June 2019

The Downlow on *Kelo*: How an Expansive Interpretation of the Public Use Clause has Opened the Floodgates for Eminent Domain Abuse

Eric L. Silkwood
*West Virginia University College of Law*

Follow this and additional works at: https://researchrepository.wvu.edu/wvlr

Part of the Constitutional Law Commons, and the Property Law and Real Estate Commons

**Recommended Citation**


Available at: https://researchrepository.wvu.edu/wvlr/vol109/iss2/10

This Student Work is brought to you for free and open access by the WVU College of Law at The Research Repository @ WVU. It has been accepted for inclusion in West Virginia Law Review by an authorized editor of The Research Repository @ WVU. For more information, please contact ian.harmon@mail.wvu.edu.
THE DOWNLOW ON KELO: HOW AN EXPANSIVE INTERPRETATION OF THE PUBLIC USE CLAUSE HAS OPENED THE FLOODGATES FOR EMINENT DOMAIN ABUSE

"Do you think it appropriate to take Justice Souter’s house in the New Hampshire woods for a public use and then call it Camp Liberty?"1

I. INTRODUCTION ............................................................................................................. 493
II. THE EVOLUTION OF THE PHRASE “PUBLIC USE” ........................................... 496
   A. The Framer’s Original Meaning. ........................................................................... 496
   B. The Public Purpose Test. ................................................................................... 501
III. BERMAN AND MIDKIFF – FURTHER EXPANSION OF THE SCOPE OF THE PUBLIC USE CLAUSE ........................................................................................................... 502
   A. Berman v. Parker ................................................................................................. 504
   B. Hawaii Housing Authority v. Midkiff ..................................................................... 507
IV. COUNTY OF WAYNE V. HATHCOCK : A TEMPORARY RETURN TO THE NARROW VIEW .................................................................................................................... 509
V. KELO V. CITY OF NEW LONDON .............................................................................. 512
   A. The Majority Opinion ......................................................................................... 515
   B. Dissenting Opinions and Views .......................................................................... 517
VI. RACE AND CLASS IMPLICATIONS OF THE BROADENING OF THE PUBLIC USE CLAUSE ....................................................................................................................... 519
VII. CONCLUSION ........................................................................................................... 524

I. INTRODUCTION

Imagine that it is a sunny morning and you have just finished your morning cup of coffee on your back porch before heading in to get ready for the day. After showering and going through your normal morning routine, on your way out the front door, you find a notice nailed to your door stating that your home is within a redevelopment area, and it will be condemned and razed in the near future.

Now, imagine how you would feel if this was your family home, which you remodeled with your blood, sweat, and tears, or which has been in your family for decades, and may have been built with your own hands, or those of your family members. Imagine if it was your home that was tagged for demolition by the local Redevelopment Authority because the Authority thinks your property could be put to better use by someone else. Maybe that someone else is a large private corporation who will build luxury high-rise housing, a corporate headquarters, or just a bigger and better home, by using the State’s power of eminent domain\(^2\) delegated to them by your great State’s Legislature. Under these circumstances, no homeowner would be happy. One would be even more upset when he or she found out that, not only can this happen, but that it is Constitutional under the U.S. Supreme Court’s latest interpretation of the Takings Clause of the Fifth Amendment.\(^3\) In a nutshell, this story of finding a dream home only to have it subsequently tagged for demolition is the sad story of the lead plaintiff in Kelo v. City of New London,\(^4\) a case decided by the United States Supreme Court in June of 2005.

The Takings Clause of the Fifth Amendment guarantees that private property shall not be taken by the government unless it is taken for a public use and just compensation is paid to the private landowner.\(^5\) This is a bedrock principle upon which private property rights have been built, as it implicitly precludes the government from forcing citizens to surrender their private property for anything other than a valid “public use.” The problem is that when interpreting the Fifth Amendment’s Takings Clause, the United States Supreme Court has interpreted the phrase “public use,” also known as the Public Use Clause,\(^6\) so expansively that a public use can now be justified if the legislature merely

---

\(^2\) Eminent domain is the power of the sovereign to acquire private property for public use. \textit{BLACK'S LAW DICTIONARY} 562 (8th ed. 2004). Both State and Federal Governments have the power of eminent domain and this power lies in the legislative branch, not the executive. \textit{RICHARD R. POWELL, 13 POWELL ON REAL PROPERTY} \S 79F.01[2], [3] (Michael Allan Wolf ed., Matthew Bender) 2005. This eminent domain power can be delegated from the legislature to any political subdivision or other entity. \textit{Id.} at [3][a]. There are no restraints on a legislature’s ability to delegate its eminent domain authority. \textit{Id.} at [3][b].

\(^3\) U.S. CONST. amend. V. Stated in full the Fifth Amendment reads:

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

\textit{Id.} (emphasis added).

\(^4\) 125 S. Ct. 2655 (2005).

\(^5\) U.S. CONST. amend. V.

\(^6\) The Public Use Clause refers to the “public use” requirement within the Fifth Amendment.
provides evidence of appreciable benefits to the community, including new jobs and increased tax revenue.7

Various pre-Kelo interpretations of the Public Use Clause by the United States Supreme Court and a variety of state supreme courts have forced scores of Americans to surrender their private property to entities wielding the government’s awesome power of eminent domain.8 For example, the power of eminent domain has been used to raze a minority neighborhood in order to provide access and parking for a local casino and hotel,9 to destroy a successful business to make way for an alleged bigger, better one,10 and to demolish a neighborhood of colonial homes to make way for upscale condominiums and high-end retail.11 These examples are just the tip of the iceberg regarding the actions that state and local governments have engaged in under the guise of furthering “public use.”12

This Note will focus on the ever expanding interpretation of the Public Use Clause, from the meaning of the Clause as originally envisioned by the Framers of the Constitution to its current expansive and seemingly pro-condemnation meaning.13 It is this vast change in the interpretation of the term “public use” that has led to many post-Kelo abuses of the state’s eminent do-

---

7 Kelo, 125 S. Ct. at 2675 (O’Connor J., dissenting).
8 DANA BERLINER, PUBLIC POWER, PRIVATE GAIN: A FIVE YEAR, STATE-BY-STATE REPORT EXAMINING THE ABUSE OF EMINENT DOMAIN 1-2 (2003), http://www.castlecoalition.org/report/pdf/ED_report.pdf. Between 1998 and 2002, the study documented over 10,000 eminent domain actions that were threatened or actually filed against private property owners. Id.
9 Casino Reinvestment Dev. Auth. v. Banin, 727 A.2d 102 (N.J. Super. Ct. Law Div. 1998). This case was not only illustrative of the egregious uses of eminent domain, but it also illustrated one of the rare cases in which the property-owner won her case in court. See Paul Schwartzman, She Kicks Sand in Trump’s Face, Sneers at the Donald’s Bucks, N.Y. DAILY NEWS, July 26, 1998, at News 7.
11 BERLINER, supra note 8, at 165-66.
12 See Kelo, 125 S. Ct. at 2675 (O’Connor J., dissenting); Casino, 727 A.2d at 102.
13 Kelo, 125 S. Ct. at 2675 (O’Connor J., dissenting). Justice O’Connor in her dissenting opinion stated that:

[T]he Court today significantly expands the meaning of public use. It holds that the sovereign may take private property currently put to ordinary private use, and give it over for new, ordinary private use, so long as the new use is predicted to generate some secondary benefit for the public – such as increased tax revenue, more jobs, maybe even aesthetic pleasure. But nearly any lawful use of real private property can be said to generate some incidental benefit to the public. Thus, if predicated (or even guaranteed) positive side effects are enough to render transfer from one private party to another constitutional, then the words for “public use” do not realistically exclude any takings, and thus do not exert any constraint on the eminent domain power.

Id. (internal citations omitted) (emphasis added).
main power and, it is this change in “Public Use Clause” interpretation that will certainly lead to similar abuses in the future.14

Part II of this Note will trace the evolution of the Public Use Clause from its original meaning, to an interim narrow interpretation, and then finally to its evolving “public purpose” interpretation. Part III will explore two landmark eminent domain cases styled Berman v. Parker15 and Hawaii Housing Authority. v. Midkiff.16 More specifically, it will look at the broad definition that the phrase “public use” received in those cases. Part IV will explore County of Wayne v. Hathcock,17 a Michigan Supreme Court case that illustrates a temporary pullback from a broad interpretation of public use to a more traditional narrow approach. Part V will discuss the recent Kelo decision, focusing on the expansive interpretation that the Public Use Clause received in that opinion. Part VI will illustrate why, after the Kelo case, the floodgates for eminent domain abuse are now open due to an expansion of the term “public use” to include economic development and other seemingly endless justifications. Finally, part VII will include closing remarks and conclusions.

II. THE EVOLUTION OF THE PHRASE “PUBLIC USE”

A. The Framer’s Original Meaning

The United States Constitution did not create the power of eminent domain.18 It was assumed when the Constitution was signed that the power already existed as an aspect of state sovereignty.19 But, the Constitution did attempt to limit the use of the state’s eminent domain power.20 These limitations

14 One commentator has stated that the “public use provision has become toothless in the text of the modern doctrine . . . .” Camarin Madigan, Taking for Any Purpose?, 9 HASTINGS W.-NW. J. ENVTL. L. & POL’Y 179, 192 (2003) (internal quotations omitted). This argument advances the thought that the Public Use Clause has practically been interpreted out of the Constitution. Id.
17 684 N.W. 2d 765 (Mich. 2004).
18 POWELL, supra note 2, at § 79F.01[1][a][3] (noting that the “power [of eminent domain] was so well accepted that prior to the adoption of the Constitution, none of the state constitutions explicitly granted to the state governments the power of eminent domain, even though the state governments in every state exercised that power.”) (citations omitted).
19 The inherent power of eminent domain was “well known when the Constitution was adopted.” Kohl v. United States, 91 U.S. 367, 372 (1875). The actual phrase “eminent domain” has been traced back to the legal writings of Grotius in 1685. See Jack J. Kitchin, What Use is a Public Use in Eminent Domain?, 4 ST. LOUIS U. L.J. 316 n.1 (1957) (citing Graff v. Bird-in-Hand Turnpike Co., 18 A. 431 (Pa. 1889)).
20 See 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 [S]tate.”); see Kohl, 91 U.S. at 372 (“The right of eminent domain was . . . known when the Constitution was adopted . . . .”). See also Hathcock, 684 N.W. 2d at 781 (“[W]hen [the Michigan] Constitution was ratified in
can be found in the text of the Fifth Amendment's Takings Clause, which declares that private property cannot be taken for a public use unless just compensation is paid to the landowner from whom the property is taken.\footnote{21}

The Takings Clause, which originally only applied to the federal government,\footnote{22} became applicable to the States through the passage of the Fourteenth Amendment.\footnote{23} Further, all States have constitutional provisions limiting the exercise of eminent domain to situations where there is a valid public use and just compensation is paid to the landowner.\footnote{24}

Framer James Madison proposed what would come to be known as the Takings Clause to the House of Representatives in 1789\footnote{25} in response to the concerns that many of the founders expressed over the protection of private property and private property rights.\footnote{26} Interpreting the "public use" phrase in the Takings Clause proposed by Madison has caused the judiciary problems

\footnote{21} U.S. CONST. amend. V. For a discussion of the just compensation element of the Fifth Amendment, see Powell, supra note 2, at § 79F.01[1][c].

