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The Kelo Threshold: Private Property and Public Use Reconsidered

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COMMENTS

THE *KELO* THRESHOLD: PRIVATE PROPERTY AND PUBLIC USE RECONSIDERED

> *"The poorest man may in his cottage bid defiance to all the forces of the Crown. It may be frail—its roof may shake—the wind may blow through it—the storm may enter—the rain may enter—but the King of England cannot enter!—all his force dares not cross the threshold of the ruined tenement!"*[1]
>
> —William Pitt, the Elder, Earl of Chatham

> *"I thought I bought this place. But I guess I just leased it, until the city wants it."*[2]
>
> —Jim Saleet, an Ohio resident whose home was to be condemned

I. INTRODUCTION

Susette Kelo was a homeowner in New London, Connecticut.[3] The neighborhood in which she lived—Fort Trumbull—was peaceful; from the front porch of her old salmon-colored Victorian home, Mrs. Kelo could look out onto the Thames River and watch ferries slowly crawling across the horizon.[4] Fort Trumbull may

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1. William Pitt, the Elder, Earl of Chatham, Speech in the House of Lords (1763), *in* RESPECTFULLY QUOTED: A DICTIONARY OF QUOTATIONS REQUESTED FROM THE CONGRESSIONAL RESEARCH SERVICE 165 (Suzy Platt ed., 1989).

2. *60 Minutes: Eminent Domain: Being Abused?*, CBS NEWS, July 4, 2004 [hereinafter *60 Minutes*], *available at* http://www.cbsnews.com/stories/2003/09/26/60minutes/main575343.shtml (last visited Apr. 2, 2005).

3. Carrie Budoff, *A Battle Against Eminent Domain; Gritty Dispute in New London*, HARTFORD COURANT, Jan. 1, 2001, at A1.

4. *Id.*

not have been luxurious, but it was Susette's home—until she was confronted with eviction. Nailed to her door on the day before Thanksgiving, a notice of condemnation had been issued by the City of New London.[5] Mrs. Kelo's property—as well as the properties of many other Fort Trumbull residents—was to be cleared to make way for New London's recently adopted economic development strategy.[6] Among other things, this plan envisioned the construction of a riverfront hotel, offices, and luxury condominiums on land that was then occupied by private homes and businesses.[7] The Fort Trumbull residents were not consulted; they were simply given the choice either to leave willingly or to be forced out.[8]

The City of New London attempted to justify its condemnations by claiming authority under eminent domain.[9] Eminent domain describes the power of governments to take property owned by private citizens for public use.[10] In the United States, that power is wielded not only by the federal government,[11] but also by the government of each state.[12] While sweeping, the breadth of power animating eminent domain is not without limitation. The United States Constitution provides that the government shall not deprive any person of "life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."[13]

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5. Laura Mansnerus, *Ties to a Neighborhood at Root of Court Fight; New London Residents Challege City Plans*, N.Y. TIMES, July 24, 2001, at B5.

6. Dana Berliner, *You Can't Go Home Again*, LEGAL TIMES, Oct. 11, 2004, at 42.

7. *Id.*

8. *See* Mansnerus, *supra* note 5.

9. Brief of the Respondents at 1–2, Kelo v. City of New London, ___ U.S. ___ (2005) (No. 04-108) [hereinafter Respondents' Brief].

10. *See* 13 RICHARD R. POWELL, POWELL ON REAL PROPERTY § 79F.02 (Michael Allan Wolf ed., 2000).

11. *E.g.*, Kohl v. United States, 91 U.S. 367, 371–72 (1876).

12. *E.g.*, Georgia v. City of Chattanooga, 264 U.S. 472, 480 (1924) ("The power of eminent domain is an attribute of sovereignty, and inheres in every independent State."). From this point forward, the general use of the word "government" is intended to include both the state and federal levels of government.

13. U.S. CONST. amend. V. Although the Fifth Amendment applies directly only against the federal government, many of its provisions have been incorporated against the states via the Fourteenth Amendment, which provides that no state may "deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV. Included among the incorporated provisions is the Takings Clause. *See, e.g.*, Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 122 (1978) (articulating a Takings Clause issue). With respect to exercises of eminent domain, then, the maximum scope of the authority of the federal government to exercise its power of eminent domain is coterminous with that of the several

For much of America's constitutional history, exercises of eminent domain were not terribly controversial.[14] When the power was used, its purpose was generally for the appropriation of land for roads, dams, or other structures of general public utility.[15] During the twentieth century, however, governments began to employ eminent domain for purposes whose public utility was strained, if not tenuous.[16] This trend has continued until the present, and it is now a rather routine occurrence for the homes and businesses of private citizens to be claimed by the government and transferred to private entities in pursuit of a more efficient use of the land.[17]

Turning back to New London, many of those who received notices of condemnation voluntarily sold their property.[18] Mrs. Kelo and several others, however, refused to sell.[19] These obstinate few denied the authority of New London to condemn privately owned property for use by another private—and wealthier—citizen and resorted to the courts for the protection of their rights. Recently, the Fort Trumbull residents presented their case before the Supreme Court of the United States.[20]

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states.

14. *See* 13 POWELL, *supra* note 10, § 79F.03[1], at 79F-25.

15. *Id.*

16. In Cincinnati, for example, the local government condemned a Walgreens pharmacy for the construction of a Nordstrom department store. The city then condemned a CVS pharmacy to relocate Walgreens, and then condemned several smaller private businesses to relocate the CVS. The Nordstrom was never built, and the site of the former Walgreens became an empty parking lot. DANA BERLINER, INSTITUTE FOR JUSTICE, PUBLIC POWER, PRIVATE GAIN: A FIVE-YEAR, STATE BY STATE REPORT EXAMINING THE ABUSE OF EMINENT DOMAIN 160–61 (2003), *available at* http://www.castlecoalition.org/report/pdf/ED_report.pdf (last visited Apr. 2, 2005); *see* 13 POWELL, *supra* note 10, §§ 79F.03[3][b][iii]–[3][c], at 79F-30 to 79F-33.

17. In the five-year period between 1998 and 2002, one organization estimated that there were approximately 10,000 episodes of redevelopment condemnations in the United States perpetrated by either a state or federal government. BERLINER, *supra* note 16, at 2. Some governments go so far as to advertise in local newspapers that land will be condemned for developers who choose to build in certain locales. Laura Mansnerus, *Refusing to Let Go, Property Owners Test Eminent Domain's Limits*, N.Y. TIMES, July 23, 2001, at B1.

18. *See* Mansnerus, *supra* note 17.

19. David M. Herszenhorn, *Residents of New London Go to Court, Saying Project Puts Profit Before Homes*, N.Y. TIMES, Dec. 21, 2000, at B5; Mansnerus, *supra* note 5.

20. Oral arguments in *Kelo v. City of New London*, No. 04-108, were presented on February 22, 2005. Supreme Court of the United States, *Argument Calendar: Session Beginning February 22, 2005* (Dec. 15, 2004), *available at* http://www.supremecourtus.gov/oral_arguments/argument_calendars/monthlyargumentcalfebruary2005.pdf (last visited Apr. 2, 2005).

To those whose private property is condemned for efficiency's sake, eminent domain is flatly repugnant to the ideals and aspirations bound within the notion of the "American Dream." Though that dream is important,[21] there is a great deal more at stake in *Kelo v. City of New London*.[22] Because of the extensive scope of the modern governmental authority to exercise eminent domain, *Kelo*'s importance touches every American landowner. Because of the relationships implicated—those among individuals, their property, and their government—*Kelo* concerns nothing less than the foundational principles of our Republic.

This piece has been organized around the purposes for which it was written. Part II attempts to more thoroughly set forth the facts and circumstances giving rise to *Kelo* in order to frame the controversy accurately. Although New London's attempted condemnations may seem egregious, they are not irrational. In fact, New London had compelling reasons for exercising eminent domain over Fort Trumbull, though Mrs. Kelo certainly had her own compelling reasons for refusing to comply with the city's economic development plan. In addition, Part II will also discuss the pervasiveness of such economic development strategies in the United States in order to demonstrate the pressing need for immediate judicial intervention.

Part III will briefly explore the role of property in America's constitutional heritage. This section will begin by philosophically approaching the importance of private property to the sustenance of a durable society. It will then move to examine the foundation and extent of eminent domain in the early Republic. Part III will

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21. Indeed, it is very important to understand the litigants' motivation in protecting their properties, as it is most certainly their ardent desire to live free from undue and—what must doubtlessly seem to the petitioners—unfair governmental interference. In the words of the Connecticut trial judge, "[t]he plaintiffs wish to live out the typical American dream of abiding and owning in peace homes and property that they have chosen. Any threat to that dream is understandably forcefully and emotionally opposed *as it should be in a free society*." Kelo v. City of New London, No. 557299, 2002 Conn. Super. LEXIS 789, at *8 (Conn. Super. Ct. Mar. 13, 2002) (emphasis added). The "Petitioners do not want money or damages. They only seek to stop the use of eminent domain so they may hold on to their most sacred and important of possessions: their homes." Brief of Petitioners at 2, Kelo v. City of New London, ___ U.S. ___ (2005) (No. 04-108) [hereinafter Petitioners' Brief]. As Mrs. Kelo has explained: "'My house isn't for sale. . . . It's my private property.'" Budoff, *supra* note 3. "'I just want to be left alone.'" Mansnerus, *supra* note 5.

