Kelo v. City of New London: Of Planning, Federalism, and a Switch in Time

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I. INTRODUCTION

In a remarkable conversion, the so-called liberal wing of the U.S. Supreme Court, led by Justice Stevens, decided in *Kelo v. City of New London*[1] that federalism (state action is preferable to federal action across a spectrum of subjects) is a good thing after all. This is the same block which fulminated against the rebirth of federalism, the resuscitation of the Tenth Amendment, and similar relatively recent holdings by the so-called conservative wing of the Court in such cases as *United States v. Lopez*,[2] *New York v. United States*,[3] and *Gregory v. Ashcroft*.[4] Arguably going back to a somewhat different Court's decision in *Garcia v. San Antonio Metropolitan Transit Authority*,[5] Justice Stevens, usually joined by Justices Breyer, Ginsberg and Souter, has pressed for an increasingly pervasive federal role in the affairs of citizens at the expense of state and local government. His opinion in *Kelo*, in which he is joined by Justices Breyer, Ginsberg, and Souter (Justice Kennedy separately concurring) represents a philosophical U-turn in favor of state action and against the establishment of federal criteria, and from an area of law that cries out for federal standards and oversight. As demonstrated below, the states have certainly taken him at his word.

In *Kelo v. City of New London*, 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*[6] and *Hawaii*

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1 ___U.S. ___, 125 S. Ct. 2655 (2005).

2 514 U.S. 549 (1995).

3 505 U.S. 144 (1992).

4 501 U.S. 452 (1991).

5 469 U.S. 528 (1985).

6 348 U.S. 26 (1954).

Housing Authority v. Midkiff,[7] the Court stated 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[8]—at least in federal court. Indeed, the Court specifically equated public use and public purpose before 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 for purposes of the Fifth Amendment's Takings Clause.[9] The Court specifically held that it is now up to the states to decide whether or not to increase the burden on government exercise of compulsory purchase powers.[10] The federal bar is presently set so low as to be little more than a speed bump. It is worth setting out what the Court decided in *Kelo*, and on what basis, before describing more fully the shift in favor of federalism there embraced by Justice Stevens' majority opinion.

II. THE STATE OF THE FEDERAL LAW ON PUBLIC USE BEFORE *KELO*: *BERMAN V. PARKER* AND *HAWAII HOUSING AUTHORITY V. MIDKIFF*

The members of the Court expressed different views on the historical antecedents of public use and how far back to go in deriving an appropriate definition to apply in *Kelo*.[11] Nevertheless, all (except perhaps Justice Thomas) agree that the most relevant precedents are the decisions of the Court in *Berman* and *Midkiff*. In both decisions, the Court wrote expansively about the public use requirement of the Fifth Amendment.

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[7] 467 U.S. 229 (1984).

[8] ___ U.S. ___, 125 S. Ct. 2655, 2665 (2005).

[9] *Id.* at 2665-66.

[10] Of the slightly more than a dozen state courts that have considered whether economic revitalization is sufficient public use for governmental exercise of eminent domain, about half—such as Connecticut and now the U.S. Supreme Court—have decided that it is, and about half—such as Michigan in its recent and thoroughly reviewed and discussed *County of Wayne v. Hathcock*, 684 N.W.2d 765 (Mich. 2004)—that it is not, utilizing various tests such as whether the condemnation serves primarily a public purpose or primarily benefits the private sector. See Steven J. Eagle, *The Public Use Requirement and Doctrinal Renewal*, 34 ENVTL. L. REP. 10999 (2004) for extensive analysis and commentary, and Amanda S. Eckhoff & Dwight H. Merriam, *Public Use Goes Peripatetic: First, Michigan Reverses Poletown And Now The Supreme Court Grants Review In An Eminent Domain Case*, 57 PLAN. AND ENVTL. L. 3 (2005).

[11] Ranging from the lengthy historical analysis provided by Justice Thomas in dissent (he would have the Court return to original meaning in the 18th century in which most eminent domain cases appear to require actual use by the public, though Justice Stevens reads some of the same history quite differently by choosing other cases from that period upon which to rely) to concentration only on mid to late twentieth century cases by Justice Stevens for the majority and Justice O'Connor in dissent.

In *Berman*, the Court dealt with the condemnation of a thriving department store contained in a large parcel condemned by a redevelopment agency for the statutory (Congressional in this case) purpose of eliminating blight, all in accordance with a required redevelopment plan.[12] Justice Douglas for the majority commenced by observing famously that a community could decide to be attractive as well as safe, and that in thus justifying eminent domain to accomplish these goals, "[w]e deal, in other words, with . . . the police power[,]"[13] a controversial joining of the two powers which has affected definitions of public use ever since by obviating any need for the public to actually use the property condemned so long as it furthered a public purpose. Indeed, the landowners pointed out that their land would simply be turned over to another private owner.[14] No matter, said Douglas:

> But the means of executing the project are for Congress and Congress alone to determine, once the public purpose has been established. . . . The public end may be as well or better served through an agency of private enterprise than through a department of government—or so the Congress might conclude. We cannot say that public ownership is the sole method of promoting the public purposes of community redevelopment projects.[15]

To the landowners' argument that their particular parcel was unblighted and that therefore its condemnation violated the Fifth Amendment's public purpose clause, Justice Douglas responded that if experts concluded the area must be planned as a whole in order to prevent reversion to a slum, so be it.[16] Despite this broad language, many conceived the decision to apply largely to redevelopment projects, and in particularly those which were well-planned in accordance with clear statutory mandates. Not so after *Midkiff*.

