
NOTE

Kelo v. City of New London: A Perspective on Economic Freedoms

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INTRODUCTION

Consider the dilemma: General Motors, a Fortune 500 company, threatens to relocate its manufacturing operations unless the city provides property for a new plant site.¹ City officials become concerned about the potential loss of tax revenue and 6000 jobs, should GM leave town.² To induce the company to stay, the city acquires the property GM desires to build its plant.³ The problem? The city obtained the property by displacing 4200 permanent residents from their privately owned homes.⁴

These facts formed the basis of a well-known 1981 Michigan Supreme Court decision, *Poletown Neighborhood Council v. City of Detroit*.⁵ In *Poletown*, the court upheld the City's authority to take private homeowners' property and transfer it to GM.⁶ Detroit city planners expected GM's new \$500 million automotive assembly plant to provide employment growth and revitalize Detroit's economic base.⁷ The Michigan court determined that such economic benefits constituted a "public use," one of the constitutional parameters under which government may take private property.⁸ Under the

¹ This hypothetical was adapted from the facts of *Poletown Neighborhood Council v. City of Detroit*, 304 N.W.2d 455, 465-71 (Mich. 1981), *overruled by* County of Wayne v. Hathcock, 684 N.W.2d 765 (Mich. 2004); *see also* Thomas W. Merrill, *The Economics of Public Use*, 72 CORNELL L. REV. 61, 61-62 (1986) (describing facts of *Poletown*).

² *Poletown*, 304 N.W.2d at 467.

³ *Id.* at 460-61.

⁴ *See* Jack Anderson, *What's Good for GM Not Good for Town*, WASH. POST, Apr. 4, 1981, at E47; William Safire, *Poletown Wrecker's Ball*, N.Y. TIMES, Apr. 30, 1981, at A31; Ilya Somin, *Poletown Decision Did Not Create Desired Benefits*, DETROIT NEWS, Aug. 8, 2004, at 13A.

⁵ *Poletown*, 304 N.W.2d at 455.

⁶ *Id.* at 459-60.

⁷ *Id.* at 459, 467-68 (referencing Letter from Thomas A. Murphy, Chairman, Gen. Motors, to Honorable Coleman A. Young, Chairman, Econ. Dev. Corp. of City of Detroit, and Howard Woods, Chairman, Econ. Dev. Corp. of City of Hamtramck (Oct. 8, 1980), confirming expectation to retain 6000 jobs and revitalize local communities).

⁸ *Poletown*, 304 N.W.2d at 457, 459; *see* U.S. CONST. amend. V, cl. 4; *Poletown*, 304 N.W.2d at 459-60; Jacob G. Hornberger, *The Bill of Rights: Eminent Domain*, FREEDOM DAILY, Dec. 2004, at 1, *available at* <http://www.fff.org/freedom/fd0412a.pdf>; *see also* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 615-16, 637 (2002) (describing government's ability to take private property as long as taking for public use and paying just compensation to owner).

constitutional power known as “eminent domain,” governments have authority to take private property with just compensation when necessary to provide for general public needs.⁹ The process of acquiring property in this manner is referred to as a “taking.”¹⁰

The *Poletown* decision represents one of several rulings in recent decades where courts have deferred to local governments’ definitions of public use.¹¹ Courts have upheld a wide variety of municipal actions as qualified public uses.¹² When the Supreme Court granted

⁹ See *Kohl v. United States*, 91 U.S. 367, 372-73 (1875) (upholding Congress’s power to take property within state boundaries under Constitution’s Necessary and Proper Clause, and implying recognition of its power within Fifth Amendment); CHEMERINSKY, *supra* note 8, at 615-16 (noting inherent government power of eminent domain); Lawrence Berger, *The Public Use Requirement in Eminent Domain*, 57 OR. L. REV. 203, 204 (1978) (describing historical right of sovereign to take private property as dating back to Roman times); see also BLACK’S LAW DICTIONARY 562 (8th ed. 1999) (defining “eminent domain” as inherent power of governmental entity to take privately owned property, particularly land, and convert it to public use, subject to reasonable compensation for taking). The concept of eminent domain originated with seventeenth century treatise writers. See HUGO GROTIUS, 2 THE LAW OF WAR AND PEACE ch. XIV, § 7 (Louise R. Loomis trans., Walter J. Black, Inc. 1949) (1625) (explaining that sovereigns may take property from their subjects through eminent domain as long as public welfare requires it and compensation is made). Eminent domain power was not to be used arbitrarily. THOMAS RUTHERFORTH, 2 INSTITUTES OF NATURAL LAW 48 (Cambridge, J. Bentham 1756) (arguing that eminent domain does not allow taking individual property from owners without cause). Early writers, including William Blackstone, emphasized individual rights, thus narrowly construing governments’ eminent domain power within specific public use limitations. WILLIAM BLACKSTONE, 1 COMMENTARIES *134-35 (regarding private property as “[t]he third absolute right” which state could only take through eminent domain if state received property); see also Arden Reed Pathak, Comment, *The Public Use Doctrine: In Search of a Limitation on the Exercise of Eminent Domain for the Purpose of Economic Development*, 35 CUMB. L. REV. 177, 177-78 (2004) (defining “eminent domain” and its presence in American history since colonial times).

¹⁰ BLACK’S LAW DICTIONARY, *supra* note 9, at 1493.

¹¹ See Roy Whitehead, Jr. & Lu Hardin, *Government Theft: The Taking of Private Property to Benefit the Favored Few*, 15 GEO. MASON U. CIV. RTS. L.J. 81, 85-89 (2004) (describing cases since 1954 which have embraced broader understandings of public use than understood by Fifth Amendment drafters).

¹² See, e.g., *Bugryn v. Bristol*, 774 A.2d 1042, 1049 (Conn. App. Ct. 2001) (taking homes and farm of four owners to give to industrial park); *Kansas ex rel. Tomasic v. Wyandotte County*, 962 P.2d 543, 553-54 (Kan. 1998) (authorizing NASCAR racetrack as public use); *Minneapolis Cmty. Dev. Agency v. Opus Nw.*, 582 N.W.2d 596, 598 (Minn. Ct. App. 1998) (upholding public use of retail and parking space). See generally DANA BERLINER, PUBLIC POWER, PRIVATE GAIN: A FIVE-YEAR, STATE-BY-STATE REPORT EXAMINING THE ABUSE OF EMINENT DOMAIN 1-9 (2003), available at http://www.castlecoalition.org/pdf/report/ED_report.pdf (describing accounts of takings for economic development).

certiorari in its most recent eminent domain case, *Kelo v. City of New London*,¹³ many anticipated the Court would restrict economic development as an invalid public use.¹⁴ In *Kelo*, however, the Court failed to provide such a limitation.¹⁵ Instead, *Kelo* became the first Supreme Court decision supporting a government's right to acquire private property solely for economic advantage.¹⁶

This Note argues that the *Kelo* Court's holding undermines sound economic and constitutional principles by diminishing the Fifth Amendment's public use limitation, thereby expanding eminent domain authority.¹⁷ Part I provides the legal and economic history of property right protections.¹⁸ It first reviews constitutional property protections with specific focus on the Founders' intent.¹⁹ Then, Part I covers case law over two distinct historical periods — America's founding through the Industrial Revolution, and the twentieth century to the present — noting the economic environment during each era.²⁰

¹³ See 545 U.S. 469, 472 (2005) (presenting question before Court as "whether the city's proposed disposition of this property qualifies as a 'public use' within the meaning of the Takings Clause of the Fifth Amendment to the Constitution").

¹⁴ See Adam Mossoff, *The Death of Poletown: The Future of Eminent Domain and Urban Development After County of Wayne v. Hathcock*, 2004 MICH. ST. L. REV. 837, 844 (conjecturing Supreme Court's willingness to revisit demise of public use requirement); Whitehead & Hardin, *supra* note 11, at 102 (commenting on Supreme Court's opportunity in *Kelo* to unequivocally define public use, and noting its significance in protecting private property rights); Pathak, *supra* note 9, at 199-203 (describing Supreme Court's opportunity in *Kelo* to clarify and standardize whether economic development constitutes public use).

¹⁵ See *Kelo*, 545 U.S. at 492-93; The Claremont Institute, *Kelo in California: The Property Rights Counterrevolution* (June 29, 2005), <http://www.claremont.org/projects/pageid.2030/default.asp> (describing that Supreme Court's decision in *Kelo* resulted in continuing and expanding redevelopment abuse).

¹⁶ *Kelo*, 545 U.S. 469; see Web Release, Inst. for Justice, Homeowners Lose Eminent Domain Case (June 23, 2005), http://www.ij.org/private_property/connecticut/6_23_05pr.html [hereinafter Homeowners Lose] (stating current ruling now allows government to use eminent domain to take homes to enable business to generate greater revenue from land); cf. *High Court Expands Reach of Eminent Domain*, FOX NEWS, June 23, 2005, <http://www.foxnews.com/story/0,2933,160479,00.html> (quoting Justice O'Connor stating that *Kelo* now gives local government broad power to seize property to benefit another private party); *Homes May Be "Taken" for Private Projects*, MSNBC, June 23, 2005, <http://www.msnbc.msn.com/id/8331097/> (reporting governments may take homes and businesses against owners' will for private economic development).

¹⁷ See discussion *infra* Part III.

¹⁸ See discussion *infra* Part I.

¹⁹ See discussion *infra* Part I.A.

²⁰ See discussion *infra* Part I.B.

Part II introduces the facts, holding, and rationale of the *Kelo* decision.²¹ Part III argues that expanding the public use limitation to cover pure economic development threatens economic freedoms and national prosperity.²² First, the *Kelo* Court failed to apply a heightened standard of review as called for in cases involving fundamental constitutional rights, particularly those rights implicating minority interests.²³ Second, the *Kelo* Court failed to uphold the Founders' intent to protect a free society through private property rights.²⁴ Finally, the *Kelo* decision endangers wealth creation by increasing uncertainty, decreasing private investment, and adding unnecessary societal cost without certain public benefit.²⁵ This Note argues that the *Kelo* Court's holding erodes fundamental principles essential to America's economic freedoms and prosperity.²⁶

I. BACKGROUND

The American Founders who drafted the Constitution were deeply concerned with protecting the freedom to acquire, develop, and profit from private land ownership.²⁷ Influenced by John Locke and Adam Smith's ideas of wealth, property, and government, the Founders believed property rights were essential to securing individual

²¹ See discussion *infra* Part II.

²² See discussion *infra* Part III.

²³ See discussion *infra* Part III.A.

²⁴ See discussion *infra* Part III.B.

²⁵ See discussion *infra* Part III.C.

²⁶ See discussion *infra* Part III.C.

