From Public Use to Public Purpose: The Supreme Court Stretches the Takings Clause in *Kelo v. City of New London*

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I. INTRODUCTION

The genius of our Constitution lies in the intricacy of its balance—a balance that is rough but fragile, constant yet evolutionary. The Constitution balances state and national government; majoritarianism and minority rights; freedom and restraint; and the legislative, judicial, and executive branches.

This article examines one of the many Constitutional balances—the balance between private property and the public good. More specifically, the article examines the U.S. Supreme Court decision in *Kelo v. City of New London*,[1] and the resulting tension between the government's power of eminent domain and the private property owner's right to maintain his property against governmental appropriation.[2] While the Fifth Amendment clearly gives federal, state, and local governments the authority to take private property without consent,[3] it also contains a balance wheel that requires the taking be for a public use and the property owners be given fair payment for their property.[4] In *Kelo*, the Court focused on whether the public use requirement

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1. 125 S. Ct. 2655 (2005).

2. *See id.* (discussing whether the city can exercise its domain power to further an economic development plan).

3. U.S. CONST. amend. V.

4. *Id.*

was satisfied when the City of New London, Connecticut took Mrs. Kelo's and others' property pursuant to a community economic development plan.[5] The Court decided in favor of New London in a five to four decision.[6]

This article begins with a brief overview of Supreme Court case law that developed around the takings clause and public use requirements. It then discusses the two precedents relied on most heavily by the majority, *Berman v. Parker*[7] and *Hawaii Housing Authority v. Midkiff*.[8] That discussion is followed by a detailed examination of the majority and dissenting opinions in *Kelo*—a Supreme Court case of first impression to decide whether private property may be taken under the Fifth Amendment for economic development. The article ends with a conclusion that analyzes the decision and its implications.

II. A BRIEF HISTORY OF TAKINGS CLAUSE JURISPRUDENCE

A. *The Taking Requirement*

The ability of a governmental entity to take private property is often referred to as the power of eminent domain.[9] The Fifth Amendment provides, in pertinent part, that "[P]rivate property [shall not] be taken for [a] public use, without just compensation."[10] The Supreme Court first used the doctrine of incorporation in 1897, holding that the "takings clause" was applicable to the states by virtue of the Fourteenth Amendment.[11] This section provides a brief overview of Supreme Court decisions involving the taking requirement, and the next section will do the same with respect to the public use requirement.

Several decades of Supreme Court decisions have revealed a number of methods by which a compensable taking may occur.[12] Most obvious is the circumstance where the government engages in an actual physical taking of property.[13] In its quintessential form, a state may appropriate land for purposes of constructing, for

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5. 125 S. Ct. at 2663.

6. *Id.* at 2658, 2668-69.

7. 348 U.S. 26 (1954). *See infra* notes 46-54, 56-66 and accompanying text.

8. 467 U.S. 229 (1984).

9. *See* United States v. Dow, 357 U.S. 17, 21 (1958).

10. U.S. CONST. amend. V.

11. *See* Chicago, Burlington & Quincy R.R. Co. v. Chicago, 166 U.S. 226, 241 (1897). The doctrine of incorporation is a method used by the Court to impose certain of the guarantees of the Bill of Rights on states. *See* Tennessee v. Lane, 541 U.S. 509, 562 (2004). The Court has used the Due Process Clause of the 14th Amendment to do so because of its specific application to the states. *Id.* To date, the Court has not deemed all provision of the Bill of Rights applicable against the states. *See infra* notes 27, 174 and accompanying text.

12. *See infra* notes 13-18 and accompanying text.

13. *See, e.g.*, United States v. Archer, 241 U.S. 119 (1916).

example, a highway, bridge, or governmental building.[14] While such a method may be the most obvious, it is not an exclusive one.[15] In *Pennsylvania Coal Co. v. Mahon*,[16] the Court recognized the possibility that government regulation of property may be so extensive as to be recognized as a form of taking that requires compensation.[17] On further refinement, the Court held in *Loretto v. Teleprompter Manhattan CATV Corporation*[18] that a building owner who was required to suffer the placement of cable television equipment on the roof of his building was entitled to compensation under the Takings Clause.[19] *Loretto* held that a permanent physical invasion of private property constitutes a compensable taking regardless of the importance of the public interest or the minimal impact on the owner.[20] In *Lucas v. South Carolina Coastal Council*,[21] a divided Court determined that where a government regulation deprives a land owner of all economically beneficial use of his property, the regulation serves as an effective taking that requires a payment of compensation.[22] These two types of regulatory takings were considered by the Court to be *per se*[23] takings. The only remaining issue in such cases was the adequacy of compensation.[24]

In addition to the *per se* type takings mentioned above, under the terms of the Court's 1978 holding in *Penn Central Transportation Company v. New York*,[25] a government regulation could also be considered a taking based on an assessment of several factors. These factors include economic impact of the government regulation, especially the extent to which it infringed on the investment expectations of the owners, and the nature of the regulatory effect—physical invasions being considered more intrusive.[26] According to a recent Supreme Court decision, the tests of *Loretto, Lucas,* and *Penn Central* have the common theme of focusing on "the *severity* of the burden that government imposes upon private property rights."[27]

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14. *See, e.g.,* Delaware River Joint Toll Bridge Comm'n v. Colburn, 310 U.S. 419 (1940).

15. *See* Loretto v. Teleprompter Manhatten CATV Corp., 458 U.S. 419 (1982) (holding that a private landowner must be compensated for a television cable put on the roof of their house).

16. 260 U.S. 393 (1922).

17. *Id.* at 415.

18. 458 U.S. 419 (1982).

19. *Id.* at 421, 441.

20. *Id.* at 434-35.

21. 505 U.S. 1003 (1992).

22. *Id.* at 1030.

23. *See* discussion in Lingle v. Chevron U.S.A., Inc., 125 S. Ct. 2074, 2081 (2005). The *per se* regulatory taking of *Loretto* and *Lucas* is in contrast to the situation represented by the *Penn Central* line of cases discussed hereafter. *See infra* notes 18-25 and accompanying text.

24. *Loretto*, 458 U.S. at 426.

25. 438 U.S. 104 (1978).

26. *Id.* at 124.