22. ___ U.S. ___ (2005). At the time of publication, the Supreme Court of the United States had not yet issued an opinion in *Kelo*.

conclude by considering the status of eminent domain as it exists under the Supreme Court's modern jurisprudence.

With these factual and legal considerations established, Part IV will forecast the Supreme Court's decision in *Kelo*, first under the existing analytical framework, then through the application of an alternative standard. Indeed, the ultimate conclusion of this article is that *Kelo* will deliver a limitation upon the ability of governments to exercise eminent domain and rein in what has become a nearly unfettered power to condemn private property.

II. *KELO* IN DEPTH

A. Our Town *Redux: New London, Connecticut*

New London is a small Connecticut town situated at the confluence of the Thames River and Long Island Sound.[23] For the past several decades, the city has suffered from severe social and economic distress.[24] While its population has waned annually since 1970, the unemployment rate over the same period has surpassed that of both the state and the region.[25] The market for the construction of new homes and businesses has meanwhile remained virtually nonexistent.[26]

As early as 1978, it had already become apparent to the city's leadership that only deliberate action could stave off New London's total economic collapse.[27] With this disastrous scenario in mind, the city commissioned the New London Development Corporation ("NLDC" or "development corporation"), an organization whose primary function would be to advise city officials about economic development opportunities available to the municipality.[28] Despite the development corporation's creation, though, the following decades remained just as socially and economically stagnant.[29]

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23. *See* Budoff, *supra* note 3.
24. *See* Respondents' Brief, *supra* note 9, at 2.
25. *Id.*
26. *Id.* at 1–2.
27. *See id.* at 1.
28. *Id.*
29. *See id.* at 1–3.

Then in 1996, New London was dealt one of its most grievous economic blows.[30] The United States Naval Undersea Warfare Center permanently ceased operations, costing New London nearly 1500 jobs.[31] This single loss, combined with decades of a poorly performing economy and general commercial stagnation, prompted the Connecticut Office of Planning and Management to classify New London—in an undoubtedly generous understatement—as a "distressed municipality."[32]

With the city's economic stability foundering, the NLDC assumed with renewed vigor its mandate to attract investors and spur development. It immediately began planning for a large-scale economic development project in the Fort Trumbull neighborhood of New London.[33] The NLDC targeted Fort Trumbull because of its especially poor economic performance.[34] Though Fort Trumbull is not a large area, consisting only of approximately ninety acres, it was among the most economically depressed in all of New London.[35] The tax revenue generated by this neighborhood was, as of the last accounting, a mere $325,000, or slightly more than $3,600 per acre.[36] A study of property demographics conducted in Fort Trumbull revealed that many of its structures were vacant,[37] that the quality of most residential structures was below average,[38] and that more than

30. *See id.* at 2.

31. *Id.*

32. *Id.* at 1 (internal quotation marks omitted). According to the Connecticut Code, a distressed municipality is one that meets certain "quantitative physical and economic distress thresholds" as determined by the United States Department of Housing and Urban Development. CONN. GEN. STAT. ANN. § 32-9p(b) (West 2003). These criteria include the degree of economic distress as measured by "the extent of growth lag, the extent of poverty, and the adjusted age of housing" in the region. 42 U.S.C. § 5318(d)(1)(A) (2000). Connecticut also takes special cognizance of municipalities "adversely impacted by a major plant closing, relocation or layoff" in applying "distressed" status. CONN. GEN. STAT. ANN. § 32-9p(b) (West 2003).

33. Respondents' Brief, *supra* note 9, at 1.

34. *See id.* at 1–4.

35. *See id.* at 2–4.

36. *Id.* at 3. The amount of tax revenue generated per acre may be artificially low, though, due to the fact that fifty-four percent of the property in New London was not subject to taxation. *Id.* at 1.

37. *Id.* at 3 ("[Regarding the Fort Trumbull area itself, there was] [a]n 82 percent vacancy rate for non-residential buildings and a 20 percent rate for non-commercial property.")

38. *Id.* ("[L]ess than twelve percent of the residential buildings were in average or better condition.").

half of all structures were built before 1950.[39] Given that Fort Trumbull's plight was generally shared by the city in common,[40] New London certainly appeared to be "a city desperate for economic rejuvenation."[41]

Beginning in January 1998, the economic stimulus New London so urgently needed began to arrive. Responding to New London's efforts to combat its status as a distressed municipality, the Connecticut State Bond Commission issued bonds whose proceeds would support urban planning initiatives in Fort Trumbull, such as the drafting and implementation of an economic development plan.[42] From the beginning of the redevelopment efforts, Fort Trumbull was seen as the nerve-center of New London's economic revitalization potential.[43] As one of the most economically depressed neighborhoods in a commercially stagnant municipality, Fort Trumbull's renovation would doubtless engender a ripple of prosperity benefiting the entire city.[44] To that end, the NLDC was directed to use the funds raised by the bond sales for property acquisitions in the Fort Trumbull neighborhood.[45]

The following month, the city received its most promising economic news in decades. Pfizer Corporation, the renowned global leader in pharmaceutical development, announced that it would construct a 750,000-square-foot research and development headquarters in New London.[46] Pfizer's project, which was expected to cost $270 million, consisted of three office towers situated on a twenty-two acre campus.[47] In addition, Pfizer anticipated a $200

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39. *Id.*

40. *Id.* at 2 ("Sixty-one percent of the city's housing was built before 1950, with a high percentage of vacant housing.").

41. *Id.* at 3. Despite New London's economic distress, though, it has never been contended by either the City of New London nor the development corporation that the municipality was blighted. *See* Petitioners' Brief, *supra* note 21, at 6–7; *see also* Mansnerus, *supra* note 5.

42. *See* Kelo v. City of New London, No. 557299, 2002 Conn. Super. LEXIS 789, at *5–6 (Conn. Super. Ct. Mar. 13, 2002).

43. *See* Respondents' Brief, *supra* note 9, at 1–4. As discussed previously, New London was in the midst of tremendous economic stagnation, and Fort Trumbull was among the most stagnant areas of the city. The Respondents state that "the NLDC considered six possible plans of action *for the Fort Trumbull area.*" *Id.* at 6 (emphasis added). There is no discussion or mention of whether neighborhoods other than Fort Trumbull were seriously considered by the NLDC for such targeted economic development.

44. *See* Mansnerus, *supra* note 5.

45. *Kelo*, 2002 Conn. Super. LEXIS 789, at *5–6.

46. Robert A. Hamilton, *Counting on Pfizer?*, N.Y. TIMES, Apr. 29, 2001, at 14CN1.

47. *See* Eleanor Charles, *In the Region/Connecticut; Eminent Domain Challenged in*

million annual payroll that would support the creation of 2100 permanent jobs.[48] The site of this project was New London Mills, an area adjacent to Fort Trumbull that had for years been little more than an abandoned and heavily-polluted industrial complex.[49] Pfizer's development initiative reinvigorated the demand for property in this once-dilapidated area of New London and sparked renewed interest in the peripheral realty.[50]

With the momentum gained from Pfizer's announcement, the New London City Council began devoting much of its attention to economic development and urban revitalization. In April 1998, the council authorized the creation of a municipal development plan ("MDP") for the Fort Trumbull neighborhood.[51] This demanded nothing less than a careful analysis of all the geographic, environmental, economic, and social ramifications that could likely result as a consequence of the city's adoption of a particular developmental strategy.[52] Rather than supervise the analyses comprising the MDP itself, though, the council delegated oversight to the NLDC.[53] As part of its mandate, the development corporation arranged a series of informal meetings for the residents of Fort Trumbull to educate them about the process of urban redevelopment.[54] Meanwhile, the State Bond Commission appropriated additional funds for use by the NLDC in carrying out its developmental mandate.[55]

In January 2000, the MDP was completed and subsequently adopted by the city council.[56] The developmental strategy it presented was ambitious; the NLDC proposed to create "a world-class development that [would] complement the undertakings of Pfizer."[57] Fort Trumbull's 90 acres had originally consisted of ap-

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New London Project, N.Y. TIMES, Apr. 1, 2001, at 11-9; Hamilton, *supra* note 46.

48. Hamilton, *supra* note 46.

49. *See Kelo*, 2002 Conn. Super. LEXIS 789, at *6; Hamilton, *supra* note 46.

