

*KELO V. CITY OF NEW LONDON*—WRONGLY  
DECIDED AND A MISSED OPPORTUNITY FOR  
PRINCIPLED LINE DRAWING WITH RESPECT TO  
EMINENT DOMAIN TAKINGS

*Orlando E. Delogu*

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INTRODUCTION

No eminent domain taking case in the last twenty-five years has excited the level of interest, attention, and debate as has *Kelo v. City of New London*.<sup>1</sup> The Supreme Court's decision has not quelled that debate. If anything the stridency, the emotional tenor, of the debate has increased. And in the few months since the decision came down, several dozen states (in the absence of any meaningful federal limitation on what constitutes "public use") have proposed statutes or constitutional amendments that would limit their exercise of eminent domain (taking) powers.<sup>2</sup> There is even talk of federal legislation to temper, to modify, if not overrule, the holding in *Kelo*. Whether, and/or which of these state proposals will be enacted—whether federal legislation will come to pass is, of course, problematic at this point. But these conjectures and possible state or federal legislative responses to *Kelo* are not the purpose of this Article.

What seems more useful is a delineation of the *Kelo* case itself, and in particular, the root cases *Kelo* relied upon; *Berman v. Parker*,<sup>3</sup> *Hawaii Housing Authority v. Midkiff*,<sup>4</sup> and to a somewhat lesser extent, *Ruckelshaus v. Monsanto*.<sup>5</sup> Part I of this

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1. 125 S. Ct. 2655 (2005) (sustaining the power of the City to "take" private property by eminent domain for economic development purposes). The closeness and significance of this case are underscored by the Court's 5-4 vote, and by the fact that over forty amicus briefs were filed in this proceeding.

2. This latter movement is (at least in part) a direct response to the *Kelo* majority's invitation. Justice Stevens pointedly noted: "We emphasize that nothing in our opinion precludes any State from placing further restrictions on its exercise of the takings power. Indeed, many States already impose 'public use' requirements that are stricter than the federal baseline." *Id.* at 2668. See, e.g., *States Act to Protect Private Property in Wake of Ruling*, PORTLAND PRESS HERALD, July 20, 2005 at A4.

3. 348 U.S. 26 (1954) (sustaining as a public use the eminent domain taking of a viable business structure located within a blighted neighborhood that was targeted for redevelopment).

4. 467 U.S. 229 (1984) (sustaining as a public use the eminent domain taking of privately held land areas for the purpose of effectuating a broader, a less oligopolistic pattern of land ownership).

5. 467 U.S. 986 (1984). In the context of a valid pesticide regulation and licensing program, the Supreme Court held that any disclosure of submitted information/data, even trade secret information, is for a "public use" and is not a taking of property. *Id.* at 1016. Two factors motivated the Court's thinking—first, much of the information/data submitted is not trade secret information; moreover, it is voluntarily submitted in exchange for the economic advantages of "registration"; *id.* at 1007. Second, statutory mechanisms exist that provide "just compensation" to the party whose trade secret information is disclosed. *Id.* at 1019. It is also important to recognize that this case, though cited by the *Kelo* majority, is inapposite; it does not involve an eminent domain taking of property, as *Kelo* itself, *Berman* and *Midkiff* all did. It

Article will argue that *Kelo* was wrongly decided in at least three important respects: the facts in *Kelo* are fundamentally different from the facts in the cases purportedly relied upon by the *Kelo* majority; the *Kelo* Court misunderstands or misstates the doctrine of “deference”; and finally, the sequencing of reasoning undertaken by the *Kelo* Court is both at odds with the cases relied upon, and is little more than an “ends justifies means” approach that puts a wide range of constitutionally protected rights at risk (not just the property rights of the *Kelo* homeowners)—a dangerous precedent. Part II of the Article would recognize, and suggests ending, an unfortunate dichotomy between the Supreme Court’s handling of “regulatory taking” cases, and those “taking” cases that arise in eminent domain settings such as *Kelo*, *Berman*, and *Midkiff*. The argument is made that this dichotomy ought at long last to be bridged—it is inexplicable, it cannot be justified, and it produces unfair (dangerous even) results. The opportunity to harmonize these two strands of our takings jurisprudence was missed in *Kelo*. But there will be other cases, and hopefully a Supreme Court better prepared to tackle this essential task.

#### I. THE *KELO* HOLDING—THE OPINION OF THE COURT

Justice Stevens begins the five-member majority opinion by extensively laying out the history and underlying facts of the case, including the rationale and thinking of the city of New London, the state of Connecticut (which consistently supported the city’s efforts), the trial court, and the Connecticut Supreme Court. At no point do any of these entities, nor does the Stevens majority, see the motivational impetus for the eminent domain takings that took place here as anything other than “economic revitalization”; the overall plan was “projected to create in excess of 1000 jobs, to increase tax and other revenues, and to revitalize an economically distressed city, including its downtown and waterfront areas.”<sup>6</sup> Stevens’ concluding statement in section II of his opinion couldn’t be more direct: “We granted certiorari to determine whether a city’s decision to take property for the purpose of economic development [without more] satisfies the ‘public use’ requirement of the Fifth Amendment.”<sup>7</sup> *Kelo*, obviously holds that it does. But this conclusion, purportedly relying on the Supreme Court’s prior holdings in *Berman*, *Midkiff*, and *Ruckelshaus* raises some important next questions—was this reliance justified? Is the *Kelo* holding required by these prior cases, or does it represent an unwarranted, an ominous, extension of reasoning that should have been rejected?

We begin answering these questions by noting that the *Kelo* case is factually different in many important respects from the cases upon which it purports to rely. For example, in *Berman*, the eminent domain takings were rooted in the reality of, and need for, “slum” or “blight” removal, which then allowed a program of public and private redevelopment (akin to New London’s) to be undertaken.<sup>8</sup> In *Kelo*, however,

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arises out of a police power regulatory program that was not challenged by *Monsanto*; the Court’s holding, i.e., that a “regulatory taking” had not occurred and that public purpose requirements were amply met lends little, if any, support to the *Kelo* majority’s reasoning. See *infra* notes 24-27 and accompanying text.

6. See *Kelo v. City of New London*, 125 S. Ct. at 2658 (citing *Kelo v. City of New London*, 843 A.2d 500, 507 (Conn. 2004)).

7. *Id.* at 2661.

8. *Berman v. Parker*, 348 U.S. 26, 28-35 (1954). Justice Douglas, speaking for a unanimous Court

there is no threshold justification for the use of eminent domain powers. Justice Stevens expressly acknowledges that, with respect to the fifteen properties held by nine separate owners that were joined in the litigation, “[t]here is no allegation that any of these properties is blighted or otherwise in poor condition; rather, they were condemned only because they happen to be located in the development area.”<sup>9</sup> In *Berman*, Justice Douglas relies heavily on the fact that 64.3% of the structures in the project area were “beyond repair,” and that another 18.4% needed “major repairs.”<sup>10</sup> He accepts the Congressional judgment (and expert opinion) that deterioration of this magnitude cannot be remedied “on a structure by structure basis . . . . It was important to redesign the whole area so as to eliminate the conditions that cause slums . . . .”<sup>11</sup> When one looks at the larger project area in *Kelo*, there is no indication in the record that any of the properties acquired by the New London Development Corporation (whether by condemnation or market transaction) were in a “rundown,” “slum,” or “blighted” condition, or that any such designation hung over the neighborhood as a whole. Again, Justice Stevens’ opinion acknowledges this factual difference: “Those who govern the City were not confronted with the need to remove blight in the Fort Trumbull area . . . .”<sup>12</sup>

In short, the *Berman* Court does not begin its analysis or justify the challenged taking by focusing on the economic and/or social utility of the redevelopment scheme. Instead, the Court begins, and justifies the challenged taking, by focusing on the harms, the reality and pervasiveness of the blight, and the slum conditions. It is the amelioration of these conditions that triggers and justifies the use of governmental power (including the power of eminent domain).<sup>13</sup> Justice Douglas sees the governmental actions in *Berman* (the amelioration of blight and slum conditions) as falling within “what traditionally has been known as the police power.”<sup>14</sup> Once the

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in *Berman*, makes clear that it is the removal of the overwhelming number of “blighted” and “slum” structures and conditions in the area that is the glue that legitimizes the takings, and thereafter, the subsequent scheme of renewal. *See id.*

9. *Kelo v. City of New London*, 125 S. Ct. at 2660.

10. *Berman v. Parker*, 348 U.S. at 30.

11. *Id.* at 34.

12. *Kelo v. City of New London*, 125 S. Ct. at 2664-65. At several points in the majority opinion, Stevens, in a strained effort to draw closer to *Berman*, and as part of his rationale for justifying the challenged eminent domain takings, equates the economically “distressed” character of the Fort Trumbull area with the “slum” characteristics in *Berman*. *See id.* He then asserts that “a program of economic rejuvenation is entitled to our [*Berman*-type] deference.” *Id.* at 2665. But he has manufactured this economic distress/slum and/or blighted conditions analogy out of whole cloth; he cites no statute(s) or case law that has equated the two, or defined the degree of economic distress needed to put it on a par with slum and/or blighted conditions for the purpose of justifying an eminent domain taking. In fact, the two are quite different—regions of a state, whole states, groups of states are more or less economically distressed, whereas slum and/or blighted conditions are more local in character, capable of being more precisely defined and geographically delineated. In sum, the facts in *Kelo* are quite different from those in *Berman*; asserting the contrary does not make it so; and extending *Berman*-type deference to *Kelo* is both unwarranted and negates important Fifth Amendment protections.

13. Justice O’Connor’s dissent in *Kelo* recognized and cited some of the same data that the *Berman* decision turned on, i.e., the actuality of blight and slum conditions. The removal of these conditions justified the use of eminent domain powers—not the subsequent reutilization of the acquired properties. *See id.* at 2672-73 (O’Connor, J., dissenting).

14. *Berman v. Parker*, 348 U.S. at 32.

basis for an exercise of this power is established, or as Justice Douglas put it, “[o]nce the object is within the authority of Congress, the right to realize it through the exercise of eminent domain is clear.”<sup>15</sup> And at this point (but not before) the rest of the holding in *Berman* logically follows: acquired properties/neighborhoods may be renewed/redeveloped; public and/or private instrumentalities may be utilized to achieve these ends; the scope and character of the renewal/redevelopment is for policymakers to decide.<sup>16</sup>

The *Kelo* majority, however, begins its eminent domain analysis by proceeding in exactly the reverse order. In a classic example of “ends” justifying “means,” it holds that the projected, as yet unrealized, problematic benefits to the community that the largely private program of economic revitalization anticipates is sufficient, in and of itself, to justify the challenged eminent domain takings. In constitutional jargon, the takings are held to “satisfy the public use requirement of the Fifth Amendment.”<sup>17</sup> Justice Stevens either ignores or fails to realize that this reasoning subjects all private property to the very real risk of being taken by eminent domain because all renewals, economic revitalization projects, industrial development projects, whatever, are capable of being cast in glowing terms that project greater or lesser future benefits.<sup>18</sup>

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15. *Id.* at 33.

16. Justice Douglas’ recognition of this latter point produced a colorful and much quoted line of dicta: “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.* However, it is important to note that this oft-cited deference of the *Berman* Court to legislative decision-making applied only to the disposition of acquired properties, the course of conduct that followed a valid acquisition or eminent domain taking of property. The eminent domain challenge itself in *Berman* and prior cases was subject to a far more rigorous (a far less deferential) judicial analysis. See e.g., *Allen v. Inhabitants of Jay*, 60 Me. 124, 139 (1872); *Concord Railroad v. Greely*, 17 N.H. 47, 56-57 (1845); *Ryerson v. Brown*, 35 Mich. 333, 336 (1877). The *Kelo* holding may change that, but it is important to note that the *Kelo* Court seems to read *Berman* deference far more broadly than did the *Berman* Court itself.