27. *Lingle*, 125 S. Ct. at 2082-83 (emphasis added). Lingle involved Hawaii legislation limiting the rent oil companies may charge dealers leasing company owned service stations. *Id.* at

A final category of compensable takings is a result of what has been referred to as the "doctrine of unconstitutional conditions."[28] In the relatively recent decisions of *Nollan v. California Coastal Commission*[29] and *Dolan v. City of Tigard*,[30] the Court held that landowners required to cede public access to their property in exchange for development permits unrelated to the access were entitled to compensation.[31] In other words, landowners could not be required to relinquish their right to exclude the public from their property in return for a needed permit without the government providing compensation.[32] In the Court's view, were it not for the particular circumstances of the cases (the landowners need for a permit), the government's actions would amount to a physical taking of property which would, without question, require payment.[33]

B. *The Public Use Requirement Pre*-Berman

For much of our nation's history the public use requirement of the Takings Clause was not a terribly difficult or contentious issue.[34] Public use meant exactly as it sounds—use of private property by the public.[35] A government appropriation of land to construct a highway was the classic example of a justified taking of private property for public use.[36] In the nineteenth century, the taking of private lands for use by the railroads was considered a public use because railroads serve as common carriers openly available for public use.[37] On the other hand, the Supreme Court in 1896 stated that "The taking by a State of the private property of one person or a corporation, without the owner's consent, for the private use of another, is not due

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2078. The Court held that the "substantially advances" test does not apply to whether a regulation affects a Fifth Amendment taking). *Id.* at 2082-83.

28. *See, e.g.*, Dolan v. City of Tigard, 512 U.S. 374 (1994) (stating that under the doctrine of unconstitutional conditions, the government cannot take public land for public use and force an individual to give up the right to be justly compensated).

29. 483 U.S. 825 (1987).

30. 512 U.S. 374. *See generally*, Linas Grikis, Note, *Dolan v. City of Tigard: Judicial Panacea to the Takings Clause?*, 31 TULSA L.J. 181 (1995) (explaining that the government must compensate a private landowner for an eviction when the exaction imposed is unrelated to the development permit).

31. *Nollan*, 483 U.S. at 841-42; *Dolan*, 512 U.S. at 385.

32. *Nollan*, 483 U.S. at 841-42; *Dolan*, 512 U.S. at 385.

33. *Nollan*, 483 U.S. at 831-32; *Dolan*, 512 U.S. at 384.

34. *See* Rindge Co. v. Los Angeles, 262 U.S. 700, 705-706 (1923) (holding that public use designations are best determined by state and local courts); Cincinnati v. Vestor, 281 U.S. 239, 446-447 (1930) (holding local conditions and state court holdings are important in public use determinations).

35. *See Rindge*, 262 U.S. at 706.

36. *Id.*

37. *See generally* Olcott v. The Supervisors, 83 U.S. 678 (1872) (explaining that under its eminent domain power, the government may take land for a railroad).

process of law, and is a violation of the Fourteenth Article of Amendment of the Constitution . . . ."[38] Similarly, in a later case, the Court held that "[T]his Court has many times warned that one person's property may not be taken for the benefit of another private person without a justifying public purpose, even though compensation be paid."[39] That statement, of course, begs the question, What constitutes a "justifying public purpose"?[40] As will be seen below, the Court has struggled with takings falling under circumstances that appear to violate these admonitions when such takings are claimed to be pursuant to a "justifying public purpose."[41]

Less than a decade after the *Missouri Pacific* decision, the Court again addressed the public use requirement, this time in the context of who would be the arbiter of the public use determination.[42] Foreshadowing the *Kelo* case's deference to the states, an early twentieth century Supreme Court reasoned that "It is for the State, primarily and exclusively, to declare for what local public purposes private property, within its limits, may be taken upon compensation to the owner, as well as to prescribe a mode in which it may be condemned and taken."[43] Referring to the federal courts, Justice Harlan stated that "[The Circuit Court] would respect the sovereign power of the State to define the legitimate public purposes for which private property may be taken . . . ."[44]

In *Rindge Company v. County of Los Angeles*, the Supreme Court held that the judicial branch of the government is ultimately responsible for determining the issue of public use.[45] Further, the Court held that to determine a public use courts should consider local conditions and "regard with great respect the judgments of state courts upon what should be deemed public uses in any State."[46] In *Rindge Company,* the Court seemed to say that while state court determinations of public use would be weighed heavily, they were not necessarily determinative.[47] The *Rindge* viewpoint

38. Missouri Pac. Ry. Co. v. Nebraska, 164 U.S. 403, 417 (1896).

39. Thompson v. Consol. Gas Utils. Corp., 300 U.S. 55, 80 (1937).

40. *Id.*

41. *Id.*

42. *See* Madisonville Traction Co. v. Saint Bernard Mining Co., 196 U.S. 239, 253-54 (1905).

43. *Id.* at 252.

44. *Id.* at 253. The case only indirectly involved the power of eminent domain. At issue was whether an eminent domain proceeding was removable to the federal courts where it involved citizens of different states. *Id.* at 256. The Supreme Court decided the question on the affirmative. *Id.*

45. 262 U.S. 700, 705-06 (1923). ("The nature of a use, whether public or private, is ultimately a judicial question.").

46. *Id.* (citing Fallbrook Irrigation Dist. v. Bradley, 164 U.S. 112, 158, 160 (1896) and Hairston v. Danville Ry., 208 U.S. 598, 606-07 (1908)).

47. *Id.*

was reinforced in *Cincinnati v. Vester*[48] when a unanimous Court held that "[The public use question] remains a judicial one which this Court must decide in performing its duty of enforcing the provisions of the Federal Constitution."[49] The Court also specified that "a mere statement" claiming that a taking is pursuant to a public use is not alone sufficient to meet the government's burden.[50] Further evidence of a genuine public use is necessary in order to ensure that the Constitutional requirement is meaningful.[51] Accordingly, the Court required that the government "specify definitively" what public use the appropriation furthers.[52]

The role of the judiciary in these determinations was qualified somewhat in *Old Dominion Land Company v. United States*.[53] There, Congress had condemned land on which it had constructed buildings during World War I—land that the government leased from Old Dominion.[54] Several years after the end of the war, Old Dominion refused to renew the leases while refusing to sell the land outright to the government.[55] The government then proceeded to exercise its power of eminent domain with respect to the land and buildings.[56] Old Dominion argued that while the condemnation was for a public benefit (saving the buildings constructed with taxpayer dollars), it was not for a public use.[57] The Supreme Court held that Congress's determination of public use was "entitled to deference until it is shown to involve an impossibility."[58] In a later case in which the Court endorsed *Old Dominion* and distinguished *Cincinnati v. Vester,* the Court warned that any departure from the standard of deference articulated in *Old Dominion* "would result in courts deciding on what is and is not a governmental function and in their invalidating legislation on the basis of their view on that question at the moment of decision, a practice which has proved impracticable in other fields."[59] Further, in a post-*Berman*,

48. 281 U.S. 439 (1930).