²⁷ See THE FEDERALIST NO. 54, at 372 (James Madison) (Benjamin Fletcher Wright ed., 1961). Madison, the Fifth Amendment author who added the Takings Clause, stated that the purpose of government is no less for protecting property than individuals. *Id.*; see ALEXANDER HAMILTON, *The Defence of the Funding System (July 1795)*, in 19 THE PAPERS OF ALEXANDER HAMILTON: JULY 1795-DECEMBER 1795, at 1, 52 (Harold C. Syrett ed., 1961) (describing preservation of property as social compact's primary object); *Letter from Thomas Jefferson to Joseph Milligan (Apr. 6, 1816)*, in 14 THE WRITINGS OF THOMAS JEFFERSON 456, 466 (Albert E. Bergh ed., 1905) (writing that first principle of association is to guarantee free exercise of industry and its fruits); see also THOMAS G. WEST, VINDICATING THE FOUNDERS: RACE, SEX, CLASS, AND JUSTICE IN THE ORIGINS OF AMERICA 37-39 (1997) (describing Founders' understanding that liberty "protect[s] the exertions of talent and industry" as described in various founding era writings); Eric R. Claeys, *Public-Use Limitations and Natural Property Rights*, 2004 MICH. ST. L. REV. 877, 887-88 (describing natural property rights theory as understood by James Wilson and other Founders).

freedoms.²⁸ While acknowledging the need for eminent domain authority, the Founders aimed to protect property from abusive government power.²⁹ The overall prosperity Americans enjoy arose from favorable economic conditions that flourished as a result of the Founders' foresight.³⁰ Market conditions such as unfettered private

²⁸ See, e.g., JOHN ADAMS, *Discourses on Davila* (1790), in 6 THE WORKS OF JOHN ADAMS 280 (Charles Francis Adams ed., 1851) (stating liberty cannot exist without secure property rights); James Madison, *Property* (Mar. 29, 1792), in 1 THE FOUNDERS' CONSTITUTION 598 (Philip B. Kurland & Ralph Lerner eds., 1987) (describing property as embracing everything people value and have rights to, and stating that government was created to protect those rights and values); Noah Webster, *An Examination into the Leading Principles of the Federal Constitution* (Oct. 10, 1787), in 1 THE FOUNDERS' CONSTITUTION, *supra*, at 597 (advocating that property is basis of freedom); see also RICHARD EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* 16 (1985) (establishing that Locke's theories of government and property right protections were dominant when Founders adopted Constitution). The Founders' views mirrored those of John Locke, whose principles of government and wealth creation identified labor as the primary source of a society's wealth creation. JOHN LOCKE, *TWO TREATISES OF GOVERNMENT* § 37 (Peter Laslett ed., Cambridge Univ. Press 1988) (1690). Locke believed government owed an obligation to its citizens to protect property through its laws. *Id.* § 42. Adam Smith, another of the Founders' contemporaries, maintained that the principal design of government is to maintain justice through securing property rights. Adam Smith, *First Lecture of Jurisprudence* (Dec. 24, 1762), in *LECTURES ON JURISPRUDENCE* 5 (R.L. Meek, D.D. Raphael & P.G. Stein eds., 1978). See generally David Bernstein, *Equal Protection for Economic Liberty: Is the Court Ready?* (Oct. 5, 1992), http://www.cato.org/pub_display.php?pub_id=1041&full=1 (describing Founders' ideas on property rights disseminating from Locke's *Second Treatise*).

²⁹ See THE FEDERALIST NO. 51 (James Madison), *supra* note 27, at 356 (stating controls on governments were necessary to protect against abuses which might arise purely due to human nature); see also Brief of Amicus Curiae The Claremont Inst. Ctr. for Constitutional Jurisprudence in Support of Petitioners at 22, *Kelo v. City of New London*, 545 U.S. 469 (2005) (No. 04-108), available at 2004 WL 2802971 [hereinafter *Kelo* Brief] (stating Founders set public use guarantees to limit monarchical conception of eminent domain); Derek Werner, Note, *The Public Use Clause, Common Sense and Takings*, 10 B.U. PUB. INT. L.J. 335, 347-48 (2001) (describing Founders' concern that government officials would, given their human nature, misuse their takings power); Hornberger, *supra* note 8, at 1 (describing critical importance of Founders' enactment of Fifth Amendment to protect property from government assault).

³⁰ See Ana Isabel Eiras, *The Fiscal Burden of Government Is Undercutting U.S. Competitiveness* (Jan. 4, 2006), <http://www.heritage.org/Research/TradeandForeignAid/bg1906.cfm> (describing elements required for wealth creation and noting that America has exemplified these principles for many decades); cf. WEST, *supra* note 27, at 44 (commenting that Locke would not be surprised at twentieth century conveniences that resulted from Americans applying labor within secure property rights structure). See generally BRIAN GRIFFITHS, *THE CREATION OF WEALTH* 30-34 (1984) (discussing

investment, limited government, and private property protections contributed to America's remarkable historic economic growth.³¹ This section reviews the constitutional protections established to support this growth, as well as eminent domain case law from America's founding to the present.³²

A. Constitutional Protection of Property Rights

The Founders enumerated private property protections within the Bill of Rights in what is commonly known as the Takings Clause.³³ Under the Fifth Amendment, government may not take a person's property through eminent domain without due process of law.³⁴ The Amendment establishes two additional conditions restricting government's eminent domain power.³⁵ First, government can take private property only for public use.³⁶ Second, government must justly compensate the owner for any property it takes.³⁷ Through the Fourteenth Amendment, the Constitution applies the same restrictions to prevent state governments from unfairly violating their citizens' property rights.³⁸

factors conducive to wealth creation and noting successes in Western nations relative to third world countries).

³¹ See GRIFFITHS, *supra* note 30, at 25-27 (discussing wealth creation within market economies, characterized by entrepreneurial investment and property rights); *id.* at 31-34 (explaining that ownership, functioning markets, and political stability historically promote wealth creation); Eiras, *supra* note 30, at 1; MARC A. MILES ET AL., 2006 INDEX OF ECONOMIC FREEDOM 1, 393-95 (2005) (reporting various factors contributing to United States' current economic wealth compared to 160 other countries).

³² See discussion *infra* Part I.A-B.

³³ U.S. CONST. amend. V., cl. 4. Referred to as the Takings Clause, clause four of the Fifth Amendment states: "[N]or shall private property be taken for public use, without just compensation." *Id.*

³⁴ *Id.*; see also Hornberger, *supra* note 8, at 1 (describing Fifth Amendment's principle that government taking of private property must follow due process requirements of notice and hearing).

³⁵ U.S. CONST. amend. V, cl. 4; Hornberger, *supra* note 8, at 1.

³⁶ U.S. CONST. amend. V, cl. 4.

³⁷ *Id.*

³⁸ U.S. CONST. amend. XIV, § 1 ("No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States . . ."); see *Chi., Burlington & Quincy R.R. v. Chicago*, 166 U.S. 226, 234, 241 (1897) (representing first Supreme Court decision following Fourteenth Amendment's ratification to hold that Due Process Clause protects property owners from unconstitutional takings by state governments); Pathak, *supra* note 9, at 182

The Founders believed that the government's central purpose was to preserve economic and property rights.³⁹ They understood differing factions would exist between those who own property and those who do not.⁴⁰ To regulate varied societal interests and to prevent minority factions from gaining control, the Founders established the legislature to enact laws for the public good.⁴¹ They empowered the judiciary to review legislative action in order to ensure constitutional rights remained secure.⁴²

Though governed by the Fourteenth Amendment, states have adopted their own constitutional limitations on eminent domain, some of which provide even greater protection for individual rights.⁴³ At

(discussing due process requirements applied to states through Fourteenth Amendment).

³⁹ See, e.g., THE FEDERALIST NO. 10 (James Madison), *supra* note 27, at 130-31 (asserting that protection of individual means to acquire property represents government's primary objective); 1 RECORDS OF THE FEDERAL CONVENTION OF 1787, at 533 (Max Farrand ed., 1966) (statement of Governor Morris) (declaring that property was main object of society and government); LAURENCE TRIBE, AMERICAN CONSTITUTIONAL LAW 1373 n.1 (2d ed. 1988); see also Bernstein, *supra* note 28 (discussing Founders' view that private property was essence of personal liberty); cf. discussion *infra* Part I.A (discussing early Supreme Court decisions that reflected Founders' concern for economic liberty and property rights).

⁴⁰ See THE FEDERALIST NO. 10 (James Madison), *supra* note 27, at 131 (discussing different interests property owners and non-owners would have, requiring government oversight to maintain societal balance).

⁴¹ See *id.* at 132, 135.

⁴² See THE FEDERALIST NO. 78 (Alexander Hamilton), *supra* note 27, at 491 (stating that courts of justice are obligated to declare any legislative acts void that are contrary to Constitution's intent); *accord* Marbury v. Madison, 5 U.S. 137 (1803) (establishing judicial review); *Courtesy Sandwich Shop, Inc. v. Port of N.Y. Auth.*, 12 N.Y.2d 379, 398, *appeal dismissed*, 375 U.S. 78 (1963) (per curiam) (Van Voorhis, J., dissenting) (asserting function of courts is to give effect to state and federal constitutions and to enforce limitations against taking property by eminent domain except for public purposes).

⁴³ See 13 RICHARD R. POWELL, POWELL ON REAL PROPERTY § 79F.01(a)(iii) (1968) (noting that every state constitution contains public use requirements, except North Carolina, where courts have still held that public use requirements apply though unstated); cf. Pathak, *supra* note 9, at 182 (describing judicial encouragement for states to develop protections beyond federal constitutional requirements). State constitutional provisions utilize the same, or similar, "public use" phrase, generally without additional description or clarification. See, e.g., CAL. CONST. art. I, § 19 ("Private property may be taken . . . for public use only when just compensation . . . has first been paid to . . . the owner."); CONN. CONST. art. I, § 11 ("The property of no person shall be taken for public use, without just compensation therefor."); MICH. CONST. art. 10, § 2 ("[P]rivate property shall not be taken for public use without just compensation . . ."); N.Y. CONST. art. I, § 7(a) ("Private property shall not be taken

times, though, local governments have adopted laws permitting actions that seem to conflict with the plain state or federal constitutional meaning.⁴⁴ Along the way, state and federal courts provide judicial interpretations of permissible eminent domain use through attempts to reconcile constitutionally protected property rights with local legislative authority.⁴⁵

B. *Eminent Domain Case Law from America's Founding to Kelo*

Courts have struggled to consistently apply the public use restriction on government takings since the Founders drafted the Bill of Rights.⁴⁶ Reviewing Supreme Court eminent domain decisions over our nation's history reveals a growing departure from a literal interpretation of the Fifth Amendment public use limitation.⁴⁷ This section examines Supreme Court holdings over two distinct historical periods: from America's Founding through the Industrial Revolution,

for public use without just compensation.”); TEX. CONST. art. I, § 17 (“No person’s property shall be taken . . . or applied to public use without adequate compensation being made, unless by the consent of such person . . .”). New York is one exception, as its provision states that drainage of a swamp or agricultural land is a public use. N.Y. CONST. art. I, § 7(a). This is one example of a state providing additional definition for a particular public use. *Id.*

⁴⁴ For example, CONN. GEN. STAT. § 8-186 (2004) states that Connecticut’s economic welfare depends upon continued business growth; that acquisition and improvement of land to meet needs should follow local, regional, and state planning objectives; and that since such acquisition often cannot efficiently take place through private enterprise, local government intervention may be legislatively determined. *See also* MICH. COMP. LAWS §§ 45.515(c), 213.23 (stating that home rule powers and job creation are public purposes within state’s authority).

⁴⁵ *See* discussion *infra* Part I.B (describing judicial decisions defining public use restrictions).

⁴⁶ *See, e.g.,* *Berman v. Parker*, 348 U.S. 26, 31-32 (1954) (discussing whether removing blighted areas constitutes public use); *Strickley v. Highland Boy Gold Mining Co.*, 200 U.S. 527, 531 (1906) (discussing whether public use limitation should encompass public purpose of mine’s aerial line crossing private land); *Beekman v. Saratoga & Schenectady R.R. Co.*, 3 Paige Ch. 45 (N.Y. Ch. 1831) (determining whether privately owned railroad fulfilled public use).

⁴⁷ *See, e.g.,* *Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229, 230 (1984) (granting broad deference to legislature to determine whether breaking land oligopoly was valid public purpose); *Clark v. Nash*, 198 U.S. 361, 369 (1905) (defining land irrigation needs as public use); *Kohl v. United States*, 91 U.S. 367, 371 (1875) (defining only certain public and military facilities as public uses); *Van Horne’s Lessee v. Dorrance*, 2 U.S. (2 Dall.) 304, 310 (1795) (ruling laws unconstitutional that redirected property ownership between private parties).

and the twentieth century to the present.⁴⁸

1. Early Supreme Court Decisions Through the Industrial Revolution: A Strict Public Use Limitation

In its decisions prior to the Fifth Amendment's ratification, the Supreme Court held that governments violated the Constitution when they took private property for another's private use.⁴⁹ Cases following ratification narrowly interpreted the public use limitation.⁵⁰ During this period, the Court demonstrated judicial agreement with the Founders' limitations on government's ability to acquire private property.⁵¹

As the nation expanded, the economy required a vibrant

⁴⁸ See discussion *infra* Part I.B.