17. *Kelo v. City of New London*, 125 S. Ct. at 2665. In this regard, the *Kelo* holding embraces the precise rationale adopted by Michigan’s Supreme Court in *Poletown Neighborhood Council v. City of Detroit*, 304 N.W.2d 455, 634 (Mich. 1981) (holding that the anticipated benefit to the municipality of “alleviating unemployment and revitalizing the economic base of the community” was a sufficient basis to justify the challenged eminent domain takings.). There were strong dissents in *Poletown*, the most notable by Justice Ryan; *Poletown* was later overruled by Michigan’s highest court in *County of Wayne v. Hathcock*, 684 N.W.2d 765 (Mich. 2004). The overruling of *Poletown* took place after the Connecticut Supreme Court’s decision in the *Kelo* case, but before the U.S. Supreme Court’s decision in *Kelo*. Timing aside, what is clear is that the reasoning of Michigan jurists in the dissents in *Poletown*, and the unanimous views overruling *Poletown* expressed in *County of Wayne*, obviously did not dissuade the *Kelo* majority from adopting a view of “public use” that is so expansive that it seems to have swallowed the Fifth Amendment’s limitations that were originally designed to protect private property from the very sort of eminent domain taking that is today sanctioned.

18. This very risk was recognized early on by no less an authority than constitutional scholar Thomas Cooley, then Michigan’s Chief Justice, in *Ryerson v. Brown*, 35 Mich. 333 (1877). In striking down a mill dam flowage statute authorizing the eminent domain taking of private land on the theory that the public would be benefited, Cooley noted that “every lawful business does this.” *Id.* at 339. See also THOMAS COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS, 763-73 (7th ed. 1903). In particular, Justice Cooley notes that “a due protection to the rights of private property will preclude the government from seizing it in the hands of the owner, and turning it over to another on vague grounds of public benefit to spring from the more profitable use to which the latter may devote it.” *Id.* at 766. Justice Cooley goes on to acknowledge that a benefit theory allowing the eminent domain taking of private property had gained

This self-serving stratagem then allows the use of eminent domain powers to assemble whatever parcel of land is deemed necessary. This is the bottom line holding of the *Kelo* majority. It is produced by the reverse logic the Court has utilized (looking at “ends” to justify the “means”), and by the facile substituting of a “benefit” theory of justification for the use of eminent domain powers, instead of adhering to the actual language of the Fifth Amendment which speaks of “public use,” albeit a more expanded range or type of “public use” today than might have obtained a century ago.<sup>19</sup>

Turning to the *Kelo* Court’s reliance on *Midkiff*, we see the same problems noted above, i.e., a failure to take into account the factual differences in the two cases and too great a willingness to rely on the “deference” dicta in *Midkiff* as a way of avoiding the more difficult task of determining whether the eminent domain takings in *Kelo* (and the reasoning used to support those takings) are really supportable in a manner that respects Fifth Amendment limitations. The factual differences in the two cases are striking. *Midkiff* presented a unique situation; a highly concentrated pattern of land ownership borne of customs and traditions that go back to the earliest years of Polynesian settlement and that predated Hawaii’s statehood by hundreds of years. Failed efforts to broaden this oligarchical pattern of land ownership began in the early 1800s.<sup>20</sup> After Hawaii became a state, legislation intended to finally, and forever, broaden the base of private land ownership was enacted in 1967; this policy choice by Hawaii is both appropriate and permissible, and does little more than bring Hawaii’s pattern of land ownership in line with patterns of land ownership in all of the other states. The legislation authorized the eminent domain taking of a portion of a historic landowner’s vast holdings, and the subsequent resale of small individual tracts of that land to long-term lessees of these tracts. On its face it is the quintessential (and generally prohibited) taking of A’s land for the purpose of resale to B; this fact, and

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some adherents and some case law support, in his day. He clearly regards these inroads, however, as unwise and a threat to private property rights that is inconsistent with the common law, arguing that “the common law has never sanctioned an appropriation of property based upon these considerations alone.” *Id.* at 768. In addition, Cooley regards this as a minority point of view, which many (even in those states that had adopted a benefit theory) regarded as, “not sound in principle . . .” *Id.* at 773. More recently in *County of Wayne*, the Michigan Supreme Court noted:

Every business, every productive unit in society . . . contribute[s] in some way to the commonwealth. To justify the exercise of eminent domain solely on the basis of the fact that the use of that property by a private entity seeking its own profit might contribute to the economy’s health is to render impotent our constitutional limitations on the government’s power of eminent domain.

*Id.* at 786.

19. The *Kelo* Court’s rejection of “public use” (as that term has evolved over the years) as a justification for the exercise of eminent domain power seems both self-serving and disingenuous. Its characterization of this standard as “difficult to administer” and “impractical,” *Kelo v. City of New London*, 125 S. Ct. at 2662, fails to acknowledge that most courts had long ago abandoned the most literal interpretation of this term in favor of a more practical, more realistic approach, but an approach that nonetheless avoided an overly broad “public purpose” or “public benefit” standard that would have the effect of entirely swallowing the Fifth Amendment’s limitations, of vitiating the protections of private property that the constitutional language intended. See Judge Ryan’s dissent in *Poletown*, 304 N.W.2d 455, 476-80 (Mich. 1981), which subsequently was embraced by Michigan’s highest court when *Poletown* was repudiated (Ryan, J., dissenting). See also *County of Wayne v. Hathcock*, 684 N.W.2d 765, 781-83 (Mich. 2004) and *infra* note 97.

20. *Haw. Hous. Auth. v. Midkiff*, 467 U.S. at 229, 232 (1984) (laying out this historical background).

more than ten years of actual land takings and resale(s) eventually led to the *Midkiff* litigation in 1979. The Supreme Court's holding in the case sustained the underlying legislative policy (a more diversified statewide pattern of private property ownership was approved) and the eminent domain takings that were essential to the unfolding of that policy. But everyone realized the obvious, i.e., that Hawaii's singular pattern of land ownership would not remedy itself. Moreover, this pattern of land ownership did not exist in any other state, and thus, no other state would require a program of eminent domain takings and land resale(s) similar to Hawaii's. In sum, the eminent domain takings (and land resales) sustained in *Midkiff* arose from a unique historical setting that required unique governmentally sponsored remedial policies. The setting and the remedial policies would almost certainly never arise again in Hawaii or in any other state.

The facts in *Kelo* are exactly the opposite. Unlike *Midkiff*'s unique set of customs, circumstances, and traditions that concentrated the ownership of private property—a reality that cried out for remedial relief—*Kelo*-type economic (commercial, industrial, and/or mixed-use) revitalization programs are occurring in every state. They are found in urban and rural settings, in rich and poor states, and in states with growing populations and those with more stable populations. Nationally such programs number in the thousands; their scope and character have expanded dramatically in recent years.<sup>21</sup> They are the product of modern economic development thinking—efforts to grow a state's tax base and/or employment levels.<sup>22</sup> Whatever value such programs have, they are certainly not the product of facts and circumstances that in any way parallel or resemble *Midkiff* and/or that justified the eminent domain taking and land resale program sustained in *Midkiff*. And, unlike *Midkiff*, which produced a single, geographically limited program of eminent taking and land resale(s), the *Kelo* holding contains no inherent limits. It will almost certainly induce a diverse and hugely expanded number of economic revitalization programs in all parts of the country; each will be largely private, and each will have its own eminent domain taking and land resale component. And unless *Kelo* is modified, these will continue for an indefinite

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21. See Donald L. Bartlett & James B. Steele, *Special Report: Corporate Welfare*, Time Magazine, Nov. 9, Nov. 16, Nov. 23, Nov. 30, 1998. In the first installment of this four-part report the authors point out that the level of subsidy at state and local government levels is difficult to document but that, "the figure is in the many billions of dollars each year—and is growing . . ." Nov. 9 issue at 39. See also Dale F. Rubin, *The Public Pays, The Corporation Profits: The Emasculation of the Public Purpose Doctrine and a Not-For-Profit Solution*, 28 U. RICH. L. REV. 1311 (1994).

22. A discussion of the wisdom of such programs is beyond the scope of this paper; suffice it to say such programs, when challenged, have consistently been found to meet "public purpose" requirements—they have become an integral part of modern government, particularly at state and local levels of government. Accordingly, this paper, without comment, simply takes such programs as a given. Aimed at facilitating some aspect of economic development, job growth, etc., revitalization programs are largely predicated on executive/legislative policy making, taxing, bonding, and spending powers, though as in *Midkiff* and *Kelo*, the conferral of eminent domain powers on some implementing body like the Hawaii Housing Authority (HHA) or the New London Development Corporation (NLDC) is not unusual. See, e.g., *Maready v. City of Winston-Salem*, 467 S.E.2d 615 (N.C. 1996) (sustaining economic development grants to private corporations); *C.L.E.A.N. v. State*, 928 P.2d 1054 (Wash. 1996) (sustaining taxes and expenditures facilitating construction of a baseball stadium for the Seattle Mariners); *Hayes v. State Prop. and Bldgs. Comm'n*, 731 S.W.2d 797 (Ky. 1987) (sustaining state subsidies to induce construction of a Toyota manufacturing plant).

period of time into the future. A more sweeping sanctioning of the use of eminent domain powers could hardly be imagined.

The sweep of *Kelo* is further broadened by the previously noted willingness of the Court to proceed in the reverse order it has embraced; it does not look first to more tangible public use justifications for the use of eminent domain powers, i.e., “slum removal,” or the need for some public (or quasi-public) facility, or the need to remediate some unique condition or circumstance. Instead, it looks first to a problematic set of benefits which economic revitalization programs are designed to produce, and then (applying the previously described<sup>23</sup> “ends justify means” rationale) asserts that these as yet unrealized benefits meet Fifth Amendment public use requirements and thus justify the use of eminent domain powers. This linkage of economic (job and tax base creation) policies, the problematic benefits of such policies, and the use of eminent domain powers as a tool to implement these problematic policies is unprecedented. No Supreme Court case prior to *Kelo* has fashioned a rationale which allows such a sweeping use of eminent domain powers. If left unmodified, *Kelo* essentially eviscerates long-standing Fifth Amendment limitations on the use of eminent domain.

As was the case in both *Berman* and *Midkiff*, the facts in *Ruckelshaus* are also far removed from the facts in *Kelo*. To begin with, *Ruckelshaus* does not involve an eminent domain taking; the legal question posed was whether a unique, long-standing, and increasingly sophisticated scheme of comprehensive federal pesticide regulation, which contained data disclosure provisions as part of the licensing and registration of new pesticide materials, gave rise to a “regulatory taking.”<sup>24</sup> The *Ruckelshaus* Court held that it did not. A near unanimous Court stated:

Thus, as long as Monsanto is aware of the conditions under which the data are submitted, and the conditions are rationally related to a legitimate Government interest, [comprehensive federal pesticide regulation] a voluntary submission of data by an applicant in exchange for the economic advantages of a registration can hardly be called a taking.<sup>25</sup>

More important for our purposes, the *Ruckelshaus* Court held that the regulatory scheme fully met public purpose requirements; the legislation was intended to and actually did provide real public health, safety, and environmental protection benefits;<sup>26</sup>

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23. See *supra* text accompanying note 17.

24. See *supra* note 5. See also *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922).

25. *Ruckelshaus v. Monsanto*, 467 U.S. at 1007. The Court’s reasoning on this point was undoubtedly made easier by the inclusion in the 1978 Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) of amendments for provisions that compensated those who (in the course of registration) may be compelled to disclose protected (property-type) trade secret and related information. *Id.* at 994-95, particularly n.4.

26. Implicit in the *Ruckelshaus* Court’s reasoning with respect to the purposes, benefits, and permissibility of the overall regulatory scheme is a recognition that public purpose requirements have been met. *Id.* at 990-91. A range of traditional police power health, safety, and general welfare benefits growing out of the regulatory scheme were unassailable. The Court goes on to note that Monsanto did not challenge this overall regulatory scheme; had it, the Court opines that such a challenge would have failed:

But Monsanto has not challenged the ability of the Federal Government to regulate the marketing and use of pesticides. Nor could Monsanto successfully make such a challenge, for such restrictions are the burdens we all must bear in exchange for “the advantage of living and doing business in a civilized community.” This is particularly true in an area,



it was intended to and actually did provide for the removal of “significant barrier[s] to entry into the pesticide market, thereby allowing greater competition among producers of end-use products.”<sup>27</sup> There is no reverse logic here; no looking to problematic benefits to justify the public purpose character of the governmental regulatory powers being exercised.