49. *Id.* at 446. The Court also endorsed the earlier mentioned admonition that courts consider local conditions and the determinations of state legislatures and courts, *citing Fallbrook,* 164 U.S. at 159; *Missouri*, 164 U.S. at 417; Madisonville Traction Co. v. Saint Bernard Mining Co., 196 U.S. 239, 252 (1905); Rindge Co. v. County of Los Angeles, 262 U.S. 700, 705 (1923); and Old Dominion Land Co. v. United States, 269 U.S. 55, 66 (1926), among others. 28 U.S. at 446-47 n.1.

50. *Vester*, 281 U.S. at 447.

51. *Id.* at 446-47.

52. *Id.*

53. 269 U.S. 55 (1925).

54. *Id.* at 63.

55. *Id.*

56. *Id.*

57. *Id.* at 66.

58. *Id.* The Court even went so far as to *imply* that Congress had intended a public use since it had not stated one explicitly by interpreting *headings* in the authorizing statute ("for military purposes," "[f]or quarter-master warehouses") as designating a public use. *Id.*

59. U.S. *ex. rel.* Tennessee Valley Auth. v. Welch, 327 U.S. 546, 552 (1946). The Court also stated, "We think that it is the function of Congress to decide what type of taking is for a

post-*Midkiff* case, Justice Blackman reasoned that the means of a taking was up to Congress as long as the taking was for a "conceivable public character."[60]

The result of a half-century of case law preceding *Berman v. Parker* established that while, ultimately, the judicial branch determined whether or not a public use was present, in making that determination a great deal of deference should be given to legislative determinations.[61]

C. Berman v. Parker

Prior to the *Kelo* case discussed below, there were two modern, important Supreme Court decisions dealing with the public use requirement—*Berman v. Parker*,[62] a 1954 decision, and *Hawaii Housing Authority v. Midkiff*,[63] decided in 1984. This section will discuss *Berman*, and *Midkiff* will be discussed in the next. The *Kelo* Court majority relied heavily on both of these decisions.[64]

Congress passed the District of Columbia Redevelopment Act in 1945 which aimed to clean up slums and other tarnished areas of Washington, D.C.[65] As part of the legislation, the District of Columbia Redevelopment Land Agency was formed for the purpose of utilizing the government's power of eminent domain to acquire distressed properties.[66] Congress, as the entity responsible for governance of the District, had, through a newly created National Capital Planning Commission, developed a comprehensive plan for the removal of blighted areas and the replanning and replacement of eradicated buildings.[67] Congress had passed the Redevelopment Act pursuant to its police power over the district to legislate the health, safety, morals, and welfare therein.[68] Notably, Congress specified that both the acquisition of slum properties and the lease or sale of the resulting land as part of the comprehensive plan "is hereby declared to be a public *use*."[69] The Land Agency, after dedicating necessary portions of the property it acquired for streets, schools, and other public

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public use . . . ." *Id.* at 551.

60. Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1014 (1984).

61. *See* U.S. *ex rel.* Tennessee Valley Auth. v. Welch, 327 U.S. 546 (1946); City of Cincinnati v. Vester, 281 U.S. 439 (1930); Old Dominion Land Co. v. U.S., 269 U.S. 55 (1925); Rindge Co., 262 U.S. 700 (1923); Madisonville Traction Co. v. Saint Bernard Mining Co., 196 U.S. 239 (1905).

62. 348 U.S. 26 (1954).

63. 467 U.S. 229 (1984).

64. *See Kelo*, 124 S. Ct. at 2660-68 (2005).

65. *Berman*, 348 U.S. at 28.

66. *Id.* at 29.

67. *Id.*

68. *Id.* at 28.

69. *Id.* at 29 (emphasis added).

uses, was authorized to sell or lease the remaining land to private developers to be used consistent with the comprehensive plan.[70]

The appellant in the case owned a department store in the affected area which the agency sought to acquire through eminent domain.[71] Appellant Berman argued, among other things, that the property was being acquired for a private entity for private purposes, contrary to the Takings Clause's public use requirement.[72] A three judge District Court panel upheld the constitutionality of the Act by finding that the eradication of slums in the District was a public use because it furthered Congress's police power.[73] The Supreme Court affirmed the District Court's holding in a unanimous decision.[74]

Justice Douglas, writing for the Court, sloppily or conveniently, depending on one's point of view, skirted the "public use" language.[75] He endorsed the District Court's characterization of eminent domain as coterminous with the police power, and referred interchangeably to the police power, the public interest, the public purpose, and the public welfare—none of which are terms used in the Fifth Amendment.[76] For example, he says, "[W]hen the legislature has spoken, the *public interest* has been declared in terms well-nigh conclusive."[77] Later, he continues, saying that, "The concept of the *public welfare* is broad and inclusive."[78] And further, he states, "[T]he means of executing the project are for Congress and Congress alone to determine, once the *public purpose* has been established[,]"[79] and, tellingly, "The role of the judiciary in determining whether that power is being exercised for a *public purpose* is an extremely narrow one."[80] By blurring the distinction between these different terms, Douglas made the case for Congress's exercise of eminent domain power much easier.[81] The requirement that property be *used* by the public is more stringent than the requirement that property merely be used in furtherance of some public purpose, or that the use generally promotes the public welfare.[82] Douglas further aided Congress by stating that the judicial role in the review of the determination of public use, welfare, purpose, and interest is quite limited.[83] The

70. *Berman*, 348 U.S. at 30.
71. *Id.* at 29.
72. *Id.* at 31.
73. Schneider v. District of Columbia, 117 F. Supp. 705, 724-725 (D.C. 1953).
74. *Berman*, 348 U.S. at 36.
75. *Id.* at 31-32.
76. *Id.* at 32-33.
77. *Id.* at 32 (emphasis added).
78. *Id.* at 33 (emphasis added).
79. *Berman*, 348 U.S. at 33.
80. *Id.* at 32 (emphasis added).
81. *Id.* at 33.
82. *Id.* at 33-34.
83. *Id.* at 32.

