

ty inflicted affirmative harm on society—in *Berman* through blight resulting from extreme poverty and in *Midkiff* through oligopoly resulting from extreme wealth.” Id. at 2674. By eliminating a harmful use, the takings in those cases “directly achieved a public benefit”; therefore, “it did not matter that the property was turned over to a public use.” Id. In contrast, she noted, the petitioners’ homes in New London were not inherently harmful to society.

Justice O’Connor criticized “errant language in *Berman* and *Midkiff*” that suggested the “public use” requirement extended to the full reach of the sovereign’s police powers. “The case before us now demonstrates why, when deciding if a taking’s purpose is constitutional, the police power and ‘public use’ cannot always be equated,” she wrote. Id. at 2675.

Justice Thomas’s Dissent

Justice Thomas expanded on Justice O’Connor’s “errant language” analysis, arguing that the Court’s “public use” jurisprudence has strayed from the original meaning of the Takings Clause. He asserted that the natural meaning of “public use,” viewed within the structure of the Constitution as a whole, suggests a more restrictive interpretation—that takings are permitted “only if the public has a right to employ [the condemned property], not if the public realizes any conceivable benefit from the taking.” Id. at 2680.

Examining the history of “public use” cases, Justice Thomas suggested that the “public purpose” test originated as dictum in *Fallbrook Irrigation District v. Bradley*, 164 U.S. 112 (1896), and was incorporated by later cases without careful analysis. He found a similar genesis for the Court’s deferential review of legislative determinations of what constitutes a public use. In Justice Thomas’s view, it was implausible that the framers of the Constitution intended to defer to legislative assessments on this issue when such deference is not accorded in other situations involving constitutional rights, such as whether a search of a home is reasonable or when state law creates a property interest protected by the Due Process Clause.

Justice Thomas argued that the majority’s decision was not only erroneous, but dangerous. Reinforcing a point made in Justice O’Connor’s dissent, Justice Thomas predicted that the effect of the majority’s decision “will fall disproportionately on poor communities. Those communities are not only systematically less likely to put their lands to the highest and best social use, but are also the least politically powerful.” 125 S. Ct. at 2686–87. He noted that urban renewal projects historically have displaced disproportionate numbers of minorities, particularly blacks. Id. at 2687 (quoting Wendell E. Pritchett, *The “Public Menace” of Blight: Urban Renewal and the Private Uses of Eminent Domain*, 21 Yale L. & Pol’y Rev. 1, 47 (2003) (“[i]n cities across the country, urban renewal came to be known as ‘Negro removal’”).

Conclusion

Kelo establishes that economic development constitutes a permissible “public use” under the Fifth Amendment of the U.S. Constitution.



Kelo v. City of New London

A Requiem for Public Use

By David L. Callies

In *Kelo v. City of New London*, 125 S. Ct. 2655 (2005), a bare majority of the Court upheld the exercise of eminent domain for the purpose of economic revitalization. Heavily relying on its previous decisions in *Berman v. Parker*, 348 U.S. 26 (1954), and *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229 (1984), the Court concluded that it was too late in the game to revisit its present expansive view of public use, formally stating that there is no difference in modern eminent domain practice between public use and public purpose—at least in federal court. 125 S. Ct. at 2664–65. Indeed, the Court specifically equated public use and public purpose, in holding that condemning land for economic revitalization was at worst simply another small step along the continuum of permitting public benefits to be sufficient indicia of meeting public use/public purpose requirements in the context of the Fifth Amendment’s Takings Clause. Id. As the Court also noted, it is

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The controversy, however, is far from over. As Justice Stevens foreshadowed in his opinion, the debate has now shifted to the states, which are free to enact legislation that would be more protective of private property rights. Id. at 2668 (“nothing in our opinion precludes any State from placing further restrictions on its exercise of the takings power”). Within two months, legislation to overturn or limit *Kelo*’s reach had been proposed or discussed in Congress and in more than two dozen states. See Kenneth Harney, *High-Court Seizure Decision Sparks Uprising*, Balt. Sun, July 24, 2005, at 4L.

To inform this continuing debate, five property scholars share their analyses of the *Kelo* case. Their commentaries provide insights into the practical, as well as theoretical, implications of the decision. ■

now up to the states to decide whether or not to increase the burden on government exercise of compulsory purchase powers. See Amanda Eckhoff & Dwight Merriam, *Public Use Goes Peripatetic*, 56 *Planning & Envtl. L. No.* 1 (Jan. 2005), at 3; Steven J. Eagle, *The Public Use Requirement and Doctrinal Renewal*, 34 *Envtl. L. Rep.* 10999 (2004). The federal bar is presently set so low as to be little more than a speed bump.