In 1967, the Hawai'i State Legislature passed a land reform act the principle purpose of which was to eliminate a perceived oligopoly in available residential land which was thought to adversely affect the price and availability of housing for its citizens.[17] Eminent domain was the means chosen to solve the problem. The act authorized a state agency—the Hawai'i Housing Authority—to condemn the fee simple interest in land which was leased to individual homeowners, for the purpose of conveying that interest to some other private owner, usually the existing owner's lessee who owned the house on the land.[18] The main target of the legislation was the Bishop

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[12] Berman v. Parker, 348 U.S. 26, 31 (1954).
[13] *Id.* at 32.
[14] *Id.* at 31.
[15] *Id.* at 33-34.
[16] *Id.* at 34-35.
[17] Haw. Hous. Auth. v. Midkiff, 467 U.S. 229, 232-33 (1984).
[18] *Id.* at 233.

Estate (as it was then known), a charitable trust created by Princess Bernice Pauahi Bishop, a descendent of King Kamehameha the Great and whose large landholdings she eventually inherited. The Estate challenged the act's condemnation process as a taking without the public use required by the U.S. Constitution's Fifth Amendment.[19] While the Federal District Court upheld the statute, the Ninth Circuit Court of Appeals held that the statute essentially provided for a "naked" transfer from one private individual to another, and so lacked the requisite public use.[20]

In a unanimous decision, the U.S. Supreme Court reversed the Ninth Circuit, citing *Berman* for the proposition that once a legislative body had declared a public purpose, it was not for federal courts to interfere unless that purpose was "inconceivable" or an "impossibility."[21] The means were irrelevant; this was simply a mechanism or process to accomplish the legislatively-declared public purpose. Indeed, it would make no difference, said Justice O'Connor writing for the Court, if that public purpose never came to pass, so long as the legislature could reasonably have thought it would when enacting the statute.[22] Note throughout the frequent use of public purpose, instead of public use. These words would come back to haunt Justice O'Connor in *Kelo*, as appears below.

III. *KELO V. CITY OF NEW LONDON*

The Court in *Kelo* simply extended the reasoning in *Berman* and *Midkiff* to the economic revitalization condemnations increasingly common throughout urban areas in the United States during the last quarter of the Twentieth Century. Indeed, the majority was singularly unimpressed with extreme uses of eminent domain for the purposes of providing employment and bettering the local tax base as the parties brought to its attention: "A parade of horribles is especially unpersuasive in this context since the Takings Clause largely 'operates as a conditional limitation permitting the government to do what it wants so long as it pays the charge.'"[23]

The facts in *Kelo* are straightforward. In order to take advantage of a substantial private investment in new facilities by Pfizer, Inc., in an

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[19] *Id.* at 234-35.

[20] *Id.* at 235.

[21] *Id.* at 240.

[22] *Id.* at 241.

[23] Kelo v. City of New London, ___ U.S. ___, 125 S. Ct. 2655, 2667 n.19 (2005) (citing Eastern Enters. v. Apfel, 524 U.S. 498, 545 (1998)). See DANA BERLINER, INST. FOR JUSTICE, PUBLIC POWER, PRIVATE GAIN: A FIVE YEAR, STATE-BY-STATE REPORT EXAMINING THE ABUSE OF EMINENT DOMAIN (2003), http://www.castlecoalition.org/pdf/report/ED_Report.pdf, for a compendious list of such "horribles."

economically depressed area of New London along the Thames River, the City reactivated the private non-profit New London Development Corporation ("NLDC") to assist in planning the area's economic development.[24] Authorized and aided by grants totaling millions of dollars, NLDC held meetings and eventually "finalized an integrated development plan focused on [ninety] acres in the Fort Trumbull area."[25] The City Council also authorized the NLDC to purchase property or to acquire property by exercising eminent domain in the City's name.[26] Although the NLDC successfully negotiated the purchase of most of the real estate, its negotiations with Kelo and fellow petitioners failed.[27] As a consequence, the NLDC initiated the condemnation proceedings that gave rise to this case.[28] There was no allegation than any of these properties were blighted or in poor condition; rather they were condemned "only because they happen to be located in the development area."[29]

The Kelos owned a single-family house with a water view, in which Mrs. Kelo had lived since 1997.[30] Petitioner Wilhemina Dery was born in her home in 1918, and has lived there her entire life.[31] On these facts, petitioners claimed that the taking of their property violated the public use restriction in the Fifth Amendment.[32] A trial court agreed as to the parcel containing the Kelo house, but a divided Supreme Court of Connecticut reversed, holding that all of the City's proposed takings were constitutional.[33] Noting that the proposed takings were authorized by the state's municipal development statute and in particular the taking of even developed land as part of an economic development project was for a public use and in the public interest, the court relied on *Berman* and *Midkiff* in holding that such economic development qualified as a public use under both Federal and State Constitutions.[34] The U.S. Supreme Court granted certiorari "to determine whether a city's decision to take property for the purpose of economic development satisfies the 'public use' requirement of the Fifth Amendment."[35]

The Court's answer: an unequivocal yes. While the Court noted that

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[24] *Kelo*, ___ U.S. ___, 125 S. Ct. at 2659.
[25] *Id.*
[26] *Id.* at ___, 125 S. Ct. at 2660.
[27] *Id.*
[28] *Id.*
[29] *Id.*
[30] *Id.*
[31] *Id.*
[32] *Id.*
[33] *Id.* at ___, 125 S. Ct. at 2660-61.
[34] *Id.* at ___, 125 S. Ct. at 2660.
[35] *Id.* at ___, 125 S. Ct. at 2661.

> the sovereign may not take the property of *A* for the sole purpose of transferring to it another private party *B*. . . . [I]t is equally clear that a State may transfer property from one private party to another if future 'use by the public' is the purpose of the taking . . . .[36]

The question, then, is what constitutes sufficient use by the public. Three factors appear to be important in reaching the conclusion that economic revitalization in New London constitutes such use: a rigorous planning process, the Court's precedents embodied in *Berman* and *Midkiff*, and deference to federalism and state decision making.