Justice refers in various places to the legislative voice being "well-nigh conclusive";[84] the legislature being the "main guardian of the public needs";[85] the judiciary's role in determining the public purpose being, "an extremely narrow one";[86] and the means of attaining a legitimate governmental object being "for Congress to determine."[87] Accordingly, the combination of ambiguous language and broad judicial deference to government as to the means and end of the exercise of eminent domain serves as a recipe for nearly unbridled use of that power.[88]

D. Hawaii Housing Authority v. Midkiff

Thirty years later, the Court made another strong statement about the public use requirement.[89] Once again the Court was unanimous, without Justice Marshall's participation,[90] although this was a totally different Court, under a vastly different set of circumstances than those of *Berman*.[91]

The state of Hawaii adopted the Hawaii Land Reform Act in 1967 to attempt to remedy a severe problem of concentrated land ownership in the state.[92] While the government owned 49% of the land, another 47% was owned by a mere seventy-two private landowners.[93] Even more startlingly, eighteen owners held title to 40% of the land on the island of Oahu, and twenty-two persons or entities owned 72.5% of it.[94] The legislature determined that this so called land oligopoly was detrimental to the state and was causing greatly inflated land prices.[95] As a remedy, the state afforded lessees of certain lots the right to request condemnation of their parcel and, if a

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

85. *Id.*

86. *Id.*

87. *Id.* at 33.

88. *See* Brief for King Ranch, Inc. as Amicus Curiae Supporting Petitioners, Kelo v. City of New London, 125 S. Ct. 2655 (2005) (No. 04-108).

89. Hawaii Housing Auth. v. Midkiff, 467 U.S. 229, 231-32 (1984).

90. *Id.* at 231 (8-0 decision) (Marshall, J., abstaining).

91. Members of the Midkiff Court were Burger, J., Brennan, J., Marshall, J., Blackmun, J., Powell, J., Rehnquist, J., Stevens, J., O'Connor, J., 467 U.S. III (1984); Members of the Berman Court included Warren, J., Black, J., Reed, J., Frankfurter, J., Douglas, J., Jackson, J., Burton, J., Clark, J., Minton, J., and Harlan, J., 348 U.S. III (1954).

92. *Hawaii Housing Auth.*, 467 U.S. at 232-33.

93. *Id.* at 232. *See generally* Sara B. Falls, Note, *Waking a Sleeping Giant: Revisiting the Public Use Debate Twenty-Five Years After* Hawaii Housing Authority v. Midkiff, 44 WASHBURN L.J. 355, 360-61 (2005); Amy Kellogg, Case Comment, Hawaii Housing Authority v. Midkiff: *The Continued Validity of the Public Use Doctrine*, 47 OHIO ST. L.J. 521, 528 (1986); Russell A. Brive, Note, *Containing the Effect of* Hawaii Housing Authority v. Midkiff *on Takings for Private Industry*, 71 CORNELL L. REV. 428, 436 (1986).

94. *Midkiff*, 467 U.S. at 232.

95. *Id.*

sufficient number of lessees within a tract made similar requests, to get a hearing before the Hawaii Housing Authority to determine if condemnation would "'effectuate the public purposes' of the Act."[96] If satisfied, the Authority could condemn the property and offer it for sale to the tenant or someone else.[97] The Authority could also lend a tenant up to 90% of the purchase price.[98] Appellee Midkiff's property became subject to condemnation.[99] Midkiff objected and filed suit.[100] The District Court upheld the Act, but the Ninth Circuit reversed.[101] The Supreme Court, in turn, reversed the Ninth Circuit and held for the state.[102]

Justice O'Connor and the other members of the Court, including then Associate Justice Rehnquist, began their inquiry by citing *Berman* and its reliance on the police powers as the legitimate object of the eminent domain authority.[103] In fact, Justice O'Connor, in a stand alone sentence and paragraph unequivocally stated that "The 'public use' requirement is thus coterminous with the scope of a sovereign's police powers."[104] O'Connor also endorsed *Berman's* view of the judicial role in these matters as "extremely narrow" along with the deferential language of *Old Dominion*.[105]

The opinion imposes a rational basis analysis that borrows Justice Douglas' looseness of language holding: "But where the exercise of the eminent domain power is rationally related to a *conceivable* public *purpose*, the Court has never held a compensated taking to be proscribed by the Public Use Clause."[106] The actions of the Hawaii legislature under the Act satisfied both the necessary means and ends required by a rational basis analysis.[107]

Finally, the Court emphasized that the subject property need not pass into government hands to avoid a finding of private use.[108] What appears, according to the Court, to be a taking for a private purpose may be transformed to a public one by

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96. *Id.* at 233 (quoting HAW. REV. STAT. § 516-22 (1977)).

97. *Id.* at 234.

98. *Id.*

99. *Midkiff*, 467 U.S. at 234.

100. *Id.*

101. Midkiff v. Tom, 483 F. Supp. 62, 70 (Haw. 1979); Midkiff v. Tom, 702 F.2d 788, 798 (9th Cir. 1983).

102. *Midkiff*, 467 U.S. at 245.

103. *Id.* at 239.

104. *Id.* at 240.

105. *Id.* (quoting *Berman*, 348 U.S. 29, 32).

106. *Id.* at 241 (emphasis added).

107. *Midkiff*, 467 U.S. at 242-43. *See id.* at 245 ("The Hawaii Legislature enacted its Land Reform Act not to benefit a particular class of identifiable individuals but to attack certain perceived evils of concentrated property ownership in Hawaii—a legitimate public purpose. Use of the condemnation power to achieve this purpose is not irrational.").

108. *Id.* at 243-44.

its intended purpose.[109] According to the Court, "[I]t is only the taking's purpose, and not its mechanics, that must pass scrutiny under the Public Use Clause."[110] These Supreme Court precedents set the stage for *Kelo.*

III. *KELO V. CITY OF NEW LONDON*

The City of New London is a waterfront community that sits on six square miles at the junction of the Thomas River and the Long Island Sound in southeastern Connecticut; it is the second smallest, geographically, of the 169 municipalities in the State of Connecticut.[111] New London was once a center of the whaling industry, and later a manufacturing center.[112] New London had, at its peak, a population of 34,182, which fell to 23,860 by 1998.[113] New London's unemployment rate of 7.6% is almost twice as high as that of the entire State of Connecticut.[114] In 1996, the Naval Undersea Warfare Center, located on the Fort Trumbell peninsula, closed; it had employed up to 1500 people in the late 1980's.[115] Fort Trumbell, extending into the Thomas River, had thirty-two acres dedicated to the Naval Undersea Warfare Center, and 115 privately owned properties.[116]

The New Long Development Corporation ("NLDC"), a private, non-stock, non-profit development corporation, is the official development agency for the Fort Trumbell Municipal Development Plan.[117] The NLDC was established in 1978 under state law,[118] and reformed after the closure of the Naval Center under the Base Closure and Realignment Act.[119]

The NLDC was given approval in 1998 by the New London City Council to prepare an economic development plan for a ninety acre area of Fort Trumbell.[120]

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109. *Id.* at 244.

