore, was not addressing problems with the condemned land, but more generic problems in New London. Both the Connecticut Supreme Court and the U.S. Supreme Court began their opinions by describing the plan as "'projected to create in excess of 1,000 jobs, to increase tax and other revenues, and to revitalize an economically distressed city, including its downtown and waterfront areas.'"[72] The expected jobs spanned several categories: between 518 and 867 construction jobs, between 718 and 1362 direct jobs, and between 500 and 940 indirect jobs.[73] The City anticipated property tax revenues would rise between $680,544 and $1,249,843.[74] At trial, however, all the plaintiffs expressed their attachments to their properties. Homes were homes of long duration.[75] Rental properties were improved and maintained.[76] The plaintiffs professed a love for the Fort Trumbull area.[77]

2. The Connecticut Supreme Court Decision

The Connecticut Supreme Court faced a split-decision from the trial court. The trial court found state statutes authorized a taking for economic development, but held that all the uses delineated were not reasonably necessary to accomplish the redevelopment plan.[78] Therefore, the trial court upheld the condemnation as it applied to lands in Parcel 3, the site of the office and research building, together with parking.[79] It dismissed the condemnation action, however, in regard to Parcel 4A, the tract destined for support of the adjacent park, finding the purpose too hazy.[80] The Connecticut Supreme Court, however, granted New London the right to condemn all of the land.[81] After affirming the basic statutory authority for condemnation, it found that the economic development purposes satisfied the Public Use Clauses of both the federal and state constitutions.[82]

69. *Id.* at 2671–72 (O'Connor, J., dissenting).

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

71. *See id.* at 2659–60.

72. *Id.* at 2658 (quoting *Kelo*, 843 A.2d at 507).

73. *Kelo*, 843 A.2d at 510.

74. *Id.*

75. *Id.* at 511.

76. *Id.*

77. *Id.*

78. *Kelo*, 843 A.2d at 511.

79. *Id.*

80. *Id.* The case was decided *en banc* on the Court's own motion. *Id.* at 507 n. 1. Three justices joined the opinion of Justice Norcott, making it a four to three decision on the major issue. Two justices joined the opinion of Justice Zarella, who dissented in part and concurred in part. *Id.* at 574.

81. *Kelo*, 843 A.2d 500. In addition to the discussion that follows, the Court considered numerous questions under Connecticut law; these were not part of the certiorari grant and therefore will not be discussed in this article.

82. *Id.* at 528. The Court treated the two as co-extensive, noting the plaintiffs did not allege that the Connecticut Constitution provided greater protection of private rights. *Id.* at 521–22.

In reaching this conclusion, the Court first examined Connecticut precedents that embraced a broad interpretation of the term "public use." The first, *Olmstead v. Camp*, dated 1866,[83] involved a mill act under which condemnation was used to allow private parties to flood land.[84] The *Kelo* Court quoted *Olmstead* extensively:

> "One of the most common meanings of the word 'use' as defined by [Webster's Dictionary], is 'usefulness, utility, advantage, productive of benefit.' *'Public use' may therefore well mean public usefulness, utility or advantage, or what is productive of general benefit; so that any appropriating of private property by the state under its right of eminent domain for purposes of great advantage to the community, is a taking for public use.*"[85]

The Court then delineated more recent urban renewal cases in which it accorded a broad construction to the term "public use."[86]

After this review of Connecticut decisions, the Court considered U.S. Supreme Court precedents, most notably, *Berman* and *Midkiff*.[87] The Connecticut Court characterized these two cases as equating pubic use with a public purpose, and with promoting a deferential standard toward legislative appraisals of such purposes; therefore, the *Olmstead* analysis had withstood more than 125 years of decision-making.[88] The Court thus ruled:

> Under this broad and deferential constitutional rubric, we conclude that an economic development plan that the appropriate legislative authority rationally has determined will promote significant municipal economic development, constitutes a valid public use for the exercise of the eminent domain power under both the federal and Connecticut constitutions.[89]

To bolster its conclusion, the Court reviewed some cases from other state courts that also sanctioned such condemnations.

These decisions from other states supported the Court. The majority delved most deeply into *Poletown Neighborhood Council v. City of Detroit*,[90] a Michigan case that upheld the condemnation of a working class neighborhood in order to allow General Motors to construct a large manufacturing plant.[91] The Court cited *Poletown* as an example of how a condemnation could benefit a private party, but still have been for a "public purpose."[92] The Court noted that the decision "informs, but does not dictate, our decision in the present case."[93] In reviewing this and other cases that endorsed the

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83. 33 Conn. 532 (1866).

84. *Id.*

85. *Kelo*, 843 A.2d at 522 (quoting *Olmstead*, 33 Conn. at 546) (bracket and emphasis in original).

86. *Id.* at 523 (discussing *Katz v. Brandon*, 245 A.2d 579 (Conn. 1968); *Gohld Realty Co. v. City of Hartford*, 104 A.2d 365 (Conn. 1954)).

87. *See infra*, at pt. II(C)(1).

88. *Kelo*, 843 A.2d at 527.

89. *Id.* at 528.

90. 304 N.W.2d 455 (Mich. 1981).

91. *Kelo*, 843 A.2d at 528 n. 39. *Poletown* was overruled after the Connecticut Court's *Kelo* decision. *See County of Wayne v. Hathcock*, 684 N.W.2d 765 (Mich. 2004); *infra*, at pt. II(C)(2).

92. *Kelo*, 843 A.2d at 528 n. 39.

93. *Id.* The Court deferred to the condemning authority more than the Michigan Court. The Connecticut Court rejected the *Poletown* decision's "heightened scrutiny" test that would be employed when the

so-called broad definition of public use,[94] the Court again found that economic development plans can be within the Public Use Clause "by creating new jobs, increasing tax and other revenues, and otherwise revitalizing distressed urban areas."[95]

The plaintiffs, however, argued otherwise. First, they tried to distinguish the New London development proposal from prior Connecticut cases, which had involved urban renewal in the setting of slum clearing.[96] They alleged that in the prior cases, the primary purpose of the condemnations was to remove slums and substandard housing; benefits to private parties were incidental to the primary goal of safety and health.[97] The Court rejected any distinction:

> [B]ecause we already have determined that municipal economic development can be, in and of itself, a constitutionally valid public use[,] . . . we also conclude that private benefit from such economic development is, just as in the blight and substandard housing clearance cases, secondary to the public benefit that results from significant economic growth and revitalized financial stability in a community.[98]

The plaintiffs also argued that some state courts had rejected the use of eminent domain for economic development.[99] The Connecticut Court acknowledged this, but concentrated on *Southwestern Illinois Development Authority v. National City Environmental, L.L.C.*,[100] rebutting the plaintiffs' characterization of the case.[101] To the Connecticut Court, Illinois did not adopt a "bright-line"[102] test against condemnations that could benefit private entities.[103] Instead, it found that the case entailed a fact-specific denial of the particular use of eminent domain.[104] The condemnation lacked an over-riding public purpose and planning process, including a failure to look at alternatives to the land acquisition that the private race-track requested.[105] Therefore, the *Southwestern Illinois Development Authority* case did not support a facial challenge against the use of eminent domain for economic development as contained in the Connecticut statute.[106] The Court then turned to an "as applied" analysis of the particular New London proposal.

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condemnation power benefits "identifiable private interests." *Id.* (internal quotation marks omitted). The *Kelo* Court found this test would clash with Connecticut's "well established approach of deference to legislative determinations of public use." *Id.* Therefore, the overruling of *Poletown* did not remove a crucial underpinning for the Connecticut decision.

94. *See id.* at 531 n. 41 (citing Julius L. Sackman, *Nichols on Eminent Domain* vol. 2A, §§ 7.02[2]–[7] (3d ed., Lexis Publg. 2000) (discussing the treatise's distinction between a "narrow" definition of public use, which requires that property taken be used by the public or be available for public use, and the "broad" definition of public use, which equates the same with "public advantage")).

95. *Kelo*, 843 A.2d at 531.

96. *Id.* (citing *Katz*, 245 A.2d 579; *Gohld Realty Co.*, 104 A.2d 365).

97. *Id.*

98. *Id.* at 532.

99. *Id.*

100. 768 N.E.2d 1 (Ill. 2002) (rejecting condemnation designed to enlarge a racing track's parking lot).

101. *Kelo*, 843 A.2d at 532–36.

102. *Id.* at 534 (citing *S.W. Ill. Dev. Auth.*, 768 N.E.2d at 240).

103. *Id.*

104. *Id.* at 535.

105. *Id.* at 534–35.

106. *Kelo*, 843 A.2d at 536.

The first problem was identifying the primary beneficiary of the plan—the public or private entities.[107] The landowners claimed it was Pfizer and the developer, Corcoran Jennison.[108] The Court, however, reviewed and affirmed the factual findings of the trial court, namely, that Pfizer did not direct the development plans, but was the catalyst for New London to try to capitalize on the unusual fact that Pfizer was relocating to a brown field in an urban setting.[109] The potential benefit of jobs in an area suffering from unemployment was substantial.[110] The Court underscored that it was not affirming the public benefit finding simply because the City would receive more taxes:

> [O]ur decision is not a license for the unchecked use of the eminent domain power as a tax revenue raising measure; rather, our holding is that rationally considered municipal economic development projects such as the development plan in the present case pass constitutional muster.[111]

The Court also held that the trial court was not clearly erroneous in finding that contractual requirements and statutory restraints mandating the land to be used in conformity with the development plan, provided sufficient assurance of future public use; there is no requirement that clear and convincing evidence show the justifying public benefits to be achievable.[112] After approving the general plan, the Court examined the standard of review for including certain tracts in the condemnation area.

When it came to specific tracts, the trial court had upheld the condemnations in regard to Parcel 3, but not Parcel 4A.[113] On appeal, the plaintiffs argued that it was not reasonably necessary to condemn their homes in Parcel 3 as part of the site for the office park because the project could be developed leaving their houses in place.[114] The Connecticut Supreme Court, however, placed the burden on the party opposing condemnation to show that the inclusion of a tract was unreasonable, in bad faith, or an abuse of power.[115] In reviewing the trial court, the Court upheld its findings because they were not in clear error.[116] However the Court reversed the trial court's finding that the taking of properties in Parcel 4A was not reasonably necessary because there was no definite plan in place for use of the Parcel.[117] The Connecticut Supreme Court avowed that once a court concludes that an enabling statute supports a public purpose, great deference should be given to the legislative determination of how to achieve that public

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107. *Id.* 536–37.

108. *Id.*

109. *Id.* at 536–42.

110. *Id.* at 542.

111. *Kelo*, 843 A.2d at 543.

112. *Id.* at 544, 544 n. 62. The dissent, in imposing such a review standard, was requiring a standard of proof as to future events that the majority considered to be without precedent. *Id.* at 544 n. 62.

113. *Id.* at 545.

114. *Id.* at 552.

115. *Kelo*, 843 A.2d at 556.

116. *Id.* at 557. The Court also found the takings on Parcel 3 were necessary for reasonably foreseeable needs; despite a lack of immediate development of the subject tracts, condemnation must take into account orderly progression in development, which acknowledges that not all project components are immediately begun. *Id.* at 558–62. The Court also rejected the plaintiffs' equal protection argument, which arose because the development plans allowed the privately owned Italian Drama Club to remain on the site. *Id.* at 562–68. There was a rational distinction between the social club and private residences. *Id.*

117. *Kelo*, 843 A.2d at 574.

purpose.[118] The trial court had conducted a necessary review beyond the determination of whether the inclusion was unreasonable, in bad faith, or an abuse of power.[119] The Court, therefore, approved the use of condemnation for the entire Fort Trumbull economic development project.

Three judges of the Connecticut Court dissented in *Kelo*. Interestingly, the dissent agreed that the statute authorizing condemnations for economic development passed facial constitutional muster.[120] Additionally, the dissent agreed that "the takings were *intended* primarily to benefit the public."[121] The reason for the difference in result, however, was the dissent required the taking agency to prove by clear and convincing evidence that the result would be achieved.[122] This burden was not met:

> The record contains scant evidence to suggest that the predicted public benefit will be realized with any reasonable certainty. To the contrary, the evidence establishes that, at the time of the takings, there was no signed agreement to develop the properties, the economic climate was poor and the development plan contained no conditions pertaining to future development agreements that would ensure achievement of the intended public benefit if development were to occur.[123]

Although the dissent would not require proof to a certainty that private economic development would take place as envisioned, the difficulties were, in its estimation, too apparent at the planning stage.[124]

In sum, all of the Connecticut justices concluded that economic development could be a valid public use to support eminent domain under a broad reading of the term "public use" to include "public advantage."[125] This did not mean that any and all condemnations so-labeled would be constitutional; the majority of the Court found that "rationally considered municipal economic development projects such as the development plan in the present case pass constitutional muster."[126] Moreover, the particular development plan was not primarily designed to benefit private individuals, but was designed to create jobs and improve the economy of an area that had been designated in need. Once making such a finding, the Court would not second-guess the legislative decision to include particular lands within a project absent particular

118. *See id.* at 569.

119. *Id.* at 572–73.

120. *Id.* at 593 (Zarella, J., concurring in part and dissenting in part).

121. *Id.* at 595 (emphasis in original). They disagreed on whether the trial court's findings on public purpose should be considered factual and subject to deferential review, but came to the same conclusion on whether the purpose was public. *Kelo*, 843 A.2d at 595.

122. *Id.* at 596. When a private party receives benefit from the condemnation, both the majority and dissent noted a possibility of abuse. The dissent, therefore, proposed heightened scrutiny with an elaborate shifting burden of proof for the various requirements of a takings case: (1) the party opposing a taking must prove the statutory scheme involved is unconstitutional in light of judicial deference to legislative findings of public use; (2) if the statutory purpose (such as economic development) is constitutional, the opposing party must prove "the primary intent of the particular economic development plan is to benefit private, rather than public, interests," *id.* at 588; and (3) in the event neither of these burdens are met, the party seeking the condemnation must prove by clear and convincing evidence that the plan will "in fact," *id.*, provide public benefit. *Id.* at 587–88.

123. *Kelo*, 843 A.2d at 596.

124. *Id.* at 602.

125. *Id.* at 531, 531 n. 41.

126. *Id.* at 543.

circumstances. The dissent disagreed on one factual question, namely, whether the takings were likely to benefit the public. The three dissenting justices also disagreed on the assignment of the burden of proof on various issues. Nevertheless, they did not adopt a per se rule placing all takings for economic development beyond the confines of the Public Use Clause.

B. *The Supreme Court Decision*

1. The Majority Decision by Justice Stevens

Justice Stevens phrased the issue on certiorari forthrightly: "[W]hether a city's decision to take property for the purpose of economic development satisfies the 'public use' requirement of the Fifth Amendment."[127] The answer was affirmative. In reaching this conclusion, Justice Stevens quickly turned to the facts of the particular case, characterizing the case as neither of two easy scenarios: It was not a transfer of land from A to B for purely private use, nor one in which the transfer resulted in "use by the public"[128] despite the transfer of title to a private party, as would result when a condemnation benefited a common carrier railroad.[129] Therefore, to Justice Stevens, the intent of the condemning agency and procedures through which the condemnation took place were both important.