The Court commences its analysis by reiterating that private-private transfers alone are unconstitutional and any pretextual public purposes meant solely to accomplish such transfers would fail the public use test.[37] The Court, however, observed that the governmental taking at issue in this case was meant to "revitalize the local economy by creating temporary and permanent jobs, generating a significant increase in tax revenue, encouraging spin-off economic activities and maximizing public access to the waterfront"[38] all in accordance with a "carefully considered"[39] and "carefully formulated"[40] development plan in accordance with a state statute "that specifically authorizes the use of eminent domain to promote economic development."[41] Therefore, the "record clearly demonstrates that the development plan was not intended to serve the interests of Pfizer, Inc., or any other private entity."[42] Indeed, the Court was particularly impressed by "the comprehensive character of the plan [and] the thorough deliberation that preceded its adoption[.]"[43] Although little in the plan demonstrated any actual use by the public, the Court observed that it had embraced a broader and more "natural" interpretation of public use as public purpose at least since the end of the Nineteenth Century,[44] and "[w]e have repeatedly and consistently rejected that narrow [use by the public] test ever since."[45]

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[36] *Id.*

[37] *Id.*

[38] *Id.* at ___, 125 S. Ct. at 2661 n.6 (quoting Kelo v. City of New London, 843 A.2d 500, 595 (Conn. 2004) (Zarella, J., concurring in part and dissenting in part)) (quotation marks omitted).

[39] *Id.* at ___, 125 S. Ct. at 2661 (quotation marks omitted).

[40] *Id.* at ___, 125 S. Ct. at 2665.

[41] *Id.*

[42] *Id.* at ___, 125 S. Ct. at 2661 n.6 (quoting Kelo v. City of New London, 843 A.2d 500, 595 (Conn. 2004) (Zarella, J., concurring in part and dissenting in part)) (quotation marks omitted).

[43] *Id.* at ___, 125 S. Ct. at 2665.

[44] *Id.* at ___, 125 S. Ct. at 2662 (citing Fallbrook Irrigation Dist. v. Bradley, 164 U.S. 112 (1896)).

[45] *Id.* at ___, 125 S. Ct. at 2663.

Next, the Court observed that this broad definition of public use accorded with its "longstanding policy of deference to legislative judgments in this field."[46] The Court then discussed its decisions in *Berman* and *Midkiff* as demonstrations of such legislative deference, quoting heavily from the language in *Berman* about "'the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled.'"[47] The Court concluded that its "jurisprudence has wisely eschewed rigid formulas and intrusive scrutiny in favor of affording legislatures broad latitude in determining what public needs justify the use of the takings power."[48] It thus appears that the Court has clearly and unequivocally substituted a welfare-based public needs test for use by the public when such needs are legislatively determined.

The Court steadfastly and bluntly rejected any suggestion that it formulate a more rigorous test.[49] Thus, for example, to require the government to show that public benefits would actually accrue with reasonable certainty or that the implementation of a development plan would actually occur, would take the Court into factual inquiries already rejected earlier in the term when the Court rejected the "substantially advances a legitimate state interest" test for regulatory takings in *Lingle v. Chevron U.S.A., Inc.*[50] Similarly, the Court declined to second-guess the city's determinations as to what lands it needed to acquire in order to effectuate the project.[51]

The Court rejected the invitation by some *amici* to deal with the appropriateness of compensation under the circumstances. Although the Court acknowledged the hardships which the condemnations might entail in this case, "these questions are not before us in this litigation," even though members of the Court itself raised the adequacy of compensation during oral argument.[52]

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[46] *Id.*

[47] *Id.* (quoting Berman v. Parker, 348 U.S. 26, 33 (1954)).

[48] *Id.* at ___, 125 S. Ct. at 2664.

[49] *Id.* at ___, 125 S. Ct. at 2667.

[50] 544 U.S. 528 (2005).

[51] *Kelo*, ___ U.S. ___, 125 S. Ct. at 2668.

[52] *Id.* at ___, 125 S. Ct. at 2668 n.21. Other countries provide a measure of extra compensation where, as here, it is a private residence which is condemned and the landowner has a demonstrable emotional attachment to the improved land. See, for example, the Australian concept of solatium, amounting to up to 10% additional compensation beyond fair market value in such circumstances, briefly noted (among other compensation issues) in 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 (2004), and referencing Murray J. Raff's more lengthy description in Chapter 1 of TAKING LAND: COMPULSORY PURCHASE AND REGULATION IN ASIAN-PACIFIC COUNTRIES (Tsuyoshi Kotaka & David L. Callies eds. 2002).

Lastly, and most important for purposes of this Article, in a nod to federalism and states rights, the Court closes by leaving to the states any remedy for such hardships posed by the condemnations in New London: "We emphasize that nothing in our opinion precludes any State from placing further restrictions on its exercise of the takings power. Indeed, many states already impose 'public use' requirements that are stricter than the federal baseline."[53] Only Justice Kennedy's concurrence suggests some small role yet for federal courts in determining that a particular exercise of eminent domain might fall short of the required public use requirement: "There may be private transfers in which the risk of undetected impermissible favoritism of private parties is so acute that a presumption (rebuttable or otherwise) of invalidity is warranted under the Public Use Clause."[54] This is, however, largely a due process argument rather than a Fifth Amendment argument, and in any event, continued Kennedy: "This demanding level of scrutiny . . . is not required simply because the purpose of the taking is economic development."[55]

IV. THE DISSENTS

Oddly, it is the conservative wing of the Court that argues vigorously for federal intervention into this area which the liberal wing leaves to the states, as the vigorous dissents from Justices O'Connor and Thomas demonstrate. Particularly strong is the dissent by Justice O'Connor who wrote the broadly-worded *Midkiff* opinion for a unanimous Court in 1984. Observing that the question of what is a public use is a judicial, not a legislative one,[56] 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."[57]

But what then of *Berman* and her own language in *Midkiff*? These decisions, according to O'Connor, were exceptions to the Court's jurisprudence that 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

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[53] *Kelo*, ___ U.S. ___, 125 S. Ct. at 2668 (footnoting the recent Michigan decision in *County of Wayne v. Hathcock*, 684 N.W.2d 765 (Mich. 2004)).

