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### Kelo v. City of New London: A Reduction of Property Rights but a Tool to Combat Urban Sprawl

Gregory V. Jolivet Jr.

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# NOTE

## *KELO V. CITY OF NEW LONDON: A REDUCTION OF PROPERTY RIGHTS BUT A TOOL TO COMBAT URBAN SPRAWL*

GREGORY V. JOLIVETTE, JR.\*

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### I. INTRODUCTION

Wilhelmina Dery has lived in her home in the city of New London, Connecticut, since she was born in 1918.<sup>1</sup> Now, after the United States Supreme Court's decision

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<sup>1</sup>Kelo v. City of New London, 545 U.S. 469, 475 (2005). Wilhelmina's husband, Charles, also has lived in the house for approximately sixty years. *Id.*

in *Kelo v. City of New London*,<sup>2</sup> she and her fellow petitioners<sup>3</sup> who own property in the Fort Trumbull area of New London will be forced to sell their properties to the city.<sup>4</sup> While Dery's and the other petitioners' properties were not "blighted or otherwise in poor condition,"<sup>5</sup> the Court determined that the city's proposed use of eminent domain was constitutional under the Fifth Amendment,<sup>6</sup> and that the condemnation of petitioners' properties could proceed solely because they "happen[ed] to be located in the development area."<sup>7</sup> So, instead of being able to live the remainder of her life in her only home, Dery must move to make way for a city-sponsored economic development project.<sup>8</sup>

Like New London, several other urban cities across the country have been using government-sponsored economic development projects to revitalize their economies and to slow population out-migration.<sup>9</sup> For instance, the city of Lakewood, Ohio, an inner-ring suburb<sup>10</sup> of Cleveland, has long been losing population and jobs to sprawling suburbs farther west of both Cleveland and Lakewood.<sup>11</sup> In 2003, in an attempt to reverse this growing trend, Lakewood sought to redevelop one of its neighborhoods to create new homes, a shopping district, and business opportunities with the hopes of making the city more desirable.<sup>12</sup> However, because several landowners refused to sell their properties to Lakewood and because the city could not condemn the properties through eminent domain at that time, the redevelopment project dissolved and the city continues to lose population and jobs to outer-ring suburbs.<sup>13</sup>

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<sup>2</sup>*Id.* at 469.

<sup>3</sup>There were a total of nine petitioners, who owned fifteen properties in Fort Trumbull, that filed suit challenging the city's use of eminent domain. *Id.* at 475.

<sup>4</sup>*Id.* at 483-84. Petitioners must sell their properties to the New London Development Corporation (NLDC), a private non-profit entity established by the City of New London "to assist the City in planning economic development." *Id.* at 473.

<sup>5</sup>*Id.* at 475.

<sup>6</sup>U.S. CONST. amend. V.

<sup>7</sup>*Kelo*, 545 U.S. at 475.

<sup>8</sup>*Id.* at 490.

<sup>9</sup>See generally Adam P. Hellegers, *Eminent Domain as an Economic Development Tool: A Proposal To Reform HUD Displacement Policy*, 2001 L. REV. M.S.U.-D.C.L. 901.

<sup>10</sup>Inner-ring suburbs are older suburbs that are immediately adjacent to major cities. ANDRES DUANY ET AL., *SUBURBAN NATION: THE RISE OF SPRAWL AND THE DECLINE OF THE AMERICAN DREAM* 4-5 (2000).

<sup>11</sup>V. David Sartin, *Eminent Domain Policy Angers Some*, PLAIN DEALER (Cleveland, Ohio), Oct. 26, 2003, at S6. Inner-ring suburbs like Lakewood are declining across the country, as they "los[e] residents and businesses to fresher locations on a new suburban edge." DUANY ET AL., *supra* note 10, at 4-5.

<sup>12</sup>Sartin, *supra* note 11.

<sup>13</sup>V. David Sartin, *Strike Two for West End Proposal: Issue 47 Loses Again in Latest Tally; Recount To Come Next Month*, PLAIN DEALER (Cleveland, Ohio), Nov. 22, 2003, at B1.

The stories of property owners like Dery and of cities like Lakewood bring to the forefront the problems inherent in cases involving the Fifth Amendment's Public Use Clause.<sup>14</sup> On the one hand, private property rights in this country are highly respected and are usually accorded the utmost deference.<sup>15</sup> Conversely, urban cities across the country often cannot compete with sprawling suburbs, and the problems of urban sprawl continue to grow unabated.<sup>16</sup>

This Note will analyze the two opposing interests of property owners and of cities in the context of the Supreme Court's Public Use Clause jurisprudence and show that while the Court's decision in *Kelo* may have diminished property rights, the decision could render an overriding positive impact on combating urban sprawl. Part II defines urban sprawl and identifies some of its associated costs. Part III briefly describes Public Use Clause jurisprudence prior to the Supreme Court's ruling in *Kelo*. Part IV discusses the Court's opinion in *Kelo* and Justice Kennedy's concurrence. Part V examines the substantial criticism of *Kelo* and the legislative responses to the ruling. Part VI then suggests how the Court's decision in *Kelo* ultimately found the right balance between the competing interests of property rights protection and an urban city's ability to compete against sprawling suburbs. Finally, Part VII concludes the Note by reiterating that cities like New London and Lakewood need the power of eminent domain for their "economic survival."<sup>17</sup>

## II. URBAN SPRAWL AND ITS ASSOCIATED COSTS

### A. What Is Sprawl?

To properly analyze the costs and problems associated with urban sprawl, it is first necessary to determine exactly what constitutes "sprawl." Unfortunately, the term historically has not been well-defined.<sup>18</sup> In fact, sprawl often has been

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In a referendum election, residents in the city of Lakewood voted against authorizing public financing and the use of eminent domain for the redevelopment project. *Id.*

<sup>14</sup>U.S. CONST. amend. V.

<sup>15</sup>See Michael J. Coughlin, Comment, *Absolute Deference Leads to Unconstitutional Governance: The Need for a New Public Use Rule*, 54 CATH. U. L. REV. 1001, 1005 (2005) (mentioning how political theorists "viewed the protection of property rights as one of the central purposes of government"); Doug Doudney, Editorial, *Ominous Implications of the Kelo Decision: America Is Outraged, and It's Easy To Understand Why*, ORLANDO SENTINEL (Fla.), July 8, 2005, at A23 ("Property rights aren't imbued by government[:] they are inherent natural human rights.").

<sup>16</sup>See DUANY ET AL., *supra* note 10; Michael Lewyn, *Suburban Sprawl: Not Just an Environmental Issue*, 84 MARQ. L. REV. 301 (2000); *see also infra* Part II.

<sup>17</sup>Avi Salzman & Laura Mansnerus, *For Homeowners, Frustration and Anger at Court Ruling*, N.Y. TIMES, June 24, 2005, at A20 (internal quotation marks omitted) (quoting Thomas J. Londregan).

<sup>18</sup>See Amy Helling, *Local and Comparative Perspectives on Managing Atlanta's Growth: Advocate for a Modern Devil: Can Sprawl Be Defended?*, 17 GA. ST. U. L. REV. 1063, 1064 (2001). The word "sprawl" as a planning term did not arise until approximately the late 1950s and early 1960s. Robert W. Burchell & Naveed A. Shad, *The Evolution of the Sprawl Debate in the United States*, 5 HASTINGS W.-NW. J. ENVTL. L. & POL'Y 137, 140 (1998).

attributed with an “I-know-it-when-I-see-it quality to it,” rather than a specific, concrete definition.<sup>19</sup>

More recently, however, several scholars have sought to clearly define the amorphous concept of sprawl by delineating its predominant characteristics.<sup>20</sup> For instance, in 1998, the Federal Transit Administration and the Transportation Research Board of the National Research Council sponsored a comprehensive study of sprawl and determined that sprawl referred “to a particular type of suburban peripheral growth” epitomized by a number of identifiable elements.<sup>21</sup> The elements consisted of residential and/or nonresidential development that is 1) relatively low-density, 2) noncontiguous and unlimited, 3) spatially segregated, and 4) automobile-dependent.<sup>22</sup> Similarly, another recent study, which outlined sprawl’s more easily identifiable characteristics, specified that there were five basic components of sprawl and emphasized that each of these components were strictly segregated from one another.<sup>23</sup> The components included 1) residential subdivisions, 2) strip shopping centers, 3) office parks, 4) under-utilized civic institutions, and 5) extensive roadways necessary to connect the other four components.<sup>24</sup>

By combining these general elements and components, scholars today have fashioned several working definitions of sprawl. For example, one straightforward description of sprawl is the “outward spread of commercial, industrial, and residential development into open spaces located on the fringes of urban centers.”<sup>25</sup> By contrast, a more precise definition that accounts for sprawl’s rather ambiguous nature is that sprawl constitutes “low-density, land-consuming, automobile-dependent, haphazard, non-contiguous (or ‘leapfrog’) development on the fringe of settled areas, often near a deteriorating central city or town, that intrudes into rural or other undeveloped areas.”<sup>26</sup> While this latter conception of sprawl is more detailed, for purposes of this Note and to focus on the adverse impact of sprawl on cities and

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<sup>19</sup>Timothy J. Dowling, *Point/Counterpoint: Reflections on Urban Sprawl, Smart Growth, and the Fifth Amendment*, 148 U. PA. L. REV. 873, 874 (2000); see also ROBERT W. BURCHELL ET AL., NAT’L RES. COUNCIL, TCRP REPORT NO. 39, THE COSTS OF SPRAWL—REVISITED 11 (1998) (noting that even an authoritative study on sprawl in 1974 did not explicitly define the term “sprawl”). Alluding to sprawl’s unspecified nature, some scholars have suggested that one possible cause of its continued growth over the years has resulted from “sprawl’s seductive simplicity, the fact that it consists of very few homogeneous components . . . which can be arranged in almost any way.” DUANY ET AL., *supra* note 10, at 5.

<sup>20</sup>See BURCHELL ET AL., *supra* note 19, at 6-8; DUANY ET AL., *supra* note 10, at 3-20; DONALD C. WILLIAMS, URBAN SPRAWL: A REFERENCE HANDBOOK (2000).

<sup>21</sup>BURCHELL ET AL., *supra* note 19, at 6-8.

<sup>22</sup>*Id.*

<sup>23</sup>DUANY ET AL., *supra* note 10, at 5-7.

<sup>24</sup>*Id.*

<sup>25</sup>WILLIAMS, *supra* note 20, at 247.

<sup>26</sup>Dowling, *supra* note 19, at 874. See also Chris J. Williams, Comment, *Do Smart Growth Policies Invite Regulatory Takings Challenges? A Survey of Smart Growth and Regulatory Takings in the Southeastern United States*, 55 ALA. L. REV. 895, 899 (2004).

inner-ring suburbs, sprawl will be referred to as any development that moves population and jobs “from older, urban cores to newer, less densely-populated”<sup>27</sup> suburbs at the outer edges of major metropolitan areas.<sup>28</sup>

### *B. The History and Growth of Urban Sprawl*

Urban sprawl in the United States has been a pervasive aspect of the country’s development.<sup>29</sup> While some commentators believe that sprawl development patterns have existed since the nation’s founding<sup>30</sup> and that urban sprawl merely represents the results of a free market economy,<sup>31</sup> there is overwhelming evidence that government policies actually have encouraged sprawl development.<sup>32</sup> In particular, federal government policies in the areas of housing and transportation have favored suburban growth at the expense of central cities.<sup>33</sup> For instance, federal government housing policies, such as the Federal Housing Administration (FHA) mortgage insurance program, which only guaranteed home loans in low-risk suburban areas, and the Housing Act of 1937, which encouraged public housing to be built in major cities, combined to move “middle-class families out of cities both by subsidizing migration to suburbs, and by turning cities into dumping grounds for the poor.”<sup>34</sup> Likewise, government transportation policy has encouraged suburban migration by subsidizing the cost of driving and by constructing new highways.<sup>35</sup> Consequently, the government’s road-building efforts have “degraded cities and accelerated suburban sprawl in two ways: by the physical destruction of city neighborhoods and by making suburban life more convenient.”<sup>36</sup> Thus, urban sprawl “does not reflect

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<sup>27</sup>Lewyn, *supra* note 16, at 301.