⁴⁹ See *Fletcher v. Peck*, 10 U.S. (6 Cranch.) 87, 135 (1810) (noting that legislative power to take property may be inherently limited by principles of free society and government); *Van Horne's Lessee*, 2 U.S. at 304 (holding that laws which redirect property to another without rightful claim are unconstitutional). Justice Chase eloquently described the Court's early view:

An ACT of the Legislature (for I cannot call it a law) contrary to the great first principles of the social compact, cannot be considered a rightful exercise of legislative authority . . . a law that takes property from A and gives it to B: It is against all reason and justice, for a people to entrust a Legislature with SUCH powers . . . it cannot be presumed that they have done it.

Calder v. Bull, 3 U.S. (3 Dall.) 386, 388 (1798).

⁵⁰ See *Kohl*, 91 U.S. at 371 (citing acceptable public uses as including, among others, forts, armories, naval yards, lighthouses, post offices, and courthouses); JOHN LEWIS, 1 A TREATISE ON THE LAW OF EMINENT DOMAIN §§ 168-77 (2d ed. 1900) (describing public uses for which eminent domain was justified in early decisions); Berger, *supra* note 9, at 205 (describing Court's narrow interpretation of public use limitation); cases cited *supra* note 49.

⁵¹ See, e.g., *Wilkinson v. Leland*, 27 U.S. (2 Pet.) 627, 657 (1829); *Fletcher*, 10 U.S. (6 Cranch.) at 135; *Calder*, 3 U.S. (3 Dall.) at 388; *Van Horne's Lessee*, 2 U.S. (2 Dall.) at 304 (explaining theories behind public use restrictions as part of "social compact" between government and citizens, whereby governments secure citizens' property rights, while citizens could be required to contribute appropriate portions for public use provided they receive just compensation). See generally *Kelo* Brief, *supra* note 29, at 14-16 (advocating that Justice Patterson's opinion in *Van Horne's Lessee* best explains how early Americans understood public use limitation on government property acquisitions); Bernstein, *supra* note 28 (noting early judicial decisions were based on fundamental constitutional principles protecting economic liberty and property rights).

infrastructure to facilitate growth and efficiency.⁵² The legal environment of the late 1800s fostered the Industrial Revolution by strongly upholding private property rights and free market incentives, which in turn stimulated commerce.⁵³ During this period, courts balanced individual property rights with the public benefits provided by industrial expansion.⁵⁴

While effectively expanding the public use limitation to new and growing public needs, courts scrutinized cases carefully to ensure takings remained consistent with Fifth Amendment property right protections.⁵⁵ Courts held that taken property was subject to at least one of two limitations.⁵⁶ The government must maintain ownership of the property and use it for actual public benefit, such as for municipal buildings or military bases.⁵⁷ Alternatively, courts permitted private

⁵² See Berger, *supra* note 9, at 206-08 (describing need for mills, roads, railroads, and other instrumentalities of commerce); Philip Nichols, Jr., *The Meaning of Public Use in the Law of Eminent Domain*, 20 B.U. L. REV. 615, 617 (1940) (describing use of eminent domain to build roads and mills, as considered necessary for nation's development); cf. LEWIS, *supra* note 50, §§ 166-85 (citing numerous state court eminent domain cases dealing with various infrastructure needs).

⁵³ See GRIFFITHS, *supra* note 30, at 25 (explaining that Industrial Revolution took place in environment characterized by widespread private property rights and free markets); see also Berger, *supra* note 9, at 208 (describing court's holding to narrow interpretation of public use so as to ensure industrial growth and power supply needs would not permit unlimited private property invasions).

⁵⁴ See, e.g., *Strickley v. Highland Boy Gold Mining Co.*, 200 U.S. 527 (1906) (upholding mining company's use of line over land it did not own to transport ore); *Fallbrook Irrigation Dist. v. Bradley*, 164 U.S. 112 (1896) (upholding local irrigation laws and assessment fees); *Bloodgood v. Mohawk & Hudson R.R. Co.*, 18 Wend. 9 (N.Y. 1837) (upholding railroad's statutory authority to take private property for public use of railroad construction). See generally LEWIS, *supra* note 50, §§ 166-85 (discussing public use definition as covering needs of expanding industry).

⁵⁵ See *Strickley*, 200 U.S. at 531-32 (holding aerial line between mines and railroad constituted common carrier use rather than strictly private ownership); see also *Boyd v. United States*, 116 U.S. 616, 635 (1886) (noting duty of courts is to protect citizens' constitutional rights against encroachments, while liberally construing constitutional provisions); Berger, *supra* note 9, at 206-07 (describing instrumentality of commerce exception which applied to early mill acts, allowing upstream property to be flooded to facilitate downstream grain processing).

⁵⁶ See, e.g., *United States v. Gettysburg Elec. Ry. Co.*, 160 U.S. 668, 680 (1896) (allowing government to take land for its ownership and operation); *Beekman v. Saratoga & Schenectady R.R. Co.*, 3 Paige Ch. 45 (N.Y. Ch. 1831) (allowing eminent domain to acquire property for private railroad that would remain open to public as common carrier).

⁵⁷ See, e.g., *Gettysburg Elec. Ry. Co.*, 160 U.S. at 680 (upholding U.S. government's taking of private property for public battlefield memorial); *Kohl v. United States*, 91

parties to own taken property when the property would be used and regulated as a common carrier, such as a railroad or highway, allowing unlimited public access to the land and its services.⁵⁸ If a taking did not meet one of these criteria, courts found the taking to be for private use and thus unconstitutional.⁵⁹ This method of determining public use held until the early twentieth century.⁶⁰

2. Supreme Court Decisions from the Twentieth Century to Present: Expanding the Public Use Definition Under a Deferential Standard of Review

Legal realists during the early twentieth century's progressive era believed legislatures would adequately promote the public interest.⁶¹

U.S. 367, 371 (1875) (approving takings for forts, military yards, courthouses, and similar public uses); *In re Wellington*, 33 Mass. (1 Pick.) 87 (1834) (upholding taking of land already used as military field).

⁵⁸ See, e.g., *Beekman*, 3 Paige Ch. at 45 (upholding use of eminent domain for constructing private railroad that provided public service subject to government regulation); see also LEWIS, *supra* note 50, § 158 (identifying public use as question for judiciary to enforce). A "common carrier" is defined as a commercial enterprise that holds itself out to the public as offering to transport freight or passengers for a fee. BLACK'S LAW DICTIONARY, *supra* note 9, at 226.

⁵⁹ See, e.g., *Osborne v. County of Adams*, 106 U.S. 181, 182 (1882) (holding bond issue to build steam grist-mill did not qualify as work of internal improvement); *Garbutt Lumber Co. v. Ga. & Ala. Ry.*, 36 S.E. 942, 943 (Ga. 1900) (holding government may not use eminent domain to benefit purely private enterprise for private financial gain); *In re Eureka Basin Warehouse*, 96 N.Y. 42, 48-49 (1884) (stating incidental public benefit through business and commercial accommodations where properties remain under private ownership is insufficient to bring within eminent domain powers); see also *Tyler v. Beacher*, 44 Vt. 648, 652-56 (1871) (stating legislature does not possess power to determine whether particular use is public); LEWIS, *supra* note 50, § 205 (citing various cases where courts did not find valid public uses).

⁶⁰ See discussion *infra* Part I.B.2.

⁶¹ See JAMES W. ELY, JR., *THE GUARDIAN OF EVERY OTHER RIGHT: A CONSTITUTIONAL HISTORY OF PROPERTY RIGHTS* 117 (1998) (explaining Progressives' view that judges should defer to decisions of elected lawmakers who passed legislation to benefit public); TRIBE, *supra* note 39, at 583-84 (describing Supreme Court decisions on economic legislation since 1930s as deferring to legislatures); Bernstein, *supra* note 28 (describing Court's deference to legislation that extensively regulated private property). *But see* LEARNED HAND, *THE BILL OF RIGHTS* 50-51 (1958) (questioning prevailing view of asserting that no constitutional basis existed to declare greater judicial supervision over individuals' personal freedom than over their economic liberty); WEST, *supra* note 27, at 40 (commenting on those who rejected progressive reforms because reforms violated property rights). Legal realists held to the theory that the law is based on judicial decisions that should balance societal interests, rather

Following this theory, the Supreme Court upheld state and local laws during this era that promoted a greater government role in economic matters.⁶² Expanded deference to legislative action carried through to the Court's treatment of the public use limitation in the context of eminent domain cases.⁶³ In 1905, for example, the Court reasoned that public use activities often involve situations where local governments are better equipped to determine public necessity.⁶⁴ Following the significant turnover in sitting Supreme Court Justices in the late 1930s, the new Supreme Court largely deferred to the legislature to correct economic problems.⁶⁵ Previous Courts might

than on formal rules or principles. See BLACK'S LAW DICTIONARY, *supra* note 9, at 915. Notable legal realist scholars included Oliver Wendell Holmes and Karl Llewellyn. *Id.* Coupled with Progressive ideas that attempted to undermine the formal, supreme law of the Constitution and make the judiciary more responsive to public attitudes, legal realism led to a deferential view toward elected lawmakers' decisions. See ELY, *supra*, at 116-17.

⁶² See ELY, *supra* note 61, at 127 (noting Supreme Court's expansion of congressional authority over business and commercial matters since 1930s); TRIBE, *supra* note 39, at 583-84 (discussing jurisprudence since 1930s when courts believed they should facilitate legislative, social, and economic experimentation without interference); Dennis J. Coyle, *Takings Jurisprudence and the Political Cultures of American Politics*, 42 CATH. U. L. REV. 817, 821 (1993) (commenting on Supreme Court's minimal review of economics legislation where no governmental action was invalidated for forty years following 1937 *West Coast Hotel Co. v. Parrish* decision); see also Brief for The Claremont Inst. Ctr. for Constitutional Jurisprudence as Amicus Curiae Supporting Appellants at 5-6, *Bouldin v. Miss. Major Econ. Impact Auth.*, No. 2001-CA-0129 (2001) (on file with author) (noting that courts have taken deferential positions toward redistributive legislation over past 70 years).

⁶³ See *Berman v. Parker*, 348 U.S. 26, 32 (1954) (stating it is "well-nigh conclusive" that legislatures declare public interest when they speak); *Clark v. Nash*, 198 U.S. 361, 369 (1905) (upholding taking private property for local necessity of land irrigation); Pathak, *supra* note 9, at 179-80 (explaining Court's reasoning for its deference to state legislatures to include legislatures' greater familiarity with local needs); Ken Masugi, *What a Revolting Redevelopment* (Nov. 18, 2004), <http://www.claremont.org/projects/pageid.2012/default.asp> (reviewing STEVEN GREENHUT, *ABUSE OF POWER: HOW THE GOVERNMENT MISUSES EMINENT DOMAIN* (2004)) (showing that free use of eminent domain marked early twentieth century's Progressive movement to overturn particular property right protections of America's Founding).

⁶⁴ See *Clark*, 198 U.S. at 369 (noting state representatives are more familiar with facts regarding necessary public uses (citing *Fallbrook Irrigation Dist. v. Bradley*, 164 U.S. 112, 159 (1896))).

⁶⁵ See CHEMERINSKY, *supra* note 8, at 597-99 (describing Roosevelt's Court-packing plan); ELY, *supra* note 61, at 128 (describing Supreme Court Justice turnover and early 1940s decisions that upheld government power to oversee economic activity); TRIBE, *supra* note 39, at 581 (explaining Court's dramatic reversal in 1937 and subsequent

have considered legislative action during this period unconstitutional, but the new Court permitted it under the prevailing political atmosphere.⁶⁶

Since 1937, the Supreme Court has evaluated eminent domain cases under the due process analysis known as the rational basis standard of review.⁶⁷ During this period, the Court consistently presumed the constitutionality of legislation concerning commercial matters or economic problems.⁶⁸ However, the Court subjected legislation that infringed on constitutionally protected liberties, such as those

judicial approval of New Deal legislation); *see also* *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 487-88 (1955) (stating it is enough that legislatures perceive economic wrongs to empower them to correct it); *Lincoln Fed. Labor Union v. Nw. Iron & Metal Co.*, 335 U.S. 525, 536 (1949) (holding courts must construe due process clause such that legislatures may freely determine business regulation required to defend public welfare).