110. *Id.*

111. Brief of Respondents at *1, Kelo v. City of New London, 125 S. Ct. 2655 (2005) (No. 04-108).

112. *Id.*

113. *Id.* at *2.

114. *Id.*

115. *Id.*

116. Kelo v. City of New London, 125 S. Ct. 2655, 2659 (2005). Fort Trumbell was built during 1776-77 and attacked by Benedict Arnold in 1781. Joint Appendix Volume II at *369, Kelo v. City of New London, 125 S. Ct. 2655 (2005) (No. 04-108).

117. Brief for Respondents, *supra* note 111, at *iii. The NLDC has a volunteer board with no independent power of eminent domain. *Id.* at *1.

118. CONN. GEN. STAT. § 8-188 (1982). A city may designate such a private body to develop an economic plan, as well as authorize such a board to acquire property for the city, under the city's exercise of its eminent domain power. CONN. GEN. STAT. § 8-193 (1984).

119. 10 U.S.C. § 2687 (2005). The Department of Defense may close military installations after notifying Congress and allowing time for evaluation of the proposed closure. *Id.*

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

Also in 1998, the Connecticut Bond Commission authorized over $5 million in bonds to support planning and limited property acquisition, and another $10 million in bonds towards the creation of Fort Trumbell State Park, which now sits on eighteen acres formerly used by the Naval Center.[121] The Fort Trumbell area was selected because it fit the definition of a regional center to be revitalized in order to protect existing jobs and create new jobs for inner city residents, under state law.[122] Furthermore, most of the area had been zoned for commercial and light industrial use since 1928.[123]

In 1998, Pfizer, Incorporated,[124] announced that it was developing a global research facility on a site adjacent to the Fort Trumbell area, and the city conveyed this site to Pfizer.[125] This facility opened in 2001.[126]

The NLDC developed six alternate plans for the project area.[127] All six plans were reviewed and studied by various state agencies.[128] The plan approved by the city council in 2000 was projected to create more than 1,000 new jobs—dividing the site into seven areas in order to capitalize on the Pfizer facility and the new commerce it was expected to attract. Along with creating new jobs and economic opportunities, the approved plan was also designed to create leisure and recreational opportunities on the waterfront and in the park.[129] The first parcel was intended to be used for a waterfront conference hotel, restaurants, shopping, a marina, and a pedestrian riverwalk.[130] The second parcel was planned to include eighty new residences and a new U.S. Coast Guard Museum.[131] The third parcel was to retain the existing Italian Dramatic Club, and also house research and development office space near the Pfizer facility.[132] The first part of the fourth parcel was designated as "park support," including "parking or retail services for the adjacent state park."[133] The other part of

121. Brief for Respondents, *supra* note 111, at *2-4.

122. CONN. GEN. STAT. § 4-66b (1989).

123. Brief for Respondents, *supra* note 111, at *4.

124. Pfizer, Inc. is the world's largest research-based pharmaceuticals firm, with $26.6 billion in 2004 U.S. product sales in human health, and $51.6 billion total U. S. sales (2005), http://www.lexisnexis.com (follow "Legal" hyperlink; then follow "Reference" hyperlink; then follow "Business" hyperlink; then follow "Heaven's Company Records In-depth Records" hyperlink; then search "Pfizer"). Pfizer ranks 24th on the Fortune 500 list. Hoover's Company Records-In Depth Records, Pfizer, Inc. *Id.*

125. Kelo v. City of New London, 843 A.2d 500, 508 (Conn. 2004).

126. *Id.* at 509.

127. *Id.*

128. *Kelo*, 125 S. Ct. at 2659 n.2.

129. *See id.* at 2659.

130. *Kelo*, 843 A.2d at 509 (Conn. 2004).

131. *Id.*

132. *Id.* "Four properties owned by three of the plaintiffs are located in parcel [three]." *Id.*

133. *Id.* "Eleven properties owned by four of the plaintiffs are located on parcel [four]." *Id.*

parcel four was to be a renovated marina at the end of the riverwalk.[134] The fifth parcel was to include more office space.[135] The sixth parcel was planned for water-dependent commercial purposes.[136] The seventh small parcel was designed for additional office space and research use.[137] Under the development plan, the NLDC would retain ownership of the land, and lease it to private developers who would be bound by the plan's terms.[138]

As the trial began, the NLDC was negotiating with a private developer, Corcoran Jennisin, who would develop parcels 1, 2, and 3 and lease all three parcels from the NLDC for one dollar per year over the course of ninety-nine years.[139]

The NLDC successfully negotiated to purchase many of the parcels of private property in the ninety acre area.[140] Nine people, who owned fifteen parcels, however, did not sell voluntarily.[141] The NLDC voted to take these properties by eminent domain, and filed condemnation proceedings.[142]

In 2000, the plaintiffs[143] brought suit to challenge the takings proceedings.[144] Lead plaintiff Mrs. Susette Kelo, who had lived in her home since 1997, had made considerable improvements to her waterfront property.[145] Plaintiff Mrs. Wilhelmina Dery had lived in her Fort Trumbell house since she was born in 1918.[146] Her husband, plaintiff Mr. Charles Dery, moved into the house when they were married in 1946;[147] and their son lived next door with his family.[148] Ten of the properties were lived in by the owner or family member while the other five were investment properties.[149]

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134. *Id.*

135. *Kelo*, 843 A.2d at 509.

136. *Id.* at 510.

137. *Id.*

138. *Id.*

139. *Id.*

140. *Kelo*, 125 S. Ct. at 2660.

141. *Id.*

142. *Id.* Mrs. Kelo, the named plaintiff in this action, had the notice of condemnation mailed to her front door on the day before Thanksgiving in 2000. Steven E. Buckingham Comment, *The Kelo Threshold: Private Property and Public Use Reconsidered*, 39 U. RICH. L. REV. 1279, 1289 (2005).