<sup>28</sup>See BURCHELL ET AL., *supra* note 19, at 6-8; Lewyn, *supra* note 16, at 301. An example of sprawl development would be a suburb, such as Avon Lake, Ohio, located in a county west of Cleveland. Avon Lake has segregated housing subdivisions, strip shopping centers, isolated office parks, and wide roads.

<sup>29</sup>Lewyn, *supra* note 16, at 301.

<sup>30</sup>WILLIAMS, *supra* note 20, at 2 (“In many respects, present day urban development patterns are merely an outgrowth of trends set in motion over the previous 200 years.”). Williams writes that profitable land speculation and an anti-urban bias contributed to the early roots of sprawl development. *Id.* at 2-4.

<sup>31</sup>Lewyn, *supra* note 16, at 304 (citing several conservative scholars). One proponent of sprawl development has indicated that “sprawl is not the work of bad or stupid people. Rather, it is the natural result of years of pursuing improvements in travel and communication, making previously remote locations increasingly accessible.” Helling, *supra* note 18, at 1065.

<sup>32</sup>Dowling, *supra* note 19, at 880; Lewyn, *supra* note 16, at 304-05.

<sup>33</sup>Lewyn, *supra* note 16, at 305. Lewyn also discussed how governmental education policies have encouraged urban sprawl. *See id.* at 322-29.

<sup>34</sup>*Id.* at 305.

<sup>35</sup>*Id.* at 312-22.

<sup>36</sup>*Id.* at 316. Another scholar has noted that “nearly eighty-five percent of federal transportation money ‘paves the way for sprawl.’” Dowling, *supra* note 19, at 880 (quoting Pietro S. Nivola, *Make Way for Sprawl*, WASH. POST, June 1, 1999, at A1).

choices made in an unregulated marketplace but choices heavily influenced by huge government subsidies that encourage sprawl.”<sup>37</sup>

In fact, as the government began implementing these huge subsidies in the latter half of the twentieth century,<sup>38</sup> urban sprawl in the United States increased dramatically, as more and more people and jobs relocated from central cities to distant suburbs.<sup>39</sup> For instance, at the close of World War II, approximately seventy percent of metropolitan Americans lived in central cities, but today central-city populations account for only a little more than thirty percent of metropolitan Americans.<sup>40</sup> Since 1980, suburban populations have increased ten times faster than central-city populations, as now a total of over sixty percent of Americans live in suburbs outside of major cities.<sup>41</sup> And from 1960 to 1990, the amount of developed land in metropolitan areas has “more than doubled,” even though the population has increased by less than half this rate.<sup>42</sup> Furthermore, as people have moved into the suburbs, the jobs have followed.<sup>43</sup> Approximately ninety-five percent of the more than fifteen million office jobs created in the 1980’s were established in the suburbs, and today nearly two-thirds of all new jobs are located in suburban areas.<sup>44</sup> Moreover, the population and job trends of urban sprawl show no signs of slowing in the near future, as Americans continue to relocate to new homes and workplaces on the edges of metropolitan cities.<sup>45</sup>

### C. *The Costs of Sprawl*

As urban sprawl has increased in the United States, the costs of sprawl have become more clear and significant.<sup>46</sup> In general, the costs of sprawl are defined as “the resources expended relative to a type, density, and/or location of

<sup>37</sup>Dowling, *supra* note 19, at 880.

<sup>38</sup>See Burchell & Shad, *supra* note 18, at 140 (discussing how the federal government housing and transportation programs in the 1950s and 1960s “helped push development far beyond the nation’s central cities”).

<sup>39</sup>Lewyn, *supra* note 16, at 301.

<sup>40</sup>*Id.* Central cities, such as Cleveland, Buffalo, and St. Louis, have experienced drastic declines in population. *Id.* at 301-02. Since 1950, the populations of Cleveland and Buffalo have decreased by more than 45%, and St. Louis has lost more than 60% of its residents. *Id.*

<sup>41</sup>WILLIAMS, *supra* note 20, at 11.

<sup>42</sup>*Id.* at 12. For example, metropolitan New York City’s population increased by 8% as its area grew by 65%; metropolitan Chicago’s population increased by 4% as its area grew 46%; metropolitan Cleveland’s population decreased by 11% as its area grew 33%. *Id.*

<sup>43</sup>Lewyn, *supra* note 16, at 302.

<sup>44</sup>*Id.*

<sup>45</sup>WILLIAMS, *supra* note 20, at 1. Scholars have emphasized that sprawl has now become an institutional aspect of American culture: “Suburbanization and sprawl are as ingrained in our national myth as baseball and apple pie once were.” Robert H. Freilich & Bruce G. Peshoff, *The Social Costs of Sprawl*, 29 URB. LAW. 183, 186 (1997). “Sprawl has been promoted by social forces, which reflect the desire for a rural lifestyle coupled with an urban income.” *Id.*

<sup>46</sup>See *id.*; Williams, *supra* note 26, at 899-900; Dowling, *supra* note 19, at 875-79.

development.”<sup>47</sup> Specifically, the costs of sprawl have contributed to numerous societal problems, including the loss of productive farmland, excessive dependency on automobiles, pollution, onerous infrastructure costs, and the destruction of our central cities and inner-ring suburbs.<sup>48</sup> For example, sprawl destroys nearly one million acres of farmland each year, and now approximately eighty percent of our fruits, vegetables, and dairy products are threatened because of sprawl development patterns.<sup>49</sup> In addition, sprawl has led to excessive dependency on personal automobiles, which has caused substantial traffic congestion, higher energy costs, and large increases of air pollution from the additional driving miles.<sup>50</sup>

Yet, perhaps the most threatening cost of sprawl is its damaging effect on central cities and inner-ring suburbs.<sup>51</sup> For instance, as former Vice President Al Gore has commented, sprawl “has left a vacuum in the cities and suburbs which sucks away jobs . . . homes and hope; as people stop walking in downtown areas, the vacuum is filled up fast with crime, drugs, and danger.”<sup>52</sup> Thus, as more and more people and jobs move to the metropolitan edges of cities, the country’s poorest neighborhoods get left behind, and central cities become even less desirable.<sup>53</sup> For those residents, sprawl “exact[s] a price from families by providing fewer employment opportunities, resulting in lower income in education levels, and provides fewer positive role models for children living in central cities.”<sup>54</sup> In fact, as sprawl leaves a void in urban cores and fosters racial and economic segregation,<sup>55</sup> “sprawl systematically deprives inner city residents of opportunities and adequate services, which stimulates the anti-social behavior suburban America rejects.”<sup>56</sup> Furthermore, this resultant

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<sup>47</sup>BURCHELL ET AL., *supra* note 19, at 8.

<sup>48</sup>Dowling, *supra* note 19, at 875-79. Another scholar has noted that the costs of sprawl include “‘physical, monetary, temporal, and social/psychological’ costs that have contributed to at least six major crises” for American metropolitan regions: 1) the deterioration of existing built-up areas (cities and first- and second-ring suburbs); 2) environmental degradation—loss of wetlands and sensitive lands, poor air and water quality; 3) overconsumption of gasoline energy; 4) fiscal insolvency, transportation congestion, infrastructure deficiencies, and taxpayer revolts; 5) agricultural land conversion; and 6) unaffordable housing. Williams, *supra* note 26, at 899 (quoting Burchell & Shad, *supra* note 18, at 137); *see also* Freilich & Peshoff, *supra* note 45, at 184.

<sup>49</sup>Dowling, *supra* note 19, at 875.

<sup>50</sup>*Id.* at 875, 879; *see also* Lewyn, *supra* note 16, at 303.

<sup>51</sup>Freilich & Peshoff, *supra* note 45, at 189 (“Sprawl’s costs are most pronounced for those residents remaining in the central city and first-ring suburbs.”); *see also* Lewyn, *supra* note 16, at 303.

<sup>52</sup>Judith Haveman, *Gore Calls for ‘Smart’ Growth; Sprawl’s Threat to Farmland Cited*, WASH. POST, Sept. 3, 1998, at A17 (internal quotation marks omitted) (quoting Al Gore).

<sup>53</sup>*See* Freilich & Peshoff, *supra* note 45, at 189-190; *see also* Dowling, *supra* note 19, at 874.

<sup>54</sup>Freilich & Peshoff, *supra* note 45, at 189-90.

<sup>55</sup>Robert W. Burchell, *Economic and Fiscal Costs (and Benefits) of Sprawl*, 29 URB. LAW. 159, 168 (1997).

<sup>56</sup>Freilich & Peshoff, *supra* note 45, at 190.



void in central cities and inner-ring suburbs decreases the tax-paying ability of their residents and causes fiscal problems and eventually budget cuts for programs that such residents desperately need.<sup>57</sup> As one scholar has noted, metropolitan communities are now divided, as “decreasing demographic diversity, geographic separation, and escalating costs due to sprawl-borne social problems minimize the social responsibility bond that should exist between central cities and suburban communities.”<sup>58</sup>

With sprawl, the country’s sense of community and its historic and cultural heritage are gradually being replaced by new highways and big-box stores placed in the middle of what was once precious farmland.<sup>59</sup> As people move away from older, more established city neighborhoods into newer suburban areas, there seems to have been an interpersonal disconnect “evidenced by reported decreases in volunteerism, a general lack of commitment by individuals to join community-based organizations, and decreases in donations to charities.”<sup>60</sup> Suburban citizens often feel the need for two incomes to maintain a certain standard of living, and other societal interests have taken a lower priority.<sup>61</sup> As one scholar has observed, sprawl has contributed to a significant decline in the quality of life and there is now a real “danger of forgetting what life was like without [sprawl],” where we sadly “come to accept a ninety-minute daily commute, a smoggy horizon, lifeless central cities . . . as the natural order of things.”<sup>62</sup>

Thus, while some argue that sprawl has benefits, such as increasing a region’s housing supply and providing more affordable housing,<sup>63</sup> the overwhelming evidence suggests that sprawl is “a problem in need of a solution.”<sup>64</sup> One commentator has warned that if a solution is not quickly found, our nation “can look forward to increased pollution, longer commutes, more economic depression in our central cities, and further loss of our cultural heritage and sense of community.”<sup>65</sup>

### III. PUBLIC USE CLAUSE JURISPRUDENCE PRIOR TO *KELO*

Recently, governments have begun attempting to find a solution to sprawl by using the power of eminent domain, which has raised questions about the proper scope of the Fifth Amendment’s Public Use Clause.<sup>66</sup> The Public Use Clause grants governments the power to condemn private property but restricts that power by stating that “private property [shall not] be taken *for public use*, without just

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<sup>57</sup>Burchell, *supra* note 55, at 168.

<sup>58</sup>Freilich & Peshoff, *supra* note 45, at 190.

<sup>59</sup>See Dowling, *supra* note 19, at 874; Freilich & Peshoff, *supra* note 45, at 190.

<sup>60</sup>Freilich & Peshoff, *supra* note 45, at 190.