[54] *Id.* at ___, 125 S. Ct. at 2670 (Kennedy, J., concurring).

[55] *Id.*

[56] *Id.* at ___, 125 S. Ct. at 2673 (O'Connor, J., dissenting) (citing Cincinnati v. Vester, 281 U.S. 439 (1930)).

[57] *Id.* at ___, 125 S. Ct. at 2671.

"straightforward and uncontroversial"); and (3) the rare "public purpose" case "in certain circumstances and to meet certain exigencies" such as the eradication of blight and slums in *Berman* and the elimination of oligopoly in *Midkiff*, where deference to legislative determinations were warranted because the "extraordinary, precondemnation use of the targeted property inflicted affirmative harm on society . . . ."[58] 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."[59] If, as the 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 public benefit like increased tax revenues or more jobs, then "for public use" does not exclude any takings.[60] Dismissing Justice Kennedy's test as one in which no one but a "stupid staffer" could fail, Justice O'Connor warns that "[n]othing is to prevent the State from replacing any Motel 6 with a Ritz-Carlton, any home with a shopping mall, or any farm with a factory."[61] 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."[62] She ends with concerns for those with fewer resources who will suffer in contests over exercises of eminent domain with those with "disproportionate influence and power in the political process, including large corporations and development firms."[63]

Justice Thomas raises similar concerns in his dissent, but in considerably more detail. Picking up on Justice O'Connor's concern for the politically least powerful and characterizing the Court's deferential standard as "deeply perverse,"[64] Justice Thomas provides several examples indicating that those uprooted in even the urban renewal cases were overwhelmingly poor, elderly, black, or all of the above.[65] His disagreement with the Court goes much deeper than that of Justice O'Connor, however. Reviewing a series of court opinions and writings from the late Eighteenth Century, Justice Thomas

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[58] *Id.* at ___, 125 S. Ct. at 2674.

[59] *Id.* at ___, 125 S. Ct. at 2675.

[60] *Id.* 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, derive. *Id.*

[61] *Id.* at ___, 125 S. Ct. at 2676.

[62] *Id.* at ___, 125 S. Ct. at 2677.

[63] *Id.*

[64] *Id.* at ___, 125 S. Ct. at 2687 (Thomas, J., dissenting).

[65] *Id.*

concludes that the cases cited by the majority for the proposition that public use meant public purpose rather than use by the public in the early years of the republic were exceptions—aberrations that varied from the usual rule. Thomas concludes that the Court's current public use jurisprudence therefore rejects the original meaning of the public use clause, to which he urges the Court to return, and from which it has clearly deviated.[66]

V. THE EXTENT OF THE SHIFT: A SELECTIVE STROLL THROUGH THE SUPREME COURT'S FEDERALISM CASES

A. Garcia v. San Antonio Metropolitan Transit Authority[67]

The San Antonio Metropolitan Transit Authority ("SAMTA"), a public mass-transit authority that is the major provider of transportation in the San Antonio, Texas, metropolitan area,[68] sought a declaratory judgment from the United States District Court for the Western District of Texas that, contrary to the determination of the Wage and Hour Administration of the Department of Labor, its operations were constitutionally immune from the application of the minimum-wage and overtime requirements of the Fair Labor Standards Act ("FLSA") under *National League of Cities v. Usery*.[69] The district court entered judgment for SAMTA, holding that municipal ownership and operation of a mass-transit system is a traditional governmental function and thus, under *National League of Cities*, is exempt from the obligations imposed by the FLSA.[70]

On appeal, the United States Supreme Court held that there is nothing in the overtime and minimum-wage requirements of the FLSA, as applied to SAMTA that is "destructive of state sovereignty or violative of any constitutional provision":[71]

> Insofar as the present cases are concerned, then, we need go no further than to state that we perceive nothing in the overtime and minimum-wage requirements of the FLSA, as applied to SAMTA, that is destructive of state sovereignty or violative of any constitutional provision. SAMTA faces nothing more than the same minimum-wage and overtime obligations that hundreds of thousands of other employers, public as well as private, have to meet.

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[66] *Id.*

[67] 469 U.S. 528 (1985).

[68] *Id.* at 531.

[69] *Id.* at 534. In *National League of Cities v. Usery*, the Court, by a sharply divided vote, ruled that the Commerce Clause does not empower Congress to enforce such requirements against the states "in areas of traditional governmental functions." 426 U.S. 833, 852 (1976).

[70] 469 U.S. at 535-36.

[71] *Id.* at 554.

> In these cases, the status of public mass transit simply underscores the extent to which the structural protections of the Constitution insulate the States from federally imposed burdens. . . . In short, Congress has not simply placed a financial burden on the shoulders of States and localities that operate mass-transit systems, but has provided substantial countervailing financial assistance as well, assistance that may leave individual mass-transit systems better off than they would have been had Congress never intervened at all in the area. Congress' treatment of public mass transit reinforces our conviction that the national political process systematically protects States from the risk of having their functions in that area handicapped by Commerce Clause regulation.[72]

The dissent by O'Connor, in which Rehnquist and Powell joined, expressed the view that "[t]he true 'essence' of federalism is that the States *as States* have legitimate interests which the National Government is bound to respect even though its laws are supreme."[73] Moreover, "[i]f federalism so conceived and so carefully cultivated by the Framers of our Constitution is to remain meaningful, this Court cannot abdicate its constitutional responsibility to oversee the Federal Government's compliance with its duty to respect the legitimate interests of the States."[74] In sum, the Court held the only remedy the states have under the Tenth Amendment is political, and that there is no substantive legal effect to the Tenth Amendment.