⁶⁶ *See* ELY, *supra* note 61, at 127 (discussing Roosevelt's Court-packing plan and judicial retreat caused by current political climate); Jennifer Maude Klemetsrud, Note, *The Use of Eminent Domain for Economic Development*, 75 N.D. L. REV. 783, 784 (1999) (suggesting recent judicial decisions uphold takings that would previously have been found impermissible); *cf.* Bernstein, *supra* note 28 (describing twentieth century takings jurisprudence as ad hoc and rudderless); Coyle, *supra* note 62, at 821 (describing 1930s cases that identified Court-protected categories of rights, which did not include property rights). The economic depression of the 1930s sparked legislation to provide price stability, production restrictions, and government support payments to the elderly and unemployed. ROBERT B. EKELUND, JR. & ROBERT D. TOLLISON, *ECONOMICS* 65 (1988) (citing 1930s social and economic programs instituted by Roosevelt as initial expansion of government into U.S. economy); GENE SMILEY, *RETHINKING THE GREAT DEPRESSION* 81, 88-92, 111 (2002) (describing programs initiated during Roosevelt administration to counter Great Depression's effects). It is interesting to note that government spending expanded into a larger segment of the American economy at the same time the Court began allowing broader public uses to justify government takings. *See* EKELUND & TOLLISON, *supra*, at 62, 67 (describing how relative size of U.S. government grew in social and economic spheres since 1930s).

⁶⁷ *See* CHEMERINSKY, *supra* note 8, at 601 (describing substantive due process holdings since 1937). The Court's holding in *United States v. Carolene Products* was pivotal in establishing rational basis review for economic affairs. *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 (1938).

⁶⁸ *See* CHEMERINSKY, *supra* note 8, at 601; *see also* *S.C. State Highway Dep't v. Barnwell Bros., Inc.*, 303 U.S. 177, 189 (1938) (holding state law could burden interstate commerce where its purpose was to promote highway safety); *Carolene Prods.*, 304 U.S. at 152; *W. Coast Hotel v. Parrish*, 300 U.S. 379, 393 (1937) (holding legislation regulating wages constitutional as valid exercise of government police powers); ELY, *supra* note 61, at 133 (noting Court assumed economic regulations were reasonable); *cf.* Bernstein, *supra* note 28 (describing Court's rejection of *Lochner* era protections of economic liberties following New Deal).

enumerated in the Bill of Rights, to heightened scrutiny.⁶⁹ The Court also noted that prejudice against particular minorities who were unprotected in the political process called for deeper inquiry.⁷⁰ Specific standards of review evolved as due process law matured.⁷¹

As due process jurisprudence developed in the late twentieth century, the Court established three primary levels of review.⁷² All laws challenged under due process must, at minimum, pass rational basis review.⁷³ Under this test, the Court will uphold laws that are rationally related to a legitimate government purpose.⁷⁴ Second, under an intermediate level of review, the Court will uphold laws substantially related to an important government purpose.⁷⁵ Finally, at the highest level of review, the Court subjects government infringements on fundamental rights to strict scrutiny analysis.⁷⁶ Under this test, laws are constitutional if they have a vital, compelling government purpose.⁷⁷ The government must show that its actions are narrowly tailored to achieve its purpose by the least restrictive and discriminatory means.⁷⁸ In applying strict scrutiny, the Court will assess several factors, including whether a minority group can adequately protect itself through the political process.⁷⁹

⁶⁹ See *Carolene Prods.*, 304 U.S. at 153 n.4; see also CHEMERINSKY, *supra* note 8, at 600 (describing circumstances under which greater scrutiny is required); TRIBE, *supra* note 39, at 1452 (describing limitations placed on rational basis review where legislation restricting political processes may be subject to greater scrutiny).

⁷⁰ See *Carolene Prods.*, 304 U.S. at 153 n.4.

⁷¹ See *infra* text accompanying notes 72-79.

⁷² See CHEMERINSKY, *supra* note 8, at 518-19.

⁷³ *Id.* at 518; see, e.g., *Pennell v. City of San Jose*, 485 U.S. 1 (1988) (applying rational basis); *U.S. R.R. Ret. Bd. v. Fritz*, 449 U.S. 166 (1980) (same); *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483 (1955) (same).

⁷⁴ See CHEMERINSKY, *supra* note 8, at 518. The challenger bears the burden of proving that the government's action is not legitimate, or is not a rational means to accomplish its purpose. *Id.*; see cases cited *supra* notes 68, 73.

⁷⁵ See CHEMERINSKY, *supra* note 8, at 645. The government has the burden of justifying its actions. *Id.*; see, e.g., *Lehr v. Robertson*, 463 U.S. 248, 266 (1983) (analyzing substantial relation to important state purpose); *Craig v. Boren*, 429 U.S. 190, 197 (1976) (reviewing substantial relation to important government objectives).

⁷⁶ See CHEMERINSKY, *supra* note 8, at 518-19, 645. The government has the burden to prove both a compelling interest, and that the challenged law is narrowly tailored to achieve its purpose. *Id.* at 645.

⁷⁷ See CHEMERINSKY, *supra* note 8, at 518-19.

⁷⁸ See *id.*; see, e.g., *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 280 (1986) (applying strict scrutiny).

⁷⁹ See CHEMERINSKY, *supra* note 8, at 646; see also *Graham v. Richardson*, 403 U.S.

The Supreme Court reached a pinnacle in granting greater latitude toward government action in eminent domain cases under rational basis review in its 1954 decision, *Berman v. Parker*.⁸⁰ In *Berman*, the Supreme Court upheld the city's plan to redevelop a blighted area of Washington, D.C.⁸¹ The Court found that the city's purpose to eradicate a blighted area that endangered the public welfare constituted a legitimate public use.⁸² However, the Court did not require the city to target only blighted properties for redevelopment.⁸³ The Court also allowed the city to exert eminent domain to take non-blighted buildings that lay within the identified plan area.⁸⁴ The Court upheld city lawmakers' ability to exercise their police powers to improve public welfare by acquiring whatever property they needed to implement their overall plan.⁸⁵

Even more recently, the Supreme Court deferred to local lawmakers in its 1984 case, *Hawaii Housing Authority v. Midkiff*.⁸⁶ *Midkiff* involved a Hawaiian statute that sought to eliminate concentrated land ownership in the form of an oligopoly, which the Hawaii Legislature deemed responsible for the state's inflated residential housing market.⁸⁷ The statute attempted to dismantle the oligopoly by taking

365, 367 (1971) (finding need to protect aliens who cannot vote and therefore are unrepresented in political process).

⁸⁰ 348 U.S. 26, 32 (1954); see also Laura Mansnerus, Note, *Public Use, Private Use, and Judicial Review in Eminent Domain*, 58 N.Y.U. L. REV. 409, 415-16 (1983) (citing *Berman* as leading urban renewal case expanding substantive definition of public use and contracting scope of judicial review); Pathak, *supra* note 9, at 180 (citing *Berman* as landmark case justifying state police power to use eminent domain for urban renewal projects and defining public welfare as "broad and inclusive").

⁸¹ *Berman*, 348 U.S. at 28.

⁸² *Id.* at 32-33. But see Whitehead & Hardin, *supra* note 11, at 86-87 (noting Justice Douglas confused "public purpose" with constitutionally mandated "public use" requirement, thereby giving deference to legislative determination).

⁸³ *Berman*, 348 U.S. at 35-36; see also Hornberger, *supra* note 8, at 2 (describing plaintiff's privately owned, non-blighted department store which fell within city's redevelopment plan).

⁸⁴ *Berman*, 348 U.S. at 36.

⁸⁵ *Id.* at 34, 36. The Court stated that just compensation sufficiently satisfied the property owners' rights. *Id.* at 36; see Mansnerus, *supra* note 80, at 415-16 (discussing scope of *Berman* holding). Mansnerus discusses how legislatures and municipalities have expanded eminent domain in the context of renewal projects. Mansnerus, *supra* note 80, at 417-18. Generally, courts approve most statutes related to renewal projects in their deference to lawmakers. *Id.* at 418.

⁸⁶ 467 U.S. 229, 241 (1984).

⁸⁷ The Hawaii Legislature found that only 72 private landowners held over 92% of the state's non-government owned land. *Id.* at 232. This resulted in an oligopoly,

private property through eminent domain and transferring it to lessees.⁸⁸ The Court found that eliminating an oligopoly and its perceived social and economic evils constituted a valid public use.⁸⁹ Although the state transferred the property to other private owners, the Court viewed the taking as a legitimate way to eradicate concentrated property ownership.⁹⁰ The Court focused on the plan's result rather than the means by which the government achieved its perceived public benefit.⁹¹

Kelo v. City of New London conveys the Supreme Court's current interpretation of the Fifth Amendment public use restriction.⁹² In *Kelo*, the Court expanded how far eminent domain authority may extend.⁹³ Against the backdrop of the past century's holdings, the Court's deference to local government planning may seem understandable.⁹⁴ But in *Kelo*, the Supreme Court allowed government to exceed its constitutional limitations even further.⁹⁵

which exists when a market is dominated by a few sellers. See EKELUND & TOLLISON, *supra* note 66, at 274. In such cases, the owners may collaborate to maintain high prices, resulting in greater profits for the group. See *id.* at 277. The concentrated ownership at issue in the Hawaii Land Reform Act existed largely as a result of Hawaii's historic feudal system, where island chiefs owned the land and assigned it to others to administer for the chiefs' ultimate benefit. *Midkiff*, 467 U.S. at 232. Recent efforts to redistribute land had been unsuccessful. *Id.*

⁸⁸ *Midkiff*, 467 U.S. at 231 (referring to Hawaii Land Reform Act of 1967, HAW. REV. STAT. tit. 28, ch. 516 (1967)).

⁸⁹ *Id.* at 241-42.

⁹⁰ *Id.* at 244.

⁹¹ See *id.* at 245; see also *Kelo* Brief, *supra* note 29, at 22 (citing *Midkiff*'s holding that governments may redistribute property between private owners when exercise of eminent domain is rationally related to conceivable public purpose).

⁹² 545 U.S. 469, 472 (2005).

⁹³ See discussion *infra* Part III.A-B; cf. *Kelo* Brief, *supra* note 29, at 28-29 (distinguishing *Kelo* from *Berman* and *Midkiff*). *Berman* and *Midkiff*, while drifting from an original understanding of public use, had some connection to police power or antitrust regulation. *Id.* By contrast, the underlying principles in *Kelo* only involve redistributing land to businesses for local economic advantage. *Id.*

⁹⁴ See discussion *supra* Part I.B. The circumstances surrounding *Kelo* are similar to those sparking litigation in other recent state eminent domain proceedings. See *County of Wayne v. Hathcock*, 684 N.W.2d 765, 769-70 (Mich. 2004) (condemning private property for business park); *Bouldin v. Miss. Major Econ. Impact Auth.*, No. 2001-CA-01296, *dismissed* May 13, 2002 (condemning private land to build Nissan automotive factory).

⁹⁵ See discussion *infra* Part III.A-B.

II. *KELO V. CITY OF NEW LONDON*

Kelo is the most recent Supreme Court decision upholding eminent domain under a diminishing public use limitation.⁹⁶ *Kelo* is unique because, for the first time, the Court allowed economic advantage alone to qualify as a valid public use.⁹⁷ This Part discusses the facts, procedure, and rationale of the Court's holding in *Kelo*.

A. *Facts and Procedure*

Following decades of economic decline and the departure of a sizeable employer, Connecticut state and local officials targeted New London's Fort Trumbull area for redevelopment.⁹⁸ In January 1998, Connecticut approved a \$5.35 million bond issue to fund these efforts, and another \$10 million to create Fort Trumbull State Park.⁹⁹ One month later, Pfizer, Inc., a Fortune 500 pharmaceutical company, announced its plan to build a \$300 million research facility adjacent to the redevelopment area.¹⁰⁰

Based upon the state funding commitment and Pfizer's anticipated arrival, the New London city government reactivated the New London Development Corporation ("NLDC").¹⁰¹ The NLDC, a private nonprofit entity created to manage city redevelopment efforts, developed a plan encompassing seven land parcels.¹⁰² The City estimated that the project would create over 1000 jobs, increase tax revenues, and provide economic revitalization to distressed areas.¹⁰³

⁹⁶ *Kelo*, 545 U.S. 469; see also discussion *supra* Part I.B.2 (explaining historical trend towards less restrictive public use definition).