\footnote{22} Baron v. City of Baltimore, 32 U.S. 243, 250-51 (1833) (opining that the Takings Clause of the Fifth Amendment contains "no expression indicating an intention to apply . . . to state governments").

\footnote{23} U.S. CONST. amend. XIV, § 1. See also Chicago, B & Q.R. Co. v. City of Chicago, 166 U.S. 226, 239 (1897). This case noted that:

> The conclusion of the court on this question is that, since the adoption of the [F]ourteenth [A]mendment compensation for private property taken for public uses constitutes as essential element in "due process of law," and that without such compensation the appropriation of private property to public uses, no matter under what form of procedure it is taken, would violate the provisions of the [F]ederal [C]onstitution.

*Id.*

\footnote{24} Powell, supra note 2, at § 79F.01[a][iii] (citing 1 Nichols On Eminent Domain, ch. 1, § 1.3 (Matthew Bender ed. 1990). Every state except North Carolina has a Constitutional provision that roughly mirrors the takings language of the Fifth Amendment. *Id.* See Mich. Const. art. 15, § 9. North Carolina has decisions that are in conformity with the language of the Fifth Amendment. Powell, supra note 2, § 79F.01[a][iii].

\footnote{25} 5 Bernard Schwartz, The Roots of the Bill Of Rights 1012, 1026-27 (1980). Madison's proposal stated "no person shall be . . . obliged to relinquish his property, where it may be necessary for public use, without a just compensation." *Id.* at 1027. See also Powell, supra note 2, at § 79F.01[a][iii] (quoting 1 Annals of Cong. 433-36 (1789)) (Madison's proposal was made on June 8, 1789 as one of twelve proposals he sought to pass).

\footnote{26} See The Federalist No. 85, at 453 (Alexander Hamilton) (Carey and McClellan eds., 2001); See also The Federalist No. 10, at 43 (James Madison) (Carey and McClellan eds., 2001); "Discourse on Davila," The Works of John Adams, (1851) at vol. 6, 280 (Charles Francis Adams, ed.) (Little, Brown, 1851) (noting that, "Property must be secured or liberty cannot exist."); The Records of the Federal Convention of 1782, vol 1, 302 (Max Farrand, ed.) (Yale Univ. Press rev. ed. 1937) (Alexander Hamilton stated that, "One great objective of Government is personal protection and the security of Property.").
from the beginning. 27 Historically, the problem of corraling a clear definition of the phrase had been exacerbated by a lack of litigation that could have been used to flesh out a clear meaning. 28 This lack of litigation lasted for roughly forty years after the ratification of the Constitution. There were two main reasons for this lull in eminent domain litigation. First, at that time, the government could build public highways, a task that often requires the use of eminent domain, without exercising this power because large amounts of publicly held land upon which roads could be readily constructed, was still available. 29 Second, when the government did find itself in a situation that necessitated the use of eminent domain, it either used that power for a clear public use, such as construction of roads and public highways, or it was used in situations where there was such strong colonial precedent that no challenges were evoked, such as building mill dams or drainage systems. 30

Over the next 150 years numerous cases were litigated in which the Public Use Clause was interpreted. 31 This litigation, however, only muddied the waters of public use and eventually led the Supreme Court to its present seemingly all-inclusive interpretation. 32

During the nineteenth century, courts predominately interpreted the scope of eminent domain power and, more precisely, the phrase “public use” narrowly. 33 This narrow view reflected the jurisprudential belief of the times that the Public Use Clause was a straightforward and plain concept that permitted a taking of private property only when that land would literally be used by

27 POWELL, supra note 2, at § 79F.03[1] (laying out the many conflicting historical precedents regarding the phrase “public use.”). There are no records of Madison’s thoughts about this proposal, but commentators have suggested that Madison was influenced by a lack of property rights respect exhibited by the British in colonial times among other reasons. See William Michael Treanor, The Original Understanding of the Takings Clause and the Political Process, 95 COLUM. L. REV. 782 (1995); see also William Michael Treanor, Note, The Origins and Original Significance of the Just Compensation Clause of the Fifth Amendment, 94 YALE L.J. 694 (1985).

28 See POWELL, supra note 2, at §79F.03(1) (explaining that there was nearly a forty year period when the government used the power of eminent domain only to construct dams and build roads). Despite the seemingly universal acceptance of the validity of eminent domain power, it was not until 1875 that the Supreme Court had the opportunity to declare that the federal government actually had this power. See Kohl, 91 U.S. at 371-72.

29 POWELL, supra note 2, at § 79.03[1]; see Comment, The Public Use Limitation on Eminent Domain: An Advance Requiem, 58 YALE L.J. 599, 600 (1949).

30 2A NICHOLS ON EMINENT DOMAIN, ch. 7, § 7.01 (Matthew Bender ed. 1990).

31 POWELL, supra note 2, at §79.03[3].

32 POWELL, supra note 2, at § 70.03[3][b].

33 Kelo v. City of New London, 125 S. Ct. 2655, 2662 (2005) (opining that “[W]hile many state courts in the mid-19th century endorsed ‘use by the public’ as the proper definition of public use, that narrow view steadily eroded over time.”); see also POWELL, supra note 2, at §79F.03[3][a] (noting that at this same time there were some courts who used a broader view that public use included any use that “manifestly contributes to the general welfare and prosperity of the whole community . . . ”).
the public.\textsuperscript{34} This narrow view basically required that portions of the public have physical access to the property\textsuperscript{35} or, as some scholars have noted, "a public use exists when the public uses something."\textsuperscript{36} Essentially, in order for a use to be declared public under this narrow view, "the property acquired by eminent domain [had to] actually be used by the public or . . . the public [had to] have the opportunity to use the land."\textsuperscript{37}

This notion that the public had to have a right of access to the land, led the Supreme Court, in its first major eminent domain opinion,\textsuperscript{38} to opine that each state had "the right and duty of guarding its own existence, and of protecting and promoting the interests and welfare of the community at large" through the power to take private property.\textsuperscript{39} In \textit{West River Bridge Company v. Dix},\textsuperscript{40} the Court was asked to decide the constitutionality of the use of eminent domain in relation to property that had been acquired by a private entity through a state contract.\textsuperscript{41}

This case was litigated over the issue of whether Vermont's exercise of its eminent domain power against a bridge company, who had a contract with

\textsuperscript{34} Thomas W. Merrill, \textit{The Economics of Public Use}, 72 \textit{Cornell L. Rev.} 61, 67-68 (1986) (exploring the various judicial tests for interpreting the meaning of "public"); see also Harry N. Scheiber, \textit{Public Rights and the Rule of Law in American Legal History}, 72 \textit{Cal. L. Rev.} 217, 224-25 (1984) (relating the public trust doctrine to public use. "The public trust doctrine provided that certain resources were held by the government 'as a trust for the public use and benefit' – so that courts properly could place limits on government's discretionary power in regulating or alienating such resources.").


\textsuperscript{37} Nichols, \textit{supra} note 30, at ch. 7. § 7.02[1].

\textsuperscript{38} \textit{See} Benjamin Wright, \textit{The Contract Clause of the Constitution} 66-68 (1938) (noting that the power of eminent domain was not directly before the Supreme Court until 1848 in \textit{West River Bridge Co. v. Dix}).

\textsuperscript{39} \textit{West River Bridge Co. v. Dix}, 47 U.S. 507, 531 (1848).

\textsuperscript{40} \textit{Id.}

\textsuperscript{41} \textit{Id.} at 530.
the State to build and maintain a bridge, was constitutional. The taking involved a taking by the State of a privately constructed bridge in order for that bridge to be put to a public use. \footnote{Id. This case defined how the Contracts Clause would mesh with the power of eminent domain. The Court held that a compensated taking of property by a State, in conformance with its own duly made laws, did not violate the Contracts Clause. \textit{Id.} at 536.} The majority held that in making the private contract for the construction of the bridge, the State had not contracted away its eminent domain power, and therefore, the bridge could be validly taken under the Fifth Amendment’s Takings Clause, if the state determined such exercise of its eminent domain power was necessary.\footnote{Id. at 531.}

In concurrence, Justice Levi Woodbury offered his interpretation of “public use,” stating that any other interpretation would be “too broad, too open to abuse.”\footnote{Id. at 535-36.} Illustrating what he thought were permissible public uses, Justice Woodbury stated that:

> the user [sic] must be for the people at large, -- for travelers, -- for all, -- must also be compulsory by them, and not optional with the owners, -- must be right by the people, not a favor, -- must be under public regulations as to tolls, or owned, or subject to be owned, by the State, in order to make the corporation and object public . . . It is not enough that there is an act or incorporation for a bridge, or turnpike, or railroad, to make them public, so as to be able to take private property constitutionally, without the owner’s consent; but their uses, and objects, and interests . . . must in their essence, and character and liabilities, be public within the meaning of the term “public use.”\footnote{Id. at 545 (Woodbury, J. concurring).}

Justice Woodbury went on to state that the road was “a free road for the people of the State to use,” and therefore it was “eminently for a public use.”\footnote{Id. at 546-47 (internal citations omitted).} This is the essence of the narrow view; the land that was taken was expected to be put to use for the people of the community.\footnote{Id. at 547.} The narrow view, while once the view widely accepted by many State courts in evaluating “public use” claims, has since been eroded away in route to the current more expansive definition.\footnote{See supra notes 33-37 and accompanying text.}

In dismissing an application of the narrow view, the \textit{Kelo} Court stated that “this Court long ago rejected any literal requirement that condemned prop-
Explaining the United States Supreme Court’s departure from this test, the *Kelo* Court avowed that “[i]nt only was the ‘use by the public’ test difficult to administer . . . but it proved to be impractical given the diverse and always evolving needs of society.” Due to this perceived difficulty, it was clear that change was on the way. That change came by way of the public purpose test.