The facts in *Kelo* are different in almost every respect. In *Kelo* there is no unique scheme of comprehensive Federal regulation; instead there are a thousand and one state and local economic revitalization programs. In *Kelo* there is no voluntary participation in these programs—one’s property is simply delineated as part of a revitalization area; this triggers the acquisition of all properties in the area; a holdout may have his property taken by eminent domain. In *Kelo* there is no reciprocal economic advantage to one whose property is condemned; he gets whatever passes for “just compensation,” but no right to participate in the program of revitalization (akin to the marketing advantage that “registration” with the framework of FIFRA provides). In *Kelo* there are no immediate health, safety, environmental protection, and pesticide market place benefits and/or advantages such as those provided under FIFRA/*Ruckelshaus*; instead public use/purpose benefits are entirely problematic—economic rejuvenation may (or may not) occur to some degree, at some point in the future, but the eminent domain takings of non-blighted private property, as already noted, are immediate, real, and final.

Examining the “deference” factor in *Berman*, *Midkiff*, and *Ruckelshaus*, as compared to *Kelo*, one must begin by noting that the degree of deference to be accorded legislative judgments by reviewing courts is not fixed. When constitutional limitations exist (such as the Fifth Amendment’s limitations on the use of eminent domain), the degree of deference must be much less than the broader deference that is appropriately accorded to executive/legislative policy making, tax, and spending judgments that go to the manner—the “how,” “why,” and “when” of policy and program implementation—including the disposition of validly acquired properties. In the first instance, constitutional limitations are intended to hedge the legislative judgment; a more searching, a more probing judicial review is necessary to insure that constitutional rights and/or duties are honored. But once it is determined that

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such as pesticide sale and use, that has long been the source of public concern and the subject of government regulation.

*Id.* at 1007 (citations omitted).

27. *Id.* at 1015. The *Ruckelshaus* Court’s full exposition of Congressional intent with respect to FIFRA regulation begins by recognizing that the most immediate beneficiaries of disclosed information may well be, “later applicants who will support their applications by citation to data submitted by Monsanto or some other original submitter.” *Id.* at 1014. But the fact that a private party may benefit from the data disclosure requirements does not negate the fact that public benefits and purposes would also be realized; the latter were the primary focus of the Congress. The Court states:

Congress believed that the [disclosure] provisions would eliminate costly duplication of research and streamline the registration process, making new end-use products available to consumers more quickly. Allowing applicants for registration, upon payment of compensation to use data already accumulated by others, rather than forcing them to go through the time-consuming process of repeating the research, [is, in Congress’ view, a significant factor in opening up the pesticide market place].

*Id.* at 1015. It is also a factor that further meets the public purpose requirements of the law.

constitutional requirements have been met, that questioned eminent domain takings are justified, it is for the executive and legislative arms of government (largely unfettered) to determine the manner and timing of program implementation, including the disposition of validly acquired property interests.

That is the lesson of *Berman*—real slums and real blight justified the eminent domain takings; once the takings were determined to be valid, the Court then accorded the executive/legislative judgment wide latitude (“deference”) to determine the manner and scope of subsequent renewal programs.<sup>28</sup> In *Midkiff*, notwithstanding a perhaps confusing over-breadth of language with respect to deference, the same approach was taken. Justice O’Connor speaking for the Court begins by noting the unique circumstances, i.e., the historic factors that gave rise to the oligopoly of land ownership;<sup>29</sup> she acknowledges the legitimacy of Hawaii’s effort “to reduce the perceived social and economic evils of a land oligopoly . . .”;<sup>30</sup> and she ends by noting that the approach taken to correct the problem (the eminent domain taking of some land and subsequent land resale(s)) is both necessary and “a comprehensive and rational approach to identifying and correcting market failure.”<sup>31</sup> Having justified the takings on rather traditional grounds, Justice O’Connor then accords considerable deference to Hawaii’s legislature and their instrumentality, the Hawaii Housing Authority to fashion and carry out the mechanics of policy implementation. In *Ruckelshaus*, the considerable degree of deference exercised by the reviewing court in sustaining FIFRA’s regulatory scheme was more than appropriate. The case did not involve an eminent domain taking of property, and legislatively fashioned police power enactments are normally entitled to judicial respect. Such deference was even more appropriate in this case given the considerable degree of health, safety, and general welfare benefits (including the benefits of data disclosure)<sup>32</sup> that the Court acknowledged, and that met as fully as they did the public purpose requirements of the law.<sup>33</sup>

It is also worth noting that the actual holdings in cases cited by both *Berman* and *Midkiff* adhere to the varying deferential standard laid out above, i.e., more judicial scrutiny of, (less deference with respect to) constitutional questions, while at the same

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28. See *supra* text accompanying note 16.

29. See *Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229, 232-34 (1984). It should also be noted that the over-broad language in *Midkiff* with respect to deference led some scholars even then to conjecture whether Fifth Amendment protections of private property (which had been eroding for some time) had not now been eliminated. See Thomas J. Coyne, Note, *Hawaii Housing Authority v. Midkiff: A Final Requiem for the Public Use Limitation on Eminent Domain?* 60 NOTRE DAME L. REV. 388 (1985). Alarmed by this prospect, the author concludes: “[a]n examination of the potential abuse of eminent domain power and the little judicial protection offered to private land owners under a deferential standard of review reflects the unreasonableness of such a holding.” *Id.* at 404.

30. *Id.* at 241-42.

31. *Id.* at 242.

32. See *supra* notes 26-27 and accompanying text.

33. With respect to Congress’ data disclosure provisions, the Court noted: “It is enough for us to state that the optimum amount of disclosure to the public is for Congress [and its delegate, the EPA], not the courts, to decide, and that the statute embodies Congress’ judgment on that question.” *Ruckelshaus v. Monsanto*, 467 U.S. at 1015-16. Moreover Congress’ delegatee, the EPA, is generally accorded *Chevron* deference (akin to the policy making and implementation deference accorded legislative and executive arms of government). See *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

time extending considerable deference towards executive/legislative judgments with respect to policy choices, implementation, the handling, and/or disposition of validly acquired properties. For example, in *Old Dominion Co. v. United States*,<sup>34</sup> the broad language of deference cited by *Berman* and *Midkiff* almost certainly refers to acts of Congress and determinations by the Secretary of War in carrying out land condemnations that on their face did not require deference to be sustained; the challenged takings fully met constitutional “public use” standards—they were to acquire “sites for military purposes.”<sup>35</sup> Similarly, in *United States ex rel Tennessee Valley Authority v. Welsh*,<sup>36</sup> the questioned condemnations again readily met constitutional “public use” standards—a public road was being built; no deference was needed to sustain the challenged takings. The language of deference in *Welsh*, cited by *Berman* and *Midkiff*, refers to acts of Congress that cast the powers of the TVA broadly and required the agency to work with other instrumentalities to implement, (to carry out) the broad purposes of the act; the *Welsh* Court notes that:

[The TVA] was particularly admonished to cooperate with other governmental agencies—federal, state, and local—specifically in relation to the problem of “readjustment of the population displaced by the construction of dams, the acquisition of reservoir areas, the protection of watersheds, *the acquisition of rights-of-way*, and other necessary acquisitions of land, in order to effectuate the purposes of the Act.”<sup>37</sup>

*Welsh* found that these mandates were fully complied with. All of the then existing federal, state, and county agencies, with any stake in the matter agreed with the TVA that the selected road site was the most appropriate. Judicial deference to the Congressionally mandated powers of the TVA and to the decision making processes which led to the actual location of the road was fully warranted. But at the same time, the Court was aware that the eminent domain takings fully met constitutional “public use” requirements.

In sum, the Supreme Court’s holding in each of the cases cited by *Kelo* did not turn on “deference” in order to find that constitutional public use requirements were met. In *Berman*, the “public use” justifying the eminent domain takings was the elimination of existing and widespread blighted conditions (slums). In *Midkiff*, it was the elimination of a damaging, oligarchical system of land holding. In *Old Dominion*, land was condemned for a military base. In *Welsh*, land was condemned for a public road. And in *Ruckelshaus*, there was no eminent domain taking of land, nor was there a regulatory taking; constitutional limitations requiring less deferential judicial review were not a factor in *Ruckelshaus*. The Court found that a broad range of public health, safety, and general welfare benefits had been amply demonstrated: these findings sustained the police power enactment.

The fact that all of these cases contained language (dicta) suggesting the appropriateness of a high level of judicial deference to executive/legislative policy making and policy implementation is correct as far as it goes, but the *Kelo* majority failed to appreciate that constitutional limitations on legislative power stand on a

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34. *Old Dominion Co. v. United States*, 269 U.S. 55 (1925).

35. *See id.* at 66.

36. 327 U.S. 546 (1946).

37. *See United States ex rel Tenn. Valley Auth. v. Welch*, 327 U.S. at 553 (emphasis added).

different footing; Fifth Amendment limitations cannot simply be swept away by an over-broad concept of deference. The *Kelo* Court's review should have been far less deferential with respect to the eminent domain (the public use) questions posed by the case. As noted above, the holdings in all of the cases it cited, *Berman*, *Midkiff*, *Old Dominion*, and *Welsh*, found an independent basis for sustaining the challenged eminent domain takings. Only then, when constitutional public use requirements were deemed to have been met, did these courts move to a more deferential standard of review to deal with other (policy and policy implementation) issues posed by these cases. Put another way, the facts in each of these cases demonstrated that Fifth Amendment limitations on the use of eminent domain powers were not violated; traditional public use requirements were in fact met. The language of deference went only to the implementation, the manner and means by which executive/legislative arms of government carried out the underlying policies in each of these settings.

A moment's reflection suggests that it could hardly be otherwise. Given our structure of government and principles of "separation of powers," the making of policy and policy implementing choices is the duty of elected (executive/legislative) officials; these officials and their decisions are entitled to, and have always received, a very high degree of judicial deference. But at the same time, constitutional limitations on executive/legislative power cannot be avoided or finessed by glib references to deference. The monitoring of constitutional duties is the task of the judicial branch; there is little room for deference. When challenges arise, courts must determine (on the facts of the case) whether constitutional requirements have been met. An early Maine case, *Allen v. Inhabitants of Jay*,<sup>38</sup> put it quite well:

But the legislature have no power to determine finally upon the extent of their authority over private rights. This is a power in its nature essentially judicial . . . . The question whether a statute in a particular instance exceeds the just limits of the constitution must be determined by the judiciary. . . . The attempt, therefore, of the legislature to exercise the right of eminent domain, does not settle that it has the right; but the existence of the right in the legislature in any class of cases is left to be determined under the constitution by the courts.<sup>39</sup>

In *Kelo*, however, the majority opinion simply ignored the higher level of (less deferential) scrutiny that constitutional questions (as opposed to executive/legislative policy choices) require. While paying lip service to its constitutional duty to assure that A's property is not taken "for the sole purpose of transferring it to another private party B . . ."<sup>40</sup> the Court allowed precisely this end result by relying on the language of deference in each of the four cases noted above, and by lumping together the eminent domain taking questions with the executive/legislative policy and plan implementation choices that the case posed. Given the fact that all economic revitalization programs can be said to meet broad "public purpose" requirements,<sup>41</sup> this lumping together of constitutional questions and policy choices under the mantle of "deference" effectively precludes any real or independent discussion of the narrower

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38. 60 Me. 124 (1872).

39. *Id.* at 139. A complete reading of pages 138-40 of the *Jay* case is instructive on these points.

40. *Kelo v. City of New London*, 125 S. Ct. at 2661.

41. *See supra* note 22.

constitutional question posed, i.e., are the challenged takings in *Kelo* valid? Deference then, becomes a way of finessing (avoiding) Fifth Amendment limitations on the exercise of eminent domain powers. That this is precisely what the *Kelo* majority did (and intended to do) couldn't be more clear:

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—no less than debates over the wisdom of other kinds of socioeconomic legislation—are not to be carried out in the federal courts . . . .