Applying the facts to the first possibility, that is, whether New London's action was a purely private taking, Justice Stevens emphasized that the taking was not done under a pretext of a public purpose, but pursuant to a "'carefully considered' development plan."[130] It was not done "'to benefit a particular class of identifiable individuals,'"[131] especially when the identity of the developer was unknown at the time condemnation began.[132] Justice Stevens acknowledged that not all the land would be open to the public; however, he also noted that the use by the public test had long been discarded.[133] Therefore, he turned to the question of "whether the City's development plan serves a 'public purpose,'"[134] noting that Supreme Court cases "have defined that concept broadly, reflecting [its] longstanding policy of deference to legislative judgments in this field."[135] The opinion proceeded to review three precedents; all three of which upheld government action.

The first precedent discussed was *Berman*, in which Congress authorized condemnation of portions of the District of Columbia to allow for redevelopment,

127. *Kelo*, 125 S. Ct. at 2661. Justice Stevens began the *Kelo* decision by phrasing the issue as "whether the city's proposed disposition of this property qualifies as a 'public use' within the meaning of the Takings Clause of the Fifth Amendment to the Constitution." *Id.* at 2658 (footnote omitted). Justices Kennedy, Souter, Ginsburg, and Breyer joined Justice Stevens's opinion. *Id.*

128. *Id.* at 2661 (internal quotation marks omitted).

129. *Id.*

130. *Kelo*, 125 S. Ct. at 2661 (quoting *Kelo*, 843 A.2d at 536).

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

132. *Id.* at 2661 n. 6 ("It is, of course, difficult to accuse the government of having taken *A*'s property to benefit the private interests of *B* when the identity of *B* was unknown.").

133. *Id.* at 2662.

134. *Id.* at 2663.

135. *Kelo*, 125 S. Ct. at 2663.

including low-income housing.[136] Justice Stevens observed that some of the land would be leased or sold to private parties, and the objecting landowner had a non-blighted department store condemned.[137] Justice Stevens emphasized the portion of the *Berman* opinion where the Court opined that review of condemnation actions should not be on the basis of a tract-by-tract review, and the public purpose sought to be forwarded can include aesthetics as well as safety.[138] The second case was *Midkiff*, in which the Court upheld a Hawaii statute that transferred title to residential lessees in order to alleviate a concentration of ownership of fee lands.[139] Noting that the prior court found this to be a public purpose, Justice Stevens emphasized that *Midkiff* approved the transfer to private parties as simply being the "mechanics"[140] of achieving a public purpose.[141] The third case was *Ruckelshaus v. Monsanto Co.*,[142] in which the manufacturer of a pesticide objected to provisions of an environmental law.[143] The law allowed the Environmental Protection Agency to use data, a prior applicant submitted, in judging another company's subsequent application, so long as compensation was paid.[144] Justice Stevens's summary of this case centered on its acknowledgment that subsequent applicants were the "most direct beneficiaries"[145] of the statute, but that the statute's aim of enhancing competition was a valid public purpose.[146]

Justice Stevens concluded that prior case law provided for an *ad hoc* review responsive to particular and changing situations:

> Viewed as a whole, our jurisprudence has recognized that the needs of society have varied between different parts of the Nation, just as they have evolved over time in response to changed circumstances. Our earliest cases in particular embodied a strong theme of federalism, emphasizing the "great respect" that we owe to state legislatures and state courts in discerning local public needs. For more than a century, our public use jurisprudence has wisely eschewed rigid formulas and intrusive scrutiny in favor of affording legislatures broad latitude in determining what public needs justify the use of the takings power.[147]

Because of precedent, and the limited nature of review, Justice Stevens found the local government was entitled to find the area around Fort Trumbull, while not blighted, was in need of "economic rejuvenation."[148] As in *Berman*, the Court would not look at the project tract by tract, but in light of the comprehensive plan put forward.

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136. *Id.* (discussing *Berman*, 348 U.S. at 28).

137. *Id.* (discussing *Berman*, 348 U.S. at 31).

138. *Id.* (discussing *Berman*, 348 U.S. at 33). The *Berman* Court noted: "It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled." *Berman*, 348 U.S. at 33.

139. *Kelo*, 125 S. Ct. at 2663 (discussing *Midkiff*, 467 U.S. at 231–32).

140. *Id.* 2664 (quoting *Midkiff*, 467 U.S. at 244) (internal quotation marks omitted).

141. *Id.* (discussing *Midkiff*, 467 U.S. at 244).

142. 467 U.S. 986 (1984).

143. *Kelo*, 125 U.S. at 2664 (discussing *Monsanto*, 467 U.S. at 986). The act implicated in *Monsanto* was the Federal Insecticide, Fungicide, and Rodenticide Act. 7 U.S.C. § 136 et seq. (1976).

144. *Kelo*, 125 U.S. at 2664 (discussing *Monsanto*, 467 U.S. at 992).

145. *Id.* (quoting *Monsanto*, 467 U.S. at 1014) (internal quotation marks omitted).

146. *Id.* (discussing *Monsanto*, 467 U.S. at 1014–15).

147. *Id.* (citation and footnote omitted).

148. *Id.* at 2664–65.

The petitioners, however, urged the Court to provide a "bright-line rule that economic development does not qualify as a public use."[149] Justice Stevens rejected this suggestion on both precedential and logical grounds.[150] To him, government has long been in the business of promoting economic growth; he averred: "It would be incongruous to hold that the City's interest in the economic benefits to be derived from the development of the Fort Trumbull area has less of a public character than any of those other interests [upheld in past cases]."[151] As a subset of this argument, the petitioners argued that economic development condemnations would "[blur] the boundary between public and private takings."[152] However, Justice Stevens delineated prior cases in which private parties also benefited from the public purposes being forwarded, citing *Midkiff* and *Monsanto*.[153] In a footnote, Justice Stevens criticized Justice O'Connor with "confus[ing] the *purpose* of a taking with its *mechanics*"[154] when she questions whether private parties could forward a public purpose.[155] Private ownership may be the means to achieve a public end. Additionally, Justice Stevens characterized the Court's prior cases as focusing on the future use of the property to define the public purpose; the condemnations were not upheld because the government was removing existent harmful land uses.[156]

Other arguments against upholding the condemnation were also rejected. Justice Stevens concurred that a direct transfer from A to B for the sole reason that B would put the land to more productive use would be suspect, but concluded that courts could deal with such "aberrations"[157] when they happened without excluding economic development from public use generically.[158] Additionally, there was no need to extract a special degree of "reasonable certainty"[159] that the public purposes would likely be met when private parties received the land; not only would that modify precedent, but would postpone judicial approval of a project until later in the redevelopment scenario than is advisable in order to proceed with orderly development.[160] Moreover, a court should not second-guess what lands are necessary to complete a project.[161]

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

150. He also rejects the conclusion that the project would only have economic benefits. *Id.* Although this point is not elaborated, he most likely is referring to recreational, aesthetic, and safety enhancements that the redevelopment might entail. In fact, Justice O'Connor notes that the plan "promises an array of incidental benefits (even aesthetic ones)," *id.* at 2676, as she disparages the prominence the majority gave to the existence of a plan in upholding the taking. *Id.*

151. *Id.* at 2665. In a footnote, Justice Stevens rejected a reading of *Berman* that would have read it as narrowly defining the public purpose as blight removal; if that were the case, Justice Stevens argued, then taking the non-blighted department store would not have been justified. *Kelo*, 125 S. Ct. at 2665 n. 13.

152. *Id.* at 2666.

153. *Id.*

154. *Id.* at 2666 n. 16 (emphasis in original).

155. *Id.*

156. *Kelo*, 125 S. Ct. at 2666 n. 16.

157. *Id.* at 2667 n. 17.

158. *Id.* at 2667.

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

160. *Id.* at 2667–68.

161. *Kelo*, 125 S. Ct. at 2668.

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In conclusion, Justice Stevens recognized that compensation alone would not alleviate all hardships the owners of condemned property might encounter.[162] Nothing would preclude states from rejecting economic development through condemnation.[163] The Court's review was necessarily limited:

> This Court's authority, however, extends only to determining whether the City's proposed condemnations are for a "public use" within the meaning of the Fifth Amendment to the Federal Constitution. Because over a century of our case law interpreting that provision dictates an affirmative answer to that question, we may not grant petitioners the relief that they seek.[164]

The wisdom of such a use of condemnation could be debated in the political realm.[165]

2. The Concurring Opinion by Justice Kennedy

Justice Kennedy joined the majority opinion, but he also wrote a concurrence.[166] Justice Kennedy emphasized that the decision of the Court was fact-dependent.[167] Therefore, he urged that, even if a rational basis review of condemnation decisions is all the Fifth Amendment requires, there were condemnation actions that would not survive such a review.[168] He identified those undertaken with a primary desire to benefit individuals, with only an incidental public benefit, as deficient.[169] Nevertheless, the record in *Kelo* was replete with evidence of the public purpose and the condemnation was constitutional.[170] Justice Kennedy, however, stressed that a rejection of a per se invalidity rule does not reduce the Court to a rubber stamp.[171]

To Justice Kennedy, review under *Berman* and *Midkiff* has meaning. Additionally, in certain instances, more stringent review may be invoked:

> My agreement with the Court that a presumption of invalidity is not warranted for economic development takings in general, or for the particular takings at issue in this case, does not foreclose the possibility that a more stringent standard of review than that announced in *Berman* and *Midkiff* might be appropriate for a more narrowly drawn category of takings. There may be private transfers in which the risk of undetected impermissible favoritism of private parties is so acute that a presumption (rebuttable or otherwise) of invalidity is warranted under the Public Use Clause.[172]

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162. *Id.*
163. *See id.*
164. *Id.*
165. *Id.*
166. *Kelo*, 125 S. Ct. at 2669 (Kennedy, J., concurring).
167. *See id.* at 2670.
168. *Id.*
169. *Id.* Justice Kennedy, *id.*, commented:

> A court applying rational-basis review under the Public Use Clause should strike down a taking that, by a clear showing, is intended to favor a particular private party, with only incidental or pretextual public benefits, just as a court applying rational-basis review under the Equal Protection Clause must strike down a government classification that is clearly intended to injure a particular class of private parties, with only incidental or pretextual public justifications.

170. *See Kelo*, 125 S. Ct. at 2670.
171. *Id.*
172. *Id.* (citing *E. Enters. v. Apfel*, 524 U.S. 498, 547–50 (1998) [hereinafter *Eastern Enterprises*]

Although Justice Kennedy did not delineate the condemnations that would be unconstitutional, he maintained that they exist and can be rooted out without per se rules.[173] New London, however, had undergone an elaborate planning procedure that resulted in a comprehensive development plan with a more than *de minimis* public economic benefit.[174] Moreover, the record revealed that individual developers were not named until late in the process.[175] Therefore, the case did not require a heightened review.[176]

3. The Dissenting Opinions by Justices O'Connor and Thomas

Two dissenting opinions were filed in the five to four decision in *Kelo*. Justice O'Connor authored a dissent in which Chief Justice Rehnquist and Justices Scalia and Thomas joined.[177] Justice Thomas also authored a dissent.[178] Both dissents would outlaw using condemnation for "economic development."[179] The rationales of the opinions, however, differed. Justice O'Connor sought to distinguish Supreme Court precedents; Justice Thomas would overrule them and return the Court to what he characterized as the original meaning of the Public Use Clause.

Justice O'Connor, as is her habit, refers to the Takings Clause protections as being rooted in "fairness and justice."[180] When condemnations are at issue, she delineates two requirements: "public use" and "compensation," both necessary to give security to property.[181] Compensation prevents imposing costs on one property owner that all should share.[182] The Public Use requirement, to her, circumscribes governmental power: "Government may compel an individual to forfeit her property for the *public's* use, but not for the benefit of another private person."[183] The final arbiter of the line between the two, despite deference to the legislature, must be the judicial branch.[184] Justice O'Connor therefore turns to legal precedent.

(Kennedy, J., concurring in part and dissenting in part) (requiring heightened scrutiny for retroactive legislation under the Due Process Clause)).

173. *Id.* at 2670. Justice Kennedy's conclusion contains the potential criteria for invalidity: "In sum, while there may be categories of cases in which the transfers are so suspicious, or the procedures employed so prone to abuse, or the purported benefits are so trivial or implausible, that courts should presume an impermissible private purpose, no such circumstances are present in this case." *Id.* at 2670–71.

174. *Kelo*, 125 S. Ct. at 2670.

175. *Id.*

176. *Id.*

177. *Id.* at 2671.

178. *Id.* at 2677.

179. *See Kelo*, 125 S. Ct. at 2671, 2678.

180. *Id.* at 2672 (O'Connor, J., dissenting) (quoting *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regl. Plan. Agency*, 535 U.S. 302, 336 (2002)) (internal quotation marks omitted). For a general appraisal of Justice O'Connor's allegiance to these dual concepts, see Mansfield, *supra* n. 28, at 283. She returned to the concept of fairness in assessing burdens as being central to takings analysis in the opinion she wrote for a unanimous Court in *Lingle*. *See Lingle*, 125 S. Ct. at 2084–85.

181. *Kelo*, 125 S. Ct. at 2672 (O'Connor, J., dissenting).

182. *Id.*

183. *Id.* (emphasis in original).

184. *Id.* at 2673.