B. Gregory v. Ashcroft[75]

The Age Discrimination in Employment Act of 1967 ("ADEA"), as amended in 1974, includes the States as employers,[76] and further provides that:

> The term 'employee' means an individual employed by any employer except that the term 'employee' shall not include any person elected to public office in any State or political subdivision of any State by the qualified voters thereof, or any person chosen by such officer to be on such officer's personal staff, or an appointee on the policymaking level or an immediate adviser with respect to the exercise of the constitutional or legal powers of the office.[77]

Several Missouri state judges, two of which were lower-court judges who had been appointed by the governor and who had been retained in office by means of retention elections in which the judges had run unopposed, subject

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[72] *Id.* at 554-55.

[73] *Id.* at 581.

[74] *Id.*

[75] 501 U.S. 452 (1991).

[76] *Id.* at 464.

[77] *Id.* at 465 (quoting 29 U.S.C. § 630(f) (2000)).

to only a "yes or no" vote, filed suit in the United States District Court for the Eastern District of Missouri challenging the validity of the mandatory retirement provision in the state's constitution.[78] The judges claimed that article V, section 26, of the Missouri Constitution, which provides that "all judges other than municipal judges shall retire at the age of seventy years," violated the ADEA and the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.[79] The district court, however, granted the governor's motion to dismiss on the grounds that: (1) Missouri's appointed judges were not protected by the ADEA because they were appointees on the policymaking level and therefore excluded from the Act's definition of "employee"; and (2) the mandatory retirement provision did not violate the Equal Protection Clause because the provision had a rational basis.[80] On appeal, the United States Court of Appeals for the Eighth Circuit affirmed on similar grounds.[81]

On certiorari, the Supreme Court affirmed.[82] In an opinion by O'Connor, joined by Rehnquist, Scalia, Kennedy, and Souter, and joined in part as to holding (2) below by White and Stevens, the Court held that the Missouri Constitution's mandatory retirement provision did not violate either: (1) the ADEA because the ADEA does not cover appointed state judges, since, in the context of a statute that plainly excludes most important state officials, the ADEA's exclusion of appointees "on the policymaking level" is sufficiently broad that it cannot be concluded that the Act plainly covers appointed state judges;[83] or (2) the Equal Protection Clause because Missouri had a rational basis for distinguishing both between judges who had reached age seventy and judges who were younger, and between judges age seventy and over and other state employees of the same age who were not subject to mandatory retirement.[84]

Justice O'Connor's opinion classically states the case for federalism:

> As every schoolchild learns, our Constitution establishes a system of dual sovereignty between the States and the Federal Government. This Court also recognized this fundamental principle. . . . The Constitution created a Federal Government of limited powers. . . . This federalist structure of joint sovereigns preserves to the people numerous advantages. It assures a decentralized government that will be more sensitive to the diverse needs of a heterogenous society; it increases the opportunity for citizen involvement in democratic

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[78] *Id.* at 455-56.
[79] *Id.* at 456.
[80] *Id.*
[81] *Id.*
[82] *Id.* at 473.
[83] *Id.* at 467.
[84] *Id.* at 470-73.

> processes; it allows for more innovation and experimentation in government; and it makes government more responsive by putting the States in competition for a mobile citizenry.[85]

White, joined by Stevens, concurring in part, dissenting in part, and concurring in the judgment, expressed the view that the court's "plain statement" requirement for the application of a federal statute to state activities "ignores several areas of well-established precedent and announces a rule that is likely to prove unwise and infeasible."[86]

C. New York v. U.S.[87]

The Low-Level Radioactive Waste Policy Amendments Act of 1985 reflects a compromise whereby "sited" states, which are states that have low-level radioactive waste disposal sites, agreed to extend by seven years the period in which they would accept waste from "unsited" states, while the "unsited" states agreed to end their reliance on the sited states by 1992.[88] The Act required each state to be responsible for providing for the disposal of wastes generated within its borders. Three types of incentives were provided to encourage state compliance: (1) under the "monetary incentives" provisions, sited states were authorized to collect a surcharge for accepting waste during the seven year extension; a portion of those surcharges would go into an escrow account held by the United States Secretary of Energy and would be paid out to states which met a series of deadlines in complying with their obligations under the Act;[89] (2) under the "access incentives" provisions, states failing to comply with the statutory deadlines could be charged multiple surcharges by sited states for a certain period and then denied access altogether;[90] and (3) under the "take title" provision, each state that failed to provide for the disposal of internally generated waste by a specific date must, upon request of the waste's generator or owner, take title to the waste, be obligated to take possession of the waste, and become liable for all damages incurred by the generator or owner as a consequence of the state's failure to take possession promptly.[91] The State of New York and two of its counties sought a declaratory judgment that the Act violated the Tenth Amendment and the Constitution's Guarantee Clause, guaranteeing to the states a republican

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[85] *Id.* at 457-58.

[86] *Id.* at 474 (White, J., concurring in part, dissenting in part, and concurring in the judgment).

[87] 505 U.S. 144 (1992).

[88] *Id.* at 151-52.

[89] *Id.* at 152-53.

[90] *Id.* at 153.