Just as we decline to second-guess the City's considered judgments about the efficacy of its development plan, we also decline to second-guess the City's determinations as to what lands it needs to acquire in order to effectuate the project.<sup>42</sup>

The *Kelo* Court essentially reduces the important constitutional question it was charged with determining to just another “socioeconomic” question or debate—a debate which (in the name of deference) it declines to join. The net result is both obvious and unfortunate—the important constitutional question in the case is reduced to nothing more than one of many socioeconomic policy choices to be made by the City of New London (or any other city) in working out its economic revitalization program. In the name of deference, (a deference far broader than that of any prior Supreme Court case) the challenged taking in *Kelo*, is sustained; it follows then, that any other private property delineated to be within a program of economic revitalization, is subject to being taken by eminent domain. Here too, no prior Supreme Court case has cast the power of eminent domain as broadly. Put another way, no prior Supreme Court case has interpreted constitutional limitations as narrowly—so narrowly as to essentially make them a nullity. In sum, it seems clear that the *Kelo* holding is not required by the language of deference in *Berman*, *Midkiff*, or any other prior Supreme Court case, but represents a significant expansion of the holding and rationale of these earlier cases.

Finally, the *Kelo* majority's analytic departure<sup>43</sup> from the cases it purports to rely upon deserves further comment and critical analysis. Obviously, the Court's holding sustains the challenged takings. It does so on the basis of the Court's and New London's belief that its economic revitalization plan will create benefits to the community; this belief (without more) is deemed sufficient to satisfy constitutional public use requirements, thereby justifying the use of eminent domain powers.<sup>44</sup> But

42. *Kelo v. City of New London*, 125 S. Ct. at 2667-68.

43. The reference here is to the “ends justify means” analysis employed by the *Kelo* majority. See *supra* text accompanying note 17.

44. This is precisely the *Kelo* majority's reasoning; immediately after referencing *Berman*, *Midkiff*, and *Ruckelshaus*, the Court states:

It would be incongruous to hold that the City's interest in the economic benefits to be derived from the development of the Fort Trumbull area has less of a public character than any of those other interests [the interests served in the cited cases]. Clearly, there is no basis for exempting economic development from our traditionally broad understanding of public purpose [which the Court equates with public use].

*Kelo v. City of New London*, 125 S. Ct. at 2665-66. At another point the *Kelo* majority approvingly states that: “The City has carefully formulated an economic development plan that it believes will provide appreciable benefits to the community . . . . To effectuate this plan, the City has invoked a state statute that specifically authorizes the use of eminent domain to promote economic development.” *Id.* at 2665.

if this same analytic sequencing is applied to other settings where constitutional rights (akin to the property rights in *Kelo*) are said to be protected, it is quickly apparent that these rights are at risk (may be eviscerated or rendered a nullity) in the same manner that the limitations in the Fifth Amendment's "takings clause" have been rendered meaningless by *Kelo*.

For example, law enforcement is surely a public purpose; if New London, faced with rising crime rates, undertook a widened program of search and electronic surveillance, it could logically believe that this enhanced program of law enforcement would have benefits to the community. Citing the reasoning of *Kelo*, would not the abrogation of traditional "probable cause" standards (standards that today protect individual rights and civil liberties) be appropriate? After all, the rationale of *Kelo*, put simply, is that once a public purpose is found, the means to achieving the ends sought are within the purview and prerogative of elected executive/legislative officials.<sup>45</sup> In the same vein, protecting young children from pornographic and/or salacious print matter is surely a public purpose; if New London faced with a rising exposure of its young people to these materials undertook a widened program of banning and/or censoring such materials, it could logically believe that this enhanced program of censorship would have benefits to the community. Again, citing *Kelo*, would not the abrogation of traditional "community based standards" defining pornography (standards that today protect First Amendment free speech rights) be appropriate? After all, *Kelo*'s requirements are met—there is a public purpose, and a not-irrational means to achieving the ends sought has been fashioned by executive and legislative leaders. The number of such examples could be expanded, but the point seems adequately made: the back to front analytic reasoning of the *Kelo* majority (a dressed up "ends" justify "means" argument) has broad and dangerous implications; if not modified, the Court's reasoning may well lead to the truncating of other constitutionally protected rights by application of the same faculty logic that underlies *Kelo*.

The simple fact is that not everything government undertakes to do, not even those things such as economic revitalization that government arguably has a legal right to undertake to do, (and which may well create some benefits) can then become the basis for avoiding, evading, or eviscerating constitutional (First, Fourth, or Fifth Amendment) limitations on governmental action(s). Laudable "ends" do not justify the use of any and all "means" to achieve those ends. If the view that "ends" do justify "means" ever gains wide acceptance, then all constitutionally protected rights are at risk. In sum, constitutional limitations are there for a purpose—they protect individual liberties and/or private rights; and in a just and balanced society—"ends" do not always justify "means." Unfortunately, the *Kelo* majority's reasoning forgets these basic truths.<sup>46</sup>

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45. According to *Kelo*: "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 [or] . . . other kinds of socioeconomic legislation are not to be carried out in the federal courts." *Id.* at 2667 (quoting *Hous. Auth. v. Midkiff*, 467 U.S. at 242).

46. See *infra* note 63 and accompanying text. It seems undeniable that the *Kelo* majority was captured by a logic that began by finding a valid governmental undertaking (economic revitalization), and arguable (albeit only problematic) public benefits that would derive from that revitalization. It then reasons that

A. Justice Kennedy's Concurring Opinion

Justice Kennedy begins by joining the opinion of the Court; he thus becomes the essential fifth vote permitting New London's eminent domain taking of the Kelo property. But at the same time Justice Kennedy is more wary than his majority colleagues.<sup>47</sup> In settings such as those posed in *Kelo*, he would leave more room than his majority colleagues for judicial examination of "a plausible accusation of impermissible favoritism to private parties."<sup>48</sup> His examination begins "with the presumption that the government's actions were reasonable and intended to serve a public purpose."<sup>49</sup> This approach, though deferential to governmental decision making is less deferential than Justice Stevens's approach, which would bar takings in *Kelo*-like cases only in settings tantamount to fraud.<sup>50</sup>

Justice Kennedy, proceeding through his more searching review of the condemnations in *Kelo*, notes that New London's depressed economic condition is real—there is "evidence corroborating the validity of this concern."<sup>51</sup> He goes on to note that "[t]here is nothing in the record to indicate that [respondents] were motivated by a desire to aid . . . particular private entities."<sup>52</sup> He finds that "the projected economic benefits of the project cannot be characterized as *de minimus*."<sup>53</sup> And finally, he is moved by the fact that "[t]he city complied with elaborate procedural requirements that facilitate review of the record and inquiry into the city's purposes."<sup>54</sup>

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these findings taken alone (and certainly taken together) constitute a valid public purpose. *See supra* note 44. The majority then baldly asserts that its finding that public purpose requirements are met is the functional equivalent of finding that the public use requirements of the Fifth Amendment are met. The majority's language speaks for itself: "Because that plan [New London's economic development plan] unquestionably serves a public purpose, the takings challenged here satisfy the public use requirement of the Fifth Amendment." *Kelo v. City of New London*, 125 S. Ct. at 2665. But the *Kelo* majority offers no case law support (indeed there is none) for this logical leap. Moreover, it is a dangerous leap—if economic revitalization and proffered benefits (without more) is a public purpose, which in turn meets public use requirements, then we sanction whatever exercise(s) of eminent domain the governing body feels is necessary to effectuate the revitalization.

This aspect of the Court's reasoning is made even more dangerous when coupled with the Court's over-broad approach to the concept of deference. *See supra* notes 28-43 and accompanying text. The breadth of the *Kelo* Court's capitulation to deference is shocking—it plucks from *Berman* the phrase: "Once the question of the public purpose has been decided, the amount and character of land to be taken . . . rests in the discretion of the legislative branch." *Kelo v. City of New London*, 125 S. Ct. at 2668 (citing *Berman v. Parker*, 348 U.S. 26, 35-36 (1954)). And with this statement the *Kelo* majority avoids meaningful review of the Fifth Amendment's limitations; *Berman*'s language of deference is applied not just to the executive/legislative plan implementing measures that the *Berman* Court was addressing, but to the threshold constitutional question that the *Kelo* Court was being called upon to decide (and which ought to have been decided on a far less deferential basis).

47. Besides Justice Kennedy, the five member majority includes Justices Stevens, Souter, Ginsburg, and Breyer.

48. *Kelo v. City of New London*, 125 S.Ct. at 2669.

49. *Id.*

50. *See id.* at 2661.

51. *See id.* at 2669.

52. *Id.* at 2670.

53. *Id.*

54. *Id.*

He concludes, “[i]n 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 so trivial or implausible, that courts should presume an impermissible private purpose, no such circumstances are present in this case.”<sup>55</sup>

But while Justice Kennedy (to his credit) would take a harder look than his majority colleagues at whether “public” or “private/pretextual” purposes are being served in an economic revitalization program that involves the eminent domain taking of property, he readily accepts the central error of the majority opinion: “that a taking should be upheld as consistent with the Public Use Clause, U.S. Const., Amdt. 5., as long as it is ‘rationally related to a conceivable public purpose.’”<sup>56</sup> He then cites the same cases cited by the majority opinion, *Berman* and *Midkiff*, failing to see the factual differences (noted above) between these cases and *Kelo*, while at the same time accepting the reverse logic—the “ends” justifying “means” approach of the majority opinion.

Justice Kennedy goes on to justify the highly deferential review of the majority as akin to the rational-basis test used to review economic regulation under the Due Process and Equal Protection Clauses. He fails to see that economic regulation is a type of executive/legislative policy making entitled to a high degree of judicial deference, whereas (as noted above) constitutional limitations on executive/legislative prerogative are entitled to much less deference. Indeed, the meaning and scope of these limitations, which in turn defines the meaning and scope of some underlying constitutional right (here the private property right) is and always has been, a judicial responsibility.<sup>57</sup> In this respect Justice Kennedy’s concurring opinion, his over-reliance on deference to executive/legislative judgment to define the public use limitations in the Fifth Amendment, is as incorrect as was Steven’s majority opinion.

Finally, Justice Kennedy further demonstrates his wariness of the broad rule fashioned by the majority opinion by expressing a willingness to explore a narrower rule of law applicable to eminent domain takings arising out of economic development. He begins this portion of his concurrence by agreeing with the majority opinion that a per se rule barring the use of eminent domain in these settings is probably inappropriate. Nor is Justice Kennedy particularly supportive of a presumption of invalidity in these settings, though he leaves the door somewhat open to this approach.<sup>58</sup> But having said this, he goes on to state that this “does not foreclose the possibility that a more stringent standard of review than that announced in *Berman* and *Midkiff* [and by extension *Kelo*] might be appropriate for a more narrowly drawn category of [eminent domain] takings.”<sup>59</sup> Having whetted our appetite for a more cautious, balanced approach to eminent domain takings, Justice Kennedy, nevertheless, backs away from his own good idea; he states in the concluding paragraph of his concurrence that “[t]his is not the occasion for conjecture as to what sort of cases might

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55. *Id.* at 2670-71.

56. *Id.* at 2669 (quoting *Hous. Auth. v. Midkiff*, 467 U.S. 229, 241 (1984)). *See also, supra* notes 44-46 and accompanying text.

57. *See supra* notes 38-39 and accompanying text. *See also, infra* note 61.

58. *See Kelo v. City of New London*, 125 S. Ct. at 2670.

59. *Id.*



justify a more demanding standard . . . .”<sup>60</sup> That’s unfortunate; *Kelo* seemed to many the ideal case, the perfect occasion to strike a better balance (than does *Berman* and *Midkiff*) between private property rights and the exercise of eminent domain powers, particularly when these interests are in conflict in economic revitalization settings. One can only conjecture that in *Kelo* the polar views of the majority and the dissent were not conducive to compromise. Part II of this paper, however, takes up Justice Kennedy’s suggestion, and in what is characterized as a *Kelo*-like case of the future, explores the outline of a more limited use of eminent domain powers in economic revitalization (and other similar) settings.