She asserts that three types of cases delineate the meaning of "public use." The first, and easiest to confirm, are those approving transfer to public ownership.[185] The second type consists of cases in which the recipient of the land is a public carrier.[186] Nevertheless, Justice O'Connor deems these two scenarios—namely, "public ownership" and "use-by-the public"—as "sometimes too constricting and impractical"[187] to be the sole definition of Public Use.[188] The third type of case in which condemnation is appropriate includes *Berman* and *Midkiff*. To Justice O'Connor, this category consists of cases in which the condemnations at issue negated existing harms.[189]

In *Kelo*, Justice O'Connor hews close to the actual holdings of *Berman* and *Midkiff*, rather than employing the oft-quoted equations of public use with public purpose that are contained within the cases.[190] Although she acknowledges that the cases prized deference to legislatures, she read them as adhering to the bedrock principle that a purely private taking could not be justified, even with compensation:

> In both those cases, the extraordinary, precondemnation use of the targeted property inflicted affirmative harm on society—in *Berman* through blight resulting from extreme poverty and in *Midkiff* through oligopoly resulting from extreme wealth. And in both cases, the relevant legislative body had found that eliminating the existing property use was necessary to remedy the harm. Thus a public purpose was realized when the harmful use was eliminated. Because each taking *directly* achieved a public benefit, it did not matter that the property was turned over to private use.[191]

To Justice O'Connor, it was the direct public benefit from changing the existent use that made these condemnations fit the definition of "public use." There was no need to equate public use with the "police power,"[192] as language in *Midkiff* and *Berman* seemingly did.[193]

It is precisely a situation such as the facts in *Kelo* that Justice O'Connor argued illustrated the error of conflating the two concepts. There was no harmful use before the condemnation. Therefore, she characterized the *Kelo* majority as

> hold[ing] that the sovereign may take private property currently put to ordinary private use, and give it over for new, ordinary private use, so long as the new use is predicted to generate some secondary benefit for the public—such as increased tax revenue, more jobs, maybe even aesthetic pleasure.[194]

She sees no limitation in the majority opinion, accusing both it and the concurrence of not detailing how anyone could truly detect an "illicit purpose"[195] behind a taking: "The trouble with economic development takings is that [the] private benefit and incidental

185. *Id.*
186. *Kelo*, 125 S. Ct. at 2673.
187. *Id.* (internal quotation marks omitted).
188. *Id.*
189. *See id.* at 2674.
190. *See infra*, at pt. II(C)(1) (discussing federal precedents).
191. *Kelo*, 125 S. Ct. at 2674 (O'Connor, J., dissenting) (citations omitted, emphasis in original).
192. *Id.* at 2675.
193. *Id.* (citing *Midkiff*, 467 U.S. at 240; *Berman*, 348 U.S. at 32).
194. *Id.*
195. *Id.*

public benefit are, by definition, merged and mutually reinforcing."[196] Moreover, she argued, the motive of the government should not be determinative of the propriety of the condemnation; the private property owner is bereft of property regardless of whether the primary purpose was to benefit an individual or the public.[197]

The remainder of the majority opinion gave no additional comfort to Justice O'Connor. She identified a presumption in the opinion, namely that condemnation will only be used to "upgrade" property.[198] Because the Due Process Clause prohibits irrational action, she found this requirement added no protection to private property.[199] The Court's disengagement from predicting the efficacy of a proposed governmental action underscored the lack of restraint.[200] Additionally, no single existing use of property can generally be deemed the best possible, which would mean that "[t]he specter of condemnation hangs over all property."[201] She also faulted the majority's reliance on the particular facts of the case, namely, that the taking arose after a "relatively careful deliberative process"[202] and was for an integrated, not parcel-by-parcel, plan.[203] She found no logical limit; the Court legitimized a taking based on legislative predictions of secondary public benefits from an economic development after a transfer of property rights.[204] To her, Justice Stevens's final comment that states could limit the use of eminent domain was an abdication of the Court's responsibility to protect constitutional rights, and one which would disparately benefit those with political influence.[205] Therefore, she would reject these condemnations.[206]

Justice Thomas similarly would overrule the Connecticut Supreme Court. He would not, however, limit the holdings of *Berman* and *Midkiff*; he would, instead, reconsider the cases and return to what he terms the "original meaning"[207] of the Public Use Clause.[208] To Justice Thomas, the Clause is a "meaningful limit on the government's eminent domain power";[209] one which allowing economic development takings to be public use has eviscerated.[210] Compensation is not the only Fifth Amendment requirement; public use must be an independent prerequisite, or else the Constitution would demand compensation when land is taken for public use, but not

196. *Kelo*, 125 S. Ct. at 2675 (O'Connor, J., dissenting).
197. *Id.* at 2676.
198. *Id.*
199. *Id.*
200. *Id.*
201. *Kelo*, 125 S. Ct. at 2676 (O'Connor, J., dissenting).
202. *Id.*
203. *Id.*
204. *Id.*
205. *Id.* at 2677.
206. *Kelo*, 125 S. Ct. at 2677 (O'Connor, J., dissenting).
207. *Id.* at 2678 (Thomas, J., dissenting).
208. *Id.* at 2677–78. He complains that the term "Public Use Clause," *id.* at 2677, has been erased in favor of a "Public Purpose Clause," *id.* (internal quotation marks and brackets omitted), or "perhaps the 'Diverse and Always Evolving Needs of Society' Clause," *Kelo*, 125 S. Ct. at 2677 (Thomas, J., dissenting) (internal quotation marks omitted).
209. *Id.* at 2678.
210. *Id.*

when it is taken for private use.[211] Several interpretive aids required Justice Thomas to reject extending the Clause to include condemnations for public purposes.

First, Justice Thomas examined the wording of the Constitution itself to justify limiting condemnation to when the public has access to the lands. Justice Thomas averred that the "natural reading"[212] of public use "allows the government to take property only if the government owns, or the public has a legal right to use, the property."[213] He cited a dictionary published in 1773 as defining "use"[214] as "[t]he act of employing any thing to any purpose."[215] To Justice Thomas, if the public has no right to use the property, it could not be "employing" it.[216] He rejected a broader meaning of "use," in the sense of making something more convenient, because of the context of the Public Use Clause.[217] Other parts of the Constitution refer to "use," and he finds these references incorporate the narrower meaning.[218] Moreover, he contrasted the phrase "public use" with "general welfare," appearing elsewhere in the Constitution, as well as, "public exigencies" and "public necessity," terms appearing in the Northwest Ordinance and some state constitutions; the language differentiation implied different meanings.[219] Therefore, he found the wording of the Constitution compelled a narrow meaning.

Beyond the wording of the Constitution, Justice Thomas marshaled evidence for his position in the common law background of the Constitution. By examining Kent and Blackstone, he posited that there was a distinction between nuisance and eminent domain.[220] Through nuisance law, governments could remedy hindrances to the public welfare without expending money.[221] Eminent domain, however, was exercised when the government, like a private party, wanted to acquire land for its own use.[222] Moreover, the Public Use Clause was a limitation on power, not a grant of power such as is found in the "Necessary and Proper" Clause of the Constitution, which gave Congress the authority to do anything "necessary and proper" in relation to its enumerated powers.[223] A public purpose reading of the Public Use Clause would duplicate the inquiry of a "necessary and proper" analysis.[224] Therefore, Justice Thomas concluded that "[t]he Clause is thus most naturally read to concern whether the property is used by

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211. *See id.*

212. *Id.* at 2679.

213. *Kelo*, 125 S. Ct. at 2679 (Thomas, J., dissenting).

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

215. *Id.*

216. *Id.*

217. *Id.*

218. *Kelo*, 125 S. Ct. at 2679 (Thomas, J., dissenting) (arguing the term "use" in other sections of the Constitution embraces the narrow meaning; discussing section 10 of Article I, referring to funds being for the "Use of the Treasury" as meaning the treasury will control the taxes, and section 8 of Article I, referring to "use" of moneys for raising an army as being limited to that purpose).

219. *Id.* at 2680.

220. *Id.*

221. *Id.*

222. *Id.*

223. *Kelo*, 125 S. Ct. at 2680–81.

224. *Id.* at 2680.

the public or the government, not whether the purpose of the taking is legitimately public."[225]

In light of this reading of the Clause, Justice Thomas critiques precedent. He found that early state cases supported his reading, limiting takings to condemnations that provided "public goods"; even when allowing private parties to gain title, the businesses forwarded were in the nature of common carriers.[226] Some cases might have stretched the boundaries, but he would not allow such cases to change the natural meaning.[227] On the Supreme Court stage, he faulted two lines of cases with expanding the Public Use Clause. One line concentrated on the public purpose of the taking;[228] the other involved deference to legislative choices.[229] Neither line of cases were justified or explained. To Justice Thomas, the whittling away of protection for traditional property from condemnation is magnified by the recent concern for non-traditional property rights.[230]

The cases commanding Justice Thomas's greatest displeasure are *Berman* and *Midkiff*. He accused the Court in *Berman* of "question begging"[231] and not deciding the nature of the constitutional limitation on condemnation.[232] To him, the Public Use Clause limited Congress's use of its enumerated powers.[233] The fundamental error of both cases was "equating the eminent domain power with the police power of States."[234] To Justice Thomas, there is no way to apply the "public purpose" test in a principled manner.[235] Therefore, he would return to the natural meaning of the Clause, and require actual use by the government, or that the public gain a right to use the property through the condemnation.[236]

Both Justice O'Connor, writing for a four Justice dissent, and Justice Thomas, writing for himself, would reject condemnations that are for economic development. There would be no room for individual factual appraisals. Justice Thomas, in his conclusion, noted that the impact of prior redevelopment schemes had fallen disproportionately on the poor and citizens of color.[237] Therefore, leaving protections to the political realm would not be appropriate.

C. *The* Kelo *Case in Perspective: Per Se Rules and Precedents*

Taking *Kelo* at face value, the effect of the majority was simply to reject a per se rule that invalidates takings for economic development under the Fifth Amendment of

225. *Id.* at 2681.
226. *Id.* at 2681–82.
227. *Id.* at 2682.
228. *Kelo*, 125 S. Ct. at 2683 (citing *Fallbrook Irrigation Dist.*, 164 U.S. 112).
229. *Id.* at 2684 (citing *Gettysburg Elec. Ry. Co.*, 160 U.S. 668).
230. *Id.* at 2684–85. In regard to deference to the legislature, Justice Thomas compares the lack of such deference in reviewing reasonable search procedures with that of review of condemnation: "Though citizens are safe from the government in their homes, the homes themselves are not." *Id.* at 2685.
231. *Id.*
232. *Kelo*, 125 S. Ct. at 2685 (Thomas, J., dissenting).
233. *Id.*
234. *Id.*
235. *Id.* at 2686.
236. *Id.*
237. *Kelo*, 125 S. Ct. at 2686–87 (Thomas, J., dissenting).

the United States. Under *Kelo*, benefit to a private party does not automatically render a taking of private property outside of the public use requirement, but the case does acknowledge that some condemnation schemes might cross the boundary into prohibited private takings. Both federal and state precedents are in line with this position. Naturally, state courts have varying views,[238] but one of the most famous discussions of the public use issue emerged in Michigan. In *Poletown*, the Michigan Supreme Court upheld a taking in which a non-blighted working class neighborhood was uprooted in order to assemble land for a General Motors plant. Many commentators attacked the decision, not simply on legal grounds,[239] but also because of the negative impact on members of minorities and the poor.[240] The Michigan Court overruled *Poletown*, but the framework it laid down in its *County of Wayne v. Hathcock*[241] decision did not simply outlaw condemnations for economic development in which private parties benefit. *Hathcock* set out exceptions to the presumption of invalidity for such condemnations.[242] Therefore, the *Kelo* case and the *Hathcock* case are mirror-images, both ending up without a per se conclusion.

1. Federal Fifth Amendment Precedents

As the *Kelo* case itself noted the federal response to when condemnation is appropriate often began with a stark dichotomy: a clear violation of the "social compact"[243] if property is taken from A to give to B regardless of compensation,[244] and a clearly appropriate use of condemnation if property is taken from A and put to a use in which the public has access to the condemned land.[245] An archetypical example of the latter is condemning land to build a post office, a highway, or a military cemetery.[246] The line, however, quickly blurred.[247]

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238. *See generally* Adam Mossoff, *The Death of* Poletown*: The Future of Eminent Domain and Urban Development After* County of Wayne v. Hathcock, 2004 Mich. St. L. Rev. 837, 841, 841 n. 18 (collecting state cases).

239. For example, Justice O'Connor referred to the *Poletown* decision as "infamous." *Kelo*, 125 S. Ct. at 2677 (O'Connor, J., dissenting). *See generally Kelo*, 843 A.2d at 535–36, 536 nn. 48–49 (listing a collection of citations to law review articles supporting and disputing the use of eminent domain for economic development).

240. Ilya Somin, *Overcoming* Poletown*:* County of Wayne v. Hathcock, *Economic Development Takings, and the Future of Public Use*, 2004 Mich. St. L. Rev. 1005, 1035–38 (describing the general impact of urban renewal on the poor and minorities, and noting those remaining in Poletown were the white elderly).

241. 684 N.W.2d 765 (Mich. 2004).

242. *Id.* at 781.

243. *Kelo*, 125 S. Ct. at 2661 n. 5 (quoting *Calder*, 3 U.S. at 388) (internal quotation marks omitted).

244. This situation was discussed in dicta in *Calder*. It was labeled as being unconstitutional. *Calder*, 3 U.S. at 388–89. The case actually dealt with whether or not a statute directing a court to re-open a particular case was an *ex post facto* law. *Id.* at 386–87. The Supreme Court concluded that the prohibition against *ex post facto* laws related to criminal law, not civil laws. *Id.* at 390–95; *see also Mo. P. Ry. Co. v. Neb.*, 164 U.S. 403, 417 (1896) (characterizing the requirement that a railroad allow private parties to build an elevator for private use on the railway's right-of-way as an unconstitutional taking of private property for private use).

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

246. Although there was actual public use involved in this situation, the case confirming condemnation for a Gettysburg memorial is most known and cited for the proposition that Congress has wide authority to declare whether or not something is in the "public purpose." *See Gettysburg Elec. Ry. Co.*, 160 U.S. 668. The Court noted that instilling patriotism could be such a purpose. *See id.* at 682.

247. *See generally* James W. Ely, Jr., *Thomas Cooley, "Public Use," and New Directions in Takings Jurisprudence*, 2004 Mich. St. L. Rev. 845, 845–53.

At first, the Supreme Court approved statutes that employed condemnation to benefit common carriers. Because a common carrier must provide service to the public, private ownership of the railroad or tunnel was deemed irrelevant.[248] The Supreme Court, however, also did not invalidate statutes giving private parties the right to condemn for a millsite or for an irrigation ditch, even though neither of the benefited private owners were under a regulatory duty to serve.[249] In most of these cases, the Supreme Court upheld state court determinations, thus revealing that at least some state courts were taking similarly broadened views of condemnation power. One rationale for affirming these statutes was the position that local legislatures knew best what was needed in different locales.[250] Mining might be central to one state's economy,[251] and water scarcity drive the public need in another.[252] Incremental movement of constitutional condemnation beyond actual "public use" continued.[253]

In 1954, however, the Supreme Court unanimously decided *Berman*.[254] Congress, acting under its power to govern the District of Columbia, authorized a Planning and Redevelopment Commission to look at the substandard housing and slum conditions.[255] The District Court noted the question as follows:

> We can quickly dispose of the case in so far as it relates to certain parts of the property in the project area. The power to acquire by eminent domain property to be devoted to streets (including the "expressway"), schools, recreation centers, parks (including the "greenway"), and other "public uses" is established beyond question. Likewise the power to acquire by eminent domain real estate to be used for the construction of low-cost housing is established in this jurisdiction .... Our problem concerns the remainder of the property in the area, which is to be acquired by eminent domain and sold or leased to private persons for private uses, with the provision that not less than one-third of the housing accommodations to be built on the property are to be for low-rent housing.[256]

More particularly, the problem in *Berman* involved condemnation of land that was not in itself blighted; commercial property was included in lands determined ripe for

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248. *See Gettysburg Elec. Ry. Co.*, 160 U.S. at 679–83.

249. *See Clark*, 198 U.S. 361; *Fallbrook Irrigation Dist.*, 164 U.S. 112; *see also Hairston v. Danville & W. Ry. Co.*, 208 U.S. 598 (1908) (approving condemnation for a rail spur that would not be useful to the general public).

250. *See Joslin Mfg. Co. v. City of Providence*, 262 U.S. 668 (1923) (holding necessity of use for public water system is a state legislative decision). Congress was also given the benefit of the doubt. *See Old Dominion Land Co. v. U.S.*, 269 U.S. 55, 66 (1925) (declaring a decision of Congress on condemnation of lands for military purpose "entitled to deference until it is shown to involve an impossibility").

251. *See Strickley v. Highland Boy Gold Mining Co.*, 200 U.S. 527, 531 (1906).

252. *See Clark*, 198 U.S. at 367–68.

253. This included condemning land to provide for a new townsite after the old townsite was flooded for a public water project. *See Brown v. U.S.*, 263 U.S. 78 (1923). In a similar vein, the Tennessee Valley Authority was authorized to condemn private property for incorporation into a National Park as an adjunct to acquisitions for a reservoir when the land would be isolated by the reservoir. *See U.S. ex rel. Tenn. Valley Auth. v. Welch*, 327 U.S. 546 (1946). In this case, the Supreme Court noted that it had never overturned a condemnation that the highest court of the relevant state had upheld. *Id.* at 552 (quoting *Hairston*, 208 U.S. at 607). State courts, however, could invalidate takings under state constitutional law and insulate the decision from review, therefore limiting the cases that came before the Supreme Court.