**B. The Public Purpose Test**

When the United States Supreme Court began applying the Fifth Amendment to the States via the Fourteenth Amendment in the late 19th century, a broader and more natural interpretation of public use as a “public purpose” was promulgated. The public purpose test essentially equates “public use” with public interest, focusing on the benefit the public would get from the taking. Contrast this view, to the previous narrow view, where the taking must create a facility to which the public has physical access and the underpinnings of the expansion of public use are evident.

In an early case applying the public purpose test, *Mt. Vernon-Woodberry Cotton Duck Company v. Alabama Interstate Power Company*, the United States Supreme Court expanded the permissible scope of public uses to include not only actual governmental uses, but also private uses where the clear beneficiary of the condemnation is the public at large.

In *Cotton Duck*, a power company licensed by the state and empowered with the State’s eminent domain power sought to condemn Cotton Duck’s private land for the construction of a new power plant. This power plant, the *Cotton Duck* Court noted, was going to “manufacture, supply and sell to the public, power produced by water.” Cotton Duck Company challenged the condemnation proceedings due to, among other things, the lack of a public use

---

51 *Kelo*, 125 S. Ct. at 2662 (internal quotations omitted).
52 *Kelo*, 125 S.Ct. at 2663 (opining that “[w]ithout exception, our cases have defined that concept broadly, reflecting our longstanding policy of deference to legislative judgments in this field”).
54 West River Bridge Co. v. Dix, 47 U.S. 507, 531 (1848).
55 See supra notes 33-37 and accompanying text.
56 240 U.S. 30 (1916) [hereinafter *Cotton Duck*].
57 *Id.* at 31-32 (noting that the power company had properly gained the power of eminent domain from the state of Alabama). It is important to note that in *Cotton Duck*, the United States Supreme Court opined that it would extend great deference to state decisions regarding what is a public use in light of the fact that state courts were in a better position to know what constituted a public use within their jurisdiction. *Id.* at 32 (citing Clark v. Nash, 198 U.S. 361, 367-68 (1905)).
58 *Id.* at 32.
of the property after condemnation. Rejecting Cotton Duck Company’s argument and holding that the condemnation could go forward, Justice Holmes majority opinion 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 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.

The public purpose test, described by Justice Holmes and utilized in Cotton Duck, represented a retreat from the narrow view. But, in this case, the expansion was necessary because if the Cotton Duck Court would have adhered to a strict narrow interpretation, construction of power plants, railroads, and other public utilities would have historically been much tougher under the Takings Clause.

III. Berman and Midkiff – Further Expansion of the Scope of the Public Use Clause

The interpretation of public use as public purpose endured as the method of determining proper and improper takings into the mid 1900’s. But looming on the horizon was the Supreme Court’s opinion in Berman v. Parker, It was in this case that the seeds of a dangerously expansive interpretation were planted. Speaking on the dangers of an expansive interpretation of the Constitution, Supreme Court Justice William Patterson, in 1795, warned:

The Constitution is the origin and measure of legislative authority. It says to legislators, thus far ye shall go and no further. Not a particle of it should be shaken; not a pebble of it should be removed. Innovation is dangerous. One encroachment leads to another; precedent gives birth to precedent; what has been done

59 Id.
60 Id. (emphasis added).
61 Thompson v. Consol. Gas Utils. Corp., 300 U.S. 55, 80 (1937) (stating that, “This Court has many times warned that one person’s property may not be taken for the benefit of another person without a justifying public purpose . . . ”).
may be done again; thus radical principles are generally broken in upon, and the Constitution is eventually destroyed.\textsuperscript{63}

Over 200 years after the rendering of this opinion, this language would be validated. The \textit{Kelo} opinion was born from broad precedent that was formed as each new public use decision expanded the previous interpretation even the slightest of margins.\textsuperscript{64}

This prior section briefly overviewed the various interpretations of "public use" prior to the \textit{Berman v. Parker} decision. From the narrow, strict constructionist view, to the minimally broader public purpose test, the meaning of the phrase "public use" experienced little evolution in the approximately 150 years preceding \textit{Berman}.

The \textit{Berman} decision was the beginning of the innovation and expansion phase of the Public Use Clause, just the type of expansive Constitutional interpretation that Justice Patterson warned would lead to encroachments and the eventual demise of the Constitution.\textsuperscript{65} The \textit{Berman} decision laid the groundwork and foundation for the \textit{Midkiff} and \textit{Kelo} Courts to expand the term even further.

The United States Supreme Court's decisions in \textit{Berman v. Parker} and \textit{Hawaii Housing Authority v. Midkiff}, two seminal cases in the development of eminent domain law in the United States, are illustrative of the Court's new, less restrictive approach to the use of eminent domain power. These decisions introduced a broader interpretation of "public use" by giving a great amount of deference to legislative definitions regarding what constituted a valid public use.\textsuperscript{66} This approach afforded States and municipalities the opportunity to engage in a wide range of condemnations that certainly would have been deemed improper prior to \textit{Berman}.\textsuperscript{67} Given the deference that the United States Supreme Court exercises when reviewing state court decisions concerning local conditions that might necessitate the use of eminent domain and the rejection of the narrow view in favor of broader tests, "it is not surprising that the Court for more than a hundred years has not failed to find a 'public use' in a state takings case."\textsuperscript{68}

\textsuperscript{63} VanHorne's Lessee v. Dorrance, 2 U.S. 304, 311-12 (1795).
\textsuperscript{64} From \textit{West River} to \textit{Cotton Duck} to \textit{Berman} to \textit{Midkiff}, it seems clear that the interpretation of what would constitute an acceptable public use has evolved, based in part on language from the prior decisions.
\textsuperscript{65} See supra note 63 and accompanying text.
\textsuperscript{66} See generally \textit{Berman}, 348 U.S. 26; \textit{Midkiff}, 467 U.S. 229.
\textsuperscript{68} \textit{POWELL}, supra note 2, at § 79F.03[3][b][ii].
A. Berman v. Parker

In 1954, the United States Supreme Court in Berman held constitutional Washington D.C.'s redevelopment plan that utilized eminent domain to rejuvenate an area of the city that had deteriorated to such a point that it was deemed a slum. In Section 2 of the District of Columbia Redevelopment Act, Congress stated:

a legislative determination that owing to technological and sociological changes, obsolete lay-out, and other factors, conditions existing in the District of Columbia with respect to substandard housing and blighted areas, including the use of buildings in alleys as dwellings for human inhabitation, are injurious to the public health, safety, morals, and welfare; and it is hereby declared 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 all such injurious conditions by employing all means necessary and appropriate for the purpose.

Congress further determined that "the acquisition and the assembly of real property and the leasing or sale thereof for redevelopment pursuant to a project area redevelopment plan . . . is hereby declared to be a public use." After receiving notice that his property was within the area designated for redevelopment, a department store owner challenged the constitutionality of the pending taking. The storeowner argued that the taking was unconstitutional because the property "is commercial, not residential property; it is not slum housing; it will be put into the project under the management of private, not a public, agency and redeveloped for private, not public use." The owner felt that his property was not within the scope of the statute that authorized the taking and condemnation because his property was to be transferred to another private party and this would violate the "public use" requirement.

---

69 Berman, 348 U.S. at 28.
70 District of Columbia Redevelopment Act of 1945, Pub. L. No. 592, 60 Stat. 790 (1946) [hereinafter D.C. Act]. The Act created an agency that had the power to take full title to reality in all cases in which it considered such acquisition necessary to carry out a project. Berman, 348 U.S. at 36.
71 Berman, 348 U.S. at 28. The Act does not define either "slums" or "blighted areas," but § 3 (r), however, defines substandard housing conditions and § 2 declares that acquisition of property is necessary to eliminate the housing conditions. Id.
72 Id. at 29 (quoting the D.C. Act, § 2, 60 Stat. at 791).
73 Id. at 31.
74 Id.
75 Id.
Instead of evaluating the department store owner’s public use claim, the Court upheld Congress’s legislative determinations as an appropriate exercise of its police power.\textsuperscript{76} In rejecting the landowners contention and upholding the taking, the Court stated that “public use” determinations by the legislature receive great deference.\textsuperscript{77} Further the Court opined:

In such cases the legislature, not the judiciary, is the main guardian of the public needs to be served by social legislation . . . This principle admits of no exception merely because the power of eminent domain is involved. The role of the judiciary in determining whether that power is being exercised for a public purpose is a very narrow one.\textsuperscript{78}

Although not expressly adopting the broad view, adoption of this view is implicit from the text of the opinion:

We do not sit here to determine whether a particular housing project is or is not desirable. The concept of the public welfare is broad and inclusive. The values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled. In the present case, the Congress and its authorized agencies have made determinations that take into account a wide variety of values. It is not for us to reprise them. If those who govern the District of Columbia decide that the Nation’s Capital should be beautiful as well as sanitary, there is nothing in the Fifth Amendment that stands in the way.\textsuperscript{79}

\textsuperscript{76} Id. at 31-32 ("We deal, in other words, with what has traditionally been known as the police power."). The Court further acknowledged the difficulty in setting parameters for what is and what is not a valid exercise of the police power by commenting that “[a]n attempt to define its reach or trace its outer limits is fruitless, for each case must turn on its own facts.” Id. at 32. In laying out examples of what the Court thought were traditional police powers – therefore valid for legislatures to control – the Court noted, “public safety, public health, morality, peace and quiet, law and order – these are some of the more conspicuous examples of the traditional application of the police power . . .” Id.

\textsuperscript{77} Id. at 32. The Court stated that “[s]ubject to specific constitutional limitations, when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive.” Id.

\textsuperscript{78} Id.

\textsuperscript{79} Id. at 33 (emphasis added).
By taking a backseat to the legislature in determining what is and what is not a public use, the judiciary fundamentally sanctioned the broadening of the phrase "public use," as can be seen in post- *Berman* eminent domain cases.80

Further limiting its role in the development of eminent domain law, the *Berman* Court justified its decision to allow the taking and condemnation to go forward by stating that it would be more suitable if the condemning entity had the power to take every property within the designated redevelopment area, rather than discerning between non-slum and slum properties.81 Extending the legislature’s essentially unfettered eminent domain discretion, the Court stated:

> It is not for the Courts to oversee the choice of the boundary line, nor sit in review on the size of a particular project area. Once the question of the public purpose has been decided, the amount and character of land to be taken for the project and the need for a particular tract to complete the integrated plan rests in the discretion of the legislative branch.82

Therefore, under *Berman* both the following situations are constitutionally valid: (1) a taking that may not improve public health, morality, or safety,83 and is therefore not a valid exercise of eminent domain would still be constitutional under the police-power justification, and (2) a taking that is not desig-

---


> [t]he duty of the courts is to hold the legislature within its enumerated authority. Once a legislature has determined that the public good is compromised, the court presumes that the plan, created to restore the public welfare, is rationally related to a public use. If the legislature exceeds its authority and falsely determines public use, no such judicial deference is required.