### B. Conclusions

As noted, both the majority opinion and Justice Kennedy’s concurrence fail to appreciate the significant factual differences between *Kelo* and the principal cases upon which *Kelo* purports to rely. In each of these earlier cases (*Berman*, *Midkiff*, *Ruckelshaus*, *Old Dominion*, and *Welsh*) there was either an independent justifiable basis for the challenged use of eminent domain or there was no taking at all. That is not the case in *Kelo*. In *Kelo* there is no direct, or even indirect, public use of the condemned land, and no independent basis for the eminent domain taking of non-slum, non-blighted private property. The fact that economic revitalization may well be a permissible governmental undertaking and that the land taken might facilitate these revitalization efforts has never heretofore been deemed a sufficient basis for holding that Fifth Amendment limitations on the use of eminent domain powers have been met. In sum, the facts in these earlier cases are inapposite to those posed in *Kelo*; they simply do not suggest, much less dictate the holding in *Kelo*. On the contrary, the facts in *Kelo* suggest an outcome that is exactly the opposite from that reached by the majority.

With respect to “deference,” it seems clear that both the *Kelo* majority and the Kennedy concurrence misunderstand the concept, and misread the prior case law they cite. The *Kelo* opinion fails to grasp that “deference” is a nuanced concept, that there is something that might be called a “deference continuum.” Judicial review of executive/legislative actions hedged by constitutional limitations must be searching to insure that constitutional rights and duties are protected.<sup>61</sup> Very little deference should

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60. *Id.*

61. The view that constitutionally predicated public use questions ought not to be avoided, ducked, or finessed by the judicial branch is long standing. Indeed, an impressive array of treatise and case law citations suggest that such questions must ultimately be decided by the courts. Two must suffice here. Judge Cooley noted in *A Treatise on the Constitutional Limitations* that: “The question what is a public use is always one of law. Deference will be paid to the legislative judgment, as expressed in enactments providing for an appropriation of property, but it will not be conclusive.” COOLEY, *supra* note 18 at 774-75. New Hampshire’s highest court in *Concord Railroad v. Greely* noted:

The words [public use] are very comprehensive, and may include a multitude of objects. Their construction is a matter for judicial decision; because, however decided may be the opinion of the legislature that property in a given case has been taken for a public use, still, whenever the question arises whether it has thus been taken, within the meaning of the constitution, it becomes our duty to determine it. The opinion of the legislature is not final upon this.

17 N.H. 47, 56-57 (1845).

be accorded executive/legislative judgments that are contrary to the intent and purpose of these limitations. When only federal and/or state statutory limitations hedge the executive/legislative actions of a New London (and/or its instrument, the NLDC), somewhat more, but still very little deference should be accorded the executive/legislative judgment.<sup>62</sup> In most instances, the statutory duty must be honored unless or until it is repealed or modified. Once constitutional and/or statutory limitations are shown to have been met, or do not exist, then reviewing courts can (and should) extend a much higher degree of deference to legislative policy choices, judgments, and plan implementing strategies. This higher degree of deference, however, cannot be used as it was by the *Kelo* majority to finesse or circumvent the more searching (less deferential) review that Fifth Amendment limitations on the use of eminent domain powers should have been accorded. Greater deference comes into play not before, but only after a justifiable basis for the use of eminent domain has been found. That is what happened in all of the prior cases cited by the *Kelo* majority. The failure of the *Kelo* majority to recognize (and adhere) to these nuanced differences in the application of the concept of deference was yet another factor that led to a holding that is exactly the opposite from that which might reasonably have been anticipated.

Finally, the analytic approach utilized by the *Kelo* majority (and Justice Kennedy) is unprecedented and puts not only private property rights, but many other constitutionally protected rights, at risk. At its core their reasoning accepts the view that if the “ends” are permissible (in this case economic revitalization), then the “means” chosen by the legislature to accomplish those “ends” (in this case eminent domain takings) are also permissible.<sup>63</sup> This inverse approach to determining whether constitutional limitations on the exercise of eminent domain powers have been met, coupled with the over-broad application of deference principles noted above, a deference that leads the Court to decline meaningful review of Fifth Amendment limitations on legislative prerogative, has led to a holding that seems both erroneous and unwise.

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62. See, e.g., *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 415 (1971) (holding that the reviewing court had the duty to take a “thorough, probing, in-depth review” to determine whether explicit statutory requirements were complied with by the Secretary of Transportation in approving an interstate highway right of way).

63. That this is precisely what the *Kelo* majority has done was recognized by Judge Ryan in his dissent in *Poletown Neighborhood Council v. City of Detroit*, 304 N.W. 455, 465 (Mich. 1981) (Ryan, J. dissenting). Ultimately, the Michigan Court embraced Judge Ryan’s earlier wisdom when it overruled *Poletown* in *County of Wayne v. Hathcock*, 684 N.W.2d 765, 787 (Mich. 2004). Judge Ryan noted that the *Poletown* majority gave “unwarranted judicial imprimatur upon governmental action taken under the policy of the end justifying the means.” *Poletown Neighborhood Council v. City of Detroit*, 304 N.W.2d at 465. Ryan went on to explain why he set out his views in such lengthy dissent; his parting justification is as follows:

Finally, it seems important to describe in detail for the bench and bar who may address a comparable issue on a similarly stormy day, *how easily government*, in all of its branches, caught up in the frenzy of perceived economic crisis, *can disregard the rights of the few in allegiance to the always disastrous philosophy that the end justifies the means*.

*Id.* (emphasis added).

## II. AN UNFORTUNATE DICHOTOMY

A generation or more of first year law students in basic property law courses have come to understand that private property is taken by governmental action in one of two ways. The first operates indirectly and without payment of compensation; it is triggered by exercises of the police power that regulate the rights and duties of property owners in order to protect the public's health, safety, and general welfare. As one court put it: "Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law. As long recognized, some values are enjoyed under an implied limitation and must yield to the police power."<sup>64</sup> The second means by which private property is taken is by exercise of the power of eminent domain. Here the taking is direct, "just compensation" is paid, and fee simple (or lesser) interests in those parcels of land thought to be essential to meeting public needs and/or to the carrying out of governmental duties, are acquired. The exercise of this power too is thought to be essential, an inherent aspect of the concept of sovereignty. Justice Cooley, a leading constitutional scholar begins his discussion of eminent domain by noting that "[e]very sovereignty possesses buildings, lands, and other property, which it holds for the use of its officers and agents, to enable them to perform their public functions."<sup>65</sup> He goes on: "Every species of property which the public needs may require and which government cannot lawfully appropriate under any other right, is subject to be seized and appropriated under the right of eminent domain."<sup>66</sup>

There is no inherent difficulty or problem associated with the realities just described, i.e., that private property interests may be appropriated to public use by either one of two ways: by an exercise of the police power or by exercise of eminent domain powers. An unfortunate problem does arise, however, from the fact that only one of these two broad tools (exercises of the police power) has been subject to careful and expanding judicial scrutiny, whereas the other tool (exercises of eminent domain powers) has received only a limited and declining level of judicial attention. The reality of this unfortunate dichotomy of approaches with respect to judicial review seems irrefutable. For more than eighty years, at least since *Pennsylvania Coal v. Mahon*,<sup>67</sup> the highest level of our judicial system has recognized that "[t]he general rule at least is, that while property may be regulated to a certain extent, if regulation *goes too far* it will be recognized as a taking."<sup>68</sup> Earlier the *Pennsylvania Coal* Court had noted that "it always is open to interested parties to contend that the legislature has gone beyond its constitutional power."<sup>69</sup> Thus was born both the concept of a "regulatory taking" and the legitimacy of judicial review (triggered by a private property owner) to determine whether a particular regulation has "gone too far."<sup>70</sup>

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64. Pa. Coal Co. v. Mahon, 260 U.S. 393, 413 (1922).

65. THOMAS COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS 752 (7th ed. 1903).

66. *Id.* at 756.

67. 260 U.S. 393 (1922). *Reagan v. Farmers Loan & Trust Co.*, 154 U.S. 362 (1894), was an earlier case that did not capture national attention nor hold our focus as *Pennsylvania Coal* did, but it stood for a similar proposition, i.e., that regulations, if too extreme, would give rise to a taking.

68. Pa. Coal Co. v. Mahon, 260 U.S. at 415 (emphasis added).

69. *Id.* at 413.

70. See Delogu, *The Law of Taking Elsewhere and, One Suspects, In Maine*, 52 ME. L. REV. 324

From that day to the present every state court system, and the federal courts, have been willing to subject challenged regulations to a level of judicial scrutiny that not only determines whether a “regulatory taking” has occurred in the particular instance, but by the very existence of the process serves to limit misuse of police power regulatory tools. We are the better for it.<sup>71</sup>

But no similar case, no eighty-year old landmark (analogous to *Pennsylvania Coal*) stands as a guardian of private property rights that are threatened by exercises of eminent domain power that have “gone too far.”<sup>72</sup> It is this dichotomy—that one strand of our takings jurisprudence is subject to intense and ongoing judicial review by both federal and state courts, while the other is subject to little or no judicial scrutiny, and will receive even less judicial attention as a result of the *Kelo* holding, that is unfortunate. More than unfortunate, the *Kelo* holding (in the name of deference to legislative judgments) seems to mark a retreat by the federal courts from traditional judicial review functions—a retreat from the Supreme Court’s duty to shore up and be the guardian of constitutional limitations on legislative prerogative. This abdication in the context of *Kelo* is seen by many as a threat to long and widely held views as to

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(2000), particularly notes 2, 13, and 19 which contain citations to other books and articles addressing regulatory taking issues.

71. A spate of recent Supreme Court cases has fleshed out our regulatory takings jurisprudence in any number of ways. See Delogu, *supra* note 70, at 324-25 n.4, which lists eight recent cases. Since that article was published, the Supreme Court has handed down *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001) (sustaining plaintiff’s contention that a taking claim may be brought even though title was acquired after regulations were in place, and that the case was ripe for review, but remanding the case to Rhode Island’s courts to determine whether a regulatory taking, under the guidelines of *Penn Central*, had occurred); *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302 (2002) (rejecting plaintiff’s contention that a lengthy moratorium constituted a per se taking, but again remanding the case to lower courts to determine whether a regulatory taking under the guidelines of *Penn Central* had occurred). A similar line of case law can be found in every state; in Maine, for example, see *Seven Islands Land Co. v. Maine Land Use Regulation Commission*, 450 A.2d 475 (Me. 1982) (sustaining timber harvesting regulations in designated deer yard areas challenged as a taking—the value of timber that could not be harvested was *de minimus*); *Hall v. Board of Environmental Protection*, 528 A.2d 453 (Me. 1987) (sustaining regulations that limited building in coastal sand dune areas challenged as a taking—the developer could realize reasonable economic returns); *MC Associates v. Town of Cape Elizabeth*, 2001 ME 89, 773 A.2d 439 (sustaining the town’s wetlands ordinance challenged as a taking because the applicant did not adequately show that the lot was buildable or that the diminution in value constituted a taking).

72. Two cases cited by the *Kelo* Court (see *Kelo v. City of New London* 125 Sup. Ct. at 2661), *Missouri Pacific Railway v. Nebraska*, 164 U.S. 403 (1896) and *Calder v. Bull*, 3 U.S. 386 (1798), might have served this purpose—they each contain terse language that shores up the common understanding of private property rights in the society and the meaning of constitutional limitations designed to guard these rights. For example, the *Missouri Pacific* Court concludes by noting that “[t]he taking by a State of the private property of one person or corporation, without the owner’s consent, for the private use of another, is not due process of law, and is a violation of the Fourteenth Article of Amendment of the Constitution.” *Mo. Pac. Ry. v. Neb.*, 164 U.S. at 417. But, unlike *Pennsylvania Coal* in the area of regulatory takings, our jurisprudence has not elevated either of these cases (or any other case) to be the balance wheel of competing public and private interests in the context of eminent domain takings; and the *Kelo* Court without overruling these cases, or acknowledging that the literal language of these cases has been softened to accommodate some essential private uses growing out of eminent domain takings, simply dismisses these two cases as “impractical.” *Kelo v. City of New London*, 125 S. Ct. at 2662; *supra* note 19. The *Kelo* majority’s reasoning then moves on to its “deference” and “benefit” theories, which, as noted, simply eliminate the Fifth Amendment’s limitations on the use of eminent domain—there is not even a bow to the utility or justice of balancing competing public and private interests in condemnation settings.

the sanctity and compass of private property rights. The firestorm of protest of *Kelo* and the breadth of remedial legislative proposals to narrow the Court's holding attests to the reality, and the deep seated nature of the fears aroused by *Kelo*.<sup>73</sup> Sooner or later, these fears must be addressed, not just by the legislative arms of government, but by the Supreme Court itself.<sup>74</sup> An appropriate step for the Court to take would be to bridge, and once and for all end, the dichotomy between judicial responses to regulatory takings and judicial responses to eminent domain takings that now exists.