254. 348 U.S. 26 (1954).

255. *The District of Columbia Redevelopment Act of 1945*, Pub. L. No. 79-592, 60 Stat. 790 (1946).

256. *Schneider v. D.C. Redevelopment Land Agency*, 117 F. Supp. 705, 711 (D.D.C. 1953).

"urban redevelopment."[257]

The lower court temporized, but was protective of private property. Nevertheless, it refused to find the statute totally unconstitutional. As long as the District Redevelopment Act was directed at buildings that either created or perpetuated "conditions injurious to the public health, safety, morals and welfare,"[258] it was valid. In fact, pursuant to eminent domain, title to the property could be taken and directed to another private party, but only if necessary to such end, namely eliminating a slum or preventing a slum from arising.[259] The mere presence of a slum would not be justification in and of itself for condemnation. The taking must be needed to meet the health and welfare goal, which is primarily a legislative determination.[260] The court, moreover, was adamant that eminent domain could not be exercised simply to create a more up-to-date or better use of property: "We are of opinion that the Congress, in legislating for the District of Columbia, has no power to authorize the seizure by eminent domain of property for the sole purpose of redeveloping the area according to its, or its agents', judgment of what a well-developed, well-balanced neighborhood would be."[261] More descriptively, it noted:

> Choice of antiques is a right of property. Or suppose these people own these homes and can afford none more modern. The poor are entitled to own what they can afford. The slow, the old, the small in ambition, the devotee of the outmoded have no less right to property than have the quick, the young, the aggressive, and the modernistic or futuristic.[262]

The *Schneider* court, however, did not decide that the District of Columbia condemnation was a redevelopment plan that merely reflected taste.[263]

The court summarized the situation as one in which the government characterized some lands within the project redevelopment area as "slums," but other properties were not.[264] The lower court found that this scenario could also offend the Constitution when individual tracts of land were examined. To it, the statute only authorized taking of

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257. *Id.* at 714. Lands ripe for redevelopment are aptly described in *Schneider*, *id.* (footnote omitted):

> [T]here are sections of cities which are not at the present time used to their fullest economic possibility, or are not arranged to fit current ideas of city development. An outstanding example is Trinity Church and its surrounding cemetery at the corner of Wall Street and Broadway in New York City. Old streets are not so wide as new ones would be. Apartment houses would be more economically efficient than are single dwellings. Phrases used to describe this situation are "inadequate planning of the area", "excessive land coverage by the buildings thereon", "defective design and arrangement of the buildings thereon", "faulty street or lot layout", "economically or socially undesirable land uses". The statutes dealing with these areas are usually called "urban redevelopment" laws. The areas are frequently called "blighted". They are in no sense slums, or similar to slums; they are out-of-date. They do not breed disease or crime; they fail to measure up to their maximum potential use in terms of economic, social, architectural, or civic desirability.

258. *Id.* at 715.

259. *Id.* at 716.

260. *Schneider*, 117 F. Supp. at 718.

261. *Id.* at 720; *see also id.* at 724 ("One man's land cannot be seized by the Government and sold to another man merely in order that the purchaser may build upon it a better house or a house which better meets the Government's idea of what is appropriate or well-designed.").

262. *Id.* at 719.

263. *Id.* at 724–25.

264. *Schneider*, 117 F. Supp. at 724–75.

property for "the reasonable necessities of slum clearance and prevention."[265] Nevertheless, the court dismissed the complaint because the pleadings were facial challenges to the law, not raising "as applied" issues except for the mention of the properties being commercial.[266] It left open the option of amending the pleadings.[267]

Against this backdrop of rhetoric in favor of private rights, the decision Justice Douglas wrote in *Berman* was a paean to public planning. Justice Douglas's decision is much shorter than that of the lower court. Rather than a painstaking review of precedents, the decision declared its basic premises in an almost staccato fashion: (1) Congress's power over the District of Columbia is similar to the police power,[268] (2) legislative determinations define the boundaries of the power,[269] (3) the judiciary has little role in oversight,[270] (4) if the end is within the authority of Congress, then Congress may use the means of eminent domain to reach that end,[271] and (5) Congress can choose private development as a means to the end after condemnation.[272] On its way to upholding the statute, the Supreme Court made it clear that the "public welfare is broad and inclusive."[273] Additionally, the choice of what lands to condemn was that of the legislature; it was not up to the courts to review which tract of land should or should not be included in the redevelopment.[274] No "integrated [plan] for redevelopment"[275] could ever be accomplished if each tract owner could argue that his or her tract of land was not being used against the public interest at the time of condemnation.[276] Moreover, unlike the lower court's decision, the *Berman* Court had no doubt that title to lands could be taken by condemnation, and that the Redevelopment Act had sufficient standards to guide the agency.[277] The Supreme Court unequivocally upheld a redevelopment statute

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265. *Id.*

266. *Id.* at 725.

267. *Id.*

268. *Berman*, 348 U.S. at 31–32.

269. *Id.* at 32.

270. *Id.*

271. *Id.* at 33.

272. *Id.* at 33–34. The Court stated:

> Once the object is within the authority of Congress, the means by which it will be attained is also for Congress to determine. Here one of the means chosen is the use of private enterprise for redevelopment of the area. . . . *The public end may be as well or better served through an agency of private enterprise than through a department of government—or so the Congress might conclude. We cannot say that public ownership is the sole method of promoting the public purposes of community redevelopment projects.*

Berman, 348 U.S. at 33–34 (emphasis added).

273. *Id.* at 33 ("The values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled.").

274. *Id.* at 35–36.

275. *Id.* at 35.

276. *Id.* The Court elaborated:

> It is not for the courts to oversee the choice of the boundary line nor to sit in review on the size of a particular project area. Once the question of the public purpose has been decided, the amount and character of land to be taken for the project and the need for a particular tract to complete the integrated plan rests in the discretion of the legislative branch.

Berman, 348 U.S. at 35–36.

277. *See id.* at 35.

both in the abstract and as applied. It did none of the agonizing that characterized the lower court opinion.

Similarly, the Supreme Court in *Midkiff* had no difficulty. It overruled a Ninth Circuit decision that had invalidated a statute as an unconstitutional taking.[278] The statute sought to remedy a concentration of landownership, which resulted from native Hawaiian landownership patterns.[279] In essence, most residential housing was built on ground leases, with the home "owner" not having fee title to the land.[280] The Hawaii legislature passed a scheme through which lessees in a residential subdivision could have the housing authority condemn the land in the subdivision, with the lessee ultimately providing the purchase money and getting title to the land.[281] Only lessees in possession could enlist the procedure, and only one lot could be bought in this manner.[282] To the Ninth Circuit, the statute directly violated the entire purpose of the Fifth Amendment.[283]

The decision in *Midkiff v. Tom* assaulted the statute, harking to the writings of James Madison, which cautioned about the tyranny of the majority:

> As anticipated by Madison, the Hawaii Legislature has become the instrument by which private property held by a minority of the persons within that state is to be redistributed to appease the desires of a landless majority to own residential land. The Federal Constitution and the fifth and fourteenth amendments were adopted with the express purpose of invalidating the taking of the private property from one person for the private and exclusive enjoyment by another.[284]

To the circuit, this was a simple case of taking the property of A and giving it to B for B's private use.[285] The court meticulously reviewed prior decisions. It found those authorizing eminent domain as limited to five situations, namely: (1) when property would be put to a "historically accepted public use,"[286] (2) the land would change in use, (3) possession of the land would change, (4) a governmental entity would gain ownership, or (5) the taking was a "*de minimis* condemnation"[287] required for redevelopment of adjacent land.[288] Judicial review of a state public use determination was not confined to a review of whether the purpose was within the police power; the Ninth Circuit limited the *Berman* holding to review of Congressional determinations.[289]

278. *See Midkiff v. Tom*, 702 F.2d 788 (9th Cir. 1983), *modified on mandate*, *Midkiff v. Tom*, 725 F.2d 502 (9th Cir. 1984), *rev'd sub nom. Midkiff*, 467 U.S. 229.

279. *Midkiff v. Tom*, 483 F. Supp. 62, 65, 67 (D. Haw. 1979).

280. *Id.* at 65.

281. *Hawaii Land Reform Act*, Haw. Rev. Stat. ch. 516 (1993). The District Court upheld the statute employing the *Berman* decision. *Midkiff*, 483 F. Supp. at 67. It held that judicial review was deferential; so long as a statute was not arbitrary and within the police power of the state, eminent domain could be the means to meet the end. *Id.* The statute could be justified both on a social desire to forward land distribution or as an economic measure to curb inflation and control prices of fee land. *Id.* at 69–70.

282. *Midkiff*, 467 U.S. at 233–34.

283. *Midkiff*, 702 F.2d at 798.

284. *Id.* at 793.

285. *Id.* at 798.

286. *Id.* at 793.

287. *Id.* at 794.

288. *Midkiff*, 702 F.2d at 793–94.

289. *Id.* at 796–97. The court also distinguished *Berman* from the Hawaii case because in the Washington redevelopment scenario, a public agency acquired title as an interim step before private parties potentially received the land. *Id.* at 797.

Moreover, the court read *Berman* as focusing on whether non-blighted properties could be condemned in conjunction with removal of slums that were injurious to the public health and safety.[290]

The presence of a concurring and dissenting opinion at the circuit court level emphasized that the Supreme Court in *Midkiff* was reviewing a stark rejection of eminent domain power. Judge Poole's concurrence did not make a detailed analysis of precedent, but examined the Hawaii Land Reform Statute and found that its only effect was to transfer property to a private party.[291] To Judge Poole, the transfer was not incident to another public goal, and would not actually ensure an increase in affordable residential housing.[292] This concurrence, therefore, did not hesitate to declare that the statute served no public purpose.[293] The dissenting opinion by Judge Ferguson was equally adamant in the opposite direction, namely, that a court should not substitute its judgment for that of the legislature; the deference of *Berman* applied to the legislative determinations of the state.[294]

In light of the lower courts' discussions, Justice O'Connor's opinion in *Midkiff*, despite her later disavowal in her *Kelo* dissent,[295] was a broad affirmation of the right to use eminent domain to meet public purposes despite private parties getting title to the property condemned. The language is sweeping: "The 'public use' requirement is thus coterminous with the scope of a sovereign's police powers."[296] In fact, the decision, in addition to citing *Berman*, maintained 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."[297] The lower court was directly chided for reading the Supreme Court's precedents too narrowly, both in requiring a governmental entity to take title to condemned land (even if momentarily), and in providing less deference to state legislative determinations of public purpose than those of Congress.[298] Justice O'Connor is correct in *Kelo* that the *Midkiff* decision identifies the harm the condemnation was designed to alleviate, but it did not necessarily limit the public purpose choice of the state legislature.[299] The *Midkiff* opinion concluded

290. *Id.* at 796.

291. *See id.* at 807 (Poole, J., concurring).

292. *Midkiff*, 702 F.2d at 803–04 (Poole, J., concurring).

293. *Id.* at 806 ("[W]hen as here the drastic effects of a statute contrast so starkly with its professed goals, leaving in shadow the nexus of reasonable relationship to those goals, one may question whether a public purpose in fact exists.").

294. *Id.* at 813 (Ferguson, J., dissenting). To Judge Ferguson, the appropriate question was not whether there was a transfer from one private party to another, but the following, *id.* at 809:

> The real question is whether the legislature of Hawaii may, pursuant to a plan carefully tailored to guarantee due process and just compensation, bring about the redistribution of privately held land where the legislature has found (a) that the concentration of such land in the hands of a few landholders is a cause of great social and economic harm to the public and (b) that the distribution of such land in small parcels to many persons will be to the public's benefit and advantage.

295. *Kelo*, 125 S. Ct. at 2675 (O'Connor, J., dissenting) (disavowing language equating the police power and "public use" as "unnecessary to the specific holdings of those decisions").

296. *Midkiff*, 467 U.S. at 240.

297. *Id.* at 241.

298. *Id.* at 243–44.

299. *Id.* at 245.

that eliminating an oligopoly was "a classic exercise of a State's police powers."[300] Moreover, it also refused to second-guess the legislature or require proof of the efficacy of the statute.[301]

Importantly, the *Midkiff* Court concluded that there was a market failure, and the statute in question was not designed to benefit a "particular class of identifiable individuals"[302] but to remedy that failure.[303] The *Kelo* situation could also be seen as one in which market failures are addressed. The need to assemble land for large projects to comprehensively revitalize a city neighborhood displays the classic potential for hold-out behavior.[304] Even assuming the *Kelo* plaintiffs were truly acting out of principle and not out of economic maneuvering, the scope of the government's powers cannot be judged by the individual motives of those who would resist the power.[305] Key to the *Kelo* affirmation of the exercise of eminent domain were the facts surrounding the government's planning, which did not include identifying a particular private party to benefit from development prior to the condemnation.

2. State Court Interpretations of "Public Use"

Many state courts have interpreted state constitution provisions that are parallel to the federal prerequisite of "public use" for eminent domain. In some instances, the courts merely used federal precedents, deciding that the state provisions were congruent with the federal.[306] In other situations, the state court independently construes a state requirement.[307] Although states have come to varied conclusions,[308] one of the most discussed series of state decisions has come from Michigan, and therefore that precedent will be examined most closely. The Michigan Supreme Court in *Poletown* upheld the use of eminent domain to condemn a working class neighborhood for a General Motors factory.[309] In the more recent *Hathcock* decision, the Court overruled *Poletown*. It held that eminent domain takings for economic development were not for the public use, but the decision acknowledged exceptions and thus, in essence, ended up with the same conclusion as *Kelo*, namely, that there are no per se rules. The two approaches simply begin at opposite ends, but meet at the middle.

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300. *Id.* at 242–43.

301. *Midkiff*, 467 U.S. at 242–43 ("When the legislature's purpose is legitimate and its means are not irrational, our cases make clear that empirical debates over the wisdom of takings—no less than debates over the wisdom of other kinds of socioeconomic legislation—are not to be carried out in the federal courts.").

302. *Id.* at 245.

303. *See id.*

304. *See infra*, at nn. 352–362 and accompanying text.

305. As noted by Justice O'Connor, judging what is the primary motivation of the government is difficult. *See Kelo*, 125 S. Ct. at 2676 (O'Connor, J., dissenting) (questioning why the intent of the government should be relevant to a takings appraisal). Ascertaining the primary motives of individuals is also difficult; an objective reasonable expectations test is less subject to gaming to distinguish between private parties in regard to compensation or other matters.

306. *See e.g. San Remo Hotel L.P. v. City & County of S.F.*, 41 P.3d 87, 100–01 (Cal. 2002).

307. *See e.g. Hathcock*, 684 N.W.2d at 770.

308. *See Kelo*, 843 A.2d at 532 (listing Arkansas, Florida, Kentucky, Maine, New Hampshire, South Carolina, and Washington as employing a narrow definition of "public use," one which would not include economic development).

309. *Poletown*, 304 N.W.2d 455, *overruled*, *Hathcock*, 684 N.W.2d 765.