143. "The individual plaintiffs are Susette Kelo, Thelma Brelesky, Pasquale Cristofaro, Margherita Cristofaro, Wilhelmina Dery, Charles Dery, James Guretsky, Laura Guretsky, Pataya Construction Limited Partnership and William Von Winkle." *Kelo*, 843 A.2d at 509 n.2.

144. *Id.* at 511.

145. *Kelo*, 125 S. Ct. at 2660.

146. *Id.*

147. *Id.*

148. Brief of Petitioners, *supra* note 88, at *2.

149. *Kelo*, 125 S. Ct. at 2660.

After a seven day bench trial, the court granted permanent injunctive relief to, and dismissed eminent domain action against, the four plaintiffs living on the first part of the fourth parcel.[150] The court, however, upheld the takings on parcel three.[151] These same plaintiffs appealed to the Supreme Court of Connecticut, and the defendants cross appealed the injunction granted to the first group of plaintiffs.[152]

To avoid addressing constitutional issues that were not absolutely essential to the case,[153] the Connecticut Supreme Court first addresses the statutory claim.[154] On appeal, the plaintiffs argued that the Connecticut statute[155] in question applied only to "unified land waste areas," meaning only underdeveloped lands—even though the phrase was not expressly defined in the statute.[156] The Connecticut Supreme Court, however, concluded that the trial court properly construed the term as not excluding developed or occupied land.[157]

The court then addressed the principal issue on appeal, whether the use of eminent domain for economic development violates the public use provision of the state or federal constitution.[158] Since both the Connecticut[159] and United States[160]

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150. *Id.*

151. *Id.*

152. *Kelo*, 843 A.2d at 507-08. On appeal, the plaintiffs claim that the trial court improperly concluded that:

> (1) the taking of the plaintiffs' land was authorized under chapter 132 of the General Statutes; (2) economic development constitutes a valid public use under the takings clauses of the state and federal constitutions, and that these takings will sufficiently benefit the public and bear reasonable assurances of future public use; (3) the delegation of the eminent domain power to the development corporation was not unconstitutional; (4) the taking of the plaintiffs' land on parcel 3 was reasonably necessary to the development plan; and (5) the development corporation, by allowing a private social club, but not the plaintiffs' properties to remain on parcel 3, did not violate the plaintiffs' federal and state constitutional rights to equal protection of the laws . . . . On their cross appeal, the defendants [claimed] that the trial court improperly concluded that: (1) the condemnation of the plaintiffs' properties on parcel 4A was not reasonably necessary to accomplish the development plan; and (2) the city's general power to widen and alter its roadways did not justify the taking of the plaintiffs' properties on parcel 4A.

Id. at 508.

153. *Id.* at 511 n.10 (citing Bauer v. Waste Management of Connecticut, Inc., 234 Conn. 221, 230, 662 A.2d 1179 (1995)).

154. *Id.*

155. CONN. GEN. STAT. § 8-186 (1984).

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

157. *Id.* at 518.

158. *Id.* at 519.

159. *See* Katz v. Brandon, 245 A.2d 579, 586 (Conn. 1968) (stating that the redevelopment of a blighted area, even where the area is later resold to private persons, is sufficient to fulfill the public use agreement).

160. *Berman*, 348 U.S. at 31-33 (1954) (holding that the District of Columbia's

Supreme Courts have given broad treatment to their respective public use clauses, the Connecticut Supreme Court concluded that:

> [A]n economic development plan that the appropriate legislative authority rationally has determined will promote significant municipal economic development, constitutes a valid public use for the exercise of the eminent domain power under both the federal and Connecticut constitutions.[161]

Concerning the issue of whether the public would sufficiently benefit from the condemnations, the court concluded that this economic development plan was constitutional.[162] However, the court carefully emphasized that its decision was not a license to use eminent domain as a tax raising measure.[163] Furthermore, concerning the issue of assurances of future public use, there were sufficient statutory and contractual constraints to ensure that the private parties subsequently using the land would follow the economic development plan.[164]

The Connecticut Supreme Court held that the delegation of eminent domain power to the NLDC under state law[165] was constitutional because the NLDC was not acting for its own benefit.[166] The Connecticut Supreme Court agreed with the defendants that, concerning parcel three, there was no evidence of unreasonableness, bad faith, or abuse of power.[167] Thus, the denial of the injunction for the properties on parcel three was proper.[168]

On cross appeal, concerning the first part of the fourth parcel, the Connecticut Supreme Court stated that "While there was no development commitment or formal site plan in place for parcel 4A, this is not necessarily indicative of bad faith, unreasonableness, or abuse of power."[169] Thus, the judgment was reversed on this parcel, leaving eminent domain available for use on all remaining parcels.[170]

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redevelopment plan that involved the taking of department store property located in blighted area did not violate the 15th Amendment).

161. *Kelo*, 843 A.2d at 528. The Connecticut Supreme Court also addressed the sister state cases. *Id.* at 528-30. The Connecticut Supreme Court also reviewed commentary from the academic community and concluded that eminent domain is not unconstitutional when used to further an economic development plan. *Id.* at 535-36.

162. *Id.* at 536-37.

163. *Id.* at 543.

164. *Id.* at 545.

165. CONN. GEN. STAT. § 8-188 (1982).

166. *Kelo*, 843 A.2d at 552.

167. *Id.*

168. *Id.* at 562. Additionally, the equal protection clauses of the Connecticut and U. S. Constitutions were not violated by the Italian Dramatic Club being able to keep that building, but the plaintiffs not being able to keep theirs. *Id.* at 568.

169. *Id.* at 573.

170. *Id.* at 574. *See also* Elizabeth F. Gallagher, Note, *Breaking New Ground: Using Eminent*

The dissenters, however, believed that the majority reached the wrong conclusion on the properties because private economic development differed from how public use had previously been defined.[171] The dissent would have granted the legislature no deference and would have required "the taking authority to establish by clear and convincing evidence that the public benefit anticipated in the economic development agreement [was] reasonably ensured."[172]

The United States Supreme Court granted certiorari[173] to decide whether economic development satisfies the public use requirement of the Fifth Amendment takings clause.[174] The Court, in a five-to-four ruling, held on June 23, 2005, that it does.[175]

Justice Stevens, joined by Justices Kennedy, Souter, Ginsburg, and Breyer, while declining to minimize the hardship to the individuals involved, affirmed the City of New London's authority to take the properties.[176] The Court started its analysis by examining two polar extremes. The Court reasoned that, at one extreme, the government could not take private property for the exclusive purpose of conveying it to another private party, even with just compensation.[177] According to the *Kelo* majority, the economic development plan was not passed to benefit a single class of identifiable private parties.[178] The Court reasoned, at the other extreme, that the government may transfer private property to another for future public use.[179] In *Kelo*, the plan was not intended to open the land to use by the general public.[180]

Domain for Economic Development, 73 FORDHAM L. REV. 1837 (2005); Christopher L. Harris & Daniel J. Lowenberg, *Kelo v. City of New London, Tulare Lake Basin Water Storage District v. United States, and Washoe County v. United States: A Fifth Amendment Takings Primer*, 36 ST. MARY'S L.J. 669 (2005); Buckingham, *supra* note 142; Michael J. Coughlin, Comment, *Absolute Deference Leads to Unconstitutional Governance: The Need for a New Public Use Rule*, 54 CATH. U. L. REV. 1001 (2005).