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73. The fears engendered by *Kelo* are not new; Maine courts, over 130 years ago, had occasion to address a series of somewhat different but similar threats to private property rights protected by constitutional limitations on legislative power that parallel the Fifth Amendment limitations examined in *Kelo*. In *Allen v. Inhabitants of Jay*, 60 Me. 124 (1872) (striking down a proposal to grant tax exemptions and lend taxpayer monies to induce industrial development in the town), the court concluded by noting that:

The constitution of the State is its paramount and binding law. The acquisition, possession, and protection of property are among the chief ends of government. To take directly or indirectly the property of individuals to loan to others for purposes of private gain and speculation against the consent of those whose money is thus loaned, would be to withdraw it from the protection of the constitution and submit it to the will of an irresponsible majority. It would be the robbery and spoliation of those whose estates, in whole or in part are thus confiscated. No surer or more effectual method could be devised to deter from accumulation—to diminish capital, to render property insecure, and thus to paralyze industry.

*Id.* at 142 (emphasis added).

One year earlier, Maine's highest court was asked by the Maine Legislature to render an advisory opinion as to whether "the legislature [has] authority under the constitution to pass laws enabling towns, by gifts of money . . . to assist individuals or corporations to establish or carry on manufacturing . . ." In *Opinion of the Justices*, 58 Me. 590, 590 (1871), the court answered NO; the court summarized its views as follows:

To give the power suggested would be to enable the majority, according to their own will and pleasure, to give, lend, and invest the capital of others . . . . *Let this be done, and the remaining rights of property would be hardly worth the preserving . . . .* [T]o take private property, not for public but for private uses, . . . [is] to undermine the very foundations upon which all good governments rest.

*Id.* at 598 (emphasis added). *Cf.* *Brewer Brick Co. v. Inhabitants of Brewer*, 62 Me. 62 (1873) (striking down non-uniform property taxation designed to benefit a particular firm as a violation of constitutional limitations).

74. It is no answer for the *Kelo* Court to invite individual states to put in place more stringent limitations on the exercise of eminent domain powers, see *supra* note 2; the states have always had this power and some states have exercised it—perhaps more will do so in the wake of *Kelo*. But this line of reasoning misses the point—the Fifth Amendment's protections and limitations are part of the Federal Constitution. It is this document, guarded by a Supreme Court with judicial review powers and responsibilities that cannot be abdicated, that was historically seen as the bulwark, the vehicle for protecting the private property rights of all citizens without regard to the state they happened to live in. As recent Supreme Court cases attest, see Delogu, *supra* notes 70-71, the protections afforded property owners faced with "regulatory takings" are not subject to the vagaries of state law—the Supreme Court has fashioned (and continues to fashion) a reasonable balance between the rights of property and the scope of police power controls. Sooner or later, *Kelo* notwithstanding, a similar balance must be struck by the Supreme Court between the rights of property and exercises of eminent domain powers. In short, it cannot be maintained that because the individual states can correct the problem (in whole or in part), the Supreme Court is free to abdicate its judicial review responsibilities with respect to eminent domain takings. This reasoning is all the more untenable given the fact that the Supreme Court has abdicated nothing in the area of "regulatory takings"—indeed it maintains a health vigil over the latter.

This paper would offer some modest suggestions with respect to the shape and content of this bridging case.

A. *A Missed Opportunity*

Obviously, the opportunity for the *Kelo* case itself to become the bridging vehicle, the case that ends the dichotomy of approach that exists in our takings jurisprudence, has passed. Many who had followed this case and this area of law had high hopes that *Kelo* would be the *Pennsylvania Coal* of eminent domain takings law. This hope was whetted by the timing of events—the Michigan court repudiated *Poletown* and its controversial rationale (that General Motor’s proposed economic revitalization, without more, justified the use of eminent domain)<sup>75</sup> after the Connecticut court’s decision in *Kelo*, but well before the Supreme Court was likely to hand down its decision in the case; this seemed a good omen. If Michigan’s highest court could reexamine and reject its own prior reasoning, then why couldn’t/shouldn’t the Supreme Court reexamine these issues anew (and put *Berman* and *Midkiff* in a more balanced posture)? But that didn’t happen—with barely a footnote reference, and without discussing or distinguishing the rationale of the case that overruled *Poletown*, *County of Wayne v. Hathcock*,<sup>76</sup> the *Kelo* majority not only embraces the reasoning that Michigan had rejected, but does so in a manner that all but eliminates the Fifth Amendment’s protections of private property in eminent domain settings.

What is most striking and inexplicable about the *Kelo* holding is the majority’s failure to recognize the fundamental differences in reasoning between *Kelo* and *Pennsylvania Coal* (a case which remains good law today and is frequently cited by the Supreme Court). For example, immediately after the *Pennsylvania Coal* passage cited above (“[g]overnment hardly could go on, etc . . . .”<sup>77</sup>)—a passage which recognized that reasonable, albeit uncompensated, diminutions of property rights were necessary and that property rights can be limited by reasonable regulation and “must yield to the police power,”<sup>78</sup>—the *Pennsylvania Coal* Court went on to recognize that any limit on property rights must itself “have its limits, or the contract and due process clauses are gone.”<sup>79</sup> In other words laudable end results sought by police power controls could not be viewed as absolute or without limit; the legislative judgment was entitled to deference, but could not be seen as inviolate; a balance between private property rights and legislatively fashioned police power controls must be struck. Striking this balance, determining whether “the legislature has gone beyond its constitutional power,”<sup>80</sup> was the duty of the court(s). More importantly, the *Pennsylvania Coal* Court saw clearly that failing to strike this balance would nullify constitutional limitations designed to protect private property rights. It was not prepared to let this happen.

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75. See *supra* note 17.

76. 684 N.W.2d 765 (Mich. 2004). See also *Kelo v. City of New London*, 125 S. Ct. 2655, 2668 n.22 (2005).

77. See text accompanying note 64.

78. *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922).

79. *Id.*

80. *Id.*

In *Kelo*, on the other hand, there are no parallel lines of reasoning, e.g., that property rights are held subject to exercise of eminent domain powers (a point that all would readily concede); but that exercise of the latter power must itself, “have its limits, or the [Fifth Amendment’s protections of private property] are gone.”<sup>81</sup> Instead, the *Kelo* majority begins by finding a laudable end, i.e., economic revitalization (analogous to the police power regulation in *Pennsylvania Coal*). But unlike the *Pennsylvania Coal* Court, the *Kelo* majority regards the legislative judgment that this end can only be achieved by the exercise of eminent domain powers as inviolate; bowing to an over-broad concept of deference, it finds no meaningful judicial role; it strikes no meaningful balance between private property rights and governmental exercise of its eminent domain powers; it does not ask whether government in this instance has gone “too far.”<sup>82</sup> In so reasoning, the *Kelo* holding does precisely what the reasoning and holding of *Pennsylvania Coal* avoided—it eviscerates constitutional limitations designed to protect private property.

Another example of fundamentally different reasoning between *Kelo* and *Pennsylvania Coal* is seen in how they approach (characterize) the possibility of governmental excess and/or errors in judgment. The *Pennsylvania Coal* Court fully recognized that those exercising the police power may allow their human nature to run away with them; they may be caught up in an excess of zeal, or simply err as to where (in a particular setting) the balance between police power controls and private property should be struck. This non-judgmental recognition of the possibility of error by government officials is noted at several points: “[w]e assume, of course, that the statute was passed upon the conviction that an exigency existed that would warrant it . . . . But the question at bottom is upon whom the loss of the changes desired should fall.”<sup>83</sup> The Court further noted:

When this seemingly absolute protection [of private property] is found to be qualified by the police power, the natural tendency of human nature is to extend the qualification more and more until at last private property disappears. But that cannot be accomplished in this way under the Constitution of the United States.<sup>84</sup>

Another oft-quoted passage makes the same point, i.e., that earnest desire may cloud judgment and may give rise to impermissible regulation; rising to the level of a “regulatory” taking that (if the underlying issue is thought to be important enough) can only be sustained by an exercise of government’s spending powers: “We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change.”<sup>85</sup> And again, determining whether “desire” or “human nature” had outrun the bounds of reasonable regulation was, under *Pennsylvania Coal*, the task of the courts; interested parties were free to “contend that the legislature had gone beyond its constitutional power,”<sup>86</sup> but it was the courts, in the course of carrying out a

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81. *Id.*

82. *Id.* at 415.

83. *See id.* at 416.

84. *Id.* at 415.

85. *Id.* at 416.

86. *Id.* at 413.

meaningful judicial review, that would finally determine whether a particular exercise of governmental regulatory power had gone “too far.”

In sharp contrast, *Kelo* does not acknowledge the possibility of governmental error in the exercise of eminent domain powers—error arising out of having gone “too far,” or stemming from “the natural tendency of human nature”<sup>87</sup> to extend the power being exercised to a point where it swallows constitutional limitations on the use of that power, or from an excess of “desire to improve the public condition . . .”<sup>88</sup> Instead, in what amounts to little more than a fraud standard, *Kelo* states the obvious: condemning A’s land for the sole purpose of conferring a private benefit on a particular private party, B, is forbidden; also forbidden is the taking of “property under the mere pretext of a public purpose . . .”<sup>89</sup> Under *Kelo*, that’s all that remains of the Fifth Amendment’s limitations on the exercise of eminent domain powers.

*Kelo* begins with the majority finding a public purpose (economic revitalization), and ends by exercising a deference that regards all other legislative judgments (except for the fraud settings noted above) as inviolate—not subject to judicial review. *Kelo*’s crabbed reasoning has fashioned a new reality in which no meaningful judicial role remains; no meaningful balance between private property rights and the exercise of eminent domain powers is capable of being struck. In short, *Kelo*’s reasoning, by failing to acknowledge even the possibility that errors of the type noted in *Pennsylvania Coal* will occur, much less that such errors when they do arise in eminent domain contexts will be redressed by the courts, has once again managed to do what *Pennsylvania Coal* avoided doing; it strips away constitutional protections intended to protect private property.

The point being made is that the two strands of our takings jurisprudence, so-called regulatory takings on one hand, and eminent domain takings on the other, are being dealt with in quite different ways. More importantly, it seems clear that the approach and reasoning of *Pennsylvania Coal*, established in the context of a challenge to police power regulation and adhered to for over eighty years in thousands of cases handed down in state and federal courts in every state in the nation, is more realistic, more pragmatic, and more faithful to fundamental principles that operate in society than is *Kelo*. It is *Pennsylvania Coal*, not *Kelo*, that recognizes that property rights (though not absolute) are entitled to stability, protection, and respect; it is *Pennsylvania Coal* that recognizes that constitutional limitations must count for something—they cannot be rendered a nullity; it is *Pennsylvania Coal* that refuses to abdicate fundamental (constitutionally predicated) judicial responsibilities, i.e., to fashion, one case at a time, a framework of law that fairly balances private property rights on one hand and legitimate public interests on the other.<sup>90</sup> *Kelo*, set in the

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87. *Id.* at 415.

88. *Id.* at 416.

89. *Kelo v. City of New London*, 125 S. Ct. at 2661.