<sup>61</sup>*Id.*

<sup>62</sup>Dowling, *supra* note 19, at 874.

<sup>63</sup>See Helling, *supra* note 18, at 1065-74.

<sup>64</sup>Williams, *supra* note 26, at 900; see Dowling, *supra* note 19, at 887.

<sup>65</sup>Dowling, *supra* note 19, at 887.

<sup>66</sup>See *Kelo v. City of New London*, 545 U.S. 469 (2005); see also *infra* Part VI.

compensation.”<sup>67</sup> Throughout the country’s history, there has been a substantial amount of litigation regarding the meaning of the Public Use Clause, and courts have subjected the clause to varying interpretations.<sup>68</sup>

#### A. Narrow Interpretations

In the years immediately following the ratification of the Bill of Rights, the United States Supreme Court narrowly interpreted the Public Use Clause, requiring that the government’s power of eminent domain be limited to instances where the condemned land was taken for use by the general public.<sup>69</sup> During that time, eminent domain could be used for public projects, such as “mills, private roads, and the drainage of private lands.”<sup>70</sup> However, the Court strictly prohibited a legislature from using the power of eminent domain to take property from one private party to give to another.<sup>71</sup> For instance, in the 1795 case *Vanhorne’s Lessee v. Dorrance*,<sup>72</sup> the Court emphasized the paramount rights of property ownership and ruled that eminent domain should be exercised only in “urgent cases,”<sup>73</sup> and that it was difficult to imagine such an urgent case “in which the necessity of a state can be of such a nature as to authorize or excuse the seizing of landed property belonging to one citizen, and giving it to another citizen.”<sup>74</sup> Likewise, in the 1798 case *Calder v. Bull*, the Court again stressed that the Public Use Clause explicitly banned takings that effectively transferred private property to another citizen.<sup>75</sup> Justice Chase wrote, “[A] law that takes property from A. and gives it to B: It is against all reason and justice, for a people to entrust a Legislature with SUCH powers . . . .”<sup>76</sup>

This narrow interpretation of the Public Use Clause continued into the nineteenth century. For example, in the 1848 case *West River Bridge Co. v. Dix*,<sup>77</sup> two justices

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<sup>67</sup>U.S. CONST. amend. V, cl. 2 (emphasis added). The entire clause is referred to as the Takings Clause, but the phrase “for public use” is referred to as the Public Use Clause. See *Hous. Auth. v. Midkiff*, 467 U.S. 229, 231 (1984).

<sup>68</sup>See discussion *infra* Part III.A–C.

<sup>69</sup>See Coughlin, *supra* note 15, at 1007-10; Stephen J. Jones, Note, *Trumping Eminent Domain Law: An Argument for Strict Scrutiny Analysis Under the Public Use Requirement of the Fifth Amendment*, 50 SYRACUSE L. REV. 285, 290-93 (2000); Peter J. Kulick, Comment, *Rolling the Dice: Determining Public Use in Order to Effectuate a “Public-Private Taking” A Proposal To Redefine “Public Use”*, 2000 L. REV. M.S.U.-D.C.L. 639, 646-48.

<sup>70</sup>Glen H. Sturtevant, Jr., Note, *Economic Development as Public Use: Why Justice Ryan’s Poletown Dissent Provides a Better Way to Decide Kelo and Future Public Use Cases*, 15 FED. CIR. B.J. 201, 206 (2005).

<sup>71</sup>See *Vanhorne’s Lessee v. Dorrance*, 2 U.S. (2 Dall.) 304 (1795); *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 388 (1798).

<sup>72</sup>*Dorrance*, 2 U.S. (2 Dall.) at 304.

<sup>73</sup>*Id.* at 311.

<sup>74</sup>*Id.*

<sup>75</sup>*Calder*, 3 U.S. (3 Dall.) at 388.

<sup>76</sup>*Id.*

<sup>77</sup>*W. River Bridge Co. v. Dix*, 47 U.S. (6 How.) 507 (1848).

issued concurring opinions stressing that property could not be taken simply to transfer ownership from one private entity to another.<sup>78</sup> Justice McLean stated that such an action “the State cannot do. It would in effect be taking the property from A to convey it to B. The public purpose for which the power is exerted must be real, not pretended.”<sup>79</sup> Similarly, in the 1876 decision *Kohl v. United States*, the Court determined that eminent domain was “a right belonging to a sovereignty to take private property for its own public uses, and not for those of another.”<sup>80</sup>

### B. Broad Interpretations

However, in the twentieth century, the Supreme Court interpreted the Public Use Clause much more broadly, granting legislators wide discretion to determine what actions constitute a “public use.”<sup>81</sup> For example, in *Berman v. Parker*, the Court in 1954 found that there was no violation of the Public Use Clause when it held that the federal government could condemn property located in a blighted neighborhood, despite the fact that the property was later to be leased or sold to another private entity.<sup>82</sup> The *Berman* Court deferred to Congress’s determination that redeveloping a depressed area of Washington, D.C. to eliminate and to prevent slum housing was a public purpose within the government’s police power.<sup>83</sup> The Court wrote, “If those who govern [D.C.] decide that [Washington] should be beautiful as well as sanitary, there is nothing in the Fifth Amendment that stands in the way. Once the object is within the authority of Congress, the right to realize it through the power of eminent domain is clear.”<sup>84</sup> The Court then refused to review Congress’s development plans on a property-by-property basis,<sup>85</sup> noting that “the means of executing the project [were] for Congress and Congress alone to determine.”<sup>86</sup>

Likewise, in 1984, the Court reaffirmed a deference to legislative pronouncements regarding the Public Use Clause in *Hawaii Housing Authority v. Midkiff*.<sup>87</sup> There, the Court declared that Hawaii’s plan to take title from private

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<sup>78</sup>*Id.* at 537-38 (McLean, J., concurring); *id.* at 543-44 (Woodbury, J., concurring).

<sup>79</sup>*Id.* at 537 (McLean, J., concurring).

<sup>80</sup>*Kohl v. United States*, 91 U.S. 367 (1876).

<sup>81</sup>*See* Coughlin, *supra* note 15, at 1010-18; Jones, *supra* note 69, at 293-96; Kulick, *supra* note 69, at 647-52.

<sup>82</sup>*Berman v. Parker*, 348 U.S. 26, 33-34 (1954).

<sup>83</sup>*Id.* at 32-33. The Court wrote, “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.” *Id.* at 33.

<sup>84</sup>*Id.*

<sup>85</sup>*Id.* at 34-36.

<sup>86</sup>*Id.* at 33. The Court further wrote, “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.” *Id.* at 35-36.

<sup>87</sup>*Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229, 239-41 (1984). “[T]he Court has made clear that it will not substitute its judgment for a legislature’s judgment as to what constitutes a

landowners and then transfer it to lessees “to reduce the concentration of ownership of fees simple in the State” satisfied the Public Use Clause.<sup>88</sup> The Court stated that “[t]he mere fact that property taken outright by eminent domain is transferred in the first instance to private beneficiaries does not condemn that taking as having only a private purpose.”<sup>89</sup> Instead, relying on the findings of the Hawaiian state legislature, the Court declared, “[W]here 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.”<sup>90</sup>

One other landmark case that broadly interpreted the Public Use Clause in the twentieth century was the recently overturned case *Poletown Neighborhood Council v. City of Detroit*.<sup>91</sup> In *Poletown*, the Michigan Supreme Court applied state law and held that Detroit could use the power of eminent domain to acquire a large tract of land so that General Motors could build a car assembly plant.<sup>92</sup> The Michigan court rejected the landowners’ arguments that there was a legal distinction between “public use” and “public purpose” and that the city was unconstitutionally using eminent domain merely to transfer property from one private citizen to another.<sup>93</sup> Instead, the court noted that “[t]he power of eminent domain is to be used in this instance primarily to accomplish the essential public purposes of alleviating unemployment and revitalizing the economic base of the community. The benefit to a private interest is merely incidental.”<sup>94</sup> The court then refused to subject the city’s findings to meaningful judicial review, citing *Berman* and writing that “when a legislature speaks, the public interest has been declared in terms ‘well-nigh conclusive.’”<sup>95</sup>

### C. Towards a Narrow Interpretation?

Yet, as alluded to earlier, the Michigan Supreme Court in 2004 overruled *Poletown* in *County of Wayne v. Hathcock*.<sup>96</sup> In *Hathcock*, Wayne County sought to use the power of eminent domain to transfer land to a private developer who was going to construct a large business and technology park.<sup>97</sup> The court began its analysis of the Michigan Constitution’s Public Use Clause by noting that the clause

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public use ‘unless the use be palpably without reasonable foundation.’” *Id.* at 241 (quoting *United States v. Gettysburg Elec. Ry. Co.*, 160 U.S. 668, 680 (1896)).

<sup>88</sup>*Id.* at 231-32.

<sup>89</sup>*Id.* at 243-44.

<sup>90</sup>*Id.* at 241. The Court added, “When the legislature’s purpose is legitimate and its means are not irrational, our cases make clear that empirical debates over the wisdom of takings . . . are not to be carried out in the federal courts” *Id.* at 243.

<sup>91</sup>*Poletown Neighborhood Council v. City of Detroit*, 304 N.W.2d 455 (Mich. 1981), *overruled by* *County of Wayne v. Hathcock*, 684 N.W.2d 765 (Mich. 2004).

<sup>92</sup>*Id.* at 457.

<sup>93</sup>*Id.* at 458.

<sup>94</sup>*Id.* at 459.

<sup>95</sup>*Id.* (quoting *Berman v. Parker*, 348 U.S. 26, 32 (1954)).

<sup>96</sup>*Hathcock*, 684 N.W.2d 765.

<sup>97</sup>*Id.* at 769.

was not an absolute prohibition against transferring condemned property to private entities but did foreclose the ability of governments to transfer “condemned property to private entities for a *private* use.”<sup>98</sup> Citing Justice Ryan’s dissent in *Poletown*, the *Hathcock* majority outlined three categories in which the transfer of a condemned property constituted a public use: 1) when the transfer involves a “‘public necessity of the extreme sort otherwise impracticable,’”<sup>99</sup> 2) “when the private entity remains accountable to the public in its use of that property,”<sup>100</sup> and 3) “when the selection of the land to be condemned is itself based on public concern.”<sup>101</sup> Applying this test, the Michigan court ruled that the proposed business and technology park did not fall within any of the three categories and held that the public use requirement of eminent domain was not satisfied.<sup>102</sup> The court then determined that the *Poletown* majority wrongly concluded that “a generalized economic benefit was sufficient . . . to justify the transfer of condemned property to a private entity,”<sup>103</sup> and announced that *Poletown* was thereby overruled.<sup>104</sup>

Thus, before *Kelo*, there seemed to be a consensus among courts that governments could use the power of eminent domain to transfer blighted property from one private entity to another.<sup>105</sup> Yet, the issue still remained whether governments had the authority to use eminent domain to revitalize non-blighted, economically-depressed neighborhoods.<sup>106</sup> So, in *Kelo*, the Court was faced with a choice between favoring a broad interpretation of the Public Use Clause as advanced in *Berman* and *Midkiff*,<sup>107</sup> or instead favoring an interpretation that was more narrowly-tailored as suggested by the Michigan Supreme Court in *Hathcock*.<sup>108</sup>

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<sup>98</sup>*Id.* at 781.

<sup>99</sup>*Id.* (quoting *Poletown*, 304 N.W.2d at 478 (Ryan, J., dissenting)). The Court wrote, “Justice Ryan listed ‘highways, railroads, canals, and other instrumentalities of commerce’ as examples of this brand of necessity.” *Id.* (quoting *Poletown*, 304 N.W.2d at 478 (Ryan, J., dissenting)).