Madigan, *supra* note 14, at 190 (citing Armendariz v. Penman, 75 F.3d 1311, 1321 (9th Cir. 1996)).

81 *Berman*, 348 U.S. at 35 noting that

> [w]e have said enough to indicate that that it is the need of the area as a whole which Congress and its agencies are evaluating. 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 . . . . [A]s we have already stated, community redevelopment programs need not, by force of the Constitution, be on a piecemeal basis – lot by lot, building by building.

*Id.*

82 *Id.* at 35-36 (citing Shoemaker v. United States, 147 U.S. 282, 298 (1893); United States ex rel. TVA v. Welch, 327 U.S. 547, 554 (1946); United States v. Carmack, 329 U.S. 230, 247 (1946)).

83 *Berman*, 348 U.S. at 28.
nated for public use although a "public purpose" for the project as a whole has been delineated.\textsuperscript{84} 

The \textit{Berman} decision set the wheels in motion for the broadening of the "public use" requirement of the Fifth Amendment by showing almost complete deference to the decisions of legislatures, redevelopment agencies, and localities, and, thus, giving them unfettered discretion in the use of the eminent domain power.\textsuperscript{85} This wholesale deference opened the door for States and municipalities to engage in a wide range of condemnations that certainly would have been deemed improper before \textit{Berman}.\textsuperscript{86} The problem of providing a precise yet workable definition of public use has led more cautious courts to extend greater deference to the legislature.\textsuperscript{87} This is where \textit{Midkiff} comes in.\textsuperscript{88}

\textbf{B. Hawaii Housing Authority v. Midkiff}

In \textit{Midkiff}, the United States Supreme Court echoed the deferential approach laid out in \textit{Berman} and reiterated that it would be applied to interpretations of the Public Use Clause.\textsuperscript{89} At issue in \textit{Midkiff} was the constitutionality of a Hawaiian law known as The Land Reform Act.\textsuperscript{90} The Hawaiian legislature had "concluded that concentrated land ownership was responsible for skewing the State’s residential fee simple market [as well as] inflating land prices."\textsuperscript{91} In

\begin{itemize}
  \item \textit{Berman}, 348 U.S. at 36 (opining that "[t]he rights of these property owners are satisfied when they receive that just compensation which the Fifth Amendment exacts as the price of the taking.").
  \item \textit{See supra} notes 66-67, 76 and accompanying text.
  \item \textit{See supra} note 67 and accompanying text.
  \item \textit{See supra} note 52.
  \item \textit{See} Merrill, \textit{supra} note 34, at 63 (noting that "\textit{Midkiff} hints that the public use analysis parallels the 'minimum rationality' standard applied to equal protection and substantive due process challenges to economic legislation.").
  \item \textit{HAW. REV. STAT.} §516 (1967).
  \item \textit{Midkiff}, 467 U.S. at 232. Forty-seven percent of the privately owned land in Hawaii at the time was owned by seventy-two people. \textit{Id}. The legislature also found that eighteen land owners, with tracts of 21,000 acres or more, owned more than forty percent of this land, and on Oahu, twenty-two landowners held more than seventy-two percent of the fee simple title. \textit{Id. But see}, Madigan, supra note 14, at n.57. The author commented that:
    
    In fact no oligopoly existed. The condemned land was part of a moral trust formed by the last Hawaiian royalty. Income from the supported Kama-hamaha schools. The long-term leaseholds were functioning for the public good. Politician John Connor pushed the Act through the Hawaiian legislature for his own benefit. The results were devastating to the lessees. When the land became freehold, Japanese businessman, who do not tend to deal with lease-
response to this perceived problem, the legislature promulgated the Land Reform Act,\(^2\) which sought to compel large landowners to break up their estates and redistribute them to the current lessees through a process of condemnation.\(^3\) This legislation also created the Hawaii Housing Authority, which had the statutory authority to condemn a lessor’s property and transfer it to the lessee.\(^4\) The Ninth Circuit Court of Appeals held that the Act was unconstitutional on the basis that it was a “naked attempt on the part of the State of Hawaii to take the private property of A and transfer it for B’s private use and benefit.”\(^5\)

In reversing the Ninth Circuit’s decision, the United States Supreme Court relied heavily on the deferential treatment analysis from Berman.\(^6\) Condensing the Berman analysis, the Court stated, “The public use requirement is . . . coterminous with the scope of a sovereign’s police powers.”\(^7\) The Court noted that “[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 eminent domain power is equated with the police power,”\(^8\) but restricted the role as “an extremely narrow one.”\(^9\)

Bolstering its position that the deferential approach was the proper method for evaluating legislative schemes that involve eminent domain, the Midkiff Court stated that “where the exercise of the eminent domain power is

\[\text{Id.}\]\n
\(^2\) Midkiff, 467 U.S. at 233. The court noted that the Act:

created a mechanism for condemning residential tracts and for transferring ownership of the condemned fees simple to existing lessees. By condemning the land in question, the Hawaii Legislature intended to make the land sales involuntary, thereby making the federal tax consequences less severe while still facilitating the redistribution of fees simple.

\[\text{Id.}\]\n
\(^3\) Haw. Rev. Stat. § 516-186. This Act was passed because landowners strongly rebuffed attempts by the state to require landowners to sell the lands that they were leasing to the lesseors, due to the significant tax liabilities involved.\(^{10}\) To accommodate the needs of both parties, the Act was created.\(^{11}\) The act “created a mechanism for condemning residential tracts and for transferring ownership of the condemned fee simple to existing lessees. By condemning the land in question, the Hawaii Legislature intended to make the land sales involuntary, thereby making the federal tax consequences less severe while still facilitating the redistribution of fees simple.”

\[\text{Id.}\]\n
\(^4\) Midkiff, 467 U.S. at 233-34.

\[\text{Id. at 235.}\]

\(^5\) Id. at 239-45.

\[\text{Id. at 240.}\]

\(^6\) Id.

\[\text{Id. (quoting Berman v. Parker, 348 U.S. 26, 32 (1954)).}\]
rationally related to a conceivable public purpose, the Court has never held a compensated taking to be proscribed by the Public Use Clause."\textsuperscript{100} This verbiage used by the court helped to further expand the interpretation of the Public Use Clause.

Rationally related to a conceivable public purpose? This Author finds it hard to think of any claimed public use that is not "rationally related to a conceivable public purpose." This standard validates not only a public use that relates to a public purpose, but also public uses that rationally relate to some conceivable purpose.

This standard that was set forth in Midkiff has been called "the most liberal test\textsuperscript{101} because "any rational suggestion of general welfare will do."\textsuperscript{102} One scholar suggests that "in its search for a 'rational basis,' courts can supply a purpose the legislature itself missed."\textsuperscript{103} Therefore, if the legislature is unable to justify the taking, or the reason offered by the condemning entity does not do so, a court can attempt to create a justification.\textsuperscript{104}

In solidifying the applicability of the deferential approach to all takings cases, the Midkiff Court stated that "if a legislature, state or federal, determines there are substantial reasons for an exercise of the takings power, courts must defer to its determination that the taking will serve a public use."\textsuperscript{105}

Under Berman and Midkiff, it is unclear if any condemnation proceeding would violate the Public Use Clause.\textsuperscript{106} Clearly, Midkiff extended even further the already expansive interpretation of the Public Use Clause from Berman.\textsuperscript{107} To the chagrin of private property owners everywhere, the expansion would later continue when the Court decided Kelo v. City of New London. But before the United States Supreme Court’s decision in Kelo, there was a temporary return to the "narrow view" in a Michigan Supreme Court case.

IV. \textit{COUNTY OF WAYNE V. HATHCOCK: A TEMPORARY RETURN TO THE NARROW VIEW}

In July of 2004, the Michigan Supreme Court, in a decision temporarily applauded by private property owners, held that the government could not use

\textsuperscript{100} \textit{Id.} at 241 (emphasis added).
\textsuperscript{101} Madigan, \textit{supra} note 14, at 185.
\textsuperscript{102} \textit{Id.}
\textsuperscript{104} Cramer, \textit{supra} note 67, at 421.
\textsuperscript{105} \textit{Midkiff}, 467 U.S. at 244.
\textsuperscript{106} \textit{EPSTEIN, supra} note 103, at 179.
eminent domain to take land for the purpose of developing a privately owned and operated business and technology park.\textsuperscript{108}

After expansion of the local airport, Wayne County, Michigan attempted to purchase almost 500 acres of private property around the airport to implement a federally funded noise abatement program.\textsuperscript{109} To put all lands purchased with federal grant money to an economically productive use, as the Federal Aviation Administration requires, the county devised the "Pinnacle Project," which was to be a "state-of-the-art business and technology park."\textsuperscript{110} At the completion of the voluntary sale period, forty-six randomly distributed properties were yet to be acquired.\textsuperscript{111} The County authorized eminent domain to be used for the acquisition of those properties, after which, some property owners consented to a compensated sale. But nineteen property owners refused the buy-out offered and challenged the condemnation.\textsuperscript{112} The trial court rejected the property owners' challenge and held that the taking was necessary and authorized under the state's public use requirement.\textsuperscript{113} The appeals court affirmed this decision, though a two judge concurrence noted that the case relied on for precedent\textsuperscript{114} was "poorly reasoned, wrongly decided, and ripe for reversal."\textsuperscript{115}

The Michigan Supreme Court reversed the appeals court and held in favor of the landowners.\textsuperscript{116} The Court side-stepped the trend of utilizing the rational basis review established in Berman and Midkiff and instead utilized a more traditional approach, within which there are only three categories of permissible takings.\textsuperscript{117} The first category encompasses "those enterprises generat-