[91] *Id.* at 153-54.

form of government, and filed suit against the United States in the United States District Court for the Northern District of New York.[92] The district court dismissed the complaint, and the United States Court of Appeals for the Second Circuit affirmed.[93]

In an opinion by O'Connor, joined by Rehnquist, Scalia, Kennedy, Souter, and Thomas, the Court held that the "take title" provision was unconstitutional, either as lying outside Congress' enumerated powers or as violating the Tenth Amendment, "[b]ecause an instruction to state governments to take title to waste, standing alone, would be beyond the authority of Congress, and because a direct order to regulate, standing alone, would also be [invalid], it follows that Congress lacks the power to offer the States a choice between the two."[94]

White, joined by Blackmun and Stevens, dissented in part expressing the view that: (1) the Act represented a hard-fought agreement among the states as refereed by Congress, rather than federal direction of state action;[95] (2) New York should be estopped from asserting the unconstitutionality of the "take title" provision, which sought to insure that the state, after deriving substantial advantages from the Act, either live up to its bargain by establishing an in-state waste facility or assume liability for its failure to act;[96] (3) such an incursion on state sovereignty can be deemed ratified by the consent of state officials;[97] and (4) there was no precedential support for the general proposition that Congress cannot directly compel states to enact and enforce federal regulatory programs.[98] Stevens, writing separately, expressed the view that the Constitution does not prohibit Congress from simply commanding state governments to implement congressional legislation.[99]

D. U.S. v. Lopez[100]

In a famous restriction of federal power under the Commerce Clause, the Court's conservative wing cobbled together a majority to strike down a federal statute prohibiting the carrying of firearms within one thousand feet of a school, on the ground that the relationship to the Commerce Clause was too attenuated. Justices O'Connor and Kennedy concurred on classic federalism

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[92] *Id.* at 154.

[93] *Id.*

[94] *Id.* at 176.

[95] *Id.* at 194 (White, J., concurring in part and dissenting in part).

[96] *Id.* at 198-99.

[97] *Id.* at 200.

[98] *Id.* at 201-207.

[99] *Id.* at 211. (Stevens, J., concurring in part and dissenting in part).

[100] 514 U.S. 549 (1995).

grounds. In that case, respondent, who was then a 12th-grade student, was charged in a federal grand jury indictment with the knowing possession of a firearm at a school zone, in violation of the Gun-Free School Zones Act of 1990 ("GFSZA").[101] The Act makes it a federal offense "for any individual knowingly to possess a firearm at a place that the individual knows, or has reasonable cause to believe, is a school zone."[102] The term "school zone" is defined as "in, or on the grounds of, a public, parochial, or private school or within a distance of 1,000 feet from the grounds of" such a school.[103] The United States District Court for the Western District of Texas denied the respondent's motion to dismiss the indictment, concluding that the GFSZA was a constitutional exercise of Congress' power to regulate activities in and affecting commerce, and that the business of elementary, middle, and high schools affects interstate commerce.[104] The respondent was then tried in the District Court and convicted of violating the Act.[105] The respondent appealed, claiming that the GFSZA exceeded the power of Congress to legislate under the Commerce Clause.[106] The United States Court of Appeals for the Fifth Circuit agreed and reversed, holding that in light of what the court characterized as insufficient congressional findings and legislative history, the Act, "in the full reach of its terms, is invalid as beyond the power of Congress under the Commerce Clause."[107]

The Supreme Court affirmed.[108] In an opinion by Rehnquist, joined by O'Connor, Scalia, Kennedy, and Thomas, the Court held that the GFSZA exceeded the authority of Congress to regulate commerce among the several states under the commerce clause and that the Act could not be sustained as a regulation of an activity that substantially affects interstate commerce.[109] The Court reasoned that the Act "is a criminal statute that by its terms has nothing to do with 'commerce' or any sort of economic enterprise, however broadly one might define those terms."[110] The Act also "contains no jurisdictional element which would ensure, through case-by-case inquiry, that the firearm possession in question affect[ed] interstate commerce."[111] While the Court agreed that "Congress normally is not required to make formal findings as to the substantial burdens that an activity has on interstate

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[101] *Id.* at 551.
[102] *Id.* (quoting 18 U.S.C. § 922(q)(1)(A) (1988 ed., Supp. V)) (quotation marks omitted).
[103] *Id.* at 551 n.1 (quoting 18 U.S.C. § 921(a)(25)) (quotation marks omitted).
[104] *Id.* at 551-52.
[105] *Id.* at 552.
[106] *Id.*
[107] *Id.*
[108] *Id.* at 568.
[109] *Id.*
[110] *Id.* at 561.
[111] *Id.*

commerce," to the extent that findings would have enabled the Court to evaluate the legislative judgment that the possession of a firearm in a local school zone substantially affected interstate commerce, such findings were lacking here.[112] The Court refused to "pile inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States."[113]

Kennedy, joined by O'Connor, concurring, expressed the view that the GFSZA "upsets the federal balance to a degree that renders it an unconstitutional assertion of the commerce power . . . ."[114] Kennedy agreed with the majority that "neither the actors nor their conduct have a commercial character, and neither the purposes nor the design of the Act have an evident commercial nexus."[115] "[E]ducation is a traditional concern of the states"[116] and "[i]f a state or municipality determines that harsh criminal sanctions are necessary and wise to deter students from carrying guns on school premises, the reserved powers of the States are sufficient to enact those measures."[117] The GFSZA "forecloses the States from experimenting and exercising their own judgment in an area to which States lay claim by right of history and expertise, and it does so by regulating an activity beyond the realm of commerce in the ordinary and usual sense of that term."[118]

Breyer, joined by Stevens, Souter, and Ginsburg, dissented reasoning that Congress could have had a rational basis for finding a significant or substantial connection between gun-related school violence and interstate commerce.[119] The Court's holding creates "serious legal problems" in that the holding "runs contrary to modern Supreme Court cases that have upheld congressional actions despite connections to interstate or foreign commerce that are less significant than the effect of school violence."[120]

In sum, the liberal wing of the Court has previously eschewed federalism and states' rights in favor of an increasing federal presence—some would say intrusion—into the lives of the citizens of the several states that constitute the United States. Its new-found deference to the states is a welcome shift. But why now?

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[112] *Id.* at 562-63.
[113] *Id.* at 567.
[114] *Id.* at 580 (Kennedy, J., concurring).
[115] *Id.*
[116] *Id.*
[117] *Id.* at 581.
[118] *Id.* at 583.
[119] *Id.* at 618-25 (Breyer, J., dissenting).
[120] *Id.* at 625.