⁹⁷ *Kelo*, 545 U.S. at 498 (O'Connor, J., dissenting); see *Kelo* Brief, *supra* note 29, at 29; articles cited *supra* note 16; discussion *infra* Part III.A-B.

⁹⁸ *Kelo*, 545 U.S. at 473. The federal government closed the Naval Undersea Warfare Center in 1996, resulting in a loss of 1500 jobs. *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.* at 473-74. Specific uses of the seven parcels were designated as follows: Parcel 1 for waterfront conference hotel, restaurants, shopping, and walkways; Parcel 2 for new residences and a U.S. Coast Guard museum; Parcel 3 for 90,000 square feet of office space; Parcels 4A and 4B for a marina and supporting parking or retail space; and Parcels 5, 6, and 7 for various commercial uses and parking space. *Id.* at 474.

¹⁰³ *Id.* at 472. The City intended for the economic development plan to stimulate regrowth following the Federal Government's Naval Undersea Warfare Center closure, which employed 1500 people. *Id.* at 473. The City also intended to counter the area's high unemployment rate and declining population. *Id.*

The NLDC successfully acquired most of the property it needed through private purchases.¹⁰⁴ When negotiations with some private property owners failed, the NLDC invoked eminent domain powers in the City's name.¹⁰⁵

Susette Kelo and other owners brought suit against the City and the NLDC when the government entities began eminent domain proceedings to acquire fifteen privately owned properties.¹⁰⁶ The plaintiffs claimed that the City's use of eminent domain power to take their properties violated the Fifth Amendment public use restriction.¹⁰⁷ The properties were neither in blighted areas nor in condemnable condition.¹⁰⁸ The properties were simply located within two parcels — one intended for office space and the other for surrounding support areas for the intended state park and marina.¹⁰⁹

In a bench trial decision, the New London Superior Court granted a permanent injunction against taking eleven properties in the parcel deemed for support space.¹¹⁰ The court denied relief to the four property owners located in the parcel intended for office buildings.¹¹¹ Both parties appealed to the Connecticut Supreme Court, which found all of the takings valid under the state's municipal development statute.¹¹² The Connecticut Supreme Court held that New London's economic development plan satisfied the public use requirement.¹¹³ The court found the takings reasonably necessary to achieve the City's objectives of generating tax revenue and economic growth.¹¹⁴

B. *Holding and Rationale*

The U.S. Supreme Court granted review to determine whether the City of New London's action to take property for economic development satisfied the Fifth Amendment public use requirement.¹¹⁵

¹⁰⁴ *Id.* at 475.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at 475-76.

¹¹⁰ *Id.* The 11 properties lay within Parcel 4A, slated for park or marina support.

¹¹¹ *Id.* at 476. The four properties lay within Parcel 3, intended for office space. *Id.*

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Id.* at 476-77.

¹¹⁵ *Id.* at 477.

Following recent precedent, the Court applied rational basis review to reach its decision.¹¹⁶ The Court noted that under the development plan, most parcels would eventually pass to private parties with no requirement to maintain them for public use.¹¹⁷ However, the Court reasoned that the City's definition of "public purpose" was itself an appropriate benchmark to determine valid use of eminent domain powers.¹¹⁸ Under rational basis review, the development plan met the public use limitation because the City rationally believed the plan adequately served a public purpose.¹¹⁹ The Court acknowledged that pursuing public purposes would at times benefit individual parties.¹²⁰ However, the Court did not believe current law required the property to actually be used by the public to satisfy the Fifth Amendment limitation.¹²¹

In a narrow five to four decision, the Court ruled in New London's favor.¹²² The Court held that the City properly exercised its eminent domain power because the property fell within an integrated

¹¹⁶ See *id.* at 480 (noting longstanding policy of deferring to legislative judgments in assessing public purpose).

¹¹⁷ *Id.* at 478. The Court noted that its decision in *Kelo* differed from common carrier restrictions imposed in prior eminent domain decisions. *Id.* at 478-80. The Court referenced prior holdings where it allowed property transfers to private parties acting as common carriers. *Id.* In those cases, the Court allowed the transfers because the new owners operated the land in such capacities as railroads or highways that would remain open to public use. *Id.*; see discussion *supra* note 58 and accompanying text (describing common carriers).

¹¹⁸ *Kelo*, 545 U.S. at 479-80 (citing various decisions over past century where "public purpose" sufficed as public use).

¹¹⁹ *Id.* at 480-82 (citing *Berman v. Parker*, 348 U.S. 26, 31 (1954); *Hous. Auth. v. Midkiff*, 467 U.S. 229, 235 (1984)) (upholding congressional determinations to redevelop blighted area, and to eliminate social and economic evils of land oligopoly). The Court held that its decision was consistent with prior holdings in similar circumstances. *Id.* at 485. The Court called the recent holdings a "traditionally broad understanding of public purpose," though the broader interpretation only spans the last century. See *id.*; discussion *supra* Part I.B.2 (describing trend during twentieth century towards less restrictive public use limitation).

¹²⁰ *Kelo*, 545 U.S. at 485.

¹²¹ *Id.* The Court noted that while state courts utilized "use by the public" as the appropriate definition of "public use," decisions from the end of the nineteenth century forward evaluated usage based on an overall public purpose test. See *id.* (citing *Strickley v. Highland Boy Gold Mining Co.*, 200 U.S. 527 (1906); *Fallbrook Irrigation Dist. v. Bradley*, 164 U.S. 112 (1896)). The Court effectively rejected the prior, narrower public use test. *Id.*

¹²² *Id.* at 489.

development plan.¹²³ The Court denied any need for heightened review, saying that awaiting assurances that the proposed plan would succeed would unnecessarily delay redevelopment efforts.¹²⁴ Thus, the Court expanded its century-long jurisprudence giving local governments wide latitude to determine which public needs justify using eminent domain.¹²⁵ In doing so, the Court endorsed broader government control over individual property rights.¹²⁶

III. ANALYSIS: *KELO*'S ECONOMIC AND CONSTITUTIONAL RAMIFICATIONS

By approving economic development plans as a legitimate public use, the *Kelo* Court expanded its scope of deference to local government, exceeding constitutional limitations.¹²⁷ Because of its deferential approach, the Court failed to address minority interests or to fully assess the reasons behind Fifth Amendment private property protections.¹²⁸ Further, the Court's virtual elimination of the constitutional public use limitation erodes economic and individual freedoms, threatening America's prosperity and global economic position.¹²⁹

When the *Kelo* Court expanded its interpretation of public use to include economic development, it erred in three ways. First, the Court failed to apply a heightened standard of review to the

¹²³ *Id.* at 487-89. The Court indicated that individual transfers executed outside of an integrated development plan could cause suspicion of over-reaching government power. *Id.* The Court did not find the concern applied in this situation. *Id.*

¹²⁴ *Id.* at 488.

¹²⁵ *Id.* at 483.

¹²⁶ See Web Release, Inst. for Justice, Floodgates Open: Tax-Hungry Governments & Land-Hungry Developers Rejoice in Green Light from U.S. Supreme Court (June 29, 2005), http://www.ij.org/private_property/connecticut/6_29_05pr.html; Homeowners Lose, *supra* note 16, at 1.

¹²⁷ See *Kelo*, 545 U.S. at 494 (O'Connor, J., dissenting) (describing *Kelo* as abandoning long-held constitutional public use limitation on government power); discussion *infra* Part III.A-B. See generally discussion *supra* Part I.B.

¹²⁸ See discussion *infra* Part III.A-B; *cf.* *Kelo*, 545 U.S. at 501-02 (O'Connor, J., dissenting) (imploring Court to more thoroughly evaluate takings whose sole purpose is to grant economic benefits to private parties); Michael J. Coughlin, Comment, *Absolute Deference Leads to Unconstitutional Governance: The Need for a New Public Use Rule*, 54 CATH. U. L. REV. 1001, 1033 (2005) (suggesting court should subject takings, where private parties will enjoy more than pro rata share of resulting benefits, to greater court scrutiny).

¹²⁹ See discussion *infra* Part III.B-C.

Connecticut law that allowed government to use eminent domain for economic development.¹³⁰ Second, it failed to uphold the Founders' intent to protect a free society by preserving property rights.¹³¹ Finally, *Kelo's* ramifications threaten American prosperity by failing to advance wealth creation principles and by adding societal cost without providing a proven public benefit.¹³²

A. *The Supreme Court Failed to Apply a Heightened Standard of Review to Economic Development as a Legitimate Public Use*

The factual circumstances surrounding *Kelo* fall beyond the Court's established acceptable public use parameters.¹³³ Previously, the Court deferred to a government's rationale for invoking eminent domain only when it fell into one of three categories: (1) the government itself acquired property that it maintained for the public, (2) the property taken would be regulated as a common carrier and available for public use, or (3) the taking fell within the government's legitimate police powers to eradicate social harms.¹³⁴ In *Kelo*, however, the issue

¹³⁰ See discussion *infra* Part III.A.

¹³¹ See discussion *infra* Part III.B.

¹³² See discussion *infra* Part III.C.

¹³³ Compare *Kelo*, 545 U.S. at 500-02 (O'Connor, J., dissenting) (explaining that homes subject to eminent domain in *Kelo* do not cause social harm, and advocating that Court should thoroughly evaluate takings resulting in economic benefits to private parties), and *Kelo* Brief, *supra* note 29, at 29-30 (stating that prior cases do not allow states to redistribute land from one private owner to another merely for economic advantage), with sources cited *supra* notes 57-58 (discussing takings allowed for specific public purposes where government owned property or private parties operated as common carriers).

¹³⁴ Within the first category, the Court allowed eminent domain when the government retained ownership of the property. See, e.g., *United States ex rel. Tenn. Valley Auth. v. Welch*, 327 U.S. 546, 552 (1946) (upholding land taken to construct public road as constitutional); *Old Dominion Land Co. v. United States*, 269 U.S. 55, 66-67 (1925) (upholding property taken to provide sites for military purposes as constitutional); *United States v. Gettysburg Elec. Ry. Co.*, 160 U.S. 668, 680 (1896) (holding U.S. government's taking of private property in Gettysburg, Pennsylvania, constitutional because government would retain ownership to preserve Gettysburg battlefield for public use). See generally Coughlin, *supra* note 128, at 1008-12 (discussing Supreme Court deference to legislation when takings were for actual public uses). The Court in *Gettysburg Electric* cautioned against using the same deference in matters involving takings for private uses. *Gettysburg Elec. Ry. Co.*, 160 U.S. at 680. Other cases allowed takings for common carrier use. See *supra* note 58 and accompanying text. Still other cases allowed takings to correct public harm under legitimate police powers. See, e.g., *Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229, 232 (1984) (citing Hawaii legislature's assessment that land ownership oligopoly was

was whether government-directed economic development is a legitimate public use.¹³⁵ Because this fell outside the three accepted categories, the Supreme Court should have applied heightened scrutiny to reach its conclusion.¹³⁶

The Court applies strict scrutiny when government action infringes on fundamental liberties protected within the Bill of Rights, particularly when the action prejudices minority interests.¹³⁷ This threshold applies to the circumstances in *Kelo*.¹³⁸ Connecticut law allowed cities such as New London to assemble land areas to stimulate economic development and to take private property through eminent domain as they deemed necessary.¹³⁹ The Fifth and Fourteenth Amendments specifically protect the private property rights affected by New London's development plan.¹⁴⁰ Further, compared with the influential corporate interests motivating the City's redevelopment plan, Susette Kelo and the other New London homeowners represented minority political interests.¹⁴¹ Their interests required

skewing state's residential fee simple market, thereby injuring public welfare, justifying use of eminent domain powers to provide relief); *Berman v. Parker*, 348 U.S. 26, 28 (1954) (deferring to congressional determination that blighted neighborhoods were "injurious to the public health, safety, morals, and welfare" and allowing eminent domain to correct harm); see also *Kelo*, 545 U.S. at 500 (O'Connor, J., dissenting) (citing *Berman* and *Midkiff* as cases where governments utilized eminent domain to eliminate harms caused by existing properties).