<sup>100</sup>*Id.* at 782 (citing *Poletown*, 304 N.W.2d at 479 (Ryan, J., dissenting)). The Court elaborated that this second category would satisfy the “public use” requirement when the “public retained a measure of control over the property.” *Id.*

<sup>101</sup>*Id.* at 782-83 (citing *Poletown* 304 N.W.2d at 480 (Ryan, J., dissenting)). The primary example of this third category would be condemnation for the purposes of blight removal. *See id.* at 783.

<sup>102</sup>*Id.* at 783-84.

<sup>103</sup>*Id.* at 786.

<sup>104</sup>*Id.* at 787.

<sup>105</sup>*See* discussion *supra* Part III.B.-C.

<sup>106</sup>*See* Kimberly J. Brown, Recent Decisions Affirm Use of Eminent Domain for Economic Development (Aug. 2005), <http://www.bricker.com/publications/articles/870.asp>.

<sup>107</sup>*See* discussion *supra* Part III.B; *see also* *Berman v. Parker*, 348 U.S. 26 (1954); *Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229 (1984).

<sup>108</sup>*See* discussion *supra* Part III.C; *see also* *Hathcock*, 684 N.W.2d 765.

IV. *KELO V. CITY OF NEW LONDON*A. *Background*

In a divisive five to four decision with one concurrence and two dissenting opinions, the United States Supreme Court in *Kelo v. City of New London* once again reaffirmed its deference to legislative pronouncements and construed the Public Use Clause broadly.<sup>109</sup> In *Kelo*, the city of New London, Connecticut, was a “distressed municipality” that had been experiencing a prolonged period of economic decline.<sup>110</sup> By 1998, New London had an unemployment rate that was approximately double the state of Connecticut’s, and its population was at its lowest level since 1920.<sup>111</sup> In response to the city’s deteriorating economic conditions, the city council of New London approved a development plan that proposed to redevelop a ninety-acre section of the city to create jobs, increase tax revenues, and revitalize the economically-depressed city.<sup>112</sup> The council designated the New London Development Corporation (“NLDC”)<sup>113</sup> to obtain the land needed for the development plan, authorizing the NLDC “to purchase property or to acquire property [through] eminent domain.”<sup>114</sup> The NLDC successfully negotiated and purchased most of the property within the redevelopment area, but nine property owners refused to sell, and the NLDC instituted eminent domain proceedings to acquire the remaining parcels.<sup>115</sup>

The nine property owners responded by bringing a claim in Connecticut state court, asserting that the takings of their properties would violate the Public Use Clause of the Fifth Amendment.<sup>116</sup> The New London Superior Court conducted a seven-day bench trial and granted a permanent restraining order forbidding the taking of certain parcels.<sup>117</sup> The lower court prohibited the taking of properties where the NLDC was to construct a park or marina, but it permitted the takings where the NLDC was to develop office space.<sup>118</sup> Both the city and the property owners appealed, and the Connecticut Supreme Court, over three dissenting justices,<sup>119</sup> reversed in part and ruled that all of the city’s proposed takings

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<sup>109</sup>See *Kelo v. City of New London*, 545 U.S. 469 (2005).

<sup>110</sup>*Id.* at 473. In 1990, the state of Connecticut had labeled New London a “distressed municipality.” *Id.*

<sup>111</sup>*Id.* For instance, “[i]n 1996, the Federal Government closed the Naval Undersea Warfare Center, which had been located in the Fort Trumbull area of the City and had employed over 1,500 people.” *Id.*

<sup>112</sup>*Id.*

<sup>113</sup>The NLDC is a private non-profit organization. *Id.*

<sup>114</sup>*Id.* at 475.

<sup>115</sup>*Id.*

<sup>116</sup>*Id.*

<sup>117</sup>*Id.* at 475-76.

<sup>118</sup>*Id.* at 476.

constituted a public use under both the Federal and State Constitutions.<sup>120</sup> The United States Supreme Court granted certiorari “to determine whether a city’s decision to take property for the purpose of economic development satisfies the ‘public use’ requirement of the Fifth Amendment”<sup>121</sup> when “there [was] no allegation that [the] properties were blighted or otherwise [undesirable].”<sup>122</sup>

### B. The Majority Opinion

Justice Stevens wrote the opinion of the Court in the narrow five to four decision affirming the Connecticut Supreme Court.<sup>123</sup> Justice Stevens began his analysis by noting that two opposing situations were clear under Public Use Clause jurisprudence.<sup>124</sup> First, the government “may not take the property of *A* for the sole purpose of transferring it to another private party *B*, even though *A* is paid just compensation.”<sup>125</sup> Second, by contrast, the government “may transfer property from one private party to another if future ‘use by the public’ is the purpose of the taking . . . .”<sup>126</sup> Yet, Justice Stevens observed that neither of those situations governed the city of New London’s proposed takings.<sup>127</sup> Instead, he indicated that the dispositive inquiry was “whether the City’s development plan serve[d] a ‘public purpose’” within the Supreme Court’s historically broad interpretation of the Fifth Amendment.<sup>128</sup>

<sup>119</sup>*Id.* at 477 (citing *Kelo v. City of New London*, 843 A.2d 500, 587-88 (Conn. 2004) (Zarella, J., concurring in part and dissenting in part), *aff’d*, 545 U.S. 469 (2005)). The dissents in the Connecticut Supreme Court wanted to impose “a ‘heightened’ standard of judicial review for takings justified by economic development.” *Id.* (quoting *Kelo*, 843 A.2d at 587 (Zarella, J., concurring in part and dissenting in part)). “Although they agreed that the plan was intended to serve a valid public use, they would have found all the takings unconstitutional because the city had failed to adduce ‘clear and convincing evidence’ that the economic benefits of the plan would in fact come to pass.” *Id.* (quoting *Kelo*, 843 A.2d at 588 (Zarella, J., concurring in part and dissenting in part)).

<sup>120</sup>*Id.* at 476.

<sup>121</sup>*Id.* at 477.

<sup>122</sup>*Id.* at 475.

<sup>123</sup>*Id.* at 470.

<sup>124</sup>*Id.* at 477.

<sup>125</sup>*Id.*

<sup>126</sup>*Id.* Justice Stevens added that “the condemnation of land for a railroad with common-carrier duties is a familiar example.” *Id.*

<sup>127</sup>*Id.* Justice Stevens wrote that New London’s development plan was not enacted “‘to benefit a particular class of identifiable individuals.’” *Id.* at 478 (quoting *Haw. Hous. Auth. v. Midkiff*, 469 U.S. 229, 245 (1984)). New London’s plan also was “not a case in which the City is planning to open the condemned land—at least not in its entirety—to use by the general public.” *Id.*

<sup>128</sup>*Id.* at 480. Justice Stevens wrote, “[W]hen this Court began applying the Fifth Amendment to the States at the close of the 19th century, it embraced the broader and more natural interpretation of public use as ‘public purpose.’” *Id.* (quoting *Fallbrook Irrigation Dist. v. Bradley*, 164 U.S. 112, 158 (1896)).

Justice Stevens then cited both *Berman* and *Midkiff* and indicated that the Court often has deferred to legislative determinations finding a “public purpose.”<sup>129</sup> Justice Stevens noted that this deference has allowed governing bodies to be flexible and to respond effectively to ever-changing conditions and circumstances.<sup>130</sup> Justice Stevens wrote, “For more than a century, our public use jurisprudence has wisely eschewed rigid formulas and intrusive scrutiny in favor of affording legislatures broad latitude in determining what public needs justify the use of the takings power.”<sup>131</sup>

Applying these principles, Justice Stevens found that the city of New London’s judgment should be accorded deference and that the city’s development plan satisfied a “public purpose.”<sup>132</sup> Although there was no suggestion that any of the properties were “blighted or otherwise in poor condition,”<sup>133</sup> Justice Stevens wrote that the city’s finding that the area was “sufficiently distressed to justify a program of economic rejuvenation” should be entitled to the Court’s deference.<sup>134</sup> He also added that deference was appropriate in this case, because the takings “would be executed pursuant to a ‘carefully considered’ development plan” and that the lower courts had found “no evidence of an illegitimate purpose.”<sup>135</sup> Thus, by emphasizing judicial deference and the factual background of the case, Justice Stevens reasoned that the “comprehensive character of the [city’s] plan, the thorough deliberation that preceded its adoption, and the limited scope of [the Court’s] review” demonstrated that the takings were justified under the Fifth Amendment.<sup>136</sup>

Consequently, Justice Stevens rejected the property owners’ argument that the Court “adopt a new bright-line rule [declaring] that economic development does not qualify as a public use.”<sup>137</sup> Justice Stevens also rejected the owners’ alternative argument that the public benefits of economic development takings should be proved with a “reasonable certainty.”<sup>138</sup> Justice Stevens countered that both rules would be contrary to the Court’s precedents.<sup>139</sup> Instead, Justice Stevens reiterated the appropriateness of judicial deference in cases involving the Public Use Clause by quoting the Court in *Midkiff*: “‘When the legislature’s purpose is legitimate and its means are not irrational, our cases make clear that empirical debates over the

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<sup>129</sup>*Id.* at 480-81.

<sup>130</sup>*Id.* at 483.

<sup>131</sup>*Id.*

<sup>132</sup>*Id.* at 484.

<sup>133</sup>*Id.* at 475.

<sup>134</sup>*Id.* at 483.

<sup>135</sup>*Id.* at 478 (quoting *Kelo v. City of New London*, 843 A.2d 500, 536 (Conn. 2004), *aff’d*, 545 U.S. 469 (2005)).

<sup>136</sup>*Id.* at 484.

<sup>137</sup>*Id.*

<sup>138</sup>*Id.* at 487.

<sup>139</sup>*Id.* at 484, 487-88.



wisdom of takings—no less than debates over the wisdom of other kinds of socioeconomic legislation—are not to be carried out in the federal courts.”<sup>140</sup>

Justice Stevens then concluded the majority opinion by further stressing the Court’s limited role in this case and how the Court’s authority “extend[ed] only to determining whether [New London’s] proposed condemnations [were] for a ‘public use’ within the meaning of the Fifth Amendment to the Federal Constitution.”<sup>141</sup> Justice Stevens observed that while the majority found that the city’s takings satisfied the public use requirement of the Fifth Amendment, the Court was still aware of the plight of the petitioners and “the hardship that condemnations may entail, notwithstanding the payment of just compensation.”<sup>142</sup> Accordingly, Justice Stevens noted that the Supreme Court’s protections were merely a baseline and that states were free to impose further “public use” requirements.<sup>143</sup> He wrote, “We emphasize that nothing in our opinion precludes any State from placing further restrictions on its exercise of the takings power.”<sup>144</sup> In fact, Justice Stevens recognized that “the necessity and wisdom of using eminent domain to promote economic development [were] certainly matters of legitimate public debate,”<sup>145</sup> and subsequently, this controversial issue properly should be resolved in the legislative branch.<sup>146</sup>

### C. Justice Kennedy’s Concurring Opinion

Justice Kennedy, the fifth and deciding vote to rule in favor of the respondent city of New London, joined the opinion for the Court but wrote separately to add several observations.<sup>147</sup> In his concurrence, Justice Kennedy emphasized that under the Public Use Clause, courts should not blindly accept a legislature’s determination but instead should engage in a “meaningful rational basis review”<sup>148</sup> and “should strike down a taking that, by a clear showing, is intended to favor a particular private party, with only incidental or pretextual public benefits.”<sup>149</sup> Under this standard, he noted that a court “confronted with a plausible accusation of impermissible favoritism to private parties should treat the objection as a serious one and review the

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<sup>140</sup>*Id.* at 488 (quoting *Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229, 242 (1984)).