The Michigan Supreme Court decided *Poletown* on an expedited schedule against a backdrop of economic crisis. Unemployment was high in Detroit.[310] General Motors had an obsolete plant and would leave Detroit for a suburban or sunbelt location if land could not be made available to it within Detroit.[311] General Motors had certain criteria for a plant and a date certain by which it wanted title.[312] In view of the urgency, the majority and the dissent phrased the legal issue in diametrically opposed fashion. The five-member per curiam decision spoke of the need to reach a public end, emphasizing employment goals.[313] The two dissents underscored that private property was being taken for the use of another private party;[314] as Justice Ryan put it: "Stripped of the justifying adornments which have universally attended public description of this controversy, the central jurisprudential issue is the right of government to expropriate property from those who do not wish to sell for the use and benefit of a strictly private corporation."[315]

Nevertheless, the *Poletown* majority upheld the taking, conflating "public use" and "public purpose":

> We are persuaded the terms have been used interchangeably in Michigan statutes and decisions in an effort to describe the protean concept of public benefit. The term "public use" has not received a narrow or inelastic definition by this Court in prior cases. Indeed, this Court has stated that "'[a] public use changes with changing conditions of society'" and that "'[t]he right of the public to receive and enjoy the benefit of the use determines whether the use is public or private.'"[316]

An increase in jobs or positive impact on the commercial or retail base of the city alone would not earn blanket approval of condemnations that granted title to specified private parties. The key to the Court's approval in *Poletown* was a finding that the purpose was essentially public, with only incidental benefit to the private interest.[317] Indeed, the majority found the benefit "clear and significant"[318] after a "heightened scrutiny."[319]

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310. In the words of dissenting Justice Ryan, it was of "calamitous proportions." *Id.* at 465 (Ryan, J., dissenting) (citing unemployment rates of eighteen percent in Detroit, rising to thirty percent among African Americans).

311. *Id.* at 466.

312. *Id.* at 465–67.

313. *Id.* at 457. The per curiam opinion asked:

> Can a municipality use the power of eminent domain granted to it by the Economic Development Corporations Act, to condemn property for transfer to a private corporation to build a plant to promote industry and commerce, thereby adding jobs and taxes to the economic base of the municipality and state?

Poletown, 304 N.W.2d at 457 (citations omitted).

314. *Id.* at 460 (Fitzgerald & Ryan, JJ., dissenting); *id.* at 464–65 (Ryan, J., dissenting).

315. *Id.* at 471.

316. *Id.* at 457 (footnotes omitted, brackets in original).

317. *Poletown*, 304 N.W.2d at 459. As one commentator describes the decision, "[y]ou had to have been in Detroit at the time to understand [it]." William A. Fischel, *The Political Economy of Public Use in* Poletown*: How Federal Grants Encourage Excessive Use of Eminent Domain*, 2004 Mich. St. L. Rev. 929, 953. There was overwhelming community support and sense of need. *See id.* at 953–54. Moreover, the federal government contributed to the costs with dedicated grants, therefore reducing the political exposure of the local officials. *See id.* at 954.

318. *Poletown*, 304 N.W.2d at 459. In fact, the terms "clear and significant" are repeated, *id.* at 459–60 (emphasis added):

The dissenting opinions disagreed. Of the two dissents, that of Justice Ryan is the most interesting, because the Michigan Supreme Court eventually adopted his position in *Hathcock.* Justice Ryan devoted several pages to delineating how General Motors dictated what land would be acquired, and on what terms General Motors would build a factory.[320] Land the public obtained for $200 million would be sold to General Motors for $8 million.[321] There was no guarantee that the proposed six thousand jobs would materialize and be maintained.[322] Therefore, he opined that the project was primarily to benefit a private, profit-driven entity.[323] This, in itself, would not make it impossible to uphold the use of eminent domain, but he found that precedents would only allow condemnation for a private corporation under what he referred to as the "instrumentality of commerce exception."[324] He further delineated three situations in which this exception could operate: "1) *public* necessity of the extreme sort, 2) continuing accountability to the *public*, and 3) selection of land according to facts of independent *public* significance."[325] Justice Ryan found none of these exceptional circumstances existed in the *Poletown* scenario.[326]

More than twenty years later, the Michigan Supreme Court would abandon *Poletown*'s "heightened scrutiny" test and adopt these criteria, albeit not as exceptions to a ban on eminent domain, but as glosses on the definition of "public use."[327] The condemnation at issue was an aggregation of land for a technology and business park referred to as the "Pinnacle Project."[328] Because the project did not have any of the validating characteristics, the Court found no justification for the condemnation in *Hathcock.*[329] The Court expressly overruled *Poletown*, labeling the earlier case an aberration in takings law because it allowed the incidental benefits from a profit-seeking corporation's private ownership of land to be a public use.[330] The Michigan Constitution, ratified in 1963, only allowed taking of private property for "public use."[331] The majority defined the term in the manner that a person sophisticated in the

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> If the public benefit was not so *clear and significant*, we would hesitate to sanction approval of such a project. The power of eminent domain is restricted to furthering public uses and purposes and is not to be exercised without substantial proof that the public is primarily to be benefited. Where, as here, the condemnation power is exercised in a way that benefits specific and identifiable private interests, a court inspects with heightened scrutiny the claim that the public interest is the predominant interest being advanced. Such public benefit cannot be speculative or marginal but must be *clear and significant* if it is to be within the legitimate purpose as stated by the Legislature.

319. *Id.*

320. *Id.* at 468–70 (Ryan, J., dissenting).

321. *Id.* at 469.

322. *Poletown*, 304 N.W.2d at 471.

323. *See id.*

324. *Id.* at 477.

325. *Id.* at 478 (emphasis in original).

326. *Id.* at 480.

327. *See Hathcock*, 684 N.W.2d at 781. In his concurrence, Justice Cavanagh would use Justice Ryan's analysis directly. *Id.* at 799 (Cavanagh, J., concurring in part and dissenting in part).

328. *Id.* at 770.

329. *Id.* at 788.

330. *Id.* at 786–87 (characterizing *Poletown* as the only case "holding that a vague economic benefit stemming from a private profit-maximizing enterprise is a 'public use'").

331. *Hathcock*, 684 N.W.2d at 784. The Court read *Poletown* as asserting that the plaintiff acknowledged

law would have interpreted its meaning in 1963; this would encompass the existing Michigan legal precedents.[332] Therefore, if a private party was to gain title to land, only in the three situations Justice Ryan detailed would the resulting land use constitute public use.

The majority opinion explicated the dimensions of the three situations where private title-taking did not interfere with public use. The first, extreme public necessity, related to "instrumentalities of commerce."[333] Railroads, pipelines, and highways epitomized this group; location is important in these projects, with little flexibility to maneuver around a hold-out, making collective action through condemnation necessary.[334] In the second gloss, there could be public use and eminent domain if a public entity retained sufficient control to ensure the public was accommodated, such as with a regulated industry.[335] Third, the Court identified the situation where a public purpose drives the choice of lands to be condemned, independent of what use the lands will be put to after condemnation, with slum clearance listed as an example.[336] The *Hathcock* approach contained a fact-dependent appraisal of a condemnation's propriety.

With this reversal of *Poletown*, the Court repudiated one methodology—heightened scrutiny—and one holding in one case. Many had criticized the *Poletown* result, which uprooted a thriving community and possibly displaced as many jobs as it potentially could create.[337] General Motors Corporation was not required to sustain the factory and the jobs; all decisions were left to the board of directors of the private company.[338] The majority in *Hathcock* was thus emboldened to apply its decision retroactively to pending condemnation actions.[339] Nevertheless, there was no bright line that automatically precluded a condemnation for economic development.

The glosses on the definition of "public use," especially the finding of public use if a government entity retained control to assure the public benefit, could end up justifying many condemnations designed to "upgrade" land-use.[340] For example, in *Kelo* the redevelopment agency was to retain title to the land; it would be developed pursuant to

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that "public use" and "public purpose" were the same and that the question was whether there was sufficient "public" benefit when such benefit was incidental to the private benefit. *Id.* (quoting *Poletown*, 304 N.W.2d at 458).

332. *Id.* at 783. Justice Weaver's concurring opinion took a different tack. The ordinary understanding of a ratifier would govern. *Id.* at 788–89 (Weaver, J., concurring in part and dissenting in part). This would require some actual public "use," access, or control of the property condemned except when the controlling purpose of the land acquisition was to remove slums. *See id.* at 796. There would be no need to be "elitist"; ordinary people could understand the dimension of rights that have been central to liberty through time. *Hathcock*, 684 N.W.2d at 798–99 (Weaver, J., concurring in part and dissenting in part). Although the majority's result was deemed correct in this interest, Justice Weaver could not endorse the method. *Id.*

333. *Id.* at 781.

334. *Id.* at 781–82.

335. *See id.* at 782.

336. *Hathcock*, 684 N.W.2d at 782–83.

337. *See Somin*, *supra* n. 240 at 1016–18 (describing large business dislocation from the condemnation approved in *Poletown*).

338. *Poletown*, 304 N.W.2d at 480 (Ryan, J., dissenting). In fact, the jobs did not materialize as promised. Somin, *supra* n. 240, at 1013. However, there were three-thousand workers in the plant, and property tax revenue was higher than anticipated because of the value of robotic equipment installed. Richard H. Chused, *Cases, Materials, and Problems in Property* 935 (2d ed., Matthew Bender & Co. 1999).

339. *Hathcock*, 684 N.W.2d at 787–88.

340. *See* Somin, *supra* n. 240, at pt. II (cautioning that the exceptions could swallow the rule).

long-term leases that contained specific requirements.[341] Although the example of a regulated utility was provided in *Hathcock* as illustrative of this category, if covenants or leasing is sufficient public control, more acquisitions could qualify for condemnation. Similarly, as is further discussed below, condemnation might be allowable under the rationale of "extreme public necessity," and in instances where land is chosen for condemnation to remedy some blight or nuisance-like activity existing on the land. Therefore, although Justice Stevens cites the *Hathcock* case as one in which states give greater protection to private rights under a state constitution than what is being forwarded in *Kelo*,[342] the decision Justice Stevens authored is not that different in result from the *Hathcock* decision. The *Hathcock* Court simply begins by questioning any condemnation that results in private ownership with perhaps a presumption of invalidity. The *Kelo* Court begins with a presumption that the legislature or local entity has exercised the condemnation power legitimately. Both decisions reject per se rules.

3. *Kelo* and Practical Reality

Takings law, be it regulatory takings or eminent domain, is not known for its clarity. The Fifth Amendment requirement that no private property be taken for public use without just compensation, seemingly only requires compensation. The words "for public use" could be merely descriptive of eminent domain; the power of a sovereign to commandeer property had long been acknowledged and the requirement of compensation was the primary limitation intended.[343] Therefore, it is not surprising that determinations of what is "public use" would proceed by *ad hoc* rules. The element of uncertainty and the potential for judicial line-drawing are cited criticisms of this approach,[344] but it is inevitable in any attempt to review political decision-making. Per se rules do not eliminate the concern.

In fact, a per se rule, such as contained in Justice O'Connor's dissent in *Kelo*,[345] could engender as much judicial lee-way to the political sphere as the majority opinion, which rejects the concept of outlawing condemnations simply because the purpose is economic development with private participation. Justice O'Connor would require a pre-existing "evil" to exist, and therefore, would not uphold a condemnation that simply seeks to "upgrade" land use.[346] However, in so doing she focuses on the existing use of individual tracts of land, rather than on societal ills or harms that might need remedying

341. *Kelo*, 843 A.2d at 544–45. In *Berman*, a contract required the developers to implement the redevelopment plan. 348 U.S. at 30 (cited in *Kelo*, 125 U.S. at 2666 n. 15).

342. *Kelo*, 125 S. Ct. at 2668, 2668 n. 22.

343. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1056 (1992) (Blackmun, J., dissenting) (noting that it was not clear that colonial governments compensated when taking land for highways and other purposes, and that states continued to not compensate through the eighteenth century); *but see* Dana & Merrill, *supra* n. 11, at 17–18 (arguing compensation was the rule, except perhaps in rural areas where road-building increased the value of the land remaining in the possession of the private owner).

344. *Kelo*, 125 S. Ct. at 2686 (Thomas, J., dissenting) (arguing there is no principled way to apply the majority's opinion).

345. Justice Thomas's dissent presents a different problem. He contends that he avoids the line-drawing problem inherent in a "public purpose" test by requiring an "actual use" test, admonishing that the latter is easier to administer. *Id.* at 2686 (Thomas, J., dissenting).

346. *Id.* at 2676 (O'Connor, J., dissenting).

in the greater New London area. It is true, as Justice O'Connor notes, that the well-maintained houses of the plaintiffs in *Kelo* were not the source of any social harm.[347] Neither, however, was the department store in *Berman*, nor the individual tracts of land condemned for individual lessees in *Midkiff*. Therefore, Justice O'Connor's test could not explain existing precedents on the tract-by-tract basis.

Moreover, creating any rule in advance and drawing a bright line can lead to situations in which legislative ends are simply recast. Justice O'Connor referred to the "stupid staffer"[348] as the only potential violator of Justice Kennedy's test ferreting out impermissible intentions for condemnation.[349] However, Justice Scalia, in first invoking the stupid staffer, was faulting a test that distinguished between harm-preventing and benefit-conferring governmental actions;[350] this is just the type of distinction that Justice O'Connor seems to be presenting. She would outlaw condemnations for the benefit-granting activity of economic development, yet approve condemnations that are designed to right an existing wrong.

In addition to inviting linguistic gymnastics, per se rules invite strategic behavior on the part of state and municipal governments.[351] The actual breadth and scope of a governmental action might change to shoehorn it into the proper category. For example, a development plan could become greater than initially conceived in order to take in properties that are more objectively blighted. Condemnation, however, might be needed to solve other market problems.

In order to proceed with development, tract assembly is often required. Highways, railroads, and pipelines are easy examples of projects that are location dependent; while there are perhaps numerous choices in a broad goal of going from New York to Boston, once a highway or pipeline is begun to be laid out, deviation around reluctant land sellers becomes more and more difficult. Each and every landowner on the chosen route will hold a keystone necessary to complete the project. Therefore, landowners could have economic reasons to "hold out" and attempt to garner a profit, beyond the intrinsic worth of the actual property, namely a "monopoly rent."[352] At some point, a bi-lateral monopoly could result; there will only be one seller available and the land will only be suitable for inclusion in the project. It is not only transportation links, however, that are dependent on land assembly. Flexibility for governmental land acquisition is therefore necessary.

Practical realities can affect more projects than transportation. One example is a piece of land within the confines of a battlefield or other site of historic relevance.[353] The value the land in its current use as a farm, or in conversion to residences, might

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347. *Id.* at 2675.

348. *Id.* (quoting *Lucas*, 505 U.S. at 1025 n. 12) (internal quotation marks and bracket omitted).

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

350. *Lucas*, 505 U.S. at 1025 n. 12.

351. James E. Krier & Christopher Serkin, *Public Ruses*, 2004 Mich. St. L. Rev. 859, 865 (arguing governmental entities will structure activities to meet the definitions even if not otherwise required).

352. A "monopoly rent "is the difference in value between the price achievable selling the land for other uses (the "opportunity cost") and the special value to the government or transportation utility. Dana & Merrill, *supra* n. 11, at 29–30.