The argument for a judicial hand-off is not so strong as the Court majority suggests, however. If it is now up to the states to regulate the use of eminent domain for "economic revitalization" absent blight either of the subject property or the area to be revitalized, Justice O'Connor (who wrote the broadly worded *Midkiff* opinion for a unanimous Court in 1984) provides a template for such regulation in her cogent and strongly worded dissent. She observes that the question of what is a public use is a judicial, not a legislative, one. 125 S. Ct. at 2673 (O'Connor, J., dissenting) (citing *Cincinnati v. Vester*, 281 U.S. 439 (1930)). Justice O'Connor commences by declaring that if economic development takings meet the public use requirement, there is no longer any distinction between private and public use of property, the effect of which is "to delete the words 'for public use' from the Takings Clause of the Fifth Amendment." Id. at 2671. *Berman* and *Midkiff*, according to O'Connor, were exceptions to the Court's jurisprudence, which required public use to be actual use by the public. The Court, says O'Connor, has "identified" three categories of public use takings of private property: (1) transfers to public ownership for such as roads, hospitals, and military bases; (2) transfers to private common carriers or utilities for railroads or stadia (both of which she characterizes as "straightforward and uncontroversial"); and (3) the rare "public purpose" case "in certain circumstances and to meet certain exigencies." Id. at 2673. For public purposes such as the eradication of blight and slums in *Berman* and the elimination of oligopoly in *Midkiff*, deference to legislative determinations was warranted because the "extraordinary, precon-

demnation use of the targeted property inflicted affirmative harm on society." Id. at 2673-74. In other words, these were exceptional circumstances clearly not replicated in New London, and the application of this third exceptional category in these circumstances "significantly expands the meaning of public use." Id. at 2675.

Justice O'Connor also confesses error (her own as well as the Court's) in ever equating public use and the police power, from which, she accurately observes, much of the expanded doctrine of public use into broad public purpose, and particularly deference to legislative determinations of public purpose, derives. Id. at 2675. If, as the

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majority suggests, government can take private property and give it to new private users so long as the new use is "predicted to generate some secondary benefit for the public" like increased tax revenues or more jobs, Justice O'Connor asserts, then "for public use" does not exclude any takings. Id. Thus, under the majority's criteria, "[n]othing is to prevent the State from replacing any Motel 6 with a Ritz-Carlton, any home with a shopping mall, or any farm with a factory." Id. at 2676. Leaving any tougher standards designed to limit such possibilities to the states is "an abdication of our responsibility. States play many important functions in our system of dual sovereignty, but compensating for our refusal to enforce properly the Federal Constitution . . . is not among them." Id. at 2677.

States—and Congress—have stepped up to the plate following the public outcry that greeted the decision. Currently, almost 40 state legislatures have introduced or plan to introduce laws limiting the use of eminent

domain, or review their current eminent domain laws. For a list of current legislation, see Castle Coalition, *Current Proposed State Legislation on Eminent Domain* (last visited Oct. 14, 2005), at www.castlecoalition.org/legislation/states/index.asp. Local governments are also taking measures to protect their homeowners, with several dozen cities and counties introducing their own bills to restrict the use of eminent domain. See Castle Coalition, *Current Proposed Local Legislation on Eminent Domain* (last visited Oct. 14, 2005), at www.castlecoalition.org/legislation/local/index.asp. Overall, lawmakers have introduced more than 70 bills on eminent domain. Tresa Baldas, *States Ride Post-"Kelo" Wave of Legislation*, Nat'l L.J., Aug. 1, 2005, at 1.

On August 3, 2005, Alabama became the first state to enact new protections against local government seizure of property allowed under *Kelo*. 2005 Ala. Acts 313; Donald Lambro, *Alabama Limits Eminent Domain*, Wash. Times, Aug. 4, 2005, at A1. Lawmakers in Connecticut and New York "have called for moratoria on the use of eminent domain until their legislatures can revise the law to protect property owners." Institute for Justice, *With Governor's Signature Today, Alabama Will Become First State to Curb Eminent Domain Abuse After Kelo* (Aug. 3, 2005), www.ij.org/private_property/castle/8_3_05pr.html. Even "[t]he city of New London, Conn[ecticut], has agreed to abide by the moratorium and allow Susette Kelo and the other homeowners to stay for now." Id.

Congress also has taken action in the wake of *Kelo*, introducing numerous bills that would curb the federal and state governments' use of eminent domain for economic development. For a list of current federal legislation, see Castle Coalition, *Current Proposed Federal Legislation on Eminent Domain* (last visited Oct. 14, 2005), www.castlecoalition.org/legislation/federal/index.asp. The Senate introduced a bill only four days after the *Kelo* decision was announced that would limit eminent domain to only "public use," provided "the term 'public use' shall not be construed to

include economic development." S. 1313, 109th Cong. (2005). This bill was pending in the Committee on the Judiciary. Castle Coalition, *supra*.