<sup>141</sup>*Id.* at 489-90.

<sup>142</sup>*Id.* at 489.

<sup>143</sup>*Id.*

<sup>144</sup>*Id.*

<sup>145</sup>*Id.* In footnote 24 of the *Kelo* opinion, Justice Stevens mentioned several arguments for both sides of the issue. *Id.* at 489 n.24.

<sup>146</sup>*See id.* at 488-89.

<sup>147</sup>*Id.* at 490 (Kennedy, J., concurring).

<sup>148</sup>*Id.* at 492.

<sup>149</sup>*Id.* at 491.

record to see if it has merit,”<sup>150</sup> even though the court should still presume that a government’s actions served a reasonable public purpose.<sup>151</sup>

Agreeing with the majority opinion, Justice Kennedy rejected the petitioners’ argument that there should be a bright-line prohibition or a presumption against takings for the purpose of economic development under the Public Use Clause.<sup>152</sup> Touting the advantages of redevelopment projects, he wrote, “A broad *per se* rule or a strong presumption of invalidity . . . would prohibit a large number of government takings that have the purpose and expected effect of conferring substantial benefits on the public at large.”<sup>153</sup> However, Justice Kennedy added that a court, in certain circumstances, probably should impose a more demanding standard of review “for a more narrowly drawn category of takings.”<sup>154</sup> While Justice Kennedy explicitly declined to identify such categories,<sup>155</sup> he wrote, “There may be private transfers in which the risk of undetected impermissible favoritism of private parties is so acute that a presumption (rebuttable or otherwise) of invalidity is warranted under the Public Use Clause.”<sup>156</sup>

In *Kelo*, Justice Kennedy determined that the takings of petitioners’ properties did not create such a risk of impermissible favoritism and that his more stringent standard should not be applied to the city of New London’s actions.<sup>157</sup> Justice Kennedy then highlighted five illustrative factors that demonstrated why a more demanding standard was not appropriate in *Kelo*.<sup>158</sup> First, the takings in New London “occurred in the context of a comprehensive development plan.”<sup>159</sup> Second, this comprehensive development plan was implemented to rectify a “serious city-wide depression.”<sup>160</sup> Third, the “projected economic benefits” of the development plan could not be “characterized as *de minimis*.”<sup>161</sup> Fourth, the “identity of most of the private beneficiaries were unknown at the time the city formulated its plans.”<sup>162</sup> Fifth, the city of New London “complied with elaborate procedural requirements that facilitate review of the record and inquiry into the city’s purposes.”<sup>163</sup> In essence,

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<sup>150</sup>*Id.*

<sup>151</sup>*Id.*

<sup>152</sup>*Id.* at 493.

<sup>153</sup>*Id.* at 492.

<sup>154</sup>*Id.* at 493.

<sup>155</sup>*Id.* Justice Kennedy wrote, “This is not the occasion for conjecture as to what sort of cases might justify a more demanding standard.” *Id.*

<sup>156</sup>*Id.*

<sup>157</sup>*Id.*

<sup>158</sup>*Id.* Justice Kennedy wrote, “[I]t is appropriate to underscore aspects of the instant case that convince me no departure from *Berman* and *Midkiff* is appropriate here.” *Id.*

<sup>159</sup>*Id.*

<sup>160</sup>*Id.*

<sup>161</sup>*Id.*

<sup>162</sup>*Id.*

<sup>163</sup>*Id.*

based on these five factors, which some commentators now believe constitutes the test for permissible “public purpose” private takings,<sup>164</sup> Justice Kennedy believed that New London’s actions were reasonable and that the takings were properly justifiable under a meaningful rational basis review.<sup>165</sup>

#### V. CRITICISMS OF *KELO* AND LEGISLATIVE RESPONSES

The Court’s majority opinion in *Kelo*, and to some extent Justice Kennedy’s concurrence, has generated a significant amount of criticism and debate.<sup>166</sup> First, in two separate dissenting opinions, Justice O’Connor<sup>167</sup> and Justice Thomas<sup>168</sup> passionately argued that the majority’s decision improperly applied precedent and has essentially rendered the Public Use Clause meaningless.<sup>169</sup> Then, in the months following the ruling, several commentators have criticized that the Court has greatly diminished private property rights and has given too much authority to local governments.<sup>170</sup> As a result, mounting public pressure has influenced federal and state legislatures to enact several bills restricting the use of eminent domain.<sup>171</sup>

<sup>164</sup> See *id.* at 502 (O’Connor, J., dissenting) (mentioning Justice Kennedy’s concurrence as a “yet-undisclosed test”).

<sup>165</sup> *Id.* at 493 (Kennedy, J., concurring). Justice Kennedy wrote, “In sum, while there may be categories of cases in which the transfers are so suspicious, or the procedures employed so prone to abuse, or the purported benefits are so trivial or implausible, that courts should presume an impermissible private purpose, no such circumstances are present in this case.” *Id.*

<sup>166</sup> See Richard Epstein, *Kelo: An American Original: Of Grubby Particulars & Grand Principles*, 8 GREEN BAG 2d 355, 355 (2005) (“The 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 Judy Coleman, Outlook, *The Powers of a Few, the Anger of the Many*, WASH. POST, Oct. 9, 2005, at B2 (discussing why “*Kelo* incited a hostile reaction”); Craig Gilbert, *Public-Use Ruling Has Political Backlash; Loss in Court Gives Law’s Opponents Help in Legislatures*, MILWAUKEE J. SENTINEL, Aug. 7, 2005, at A1 (“The outcry over *Kelo* has been fast and unflagging, with politicians of all stripes assailing the decision and drafting bills to curb the use of eminent domain.”); Charles Hurt, *Senators, Property Owners Review Kelo; Relationship Between American Dream, Eminent Domain Debated*, WASH. TIMES, Sept. 21, 2005, at A4 (discussing a bill proposed by Texas Republican Senator Jon Cornyn that would prohibit federal funds from being used in projects that utilize eminent domain for economic development); Diane Mastrull, *Eminent Domain Ruling’s Backlash*, PHILA. INQUIRER, Nov. 14, 2005, at A1 (discussing how the Court’s decision created a “nationwide panic attack”); Michael May, Editorial, *Facts About Eminent Domain Should Stop the Hysteria*, CAPITAL TIMES (Madison, Wis.), Aug. 3, 2005, at 11A (discussing “the post-*Kelo* hysteria”); Peter J. Smith, Opinion, *Understanding “Kelo”: Why Justice Souter Should Be Praised*, UNION LEADER (Manchester, N.H.), Aug. 3, 2005, at A9 (“The reaction to the Court’s decision was swift and almost universally negative.”).

<sup>167</sup> *Kelo*, 545 U.S. at 494 (O’Connor, J., dissenting).

<sup>168</sup> *Id.* at 505 (Thomas, J., dissenting).

<sup>169</sup> See *id.* at 494 (O’Connor, J., dissenting); *id.* at 505 (Thomas, J., dissenting).

<sup>170</sup> See Editorial, *A Sad Day for Property Rights*, HARTFORD COURANT, June 24, 2005, at A10 [hereinafter Editorial, *A Sad Day for Property Rights*] (“[T]he ruling is dangerous and should raise the hackles of all property owners.”); Doudney, *supra* note 15 (“The *Kelo* ruling throws [property] rights out the window and demonstrates that our government has gotten out

A. *The Dissenting Opinions*

## 1. Justice O'Connor's Dissent

Justice O'Connor, joined by Chief Justice Rehnquist, Justice Scalia, and Justice Thomas, wrote a vigorous dissent to the Court's opinion in *Kelo*.<sup>172</sup> Justice O'Connor began the dissent by stating her fundamental objections to the majority's decision.<sup>173</sup> She asserted that the Court's ruling has violated the longstanding constitutional principle that a legislature cannot use the power of eminent domain to take property from A and give it to B.<sup>174</sup> She also observed that with its decision, the Court has now subject all private property to being taken and transferred to other private parties under the guise of economic development, thus jeopardizing the relevancy of the Public Use Clause.<sup>175</sup> Justice O'Connor wrote, "To reason . . . that the incidental public benefits resulting from the subsequent ordinary use of private property render economic development takings 'for public use' is to wash out any distinction between private and public use of property—and thereby effectively to delete the words 'for public use' from the Fifth Amendment."<sup>176</sup>

Justice O'Connor then crafted a detailed argument to support her objections to the majority's opinion.<sup>177</sup> First, Justice O'Connor recited the facts of *Kelo*, and instead of emphasizing the economic troubles of New London, she underscored the plight of the Fort Trumbull property owners.<sup>178</sup> She sympathetically portrayed the petitioners, by stressing how the properties were well-maintained and by noting how long some of the owners had lived in their homes.<sup>179</sup> O'Connor claimed that the petitioners were not holdouts and that they did "not seek increased compensation,

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of control."); Richard A. Epstein, Opinion, *Supreme Folly*, WALL ST. J., June 27, 2005, at A14 ("The Court could only arrive at its shameful *Kelo* ruling by refusing to look closely at past precedent and constitutional logic."); Debra J. Saunders, Editorial, *Your Home Can Be Pfizer's Castle*, S.F. CHRON., June 30, 2005, at B9; *see generally* Castle Coalition, Citizens Fighting Eminent Domain Abuse, <http://www.castlecoalition.org/> (last visited May 1, 2007); Inst. for Justice, Private Property Rights, [http://www.ij.org/private\\_property/index.html](http://www.ij.org/private_property/index.html) (last visited May 1, 2007).

<sup>171</sup>*See* Castle Coalition, Legislative Center, <http://www.castlecoalition.org/legislation/index.html> (last visited May 1, 2007).

<sup>172</sup>*Kelo*, 545 U.S. at 494 (O'Connor, J., dissenting).

<sup>173</sup>*Id.*

<sup>174</sup>*Id.*

<sup>175</sup>*Id.* Justice O'Connor wrote,

Under the banner of economic development, all private property is now vulnerable to being taken and transferred to another private owner, so long as it might be upgraded—*i.e.*, given to an owner who will use it in a way that the legislature deems more beneficial to the public—in the process.

*Id.*

<sup>176</sup>*Id.*

<sup>177</sup>*See id.* at 494-505.

<sup>178</sup>*See id.* at 494-96.

<sup>179</sup>*See id.* at 494, 501.

and none [was] opposed to new development in the area.”<sup>180</sup> Instead, she wrote that the property owners’ opposition was merely “in principle: They claim that the NLDC’s proposed use for their confiscated property is not a ‘public’ one for purposes of the Fifth Amendment.”<sup>181</sup>

Justice O’Connor next wrote that this claim of petitioners, whether economic development takings were constitutional under the Fifth Amendment, “present[ed] an issue of first impression” for the Court.<sup>182</sup> She distinguished *Berman* and *Midkiff*, by noting that “in both cases, the relevant legislative body had found that eliminating the existing property use was necessary to remedy [a] harm.”<sup>183</sup> As such, the takings were justified “in *Berman* through blight resulting from extreme poverty and in *Midkiff* through oligopoly resulting from extreme wealth.”<sup>184</sup> Thus, she wrote, “Because each taking *directly* achieved a public benefit, it did not matter that the property was turned over to private use.”<sup>185</sup> By contrast, in *Kelo*, Justice O’Connor emphasized that the petitioners’ properties were well-maintained and not the source of any social harm, so that the takings did not achieve any direct public benefit.<sup>186</sup> Instead, it was merely a “bare transfer from A to B for B’s benefit”<sup>187</sup> that should have been ruled unconstitutional under the Public Use Clause.<sup>188</sup>

Justice O’Connor went on to add that the majority’s opinion and Justice Kennedy’s “special emphasis on facts peculiar” to *Kelo* was misguided and would not serve as a practical limitation on legislatures’ power to use eminent domain for economic development.<sup>189</sup> Because Justice O’Connor felt that the Court had significantly stretched the meaning of public use, she believed that none of the facts could “blunt the force”<sup>190</sup> of the holding in *Kelo* and that the Court had abandoned its judicial duty.<sup>191</sup> O’Connor wrote:

If legislative prognostications about the secondary public benefits of a new use can legitimate a taking, there is nothing in the Court’s rule or in Justice Kennedy’s gloss on that rule to prohibit property transfers generated with less care, that are less

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<sup>180</sup>*Id.* at 495-96.