\textsuperscript{109} Id. at 770.
\textsuperscript{110} Id.
\textsuperscript{111} Id. at 771.
\textsuperscript{112} Id. After the 46 homes were appraised as required by the Uniform Condemnation Procedures, the county issued written offers, and 27 home owners took the deal. Id.
\textsuperscript{113} Id.
\textsuperscript{114} Poletown Neighborhood Council v. City of Detroit, 304 N.W.2d 455 (Mich. 1981). After years of deferring to the traditional "narrow view," the Michigan Supreme Court deviated from that trend and allowed the condemnation of an entire Detroit neighborhood in order to allow General Motors to build a plant. Id. This is generally understood to be the leading case to hold that a taking for economic development to benefit private parties is permissible, as long as it survives a heightened scrutiny. See Mary Massarow Ross, Public Use: Does County of Wayne v. Hathcock Signal a Revival of the Public Use Limit to the Taking of Private Property?, 37 URB. LAW. 243, 249 (2005); see also JULIAN CONRAD JUERGENSEMeyer & THOMAS E. ROBERTS, LAND USE PLANNING AND CONTROL LAW 688 (1998).
\textsuperscript{115} Hathcock, 684 N.W.2d at 772; see also County of Wayne v. Hathcock, 2003 WL 1950233, at 7-9 (Mich. Ct. App. 2003) (Murray & Fitzgerald, JJ., concurring) (commenting that the Poletown opinion was a departure from traditional "public use" and that the "economic crisis" that justified that decision was not present in the case at hand), overruled by County of Wayne v. Hathcock, 684 N.W. 2d 765 (Mich. 2004).
\textsuperscript{116} Hathcock, 684 N.W.2d at 784.
\textsuperscript{117} Id. at 781.
ing public benefits whose very existence depends on the use of land that can be
assembled only by the coordination central government alone is capable of
achieving.\footnote{Id. The court offered as examples railroads, highways, and other such “instrumentalities of commerce.” Id. at 781-82.} The second category allows condemnation to be used if the land
will be transferred to an entity that “remains accountable to the public in its use
of that property.”\footnote{Id. at 782.} Thirdly, if the condemnation is “on the basis of ‘facts of
independent public significance,’” the land can be transferred to a private party
because the public use requirement would be satisfied by the “act of condemna-
tion itself, rather than the use to which the condemned land eventually would be
put.”\footnote{Id. at 783.} Significantly, this court did not use the rational basis test and it evaluated
the merits of the condemnation, as opposed to deferring to legislative or
municipal findings regarding the public purpose of the project.\footnote{Id. at 785; see also Recent Cases, Eminent Domain – Nongovernmental Takings – Michigan
The county attempted to rely on the creation of new jobs and greater tax revenue as the pro-
jected “public use” that would justify eminent domain.\footnote{Hathcock, 684 N.W.2d at 770.}
The Michigan Supreme Court however, poignantly noted that “every productive unit of society ..
. contributes in some way to the commonwealth.”\footnote{Id. at 786; See also Brief of Amici Curiae of the Rutherford Institute at 9, Kelo v. City of
New London, 125 S. Ct. 2655 (2005).} Further, the court cautioned that “if one’s ownership of private property is forever subject to the gov-
ernment’s determination that another private party would put one’s land to bet-
ter use, then the ownership of real property is perpetually threatened by the ex-
pansion plans of any large discount retailer, ‘megastore,’ or the like.”\footnote{Hathcock, 684 N.W.2d at 786. For similar arguments see S.W. Ill. Dev. Auth. v. Nat’l City
Envtl., L.L.C., 768 N.E.2d 1, 10 (Ill. 2002) (noting that “if [private] property ownership is to
remain what our forefathers intended it to be, if it is to remain a part of the liberty we cherish, the
economic by-products of a private capitalist’s ability to develop land cannot justify a surrender of
ownership to eminent domain.”); see also City of Owensboro v. McCormick, 581 S.W.2d 3, 6
(Ky. 1979) (stating that “[i]f public use was construed to mean that the public would be benefited
in the sense that the enterprise or improvement for the use of which property was taken might contribute to the comfort or convenience of the pubic, or a portion thereof, or be esteemed neces-
sary for their enjoyment, there would be absolutely no limit on the right to take private property.
It would not be difficult for any person to show that a factory or hotel or other like improvement
he contemplated erecting or establishing would result in benefit to the public, and under this rule
the property of the citizen would never be safe from invasion” (quoting Chesapeake Stone Co. v.
Moreland, 104 S.W. 762, 765 (Ky. 1907))).}
Justice Weaver, who concurred in part and dissented in part, agreed
with the holding of the case, but lobbied for an even narrower interpretation of
public use. She argued for a return to the “narrow view” of old,\footnote{See supra notes 33-37 and accompanying text.} that takings
should be limited to cases in which “the public retained the right to actually use the land,” and since the Pinnacle Project would be “under no obligation to let the public in their doors or even on their lands,” this taking, in her view, did not satisfy the Public Use Clause.

As Hathcock was the most recent major eminent domain court decision prior to Kelo, it is no wonder the Kelo plaintiffs were optimistic about their chances of prevailing and keeping their homes. The strong verbiage used in this opinion left no question as to the stance of the Michigan Supreme Court when interpreting the Public Use Clause, a stance that would be exposed as clearly opposite to that of the United States Supreme Court.

V. Kelo v. City of New London

In a highly publicized five-to-four decision, the United States Supreme Court in Kelo v. City of New London held that a city could exercise its eminent domain power under the guise of economic development and that such use satisfies the Fifth Amendment’s “public use” requirement as long as the plan serves a public purpose. Generating massive public outcry and opinion from coast to coast, the Kelo litigation was hailed as the chance for the Supreme Court to reverse the trend of eminent domain decisions that narrowed private property owners rights, and reclaim private property rights that had been held

126 Hathcock, 684 N.W.2d at 794.
127 Id. at 796.
128 See supra notes 124-27 and accompanying text.
129 See supra notes 124-27 and accompanying text.
130 See infra Part V.A. and notes 158-60.
131 Interestingly, the majority opinion is silent on the meaning of economic development except for the statement that, “Clearly, there is no basis for exempting economic development from our traditionally broad understanding of public purpose.” Kelo, 125 S. Ct. at 2665-66.
132 U.S. CONST. amend IV; Kelo, 125 S. Ct. at 2668.
133 Richard Epstein, Kelo: An American Original: Of Grubby Particulars and Grand Principles, 8 Green Bag 2d. 355 (Summer 2005) [hereinafter “Grubby Particulars”] (stating that “[t]he American public has found few cases in the past 50 years as riveting as the ongoing saga in Kelo v. City of New London.”); see also Avi Salzman & Laura Mansnerus, For Homeowners, Frustration and Anger at Court Ruling, N.Y. Times, June 24, 2005 at A20; Micheal Corkery & Ryan Chittum, Eminent-Domain Uproar Imperils Projects, Wall.St. J., Aug 3, 2005, at B1 (describing how the vehement public response resulted in many large, possibly social worthwhile projects being dropped for fear of adverse publicity); G.M. Filisko, Contra Kelo – Ohio High Court Rejects U.S. Supreme Court’s Rationale on Eminent Domain, 31 A.B.A.J. E-REP. 3 (2006) (quoting an Ohio attorney as saying, “There’s been this huge political firestorm in response to the Kelo decision, and I absolutely believe that if it weren’t for the Kelo case, the Norwood case (which he was working on) wouldn’t have gotten into the Ohio Supreme Court because it wasn’t particularly unique.”).
basically non-existent by prior decisions.\textsuperscript{134} \textit{Kelo} galvanized the public at large because the Court not only failed to reverse the trend, but it further perpetuated the elimination of private property rights through an even more expansive interpretation of the Public Use Clause.\textsuperscript{135} Commentators have noted that \textit{Kelo} was "the final signal that . . . the U.S. Constitution . . . provides no protection for the private property rights of Americans."\textsuperscript{136}

Susette \textit{Kelo}, the lead plaintiff, was a homeowner in New London, Connecticut.\textsuperscript{137} From the porch of her salmon colored Victorian home, Ms. Kelo could see the water of the Thames River.\textsuperscript{138} Her home was in no way blighted or in bad condition. In fact, the exact opposite is true.\textsuperscript{139} She had spent her time fixing up her home to make it the waterfront property that she had always dreamed of.\textsuperscript{140} Her efforts did not pay thanks to the City of New London who nailed a condemnation notice to her front door on the day before Thanksgiving.\textsuperscript{141}

Ms. Kelo's home, along with the homes of her neighboring residents, were to be razed so the City could implement its new economic redevelopment plan.\textsuperscript{142} This redevelopment plan was adopted to rejuvenate the City of New London's economy after the city had fallen into tough times.\textsuperscript{143} This plan was designed to encourage new economic opportunities in the area and supplement Pfizer Corporation's construction of a $300 million dollar research facility on the outer edge of Fort Trumbull.\textsuperscript{144}

To accomplish this goal the city formed a private redevelopment group called the New London Development Corporation (hereinafter the "NLDC" or "development corporation"), a private non-profit entity created by the city with

\textsuperscript{134} To liberals, \textit{Kelo} represents the worst of rent-seeking politics where the powerful and wealthy may triumph over the common man. Grubby Particulars, supra note 133 at 355. To conservatives, \textit{Kelo} represents an unnecessary expansion of governmental power. \textit{Id.}

\textsuperscript{135} See generally Grubby Particulars, supra note 133, at 355.

\textsuperscript{136} See Senate Hearing, supra note 1 (statement of Dana Berliner, Senior Attorney, Institute for Justice).


\textsuperscript{138} \textit{Kelo}, 125 S. Ct. at 2660.

\textsuperscript{139} \textit{Id.}

\textsuperscript{140} \textit{Id.}

\textsuperscript{141} Laura Mansnerus, \textit{Ties to a Neighborhood at Root of Court Fight}, N.Y. TIMES, July 24, 2001, at B5.

\textsuperscript{142} \textit{Kelo}, 125 S. Ct. at 2659.

\textsuperscript{143} \textit{Id.} at 2658. After the federal government closed the Naval Undersea Warfare Center in New London in 1998, the State authorized millions of dollars to be spent in support of the new, 90 acre Fort Trumbull State Park. \textit{Powell}, supra note 2, at § 79F.03(3)(b)(iii). The city was facing a skyrocketing unemployment rate, nearly double that of the state. \textit{Kelo}, 125 S. Ct. at 2658.