50. *See* Hamilton, *supra* note 46. *But see id.* ("Not everyone is convinced that the Pfizer effect is transforming New London. . . . [A] real estate broker with U.S. properties in New London . . . said she knew of only two businesses that had moved in as a direct result of Pfizer.").

51. Respondents' Brief, *supra* note 9, at 4.

52. *Id.* at 5.

53. *See id.* at 4–6.

54. *Id.* at 4.

55. Kelo v. City of New London, No. 557299, 2002 Conn. Super. LEXIS 789, at *6 (Conn. Super. Ct. Mar. 13, 2002).

56. Petitioners' Brief, *supra* note 21, at 3.

57. Mansnerus, *supra* note 17.

proximately 115 parcels of land, upon which were situated 85 private homes and businesses.[58] The MDP divided the acreage into seven parcels.[59] One was to be developed as a waterfront hotel and conference center; another parcel would contain eighty new town houses and apartments; three others were intended for additional office or research and development space.[60] Redeveloping Fort Trumbull would also create thousands of additional jobs. The NLDC estimated that the Fort Trumbull project would generate between 1700 and 3200 new jobs in addition to the 2100 jobs created by Pfizer.[61] Fort Trumbull's redevelopment would also allow the city to collect substantially more tax revenue—up to $1 million more—than what it was presently receiving.[62] To say the least, the advantages of renovating Fort Trumbull would not be inconsequential.

Nor was the MDP founded upon merely wistful speculation. With Pfizer's heavyweight presence, the NLDC had little difficulty attracting other prospective developers.[63] In fact, by the end of 2001, the City of New London and the NLDC had entered into serious negotiations with Corcoran Jennison, a prominent Boston-based real estate development firm.[64] Under the terms of the negotiations, Corcoran Jennison would exclusively develop several of the Fort Trumbull parcels.[65] In exchange, Corcoran Jennison would be allowed to lease those parcels from the NLDC for $1 each year for the next ninety-nine years.[66]

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58. *See* Petitioners' Brief, *supra* note 21, at 3; Budoff, *supra* note 3.

59. Petitioners' Brief, *supra* note 21, at 3.

60. Respondents' Brief, *supra* note 9, at 6–7; Charles, *supra* note 47. At the time of the MDP's adoption, two of the seven parcels were assigned nondescript uses. *See* Respondents' Brief, *supra* note 9, at 7. One was for "park support," and the other for "water-dependent commercial uses." *Id.*

61. *See* Respondents' Brief, *supra* note 9, at 8. The MDP predicted that Fort Trumbull's renovation would create between 518 and 867 construction jobs, 718 and 1362 direct jobs, and 500 and 940 indirect jobs. *Id.*

62. *Id.* As mentioned previously, Fort Trumbull was then generating approximately $325,000 of tax revenue annually. *Id.* at 3. The MDP, however, projected that a rejuvenated and commercially vibrant Fort Trumbull could generate between $680,544 and $1,249,843 in tax revenue. *Id.* at 8.

63. *See* Hamilton, *supra* note 46 ("'Everybody's looking to do something in New London, because you're going to have all these high-income people working at Pfizer and either living in the city or driving to it every day.'") (quoting Ernest Hewitt, former mayor of New London).

64. Petitioners' Brief, *supra* note 21, at 6.

65. *Id.*

66. *Id.* Pfizer received a similar arrangement from the city council in choosing New

New London's developmental strategy was sound, though not flawless. Chief among its defects was the obvious fact that, at the time of the MDP's adoption, the city did not own Fort Trumbull's ninety acres.[67] In order to proceed with its plan for economic revitalization, New London had to first acquire the land it needed from Fort Trumbull's home and business owners.[68] To that end, the city council formally authorized the NLDC to begin property acquisitions in January 2000.[69]

By that time, however, the NLDC had already been acquiring Fort Trumbull property covertly.[70] Many residents and business owners had been approached by real estate agents who, on behalf of an unidentified buyer, had offered to purchase their properties.[71] Some occupants accepted the offers immediately; others reluctantly accepted when they were informed that the city could take their property regardless of their consent.[72] In less than one year, the NLDC had acquired most of the property needed to implement the MDP.[73]

Several Fort Trumbull property owners, however, would not sell.[74] The NLDC eventually came to realize that no amount of negotiation or money could convince these obstinate few to relent.[75] In October 2000, the NLDC elected to begin acquiring the property of the Fort Trumbull hold-outs through eminent domain.[76] Notices of condemnation were then issued to the remain-

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London Mills. *See* Hamilton, *supra* note 46. Under the terms of that agreement, Pfizer bought the twenty-two acres upon which its headquarters is situated for only $10. *Id.*

67. *See* Petitioners' Brief, *supra* note 21, at 5–6.

68. *See id.* at 6.

69. *Id.*

70. *See* Mansnerus, *supra* note 17.

71. *Id.*

72. *See id.*

73. By December 2000, the NLDC had "bought 65 properties in the 90-acre neighborhood." Herszenhorn, *supra* note 19. The MDP called for the acquisition of a total of eighty-five homes and businesses. Budoff, *supra* note 3.

74. Herszenhorn, *supra* note 19; Mansnerus, *supra* note 5.

75. *See* Herszenhorn, *supra* note 19.

> "We do not want to sell," said Michael Cristofaro, 38, a computer technician, whose parents own a home at 53 Goshen Street that the family says is worth about $200,000. "The property has been in our family for the last 36 years. They could come in here and offer us $500,000 for it and we wouldn't take it. It's really not the money issue. It's the principle of it."

Id.

76. Petitioners' Brief, *supra* note 21, at 6. When the New London City Council authorized the Fort Trumbull property acquisitions in January 2000, the Council delegated its

ing Fort Trumbull residents.[77] Mrs. Kelo, whose notice was nailed to her front door, received hers on the day before Thanksgiving 2000.[78] According to its terms, Mrs. Kelo was no longer a private homeowner, but was required to pay rent to the NLDC if she continued to occupy her residence.[79] The following November, the NLDC initiated formal condemnation actions against the residents to whom notices were issued.[80]

In response, the residents filed an eight-count complaint in Connecticut Superior Court against the NLDC, seeking to enjoin the development corporation from proceeding with its condemnations.[81] After a seven-day trial, the court granted permanent injunctive relief in favor of several plaintiffs[82] and temporary injunctions for others.[83] For the plaintiffs who received permanent injunctions, the constitutional application of public use drove the court's decision.[84] In the court's estimation, public use was not an interest reserved exclusively by governments to excuse the seizure of citizens' private property; the public also had a constitutionally protected interest in having security in their property.[85]

On appeal, however, the Supreme Court of Connecticut reversed the judgment of the trial court with respect to the permanent injunctions, holding that New London's condemnations were reasonable in spite of the fact that the city had not yet committed to specific development plans.[86] This decision prompted a dissent

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authority to exercise eminent domain to the NLDC. *Id.*

77. *See* Mansnerus, *supra* note 5.

78. *Id.*

79. *Id.*

80. Respondents' Brief, *supra* note 9, at 9.

81. *Id.*; *see also* Kelo v. City of New London, No. 557299, 2002 Conn. Super. LEXIS 789, at *1–2 (Conn. Super. Ct. Mar. 13, 2002) ("[T]he plaintiffs . . . seek injunctive relief to prevent the taking of their homes by eminent domain.").

82. *Kelo*, 2002 Conn. Super. LEXIS 789, at *265, 341. The plaintiffs who received permanent injunctions were those whose properties were situated on parcel 4A. *Id.* at *341. At the time of trial, the NLDC had failed to advance a sufficiently specific intended use for that property that would have justified their condemnations. *Id.* at *231–66.

83. *Id.* at *341. These injunctions were granted during the pendency of appeal for the owners of properties situated in parcel 3, which was intended for research and development office space. Respondents' Brief, *supra* note 9, at 7.

84. *Kelo*, 2002 Conn. Super. LEXIS 789, at *336.

85. *Id.*

86. Kelo v. City of New London, 843 A.2d 500, 573–74 (Conn. 2004).

criticizing the majority for establishing what was facetiously—but perhaps appropriately—termed the "Field of Dreams" test:[87]

> [I]f the enabling statute is constitutional, if the plan of development is drawn in good faith and if the plan merely states that there are economic benefits to be realized, that is enough. Thus, the test is premised on the concept that "if you build it, [they] will come," and fails to protect adequately the rights of private property owners.[88]

From this decision the Fort Trumbull residents appealed their cause to the Supreme Court of the United States.[89] Granting certiorari,[90] the Court resolved to set forth what protection under the Fifth Amendment—if any—is due "for individuals whose property is being condemned, not to eliminate slums or blight, but for the sole purpose of 'economic development.'"[91]

B. *New London is Not Alone*

The residents of Fort Trumbull are certainly not the first to face eviction through an exercise of eminent domain for the purpose of economic development; they are only among the latest in a widespread practice that has spanned the past half-century.[92] According to the Institute for Justice, a Washington-based civil liberties law firm that monitors exercises of eminent domain nationwide, there were more than 10,000 actual or threatened private-to-private[93] condemnations in the United States between 1998 and 2002.[94] This figure represents only the number of such

87. *Id.* at 602 (Zarella, J., dissenting).