<sup>181</sup>*Id.*

<sup>182</sup>*Id.* at 498.

<sup>183</sup>*Id.* at 500.

<sup>184</sup>*Id.*

<sup>185</sup>*Id.* Justice O’Connor also noted, “*Berman* and *Midkiff* hewed to a bedrock principle without which our public use jurisprudence would collapse: ‘A purely private taking could not withstand the scrutiny of the public use requirement; it would serve no legitimate purpose of government and would thus be void.’” *Id.* (quoting *Hous. Auth. v. Midkiff*, 469 U.S. 229, 245 (1984)).

<sup>186</sup>*Id.* at 500-01.

<sup>187</sup>*Id.* at 502.

<sup>188</sup>*Id.* at 498.

<sup>189</sup>*Id.* at 503.

<sup>190</sup>*Id.* at 504.

<sup>191</sup>*Id.* at 497, 504.

comprehensive, that happen to result from less elaborate process, whose only projected advantage is the incidence of higher taxes, or that hope to transform an already prosperous city into an even more prosperous one.<sup>192</sup>

O'Connor maintained that despite the deferential role the Court should play in allowing legislatures to determine "what governmental activities will advantage the public,"<sup>193</sup> it was the Court's duty to be "[a]n external, judicial check on how the public use requirement is interpreted, however limited."<sup>194</sup>

Therefore, as a result of the Court's apparent abdication of its responsibility in *Kelo*, Justice O'Connor predicted that there would be perilous consequences for American society.<sup>195</sup> Because of the Court's opinion, Justice O'Connor believed that all property in the United States was now subject to being taken by federal and state governments.<sup>196</sup> She wrote, "The specter of condemnation hangs over all property. Nothing is to prevent the State from replacing any Motel 6 with a Ritz-Carlton, any home with a shopping mall, or any farm with a factory."<sup>197</sup> Furthermore, Justice O'Connor felt that the dire effects of the majority's decision would not be dispersed randomly across the country's population, but instead would have a disparate impact on the nation's poor, while simultaneously providing another opportunity for the rich.<sup>198</sup> She wrote, "The beneficiaries are likely to be those citizens with disproportionate influence and power in the political process, including large corporations and development firms. As for the victims, the government now has license to transfer property from those with fewer resources to those with more."<sup>199</sup>

## 2. Justice Thomas's Dissent

Justice Thomas, in his separate dissenting opinion, also reiterated how the majority's decision would benefit the rich at the expense of disadvantaged Americans.<sup>200</sup> While he emphasized that the Court should return to the original meaning of the Public Use Clause,<sup>201</sup> Justice Thomas noted that the consequences of the majority's ruling would "fall disproportionately on poor communities."<sup>202</sup> He

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<sup>192</sup>*Id.* at 504.

<sup>193</sup>*Id.* at 497.

<sup>194</sup>*Id.*

<sup>195</sup>*See id.* at 503-05.

<sup>196</sup>*Id.* at 504-05.

<sup>197</sup>*Id.* at 503.

<sup>198</sup>*Id.* at 505.

<sup>199</sup>*Id.*

<sup>200</sup>*Id.* at 505, 521-22 (Thomas, J., dissenting).

<sup>201</sup>*See id.* at 505-21. Justice Thomas criticized the majority's decision: "If such 'economic development' takings are for a 'public use,' any taking is, and the Court has erased the Public Use Clause from our Constitution, as Justice O'Connor powerfully argues in dissent. I do not believe that this Court can eliminate liberties expressly enumerated in the Constitution . . . ." *Id.* at 506 (citations omitted).

<sup>202</sup>*Id.* at 521.

wrote, “Those communities are not only systematically less likely to put their lands to the highest and best social use, but are also the least politically powerful.”<sup>203</sup> Justice Thomas then cited a study that demonstrated how government urban renewal projects more often than not destroyed poor neighborhoods, and in particular, mostly minority-populated communities.<sup>204</sup> In fact, Justice Thomas pointed out that “[o]ver 97 percent of the individuals forcibly removed from their homes by the ‘slum-clearance’ project upheld by [the] Court in *Berman* were black.”<sup>205</sup> Rather than attempting to rectify or protect against these injustices, Justice Thomas felt that the majority’s deferential standard actually encouraged politically powerful groups to continue to “victimize the weak” to generate profits.<sup>206</sup> Accordingly, Justice Thomas believed that, contrary to the views in the majority opinion, the Public Use Clause should serve as a strict limitation on governments to ensure the protection of “discrete and insular minorities.”<sup>207</sup>

### B. Popular Responses

Prompted by the two dissenting opinions,<sup>208</sup> people across the nation have been outraged by the Court’s decision in *Kelo*.<sup>209</sup> In the days following the ruling, polls showed that nearly eighty-nine percent of Americans were against using eminent domain for economic redevelopment,<sup>210</sup> as opposition to *Kelo* seemed to unite both liberals and conservatives.<sup>211</sup> Citizens of all political affiliations questioned how the Court could so easily disregard private property rights and essentially authorize

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<sup>203</sup>*Id.*

<sup>204</sup>*Id.* at 522 (citing BERNARD J. FRIEDEN & LYNNE B. SAGALAYN, DOWNTOWN, INC.: HOW AMERICA REBUILDS CITIES 17 (1989)). Justice Thomas also specifically mentioned urban renewal projects in St. Paul, Minnesota and Baltimore, Maryland, that “destroyed predominantly minority communities.” *Id.*

<sup>205</sup>*Id.*

<sup>206</sup>*Id.*

<sup>207</sup>*Id.* at 521 (quoting *United States v. Carolene Prod. Co.*, 304 U.S. 144, 152 n.4 (1938)).

<sup>208</sup>See Doudney, *supra* note 15 (“Every American needs to take five minutes this week to read the dissenting opinions of Justice Sandra Day O’Connor and Justice Clarence Thomas.”); Jonathan Gurwitz, Editorial, *Eloquent Dissent Explains Gravity of Eminent Domain*, SAN ANTONIO EXPRESS-NEWS, July 13, 2005, at 7B (“O’Connor’s dissent in *Kelo* . . . is a clear warning for all American citizens and a wake-up call for lawmakers in state capitols and in Washington.”).

<sup>209</sup>See Ashley J. Fuhrmeister, Note, *In the Name of Economic Development: Reviving “Public Use” as a Limitation on the Eminent Domain Power in the Wake of Kelo v. City of New London*, 54 DRAKE L. REV. 171, 227-28 (2005).

<sup>210</sup>*Id.* at 228.

<sup>211</sup>See Kristyna C. Ryan, *Private Property, Public Benefit: Economic Redevelopment and the Power of Eminent Domain*, CBA RECORD, Nov. 2005, at 50. Ryan wrote, “To conservative factions, *Kelo* represents an expansion of governmental power. To liberal factions, *Kelo* represents the worst of rent-seeking politics where the powerful and wealthy may triumph over the common man.” *Id.*

governments “to seize your bedroom—and kitchen, parlor, and dining room—and then hand your precious home over to a corporation.”<sup>212</sup>

Critics also questioned how the Court could grant so much discretion to local governments, especially when the ruling seemed to create perverse incentives.<sup>213</sup> One commentator observed, “It should be obvious that when wealthy developers and the local government politicians they help put in office join forces in exploiting the *Kelo* precedent, every homeowner and property holder of ordinary means is potentially at risk.”<sup>214</sup> And for what? Opponents of the decision emphasized that economic development takings are merely based on uncertain future benefits,<sup>215</sup> or typically some “vague promise.”<sup>216</sup> Furthermore, critics note that unfortunate property owners, who are uprooted from their homes and businesses against their will, are only entitled to “just compensation.”<sup>217</sup> This payment is usually measured as the fair market value of the condemned property, which many believe is not enough to “mak[e] the individual landowner whole.”<sup>218</sup>

However, because of the large public disapproval against *Kelo*, cities have been hesitant to initiate economic development takings, and some existing projects have even been suspended.<sup>219</sup> In fact, the city of New London has not yet forced Mrs. Dery or any of the petitioners to move, as “elements of the project have been effectively paralyzed since the Court ruling prompted a political outcry.”<sup>220</sup> Groups,

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<sup>212</sup>Saunders, *supra* note 170.

<sup>213</sup>Rosa Brooks, Editorial, *It's Open Season on Private Property*, L.A. TIMES, July 27, 2005, at B13; Robert J. Caldwell, Opinion, *Property Wrongs: A Supreme Blunder*, SAN DIEGO UNION-TRIB., July 3, 2005, at G-1.

<sup>214</sup>Caldwell, *supra* note 213. Another commentator wrote, “Developers are salivating at the thought of all the profitable real estate they may now be able to snatch up with a little help from their pals on the city council.” Brooks, *supra* note 213.

<sup>215</sup>See Fuhrmeister, *supra* note 209, at 209. Fuhrmeister wrote, “When property is taken in the name of economic development, it is significantly more uncertain as to how, when, and if a public benefit will be realized.” *Id.*

<sup>216</sup>Editorial, *A Sad Day for Property Rights*, *supra* note 170.

<sup>217</sup>U.S. CONST. amend. V.

<sup>218</sup>Epstein, *supra* note 170; see also *Kelo v. City of New London*, 545 U.S. 469, 521 (Thomas, J., dissenting) (“So-called ‘urban renewal’ programs provide some compensation for the properties they take, but 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.”); Fuhrmeister, *supra* note 209, at 220 (“Constitutionally mandated just compensation is unlikely to be enough to remedy the loss of [condemned] property.”).

<sup>219</sup>See T.R. Reid, *Missouri Condemnation No Longer so Imminent; Supreme Court Ruling Ignites Political Backlash*, WASH. POST, Sept. 6, 2005, at A2 (“The popular backlash has slowed or blocked many pending projects, as developers, their bankers and local governments suddenly face public furor.”).

<sup>220</sup>William Yardley, *After Eminent Domain Victory, Disputed Project Goes Nowhere*, N.Y. TIMES, Nov. 21, 2005, at A1.



such as the Institute for Justice and the Castle Coalition, have continued to actively publicize the issue and have placed considerable pressure on legislatures to act.<sup>221</sup>

### C. Legislative Responses

In the first few months after *Kelo*, both Republican and Democratic legislators<sup>222</sup> across the country have acted and have proposed a number of bills that would restrict the use of eminent domain.<sup>223</sup> For example, the United States House of Representatives, which had approved a nonbinding resolution condemning the majority's decision one week after its ruling,<sup>224</sup> passed a bipartisan bill in November 2005 entitled the Private Property Rights Protection Act.<sup>225</sup> The bill, if approved by the Senate and signed by the President, would withdraw all federal economic development funding from states and municipalities that used the power of eminent domain to transfer property from one private party to another.<sup>226</sup> Similarly, as of November 2005, there were more than thirty states considering bills that would prohibit the use of eminent domain for economic redevelopment, and Alabama and Texas already had enacted such legislation.<sup>227</sup> Clearly, federal and state legislators have not wasted any time to follow the majority opinion's advice<sup>228</sup> and to provide further safeguards to the baseline protection of property under the Fifth Amendment's Public Use Clause.<sup>229</sup>

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<sup>221</sup>See Inst. for Justice, *supra* note 170; Castle Coalition, *supra* note 170. One activist, in a publicity stunt, has even attempted to condemn Justice Souter's 200-year-old farmhouse in Weare, New Hampshire, so that the property could be used for a luxury hotel. Brooks, *supra* note 213.