171. *Kelo*, 843 A.2d at 575.

172. *Id.* at 602. Here, "[t]here are no assurance of a public use in the development plan," according to the dissent. *Id.* "[T]here was no signed development agreement at the time of the takings." *Id.* *See* William P. Barr, Henry Weissmann, & John P. Frantz, *The Gild That is Killing the Lily: How Confusion Over Regulatory Takings Doctrine is Undermining the Core Protections of the Takings Clause*, 73 GEO. WASH. L. REV. 429 (2005); Roy Whitehead, Jr. & Lu Hardin, *Government Theft: The Taking of Private Property to Benefit the Favored Few*, 15 GEO. MASON U. CIV. RTS. L.J. 81 (2004).

173. Kelo v. City of New London, 125 S. Ct. 27 (2004).

174. *See Kelo*, 125 S. Ct. at 2658; *see also supra* note 10.

175. *Kelo*, 125 S. Ct. at 2669.

176. *Id.* at 2668.

177. *Id.* at 2661 (citing Hawaii Housing Authority v. Midkiff, 467 U. S. 229, 245 (1954)). The government also could not do this under the pretext of a public purpose. *Kelo*, 125 S. Ct. at 2661.

178. *Id.* at 2661-62.

179. *Id.* at 2661.

180. *Kelo*, 125 S. Ct. at 2671-72.

Kelo turns on whether the City of New London's economic development plan accomplishes a "public purpose," defined broadly, and with deference to legislative judgments.[181] The Court revisited its prior decisions on the issue, such as *Berman v. Parker*,[182] *Hawaii Housing Authority v. Midkiff*,[183] and *Ruckelhaus v. Monsanto Company*,[184] and concluded that for over a century, the Court's public use scrutiny has afforded legislatures broad latitude in using the public use clause to justify takings for the good of the public.[185] "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."[186]

The decision by the City of New London that the Fort Trumbell area was sufficiently distressed to justify a carefully formulated economic development plan, under state law, is entitled to deference.[187] The original plaintiffs' contention that economic development fails to serve as a public use,[188] and using eminent domain for economic development crosses the boundary of taking for a public use,[189] was rejected by the Court.[190] "Promoting economic development is a traditional and long accepted function of government"[191] that cannot be distinguished from "public purpose."[192]

The Court similarly rejected the argument that the government should demonstrate "reasonable certainty" that public benefits will occur.[193] While not minimizing the plaintiff's hardship,[194] the Court held that precedent requires the City of New London's takings to be for "public use" under the Fifth Amendment.[195] In dicta, the Court reasoned that nothing precludes states from restricting usage of the takings power.[196]

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181. *Id.* at 2663 (citing Berman v. Parker, 348 U.S. 266 (1954)); Hawaii Housing Authority v. Midkiff, 467 U.S. 229 (1984)).

182. 348 U.S. 26 (1954).

183. 467 U.S. 229 (1984).

184. 467 U.S. 986 (1984).

185. *Kelo*, 125 S. Ct. at 2664.

186. *Id.* (citing Hairston v. Danville & Western R. Co., 208 U.S. 598 (1908)).

187. *Id.* at 2664-65.

188. *Id.* at 2665.

189. *Kelo*, 125 S. Ct. at 2664.

190. *Id.*

191. *Id.* at 2665.

192. *Id.* The term "public purpose" and not "public use" was used by the Court. *Id.*

193. *Id.* at 2667. This would require a greater departure from precedent. *Id.* (citing *Midkiff*, 467 U.S. at 242; Lingle v. Chevron U.S.A., Inc., 125 S. Ct. 2074).

194. *Id.* at 2668.

195. *Id.*

196. *Id.*

Justice Kennedy concurred and further observed that a taking complies with the "public use" clause if it is rationally related to a conceivable public purpose,[197] but a court should strike down a taking that is intended to benefit a particular private party with only incidental public benefit.[198] While the presumption of invalidity of the taking for economic development is not warranted in general, or even in this case, a more stringent standard of review might be appropriate according to Justice Kennedy.[199]

Justice O'Connor, joined by Chief Justice Rehnquist, Justice Scalia, and Justice Thomas dissented.[200] The dissenters started with the words of the Fifth Amendment takings clause.[201] Under the premise that every word has independent meaning,[202] the dissenters concluded that the Fifth Amendment places two conditions on eminent domain: "[T]he taking must be for a 'public use' and 'just compensation' must be paid."[203]

There have been three categories of takings under the public use doctrine.[204] First, the government may transfer private property to public ownership, such as for a road, public hospital, or military base.[205] Second, the government may transfer private property to another private party, such as a common carrier, who makes the property available for public use.[206] Third, in certain circumstances, private property may be transferred to another private owner for subsequent private use.[207] The Court, for the first time in over twenty years, had to address whether a public purpose taking fulfills the public use requirement, and in a case of first impression, whether economic development takings comply with Fifth Amendment requirements.[208]

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197. *Id.* at 2669 (Kennedy, J., concurring) (citing *Midkiff*, 467 U.S. at 241).

198. *Id.*

199. *Id.* at 2670. While Justice Kennedy did not speculate on what cases would justify a more stringent standard, there might be instances when the standards are suspicious, the procedures are prone to manipulation, or the benefits are trivial or implausible. *Id.* at 2670-71.

200. *Id.* at 2671.

201. *See supra* note 11. The Fifth Amendment was made applicable to the states by the Fourteenth Amendment. *Kelo*, 125 S. Ct. at 2672 (O'Connor, J., dissenting).

202. *Kelo*, 125 S. Ct. at 2672 (citing Wright v. United States, 302 U.S. 583, 588 (1938)).