88. *Id.* (Zarella, J., dissenting) (second alteration in original).

89. *See* Petitioners' Brief, *supra* note 21, at 9.

90. Kelo v. City of New London, 125 S. Ct. 27 (2004), *cert. granted* (No. 04-108).

91. Supreme Court of the United States, Granted & Noted List, October Term 2004 (Sept. 28, 2004), *at* http://www.supremecourtus.gov/qp/04-00108qp.pdf (last visited Apr. 2, 2005).

92. The modern practice of using eminent domain as a means of economic development first vested in 1954 with *Berman v. Parker*, 348 U.S. 26 (1954), which is discussed more thoroughly below in Part III.C.1.

93. "Private-to-private condemnation" describes the situation where the private property of one landowner is condemned by his government so that it may then be either used by or conveyed to another private citizen, be that citizen a natural person or a corporate entity.

94. BERLINER, *supra* note 16, at 2. As part of its mission, the Institute for Justice also represents citizens facing private-to-private condemnation. *Id.* at 9. In fact, the Institute argued on behalf of Mrs. Kelo and the other Fort Trumbull residents before the Supreme Court. For more information about the Institute for Justice or its representative clients, see the organization's website at http://www.ij.org.

condemnations that were reported, and the Institute cautions that the actual figure could be much higher.[95] For example, of all fifty states, Connecticut alone records the number of eminent domain condemnation actions filed in its courts.[96] During the five-year study period, Connecticut recorded 543 redevelopment condemnations.[97] When the Institute researched the number of times Connecticut redevelopment condemnations were mentioned in the state's newspapers, however, there were only thirty-one.[98]

Regardless of the actual number of redevelopment condemnations, there can be no doubt that the practice is widespread. In Lakewood, Ohio, for example, the city government attempted to condemn an entire neighborhood of single-family homes—fifty-five in all—to make way for luxury condominiums and an upscale mall.[99] The houses proposed for condemnation in Lakewood were neither ramshackle nor run-down. Instead, they were colonial-style homes located in an area known as Scenic Park, a community that was more than a century old.[100] The residents of Scenic Park were informed by their municipal government, though, that their homes were "blighted"—a term describing residences that lacked three bedrooms, two bathrooms, an attached three-car garage, or central air conditioning.[101] At a town hall meeting concerning the redevelopment, Scenic Park residents pointed out that *none* of the homes of the council members could satisfy the statutory criteria by which they had unanimously—and apparently hypocritically—resolved to condemn Scenic Park.[102] In an attempt to justify Scenic Park's designation, Lakewood Mayor Madeleine Cain explained that blighted was only a statutory term; and that the true "'question [was] whether or not [Scenic Park could] be used for a higher and better use.'"[103]

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95. BERLINER, *supra* note 16, at 9.
96. *Id.* at 2.
97. *Id.*
98. *Id.*
99. *60 Minutes*, *supra* note 2.
100. *Id.*
101. *Id.*
102. *Id.*
103. *Id.* The City of Lakewood was never able to determine whether Scenic Park could be put to a higher and better use, though. In a 2003 referendum, Lakewood voters not only rescinded the blighted designation applied against Scenic Park, but also rejected the development plan that would have necessitated that neighborhood's condemnation. Institute for Justice, Saleet v. City of Lakewood: *IJ Defeats Eminent Domain Abuse in Lakewood,*

That was precisely the same question that the City Council of Mesa, Arizona asked with respect to Bailey's Brake Service. Randy Bailey was the owner of Bailey's Brake Service, a business that he inherited from his father.[104] Bailey's Brake was situated in downtown Mesa at one of the city's busiest intersections.[105] In 1998, the Mesa City Council unveiled its strategy to revitalize the downtown area, a plan that predictably entailed the redevelopment of occupied real estate into more profitable uses.[106] Seizing upon the opportunity to build a bigger store at the city's expense, the owner of another local business convinced the city council to condemn Bailey's Brake, as well as several adjoining properties, and to convey the land to him.[107] The council was happy to oblige and began buying out Mr. Bailey's neighbors.[108] Mr. Bailey tried to negotiate a solution that would allow him to keep his family business in its present location, but these efforts were made in vain.[109] In a *60 Minutes* interview, the owner of the business that wanted to relocate displayed little concern for petitioning the city to condemn Mr. Bailey's property. "'It happens all over the country. In practically any town you want to go to, they're redeveloping their town centers.'"[110] "Redevelopment to me," Mr. Bailey remarked, "'means [you] work with existing people who are there . . . . If I'd had a "For Sale" sign out there, it would have been a whole different deal. . . . It doesn't even sound like the United States.'"[111]

For the past several decades, though, condemnations like these have been common practice in American cities.[112] But this has not

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Ohio, *at* http://www.ij.org/private_property/lakewood/index.html (last visited Apr. 2, 2005).

104. BERLINER, *supra* note 16, at 16.

105. *Id.*

106. *See id.*

107. *See 60 Minutes*, *supra* note 2.

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.* Bailey's Brake Service escaped condemnation. *See* Bailey v. Myers, 76 P.3d 898, 899 (Ariz. Ct. App. 2003). The Arizona Court of Appeals held that Mesa's reliance on eminent domain was not justified in this circumstance, as condemning one privately owned business so that the property upon which it was situated could be transferred to another was not a public use within the meaning of the constitution. *Id.* at 904.

112. The modern era of eminent domain began with the Supreme Court's decision in *Berman v. Parker*, 348 U.S. 26 (1954). Since that time, a number of state courts have had the opportunity to determine to what extent eminent domain may be exercised within their respective jurisdictions. Seven states presently allow condemnations of private property to serve purposes related to economic development, such as increasing tax revenue

always been the case. As the next section will explain, the power of eminent domain throughout history has been narrowly confined to circumstances in which the public utility of a condemnation has been fairly apparent. Indeed, for much of America's political history, condemnations of private property for economic redevelopment would doubtless have been considered flatly repugnant to the Constitution. The following section will explore the philosophical and historical foundations of eminent domain in an attempt to track the route by which *Kelo* came to be presented before the Supreme Court of the United States.

III. COMING TO *KELO*: THE LEGAL FOUNDATIONS OF EMINENT DOMAIN

A. *Property Ownership as the Basis of a Durable Society*

The proposition that respect for private property is essential to the integrity of durable societies is beyond question. Without a general distribution of wealth and the means of its production, the capacity of society to support essential social functions would be grievously impaired.[113] Were wealth concentrated in the hands of the state, individuals existing under such a regime would live permanently at their government's discretion. With this concern in mind, James Madison warned that "[w]here an excess of power prevails, property of no sort is duly respected."[114] Just as an excess of power imposes grave dangers to the durability of society, though, so too does an excess of liberty.[115] In the event of either

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and creating job opportunities: Connecticut, Kansas, Maryland, Michigan, Minnesota, New York, and North Dakota. Petition for a Writ of Certiorari at 12, Kelo v. City of New London, ___ U.S. ___ (2005) (No. 04-108). Arkansas, Florida, Illinois, Kentucky, Maine, Montana, South Carolina, and Washington have affirmatively declared that economic development alone is not a sufficient public use that can justify condemning private property. *Id.* at 13. In addition, Delaware, New Hampshire, and Massachusetts have all indicated that, if confronted with the question, they would also decline to recognize public use as a sufficiently compelling reason to condemn private property. *Id.* at 14. The remaining thirty-two states fall, by inference, somewhere in the middle.

113. *See generally* Loren A. Smith, *Life, Liberty & Whose Property?: An Essay on Property Rights*, 30 U. RICH. L. REV. 1055, 1060 (1996) ("Underlying all of our political and intellectual freedoms which make for a civilized society is a foundation of widely dispersed private property. . . .").

114. James Madison, *Property*, NAT'L GAZETTE, Mar. 29, 1792, *reprinted in* 6 THE WRITINGS OF JAMES MADISON 101 (Gaillard Hunt ed., 1906).

115. *See id.*

circumstance, Madison predicted that "[n]o man [would be] safe in his opinions, his person, his faculties or his possessions."[116] Government's role with respect to private property should therefore be to accord it maximum protection without engendering an effective transfer of control from the citizen to the state.