<sup>222</sup>Gilbert, *supra* note 166 ("The outcry over *Kelo* . . . has been fast and unflagging, with politicians of all stripes assailing the decision and drafting bills to curb the use of eminent domain.").

<sup>223</sup>See Gilbert, *supra* note 166; Kenneth R. Harney, *On Capitol Hill, a Move To Curb Eminent Domain*, WASH. POST, Nov. 5, 2005, at F1; Mastrull, *supra* note 166; Jim Siegel, *Taft Halts Eminent Domain Land Grabs Until At Least 2007*, COLUMBUS DISPATCH, Nov. 17, 2005, at 1A; see also Castle Coalition, *supra* note 171.

<sup>224</sup>H.R. Res. 340, 109th Cong. (2005) ("Expressing the grave disapproval of the House of Representatives regarding the majority opinion of the Supreme Court in the case of *Kelo v. City of New London* that nullifies the protections afforded private property owners in the Takings Clause of the Fifth Amendment.").

<sup>225</sup>H.R. 4128, 109th Cong. (2005). The bill passed by a vote of 376 to 38. Harney, *supra* note 223.

<sup>226</sup>Harney, *supra* note 223. This funding, which would be withheld for two years, represents "a large pot of money for most localities and states." *Id.* There is a similar bill that originated in the Senate and was introduced by Senator Jon Cornyn. See Hurt, *supra* note 166.

<sup>227</sup>Harney, *supra* note 223. See also Castle Coalition, *supra* note 171. In Ohio, Governor Bob Taft recently signed a law that placed a one-year moratorium on the use of eminent domain for economic development. Jim Siegel, *supra* note 223.

<sup>228</sup>See *Kelo v. City of New London*, 545 U.S. 469, 489 (2005) ("We emphasize that nothing in our opinion precludes any State from placing further restrictions on its exercise of the takings power.").

<sup>229</sup>See Mastrull, *supra* note 166.

# VI. THE PROPER BALANCE: RESPECTING PROPERTY RIGHTS AND COMBATING URBAN SPRAWL

Yet, before the federal government and additional states rush to enact such “knee-jerk” legislation,<sup>230</sup> lawmakers should reassess the Court’s decision in *Kelo*. While the majority opinion may have diminished private property rights under the federal Constitution, the Court’s ruling was justified, because the decision could render an overriding positive impact on combating urban sprawl. By recognizing that the use of eminent domain for economic development was an area of “legitimate public debate,”<sup>231</sup> the Court ultimately struck the proper balance between the divergent interests of property right protection and an urban city’s ability to redevelop and compete against sprawling suburbs.

## A. Eminent Domain as a Solution to Sprawl

As mentioned, urban sprawl is a major problem in our country, and solutions are needed.<sup>232</sup> The power of eminent domain, if used effectively by major cities and inner-ring suburbs, can produce significant benefits for urban areas and can be part of the solution to reduce sprawl.<sup>233</sup>

One of the primary reasons for the sustained growth of suburban sprawl is that it is easier to develop land in rural areas as opposed to building in urban cities.<sup>234</sup> In rural areas, developers usually can acquire the large tracts of land necessary for development projects because they generally only have to negotiate with a few property owners.<sup>235</sup> By contrast, developers planning a project in urban cities are often forced to deal with numerous property owners to assemble a requisite amount of land.<sup>236</sup> Consequently, several market failures confront prospective city developers, making it extremely difficult for the private sector to redevelop urban areas.<sup>237</sup> Some of the market failures include the problems of assembling a “critical mass of land in the face of holdouts,” dealing with absentee landowners, obtaining

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<sup>230</sup>*See id.*

<sup>231</sup>*Kelo*, 545 U.S. at 489.

<sup>232</sup>*See* discussion *supra* Part II.

<sup>233</sup>*See* Elizabeth F. Gallagher, Note, *Breaking New Ground: Using Eminent Domain for Economic Development*, 73 *FORDHAM L. REV.* 1837, 1854-55 (2005); Terry Pristin, *Connecticut Homeowners Say Eminent Domain Isn’t a Revenue-Raising Device*, *N.Y. TIMES*, Sept. 8, 2004, at C8 (“Environmental groups say that eminent domain powers must sometimes be used to promote ‘smart growth’—that is, denser development in older neighborhoods—as a means of reducing suburban sprawl.”).

<sup>234</sup>*See* Gallagher, *supra* note 233; *see also* BURCHELL ET AL., *supra* note 19, at 27 (discussing how farmland is perfect for development also because it’s generally flat and the cheapest land available).

<sup>235</sup>*See* Brief of the Respondents at 34, *Kelo v. City of New London*, 545 U.S. 469 (2005) (No. 04-108), 2005 WL 429976; Gallagher, *supra* note 233.

<sup>236</sup>*See* Brief of the Respondents, *supra* note 235, at 34.

<sup>237</sup>*See* Brief of the National League of Cities et al. as Amici Curiae Supporting Respondents at 19, *Kelo*, 545 U.S. 469 (No. 04-108), 2005 WL 166931.

unclouded property titles, and managing the legal risks related to redeveloping sites that are often contaminated “brownfields.”<sup>238</sup>

Probably the most obstructive market failure threatening private-sector city redevelopment is the problem of “holdouts.”<sup>239</sup> Holdouts are individuals who own property within proposed redevelopment sites and who refuse to negotiate or sell to the developer, thus impeding the project.<sup>240</sup> Such individuals realize that their land is necessary for the project to proceed, and they “have an incentive to hold out for a higher selling price than fair market value.”<sup>241</sup> Holdout property owners who recognize their monopolistic position “can greatly increase the price of acquiring land for development projects,” or may even defeat a project altogether if one owner refuses to sell at any cost.<sup>242</sup> For instance, one study has noted that in land assembly situations, holdouts who eventually sold their properties usually received as much as twenty-six percent above fair market value, compared to an average of only an eight percent market premium for owners who were among the first to sell.<sup>243</sup> Thus, because the problem of holdouts is particularly acute in urban areas, where

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<sup>238</sup>Timothy J. Dowling, *Saving a City*, LEGAL TIMES, Feb. 21, 2005, at 54. In urban areas, private developers also may face the problems of dilapidated streets and other infrastructure that must be improved before redevelopment. *Id.* In addition, some existing businesses in cities purposely leave nearby properties vacant to preclude “competitors from entering the market.” Brief of the National League of Cities, *supra* note 237.

<sup>239</sup>See Brief of the Respondents, *supra* note 235, at 33-35; Brief of the National League of Cities, *supra* note 237, at 19-21; Gallagher, *supra* note 233, at 1854; Thomas W. Merrill, *The Economics of Public Use*, 72 CORNELL L. REV. 61, 65 (1986).

<sup>240</sup>See Gallagher, *supra* note 233, at 1854.

<sup>241</sup>*Id.* Economists Miceli and Sirmans wrote, “Properly understood, [the holdout problem] is a form of monopoly power that potentially arises in the course of land assembly. Once assembly begins, individual owners, knowing their land is essential to the completion of the project, can hold out for prices in excess of their opportunity costs.” Thomas J. Miceli & C.F. Sirmans, *The Holdout Problem and Urban Sprawl* 1 (Univ. of Conn., Working Paper No. 2004-38, 2004).

<sup>242</sup>Gallagher, *supra* note 233, at 1854. Legal scholar Richard Epstein has detailed an excellent hypothetical that illustrates the problem of holdouts. Richard A. Epstein, *A Clear View of The Cathedral: The Dominance of Property Rules*, 106 YALE L.J. 2091, 2094 (1997). Epstein wrote the following:

[H]oldout situations arise when the resource currently commanded by A is needed by B, such that each can deal only with the other for the useful exchange to take place. In such settings, A may value the thing at 10 and B may value it at 1000, such that it is clear that a mutually beneficial voluntary exchange could take place at any sum between 11 and 999, but the exact point between the two extremes cannot be determined in the abstract, so that the parties labor under strong incentives to hold out for the largest fraction of the gain. At this point, even if the bargain is made, much of the surplus (equal to 1000 minus 10, or 990) could be dissipated in achieving it. Alternatively, the bargaining process itself could break down.

*Id.*

<sup>243</sup>Edward W. Hill, Professor and Distinguished Scholar, Cleveland State University Levin College of Urban Affairs, Remarks at a Panel Discussion on Citizens’ Rights and Government’s Rights Following the Supreme Court’s Decision in *Kelo v. City of New London* (Sept. 8, 2005) (notes on file with the author).

developers often must negotiate with several owners, the more attractive private-sector investment has been to develop rural areas and to leave city neighborhoods behind.<sup>244</sup> So, in essence, the “optimal location choices of developers [has been] systematically biased outward, toward the urban fringe, where land ownership is more consolidated and assembly costs are therefore minimized. The result [has been cities] characterized by urban sprawl.”<sup>245</sup>

However, a government’s power to use eminent domain can help correct the market failure associated with holdouts, so that private developers would be more willing to invest in areas with a relatively fragmented ownership, such as aging urban neighborhoods.<sup>246</sup> Granting local governments the mere authority to condemn property in economic development areas prevents individual landowners from having an incentive to holdout and to extract excessive market premiums at the potential expense of the entire project.<sup>247</sup> Essentially, eminent domain levels the playing field vis-à-vis rural areas, by giving cities the power to assemble enough land to compete for meaningful economic development projects. As some economists have noted, “Seen in this light, urban renewal [through eminent domain] is a legitimate . . . public response to a failure in the urban land market.”<sup>248</sup>

Consequently, by having the ability to use eminent domain for economic development and by utilizing the improved capacity to attract private-sector development projects, cities would have a better opportunity to bring people back from the suburbs, create much-needed jobs, and generate increased tax revenues.<sup>249</sup> Such economic development projects are integral for the continued viability of older, urban areas and could generate a substantial amount of money for essential government services.<sup>250</sup> For example, in one notable project, the city of Boston used the power of eminent domain to redevelop the Dudley Street Neighborhood, an

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<sup>244</sup>See Brief of the Respondents, *supra* note 235, at 33-35; Brief of the National League of Cities, *supra* note 237, at 19-21.

<sup>245</sup>Miceli & Sirmans, *supra* note 241, at 8-9.

<sup>246</sup>See Brief of the Respondents, *supra* note 235, at 33-35; Brief of the National League of Cities, *supra* note 237, at 19-21; Gallagher, *supra* note 233, at 1854-55; Merrill, *supra* note 239.

<sup>247</sup>See Epstein, *supra* note 242. Epstein discussed how eminent domain could address the problem of holdouts:

To prevent the bargaining from breaking down in these contexts, the law could tell one person that he is entitled to take the property of another upon payment of just compensation, namely, an amount that equals the return he could have gotten for that asset in a competitive situation in which that holdout potential is lost.

*Id.* at 2094.