353. *See Gettysburg Elec. Ry. Co.*, 160 U.S. 668. This case, often cited for its broad definition of public purpose, involved an actual government use of the condemned land for a battlefield memorial. *Id.* at 669.

bring one price, similar to other lands of like kind. To the government, however, the particular piece of land is the only land that could meet its need. Therefore, if condemnation were not available, the landowner could demand monopoly rent.[354] The *Hathcock* Court insisted that a business and technology center was not a development that required a particular location and condemnation to avoid hold-outs, pointing to the number of centers that get built without condemnation.[355] There is, however, no way to actually count those centers that have not been constructed because of land assemblage difficulties.[356] As a practical matter, once assemblage begins, there are less and less ways to complete a project, and location becomes key even for office complexes, hotels, factories, and other undertakings that initially do not seem to command location sensitivity. Suggestions to avoid hold-outs and other strategic behavior by sellers without condemnation include secret negotiations and favored nation clauses.[357] Favored nation clauses would require the purchaser to pay an early seller the same price paid later sellers. These contracts could potentially spread the "windfall" from increased property values derived from the change of use, but secret negotiations and other tactics, such as the use of dummy purchasers, smack of deception and underhandedness that could engender a taste as bitter as condemnation in the mouths of sellers.

Moreover, the need to assemble land for purposeful redevelopment is most acute in cities, rather than in undeveloped rural areas.[358] Land ownership is subdivided into lots. Existing conflicting uses are more numerous. Individual owners each become increasingly important as the lay-out progresses. The argument over whether development of Parcel 3 in the Fort Trumbull project could have proceeded, leaving in place the plaintiffs' homes, is instructive. The expert for the landowners cited the contiguity of the homes and the possibility of reorienting the new buildings.[359] The City countered by noting the geological and environmental challenges already existing on the development tract.[360] It essentially alleged that adding the design constraint of accommodating the existing homes would be a proverbial straw breaking the camel's back.[361] Missing pieces at the center of a development site obviously would cause problems, but even at the edges it can be difficult to re-align the proposed activity. Because of these practical difficulties, state and local governments have relied on the

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354. *See* Dana & Merrill, *supra* n. 11, at 29–30.

355. *Hathcock*, 684 N.W.2d at 783–84.

356. *See* Fischel, *supra* n. 317, at 947. For an example of difficulties in assemblage, see Terry Pristin, *Square Feet; Eminent Domain Revisited: A Minnesota Case*, 155 N.Y. Times C9 (Oct. 5, 2005) (detailing hold-outs requiring condemnation to complete headquarters for the national chain, Best Buy, and the public benefits of the project).

357. *See Kelo*, 125 S. Ct. at 2668 n. 24 (acknowledging the debate over whether or not condemnation is needed for profitable projects or whether they could be forwarded by other means); Somin, *supra* n. 240, at 1026–27 (arguing hold-out problems can be avoided by using secret negotiations or using agents or through "favored nation" clauses in contracts).

358. That, of course, was Detroit's problem in *Poletown*: in order to build a plant on one floor to suit more modern production techniques, General Motors needed more land than its current location in Detroit. *See Poletown*, 304 N.W.2d at 466. It was therefore attracted to suburbs. *See id.* at 466–67; *see also Kelo*, 125 S. Ct. at 2668 n. 24 (noting the argument that older and smaller cities have the greatest need for condemnation).

359. *Kelo*, 843 A.2d at 553.

360. *Id.* at 554 n. 82.

361. *Id.* at 554–55.

availability of condemnation when planning and incurring financing costs.[362] Public expectations would need changes to be prospective.

D. Expectations and Compensation

Private expectations about property ownership also must factor into any discussion of eminent domain. One utilitarian definition of property defines it as the expectation of deriving an advantage from control over a thing; law, however, is crucial to the formation of such an expectation.[363] Nevertheless, these expectations, arising out of law, are always subject to the law of the land.[364] The law has always included the right of eminent domain, which allows the government to take private property, but under the Fifth Amendment, upon the payment of just compensation. This right has been a constant and thus, should always color a private party's expectations. The dimensions of what it is *reasonable* to expect as a public use of property, and hence the possibilities for eminent domain impacting on a particular citizen, have changed over time.[365] Without assuming the drafters of the Constitution intended to freeze reality as of the date of ratification of the Fifth Amendment, looking closer at the just compensation component may reconcile the two sets of expectations—the public and the private.

Some might question why there is ever a problem with eminent domain if compensation is required. A monetary payment in theory would make the private property owner "whole," as dollars are substituted for the real property. Wholeness, however, does not always result from the payment.[366] As Justice Ryan in his *Poletown* dissent succinctly put it:

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362. *See Hathcock*, 684 N.W.2d at 799 (Cavanagh, J., concurring in part and dissenting in part); *id.* at 800 (Kelly, J., concurring in part and dissenting in part).

363. Jeremy Bentham, *Theory of Legislation* 112–13 (R. Hildreth trans., 4th ed., Trübner & Co. 1882). The author states:

> The idea of property consists in an established expectation .... Now this expectation ... can only be the work of law. I cannot count upon the enjoyment of that which I regard as mine, except through the promise of the law which guarantees it to me.
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> . . .
>
> Property and law are born together, and die together.

Id. Felix Cohen phrases it thusly: Private property is that to which the following sign can be placed: "To the world: Keep off X unless you have my permission, which I may grant or withhold. Signed: Private citizen. Endorsed: The state." Felix S. Cohen, *Dialogue on Private Property*, 9 Rutgers L. Rev. 357, 374 (1954).

364. *See* William Blackstone, *Commentaries on the Laws of England* bk. 2, 393 (J.B. Lippincott Co. 1898). Blackstone comments:

> [T]he right of property; [is] that sole and despotic dominion ... over the external things of the world, in total exclusion of the right of any other individual in the universe.
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> . . .
>
> [It] consists in the free use, enjoyment, and disposal of all [a person's] acquisitions, without *any control or diminution, save only by the laws of the land.*

Id.; *id.* at bk. 1, 107 (emphasis added).

365. *See* Marla E. Mansfield, *"By The Dawn's Early Light:" The Administrative State Still Stands After the 2000 Supreme Court Term (Commerce Clause, Delegation, and Takings)*, 37 Tulsa L. Rev. 205, pt. V(C)(2) (2001) (arguing that expectations of regulation change over time and influence regulatory takings calculus).

366. Frank Michelman labeled uncompensated costs "demoralization costs." Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 Harv. L. Rev. 1165, 1214 (1967). He included not only the personal losses, but the investments landowners forego

> Eminent domain is a far more intrusive power [than taxation]. Like taxation, it can entail financial loss, although "just compensation" is required. But more important, it can entail, as it did in this case, intangible losses, such as severance or personal attachments to one's domicile and neighborhood and the destruction of an organic community of a most unique and irreplaceable character.[367]

This leads to people not holding-out for greater economic return from purchasers,[368] but desiring to "holdin"[369] on their property.

No one can seriously doubt that real property can have a personal side that an existing use strengthens. Some of the plaintiffs in *Kelo* were poster children for sympathetic treatment. Susette Kelo owned her house since 1997 and had made numerous improvements.[370] Mr. and Mrs. Dery had even more compelling attachments: Wilhelmina Dery was born in their house in 1918, and her husband Charles lived there for sixty years.[371] One needs little imagination to envision the family memories set in the house. While the Derys provided the most drama, the other plaintiffs either resided on the property or actively managed rental property.[372] It is always more disruptive to interfere with existing uses than those that are simply planned.[373] The traditional eminent domain standard for compensation does not address the loss of place and personality.[374]

Generally, just compensation has been interpreted as requiring payment of fair market value. The standard gauges fair market value for the highest and best use without reference to the governmental project.[375] In other words, the owner of the condemned

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because of the possibility of condemnation. *Id.* at 1237, 1237 n. 122. *See also* Nicole Stelle Garnett, *The Public-Use Question as a Takings Problem*, 71 Geo. Wash. L. Rev. 934, pt. I(A) (2003) (describing the shortfall between fair market value and an owner's full loss). Nevertheless, some elements of the condemned owner's costs are sometimes paid because of statutory requirements. *See* Fischel, *supra* n. 317, at 950–51 (detailing the $15,000 relocation payments, mortgage rate and property tax assistance, and move-out bonus offered to residents of the Poletown area).

367. *Poletown*, 304 N.W.2d at 481 (Ryan, J., dissenting). This increment of value is the personal valuation of the property, which can be "confiscated." *Coniston Corp v. Village of Hoffman Estates*, 844 F.2d 461, 464 (7th Cir. 1988) (recognizing that eminent domain "in effect confiscates the additional (call it 'personal') value that [many landowners] obtain from the property"). *See* Lee Anne Fennell, *Taking Eminent Domain Apart*, 2004 Mich. St. L. Rev. 957, 958–59 (identifying three uncompensated components: (1) the amount the landowner's valuation of the property exceeds fair market value, (2) the loss of the possibility of reaping a surplus above this subjective valuation in trade, and (3) the loss of autonomy in deciding when or whether to sell).

368. See Justice O'Connor's description of the petitioners in *Kelo*. 125 S. Ct. at 2672 (O'Connor, J., dissenting) (depicting petitioners as not "hold-outs" seeking more money, but as objectors on principle to the nature of the condemnation).

369. Fennell, *supra* n. 367, at 979 (quoting Gideon Parchomovsky & Peter Siegelman, *Selling Mayberry: Communities and Individuals in Law and Economics*, 92 Cal. L. Rev. 75, 128–29 (2004)).

370. *Kelo*, 125 S. Ct. at 2660. The trial court noted that she loved the view from her property and its proximity to water. *Kelo*, 843 A.2d at 511.

371. *Kelo*, 125 S. Ct. at 2660. The house had been in her family for one hundred years. *Id.* at 2671 (O'Connor, J., dissenting).

372. *Id.* at 2660. The owner or a family member resided on a total of ten parcels, and five were investment properties. *Id.*

373. *See* Mansfield, *supra* n. 1, at 465–69 (arguing for a "strong expectation test" to determine valid existing rights under the Surface Mining Reclamation Act); Rose, *supra* n. 1, at 275–77 (discussing grandfathering existing uses in environmental law generally).

374. *See generally* Margaret Jane Radin, *Property and Personhood*, 34 Stan. L. Rev. 957 (1982).

375. *See U.S. v. Causby*, 328 U.S. 256, 261 (1946); *U.S. v. Miller*, 317 U.S. 369, 374 (1943).

property is not to receive the increment of gain connected with the change of use.[376] Fair market value, however, is based on the price that a willing buyer, who is not compelled to buy, would pay a willing seller, who is not compelled to sell. Condemnation is the opposite of this paradigm. Not only is the seller not willing to sell by definition, the governmental agency, to a certain extent, is not a willing buyer, that is, in regard to a particular tract within a larger project area. Once a plan is decided upon and the acquisitions have begun, the agency is relatively locked in. The Fifth Amendment, however, does not reference fair market value.

Just compensation could arguably be tied to a different standard or formula.[377] Moreover, it need not be one fixed value or method in all circumstances. For example, rates for utilities, in order to pass constitutional muster, must be at "just and reasonable rates."[378] Because a regulated utility is not able to collect revenue without a rate, if the rate is set too low, a confiscatory taking of the utility's capital will result.[379] However, there is no one method or "perfect" rate that is required; there is a "range of reasonableness"[380] for a rate that will satisfy the constitutional requirement.[381] Similarly, when there is greater interference with expectations of what the line is between eminent domain powers and private rights, compensation can be raised. Unlike Justice Thomas, most people do recognize that the complexity of life and the need for governmental intervention is not what it was at the end of the eighteenth century.[382]

The eighteenth century, however, could provide a starting point to gauge people's expectations. At that date, government could clearly condemn land when the government was directly going to use the land.[383] Therefore, any reasonable expectation about property rights acknowledged the private right was subject to the sovereign's right of eminent domain for direct governmental or public use.[384] No adjustment upward

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376. *See Causby*, 328 U.S. 256; *Miller*, 317 U.S. 369. One proposal to remedy the economic development dilemma is to value the taken land at the higher value use when "naked" transfers to private parties are involved. Krier & Serkin, *supra* n. 351, at 873.

377. In *Kelo*, Justice Stevens noted the question of compensation was "important" but the case did not raise the issue. *Kelo*, 125 S. Ct. at 2668 n. 21 (responding to amicus briefs arguing for increased compensation to homeowners for subjective losses).

378. *Fed. Power Commn. v. Hope Nat. Gas Co.*, 320 U.S. 591, 595 (1944).

379. *See Duquesne Light Co. v. Barasch*, 488 U.S. 299 (1989).

380. *Id.* at 312.

381. *Id.*; *Hope Natural Gas Co.*, 320 U.S. at 602 (averring "not theory but the impact of the rate order which counts"). Rates are generally geared to a reasonable return on investment, not fair market value, but the analogy is possible because the constitutional prohibition against uncompensated takings provides the ultimate standard to judge the appropriateness of a rate.

382. *But see* Eric R. Claeys, *Public-Use Limitations and Natural Property Rights*, 2004 Mich. St. L. Rev. 877, 881 (arguing that it was policy that led to the "evolving, elastic, or deferential" interpretations of public use, and that policy could be reversed).

383. Regulation alone could not rise to an exercise of eminent domain. In colonial times, land was regulated, often requiring specific uses of property owned in fee; the law regulated both what could or could not take place on property. John F. Hart, *Colonial Land Use Law and Its Significance for Modern Takings Doctrine*, 109 Harv. L. Rev. 1252, 1281 (1996); *see also* Richard J. Lazarus, *Counting Votes and Discounting Holdings in the Supreme Court's Taking Cases*, 38 Wm. & Mary L. Rev. 1099, 1122 (1997). Interestingly, when the subject is regulatory takings, the conservative Justices cite theory and practice at the time of constitutional adoption as "entirely irrelevant" and the more liberal Justices chide this failure to conform current holdings to such understanding. *Compare Lucas*, 505 U.S. at 1028 n. 15 (Scalia, J.) *with id.* at 1055–60 (Blackmun, J., dissenting).

384. *See Kohl v. U.S.*, 91 U.S. 367, 371–75 (1875) (finding eminent domain to be inherent in the concept of

from fair market value would be needed.[385] Similarly, a reasonable person would most likely expect that the sovereign could condemn on behalf of, or delegate condemnation power to, hospitals, railroads, pipelines and other utilities, or businesses with a duty to provide service to the public.[386] This extension of the "strict" use by the public test has been existent long enough to become part of common understanding.[387] In fact, Justice O'Connor, Justice Thomas, and the *Hathcock* Court would include such condemnations within the rubric of "public use."[388] It is when condemnations move beyond these safe harbors that expectations of private property owners become of greater concern.[389]

The next subset of common condemnations involves slum clearance or blight removal. In theory, these condemnations are targeted at ending obstacles to the health and safety of the public.[390] If ending harmful activities was the sole aim, then the government could exercise its police power, simply enjoin the nuisance-creating activity, and pay no compensation at all.[391] However, if the governmental agency transfers title from the prior owner, some compensation must be paid.[392] The alignment of slum clearance and nuisance abatement, however, would temper a private party's expectation that the current use of the property could continue without some interference from the government or neighbors; private property rights never encompassed the right to maintain a nuisance.[393] Loss of title, nevertheless, might be unexpected. Therefore, even for lands truly blighted or containing slum conditions, some adjustment upward from pure fair market value might be appropriate to correspond to property owner expectations. Not all properties condemned for slum clearance, however, fall into this nuisance-causing category.