To be certain, government's obligation with respect to the protection of private property is not discretionary; it is *obligatory*. In John Locke's estimation, property—which included an individual's life, liberty, and estate[117]—is the foundation of society.[118] Prior to the formation of societies, these three aspects of property exist solely at the discretion of each individual. Property is therefore not a privilege granted by the state to individuals; it is a right that exists apart from society and, indeed, exists *before* society.[119]

For Locke, this describes the "state of nature," a condition in which all are equal and everyone sovereign.[120] The state of nature may sound utopian, but consistent with Madison's warning, Locke envisions the natural world in which there is an excess of liberty as one "full of fears and continual dangers;" "the enjoyment of the property . . . in this state is very unsafe, very unsecure."[121] To escape the fear and insecurity engendered by living at complete liberty, individuals unite for their common welfare and defense.[122] In exchange, a substantial portion of their natural liberty is surrendered to society. With the authority ceded from its constituent members, the society may then accomplish the purpose for which it was created—providing a refuge from continual fear and danger through its operative force, the government.[123]

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116. *Id.*

117. JOHN LOCKE, THE SECOND TREATISE OF GOVERNMENT 71 (Thomas P. Peardon ed., Prentice-Hall 1952) (1690).

118. *See id.*

119. This describes the very relationship between the individual and property that courses through America's political heritage. *See, e.g.*, Vanhorne's Lessee v. Dorrance, 2 U.S. (2 Dall.) 304 (1795). "The constitution expressly declares, that the right of acquiring, possessing, and protecting property is natural, inherent, and unalienable. It is a right not *ex gratia* from the legislature, but *ex debito* from the constitution." *Id.* at 311.

120. *See* LOCKE, *supra* note 117, at 70.

121. *Id.*

122. *See id.* at 70–71.

123. This relationship between individuals and their government is clearly reflected in the preamble to the United States Constitution:

We the People of the United States, in Order to form a more perfect Union, es-

To summarize Locke's argument, "[t]he great and chief end . . . of men's uniting into commonwealths and putting themselves under government is the preservation of their property."[124] Properly limited, then, government's mandate should be conceived as coterminous with the amount of liberty individuals have ceded to society for the preservation of their property—and no further.[125]

B. *A Brief Discussion of the Historical Development of Eminent Domain*

Although the term "eminent domain" was not coined until the seventeenth century,[126] the power of the state to take privately owned property for public uses had already been firmly established for millennia.[127] It was not until the decline of the English feudal system, however, that eminent domain became a matter of pressing legal concern.[128] As the ownership of private property passed from the Crown to its subjects, laws developed that regu-

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> tablish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, *do ordain and establish* this Constitution for the United States of America.

U.S. CONST. pmbl. (emphasis added).

124. LOCKE, *supra* note 117, at 71.

125. In fairness, it should be noted that Locke was not absolutely against the power of government to take private land. Although he strictly maintained that legitimate governments must first receive the consent of the owner before taking his property, Locke reasoned that, in a representative government, the owner's elected representative to the legislature may properly consent to the taking. *See* 13 POWELL, *supra* note 10, § 79F.01[1][a][ii], at 79F-9. This, however, should not be considered as Locke's absolution of eminent domain. Instead, Locke recognized a great danger in legislatures whose members had become so comfortable in their positions that they would develop ideas of what served the public good distinct from what was actually in society's best interests. *See* LOCKE, *supra* note 117, at 79. A legislature should be variable, rather than in continuous session, and its members should have to return to the community and exist under the laws they enact. *Id.* The problem with eminent domain, of course, is that those who serve in the legislature are most likely those whose land is safe from condemnation.

126. The Dutch political philosopher Grotius is widely credited with coining the term "eminent domain" in *De Jure Belli et Pacis* (*Concerning the Law of War and Peace*). *E.g.*, Lawrence Berger, *The Public Use Requirement in Eminent Domain*, 57 OR. L. REV. 203, 204 (1978).

127. It is generally accepted that the power of eminent domain dates to at least the era of the Roman Empire. *See, e.g.*, *id.* ("The right of the sovereign to condemn private property dates back at least to the ancient Romans."). *But see* 13 POWELL, *supra* note 10, § 79F.01[1][a], at 79F-7 ("Historians of the law of eminent domain have been interested in Roman practice, but not much good historical evidence exists concerning the Roman law of land expropriation.").

128. 13 POWELL, *supra* note 10, § 79F.01[1][a], at 79F-7 to 79F-8.

lated the balance of power between individuals and their government.[129] First among these was the Magna Charta, which provided, among other things, that the King could not even take timber from a citizen's land without the owner's consent.[130] He could only "make use of but not take ownership of private land in the areas of his prerogative—for example, navigation, foreign affairs, defense, and law enforcement—all without payment of compensation."[131] Nor could the King wield the power of expropriation exclusively.[132] Parliament could take ownership of private property, but only after fairly compensating the property owner.[133]

As the laws of a government follow its flag, so the American colonies—and later, the several states—received the legal traditions of Great Britain.[134] From its first exercises in the fledgling Republic, eminent domain was a despised power. In one of the earliest cases to reach the Supreme Court of the United States regarding the federal government's ability to take private property, *Vanhorne's Lessee v. Dorrance*,[135] eminent domain was slandered as "the despotic power," though it was reluctantly conceded that "the existence of [eminent domain] is necessary" and that "government could not subsist without it."[136] The Court supposed, however, that Congress would not exercise its power of eminent domain "except in urgent cases, or cases of the first necessity."[137] "Singular, indeed, and untoward must be the state of things, that would induce the Legislature . . . to divest one individual of his landed estate merely for the purpose of vesting it in another. . . ."[138] In fact, the Court admitted to finding it "difficult to

129. *See id.* § 79F.01[1][a][i], at 79F-8.

130. *Id.*

131. Berger, *supra* note 126, at 204.

132. *See* 13 POWELL, *supra* note 10, § 79F.01[1][a][i], at 79F-8 ("[N]o Freeman shall . . . be desseized of his Freehold . . . but by lawful Judgment of his Peers, or by the Law of the Land.") (quoting MAGNA CHARTA, ch. XXIX).

133. *See* Berger, *supra* note 126, at 204.

134. *See generally* 13 POWELL, *supra* note 10, § 79F.01[1][a][iii], at 79F-10 to 79F-11.

135. 2 U.S. (2 Dall.) 304 (1795). In *Vanhorne's Lessee*, two groups of settlers—one from Connecticut and one from Pennsylvania—had each established a claim to the same acreage at a time before the formation of the Republic when the boundaries among colonies were not clearly defined. One deed was received from Native Americans, the other from William Penn. Both groups of settlers subsequently passed title to different purchasers, who then sought to establish their own respective paramount rights to the property. *Id.* at 304–05.

136. *Id.* at 311.

137. *Id.*

138. *Id.* at 312.

form a case, in which the necessity of a state can be of such a nature, as to authorise or excuse the seizing of landed property belonging to one citizen, and giving it to *another citizen*."[139] Waxing poetic on the integrity of property in the new Republic, the Court concluded that "[t]he constitution encircles, and renders [property a] holy thing. . . . It is sacred."[140]

In the original estimation of the Supreme Court, then, it is clear that proper exercises of eminent domain were to be confined to urgent matters of public necessity. What issues constituted matters of public necessity remained within Congress's exclusive discretion.[141] With respect to takings of private property in which the property seized was to be subsequently transferred to another private citizen, however, the Court found this constitutionally inconceivable.[142]

The integrity of this formulation of eminent domain appears to have remained intact through the beginning of the twentieth century, though it was slightly enlarged in 1916 with the Supreme Court's decision in *Mt. Vernon-Woodberry Cotton Duck Company v. Alabama Interstate Power Company*.[143] In *Cotton Duck*, a state-licensed power company had initiated a condemnation action against land on which it wanted to construct a power plant.[144] Cotton Duck opposed the condemnation, objecting on the grounds that this exercise of eminent domain did not entail a public use of the property; the power company was not a governmental entity,

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139. *Id.* at 311 (emphasis added).

140. *Id.*

141. "[T]he Legislature are [sic] the sole and exclusive judges of the necessity of the case, in which this despotic power should be called into action." *Id.* at 312.

142. Based on these principles, the original test for the propriety of an exercise of eminent domain seemingly consisted of two parts. First, the court would inquire into whether the property seized is for public use—and not the broader classification of public utility. This distinction is subtle, but important. To use a modern example, a shopping center may have public utility, but it is not for public use in a sense consistent with *Vanhorne's Lessee*. *Vanhorne's Lessee* draws a clear distinction between public and private entities, and candidly asserts disapproval for the state's forced transfer of private property to another private—nongovernmental—individual. *See id.* at 314–15. And so it seems that, to satisfy the first requisite of permissibility under *Vanhorne's Lessee*, the governing authority that condemned an individual's private property would actually have to occupy it. The second requisite appears to be the satisfaction of an inquiry into the necessity of the condemnation. *See id.* at 315–16. Given the judiciary's well-founded reluctance to second-guess coordinate branches of government, though, this second inquiry creates nothing more than a rebuttable presumption in favor of the condemning authority.

143. 240 U.S. 30 (1916).