There was very little left of the public use clause—at least in federal court—even before the *Kelo* decision. While a growing handful of state decisions (and federal decisions applying state law on property) found economic revitalization public purposes invalid on constitutional grounds,[121] an equal number of decisions agreed with the Connecticut Supreme Court that this was a valid public use. Clearly this is the view of hundreds of state and local revitalization and redevelopment agencies.[122] Whether one reads the Court's previous jurisprudence on public use broadly, as Justice Stevens does for the Court's majority, or more narrowly, as does the 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, and 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's 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. And yet, the public use clause is more than simple policy; it is a bedrock principle contained in the Bill of Rights amendments to our Federal Constitution, 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—such as the Kelos. Surely we could have found grounds to preserve that shield in federal court.[123]

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[121] See, for example, the decisions in *County of Wayne v. Hathcock*, 684 N.W.2d 765 (Mich. 2004), and *Southwestern Illinois Development Authority v. National City Environmental*, 768 N.E.2d 1 (Ill. 2001).

[122] *See* BERLINER, *supra* note 23.

[123] *See, e.g.*, James W. Ely Jr., *"Poor Relation" Once More: The Supreme Court and the Vanishing Rights of Property Owners*, *in* CATO SUPREME COURT REVIEW, 2004-05, 39 (Mark Moller ed., 2005) (discussing commentary on both sides of the national debate on the decision); Gideon Kanner, *The Public Use Clause: Constitutional Mandate or "Hortatory Fluff"?*, 33 PEPP. L. REV. 335 (2006); Michael Berger, *Court Goes "Clueless": Now Public Use Means Whatever!*, L.A. DAILY J., June 30, 2005, *available at* http://www.manatt.com/newsevents.aspx?id=3571&folder=20; John Nolon & Jessica Bacher, *Fallout from Kelo: Ruling Spurs Legislative Proposals to Limit Takings*, N.Y. L.J., Oct. 19,

VI. STATE ACTION FOLLOWING *KELO*: FEDERALISM EXERCISED WITH A VENGEANCE

States have stepped up to the plate following the public outcry which greeted the decision. Forty-three state legislatures have passed or will soon consider eminent domain reform in their legislative sessions.[124] Local governments are also taking measures to protect their homeowners, with more than fifty cities and counties introducing their own bills and resolutions to restrict the use of eminent domain.[125] Since the ruling, lawmakers in forty-five states have introduced more than 400 bills on eminent domain.[126]

Alabama became the first state to enact new protections against local government seizure of property allowed under *Kelo* on August 3, 2005.[127] Republican governor Bob Riley signed a bill, which was passed unanimously by a special session of the Alabama Legislature, that will prohibit governments from using their eminent domain authority to take privately owned properties for the purpose of turning them over to retail, industrial, office or residential developers.[128] Besides Alabama, four other states—Texas, Delaware, Michigan, and Ohio—have passed legislation to restrict eminent domain.[129] Michigan approved a constitutional amendment that will be on the ballot in November and Ohio approved a one-year moratorium on eminent domain for economic development.[130]

The Texas bill, known as Senate Bill 7, forbids the taking of private property if the taking confers a private benefit on a particular private party. In particular, the bill prohibits the taking of private property for economic development as a primary purpose and appears to restrict such takings to blighted areas. The bill applies to all state and local government agencies as well as institutions of higher learning, particularly if taking land for parking

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2005, at 5. See, for a full treatment of the issues raised by the Kelo decision, DWIGHT H. MERRIAM, EMINENT DOMAIN USE AND ABUSE: KELO IN CONTEXT (Dwight H. Merriam et al. eds., 2006).

[124] John Kramer & Kisa Knepper, One Year After Kelo Argument National Property Rights Revolt Still Going Strong (Feb. 21, 2006), http://www.ij.org/private_property/connecticut/2_21_06pr.html.

[125] Castle Coalition, Current Proposed Local Legislation on Eminent Domain, http://www.castlecoalition.org/legislation/local/index.html (last visited Feb. 21, 2006).

[126] Castle Coalition, State Legislative Actions, http://maps.castlecoalition.org/legislation.html (last visited Feb. 21, 2006).

[127] Donald Labro, *Alabama Limits Eminent Domain*, WASH. TIMES, Aug. 4, 2005, at A1.

[128] *Id.*

[129] Dennis Cauchon, *States Review Eminent Domain*, USA TODAY, Feb. 20, 2006, *available at* http://www.usatoday.com/news/nation/2006-02-19-eminentdomain_x.htm?POE=NEWISVA.

[130] *Id.*

or facility parking. It specifically exempts "traditional" forms of eminent domain such as transportation projects, railroads, airports, roads, ports, navigation districts, certain conservation/reclamation districts, water supply, wastewater, flood control, drainage, libraries, museums, hospitals, parks, conceivably auditoriums, stadiums and convention facilities and leasehold interests in government-owned property.[131]

Commercial companies have also gotten caught up in the public outcry over *Kelo*, and on January 25, 2006, BB&T Corporation said it will not lend to commercial developers that plan to build condominiums, shopping malls and other private projects on land taken from private citizens by government entities using eminent domain. BB&T operates more than 1400 financial centers in eleven states and Washington D.C.—the Carolinas, Virginia, Maryland, West Virginia, Kentucky, Tennessee, Georgia, Florida, Alabama, and Indiana.[132] BB&T is the nation's ninth largest financial holding company, with $109.2 billion in assets.[133] In that same week, Montgomery Bank, which has $800 million in assets, announced that "it will not lend money for projects in which local governments use eminent domain to take private property for use by private developers."[134] The century-old financial lending house with six branches in St. Louis and five branches in Southeast Missouri is the first Missouri bank to take a principled stand against eminent domain for private development.[135]

VII. PLANNING AND THE CONSTITUTION: WHAT PLANNERS SHOULD KNOW ABOUT THE FIFTH AMENDMENT

Finally, it is all well and good for the majority to wax elegiac about the importance of planning in land use control. However, as Justice Brennan—a card-carrying liberal member of the Court if there ever was one—nicely observed in *San Diego Gas & Electric Co. v. San Diego*,[136] "[I]f a policeman must know the Constitution, then why not a planner?"[137] There, recall, San

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[131] Peter G. Smith, Prospective Impacts of Texas Legislation Prohibiting Condemnation for Economic Development, Presentation at the Annual Program on Planning, Zoning and Eminent Domain at the Center for American and International Law (Nov. 2, 2005).