When a property is condemned under the rubric of slum clearance or blight removal, the property itself might not be in that condition. The department store in *Berman* is illustrative. Although inclusion in the redevelopment project may be necessary and condemnation available, at this point the individual property owner may have made investments to keep the property from falling into disrepair. If these were not

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sovereignty); *see also Gettysburg Elec. Ry. Co.*, 160 U.S. at 681 (holding power of condemnation need not be expressly granted to Congress but is implied from other powers granted).

385. Nevertheless, condemning authorities often offer more than fair market value in negotiations in order to avoid the costs of having to actually condemn the property. Fischel, *supra* n. 317, at 934 (listing costs of attorneys, appraisers, hearing appeals, and trials).

386. The federal government has authorized condemnation by interstate pipelines in 1938. 15 U.S.C. § 717f(h) (2000). Only recently has Congress authorized the same on behalf of interstate electric transmission lines. 16 U.S.C. § 824p(e) (West Supp. 2005) (as amended by the *Electricity Modernization Act of 2005*, Pub. L. No. 109-58, 119 Stat. 5904 (2005)).

387. *Compare Hathcock*, 684 N.W.2d at 783 (understanding of a ratifier sophisticated in the law at the time of ratification governs meaning of "public use" in the Michigan Constitution) *with id.* at 788–89 (Weaver, J., dissenting) (understanding of an ordinary ratifier would govern interpretation).

388. *Kelo*, 125 S. Ct. at 2673 (O'Connor, J., dissenting); *id.* at 2681–82 (Thomas, J., dissenting); *Hathcock*, 684 N.W.2d at 781–82 (allowing condemnation for extreme public necessity, related to "instrumentalities of commerce").

389. Krier & Serkin, *supra* n. 351, at 861 (noting a continuum between a public use that is literally open to all, and a naked transfer, in which the public is excluded and there is no indirect public benefit).

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

391. *See Lucas*, 505 U.S. at 1029 (holding nuisance law to be a pre-existing condition on private title).

392. This would be a physical appropriation. *See Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435–36 (1982).

393. *See Lucas*, 505 U.S. at 1031–32.

made strategically in order to avoid condemnation or to increase condemnation return, then the investments would most likely have been made with the expectation of continuing to own the property. Because the property itself would not be in a nuisance-like condition, it would be reasonable to some extent to expect that private ownership would not be interrupted. Therefore, fair market value alone might not be just.

Another situation that might require more than fair market value would be economic redevelopment condemnations. As land, especially in developed areas, becomes harder and harder to assemble in large tracts, community revitalization requires the possibility of condemnation to advance the public good. Nevertheless, when other private parties will also directly benefit from the land acquisition, and the public benefit arises from the improved economic or aesthetic climate attendant with the private gain, the original owner of the property might be surprised that the government eminent domain power includes this redistribution. At this end of the continuum, reasonable expectations about property rights might require an addition to fair market value in compensation.

Additional increments of compensation are tied to the strength of reasonable expectations about the breadth of the condemnation power; these expectations may change over time to reflect common understandings about the interrelationship of public and private expectations about property.[394] This adjustment of compensation imports elements of the regulatory taking calculus from the *ad hoc* appraisal of the so-called *Penn Central* factors, namely, the nature of the governmental purpose, the degree of impact on the regulated, and the interference with the claimant's reasonable, investment-backed expectations.[395] The mechanics of how much additional compensation is needed can be a judicial or legislative decision; what controls is that the compensation must be "just," and to be just requires consideration of the currently uncompensated costs when condemnations veer from past expectations. When condemnations remained tied to highways, post offices, and provision of services to the public, it was more likely that each member of society had some approximation of reciprocity from the taking, considering other takings of similar kind and the provision of services.[396] A formulaic adjustment to fair market value would be more realistic than determining the subjective value of the property to the current owner.[397] Objective

394. Mansfield, *supra* n. 365, at pt. V(C)(2).

395. *See Penn C. Transp. Co.*, 438 U.S. 104. Another aspect of the factors, namely the nature of the government interest, has been examined in the condemnation and compensation setting. When the need for condemnation increases because the markets are "thin" (more monopolistic), the government's purpose becomes stronger, and the need for extra condemnations less. Fennell, *supra* n. 367, at 990–91 (noting that thin markets also could increase subjective attachment to property).

396. Of course, if a regulation provides "reciprocity of advantage" and does not result in physical appropriation or title change, the regulation will not be a taking. *See* Claeys, *supra* n. 382, at 923–926 (discussing Mill Acts with requirements to compensate at a percentage above damages as reciprocity cases); Krier & Serkin, *supra* n. 351, at 866 (arguing there is less of a compensation short fall in "classic public use" cases because benefits clearly accrue to public at large, including the condemnee, who also benefits from condemnations of other people's land); Mansfield, *supra* n. 28, at 279; Mansfield, *supra* n. 1, at 445.

397. *See U.S. v. 564.54 Acres of Land*, 441 U.S. 506 (1979). The Supreme Court recognized that it adopted a relatively objective fair market value rule "[b]ecause of serious practical difficulties in assessing the worth an individual places on particular property at a given time." *Id.* at 511.

reasonable property expectations about the likelihood of condemnation for the public purpose forwarded would determine whether a particular condemnee would receive additional compensation pursuant to the formula.[398]

Compensation beyond fair market value in economic development and slum redevelopment condemnations also could alleviate one major criticism of past exercises of the condemnation power, namely, the disparate impact such projects have had on the poor and minority population.[399] Often, the development replacing the condemned property does not serve the direct needs of the displaced. For example, removing existing substandard housing did not result in a substitution of affordable up-to-standard housing in the District of Columbia.[400] Similarly, the plaintiffs in *Kelo* would be unlikely to afford substitute housing with a comparable water view; residences in the economic development area were to be high-end.[401] Moreover, often in the past absolutely no development took place and condemnation lead to empty lots.

Increased compensation might lead to greater scrutiny by the condemning authorities before undertaking a course of action. Typically, voters, and hence their representatives, will want to get their "money's worth" for a project. Adding to the cost of projects expands the basic "fiscal illusion"[402] justification for compensation, which argues that internalizing the costs of a project by requiring compensation will provide a cautionary brake on governmental activity.[403] Because the traditional fair market value standard of compensation leaves many of the costs of a condemnation uncompensated, these costs are externalities to the decision-maker. A truer cost-benefit analysis would reveal whether alternative uses for taxpayer moneys might be more appropriate.[404]

A sliding scale of compensation, from fair market value to some multiplier thereof, can supplement the other restraints on takings for economic development implicit in the majority and concurring opinions in *Kelo*. The majority emphasized it was approving a "'carefully considered'"[405] development plan, which was not intended "'to benefit a

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398. The determination of "just compensation" is a judicial function. Dana & Merrill, *supra* n. 11, at 5. Therefore, courts would still need to determine fair market value and the propriety of use of a multiplier even if the legislature sets varying degrees of multipliers for use in different situations.

399. In the General Motors factory scenario of *Poletown*, however, those who did not leave were primarily elderly. Fischel, *supra* n. 317, at 950–52. The hold-out population differed from the money-accepting population based more on age, which could reflect flexibility to starting over. *Id.*

400. *See Edwards v. Habib*, 397 F.2d 687, 689 n. 3 (D.C. Cir. 1968) (Danaher, J., dissenting) (noting the displacement of prior tenants from the area razed in *Berman*); *see also* Somin, *supra* n. 240, at 1037 (arguing that in the *Berman*-approved redevelopment, only 300 of the 5,900 new homes built on site were affordable to prior residents of area). A separate problem is how to take into account the interests of tenants, especially low-income residential renters. *Id.* at 1036–39.

401. *Kelo*, 843 A.2d at 537–38. Somin, *supra* n. 240, at 1035–36 (detailing that blight removal has not served residents of the blighted area; by 1963, over 600,000 lost homes and most ended up living in worse conditions than before).

402. Dana & Merrill, *supra* n. 11, at 42 (internal quotation marks omitted).

403. *See id.* at 41–46; Michael A. Heller & James E. Krier, *Deterrence and Distribution in the Law of Takings*, 112 Harv. L. Rev. 997, 999 (1999).

404. The availability of federal money can skew decision making; if the federal funds are earmarked and not available for alternative uses, the local decisionmakers will not truly be seeking the greatest return for the moneys. Fischel, *supra* n. 317, at 943–44 (arguing federal money for the General Motors project influenced local decisionmaking and the project might not have proceeded without the money).

405. *Kelo*, 125 S. Ct. at 2661 (quoting *Kelo*, 843 A.2d at 536).

particular class of identifiable individuals.'"[406] Justice Kennedy stressed that even under a rational basis test, some takings would not pass muster:

> A court applying rational-basis review under the Public Use Clause should strike down a taking that, by a clear showing, is intended to favor a particular private party, with only incidental or pretextual public benefits, just as a court applying rational-basis review under the Equal Protection Clause must strike down a government classification that is clearly intended to injure a particular class of private parties, with only incidental or pretextual public justifications.[407]

Both process and substantive restraint governs condemnation. The importance of requiring planning is that the proposal will get public vetting. Weaknesses will be exposed.[408] The substantive concern with neither harming nor benefiting particular individuals as a primary goal reflects a similar concern with zoning. General zoning activities are usually constitutional, but spot zoning is suspect.[409] The requirement to have the public benefit be more than pretextual for certain condemnations also is reminiscent of Justice Stevens's test for when a regulatory taking exists. He would uphold laws of general applicability and only invalidate laws that target particular properties.[410]

Even without expressly adopting this regulatory takings test, *Kelo* provides that "aberrations"[411] can be discovered and condemnations invalidated.[412] The federal courts have held condemnations unconstitutional for failure to meet the public use standard.[413] Meaningful *ad hoc* judicial review together with awarding more than fair market value in certain circumstances should curb both the tyranny of the majority and that of the minority.

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406. *Id.* at 2661–62 (quoting *Midkiff*, 467 U.S. at 245).

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

408. The field will not necessarily be level between supporters and detractors of any project involving condemnation. Relative political clout, wealth, and the dispersal of benefits as opposed to the concentration of costs often render those opposing condemnation at a disadvantage. Publicity, however, can derail starkly unfair activities. *See* Ely, *supra* n. 247, at 857 (discussing the perception that eminent domain has been used "to benefit corporations and developers at the expense of homeowners and small businesses" (footnote omitted)).

409. *Compare Village of Euclid v. Ambler Realty Co.*, 272 U.S. 36 (1926) (upholding generalized zoning) *with Chrismon v. Guilford County*, 370 S.E.2d 579 (N.C. 1988) (discussing differing state approaches to the practice of re-zoning in a manner that singles out a particular property from the surrounding uses; "spot zoning" deemed a term of art that in some jurisdictions leads to automatic invalidity).

410. *See Palazzolo v. R.I.*, 533 U.S. 606, 640 n. 3 (2001) (Stevens, J., concurring in part and dissenting in part); *Lucas*, 505 U.S. at 1071–73 (Stevens, J., dissenting). Another commentator notes that the *Lingle* case, with its concentration on "'how any regulatory burden is distributed among property owners,'" also implicates the general versus particular analysis. Echeverria, *supra* n. 1, at 10583 (quoting *Lingle*, 125 S. Ct. at 2076) (emphasis omitted).

411. 125 S. Ct. at 2667 n. 17 (Stevens, J., dissenting).

412. *See id.* at 2666–67.

413. *See Daniels v. Area Plan Commn. of Allen County*, 306 F.3d 445 (7th Cir. 2002); *Cottonwood Christian Ctr. v. Cypress Redevelopment Agency*, 218 F. Supp. 2d 1203 (C.D. Cal. 2002); *99 Cents Only Stores v. Lancaster Redevelopment Agency*, 237 F. Supp. 2d 1123 (C.D. Cal. 2001).

III. THE *LINGLE* AND *SAN REMO* CASES

A. *The "Substantially Advances" Test for Regulatory Takings*

The second of the three cases decided this Term did not deal with an express exercise of eminent domain. Rather, *Lingle* dealt with when a regulation on land use could interfere with private property rights to such an extent that compensation would be necessary.[414] The questioned regulation had been passed by the State of Hawaii.[415] It limited the amount oil companies could charge as rent to independent dealers who leased stations from the companies.[416] The avowed purpose was to prevent concentration in the retail gasoline market, and thereby protect consumers from high gasoline prices.[417] Unlike the typical regulatory takings case, the attack on the statute did not allege that the law denied the private party a return on its property or otherwise interfered with property use. Chevron U.S.A., Inc. ("Chevron") assaulted the statute employing a different test, one that had become "ensconced in . . . Fifth Amendment jurisprudence,"[418] perhaps by accident.

Chevron only alleged that the statute would not work, and therefore failed to "substantially advance legitimate [state] interest."[419] Chevron's equation of such a failure with a "taking" reflected a test found in *Agins v. City of Tiburon*,[420] where the Supreme Court noted, in the disjunctive, that a regulation could be a taking if it "does not substantially advance legitimate state interests, *or* denies an owner economically viable use of his land."[421] The Ninth Circuit, twice, agreed with Chevron that a taking could be proven by meeting either of the two tests.[422] It eventually agreed that the statute would not meet its stated purpose, essentially finding that Chevron's expert economist was more persuasive than that of the State.[423] In a unanimous decision written by Justice O'Connor, the Supreme Court reversed.

The reversal was not based on the factual conclusion, but was because the Supreme Court disavowed the premise that a taking could be proven based on a facial examination of the regulation's ability to meet its goals.[424] The unanimous decision acknowledged

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414. *See* 125 S. Ct. at 2078–79. Regulatory takings emerged from a statement that regulation can impose on property rights without compensation unless it "goes too far." *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922) [hereinafter *Penn. Coal*]. As Justice O'Connor acknowledged, early constitutional theorists did not include regulation as a possible trigger for Fifth Amendment compensation. *Lingle*, 125 S. Ct. at 2081.

415. *Id.* at 2078.

416. *Id.* (explaining the statute would limit rent to 15% of gross profits from gasoline sales and 15% of gross sales of other products).

417. *Id.* at 2079.

418. *Id.* at 2078.

419. *Lingle*, 125 S. Ct. at 2079.

420. 447 U.S. 255 (1980).

421. *Id.* at 260 (citation omitted, emphasis added).

422. The case first traveled to the Ninth Circuit *sub nom Chevron USA, Inc. v. Cayetano*, 224 F.3d 1030 (9th Cir. 2000); after remand, it was decided as *sub nom Chevron USA, Inc. v. Bronster*, 363 F.3d 846 (9th Cir. 2004), *rev'd sub nom. Lingle*, 125 S. Ct. 2074.

423. *See Chevron U.S.A., Inc. v. Cayetano*, 198 F. Supp. 2d 1182 (D. Haw. 2002), *aff'd sub nom. Chevron USA, Inc.*, 363 F.3d at 855–58.