144. The State of Alabama had apparently delegated authority to the power company to condemn property necessary for the plant's construction. *Id.* at 31–32.

nor would the public physically use the premises.[145] Nevertheless, the Supreme Court upheld the propriety of the condemnation. Justice Holmes, writing for the Court, stated:

> In the organic relations of modern society it may sometimes be hard to draw the line that is supposed to limit the authority of the legislature to exercise or delegate the power of eminent domain. But to gather the streams from waste and to draw from them energy, labor without brains, and so to save mankind from toil that it can be spared, is to supply what, next to intellect, is the very foundation of all our achievements and all our welfare. If that purpose is not public we should be at a loss to say what is. *The inadequacy of use by the general public as a universal test is established.*[146]

Cotton Duck thus expanded the permissible scope of public uses to include not only actual governmental use, but also private use when the public was the clear beneficiary of the condemnation. Condemnations were still impermissible, however, where the public utility of the seizure was either too attenuated or simply insufficient.[147]

C. *Modern Developments in the Exercise of Eminent Domain*

Justice Patterson, author of *Vanhorne's Lessee*, cautioned against expansive interpretation of the Constitution. "Innovation

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145. *Id.* at 32.

146. *Id.* (emphasis added).

147. As late as 1937, the Supreme Court had maintained the status of its eminent domain jurisprudence as set forth in *Cotton Duck*. "[T]his Court has many times warned that one person's property may not be taken for the benefit of another private person *without a justifying public purpose* . . . ." Thompson v. Consol. Gas Utils. Corp., 300 U.S. 55, 80 (1937) (emphasis added).

During the first 150 years of the Republic's existence, the definition of "public use" oscillated between narrow and broad formulations. *E.g.*, 13 POWELL, *supra* note 10, § 79F.03[3][a]–[b], at 79F-27 to 79F-32. Under the narrow formulation, public use literally meant that the property must be used by the public, or that the public must have the opportunity to use the property taken. Kelo v. City of New London, No. 557299, 2002 Conn. Super. LEXIS 789, at *77 (Conn. Super. Ct. Mar. 13, 2002). The broad formulation of public use meant simply that the condemnation engendered some public advantage. *Id.* Although the Court had wavered in the past regarding the interpretation—whether broad or narrow—it would accord public use, *Cotton Duck* heralded its acceptance of the broad view. 13 POWELL, *supra* note 10, § 79F.03[3][b][i]–[ii], at 79F-29 to 79F-30. Since that time, the broad interpretation has only become broader. *See* Berman v. Parker, 348 U.S. 26, 33 (1954) (holding that it was within Congress's power to consider health and aesthetic values when enacting redevelopment legislation); *see also* Hawaii Hous. Auth. v. Midkiff, 467 U.S. 229, 244 (1984) (holding that state legislatures are as competent as Congress to make eminent domain determinations).

is dangerous. One incroachment leads to another; precedent gives birth to precedent; what has been done may be done again; thus radical principles are generally broken in upon, and the constitution eventually destroyed."[148] The previous section discussed the original meaning of "public use" in the context of governmental takings and outlined the adjustments—though minor—that were made to that conception. For more than a century and a half, the integrity of that framework persisted; government could constitutionally take private property either for its own use, or for transfer to another private individual when the property would be used to directly benefit the general public. The scope of eminent domain did not remain static, though, and in 1954 it underwent a dramatic expansion.

1. *Berman v. Parker*[149]

After World War II, Congress resolved to redevelop Washington, D.C. into a model city, declaring that it was "to be the policy of the United States to protect and promote the welfare of the inhabitants of the seat of the Government by eliminating . . . injurious conditions" such as "substandard housing," "blighted areas," and the practice of using "buildings in alleys as dwellings for human habitation."[150] Finding all these social ills offensive to the public health, welfare, safety, and morals, Congress determined to improve the city's plight "by employing all means necessary and appropriate for the purpose" of redevelopment.[151] Congress further found that the extent of the injurious conditions was so widespread as to preclude a solution through the natural operation of private enterprise alone.[152] The success of Washington's redevelopment efforts would therefore hinge upon a great degree of governmental participation.[153] To that end, Congress declared "the acquisition and the assembly of real property and the leasing

148. Vanhorne's Lessee v. Dorrance, 2 U.S. (2 Dall.) 304, 311–12 (1795).

149. 348 U.S. 26 (1954).

150. District of Columbia Redevelopment Act of 1945, ch. 736, § 2, 60 Stat. 790, 790 (1946).

151. *Id.* Congress is of course the principal and exclusive governing organization in the District of Columbia, and is so by the explicit language of the Constitution. U.S. CONST. art. I., § 8, cl. 17.

152. District of Columbia Redevelopment Act of 1945 § 2.

153. *Id.*

or sale thereof for redevelopment . . . to be a public use."[154] Once enough realty had been acquired, the land would then be transferred to public agencies for the construction of streets, schools, utilities, and recreational facilities.[155] Any real estate remaining after distribution to public agencies could then be leased or sold to private individuals or corporations.[156]

Plans were soon drafted and adopted that designated certain areas of Washington as priorities for redevelopment.[157] Private properties situated in certain designated areas were condemned, their owners paid fair market value for their loss, and the titles to the lands transferred to the government.[158] Naturally, the property owners—of which Berman was one—objected to this forced sale, and in *Berman v. Parker* appealed their cause to the Supreme Court of the United States.[159]

In a unanimous opinion, the Supreme Court affirmed Congress's exercise of eminent domain.[160] The Court began its analysis by considering the extent of Congress's regulatory power over Washington, D.C., concluding that the scope of its authority "includes all the legislative powers which a state may exercise over its affairs. . . . [It is] what traditionally has been known as the police power."[161] Though the full extent of the authority bound within Congress's police powers went largely undefined, the Court offered public safety, public health, morality, peace and quiet, and law and order as among "the more conspicuous examples" of its permissible exercise.[162] From this proposition the Court reasoned that legislatures are better suited to serve the public's needs through social legislation than the judiciary, which must therefore defer to the discretion of legislatures when acting pursuant to a valid exercise of the legislature's police powers.[163]

The Court's inquiry then moved to consider whether Congress's condemnations fell within the scope of its police power, for if the

154. *Id.*
155. *Id.* § 7(a).
156. *Id.* § 7(b), (f).
157. Berman v. Parker, 348 U.S. 26, 30–31 (1954).
158. *See generally id.* at 36.
159. *Id.* at 28.
160. *Id.* at 36.
161. *Id.* at 31–32.
162. *Id.* at 32.
163. *Id.*

condemnations were "within the authority of Congress, the right to realize [the property] through the exercise of eminent domain [would be] clear."[164] Approaching its analysis with due deference to Congress's legislative determinations, the Court had little trouble justifying the condemnations as an exercise of the traditional police power. "Miserable and disreputable housing conditions may . . . spread disease and crime and immorality."[165] Under such conditions, then, legislatures are fully justified in condemning blighted property.[166]

Although at this point in the analysis the Court had justified Congress's condemnation of blighted property, it had not yet upheld the condemnation of the petitioner's property. Berman was a business owner whose store was located in one of the most blighted areas of Washington.[167] Though the area surrounding his business was a slum, Berman contended that his individual property was not blighted.[168] As a result, condemning his upstanding business and the property on which it set not only failed to serve a public interest, but also defied the public conscience.[169]

The Court circumvented considering whether Berman's business was sufficiently blighted by declaring, without precedent or analysis, that "[p]roperty may of course be taken . . . which, standing by itself, is innocuous and unoffending. . . . If owner after owner were permitted to resist these redevelopment programs on the ground that his particular property was not being used against the public interest, integrated plans for redevelopment would suffer greatly."[170]

The precedent *Berman* established was both multifaceted and sweeping. First, the definition of "public use" as set forth in the Fifth Amendment was no longer limited to merely actual governmental use or uses benefiting the public directly. The definition had now swelled to include legislative actions occurring within the scope of the condemning authority's police power.[171]

164. *Id.* at 33.
165. *Id.* at 32.
166. *See id.* at 33.
167. *See id.* at 30–31.
168. *Id.* at 31.
169. *See id.*
170. *Id.* at 35.
171. *See supra* text accompanying notes 143–47.

Second, as the judiciary would pay great deference to legislative determinations, the Court would consider its role in determining whether the legislature properly had exercised its police power "an extremely narrow one."[172] Third, and relatedly, the rights of the individual with respect to his private property had been unequivocally subjugated to any rational public interest the state may have in that property.[173] In short, the private estate of an individual was no longer "holy," "sacred," or "inviolable" as Justice Patterson proclaimed;[174] rather, *Berman* established the proposition that the only property safe from condemnation is that which has no public utility.[175] "The rights of [the] property owners are *satisfied* when they receive that just compensation which the Fifth Amendment exacts as the price of the taking."[176]

2. *Hawaii Housing Authority v. Midkiff*[177]

Thirty years after *Berman*, the Supreme Court once again had the opportunity to consider the scope of eminent domain, though in a context different from urban redevelopment. Prior to Hawaii's admission as a state in 1959, private ownership of Hawaiian property was nearly nonexistent.[178] Since Hawaii's first colonization by Polynesian settlers, the islands had existed under a high chieftain who controlled all dispositions of property and essentially held Hawaii's land in trust for all its citizens.[179] Once

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172. *Berman*, 348 U.S. at 32.