A week after the decision, the House of Representatives passed, by a vote of 365 to 33, a resolution expressing disagreement with the majority opinion in *Kelo*. The resolution provides that "eminent domain should never be used to advantage one private party over another" and state and local governments should not construe *Kelo* as "justification to abuse the power of eminent domain. . . ." H.R. Res. 340, 109th Cong. (2005). The House also passed an amendment to a Treasury, Department of Transportation, and Department of Housing and Urban Development appropriations bill stating that "[n]one of the funds made available in this Act may be used to enforce the judgment of the United States Supreme Court in the case of *Kelo v. New London*, decided June 23, 2005." H.R. 3058, 109th Cong. § 949 (2005). The Senate approved a similar amendment to prohibit the use of federal funds for eminent domain purposes. The matter was pending in a conference committee when this article went to press. Six other bills have been introduced to curb the use of eminent domain for economic development. Castle Coalition, *supra*.

Nevertheless, in the aftermath of the *Kelo* decision, abuses of eminent domain continue unabated. "Thousands of properties nationwide are facing the threat of eminent domain for private development, and many more projects are in the planning stages." Institute for Justice, *Floodgates Open: Tax-Hungry Governments & Land-Hungry Developers Rejoice in Green Light from U.S. Supreme Court* (June 29, 2005), www.ij.org/private_property/connecticut/6_29_05pr.html. For example, hours after the *Kelo* decision, officials in Freeport, Texas, began proceedings to seize two waterfront businesses to make way for an \$8 million private boat marina. *Id.* The city of Arnold, Missouri, "wants to raze 30 homes and 15 small businesses . . . for a Lowe's Home Improvement store and a strip mall—a \$55 million project for which developer THF Realty will receive \$21 million in tax-increment financing." *Id.* In Newark, New Jersey, officials reversed their deci-

sion to vote against a development plan that would level 14 downtown acres to build 2,000 upscale condo units and retail space. *Id.* "Officials told the Associated Press that the . . . project could have been killed if the Supreme Court had sided with the homeowners in *Kelo*." *Id.* (including other examples).

A Requiem for Public Use

Very little was left of the Public Use Clause—at least in federal court—even before the *Kelo* decision. Although a growing handful of state decisions and federal decisions applying state proper-



ty law found economic revitalization public purposes invalid on constitutional grounds—see, e.g., *County of Wayne v. Hathcock*, 684 N.W.2d 765 (Mich. 2004)—an equal number of decisions agreed with the Connecticut Supreme Court that such purposes were a valid public use. *Gen. Bldg. Contractors, L.L.C. v. Bd. of Shawnee County Comm'rs*, 66 P.3d 873, 882-83 (Kan. 2003); *City of Jamestown v. Leevers Supermarkets, Inc.*, 552 N.W.2d 365, 369 (N.D. 1996). Clearly this is the view of hundreds of state and local revitalization and redevelopment agencies. See Dana Berliner, *Public Power, Private Gain* (Apr. 2003), www.castlecoalition.org/report/index.shtml.

Whether one reads the Court's previous jurisprudence on public use broadly, as Justice Stevens does for the *Kelo* Court's majority, or more narrowly, as does each dissent, it is difficult to argue with the conclusions reached separately by Justices O'Connor and Thomas: the Public Use Clause is virtually eliminated in federal court. What

yellow light of caution the handful of recent cases signaled has now turned back to green. Government may once more acquire private property by eminent domain on the slightest of public purpose pretexts unless such a use is inconceivable or involves an impossibility, the tests following *Midkiff* in 1984. In other words, it is now all about process, and process only.

There is no doubt that state and local governments will do much good in terms of public welfare and public benefits flowing from economic revitalization under such a relaxed standard, as they have often done in the past. They will do so with increased attention to carefully drafted plans and procedures guaranteeing maximum public exposure and participation, both emphasized in the majority opinion. Moreover, members of the Court during oral argument suggested rethinking how to calculate and award "just" compensation in extenuating circumstances such as those in New London now that the Public Use Clause is a mere procedural hurdle. 125 S. Ct. at 2668 n.21. For example, other countries provide a measure of extra compensation when, as here, it is a private residence that is condemned and the landowner has a demonstrable emotional attachment to the improved land. In Australia, the concept of solatium provides up to 10% additional compensation beyond fair market value in such circumstances. See Lee Anne Fennell, *The Death of Poletown: The Future of Eminent Domain and Urban Development After County of Wayne v. Hathcock: Taking Eminent Domain Apart*, 2004 Mich. St. L. Rev. 957, 1004 (referencing Murray J. Raff, *Taking Land: Compulsory Purchase and Regulation in Asian-Pacific Countries* ch. 1 (Tsuyoshi Kotaka & David L. Callies eds., 2002)).

Yet, the Public Use Clause is more than simple policy; it is a bedrock principle contained in the Bill of Rights, designed not to further the goals and desires of the majority, but as a shield against majoritarian excesses at the expense of an otherwise defenseless minority—like the Kelos. Surely the Court could have found grounds to preserve that shield in federal court. ■