¹³⁵ *Kelo*, 545 U.S. at 477.

¹³⁶ See discussion *supra* notes 69-70, 76-79; cf. EPSTEIN, *supra* note 28, at 180-81 (discussing Court's review of recent eminent domain cases under rational basis test, and concluding application of rational basis test uses false arguments to negate explicit constitutional guarantees).

¹³⁷ See *supra* notes 69-70, 76 and accompanying text (providing background for circumstances where Court utilizes strict scrutiny as advocated in *Carolene Products*). That *Carolene Products* and *Kelo* both involve commercial matters further lends support to this analysis. Compare *United States v. Carolene Prods. Co.*, 304 U.S. 144, 145-46 (1938) (analyzing statutory restrictions on commercial transactions), with *Kelo*, 545 U.S. at 472 (reviewing statutory guidance for municipal development plan).

¹³⁸ See *Kelo*, 545 U.S. at 521-22 (Thomas, J., dissenting) (requesting heightened review of cases involving powerless groups as present in *Kelo*); CHEMERINSKY, *supra* note 8, at 646 (explaining Court will evaluate group's ability to receive adequate representation in political process when determining whether to apply strict scrutiny).

¹³⁹ See CONN. GEN. STAT. § 8-186 (2006) (identifying unified land acquisitions to meet industrial growth needs as public uses); see also *Kelo*, 545 U.S. at 475.

¹⁴⁰ See *Kelo*, 545 U.S. at 477; *supra* notes 33-38 (discussing constitutional property rights protections).

¹⁴¹ See Ronald D. Utt, *Congress, States Slow to Confront Kelo* (Dec. 9, 2005), <http://www.heritage.org/Press/Commentary/ed120905c.cfm> (observing that not since

protection, calling for heightened judicial review to ensure New London's actions did not improperly infringe minority property-owner rights.¹⁴²

In addition, the Court applies a heightened level of scrutiny when government impairs an owner's use of his property through increased regulations.¹⁴³ Such action is known as a regulatory taking.¹⁴⁴ Courts evaluate a property owner's diminished use of his property under the

Dred Scott v. Sandford have weak individuals been so abused by nation's highest court); Homeowners Lose, *supra* note 16, at 2 (describing how *Kelo* undermines rights of all except most politically connected individuals). The dissenters in *Kelo* recognized this issue. See *Kelo*, 545 U.S. at 505 (O'Connor, J., dissenting) (alleging that citizens with disproportionate influence will benefit from *Kelo*'s holding, victimizing those with fewer resources); *Id.* at 521-22 (Thomas, J., dissenting) (calling for judicial review of cases involving powerless groups protected by Fifth Amendment Public Use Clause, and expressing concern that minority communities will be disproportionately affected by *Kelo* decision).

¹⁴² See CHEMERINSKY, *supra* note 8, at 646 (explaining Court will consider ability of group to protect itself through political process in determining whether to apply strict scrutiny); *cf.* THE FEDERALIST NO. 10 (James Madison), *supra* note 27, at 129 (describing pure democracies as unstable because common interests lead majorities to sacrifice weaker parties); Letter from James Madison to Thomas Jefferson (Oct. 17, 1788), in THE COMPLETE MADISON: HIS BASIC WRITINGS 254 (Saul K. Padover ed., 1953) (stating that danger of oppression lies in acts where "government is the mere instrument of the major number of the constituents"); sources cited *supra* note 141.

¹⁴³ See *Dolan v. City of Tigard*, 512 U.S. 374, 387, 395 (1994) (stating that test for evaluating petitioner's claim was to determine whether "essential nexus" existed between legitimate state interests and permit conditions required by city); *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1030-31 (1992) (analyzing state law limiting coastal property owners' use with regard to its harm to private property compared with other suitable measures to accomplish same purpose); *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 837 (1987) (finding building restriction unrelated to legitimate government purpose because there was no "essential nexus" between them); *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 127 (1978) ("[A] use restriction may constitute a 'taking' if not reasonably necessary to the effectuation of a substantial government purpose."). In establishing its method of review in these cases, the Court uses language to indicate a level of scrutiny closer to intermediate review than rational basis. See *supra* notes 73-75 and accompanying text; see also *Bernstein*, *supra* note 28 (discussing balancing test generally applied to regulatory takings under "heightened scrutiny").

¹⁴⁴ The term "regulatory taking" came into use following the Supreme Court's decision in *Pennsylvania Coal v. Mahon*, where the Court held for the first time that a taking occurred where government regulation deprived an owner of the land's economic purpose. See CHEMERINSKY, *supra* note 8, at 621-22 (discussing *Penn. Coal v. Mahon*, 260 U.S. 393 (1922)); see also Henry N. Butler, *Regulatory Takings After Lucas*, 16 REG. 76, 76 (1993), available at <http://www.cato.org/pubs/regulation/reg16n3g.html> (defining regulatory takings as reductions in property values caused by regulations).

Fifth Amendment Takings Clause, just as in eminent domain cases.¹⁴⁵ It is inconsistent for the Court to apply heightened scrutiny when new laws restrict owners' property use, but fail to apply the same level of review when government takes private property outright.¹⁴⁶

Under a strict scrutiny inquiry, the Court would have evaluated whether benefits to the local economy through development constituted a compelling government interest.¹⁴⁷ The City would have had to demonstrate its vital concern in stimulating economic growth in New London.¹⁴⁸ If successful, the City would have then had to show that its development plan was the least restrictive means to achieve that purpose.¹⁴⁹

The government might legitimately meet the compelling interest standard where the state takes private property as part of a plan to eradicate public harms, as the Court allowed in *Berman* and *Midkiff*.¹⁵⁰ However, such harms do not exist in *Kelo*.¹⁵¹ The Court briefly reviewed expected financial benefits from the redevelopment project, but stopped short of evaluating the plan's long-term impact on the local economy.¹⁵² Strict scrutiny inquiry would have exposed that

¹⁴⁵ See *Dolan*, 512 U.S. at 383-84; *Lucas*, 505 U.S. at 1007; *Nollan*, 483 U.S. at 829; see also *supra* notes 33-38 and accompanying text.

¹⁴⁶ See EPSTEIN, *supra* note 28, at 57-58 (arguing that government brings itself within scope of eminent domain clause any time it removes any incidents of ownership from property owners, and same principles should apply to all takings). The *Dolan* Court further demonstrated this inconsistency when it stated that governments do not immunize their measures from constitutional challenge simply by identifying them as business regulations. *Dolan*, 512 U.S. at 392. The Court has not applied the same analysis within the eminent domain context to subject governments to equivalent, heightened levels of constitutional scrutiny for defining their projects as being for the "public use." See discussion *supra* Part I.B.2. One author noted that policymakers who believe in constitutionally protecting privacy rights within one's home often do not extend the same protections to the home itself. CLINT BOLICK, *LEVIATHAN: THE GROWTH OF LOCAL GOVERNMENT AND THE EROSION OF LIBERTY* 113-14 (2004).

¹⁴⁷ See discussion *supra* notes 76-79 and accompanying text (discussing elements of strict scrutiny inquiry analysis).

¹⁴⁸ See CHEMERINSKY, *supra* note 8, at 519-20.

¹⁴⁹ See *id.* at 520 (describing strict scrutiny analysis).

¹⁵⁰ See discussion *supra* notes 80-91 and accompanying text (describing issues of each case); *supra* note 134 and accompanying text.

¹⁵¹ *Kelo*, 545 U.S. at 483 (noting New London was not confronted with need to remove blight); see also *id.* at 500-01 (O'Connor, J., dissenting) (explaining that private homes at issue in *Kelo* are not sources of any social harm).

¹⁵² *Id.* at 483 (majority opinion) (citing expected increase in jobs and tax revenues).

there were more effective ways to stimulate economic growth outside of direct government intervention, eroding any claim that the government alone could provide the needed benefit.¹⁵³

Further, even if a compelling interest existed to permit the City's growth efforts, the City needed to show that its plan was tailored under the least restrictive means possible.¹⁵⁴ The Court would have assessed whether there were avenues other than eminent domain by which the City could achieve the economic growth it sought.¹⁵⁵ Strict scrutiny analysis would have led the Court to consider additional important issues in deciding the case.¹⁵⁶

B. Applying Strict Scrutiny: A Broad View of Public Use Fails to Uphold the Founders' Intent to Protect Economic Freedoms

Had the Supreme Court applied strict scrutiny analysis in *Kelo*, it would have grappled with whether New London abused its power at the expense of minority factions.¹⁵⁷ The intent behind the Fifth Amendment public use limitation deals specifically with the issue of potential government abuse.¹⁵⁸ By failing to address the Amendment's

¹⁵³ See discussion *infra* Part III.C; *supra* text accompanying notes 147-49.

¹⁵⁴ See CHEMERINSKY, *supra* note 8, at 520.

¹⁵⁵ See *id.* at 520 (requiring Court to consider whether government action provided least restrictive means of accomplishing its purpose). Governments, from the local to the federal level, have successfully used other avenues to stimulate economic growth without violating property rights. Providing financing to enable companies to purchase property, or reducing government budgets to allow for tax credits and other incentives to stimulate business and individual investment are a couple avenues New London could have pursued. See STEPHEN GOLDSMITH, PUTTING FAITH IN NEIGHBORHOODS: MAKING CITIES WORK THROUGH GRASSROOTS CITIZENSHIP 54, 93-94 (2002) (describing various efforts Indianapolis took to stimulate growth in depressed areas).

¹⁵⁶ See discussion *infra* Part III.B-C. In a speech following the *Kelo* decision, Justice Stevens (who authored the majority opinion) stated his view about the wisdom in taking homes for private development: "My own view is that the free play of market forces is more likely to produce acceptable results in the long run than the best-intentioned plans of public officials." Web Release, Inst. for Justice, Author of *Kelo* Says He Would "Oppose" Eminent Domain Abuse as a Legislator (Aug. 25, 2005), http://www.ij.org/private_property/connecticut/8_25_05pr.html [hereinafter *Kelo* Author]. Had the Court utilized strict scrutiny analysis, it may have considered that very issue. See discussion *infra* Part III.C.

¹⁵⁷ See CHEMERINSKY, *supra* note 8, at 646 (discussing Court's criteria for determining which level of scrutiny to apply, including group's ability to protect itself through political process); discussion *supra* notes 137-42 and accompanying text.

¹⁵⁸ See THE FEDERALIST NO. 51 (James Madison), *supra* note 27, at 356 (noting

meaning, the Court abrogated the Founders' intent to protect a free society by preserving property rights.¹⁵⁹

The Founders included the public use limitation as a check against potential abuses of eminent domain power.¹⁶⁰ The *Kelo* Court's expanded deference to local eminent domain use substantiates the Founders' concern that government officials will tend toward abusive control.¹⁶¹ The Founders believed that property ownership is a fundamental, natural right that political majorities can neither bestow nor abolish.¹⁶² Following *Kelo*, property rights are no longer protected from majoritarian abuse, as *Kelo* opens the door to eminent domain proceedings prompted by influential local factions.¹⁶³ Further decline

concern over potential government abuse); *cf.* EPSTEIN, *supra* note 28, at 170 (arguing that allowing indirect public benefit to satisfy public use requirement renders it empty); Werner, *supra* note 29, at 336-37 (describing Founders' intent in establishing public use limitation to avoid governmental abuse of eminent domain powers).

¹⁵⁹ See discussion *supra* Part I.A.

¹⁶⁰ See THE FEDERALIST NO. 51 (James Madison), *supra* note 27, at 356 (discussing controls to protect against government abuse of property rights); Werner, *supra* note 29, at 348 (describing Madisonian view of public use clause to protect minorities from majoritarian abuse); *see also* discussion *supra* Part I.A.