\textsuperscript{144} \textit{Id.} at 2659.
enormous power and even larger goals.\textsuperscript{145} Some of the land comprising the re-development area was already in the hands of the City. But the property that was not city owned was acquired through purchases made by the NLDC.\textsuperscript{146} Some landowners within this development area refused to sell.\textsuperscript{147} These were private homes that were scattered across the future development plot, and it was the owners of these homes who mounted a legal challenge to the constitutionality of the eventual takings.\textsuperscript{148} In attempting to take these homes, the NLDC did not allege these properties were blighted or in poor condition. They sought to condemn them only because of their location in the development area.\textsuperscript{149} The homeowners argued that, since their homes were not located in the redevelop-ment areas designated by the NLDC to be marinas or walkways to be used by the public, their properties were not being taken for a public purpose.\textsuperscript{150} Therefore, the landowners argued, the taking of their properties was unconstitutional. The landowner’s asked the Court to lay out a “bright-line rule that economic development does not qualify as a public use.”\textsuperscript{151}

Sarcastically pointing out the uselessness of the Public Use Clause as it is currently interpreted by the Supreme Court, one scholar opines that “there would be no reason to have takings protection at all if governments . . . only acted in the interest of the entire public every time they took land [a]nd . . . had superior knowledge of the anticipated consequences of their actions” therefore eminent domain would be used to maximize social welfare every time it was used, and this could be guaranteed.\textsuperscript{152} The scholar further notes that “if both motive and knowledge reside in local governments, then why slow down the wheels of progress . . . we should just let it rip: the more aggressive the use of condemnation power, the better, for everyone wins in the long run if the wise and just government has its way.”\textsuperscript{153} This author satirically points out that the exercise of eminent domain is not always for a noble purpose, and to put all the power in the Legislature who get political donations from corporate America (such as Pfizer), is not the best plan. This “fairy tale rendition of government”

\textsuperscript{145} Id. at 2658-59. The power this Note refers to is the eminent domain power delegated to the NLDC by the city. Id at 2660. The goals included the building of marinas, walkways, a hotel and conference center, a state park, new residences, and office and retail space. Id.

\textsuperscript{146} Id. at 2659 (noting that some of the land was already previously a naval facility). One commentator notes that the economic development could have been “easily accomplished if the City has made sensible use” of the land it already owned. See Grubby Particulars, supra note 133, at 356. The City had already spent some 73 million dollars on “strategic planning, infrastructure, improvement, and environmental cleanup.” Id.

\textsuperscript{147} Kelo, 125 S. Ct. at 2660.

\textsuperscript{148} Id. at 2659-60.

\textsuperscript{149} Id. at 2660.

\textsuperscript{150} Grubby Particulars, supra note 133, at 356.

\textsuperscript{151} Kelo, 125 S. Ct. at 2665.

\textsuperscript{152} Grubby Particulars, supra note 133, at 359.

\textsuperscript{153} Id.
was exposed by the *Kelo* case, because “ambition exceeded judgment every step of the way.”¹⁵⁴

A. The Majority Opinion

Following broad precedent that allows the Public Use Clause to be satisfied by any “public benefit,” the *Kelo* majority permitted the condemnations to go forward based on the “public benefits” that the city claimed the project would have.¹⁵⁵

After quickly reviewing the *Berman* and *Midkiff* cases, the majority opinion summarized the Court’s current position regarding the Public Use Clause by stating:

> Viewed as a whole, our jurisprudence has recognized that the needs of society have varied between different parts of the Nation, just as they have evolved over time in response to changed circumstances. Our earliest cases in particular embodied a strong theme of federalism, emphasizing the “great respect” that we owe to state legislatures and state courts in discerning local public needs.¹⁵⁶

---

¹⁵⁴ *Id.*

¹⁵⁵ *Kelo*, 125 S. Ct. at 2665. The redevelopment plan was expected to “complement the facility that Pfizer was planning to build, create jobs, increase tax and other revenues, encourage public access to and use of the city’s waterfront, and eventually build momentum for the revitalization of the rest of the city . . . .” *Kelo* v. City of New London, 843 A.2d 500, 508-509 (Conn. 2004). Further, it was expected to generate between 1700 and approximately 3200 jobs and between $680,000 to $1.2 million dollars in property tax revenues. *Id.* at 510.

¹⁵⁶ *Kelo*, 125 S. Ct. at 2664 (citing Hairston v. Danville & W. Ry. Co., 208 U.S. 598, 606-07 (1908) (Stating that the needs of States vary because a State’s “resources, the capacity of the soil, the relative importance of industries to the general public welfare, and the long-established methods and habits of the people.”); *see also* Clark v. Nash, 198 U.S 361, 367-68 (1905); Strickley v. Highland Boy Gold Mining Co., 200 U.S. 527, 531 (1906) (stating that “In the opinion of the legislature and the Supreme Court of Utah the public welfare of that State demands aerial lines between the mines upon its mountain sides and railways in the valleys below should not be made impossible by the refusal of a private owner to sell the right to cross his land. The Constitution of the United States does not require us to say that they are wrong.”); O’Neill v. Leamer, 239 U.S. 244, 253 (1915). This case noted that:

> States may take account of their special exigencies, and when the extent of their arid or wet lands is such that a plan for irrigation or reclamation according to districts may fairly be regarded as one which promotes the public interest, there is nothing in the Federal Constitution which denies to them the right to formulate this policy or to exercise the power of eminent domain in carrying it into effect. With the local situation the state court is particularly familiar and its judgment is entitled to the highest respect.

*Id.* (citing Union Lime Co. v. N.W. Ry. Co., 233 U.S. 211, 218 (1914); *Hairston*, 208 U.S. at 606-07; *Strickley*, 200 U.S. at 531; *Clark*, 198 U.S at 367-68).
Under the typical rational basis review, Justice John Paul Stevens, writing for the majority regarding the public purpose of the proposed plan, stated that "[w]ithout exception, our cases have defined that concept broadly, reflecting our longstanding policy of deference to legislative judgments."\(^{157}\)

With this view as the guidepost, it is hard to imagine any development plan that would fail. Inevitably, the development corporation has the eminent domain authority of the locality as delegated to them by the legislature, and any development project can certainly be said to generate some benefit for the public, no matter how minute.\(^{158}\) Only an unimaginative and incompetent condemning government body could fail to come up with a justification for the project to show benefit to the public, and satisfying the public use requirement will be reduced to the question of whether the government has a "stupid staff" who cannot meet this minimal standard.\(^ {159}\)

In dismissing an application of the narrow view, the *Kelo* court stated that this "Court long ago rejected any literal requirement that condemned property be put into use for the general public."\(^{160}\) Explaining its departure from this test, the Court stated, "Not only was the use by the public test difficult to administer, but it proved to be impractical given the diverse and always evolving needs of society."\(^{161}\)

After quickly washing away any hopes of the New London landowner's for a rebirth of the narrow view, the majority opinion stated that "[p]romoting economic development is a traditional and long accepted function of the government," and further "[t]here is . . . no principled way of distinguishing economic development from the other purposes that we have recognized."\(^{162}\) Acknowledging that public purpose is a broad interpretation of public use, the Court noted that "there is no basis for exempting economic development from

---

157 *Kelo*, 125 S. Ct. at 2663; *see also* Berman v. Parker, 348 U.S. 26 (1954); Haw. Hous. Auth. v. Midkiff, 467 U.S. 229 (1984). While Justice Stevens wrote the majority opinion in *Kelo* v. New London, his comments at a Nevada Bar Association meeting seem to weaken his support for the opinion. Just Stevens stated that the outcome was "unwise" and that he "was convinced that the law compelled a result that I would have opposed if I were a legislator." Linda Greenhouse, *Supreme Court Memo; Justice Weighs Desire v. Duty (Duty Prevails)*, *N.Y. Times*, Aug. 25, 2005, at A1. Justice Stevens confessed that personally he felt that "the free play of market forces is more likely to produce acceptable results in the long run that the best-intentioned plans of public officials." *Id.*

158 This is the essence of Justice O'Connor's opinion, *see infra* Part B.


160 *Kelo*, 125 S. Ct. at 2662 (citing *Midkiff*, 467 U.S. at 244).

161 *Id.* (citing Dayton Gold & Silver Mining Co v. Sewell, 11 Nev. 394, 410 (1876)); Philip Nichols, Jr., *The Meaning of Public Use in the Law of Eminent Domain*, 20 B.U. L. Rev 615, 619-24 (1940) (stating that many state courts either circumvented the "use by the public" test when necessary or abandoned it completely).

162 *Kelo*, 125 S. Ct. at 2665.
our traditionally broad understanding of public purpose." This argument seems empty and limitless.

While distinguishing economic development from other purposes that have been traditionally recognized may in itself be impossible, the essence of this argument's underpinnings are that once a phrase has been interpreted to mean one thing, it is no big deal to take it one logical step further. Harkening back to Justice Patterson's comments earlier in Section II of this Note, this type of "[i]nnovation is dangerous" because one encroachment leads to another" and "precedent gives birth to precedent" causing the "Constitution to eventually be destroyed." These sentiments were echoed loud and clear in the scathing opinions of the dissenting justices.

B. Dissenting Opinions and Views

Writing in opposition to the majority's expansive view of the Public Use Clause, Justice O'Connor stated, "Under the banner of economic development, all private property is now vulnerable to being taken and transferred to another private property owner, so long as it might be upgraded - i.e. given to an owner who will use it in a way the legislature deems more beneficial to the public - in the process." In the dissent's view, the majority's opinion "wash[es] out any distinction between private and public use of property - and thereby effectively . . . delete[s] the phrase 'for public use' from the Takings Clause."

Justice O'Connor, attempting to distinguish the New London landowners' situation from that of the landowners in Berman and Midkiff, noted that "[i]n both [of] those cases, the extraordinary, pre-condemnation use of the targeted property inflicted affirmative harm on society . . . . [And] the relevant legislative body had found that eliminating that existing property use was necessary to remedy the harm." Therefore, a "public purpose was realized when the harmful use was eliminated." And since the taking itself served the public benefit, it did not matter that the property was turned over to private parties.

In Kelo, on the other hand, no public purpose is realized by the condemnation and taking of these homes. The NLDC does not claim that the landowners' well-maintained homes are the foundation for any social harm. They claim only that the homes are within an area designated for redevelopment. In making

---

163 Id.
164 See supra note 63 and accompanying text.
165 Kelo, 125 S. Ct. at 2671 (O'Connor, J., dissenting).
166 Id.; see Senate Hearing, supra note 1 (statement of Sen. John Cornyn, R- Tex).
167 Kelo, 125 S. Ct. at 2674 (O'Connor, J., dissenting).
168 Id.
169 Id. at 2675 (further noting that it the NLDC could not claim that these homes were the source of some public harm without making the absurd claim that "any single-family home might be razed to make way for an apartment building, or any church that might be replaced with a retail
this claim, the majority opinion moves away from decisions that sanction the condemnation of harmful property use and "the Court today significantly expands the meaning of public use."\textsuperscript{170}

Justice O’Connor further argued that, under the Court’s new expansive interpretation of the Takings Clause, the government can “take . . . property currently put to ordinary private use, and give it over for a new, ordinary private use” provided that “the new use is predicted to generate some secondary benefit for the public — such as increased tax revenue, more jobs, maybe even aesthetic pleasure.”\textsuperscript{171} Moreover, as the dissent argues, nearly any new use of private property can easily be said to generate some secondary benefit for public.\textsuperscript{172} “[I]f predicted (or even guaranteed) positive side-effects are enough to render transfer from one private party to another constitutional, then the words ’for public use’ do not realistically exclude any takings, and thus do not exert any constraint on the [exercise of] eminent domain power.”\textsuperscript{173} Take for example the tearing down of one home and the rebuilding of an exact replica in its place, only under new ownership. This would require labor, materials, loans, inspections, and appraisals, all of which would be bought, serviced and contracted for, locally. And this does not even include the sales and income tax that this demolition and construction would provide. All of this could be considered secondary benefits to the public, or economic development, which under the majority’s opinion, is a valid reason for the exercise of eminent domain.