424. *Lingle*, 125 S. Ct. at 2078; *see also id.* at 2085 (decrying courts being put in the fact-finding role of ascertaining "the need for, and likely effectiveness of, regulatory actions").

that the *Agins* disjunctive formulation was misfortunate; the Court, in dealing with a zoning case for the first time in many years, had referenced language from cases based on substantive due process.[425] No Supreme Court case had used the "failure to substantially advance" test as an independent test to determine whether a regulation constituted an uncompensated taking.[426] Recapping its takings jurisprudence, the Court reaffirmed that there are only three ways to show that a regulation is a taking of private property: (1) if it results in a physical appropriation,[427] (2) if it results in a complete denial of economical use or value of the property and the restriction was not inherent in the background principles of law,[428] or (3) if, after an *ad hoc* appraisal of *Penn Central* factors the burden on the regulated is too great.[429] Each of these tests requires examining the impact of the regulation on a particular piece of property. In the *Lingle* litigation, Chevron had never alleged the regulation would deprive it of any economic return on its property; the company could receive compensation from the dealers through charges for products, and the rental limitation did not lessen its return.[430] It had not, therefore, made a takings allegation that could survive a summary judgment.[431]

Justice Kennedy provided a short concurrence. Although he agreed that the failure to substantially advance an argument could not support a takings allegation, he took care to reserve the possibility that there could be situations where a regulation is so arbitrary or irrational that it violates due process directly.[432] Because Chevron had dismissed its due process allegation, the present situation could not be reviewed even under a "'permissive standard.'"[433]

As with *Kelo*, the Supreme Court's decision was not remarkable.[434] Only in one situation, when a government requires a dedication of land as a condition of developmental approval, had the Supreme Court examined the efficacy of regulation.[435] If the Supreme Court upheld the Ninth Circuit, it would have invited a heightened scrutiny of economic regulations that impact on land in a manner reminiscent of the *Lochner v. New York*[436] era, under the guise of regulatory analysis.[437] Additionally,

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425. *Id.* at 2083.

426. *Id.* at 2086.

427. *Id.* at 2081 (citing *Loretto*, 458 U.S. at 436).

428. *Lingle*, 125 S. Ct. at 2081 (citing *Lucas*, 505 U.S. 1003). In *Lingle*, the Supreme Court continues to use both denial of "all economical use" and "value" as the trigger for a *Lucas* "categorical" taking. *See* Mansfield, *supra* n. 28, at pt. III(B). Which language is used could be important.

429. *Lingle*, 125 S. Ct. at 2081-82 (citing *Penn C. Transp. Co.*, 438 U.S. 104).

430. *Id.* at 2084–85.

431. *Id* at 2087.

432. *Id.* (Kennedy, J., concurring).

433. *Id.* (quoting *Eastern Enterprises*, 524 U.S. at 550 (Kennedy, J., concurring and dissenting in part)).

434. If, however, it had upheld the Ninth Circuit, *Lingle* would have been noteworthy. *See* Echeverria, *supra* n. 1, at 10577 (averring that *Lingle* was the most important case of the three decided this Term).

435. *See Dolan v. City of Tigard*, 512 U.S. 374, 375 (1994) (requiring a "rough proportionality" between the remedy and the harm that would be created by the development (internal quotation marks omitted)); *Nollan*, 483 U.S. 825 (requiring a nexus between the harm to be remedied and the required dedication); *see also Lingle*, 125 S. Ct. at 2086–87 (discussing these cases as narrowly applicable to exactions, in which the government receives an interest in land that would be takings automatically if not for the fact that the private party gains a permit to develop).

436. 198 U.S. 45 (1905) (invalidating regulation prohibiting employers from employing bakers for more than sixty hours a week after an examination of whether the regulation was an appropriate means to a legitimate end).

affirming would have totally removed regulatory takings jurisprudence from its mooring, namely that some regulations are akin to physical appropriations in their disparate impact on an individual landowner, making them shoulder costs that should more fairly be spread.[438]

B. State Adjudication of Federal Claims

At issue in *San Remo* was the procedure for gaining redress for a state regulatory action that arguably "took" private property in violation of the federal Constitution.[439] Normally, entry to federal court when there is an allegation that a federal constitutional right has been violated is through a section 1983 claim.[440] To violate the constitutional prohibition against a taking, however, a claimant must show both that a taking has occurred, namely a sufficiently egregious imposition on private property rights under existing tests,[441] and that there was no compensation offered.[442] The Supreme Court, therefore, has required litigants to assure that the state agency has made a final determination of how it would treat the subject property and that the litigant has exhausted state procedures for gaining compensation. These procedures can result in state courts adjudicating federal claims. This happened in *San Remo*, and the claimants sought an exception to the federal full faith and credit statute[443] so as to allow a claimant to re-litigate whether a violation of the federal Constitution has occurred after a state court has ruled in the matter.[444]

The claimants owned the San Remo Hotel in San Francisco.[445] The City had imposed conditions on residential hotels that desired to convert to tourism use.[446] Claimants argued the provisions imposed, including a $567,000 fee, were an unconstitutional taking of their property, especially in light of an inaccurate report a

437. As Justice O'Connor phrased it, *id.* at 2085 (emphasis in original):

> [T]he "substantially advances" formula is not only *doctrinally* untenable as a takings test—its application as such would also present serious practical difficulties. The *Agins* formula can be read to demand heightened means-ends review of virtually any regulation of private property. If so interpreted, it would require courts to scrutinize the efficacy of a vast array of state and federal regulations—a task for which courts are not well suited. Moreover, it would empower—and might often require—courts to substitute their predictive judgments for those of elected legislatures and expert agencies.

438. *See Penn. Coal*, 260 U.S. at 415 ("The general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."). Justice O'Connor again cited one of her touchstone cases for this point. *See Lingle*, 125 S. Ct. at 2080 (commenting that the Fifth Amendment is designed to protect individual property owners from bearing public burdens "which, in all fairness and justice, should be borne by the public as a whole" (quoting *Armstrong v. U.S.*, 364 U.S. 40, 49 (1960))).

439. *See* 125 S. Ct. at 2495.

440. 42 U.S.C. § 1983 (2000) (providing a cause of action for deprivation of constitutional rights under color of state law).

441. *See Lingle*, 125 S. Ct. at 2081–82 (listing current takings tests); *see supra* nn. 427–429 and accompanying text.

442. *See generally* Dana & Merrill, *supra* n. 11, at 254–65.

443. 28 U.S.C. § 1738. This statute includes the doctrines of *res judicata* (claims preclusion) and collateral estoppel (issue preclusion). *See San Remo*, 125 S. Ct. at 2500.

444. *San Remo*, 125 S. Ct. at 2495.

445. *Id.*

446. *Id.*

decade earlier about the number of rooms in the hotel devoted to residential use.[447] The owners were directed from federal court to state court under *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*.[448] *Williamson County* provided that a takings claim challenging the application of land-use regulations is not ripe unless "the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue."[449] Litigation in state court is required first to determine issues of state law as applied to a particular property and to "seek compensation though the procedures the State has provided for doing so."[450] The problem, from the viewpoint of the hotel owners, was that the California court, while ostensibly deciding whether there was a taking under the California Constitution, also analyzed the case under federal precedents.[451] After the state court decided that neither Constitution was violated, the owners attempted to return to federal court, encountering the argument that issue preclusion prohibited re-litigating the question of a violation of the federal Constitution.[452]

The Ninth Circuit determined that the full faith and credit statute did require the federal courts to refrain from considering the federal constitutional issue again.[453] On certiorari, the Supreme Court stated the issue as "whether 'a Fifth Amendment Takings claim [is] barred by issue preclusion based on a judgment denying compensation solely under state law, which was rendered in a state court proceeding that was required to ripen the federal Takings claim?'"[454] The Court refused to except from the statute situations where the plaintiff was perhaps forced into state court.[455] In fact, the Court quibbled as to whether the owners were "forced" to litigate all the issues litigated in state court.[456] In the opinion Justice Stevens drafted,[457] the majority noted that there was no right to have federal rights determined in a federal court; state courts are capable of interpreting the federal Constitution.[458] The route into the federal system would be through a petition for certiorari to the Supreme Court.[459]

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447. *Id.* at 2496.

448. 473 U.S. 172 (1985).

449. *Id.* at 186.

450. *Id.* at 194 (footnote omitted).

451. *San Remo*, 125 S. Ct. at 2495.

452. *Id.* at 2499 (noting the plaintiffs did not file a writ of certiorari from the California state court denial of their claims; they returned to federal court).

453. *San Remo Hotel L.P. v. S.F. City & County*, 364 F.3d 1088 (9th Cir. 2004). The second circuit had ruled the opposite. *See Santini v. Conn. Hazardous Waste Mgt. Serv.*, 342 F.3d 118 (2nd Cir. 2003).

454. *San Remo*, 125 S. Ct. at 2495 n. 1 (quoting Pet. for Cert., at i, *San Remo*, 125 S. Ct. 2491 (available at 2004 WL 2031862 (Sept. 7, 2004))) (bracket in original).

455. *Id.* at 2495.

456. *Id.* at 2497–98 (noting that petitioners framed their state court proceeding to include more issues than those on which the federal courts abstained); *see also id.* at 2503 (noting that petitioners included more than a writ of administrative mandamus in state court).

457. Justices Scalia, Souter, Ginsburg, and Breyer joined in the opinion.

458. *Id.* at 2504, 2507.

459. *San Remo*, 125 S. Ct. at 2506.

The Court's holding on the facts was not surprising. The Court was not creating an implied exception to the full faith and credit statute.[460] What might be of import in the future lay in the concurring opinion. Four Justices would re-examine in an "appropriate case"[461] the *Williamson County* requirement of prior litigation of the compensation issue in state court.[462] These four Justices have generally been more sensitive to claims of private property owners.[463] Therefore, the import of *San Remo* may be in signaling a future Supreme Court decision that will make it easier to seek protection of private property in federal courts. Chief Justice Rehnquist and Justice O'Connor, however, were two of the Justices and their replacements on the Court will have to weigh in.

IV. CONCLUSION: JUSTICE KENNEDY AND MEANINGFUL *AD HOC* ADJUDICATION

Taken as a group, *Kelo*, *Lingle*, and *San Remo* do not rewrite takings law. On the substantive side, *Kelo* refused to adopt a per se rule that would forbid condemnations for economic development. In *Lingle*, the Court spurned judicial second-guessing of whether a law substantially advances a legitimate government purpose as a separate takings test, independent of ascertaining the impact on a particular landowner. Rejection of this ground for facial challenge of a state law also removes an avenue for litigation of takings directly in federal court.[464] This complements the holding of *San Remo*, which expressly retained procedural requirements that channel takings litigation into state courts. State courts arguably can apply *ad hoc*, fact-sensitive appraisals of takings claims under the federal Constitution and, if they desire, grant additional protection under state takings clauses. Relying on fact-sensitive review allows consideration of both public and private expectations. It does not, however, mean an abdication of judicial review. Justice Kennedy twice reminded his colleagues of the availability of some substantive due process requirements for legislation.

Justice Kennedy concurred in both *Kelo* and *Lingle*. In *Kelo*, he first applied a rational basis test to ascertain that the condemnation was appropriately one for public use, noting that the *Berman-Midkiff* standard resembled that used to review economic regulation under the Due Process and Equal Protection Clauses.[465] When there is a "plausible accusation of impermissible favoritism"[466] involved with a condemnation for

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460. The Court emphasized that the exhaustion requirement did not apply to facial challenges to state regulatory actions, just to as applied actions. *Id.* at 2506.

461. *Id.* at 2510 (Rehnquist, C.J., concurring).

462. *Id.* Justices O'Connor, Kennedy, and Thomas joined in Rehnquist's concurrence. *Id.* at 2507.

463. They are the "familiar" grouping on takings issues. *See* Mansfield, *supra* n. 28, at 264 n. 7 (grouping Chief Justice Rehnquist and Justices Scalia, Thomas, and O'Connor together in takings analyses). The four are also often insistent on states' rights. It was the majority opinion, however, that appeared more solicitous of state courts and their sensitivity to land use matters as "local concerns." *San Remo*, 125 S. Ct. at 2507 ("Indeed, state courts undoubtedly have more experience than federal courts do in resolving the complex factual, technical, and legal questions related to zoning and land-use regulations."). The concurrence rejected this as an affirmative argument for a state-litigation requirement, noting that plaintiffs could directly challenge such laws in federal court based on the First Amendment. *Id.* at 2509 (Rehnquist, C.J., concurring). *But see* Mansfield, *supra* n. 365, at 219, 244–45 (discussing Justice Rehnquist's declaration that land use is a traditional state concern).

464. *See San Remo*, 125 S. Ct. at 2506 n. 25.

465. *Kelo*, 125 S. Ct. at 2669 (Kennedy, J., concurring).

466. *Id.*

economic development, Justice Kennedy charged a court with the task of conducting a fair inquiry into the allegations under this standard.[467] He also acknowledged that some situations might require a stricter inquiry. For this proposition, he cited his concurrence in the judgment in *Eastern Enterprises v. Apfel*.[468] He cited the same opinion for this premise in *Lingle*: "[T]oday's decision does not foreclose the possibility that a regulation might be so arbitrary or irrational as to violate due process."[469] Justice Kennedy added that a regulation's failure to meet its goals could enter such a determination.[470] Meaningful review both for applications of eminent domain and regulations that impact on private property might exist outside of takings law.

Returning from *Lingle* and *Kelo* to *Eastern Enterprises* is instructive. In the earlier case, no specific property was allegedly burdened. The statute in question was a mechanism for funding health care benefits for retired coal miners and would assign a company a pecuniary amount.[471] In an action seeking injunctive relief, the plurality declared the statute to be a taking of coal companies' property under the three-part *Penn Central* balancing test; the legislation was described as "impos[ing] severe retroactive liability on a limited class of parties that could not have anticipated the liability, and the extent of that liability is substantially disproportionate to the parties' experience."[472] The statute was only invalidated, however, because Justice Kennedy concurred in the judgment.[473] He did not concur in the rationale.[474]

Justice Kennedy refused to use takings law when the questioned statute merely imposed a financial burden, albeit a large one. To trigger regulatory takings analysis required "a specific property right or interest . . . at stake."[475] Moreover, Justice Kennedy understood the plurality's motivation in seizing upon takings analysis; the plurality wanted to avoid a normative judgment about Congress's wisdom, but essentially made one. In so doing, Justice Kennedy stated that they revealed a tension with a basic understanding of the Takings Clause, namely that it simply requires compensation for an otherwise authorized act, and does not act as a substantive limit on the government's ability to act.[476] In *Eastern Enterprises*, Justice Kennedy separated takings jurisprudence from other substantive reviews, such as Due Process,[477] and emphasized that takings are concerned essentially with how property rights are affected.

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467. *See id.*

468. *Id.* at 2670 (citing *Eastern Enterprises*, 524 U.S. 549–50 (Kennedy, J., concurring and dissenting in part)).

469. *Lingle*, 125 S. Ct. at 2087 (Kennedy, J., concurring) (citing *Eastern Enterprises*, 524 U.S. at 539 (Kennedy, J., concurring and dissenting in part)).

470. *Id.*

471. *Eastern Enterprises*, 524 U.S. at 504.

472. *Id.* at 528–29 (plurality).

473. *Id.* at 539 (Kennedy, J., concurring and dissenting in part).

474. *Id.*

475. *Id.* at 541; *see also Eastern Enterprises*, 524 U.S. at 554 (Breyer, Stevens, Souter & Ginsburg, JJ., dissenting) (agreeing that takings analysis does not apply).

476. *Id.* at 544–45.

477. *Id.* at 550 (finding the statute violated due process even under a permissive standard).

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Ultimately, the Takings Clause is about fairness and expectations about property rights. Bright-line rules are not conducive to adjusting the myriad of interests that co-exist and inter-mingle in a complex society. The cases from the 2004–2005 Supreme Court Term reflect this realization.

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