¹⁶¹ See THE FEDERALIST NO. 51 (James Madison), *supra* note 27, at 356 (noting that devices are necessary to control government abuses which will arise due to human nature); Kenneth W. Starr, *The Federal Republic and the Challenge to Freedom*, 90 CORNELL L. REV. 1639, 1643 (2005) (reviewing BOLICK, *supra* note 146) (asserting danger that local governments representing special interests may abuse individual liberties); Werner, *supra* note 29, at 348-49 (describing Founders' concern about power concentrated in human beings who are apt to abuse it).

¹⁶² See 2 DEBATES ON THE ADOPTION OF THE FEDERAL CONSTITUTION 162 (photo. reprint 1987) (Jonathan Elliot ed., 1896) (statement of Theophilus Parsons) (stating Constitution did not give Congress power to infringe on natural rights); Philip A. Hamburger, *Natural Rights, Natural Law, and American Constitutions*, 102 YALE L.J. 907, 954 (1993) (describing inability of civil laws to deny or abridge natural rights); *cf.* THE FEDERALIST NO. 10 (James Madison), *supra* note 27, at 132 (discussing need for government to secure private rights against majority factions).

¹⁶³ See *Kelo v. City of New London*, 545 U.S. 469, 505 (2005) (O'Connor, J., dissenting) (alleging that beneficiaries of *Kelo* will be corporations, development firms, and others with influence and political power); *cf.* THE FEDERALIST NO. 10 (James Madison), *supra* note 27, at 135 (articulating Founders' concern that local factions represented greater dangers to liberty than national groups); Werner, *supra* note 29, at 348 n.94 (describing Supreme Court's *Midkiff* decision as disregarding Founders' concern with majoritarian abuse by overturning Ninth Circuit decision). Redevelopment projects similar to New London's, executed through eminent domain, have already affected racial minority property owners. See *Poletown Neighborhood Council v. City of Detroit*, 304 N.W.2d 455, 470 (Mich. 1981) (Ryan, J., dissenting) (noting predominately elderly, retired, largely Polish American community negatively affected by eminent domain proceedings); BERNARD J. FRIEDEN & LYNNE B. SAGALYN,

of a strict public use limitation represents the very government power encroachment and threat to liberty the Founders sought to prevent.¹⁶⁴

Challengers to this view claim that deference to legislatures, particularly in economic matters, is satisfactory because the public has voting power.¹⁶⁵ Elected representatives will safeguard the public interest and individual rights, or will be subject to removal from office.¹⁶⁶ Unfortunately, those affected by government takings comprise small, fragmented groups relative to the general voter population.¹⁶⁷ Legislators do not hear their voices as strongly as well-

DOWNTOWN, INC.: HOW AMERICA REBUILDS CITIES 28-29 (1989) (providing statistics that 63% of families displaced by urban renewal from 1949 to 1963 were non-white). Public works projects in 1950s and 1960s further destroyed predominantly minority communities in St. Paul, Minnesota, and Baltimore, Maryland. FRIEDEN & SAGALYN, at 28-29; see also BERLINER, *supra* note 12, at 102 (describing modern takings practices which target black neighborhoods).

¹⁶⁴ See THE FEDERALIST NO. 10 (James Madison), *supra* note 27, at 132-33 (expressing Founders' desire to prevent majority factions from oppressing minority rights); James Madison, Replies to Patrick Henry, Defending the Taxing Power and Explaining Federalism (Virginia Convention, June 6, 1788), in 2 THE DEBATE ON THE CONSTITUTION 611, 612 (Bernard Bailyn ed., 1993) (citing concerns that historically those in power have tended to abridge personal freedoms, producing despotism); cf. Van Horne's Lessee v. Dorrance, 2 U.S. (2 Dall.) 304, 311 (1795) (calling eminent domain "the despotic power" which must be limited to prevent abuse). For recent views on the courts' effectiveness in upholding constitutional freedoms, see BOLICK, *supra* note 146, at 159-60 (commenting on courts' function in democratic process to constrain government power and advocating for grassroots effort to encourage judicial action); Steven M. Simpson, *Judicial Abdication and the Rise of Special Interests*, 6 CHAP. L. REV. 173, 205 (2003) (citing ongoing problem of factions and stating courts have allowed government to grow beyond its intended scope).

¹⁶⁵ See Benjamin D. Cramer, Note, *Eminent Domain for Private Development — An Irrational Basis for the Erosion of Property Rights*, 55 CASE W. RES. L. REV. 409, 429 (2004) (citing *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 488 (1955)) (calling public to resort to polls to correct legislative abuse); Elizabeth F. Gallagher, Note, *Breaking New Ground: Using Eminent Domain for Economic Development*, 73 FORDHAM L. REV. 1837, 1868 (2005) (noting landowners' ability to elect representatives for their interests). *But see* Joseph J. Lazzarotti, *Public Use or Public Abuse*, 68 UMKC L. REV. 49, 73 (1999) (noting that, while possible, combating eminent domain abuses through electing new representatives is unlikely).

¹⁶⁶ See sources cited *supra* note 165.

¹⁶⁷ See Mansnerus, *supra* note 80, at 436 (commenting on relative position of individual landowners in legislative decisionmaking process); see also Lazzarotti, *supra* note 165, at 73-74 (noting near impossibility of forming group to stand for increased property protections); cf. *Kelo*, 545 U.S. at 487 (O'Connor, J., dissenting) (regretting that corporations, development companies, and others with political influence will benefit from *Kelo* holding).

organized industries that collectively lobby for their own interests.¹⁶⁸ Further, allowing legislatures to define public use puts the job of restricting government takings in the same hands as those invoking eminent domain.¹⁶⁹ Permitting the political process to function in this way, without judicial oversight, endangers freedoms the Founders wisely protected.¹⁷⁰

The Founders also viewed property rights as fundamental to national economic strength.¹⁷¹ They envisioned that a society grounded in rights to acquire property would generate substantial wealth, a crucial condition of national prominence.¹⁷² As the next section argues, the country can only realize such aspirations under secure property rights that motivate individual investment and industry.¹⁷³

C. *The Kelo Decision Threatens American Prosperity*

The *Kelo* decision stifles personal investment, which has been the

¹⁶⁸ See Mansnerus, *supra* note 80, at 436; cf. RICHARD POSNER, *ECONOMIC ANALYSIS OF LAW* 498-501 (2d ed. 1977) (failing to find basis for presumption that legislation is primarily to protect public interest because legislative process results in wealth redistribution to politically effective interest groups); Cramer, *supra* note 165, at 429 (noting majoritarian protections of political process unavailable to individuals' whose property is taken through eminent domain).

¹⁶⁹ See THE FEDERALIST NO. 78 (Alexander Hamilton), *supra* note 27, at 491 (explaining role of courts to declare void any legislative acts contrary to Constitution, so that rights do not become meaningless); Lazzarotti, *supra* note 165, at 64, 69 (rendering public use limitation dead if delegated to same branch invoking eminent domain power it was intended to restrain).

¹⁷⁰ See *supra* notes 160-62 and accompanying text.

¹⁷¹ See THE FEDERALIST NO. 12 (Alexander Hamilton), *supra* note 27, at 142 (asserting that commercial prosperity and its rewards (e.g., acquiring property) were most productive means to develop national wealth); James Wilson, Lectures on Law, in 2 WORKS OF JAMES WILSON 718-19 (Robert G. McCloskey ed., 1967) (explaining that production is secured and multiplied through exclusive property); cf. Jean Yarbrough, *Jefferson and Property Rights*, reprinted in LIBERTY, PROPERTY, AND THE FOUNDATIONS OF THE AMERICAN CONSTITUTION 78 (Ellen Paul & Howard Dickman eds., 1989) (quoting Jefferson stating that lack of industry would result in dependence on foreign nations).

¹⁷² See THE FEDERALIST NO. 11 (Alexander Hamilton), *supra* note 27, at 142 (anticipating growth of America through commerce to "dangerous greatness" in trade negotiations with Great Britain and other nations); Yarbrough, *supra* note 171, at 78 (citing Jefferson's assertion that if America were to be free and civilized, it must be commercial); cf. WEST, *supra* note 27, at 70 (commenting that America's capacity for great deeds throughout history rests on enormous wealth generated through commerce and independence).

¹⁷³ See discussion *infra* Part III.C.

hallmark of economic growth and expansion throughout America's history.¹⁷⁴ Scholars and researchers have already recognized that the *Kelo* decision's ramifications threaten economic freedoms by diminishing the security of individual property rights.¹⁷⁵ Because property rights provide crucial support to real economic growth, America's leading economic position is likewise vulnerable to competition.¹⁷⁶ Two key elements aggravate this problem.¹⁷⁷ First, the Court's support for government's broad eminent domain powers discourages wealth creation activities by increasing uncertainty, thereby discouraging private investment.¹⁷⁸ Second, by promoting an active government role in economic development, the *Kelo* Court authorizes additional societal costs without demonstrated benefit.¹⁷⁹

¹⁷⁴ See WILLIAM J. BAUMOL & ALAN S. BLINDER, *MACROECONOMICS* 353-55 (1991) (describing magnitude of economic growth as measured by increases in labor productivity and output per capita since late 1800s); Gerald P. O'Driscoll, Jr. & Lee Hoskins, *Property Rights: The Key to Economic Development*, at 7 (Aug. 7, 2003), <http://www.cato.org/pubs/pas/pa482.pdf> (describing how secure property rights made it possible for early American settlers to invest and take risks).

¹⁷⁵ See MILES ET AL., *supra* note 31, at 393, 395 (reporting on United States' economic freedoms, specifically noting *Kelo* decision's effect on private property protections as threatening economic liberties); see also William W. Beach & Gerald P. O'Driscoll, Jr., *The Role of Property Rights in Economic Growth*, in 2003 INDEX OF ECONOMIC FREEDOM 27 (2002), available at http://www.heritage.org/research/features/index/chapters/pdfs/Index2003_Chap1.pdf (describing role of constitutions and strong system of property rights in fostering economic growth and wealth creation); Lee Hoskins & Ana I. Eiras, *Property Rights: The Key to Economic Growth*, in 2002 INDEX OF ECONOMIC FREEDOM 40 (2002), available at http://www.heritage.org/research/features/index/chapters/pdfs/Index2002_Chap3.pdf (asserting that when governments interfere with economic activity, economies and standards of living suffer).

¹⁷⁶ See sources cited *supra* note 175; see also Eiras, *supra* note 30, at 2 (advocating freedoms required, including property protections, for individuals to engage in economic activities); discussion *infra* Part III.C.1 (discussing impact of diminished private investment on real economic growth); cf. BAUMOL & BLINDER, *supra* note 174, at 361 (discussing sharp slowdown of United States' productivity growth relative to other developed nations since 1960s).

¹⁷⁷ See discussion *infra* Part III.C.

¹⁷⁸ See discussion *infra* Part III.C.1.

¹⁷⁹ See discussion *infra* Part III.C.2; see also GOLDSMITH, *supra* note 155, at 6-7 (advocating limited government role to foster individual motivation for community involvement); David Boaz, *Defining an Ownership Society*, http://www.cato.org/special/ownership_society/boaz.html (last visited Feb. 21, 2007) (citing Geoff Mulgan, aide to British Prime Minister Tony Blair, who believed that escaping poverty required private asset ownership to encourage self-esteem and healthy behaviors). Boaz also comments on Margaret Thatcher's advocacy for

1. Government's Broad Use of Eminent Domain Powers Fails to Advance Wealth Creation Principles

Kelo increased government's ability to redistribute private property, raising uncertainty among property owners.¹⁸⁰ Increased uncertainty leads to diminished investment below that which free market forces would stimulate.¹⁸¹ By threatening to take personal property for redevelopment, governments dissuade individual efforts to work, save, and invest.¹⁸² These activities are crucial to a vibrant, growing economy.¹⁸³ Government's discouragement of these efforts negatively

privatized housing in order to develop homeowners as responsible citizens. *Id.*

¹⁸⁰ See *Kelo v. New London*, 545 U.S. 469, 494 (2005) (O'Connor, J., dissenting) (stating all private property is now vulnerable to being taken and transferred to another owner); The Claremont Institute, *supra* note 15 (noting *Kelo* will encourage continuation of takings abuses); John McClaghry, *Private Property at the Mercy of Government: The Kelo Supreme Court Decision Undermines the Fifth Amendment of the Constitution* (July 2, 2005), http://www.freedomworks.org/processor/printer.php?issue_id=2293 (advocating *Kelo* gives government power to take property to give to another to facilitate greater tax revenue).