203. *Id.* (quoting Brown v. Legal Found. of Wash., 538 U.S. 216, 231-32 (2003)). These two limitations protect the security of property, one of the great objectives of government. *Id.* (quoting 1 RECORDS OF THE FED. CONVENTION OF 1787, 302 (M. Farrand ed. 1934)).

204. *Id.* at 2673.

205. *Id.* at 2673 (citing Old Dominion Land Co. v. U.S. 269 U.S. 55 (1925)); Rindge Co. v. County of Los Angeles, 262 U.S. 700 (1923)).

206. *Id.* (citing Nat'l. Railroad Passenger Corp. v. Boston & Marine Corp., 503 U.S. 407 (1992); Mt. Vernon–Woodberry Cotton Duck Co. v. Alabama Interstate Power Co., 240 U.S. 30 (1916)). The public use could be a railroad, public utility, or sports stadium. *Id.*

207. *Kelo*, 125 S. Ct. at 2673 (citing Berman v. Parker, 348 U.S. 26 (1954)); Haw. Hous. Auth. v. Midkiff, 467 U.S. 229 (1984)).

208. *Id.*

The dissent believed that precedent[209] emphasized the importance of deferring to legislative judgments about public purpose[210]—with needed checks and balances.[211] Without the judicial check, the public use clause would have little meaning.[212] Further, a purely private taking would not meet the public use requirement.[213] Therefore, the majority significantly expanded the meaning of public use in taking private property for a new private use with the secondary benefits of tax revenue, more jobs, and aesthetic pleasure for the public.[214]

The dissent would have held the taking as unconstitutional,[215] as they maintained that any private property may not be taken to benefit a private party:[216]

> The beneficiaries are likely to be those citizens with disproportionate influence and power in the political process, including large corporations and development firms . . . . 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.[217]

Justice Thomas also authored his own dissent,[218] which also started with the literal words of the Fifth Amendment takings clause.[219] The most rational rendering of this clause, according to Justice Thomas, is that the government may take property only for the government to own or the public to use it.[220] Further, Justice Thomas reasoned that the Court should use the *public use clause itself*, and not its precedent, to determine the outcome of this case.[221] Furthermore, Justice Thomas perceived that the consequence of *Kelo* would be the inability of government to compensate displaced persons in an adequate manner.[222]

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209. *Id.* at 2673-74 (citing *Berman*, 348 U. S. at 30; *Midkiff*, 467 U.S. at 244).

210. *Id.* at 2674.

211. *Id.* at 2673.

212. *Kelo*, 125 S. Ct. at 2673.

213. *Id.* at 2674 (quoting *Midkiff*, 467 U.S. at 245).

214. *Id.* at 2675.

215. *Id.* at 2677.

216. *Id.*

217. *Kelo*, 125 S. Ct. at 2677.

218. *Id.* (Thomas, J., dissenting).

219. *Id.* at 2687.

220. *Id.* at 2679. The Common-law background of the Constitution reinforces this understanding. *Id.* at 2680.

221. *Id.* at 2687.

222. *Kelo*, 125 S. Ct. at 2686.

IV. CONCLUSION

The United States Supreme Court in *Kelo v. City of New London*[223] ruled, five-to-four, that economic development fulfills the requirements of the Fifth Amendment takings clause.[224] The majority drew from the Court's precedent[225] of including economic development as a public purpose in order to comply with the constitutional requirement.[226] The dissenting Justices would have more strictly construed the Constitution and ruled against the takings.[227]

States may ultimately decide to restrict such broad usage[228] of the takings power granted in *Kelo*.[229] There is a concern, however, that many of them will follow the lead of states like Connecticut[230] that allow private property to be taken for economic development—with the result being the private property of those with fewer resources is transferred to those with more.[231] In the wake of *Kelo,* the states have been given a green light to enact or use existing laws to take private property for economic development, as long as no single private property owner is intended to reap the benefit. The public use has become a public purpose, which could generate more tax revenue from the private property. States are already paying a steep price to attract industry.[232] *Kelo* could be used to shift some of that burden to the private property owners whose properties are taken for just compensation. The government is now in a better negotiating position to purchase these properties, as they can simply and accurately tell private property owners that the government can condemn the property now, with "just" compensation.

Kelo's effects may be felt for years to come unless states or even Congress, under its spending power, acts to restrict *Kelo*'s impact on personal property rights.[233] At

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223. 195 S. Ct. 2655 (2005).

224. *See supra* notes 5-6.

225. *Kelo,* 125 S. Ct. at 2663-64.

226. *Id.* at 2668.

227. *Id.* at 2677 (O'Conner, J., dissenting).

228. *Id.* at 2668.

229. *Id.* at 2668-69. Arkansas, Florida, Illinois, Kentucky, Maine, Michigan, Montana, South Carolina, Utah, and Washington forbid takings of private property but allow it for other uses. Editorial, *They Paved Paradise*, WALL ST. J., July 30, 2005, at A12.

230. Connecticut, Kansas, Maryland, Minnesota, New York, and North Dakota permit the use of eminent domain for economic development. Editorial, *They Paved Paradise*, WALL ST. J., July 30, 2005, at A12.

231. *Kelo*, 125 S. Ct. at 2677.

232. *See* Michael Schroeder, *States Pay Steep Price to Attract Industry*, WALL ST. J., June 29, 2005, at A4.

233. After the Supreme Court's decision, that legislators in Connecticut granted the affected property owners in New London a reprieve, by declaring a moratorium on takings of private property while the legislators consider revising eminent domain in that state. Editorial, *Connecticut Tea Party,* WALL ST. J., July 19, 2005, at A14.

this very moment, states are introducing legislation to counter *Kelo's* effects.[234] While real estate developers may have won a major battle, in some states the backlash may actually hurt the use of eminent domain for economic development. Also, ironically, the Court ruled unanimously, on June 27, 2005, in *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, to protect intellectual property rights of movie studios and recording companies from secondary infringement by software providers, allowing peer-to-peer file sharing.[235] Real property rights should also be afforded similar deference.

234. In the weeks before, and six weeks after *Kelo*, states including Alabama, Delaware, Texas, Oregon, Nevada, and Utah introduced legislation to limit the power of eminent domain. *See* Michael Corkery & Ryan Chittum, *Eminent-Domain Uproar Imperils Projects,* WALL ST. J., Aug. 3, 2005, at B1, 6.

235. Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd., 125 S. Ct. 2764 (2005).