Predictable positive side effects likely could be the result of the condemnation of any home or business and therefore “[t]he specter of condemnation hangs over all [of] property.”\textsuperscript{174} “For who among us can say she already makes the most productive or attractive possible use of her property?”\textsuperscript{175} This transparent distinction would allow a home to be replaced by a shopping mall, a farm with a factory, or Motel 6 by a Ritz-Carlton.\textsuperscript{176}

\textsuperscript{170} Id. (emphasis added).

\textsuperscript{171} Id.

\textsuperscript{172} Id.

\textsuperscript{173} Id.

\textsuperscript{174} Id. at 2676.

\textsuperscript{175} Id.

\textsuperscript{176} Id. Examples supporting Justice O’Connor’s statement can be seen in the following: Bugryn v. Bristol, 774 A.2d 1042, 1045 (Conn. App. 2001)(taking the homes and farm of four owners in their 70’s and 80’s and giving it to an “industrial park”); 99 Cents Only Stores v. Lancaster Redeve. Agency, 237 F. Supp. 2d 1123 (C.D. Cal. 2001) (attempted taking of a 99 Cents store to replace with a Costco); Poletown Neighborhood Council v. City of Detroit, 304 N.W.2d 455, 457 (Mich. 1981) (taking a working-class, immigrant community in Detroit and giving it to a General Motors assembly plant), overruled by County of Wayne v. Hathcock, 684 N.W.2d 765 (2004); Brief for the Becket Fund for Religious Liberty as Amici Curiae Supporting Petitioners at 4-11, Kelo v. City of New London, 125 S. Ct. 2655 (2005) (describing takings of religious properties); see also BERLINER, supra note 8 (collecting accounts of economic development takings).
Justice Clarence Thomas, who authored his own dissenting opinion, described the majority's replacement of the Public Use Clause with the Public Purpose Clause or, as he also called it, the Diverse and Ever Evolving Needs of Society Clause, by stating that "[t]his . . . shift in phraseology enables the Court today to hold, against all common sense, that a costly urban-renewal project whose stated purpose is a vague promise of new jobs and increased tax revenue, but which is also suspiciously agreeable to the Pfizer Corporation, is for a 'public use.'"\(^{177}\)

To Justice Thomas, "the most natural reading of the Clause" would allow "the government to take property only if the government owns, or the public has the legal right to use, the property, as opposed to taking it for any public purpose or necessity whatsoever."\(^{178}\) This is a throwback to the narrow view of old, or at least a view with some limits; which implicitly dissenting Justices O'Connor, Thomas, Scalia and Chief Justice Rehnquist do not feel the Kelo interpretation offers.

VI. RACE AND CLASS IMPLICATIONS OF THE BROADENING OF THE PUBLIC USE CLAUSE

Having laid out the evolution of the Public Use Clause over time, this Note shifts to predicting the future impacts of the increasingly broad interpretation of the Clause. The broadening of the Public Use Clause in the more than 215 years since the inception of the Constitution will have major negative impacts, especially on minorities and those with less money or political clout,\(^{179}\) whom it has been shown that eminent domain is already used against most.\(^{180}\)

In his sharply worded Kelo dissent, Justice Thomas jabbed, "[T]hough citizens are safe from the government in their homes, the homes themselves are not."\(^{181}\) To most Americans, this statement has never rung so true. Justice Thomas and Justice O'Connor realized what the fall-out of the Kelo decision would be. They saw that the impact of the decision would be felt most severely by poor and minority communities.\(^{182}\) They knew that it is beyond doubt that if the

\(^{177}\) Kelo, 125 S. Ct. at 2677-78 (Thomas, J., dissenting). He further stated that "[i]f such 'economic development' takings are for a 'public use' any taking is, and the Court has erased the Public Use Clause from our Constitution . . . " Id.

\(^{178}\) Id. at 2679.

\(^{179}\) Senate Hearing, supra note 1 (statement of Hilary O. Shelton, NAACP) (arguing that "even if you dismiss all other motivations allowing municipalities to pursue eminent domain for private development . . . [eminent domain] will clearly have a disparate impact on African-Americans and other racial minorities . . . in our country.").

\(^{180}\) Id.

\(^{181}\) Kelo, 125 S. Ct. at 2685 (Thomas, J., dissenting). Sarcastically noting that under the 4th Amendment, homeowners are safe from illegal searches within their homes. Id.

\(^{182}\) Id. at 2677, 2686-87. Speaking on the purposes of the public use and just compensation components of the Fifth Amendment, Justice O'Connor stated:
public use provision in the takings clause is relaxed, takings will occur more frequently and gather up considerably more land.\textsuperscript{183} If takings occur more frequently it is unquestionable that minority communities will be targeted. In the name of urban renewal and economic development, the relaxing and eventual demise of the Public Use Clause will lead to the downfall of minority Americans' private property rights.\textsuperscript{184}

The consequences of this decision "promise to be harmful" since, although some compensation is required to be paid, "no compensation is possible for the subjective value of these lands to the individuals displaced and the indignity inflicted by uprooting them from their homes."\textsuperscript{185} "Allowing . . . government to take property solely for public purposes," is in Justice Thomas's eyes, "bad enough, but extending the concept of public purpose to encompass any economically beneficial goal guarantees that th[o]se losses will fall disproportionately on poor communities."\textsuperscript{186}

Susette Kelo, the lead plaintiff in \textit{Kelo} v. \textit{City of New London}, characterized eminent domain as "the poor and middle class ha[ving] to make way for the rich and politically connected."\textsuperscript{187} The truth in this statement will become more and more evident in the post-\textit{Kelo} era. Coupling the Supreme Court's \textit{Kelo} interpretation of the Public Use Clause\textsuperscript{188} with the broad interpretation of that clause even before \textit{Kelo},\textsuperscript{189} it is easy to see why Americans are nervous about state and local governments increasing the use of eminent domain for redevelopment projects.\textsuperscript{190}

Together they ensure stable property ownership by providing safeguards against excessive, unpredictable, or unfair use of the government's eminent domain power – particularly against those who, for whatever reasons, may be unable to protect themselves in the political process against the majority's will. The public use requirement . . . imposes a . . . basic limitation, circumscribing the very scope of eminent domain power: Government may compel an individual to forfeit her property for the public's use, but not for the benefit of another private person. This requirement promotes fairness as well security.

\textit{Id.} at 2672 (internal citations omitted).

\textsuperscript{183} \textit{Kelo}, 125 S. Ct. at 2686 (Thomas, J., dissenting) (stating that this outcome will be a "predictable result of the loosening of public use conditions").

\textsuperscript{184} See Prichett, supra note 80, at 2. Several studies have shown how urban elites promoted redevelopment to protect their real estate investments. \textit{Id.}

\textsuperscript{185} \textit{Kelo}, 125 S. Ct. at 2686 (Thomas, J., dissenting).

\textsuperscript{186} \textit{Id.} at 2686-87.

\textsuperscript{187} \textit{Senate Hearing}, supra note 1 (statement of Susette Kelo, plaintiff in \textit{Kelo} v. \textit{City of New London}).

\textsuperscript{188} See discussion supra Part V.

\textsuperscript{189} See discussion supra Parts II, III and IV.

This nervousness led the Senate Judiciary Committee to hold a hearing on the issue of private property rights in light of the *Kelo* decision. Testifying in front of the House Judiciary Committee, Senator John Cornyn (R-Tex) stated,

[J]ust [to] show the range of individuals and groups concern[ed] [about the Kelo decision], an amicus brief filed by the National Association for the Advancement of Colored People [hereafter “NAACP”] and AARP . . . noted [that] [a]bsent a true public-use requirement the Takings Clause will be employed more frequently. The takings that result will disproportionately affect and harm the economically disadvantaged and in particular racial and ethnic minorities and the elderly.\footnote{Senate Hearing, supra note 1 (statement of Sen. John Cornyn, R-Tex.) (internal quotations omitted); Id. (statement of Susette Kelo) (stating that “[a]s quickly as the NLDC acquired homes in my neighborhood, they came in and demolished them, with no regard for the remaining residents who lived there, most of whom were elderly.”).}

Hilary O. Shelton, Director of NAACP’s Washington Bureau echoed this outlook while testifying in front of the Senate Judiciary Committee regarding the *Kelo* decision. He stated that “[r]acial and ethnic minorities are not just affected more often by the exercise of eminent domain power, but we are almost always affected differently and more profoundly.”\footnote{Senate Hearing, supra note 1 (statement of Hilary O. Shelton).} He noted that the dispersion caused by the condemnation affects those groups’ abilities to exercise what little political clout they may have established.\footnote{Id.}

The history of eminent domain is ripe with abuses exclusively targeting racial and ethnic minorities and poor neighborhoods. This decision will only exacerbate these abuses.\footnote{Id.; *Kelo*, 125 S. Ct. 2655, 2687 (Thomas, J., dissenting); see BERNARD J. FRIEDEN & LYNNE B. SAGALYN, DOWNTOWN, INC.: HOW AMERICA REBUILDS CITIES 28-29 (1989). This book quoted the former Attorney General of Minnesota, who was recounting a Minneapolis highway project from the 1950’s, as saying: We went through the black section between Minneapolis and St. Paul about four blocks wide and we took out the home of every black man in that city. And woman and child. In both those cities, practically. It ain’t there anymore, is it? Nice neat black neighborhood, you know, with their churches and all and we gave them about $6,000 a house and turned them loose on society. Id.; See also ADAM COHEN AND ELIZABETH TAYLOR, AMERICAN PHARAOH 216-22 (2000) (illustrating how Chicago’s use of urban renewal in the 1950’s and 60’s was “expressly designed to keep the central [Chicago] area white and to physically cut it off from black Chicago” and how this “must now be seen as an important step” in the “process of making Chicago America’s most racially segregated large city.”).} Indeed, urban renewal, which over its sketchy past has displaced scores of African-Americas, came to be called “Negro removal”
instead of urban renewal. Further, scholars have noted how governments have “implemented policies to segregate and maintain the isolation of the poor, minority, and otherwise outcast populations,” a problem that will only be exacerbated by the Kelo majority opinion’s interpretation of the public use clause.