173. In *Berman*, for example, the Court makes this plainly clear: "If owner after owner were permitted to resist these redevelopment programs on the ground that his particular property was not being used against the public interest, integrated plans for redevelopment would suffer greatly. . . . [C]ommunity redevelopment programs need not, by force of the Constitution, be on a piecemeal basis." *Id.* at 35.

174. Vanhorne's Lessee v. Dorrance, 2 U.S. (2 Dall.) 304, 311, 314 (1795).

175. *See, e.g.*, Petition for a Writ of Certiorari at 6–7, Kelo v. City of New London, ___ U.S. ___ (2005) (No. 04-108).

> [E]conomic development condemnations can occur in any area, as long as the city can conceive of a possibly more profitable use of the property that might therefore produce more tax dollars. Any home can be condemned because few if any homes generate as much tax revenue or as many jobs as an office building; any small or medium-sized business can be condemned because the land will always produce more taxes as a larger business.

Id.

176. *Berman*, 348 U.S. at 36 (emphasis added).

177. 467 U.S. 229 (1984).

178. *Id.* at 232.

179. *Id.*

Hawaii attained statehood, its monarchy was permanently dissolved, though Hawaii's historical pattern of land occupancy persisted.[180] A study commissioned by the Hawaii Legislature found that most of the state's land was owned by a small number of very wealthy landowners.[181] The effect of having so much of the state's land concentrated in the hands of so few had artificially inflated the price of realty; Hawaii's citizens, rather than owning property, had little choice but to lease land from these landholders.[182] To remedy this undesirable social condition, Hawaii proposed to break up the oligopoly of land ownership and allow for property to be publicly distributed at its fair market value through the state's use of eminent domain—an action to which the landholders strongly objected.[183]

The Supreme Court began its analysis of *Midkiff* with *Berman*, inquiring whether Hawaii's plan for land redistribution fell within the scope of the state's traditional police powers and thereby served a legitimate public interest.[184] The answer to this was in the affirmative. "Regulating oligopoly and the evils associated with it is a classic exercise of a State's police powers"[185]—doubtless for its protection and promotion of society's general welfare. The Court next considered whether Hawaii's means of exercising eminent domain were rational.[186] Finding the process employed by the state to be both comprehensive and reasonable, this too was upheld.[187] "When the legislature's purpose is legitimate and its means are not irrational," the exercise of eminent domain satisfies the requirements of the Fifth Amendment, and takings such as Hawaii's are deemed constitutionally permissible.[188]

Midkiff's significance to the development of the modern doctrine of eminent domain is in its confirmation of the extensive

180. *Id.*

181. *Id.* The degree of concentration was severe. Forty-nine percent of Hawaii's land was classified as government property, either state or federal. Forty-seven percent of the state's remaining land belonged to only seventy-two private landowners, leaving just four percent of the state for other private ownership. With respect to the seventy-two large-landholders, eighteen owned 21,000 acres or more. *Id.*

182. *Id.* at 232–33.

183. *Id.* at 233.

184. *Id.* at 239–42.

185. *Id.* at 242.

186. *Id.* at 242–43.

187. *Id.* at 243.

188. *Id.* at 242–43.

latitude granted to legislatures as recognized in *Berman*. Indeed, the Court plainly states that the public use requirement of the Fifth Amendment is "coterminous with the scope of a sovereign's police powers."[189] *Midkiff* also more clearly illustrates the due process analysis in which the Court engages in testing the validity of a challenged exercise of eminent domain. The Court will first assess whether the stated purpose of a proposed condemnation is within the reasonable ambit of the condemning authority's police power.[190] Consistent with *Berman*, though, the condemning authority's action is entitled to a strong degree of deference and is therefore presumptively valid.[191] Should the condemning authority satisfy the first criterion, the second inquiry moves to examine whether the condemnation is a rational means of achieving the stated public interest implicated in the condemnation.[192] This, too, is subject to great deference.[193]

An individual whose property is facing condemnation may certainly feel as though the deck is stacked against him. With great deference extended to legislatures out of respect for the separation of powers, the individual property owner is left to face a mountain of adverse presumptions with no assistance from the judiciary. Justice O'Connor, writing for the majority in *Midkiff*, stated that there remains "a role for courts to play in reviewing a legislature's judgment of what constitutes a public use, even when the eminent domain power is equated with the police power."[194] To date, however, that role has consisted of little more than a rubber stamp approving condemnations of private property.

D. *Revolution and Counter-Revolution in the States*

At the same time that the federal government was endorsing the broad application of public use as a matter of constitutional

189. *Id.* at 240. "Evidently, the Court meant that any of the purposes served by the police power (safety, health, morals and general welfare) may also be attained at the election of the sovereign by use of the power of eminent domain." 13 POWELL, *supra* note 10, § 79F.03[3][b][iii], at 79F-32.

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

191. *Id.* at 240–41.

192. *Id.* at 241.

193. *Id.*

194. *Id.* at 240.

interpretation, many states were following suit within their own jurisdictions. In Michigan, the supreme court held that the condemnation of private homes for the construction of an automotive manufacturing facility was a justifiable public use, because economic welfare—and by connection, job creation—was a matter of public interest traditionally entrusted to the protection of the state.[195] While condemnations of real estate for economic development are rather commonplace in modern America,[196] eminent domain may also be exercised over intangible personal property.[197] In California, for example, the City of Oakland legitimately condemned the trademark for the Oakland Raiders after the franchise threatened to relocate to another city.[198] Expansive interpretations of what constitutes public use are therefore not relegated strictly to the federal judiciary, but have over time emerged as a national phenomenon.

This is not to say, however, that courts of the several states have uniformly adopted the broad formulation of public use. To the contrary, the pendulum of public use in many states is swinging back toward the narrow construction.[199] As a consequence, there is presently no consensus on what the constitutional definition of public use is.[200]

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195. Poletown Neighborhood Council v. City of Detroit, 304 N.W.2d 455, 459 (Mich. 1981) (per curiam). This precedent was recently overturned, however, in *County of Wayne v. Hathcock*, 684 N.W.2d 765, 787 (Mich. 2004), signaling a constriction in Michigan of the meaning of public use.

196. *See generally* BERLINER, *supra* note 16, at 3 ("Eminent domain for private use happens all over the country, and local governments and developers regularly force residents and business out by threatening eminent domain.").

197. *E.g.*, City of Oakland v. Oakland Raiders, 646 P.2d 835, 840 (Cal. 1982).

198. *Id.* at 837. California's definition of public use as set forth in this decision is immensely broad. "'It is not essential that the entire community, or even any considerable portion thereof, shall directly enjoy or participate in an improvement in order to constitute a public use.'" *Id.* at 841 (quoting Fallbrock Irrigation Dist. v. Bradley, 164 U.S. 112, 161–62 (1896)).

199. *E.g.*, Bailey v. Myers, 76 P.3d 898, 901 (Ariz. 2003) (holding that the condemnation of a privately owned business for the purpose of redeveloping the property into other privately owned businesses is not a legitimate exercise of eminent domain); Southwestern Illinois Dev. Auth. v. Nat'l City Envtl., L.L.C., 768 N.E.2d 1, 11 (Ill. 2002) ("The power of eminent domain is to be exercised with restraint, not abandon."); Georgia Dep't of Transp. v. Jasper County, 586 S.E.2d 853, 856 (S.C. 2003) ("'However attractive the proposed project, however desirable the project from a government planning point of view, the use of the power of eminent domain for such purposes runs squarely into the right of an individual to own property and use it as he pleases.'") (quoting Karesh v. City Council of Charleston, 247 S.E.2d 342, 345 (S.C. 1978)).

200. *See generally* Petitioners' Brief, *supra* note 21, at 10–20.

IV. LOOKING AHEAD

A. *Applying the Due Process Analysis to* Kelo

Taken together, *Berman* and *Midkiff* establish the proposition that governments at both the state and federal levels may legitimately exercise their respective powers of eminent domain to condemn a private individual's property if the purpose of the condemnation is rationally related to protecting or promoting the health, welfare, safety, or morals of the public.[201] In the context of urban renewal, these precedents have been commonly supposed to provide municipal governments with the power to condemn private property for "economic development"—a purpose which, if valid, is almost certainly grounded in the welfare of the community. Consistent with the due process analysis set forth in *Berman* and *Midkiff*, then, *Kelo* may be reduced to two inquiries: first, whether New London legitimately exercised its authority to condemn the Fort Trumbull properties; and second, whether New London's means in condemning the property were rationally related to its ends.