90. Indeed, it must be recognized that *Pennsylvania Coal* (not *Kelo*) is the approach taken by the Supreme Court in every setting in which constitutionally protected private rights and/or interests are in conflict with some valid governmental interest. For example, a rich and lengthy body of case law has carefully balanced a limited range of time, place, and other restraints on otherwise unfettered First Amendment free speech rights. See, e.g., *Sec’y of State of Md. v. Joseph H. Munson, Inc.*, 467 U.S. 947, 970 (1984) (striking down as overly broad a state statute that limited the solicitation of contributions by a charitable organization); *Int’l Soc’y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 685 (1992)



context of a challenged eminent domain taking of property, could have been a parallel case to *Pennsylvania Coal* protecting the same broad values just noted, and harmonizing our jurisprudence as applied to these two strands of takings law. This harmonization would serve us well; it seems long overdue. That it has not yet happened can only be described as unfortunate—an unfortunate result arising from a combination of factors, not the least of which is the *Kelo* Court’s failure to recognize that its reasoning and approach are out of sync not only with the cases it purports to rely on, but with *Pennsylvania Coal*, (the leading regulatory taking case decided by the Supreme Court, and certainly one of the most widely cited cases in Supreme Court history).

But the issues that gave rise to the opportunity that *Kelo* represented will not go away. There will be another case, another Supreme Court that hopefully will see the dichotomy in our approach to judicial review in regulatory, as opposed to eminent domain, takings cases that needs to be bridged. In short, there will be another opportunity to strike the balances that *Kelo* failed to strike. It seems useful at this point to lay out some of characteristics and lines of reasoning that this future *Kelo*-like case can and should embrace.

#### *B. A Future Kelo-like Case*

It should be stated at the outset that a future *Kelo*-like case can and should leave intact a full, meaningful, and robust power of eminent domain. What is sought is not

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(sustaining regulations which prohibited the distribution of literature and solicitation of funds in airport terminal facilities); *Madsen v. Women’s Health Ctr., Inc.*, 512 U.S. 753, 776 (1994) (sustaining in part and striking down in part injunctions that limited the free speech rights of those who oppose abortion from exercising their rights in too close proximity to a clinic providing abortion services). In the Second Amendment area of gun ownership, a limited range of restraints designed to protect the safety of police officers and the public, and to keep guns out of the hands of those demonstrably unsuited to exercise the right of gun ownership, have been sustained, but only after carefully balancing these interests against the protected right of gun ownership. *See, e.g., Barrett v. United States*, 423 U.S. 212, 216, 225 (1976) (sustaining provisions of the Gun Control Act of 1968 which barred ownership of a weapon by a convicted felon); *United States v. Lopez*, 514 U.S. 549, 552 (1995) (striking down on Commerce Clause grounds the Gun Free School Zones Act of 1990). And again, in the area of Fourth Amendment safeguards against unwarranted searches, an extensive body of case law has emerged that has balanced and re-balanced governmental interests, often very legitimate law enforcement interests, against these privacy rights. *See, e.g., Mapp v. Ohio*, 367 U.S. 643 (1961) (protecting the privacy rights of individuals against unreasonable and unwarranted searches); *Whren v. United States*, 517 U.S. 806 (1996) (reiterating the principle that Fourth Amendment cases involve a balancing of all relevant factors, the Court sustained a search incident to a valid traffic stop).

The point being made is that in all of these areas of interface between constitutionally protected interests and governmental interests, the approach taken by *Pennsylvania Coal* is the norm. The *Kelo* approach that all but negates the constitutional protection, that fails to recognize that well-intentioned government officials may nonetheless overreach, that affords near absolute deference to the governmental interest and governmental decision making, that fails to draw prudential lines enabling a balance between the competing interests to be struck, has been rejected, rejected because it is unsound, rejected because, as the court in *Mapp* noted: “It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon.” 367 U.S. at 647 (quoting *Boyd v. United States*, 116 U.S. 616, 635 (1886)). For these reasons, if for no other, the reasoning of the *Kelo* majority must be revisited in a *Kelo*-like case of the future, a case that will do for eminent domain takings what *Pennsylvania Coal* has done for regulatory takings.

a truncating of the power of eminent domain, but an assurance that the power will be used reasonably. In the same way that the regulatory powers of government are essential, so too is the power of eminent domain. But in the same way that *Pennsylvania Coal* required regulatory powers to be used reasonably, lest they give rise to a “regulatory taking,” a future *Kelo*-like case must insist that eminent domain powers be exercised reasonably, that they be exercised in a manner that gives full meaning to existing and long-standing constitutional limitations, in a manner that balances private property rights on one hand and the legitimate needs of government on the other.

Nor does it seem particularly necessary or useful in a future *Kelo* case to embrace any type of per se rule. Per se rules assume a predictable and fixed set of conditions and factors that are unlikely to be found in settings calling for the use of eminent domain powers. Moreover, they introduce a rigidity that on occasion we will almost certainly want to circumvent. The shape of a future *Kelo* case, a case that does for eminent domain takings what *Pennsylvania Coal* did for regulatory takings, should rely on more general (more flexible) principles that define “public use” and “just compensation,” not per se rules that invite a search for exceptions and/or that become less appropriate as time passes.

It would also seem useful if a future *Kelo*-like case began by acknowledging the unfortunate dichotomy between the level of judicial scrutiny afforded regulatory takings and the level of scrutiny in eminent domain cases. Also important would be a commitment to bridging and thereby ending this dichotomy of approach by taking up Justice Kennedy’s invitation to fashion a more stringent standard of review for eminent domain takings than that announced in *Berman*, *Midkiff*, and *Kelo*. A future *Kelo*-like case can and should be cast even more broadly than Justice Kennedy suggests; it should encompass not only eminent domain takings growing out of economic revitalization programs, but eminent domain takings where the property owner makes a plausible argument that the blight/slum removal or the public use justification for the taking is pretextual, or does not strike a fair balance between the private property right and the asserted governmental interest.

In other words, if the dichotomy of approach in our takings jurisprudence is to be fully bridged, a wide range of eminent domain takings, not just those arising in the context of economic revitalization, must be subject to a type of judicial review that parallels the review afforded property owners faced with a regulatory taking; a review that parallels *Pennsylvania Coal*; a review that confesses the possibility of governmental error (going “too far”); a review that strikes reasonable balances between property rights on one hand and eminent domain powers on the other; a review that does not, in the name of deference, render Fifth Amendment (“public use”) limitations all but meaningless. In addition, a future *Kelo*-like case must not fall into the trap that the *Kelo* majority fell into—laudable “ends” (economic revitalization) do not justify the use of any “means” to achieve those “ends.” Finding a “public purpose” must not be seen as the same thing as finding that constitutional “public use” limitations have been met.

To facilitate the type of judicial review of eminent domain takings being suggested, at least in those cases where Justice Kennedy’s standard of a “plausible

accusation”<sup>91</sup> of the impermissibility of the taking is presented, our future *Kelo*-like case should shift the burden of justifying the proposed condemnation onto the governmental entity proposing use of this power. This is the same approach that was taken by the Supreme Court in *Dolan v. City of Tigard*<sup>92</sup> when regulatory exactions (requirements that a property owner relinquish title to a portion of his property) were struck down because “the city ha[d] not met its burden of demonstrating that the additional number of vehicle and bicycle trips generated by petitioner’s development reasonably relate to the city’s requirement for a dedication of the pedestrian/bicycle pathway easement.”<sup>93</sup> Embracing this approach in settings where condemnations are justifiably challenged would put eminent domain takings and regulatory takings on the same footing.

Beyond these seemingly essential characteristics and lines of reasoning that a future *Kelo*-like case should embrace, a future case would do well to recognize that the Fifth Amendment’s language is both explicit and narrower than the concepts of “public purpose” and/or “public benefit.” The Constitution says: “nor shall private property be taken for public use . . .”<sup>94</sup> It is “public use” then, that must be found as a justification for exercising the awesome power of eminent domain, as a justification for ousting one of his or her property right, not some broader, looser concept (public purpose or public benefit) that trivializes both property rights and the Fifth Amendment’s limitations.<sup>95</sup> Justice Steven’s assertion that the concept of “public use” is “impractical” and “difficult to administer”<sup>96</sup> is simply not borne out by the facts. It has been administered by state courts in almost every jurisdiction for over a century in a way that has avoided its narrowest, and a too literal, interpretation, but which at the same time has avoided an overly broad public purpose/benefit interpretation that would make the Fifth Amendment’s limitations almost meaningless.<sup>97</sup> A Supreme Court

91. *Kelo v. City of New London*, 125 S. Ct. at 2669.

92. 512 U.S. 374, 391, 395 (1994) (imposing a proportionality requirement on government exactions imposed in the course of regulating development, and shifting the burden of justifying exactions that call for relinquishing a property right onto the governmental entity).

93. *Id.* at 395.

94. U.S. CONST. amend. V.

95. The distinction between “public use” that would justify an eminent domain taking, and “public benefit” that all lawful businesses give rise to (which do not justify a taking of private property) was fully understood over a century ago. See *Ryerson v. Brown*, 35 Mich. 333 (1877) (striking down a statute that granted mill dam owners a power of eminent domain; public use requirements were not met). This distinction was clearly and exhaustively laid out by Justice Ryan in his original dissent in the *Poletown* case. *Poletown Neighborhood Council v. City of Detroit*, 304 N.W.2d 455, 472-75 (Mich. 1981). Judge Ryan’s dissent is now embraced (and further elaborated) by the full Michigan court in its over-ruling of *Poletown* in *County of Wayne v. Hathcock*, 684 N.W.2d 765 (Mich. 2004). In *County of Wayne*, note particularly Justice Young’s majority opinion at 779-83. See also *supra* notes 17 and 18.

96. *Kelo v. City of New London*, 125 S. Ct. at 2662. See also, *supra* note 19.

97. Judge Ryan’s dissent in the *Poletown* case, see *supra* note 95, gives us any number of examples of how Michigan (and other states) have proceeded. Ryan begins by acknowledging: “It is plain, of course, that condemnation of property for transfer to private corporations is not wholly proscribed.” *Poletown Neighborhood Council v. City of Detroit*, 304 N.W.2d at 476. He then turns to a range of public/private undertakings—highways, railroads, canals—he might have added, public utility rights-of-way (all of which are often privately owned), where the use of eminent domain powers has long been sanctioned because the facilities serve commerce and the general public, and without the power to condemn land they almost certainly could not exist, could not overcome the “holdout” problem. Judge Ryan next cites a half-dozen

dealing with a future *Kelo*-like case is fully capable of fashioning a similarly nuanced (and practical) approach to the concept of “public use.” In doing so, the Court would do well to keep in mind those factors (conditions/circumstances) that have moved constitutional scholars and state courts in those settings where condemnation followed by private ownership has been allowed. The primary factors, stated most recently in *County of Wayne v. Hathcock*,<sup>98</sup> include situations where “public necessity of the extreme sort . . .”<sup>99</sup> is present. The second factor noted is where “the private entity remains accountable to the public in its use of that property.”<sup>100</sup> The third factor noted is where “the selection of the land to be condemned is . . . based on . . . facts of independent public significance.”<sup>101</sup> In other words, where the land condemnation is driven by the realities of slum clearance as in *Berman*, not the needs of General Motors, as it was in the *Poletown* case, or by the aspirational economic revitalization plans of the Pfizer Corporation and/or of the New London Development Corporation as it was in *Kelo*.

Finally, a future *Kelo*-like case, should also focus on the “just compensation” aspect of the Fifth Amendment’s eminent domain taking limitations, and might well include some, or all, or an even broader range of individually small adjustments (beyond those suggested in this paper) to our usual approach in the exercise of eminent domain powers. Many, if not all, of these adjustments seem particularly appropriate in settings where the condemned land, for whatever reason, is ultimately conveyed to other private individuals or corporate entities, and/or where Justice Kennedy’s “plausible accusation” standard is met (a standard that suggests there are reasonable arguments that the condemnation is impermissible). In such settings, for example, the so-called “quick take” provisions of a federal, state, or local government’s condemnation powers might very well be deemed inapplicable.<sup>102</sup> A second step

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cases in and out of Michigan reaching back to the mid-1850’s to support his point. *Id.* He discusses the slum clearance cases in his expanded (but still limited) range of settings in which condemnation followed by private ownership is permissible. Citing *In re Slum Clearance*, 50 N.W.2d 340 (Mich. 1951), Judge Ryan notes: “It seems to us that the public purpose of slum clearance is in any event the one controlling purpose of the condemnation . . . resale . . . is not a primary purpose and is incidental and ancillary to the primary and real purpose of clearance . . . [which was] to remove slums for reasons of the health, morals, safety, and welfare of the whole community.” *Poletown Neighborhood Council v. City of Detroit*, 304 N.W.2d at 477.