Recognizing that a future of eminent domain abuse is likely after the Kelo decision, Mr. Shelton stated, “The expansion of eminent domain to allow government[s] or its designees to take property simply by asserting that it can put the property to a higher use will systematically sanction transfers from those with less resources to those with more.” For example he noted that ninety percent of the over 10,000 families displaced by blight focused eminent domain projects in the greater Baltimore area were African American. Further, in Los Angeles, a Mexican neighborhood was completely demolished so the city could continue to expand its freeways. Over 97 percent of the people forcibly removed from their homes by the “slum clearance” project in Berman, were African-American. One commentator estimates that no less than 1,600 African American neighborhoods have been destroyed by similar government pro-

195 Kelo, 125 S. Ct. at 2687, (Thomas, J., dissenting) (citing Wendell E. Pritchett, The Public Menace of Blight: Urban Renewal and Private Uses of Eminent Domain, 21 Yale L. & Pol’y Rev. 1, 6 (2003) (noting that “blight was a facially neutral term infused with racial and ethnic prejudice”); see also 12 THOMPSON ON REAL PROPERTY 194, 98.02(e) (David A. Thomas ed., 1994) (quoting James Baldwin); see also Senate Hearing, supra note 1 (statement of Hilary O. Shelton).

196 See Pritchett, supra note 80, at 16-20.

197 Senate Hearing, supra note 1. This is not only a circumstance of the past. See, e.g., Charles Toutant, Alleging Race-Based Condemnation, N.J. L.J. (Aug 2, 2004) (outlining litigation alleging that municipalities targeted minority areas in an attempt to force them from the community in favor of those people and businesses that the local government considers more desirable.); Erik Schwartz, Progress or Discrimination? Facing Displacement, Minorities Battle Towns’ Eminent Domain, Courier-Post, July 30, 2004.

198 Senate Hearing, supra note 1 (statement of Hilary O. Shelton); FRIEDEN & SAGALYN, supra note 194, at 29.

199 Id.

200 Berman v. Parker, 348 U.S. 26, 30 (1954); Kelo, 125 S. Ct. at 2686 (Thomas, J., dissenting). Justice Thomas further noted that:

Of all the families displaced by urban renewal from 1949 through 1963, 63 percent of those whose race as known were nonwhite, and of these families, 56 percent of nonwhites and 38 percent of whites had income low enough to qualify for public housing, which, however, was seldom available to them. Public works projects in the 1950’s and 1960’s destroyed predominately minority communities in St. Paul, Minnesota, and Baltimore, Maryland. In 1981, urban planners in Detroit, Michigan, uprooted the largely lower-income and elderly Poletown neighborhood for the benefit of General Motors Corporation. Urban renewal projects have long been associated with the displacement of blacks; in cities across the country, urban renewal became known as Negro removal.

Id. (internal citations and quotations omitted).
2007] THE DOWNLOW ON KELO 523

jects. This is essentially the only likely result when, as one commentator noted, "Lower class neighborhoods [are] viewed as cancerous tumors that needed to be removed by the governmental equivalent of surgery," also know as eminent domain. 202

For instance on May 9, 2005, in the city of Lawnside, New Jersey, the City's planning board recommended a plan to the city council that would redevelop 120 acres on the northeast side of the city. 203 Lawnside has been a distinct and settled African-American community since the late 1700's, and was a stop on the historic Underground Railroad. 204

Further, several African-American families in Canton, Mississippi had their homes slated for demolition to clear land for a Nissan automobile plant. 205 The taking of these homes, which the families had lived in for over sixty years, was not justified on the basis of blight or necessity, but the trial court nevertheless ruled to allow the takings to proceed. 206 Upon a motion made by the families, the Mississippi Supreme Court stayed the condemnations while it considered the families' appeal. Once the stay was granted, the State gave up its fight against the families and dismissed its eminent domain actions.

The executive director of the Mississippi Development Authority explained, in an attempt to justify the takings, "It's not that Nissan is going to leave if we don't get the land. 207 What's important is the message it would send to other companies if we are unable to do what we said we would do. 208 If you make a promise to a company like Nissan, you have to be able to follow through." 209 Clearly, the corporate dollars meant more to the Mississippi Development Authority than the Constitutional rights of the minority homeowners whom they sought to uproot and displace. This sort of attempted justification for the use of eminent domain is why Justice O'Connor stated in her KELO dis-


202 Eric R. Claeys, Don't Waste a Teaching Moment: Kelo, Urban Renewal, and Blight, 15 J. Affordable Housing & Comm. Dev. L. 14 (Fall 2005). The author continues to note that, "In Berman the US. Supreme Court described the neighborhoods at issue "as though possessed of a congenital disease." Id. (citing Berman, 348 U.S. at 34.).

203 Jason Laughlin, In Lawnside Some Fear Development, COURIER-POST, August 29, 2005, at 1G. Most of the area sought to be taken through eminent domain is vacant, but the most prized locations, near the interstates, are residential home sites. Id.

204 Id.


206 Miss. Major Impact Auth. v. Archie, No. Co-2001-0082, slip op. (Miss. Spec. Ct. Madison Cty. July 26, 2001). Interestingly, the condemning authority recognized that these parcels were not necessary for the project, but they went ahead anyway due to the message it would send if they could not do what they had promised. Firestone, supra note 205.

207 Firestone, supra note 205.

208 Id.

209 Id.
sent that “[a]n external judicial check on how the public use requirement is interpreted, however limited, is necessary if this constraint on government power is to retain any meaning.”\textsuperscript{210} Without this judicial check, Justice O’Connor feels that

Any private property may . . . be taken for the benefit of another party, but the fallout from this decision will not be random . . . the government now has license to transfer property from those with fewer resources to those with more. The Founders cannot have intended this perverse result. “[T]hat alone is a just government,” wrote James Madison, “which impartially secures to every man, whatever is his own.”\textsuperscript{211}

Curtailing the fallout as described by Justice O’Connor creates a “justification for intrusive judicial review of constitutional provisions that protect discrete and insular minorities” as well as “the powerless groups and individuals the Public Use Clause protects.”\textsuperscript{212} By upholding the deference to the legislature approach, and fundamentally removing the judiciary from Public Use determinations, the \textit{Kelo} majority is encouraging “those citizens with disproportionate influence and power in the political process, including large corporations and development firms, to victimize the weak.”\textsuperscript{213} It is rarely the drafters of the development plan whose home will be condemned.\textsuperscript{214}

\textbf{VII. CONCLUSION}

The admitted “narrow role”\textsuperscript{215} that the courts play in eminent domain cases is perilous and dangerous to the rights of private property owners because it allows powerful corporations and businesses to collude with the government and condemn private property for nearly any justifiable reason.\textsuperscript{216} Almost any justification for the use of eminent domain can be said to fall within the wide scope of public use because it is easy to show a possible public benefit through

\textsuperscript{210} \textit{Kelo}, 125 S. Ct. at 2673 (O’Connor, J., dissenting) (citing Cincinnati v. Vester, 281 U.S. 439, 446 (1930) (“It is well established that . . . the question [of] what is a public use is a judicial one.”)).

\textsuperscript{211} \textit{Id.} at 2677 (citing National Gazette, Property, (Mar. 29, 1792), reprinted in 14 Papers of James Madison 266 (R. Rutland et. al. eds. 1983).

\textsuperscript{212} \textit{Id.} at 2687 (Thomas, J., dissenting).

\textsuperscript{213} \textit{Id.} “An expansive power of eminent domain is particularly hard to insulate from abuse by the politically and economically powerful at the expense of the disenfranchised, whose property rights are often all they have to repel developers seeking quick profits.” Eric Rutkow, \textit{Case Comment, Kelo v. City of New London}, 30 Harv. Envtl. L. Rev. 261, 269 (2006).

\textsuperscript{214} Rutkow, 30 Harv. Envtl. L. Rev. at 269.

\textsuperscript{215} \textit{Berman}, 348 U.S. 26, 32 (1954).

\textsuperscript{216} Joseph J. Lazzarotti, \textit{Public Use or Public Abuse}, 68 UMKC L. Rev. 49, 51 (1999).
general welfare, and the legislature has the express power to provide for the general welfare.\footnote{U.S. CONST. art. I, § 8.}

Thus, the judiciary is sanctioning the expansion of the Public Use Clause and the loss of private property rights by deferring to the legislature regarding when the use of eminent domain is proper. This expansive interpretation of the Public Use Clause coupled with the judiciary’s decision to take a back seat to legislative determinations has opened the door for abuses of eminent domain power and may have essentially eliminated the safeguards afforded to private property under the Fifth Amendment.\footnote{See STEVEN GREENHUT, ABUSE OF POWER: HOW THE GOVERNMENT MISUSES EMINENT DOMAIN 239-48 (2004) (illustrating how the media got involved, publicized and took a stand against eminent domain abuse); Dean Starkman, Cities Use Eminent Domain to Clear Lots for Big-Box Stores, WALL ST. J., Dec. 8, 2004, at B1 (explaining that many cities are using eminent domain power to obtain land to give to big-box retailers such as Home Depot, Kmart, and Wal-Mart); Dean Starkman, Take and Give: Condemnation Is Used to Hand One Business Property of Another, WALL ST. J., Dec. 2, 1998, at A1 (noting that many state and local governments condemn business property just to give it to another business); BERLINER, supra note 8, at 1-2 (compiling and documenting over 10,000 "filed or threatened" condemnations of private property from January 1, 1998, through December 31, 2002); Jones, supra note 107, at 292. But see G.M. Filisko, Contra Kelo – Ohio High Court Rejects U.S. Supreme Court’s Rationale on Eminent Domain, 31 A.B.A.J. E-REP. (2006) (explaining how Ohio’s Supreme Court rejected the holding of the Kelo case and allowed a non-blighted home to remain standing by expressly rejecting “economic benefit” as a valid justification for the use of eminent domain).}

\textit{Eric L. Silkwood}\textsuperscript{*}

\textsuperscript{*} Associate, Flaherty, Sensabaugh & Bonasso, Charleston, W.Va.; J.D., West Virginia University College of Law, 2006; B.S. in Journalism, West Virginia University, 2002. I would like to thank that staffs of Volume 108 and 109 of the West Virginia Law Review for all your assistance. I would especially like to thank Kevin Cimino for always pushing me to make to the most of what I am writing (and for the citation format assistance). Also, a special thanks to Professor andre cummings (dre) for all the encouragement, advice and most of all inspiration. A double thanks to my wife Kristi for putting up with me talking about eminent domain law at the dinner table . . . Love you. Finally, to all my family, thanks for pushing me and being there for me, even when I could not truly be there while writing this paper.