To the first inquiry—and assuming that the Supreme Court applies no new standards—New London's decision to exercise eminent domain to take the Fort Trumbull properties would very likely be upheld. Consistent with *Berman*, a legislature need only assert that the proposed taking will serve some public use by promoting an interest protected within the scope of its police powers.[202] "[W]hen the legislature has spoken, the public interest has been declared in terms well-nigh conclusive. In such cases the legislature, not the judiciary, is the main guardian of the public needs to be served by social legislation . . . ."[203] In other words, an exercise of eminent domain generally serves a legitimate public purpose when the condemning authority says it does.[204]

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201. *See supra* notes 171–73, 184–89 and accompanying text.

202. Berman v. Parker, 348 U.S. 26, 32 (1954).

203. *Id.*

204. Though not entirely precluded from examining a legislature's relation of a condemnation to its purported public utility, "[t]he role of the judiciary in determining whether [the condemnation] is being exercised for a public purpose is an extremely narrow one." *Id.* Indeed, courts are directed to uphold a legislature's judgment "as to what constitutes a public use 'unless the use be palpably without reasonable foundation.'" Hawaii Hous. Auth. v. Midkiff, 467 U.S. 229, 241 (1984) (quoting United States v. Gettysburg

In *Kelo*, New London and the Connecticut legislature had both declared that economic development was necessary to the city's continued subsistence and prosperity and recognized that, without immediate redevelopment, New London's prospects for a more commercially vibrant future would continue to wane.[205] In contrast to *Berman*, however, it was never contended that Fort Trumbull was blighted,[206] only that New London's economic vitality depended upon its ability to attract commercial investment and increase its annual tax revenue.[207] This, in turn, depended on Fort Trumbull's wholesale condemnation and redevelopment.[208] If the Court's eminent domain jurisprudence holds steady and it remains the case that governments need only demonstrate the existence of some rational relationship between a condemnation and a matter of public interest, the constitutionality of New London's condemnations will likely be recognized.

The *Kelo* decision is by no means a foregone conclusion, though. The Court may very well find—as the Connecticut trial court judge found[209]—that a rational relationship did not exist between New London's condemnations and the purpose of those condemnations. Certainly, Fort Trumbull's condemnation will provide the space necessary for New London's large-scale economic redevelopment, and to that end there is *a* relationship between the condemnations and public welfare.[210] But is it a *rational* relationship? Coursing through this inquiry is an undeniable irony. New London's expressed purpose in condemning Fort Trumbull is economic redevelopment, consisting of job creation and revenue generation, which will thereby ultimately serve the general public welfare.[211] What could be more destructive to the welfare of a peo-

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Elec. Ry. Co., 160 U.S. 668, 680 (1896)).

205. *See supra* text accompanying notes 23–41.

206. Mansnerus, *supra* note 5.

207. *See* Respondents' Brief, *supra* note 9, at 1–3.

208. *Id.* at 6–8.

209. Under the Takings Clause of the U.S. Constitution, "no one's property can be taken even if compensation is offered unless it is taken for a public use. Therefore, the defendant government entities cannot make an *exclusive* claim to the public interest, the public has recognized the interest the plaintiffs should have as of right in their property." Kelo v. City of New London, No. 557299, 2002 Conn. Super. LEXIS 789, at *336 (Conn. Super. Ct. Mar. 13, 2002) (emphasis added). The inference drawn by the court is that the public use of a condemnation is rational insofar as it sufficiently outweighs society's general interest in protecting the individual's security in his private property.

210. *See supra* note 33 and accompanying text.

211. *See supra* notes 44–62 and accompanying text.

ple, though, than to know that their government could foreclose on their private homes and businesses at any moment, have them condemned, and grant the land to another private citizen who can make a more efficient use of the property than the present occupant? As a consequence, while the promotion of the public's general welfare is an interest that New London may legitimately protect pursuant to its police powers, it would be difficult to identify the rational relationship between New London's means—evicting citizens from their homes through condemnation—and its end—economic development.

B. *A Potential Solution: Striking a Balance Between* Berman *and* Kelo

In modern America, economic development and urban revitalization are increasingly becoming essential to the maintenance of well-managed cities and well-preserved greenspace.[212] But the exigencies of contemporary municipal planning and commercial investment should not be so highly esteemed as to allow their exercise to disintegrate the fundamental social relationships among the individual, his property, and his government that have defined our Republic. The wisest decision is one that protects both interests—that of the government in promoting public welfare and that of the citizen in having security in his property. *Kelo* provides a timely opportunity for striking a prudent balance between the two.

Indeed, *Kelo*'s lasting legacy may very well be the establishment of an eminent domain threshold, a point beyond which certain condemnations are held illegitimate. Although the basic framework first set forth in *Berman* would continue to apply and legislatures would still enjoy a great amount of judicial deference, condemnations under a new analysis would be justified only if there were a critical mass of public interests implicated. On one side of the *Kelo* threshold—where condemnations in the public interest are found legitimate—facts and circumstances similar to *Berman* would exist. Legitimate condemnations would demand more justification than mere economic redevelopment, implicating other aspects of the police power. On the other side of the

212. *See generally* URBAN PLANNING (Andrew I. Cavin ed., 2003).

threshold, however, are facts similar to *Kelo*. A legitimate public interest such as the generation of tax revenue may be at stake, but on the whole the harm done to the security of individuals in their private property outweighs the general public utility. To satisfy the due process analysis under this proposed framework, the condemning authority would need to show that the rational relationship between its condemnation and the public interest is sufficiently compelling to prevail against the rights of a private property owner.

There is every indication that the Supreme Court is prepared to establish such a test. While the constitutionality of New London's condemnations could be decided in either way, the mere fact that certiorari was granted provides tremendous insight into how the Court will approach the analysis in *Kelo*. After *Berman* and *Midkiff*, the scope of power wielded by the government regarding eminent domain is near plenary. If *Kelo* is decided in favor of New London, then the current doctrine of eminent domain will be left largely unchanged. *Kelo*, like *Midkiff*, would come to be known as additional confirmation of the latitude granted to governments to exercise their power of eminent domain. Audiences before the Court, though, are rare and not granted without good cause. While *Kelo* may prove to be nothing more than a rubber stamp on existing government practices, it is more likely that *Kelo* will set forth a new principle limiting the scope of legitimate governmental condemnations.[213]

Should the Supreme Court in fact establish a new test consistent with the principles outlined above, New London's takings would fail constitutional muster. New London has based much of its justification on the fact that redevelopment will generate more tax revenue.[214] If such a justification were upheld, there would be very little limit to what properties could be taken by the government and for how insignificant of a purpose.[215] While the additional tax revenue at stake in *Kelo* is several hundred thousand

213. Though the role of the judiciary in determining whether the power of eminent domain is being exercised for a public purpose is an "extremely narrow one," Berman v. Parker, 348 U.S. 26, 32 (1954), "[t]here is, of course, a role for courts to play in reviewing a legislature's judgment of what constitutes a public use, even when the eminent domain power is equated with the police power." Hawaii Hous. Auth. v. Midkiff, 467 U.S. 229, 240 (1984).

214. Petitioners' Brief, *supra* note 21, at 2.

215. *See supra* note 173 and accompanying text.

dollars, the next case to test such expansive limits may only be several hundred dollars, perhaps even less. In contrast, the public interest in protecting private property—though not insurmountable—must always be considered great. On balance, the harm wrought against property security would seem more substantial than the benefits rendered through the condemnations. Under the threshold set forth above, New London's expropriation—and those in similar fashion presently occurring across the United States—would cease permanently.

V. CONCLUSION

Though the scope of the government's power to condemn the property of individuals has waxed since the founding of the Republic, the centrality—and indeed, the necessity—of private property to the maintenance of a durable society has remained constant. In the past fifty years, Americans have witnessed a steady erosion of their property rights, watching them slip before their eyes into an unfathomable stream of public use. Certainly, to be effective, both the federal and state governments must be endowed with sufficient power to ensure the solvency of the Union. This requires the authority to regulate, within appropriate jurisdictions, the health, welfare, safety, and morals of the constituency. But government is due only a certain amount of latitude, above and below which its power must not be allowed; for in both excesses and abscesses, the power of the state can lead to the destruction of fundamental rights. The modern trend has been toward having an excess of power—of allowing governments to take property in the public's name for what is essentially private development. The dangers from the persistence of such a trend are manifold; the benefits, few; the stakes, high. Under current law, governments may exercise their powers of condemnation to the fullest extent of their sovereign authority. It can only be presumed that, by granting certiorari to *Kelo*, the Supreme Court has every intention of refining the relationships among the individual, his property, and his government by establishing a threshold by which to test condemnations, and of reining in future abuses of the despotic power of eminent domain.

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