<sup>248</sup>Miceli & Sirmans, *supra* note 241, at 9-10.

<sup>249</sup>Brief of the National League of Cities, *supra* note 237.

<sup>250</sup>*Id.* at 18-19. Government services include “more police officers and firefighters, support for senior citizens, better pre-natal care, adolescent pregnancy prevention, more teachers and better-equipped schools, and more effective child-abuse prevention.” *Id.* at 19; see also Dowling, *supra* note 238.

inner-city community that was rapidly declining.<sup>251</sup> There, Boston was able to condemn properties so that enough land could be assembled for the project,<sup>252</sup> which has resulted in investments of over \$50 million<sup>253</sup> and “widely acknowledged improvement in the neighborhood.”<sup>254</sup> In sum, economic redevelopment projects represent an excellent opportunity to spark the revitalization of cities and to reverse the trend of increased sprawl. Yet, because of market failures like the problem with holdouts, urban cities need the power of eminent domain, or “these cities cannot realistically compete with their less-developed suburban neighbors for economic development projects and have little hope of reversing the decline of the past half-century.”<sup>255</sup>

Fortunately, the Court in *Kelo* implicitly recognized the peril of urban areas and allowed local governments to retain the option to use eminent domain for economic development under the Fifth Amendment.<sup>256</sup> At the end of the majority opinion, the Court noted that there was a “legitimate public debate” regarding whether the use of eminent domain for economic development was both beneficial and necessary.<sup>257</sup> So, rather than establishing a bright-line rule strictly prohibiting economic development takings, the Court made the correct decision, under these factual circumstances,<sup>258</sup> to defer the issue to the legislative process. There, Congress, state legislatures, and local officials can adequately debate the desirability of this governmental power and thoroughly consider all the issues, including, as discussed above, how the power of eminent domain can help rectify this country’s growing

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<sup>251</sup>See Elizabeth A. Taylor, Note, *The Dudley Street Neighborhood Initiative and the Power of Eminent Domain*, 36 B.C. L. REV. 1061, 1077 (1995) (“Once a thriving neighborhood with many family-owned businesses and a vital community spirit, Dudley Street gradually turned into a wasteland as disinvestment, abandonment and arson took their toll.”); David J. Barron & Gerald E. Frug, *Make Eminent Domain Fair for All*, BOSTON GLOBE, Aug. 12, 2005, at A17.

<sup>252</sup>See Taylor, *supra* note 251, at 1080 (“[T]aking the privately owned land by eminent domain seemed to DSNi to be the only way to acquire a coherent area of land on which to implement its plan.”).

<sup>253</sup>Benjamin B. Quinones, *Redevelopment Redefined: Revitalizing the Central City with Resident Control*, 27 U. MICH. J.L. REFORM 689, 757 (1994).

<sup>254</sup>Barron & Frug, *supra* note 251.

<sup>255</sup>Brief of Connecticut Conference of Municipalities et al. as Amici Curiae in Support of Respondents at 17, *Kelo v. City of New London*, 545 U.S. 469 (2005) (No. 04-108), 2005 WL 176426. Two commentators have stressed that urban cities must take a proactive approach: “If communities refrain from adopting aggressive, coordinated growth management strategies, development will continue to sprawl across the countryside, because sprawl is a *process* that pits new development areas against old. As the decay spreads outward, second and third-ring suburbs will be affected, and the ‘doughnut hole’ will expand.” Freilich & Peshoff, *supra* note 45, at 197.

<sup>256</sup>See discussion *supra* Part IV.B.

<sup>257</sup>*Kelo*, 545 U.S. at 489.

<sup>258</sup>The facts in *Kelo* indicated that there was no illegitimate purpose for the taking. See discussion *supra* Parts IV.B.-C.

problem with urban sprawl.<sup>259</sup> By contrast, if the Court had issued a *per se* rule banning the use of eminent domain for economic development, it would be more difficult, merely by judicial fiat, for cities across the nation to overcome the market failures challenging urban redevelopment efforts, and there would be one less tool to combat sprawl.

### B. Property Rights Are Still Respected

Furthermore, contrary to popular opinion and the view of the dissenting justices, property rights have not been eviscerated by the Court's decision in *Kelo*.<sup>260</sup> While critics claim that the Court has abdicated its judicial responsibility and has blindly authorized governments to condemn all private property for a new Wal-Mart or other development, the reality is that the majority opinion followed precedent by correctly applying a standard deferential to the legislature, encouraged local governments to utilize a fair and transparent process of eminent domain, and maintained a basis for an independent level of judicial review. Thus, as the Court in *Kelo* preserved the tool of eminent domain for urban redevelopment, it also ensured that property rights would still be respected.

First, *Kelo* does not represent a shift in precedent.<sup>261</sup> As discussed earlier, the Court has been interpreting the Public Use Clause broadly since the latter half of the twentieth century, granting a great deal of deference to legislative determinations of what constitutes a "public use."<sup>262</sup> This policy reflects the notion that local elected officials, with the advantages of the legislative process, can better decide whether governmental takings will benefit the public, as opposed to unelected federal judges.<sup>263</sup> In *Kelo*, the Court merely reaffirmed this longstanding rule of judicial deference and thereby supported the city of New London's determination that its use of eminent domain was justified.<sup>264</sup>

However, the majority opinion's championing of the policy of judicial deference does not mean that local governments have been given a free pass to use eminent domain at their blind discretion. Instead, the Court has shifted the issue of economic development takings to the political arena and has given legislatures and local governments a greater responsibility to ensure that eminent domain is used appropriately and with adequate safeguards. As the Court recognized in *Kelo*, the

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<sup>259</sup>In fact, the Court hinted that the legislative debate should address the holdout problem when Justice Stevens recognized in a footnote that commentators have argued "the need for eminent domain is especially great with regard to older, small cities like New London, where centuries of development have created an extreme overdivision of land and thus a real market impediment to land assembly." *Kelo*, 545 U.S. at 490 n.24.

<sup>260</sup>See discussion *infra* Part VI.B.

<sup>261</sup>See Lora A. Lucero, Commentary, *Kelo v. City of New London*, PLAN. & ENVTL. L., July 2005, at 11, reprinted in AM. PLANNING ASS'N, REPORT NO. 535, THE FOUR SUPREME COURT LAND-USE DECISIONS OF 2005: SEPARATING FACT FROM FICTION 68 (2005). The American Planning Association's text is a great source that contains a great deal of information about *Kelo* and is highly recommended for any interested reader.

<sup>262</sup>See discussion *supra* Part III.B.

<sup>263</sup>See *Kelo*, 545 U.S. at 487-88.

<sup>264</sup>See *id.* at 484.

use of eminent domain often involves hardship and thus should be used as a last resort and only when absolutely necessary.<sup>265</sup> Consequently, the Court stressed with approval how the city of New London initiated the takings as a result of a comprehensive redevelopment plan and only after every effort was made to purchase the unsold properties.<sup>266</sup> Likewise, legislatures and other local governments should follow the city of New London's lead in formulating and executing their own redevelopment projects. Elected officials must realize that eminent domain is inappropriate in certain situations, such as when a developer does not engage in good-faith negotiations with property owners, or when a majority of landowners within a proposed redevelopment site do not wish to sell at any price. Legislatures and local governments should strive to ensure that the process of eminent domain is not tainted by an illegitimate purpose and is completed in an open and just manner for the benefit of all American citizens.

Furthermore, despite skepticism by the dissents and other commentators, the average local government official is not a "corrupt money-grubber"<sup>267</sup> but will in fact strive to protect each of his or her constituents from being subjected to an improper use of eminent domain.<sup>268</sup> Yet, should an elected official support an egregious use of eminent domain, the Court in *Kelo* still provides any affected constituents with an opportunity to seek meaningful review. While the Court determined that a deferential standard should apply in cases involving the Public Use Clause, the majority opinion placed a strong emphasis on the factual circumstances of the case to reach its conclusion that New London's takings satisfied a "public purpose."<sup>269</sup> In addition, in his concurrence, Justice Kennedy pointed out five factors from the underlying facts of the case that he felt justified New London's use of eminent domain.<sup>270</sup> So, while critics suggest that the Court's opinion in *Kelo* has essentially authorized any taking, a close reading of the majority opinion and Justice Kennedy's concurrence indicates that the Court actually has imposed procedural limits on how local governments can constitutionally use eminent domain for economic development. Therefore, contrary to Justice O'Connor's view, the Court has still reserved a role for itself as a final guardian of property rights as "[a]n external, judicial check"<sup>271</sup> on the actions of legislatures and local governments, such that only takings pursuant to a carefully considered and comprehensive economic development plan will be adjudged to satisfy the Fifth Amendment.

## VII. CONCLUSION

In *Kelo*, the Court faced a difficult dilemma. On the one hand, property owners like Mrs. Dery stood to lose their homes. On the other hand, the city of New London was an economically distressed city losing residents and jobs. However, as pointed

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<sup>265</sup>See *id.* at 489.

<sup>266</sup>See *id.* at 478.

<sup>267</sup>Dowling, *supra* note 238, at 55.

<sup>268</sup>See *id.*

<sup>269</sup>See discussion *supra* Part IV.B.

<sup>270</sup>See discussion *supra* Part IV.C.

<sup>271</sup>*Kelo*, 545 U.S. at 497 (O'Connor, J., dissenting).

out by New London's lead counsel, "This case was not some type of land grab. This case was about the City of New London, its six square miles and its economic survival."<sup>272</sup> Likewise, from a national perspective, *Kelo* should not be viewed as a violation of property rights but a decision that allows urban cities like New London and Lakewood to compete against sprawling suburbs and gradually reduce sprawl.

The proliferation of urban sprawl in the United States is an enormous challenge facing the country. In part because of various government policies, there has been a steady stream of people and jobs moving from central cities to the edges of metropolitan areas, leaving an ever-expanding void in the core of urban communities. This trend has been augmented by market failures such as the problem with holdouts that systematically encourage developers to construct commercial and residential projects at the undeveloped fringes of major cities. Thus, to effectively combat sprawl, proactive government solutions are needed.

One solution, if used properly and with adequate procedural safeguards, is for cities to use the power of eminent domain for economic development. This governmental power neutralizes the holdout problem and allows central cities and inner-ring suburbs to compete for development projects on an equal footing with rural communities. In *Kelo*, by ruling in favor of New London and establishing that cities did have the power to initiate economic development takings, the Court implicitly recognized this dynamic. While many believe that the Court has overstepped its constitutional boundaries in affirming this use of eminent domain and has subsequently endangered private property rights, the majority opinion in *Kelo* ultimately still ensures that property rights will be respected. It also, more importantly, defends a city's right to use eminent domain for economic development, which correspondingly can help diminish urban sprawl.

So, as legislators respond to the perceived loss of private property rights under *Kelo* and rush to enact prohibitive bright-line rules, Congress and state leaders must recognize the effect of such prohibitions and realize how holdouts can thwart a community's attempt to improve. Even though the Court in *Kelo* "emphasize[d] that nothing in our opinion precludes any State from placing further restrictions on its exercise of the takings power,"<sup>273</sup> lawmakers should construe the Court's suggestion as an opportunity to address legitimate property right concerns, rather than to hastily enact a complete ban of the use of eminent domain for economic development. Urban sprawl is a major problem in our country, and legislators should follow the Court's implicit lead in preserving the power of eminent domain as a tool to combat the growth of sprawl.

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<sup>272</sup>Salzman & Mansnerus, *supra* note 17 (internal quotation marks omitted) (quoting Thomas J. Londregan).

<sup>273</sup>*Kelo*, 545 U.S. at 489.