[132] BB&T, BB&T Announces Eminent Domain Policy, Jan. 25, 2006, http://www.bbandt.com/about/media/newsreleasedetail.asp?date=1%2F25%2F06+9%3A48%3A52+AM.

[133] *Id.*

[134] John Kramer & Lisa Knepper, Montgomery Bank Won't Finance Eminent Domain Abuse: Second bank ,within week to reject eminent domain for private gain, Feb. 6, 2006, http://www.castlecoalition.org/media/releases/2_6_06pr.html.

[135] *Id.*

[136] 450 U.S. 621 (1981).

[137] *Id.* at 661 (Brennan, J., dissenting).

Diego had reclassified (from industrial to agricultural through zoning, and to open space through an open space plan) dozens of acres owned by the utility and acquired for the construction of a power plant.[138] The utility successfully sued for damages, only to have its damage claim eventually overruled by the California Supreme Court which held invalidation was its only remedy. The Supreme Court narrowly voted to dismiss the utility's appeal for lack of a final judgment.[139]

Justice Brennan wrote a stinging dissent from which the above quotation is taken, noting that invalidation fell substantially short of a sufficient remedy, and proposing that once a court finds there has been a regulatory taking, the government must pay just compensation, either for the entire value of the property or, should government revoke the offending regulation, for the period during which the regulation effected a taking.[140]

Justice Stevens, however, was apparently unimpressed. In his dissent in *First English v. Los Angeles*,[141] Stevens stated that he liked Justice Brennan's take on takings much better, and finally persuaded the Court to his way of thinking in *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*.[142]

The Supreme Court's narrow holding in *Tahoe-Sierra* broke little new ground in the takings debate, holding merely that a thirty-two-month moratorium is not a *per se* taking of property.[143] It is flawed in several respects, both in its random choice in factual context and in its misinterpretation of the Court's previous decisions in *Lucas v. South Carolina Coastal Commission*[144] and *First English*, all as set out in the cogent dissent by the late Chief Justice Rehnquist, who joined in the first opinion and wrote

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[138] *Id.* at 624-25 (majority opinion).

[139] *Id.* at 636 (Rehnquist, J., concurring).

[140] Indeed, this theory became a matter of constitutional law in 1987, in *First English Evangelical Lutheran Church of Los Angeles v. Los Angeles*, 482 U.S. 304 (1987), an opinion written by Chief Justice Rehnquist who provided the fifth vote in favor of dismissal in *San Diego Gas & Electric*, by means of a concurring opinion in which he stated that except for the procedural issue, he basically agreed with the Brennan dissent on substance. 450 U.S. at 633-36 (Rehnquist, J., concurring).

[141] 482 U.S. at 335, 349 n.17 (Stevens, J., dissenting).

[142] 535 U.S. 302 (2002).

[143] See, for comment on the marginal relevance of the decision, David L. Callies & Calvert G. Chipchase, *Moratoria and Musings on Regulatory Takings: Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*, 25 U. HAW. L. REV. 279 (2003). See, for a different view on the importance of the holding, J. David Breemer, *Temporary Insanity: The Long Tale of Tahoe-Sierra Preservation Council and Its Quiet Ending in the United States Supreme Court*, 71 FORDHAM L. REV. 1 (2002).

[144] 505 U.S. 1003 (1992).

the second, and therefore can authoritatively comment upon what the Court said and meant.

In particular, the majority demonstrated a misunderstanding of land-use planning and controls by suggesting that loss of the moratorium as a planning tool would eviscerate local land-use regulatory schemes. As my colleague Edward Ziegler so amply demonstrates in his treatise, moratoria are only one form of interim land-use control, whose purpose is to maintain the status quo, not by stopping all economically beneficial land use, but by freezing *existing* land uses or by allowing the issuance of only selective building permits.[145] The lengthy moratorium imposed by the Tahoe Regional Planning Agency goes far beyond either one. Moreover, lengthy interim controls are usually provided by the enactment of interim zoning measures. Moratoria are designed for exceedingly short periods while interim zoning is formulated and adopted. The history of zoning is replete with such traditions, including short-term delays as part of a state's background principles of its law of property (though this is something of a stretch) and so beyond the reach of the *Lucas* categorical rule in the same manner as regulations that are designed to abate nuisances are, on the ground that such matters were not part of an owner's title to begin with. But a six-year (or indeed a three-year) moratorium does not fit within such an exception, at least in part because such lengthy moratoria are anathema to traditional land-use management and control processes of the sort envisioned in *First English*. As Rehnquist noted in conclusion, keeping Lake Tahoe as pristine as possible is clearly in the public interest.[146] However, the way in which the Tahoe Regional Planning Commission has gone about it targets only certain citizens, whereas the Constitution "requires that the costs and burdens be borne by the public at large."[147] The majority was clearly overly persuaded by arguments favoring land-use planning.

Thus, the liberal wing of the Court seems overly enamored of plans and planning as an excuse to avoid applying the public use standards of the Fifth Amendment. Planners, policemen—indeed all connected with government—need to know and apply the Constitution, and particularly the Fifth Amendment.

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[145] EDWARD H. ZIEGLER, RATHKOPF'S LAW OF ZONING & PLANNING (4th ed. 2005).

[146] *Tahoe-Sierra Pres. Council*, 535 U.S. at 354 (Rehnquist, C.J., dissenting).

[147] *Id.*