98. 684 N.W.2d 765, 781-83 (Mich. 2004).

99. *Id.* at 781.

100. *Id.* at 782.

101. *Id.* at 783.

102. These provisions, *see e.g.*, ME. REV. STAT. ANN. TIT. 30-A § 5204 (1996), are designed to operate in settings where the power to take a particular property is clear; presumably the only issue to be determined, with respect to which there may be disagreement, is the level of compensation. What is “just” in the particular setting? A further presumption of such statutory provisions is that judicial proceedings can, and ultimately will, arrive at a figure that will then be paid over to the condemnee. In the interim, however, title is vested in the condemnor; the project which necessitated the condemnation will not be delayed. In settings where the power to take is not clear, however, where plausible “public use” arguments are sought to be raised by the private property owner, the operation of such statutes may be very unfair. The governmental entity that initiated the condemnation (anticipating that its right to do so will be sustained) may undertake to clear the property before the permissibility of its actions are finally determined. The property owner’s ability in such situations to obtain injunctive relief to maintain a pre-existing status quo is at best problematic. Without such relief, a condemnee whose land has been cleared, but who

(adjustment) that could be undertaken in these settings would set the “just compensation” level at 125-150 percent of the average condemnor/condemnee appraised market values. This would compensate the condemnee for many of the intangible values and costs (goodwill, the value inherent in an existing neighborhood, a variety of relocation costs, etc.) not usually covered within the concept of “just compensation” as it is traditionally applied. In other words, even in settings where we permissibly take A’s private property and it winds up in private entity B’s hands, we could soften the bad taste that this leaves by more generously (some would say more realistically) fashioning our concept of “just compensation.”<sup>103</sup>

When property held by the government (whether acquired by eminent domain or by any other means) is transferred to a private individual or corporate entity pursuant to an economic revitalization plan or to carry out any other defined industrial development project, a third adjustment that seems particularly useful would effectuate the transfer by creating what property lawyers call a “defeasible estate.”<sup>104</sup> This approach allows government to recapture the property (subject to the limits imposed by the Rule Against Perpetuities) for public use and/or benefit in the event a grantee either abandons, prematurely closes, significantly alters, or fails to deliver on promises made with respect to the plan or project—promises that both induce and justify the government’s land transfer. It must be remembered that the land transfer is made to facilitate the private project, plant, or scheme of economic revitalization; if this doesn’t

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ultimately prevails on the merits obtains nothing more than a pyrrhic victory. In short, in settings such as those laid out in the text, until a determination is made that a questioned eminent domain taking is in fact permissible, preventing the use of these (“quick take”) statutes, and/or the automatic granting of injunctions to maintain a pre-existing status-quo seems to strike a fair balance between private property rights and governmental eminent domain powers. See also William A. Fischel, *The Political Economy of Public Use in Poletown: How Federal Grants Encourage Excessive Use of Eminent Domain*, MICH. ST. L. REV. 929, 951 (2004); Gregory G. Schwab, *The Maryland Survey 2001-2002: Recent Decisions: The Court of Appeals of Maryland*, 62 MD. L. REV. 840, 847-48 (2003); Christopher A. Bauer, Comment, *Government Takings and Constitutional Guarantees: When Date of Valuation Statutes Deny Just Compensation*, BYU L. REV. 265, 286-87 (2003).

103. This idea in various forms has been recognized and/or advanced by others. See Fischel, *supra* note 102, at 950-51. A section of Fischel’s article is pointedly entitled, “Why not Enhanced Compensation in Doubtful Cases?” *Id.* at 950. He goes on to note that: “An alternative to heightened scrutiny for the enterprise-use of eminent domain is to insist on a higher level of compensation in these cases. This would have the simultaneous benefits of making recipients less unhappy with having to relocate and making the government agency think harder about whether the project was such a good idea.” *Id.* More recently, in a National Law Journal/University of Chicago roundtable that examined *Poletown* and *Kelo*, Richard Epstein noted that “every single bias in the compensation system leads to undercompensation.” *Debating Eminent Domain*, NAT’L L.J., Dec. 6, 2004, at 15. In other words, our concept of “just compensation” is less than “just.” He called for compensation that is “50% over market . . .” *Id.* at 14-15. On the issue of how “just” is our present system for fashioning “just compensation,” see R. EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* (1985). See particularly chapter 13 wherein he notes: “The central difficulty of the market value formula for . . . compensation . . . is that it denies any compensation for real but subjective values.” *Id.* at 183. See also Gideon Kanner, *Condemnation Blight: Just How Just Is Just Compensation?*, 48 NOTRE DAME LAWYER 765 (1973).

104. The choice as to whether the granting governmental entity should create a fee simple determinable, or a fee subject to a condition subsequent (and a description of the differences between these two types of defeasible estates) is beyond the scope of this paper; the matter seems best decided when the facts of a particular transfer, and the property laws of the jurisdiction (including the jurisdiction’s approach to the Rule Against Perpetuities) are known.

happen, the assembled parcel, any appreciated value, long-term future use opportunities, etc., should all revert to the government; they should not accrue as a windfall to the defaulting grantee.<sup>105</sup> Alternatively, a carefully conditioned long-term lease of the property (instead of a transfer in fee) could be fashioned; or the transferring governmental entity could reserve a right of first refusal (at a nominal price)<sup>106</sup> should the grantee, at a later date, seek to sell the transferred property. Again, the purpose here is to protect as fully as possible the long-term interests of the government with respect to transferred land, not the interests of a defaulting private grantee.

Two last, relatively minor, adjustments in the use of eminent domain in settings where the economic revitalization requires the transfer of A's property to B, include first, defining the time frame within which the grantee must commence utilization of the property; something on the order of three to five years would seem appropriate. Anything longer suggests that the revitalization scheme is problematic at best, speculative at worst, and in either case, does not justify the condemnation of A's private property. Second, a further step that could be taken would enable (whenever possible) those whose land was purchased or condemned to facilitate revitalization to have the option of relocating back to the project site or revitalized area. Obviously, if homes are condemned and an office block or factory is put in place, this is not possible. But when revitalization schemes (as in *Kelo*) contemplate a range of mixed uses, there may well be some homeowners and small businesses that would welcome the opportunity to return to the revitalized area. This option should be available and could even be provided at below market rates as a quid pro quo, particularly for those who are forced to relocate by government condemnation.

### C. Conclusions

The fact that our takings jurisprudence has two quite separate strands—so-called “regulatory” takings and “eminent domain” takings seems self-evident; it also seems beyond debate that the “regulatory” taking strand, at least since *Pennsylvania Coal*, has been subject to continuous judicial scrutiny (in both state and federal courts) that has sought to strike reasonable balances between private property rights on one hand and legitimate police power controls on the other—to answer, and give meaning to the ubiquitous question—when does a regulation go “too far.” At the same time the “eminent domain” strand of our takings jurisprudence has succumbed to a line of reasoning said to begin with *Fallbrook Irrigation District v. Bradley*,<sup>107</sup> but more

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105. In the *Poletown* case, for example, the City of Detroit assembled and transferred 465 acres of densely settled urban land that was subsequently cleared to facilitate the building of a General Motors' assembly plant. GM, however, never realized either the employment levels, or the satellite plant development that it promised to the City. See Corsetti, *Poletown Revisited*, Counter Punch (weekend ed. Sept. 18/19, 2004). If, and when, this plant is closed and GM looks to sell or lease some or all of the plant site and/or the buildings on the site, the recapture provision suggested should be triggered. Failed economic revitalization schemes should not accrue benefits to the private entity that obtained the condemned land; these benefits belong to the public, to the governmental entity that initially condemned the land.

106. “Nominal price” could be defined as the original sale price, adjusted by the Consumer Price Index, or current market value, whichever is lower.

107. 164 U.S. 112 (1896) (sustaining a condemnation for an irrigation ditch in language that associated public use with public purpose). But Justice Thomas in his *Kelo* dissent quite correctly points out that the language was dictum; the reality was that the law underlying the irrigation project provided that “[a]ll

recently derives from *Berman*, *Midkiff*, and now *Kelo*, that imposes a shrinking level of judicial review on challenged “eminent domain” takings by elevating the principle of “deference” to legislative judgment to a point where it becomes an insurmountable barrier to meaningful review, by equating public benefit and/or public purpose, with public use, and by adopting an analytic approach that accepts the view that the “ends” justify the “means.” The net result is that in eminent domain settings no balance is struck between private property rights on one hand and the exercise of condemnation powers on the other. The exercise of eminent domain powers by any governmental entity is all but unassailable—the Fifth Amendment’s protections (of private property) and limitations (on governmental power) are eviscerated.

*Kelo* was a case where the unfortunate consequences of this dichotomy of approach between the two strands of our takings jurisprudence could have been ameliorated, at least to some degree. It was a case which lent itself to the fashioning of prudential (more balanced) lines of analysis and reasoning in settings where the use of eminent domain is challenged—analysis and reasoning akin to that fashioned by *Pennsylvania Coal* in settings where a “regulatory taking” is said to have occurred. But, obviously, this did not happen.

*Kelo* is now a part of the fabric of “eminent domain” takings law—it is part of the problem. At the same time its flawed reasoning, its very excess, the threat it poses to long-standing concepts of private property has reverberated throughout the land. As noted at the outset, the end of these reverberations is not yet in sight. Nowhere have the flaws, the excess, and the threats to private property been more succinctly stated than by Michigan’s highest court in *County of Wayne v. Hathcock* (the case that overruled *Poletown*).<sup>108</sup> Judge Young, speaking for a unanimous court, noted:

*Poletown*’s [and *Kelo*’s] “economic benefit” rationale would validate practically any exercise of the power of eminent domain on behalf of a private entity. After all, if one’s ownership of private property is forever subject to the government’s determination that another private party would put one’s land to a better use, then the ownership of real property is perpetually threatened by the expansion plans of any large discount retailer, “megastore,” or the like. Indeed, it is for precisely this reason that this Court has approved the transfer of condemned property to private entities only when certain other conditions—those identified in . . . Justice Ryan’s *Poletown* dissent—are present.<sup>109</sup>

In sum, the flawed reasoning, the excess, the threat to private property that *Kelo* represents will almost certainly produce a series of legislative corrections in any number of states, perhaps even at the federal level. There will also be another case—a

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landowners in the district have the right to a proportionate share of the water.” *Kelo v. City of New London*, 125 S. Ct. 2655, 2683 (2005) (Thomas, J., dissenting) (quoting *Fallbrook Irrigation Dist. v. Bradley*, 164 U.S. at 162). Thus, in *Fallbrook* there was an actual meeting of the “public use” requirement which the Fifth Amendment imposes. *Id.*

108. 684 N.W.2d 765 (Mich. 2004). The timing of these events could hardly be more ironic. The *Kelo* majority (implicitly, if not explicitly) embraces fully the rationale of *Poletown* less than a year after Michigan’s highest court (the original authors of *Poletown*) rejected it completely. With Justice Cooley’s, Justice Ryan’s, and Justice Young’s logic staring them in the face, one had reason to hope for more from the *Kelo* majority.

109. *Id.* at 786.

future *Kelo*-like case that will be heard by a different Supreme Court, hopefully by a Court prepared to find that an exercise of eminent domain power may go “too far” in the same sense that regulation may go “too far”—a Court prepared to strike a better, a more fair, and more reasoned balance between the rights of private property on one hand and the power of eminent domain on the other. For the well-being of the nation, one hopes that such a case and such a Court will meet shortly.