¹⁸¹ See ROBERT COOTER & THOMAS ULEN, *LAW AND ECONOMICS* 180-81 (2004) (explaining that investors will account for risks of government action in determining efficient investment levels, resulting in lower overall investment). Clear and certain property rights facilitate market exchanges, which create surpluses. *Id.* at 174. The government's power to take property reduces an investor's clarity and certainty of property rights. *Id.* As a result, surpluses decline, representing an economic cost of the state's power to regulate property. *Id.*; see also GRIFFITHS, *supra* note 30, at 33 (describing how asset expropriation and less than adequate compensation diminish business investment); cf. SMILEY, *supra* note 66, at 132 (describing recovery problems during 1930s resulting from businesses' reluctance to invest, due to uncertain property rights).

¹⁸² See Hoskins & Eiras, *supra* note 175, at 40 (asserting property rights prompt citizens to save, innovate, and invest more than without them); Boaz, *supra* note 179, at 3 (encouraging property ownership produces higher long-term values and overall prosperity due to market forces); see also *60 Minutes: Eminent Domain: Being Abused?* (CBS television broadcast July 4, 2004), available at <http://www.cbsnews.com/stories/2003/09/26/60minutes/main575343.shtml> (quoting Lakewood, Ohio, resident Jim Saleet reflecting that government's ability to take property changes concept of personal ownership to mean that he "just leased [his home], until the city wants it"); cf. FRIEDRICH A. HAYEK, *THE ROAD TO SERFDOM* 84 (50th anniversary ed. 1994) (observing that "the more the state 'plans,' the more difficult planning becomes for the individual"); BERLINER, *supra* note 12, at back cover (quoting Richard Epstein advocating that higher perceived levels of economic insecurity should be of such concern to legislatures and courts that they take strong action to eliminate abuses).

¹⁸³ See GOLDSMITH, *supra* note 155, at 25-26 (describing sustainable economic base is best created through private, for-profit initiatives); GRIFFITHS, *supra* note 30, at 32 (observing that private ownership encourages economic efficiency and growth); WEST, *supra* note 27, at 69-70 (discussing public virtues emanating from private ownership,

affects real economic growth and increases reliance on the government to provide economic opportunity.¹⁸⁴

Kelo supports an economic policy that favors government intervention rather than market forces to stimulate economic growth, thereby negatively affecting long-term public welfare.¹⁸⁵ By failing to apply strict scrutiny, the Court did not critically evaluate whether the City could realistically achieve its goal of higher employment levels and revenues on a long-term basis.¹⁸⁶ Historical evidence shows that

and cautioning that virtues give way to dependency on government when property rights erode); Hoskins & Eiras, *supra* note 175, at 40 (noting property rights are essential part of economic growth and prosperity). The economic wealth differences between free market economies and nations subject to communist rule provides a useful comparison. South Koreans, for example, have 17 times the income of North Koreans. O'Driscoll & Hoskins, *supra* note 174, at 2. When comparing nations with similar culture, language, and traditions (such as Taiwan and China, Finland and Estonia), nations operating under a market system grew economically stronger over the same period than those in non-market economies. *Id.* at 2-3. The authors describe the correlation between protected property rights and wealth by evaluating gross domestic product ("GDP") per capita for 150 countries. *Id.* at 9. The average GDP per capita is twice as high (\$23,769) in nations strongly protecting property than in those providing only fair protection (\$13,027). *Id.*; cf. Gerard Alexander, *The Other American Exceptionalism* (Nov. 28, 2005), <http://www.claremont.org/writings/crb/fall2005/alexander.html> (describing economic problems plaguing European nations in their drive to become government-centered, including 10% unemployment in Germany and France). The average U.S. per capita income is 55% higher than average per capita income among the European Union's core countries. Alexander, *supra*.

¹⁸⁴ See COOTER & ULEN, *supra* note 181, at 180-81 (explaining that investors account for risks of government intervention by decreasing amounts invested); GOLDSMITH, *supra* note 155, at 12 (noting that centralized growth policies cause dependence on government, undermining personal responsibility and creating entitlement mentality); cf. EPSTEIN, *supra* note 28, at 24 (discussing role of private property systems in promoting economic production); Hoskins & Eiras, *supra* note 175, at 37-38 (advocating that businesses and individuals must be secure in knowledge of their full property ownership to encourage investment and expansion); Boaz, *supra* note 179, at 1 (describing how ownership of homes and other assets creates responsible citizens); Eiras, *supra* note 30, at 1 (stating that fewer obstacles to economic activity will encourage working, investing, saving, and consuming).

¹⁸⁵ See PETER F. DRUCKER, *THE NEW REALITIES* 72-73 (1989) (explaining that economies will ultimately become depressed by increased government spending that fails to stimulate economic growth); SMILEY, *supra* note 66, at 129 (asserting that when government weakens property rights, it discourages market activity and private investment). See generally COOTER & ULEN, *supra* note 181, at 175 (explaining that expropriations through government takings distort incentives and cause economic inefficiency).

¹⁸⁶ *Kelo v. City of New London*, 545 U.S. 469, 487-90 (2005). The Court limited its review to determining that the City's plan provided a legitimate purpose, and that the legislature could rationally believe the plan's provisions would promote its

increased government involvement in economic matters often fails to remedy the problems it seeks to address.¹⁸⁷ For example, the New Deal legislation of the 1930s increased government spending in an effort to stabilize employment, wages, and production.¹⁸⁸ Yet billions of dollars in government spending failed to stimulate the depressed economy, and in fact delayed economic recovery.¹⁸⁹ Similarly, government entitlement payments increased during the 1960s and 1970s in the form of welfare payments and low-income housing.¹⁹⁰

Although projected to improve social conditions, these government measures totaling \$5.5 trillion failed to achieve their purpose.¹⁹¹

Opponents of this view might argue that economic development like New London's provides needed stimulus to further private

objective. *Id.* at 488-90.

¹⁸⁷ See discussion *infra* notes 188-91 and accompanying text; see also DRUCKER, *supra* note 185, at 20-21; GOLDSMITH, *supra* note 155, at 43.

¹⁸⁸ See SMILEY, *supra* note 66, at 71-96, 111-14 (reviewing legislative acts during New Deal attempting to regulate prices, wages, and production); Richard A. Epstein, *A Common Law of Labor Relations: A Critique of the New Deal Labor Legislation*, 92 *YALE L.J.* 1357, 1363 (1983) (describing New Deal statutes designed to cure imperfections from market system and save capitalism from its excesses); see *supra* note 66 and accompanying text (discussing programs instituted through 1930s New Deal legislation); see also Bernstein, *supra* note 28 (supporting view that takings principles apply to welfare-state redistributions such as those introduced in New Deal legislation, rendering such legislation unconstitutional).

¹⁸⁹ See DRUCKER, *supra* note 185, at 20-21 (noting economic recovery did not ensue under New Deal, but rather under war economy which followed); SMILEY, *supra* note 66, at 96 (reporting virtually unchanged unemployment rates and production declines following early 1930s New Deal measures). Economic recovery began slowly during 1935-1937, but suffered setbacks due to additional welfare programs and planning acts implemented during the same period. *Id.* at 106-18. By 1940, the economy regained 1937 levels, though far below full employment. *Id.* at 125. Real economic recovery began when America entered World War II in 1941. *Id.* at 134, 137.

¹⁹⁰ See DRUCKER, *supra* note 185, at 69-70; GOLDSMITH, *supra* note 155, at 6 (quoting amount spent on Great Society entitlement programs); see also EKELUND & TOLLISON, *supra* note 66, at 67-68 (showing increased government entitlement payments from 1960 to 1987).

¹⁹¹ See DRUCKER, *supra* note 185, at 69-70 (discussing failures of government low-income housing and welfare programs to change social conditions); GOLDSMITH, *supra* note 155, at 6, 43 (discussing failure of 1970s and 1980s wealth redistribution efforts through government intervention). Even with high levels of government spending from 1960 to 1990, social problems in America worsened. Violent crime increased 450%, divorce rates increased to 40% of all marriages, and out-of-wedlock births more than quintupled. *Id.* at 6. Programs intended to fight poverty within certain communities resulted in continued low economic opportunity. *Id.*

investment.¹⁹² City lawmakers claim that redevelopment efforts motivate investment that would otherwise remain absent, particularly in blighted areas.¹⁹³ Increased jobs and tax revenues resulting from such projects provide sorely needed economic relief within communities.¹⁹⁴ To achieve these results, governments believe they must interfere, even to the extent of exercising eminent domain

powers.¹⁹⁵ Such a position, however, assumes that government provides the most effective market stimulus.¹⁹⁶

While markets may fail to encourage investment in certain

¹⁹² See DAVID R. GODSCHALK ET AL., CONSTITUTIONAL ISSUES OF GROWTH MANAGEMENT 162 (1979) (asserting that growth management requires government intervention into market operations); Gallagher, *supra* note 165, at 1865-66 (advocating that economic development is necessary to create job opportunities and tax revenues); cf. Lazzarotti, *supra* note 165, at 57 (noting that large developments are sometimes needed to fulfill legislature's duty to promote public welfare). See generally discussion *infra* note 197 (regarding market failures).

¹⁹³ See *Berman v. Parker*, 348 U.S. 26, 34-35 (1954) (explaining that government action was necessary to develop balanced plan, eradicate cycle of decay, and control future slums); see also WEST, *supra* note 27, at 65 (discussing current call for government to direct industrial efforts into more prudent courses than industry would choose on its own). See generally GODSCHALK ET AL., *supra* note 192, at 162, 192-93 (discussing government role to impose limitations or provide incentives to encourage market response, and noting American Law Institute's proposed Model Land Development Code which recommends comprehensive planning, particularly for areas facing growth pressures); Gallagher, *supra* note 165, at 1866-67 (arguing that beneficial development projects are only completed cost-effectively by taking property through eminent domain rather than negotiating with owners).

¹⁹⁴ See Gallagher, *supra* note 165, at 1854. Cities may use resulting tax revenues to fund social services on which particularly lower income residents depend. *Id.* at 1855 (noting that revenues fund public education, housing, and other government services); see Lazzarotti, *supra* note 165, at 57 (suggesting that large-scale developments are necessary to promote general welfare, and costs would outweigh benefits if approached in fragments).

¹⁹⁵ See GODSCHALK ET AL., *supra* note 192, at 163, 171-72 (describing approaches to integrated planning and noting constitutional issues involved with identifying land parcels to develop); cf. Gallagher, *supra* note 165, at 1867 (supporting use of eminent domain when necessary to achieve development goals).

¹⁹⁶ See GODSCHALK ET AL., *supra* note 192, at 162 (stating presumption that growth management requires government intervention); see also Gallagher, *supra* note 165, at 1867-68 (supporting legislature's role to make land use decisions); cf. *Kelo v. City of New London*, 545 U.S. 469, 489 (2005) (suggesting economic development is traditionally performed by government).

circumstances, government takings are not the most effective means to encourage revitalization.¹⁹⁷ A position favoring eminent domain fails to recognize ways government can encourage market growth less intrusively and more effectively.¹⁹⁸ The legal and economic environment of the late nineteenth century, for instance, fostered dramatic real economic growth through limited government intrusion and strong property right protections.¹⁹⁹ By contrast, government attempts to remedy social concerns during the twentieth century show

¹⁹⁷ See GOLDSMITH, *supra* note 155, at 6-7 (citing Adam Ferguson, contemporary of America's Founders, describing ideal civil society as one where commerce flourishes, local associations influence communities, and government's role remains balanced). "[I]f government tries to do too much, it often strips away the motivation people have to be engaged" *Id.*; see also Michael Porter, *New Strategies for Inner-City Economic Development*, 1 *ECON. DEV. Q.* 11, 12 (1997) (maintaining that sustainable economic bases are best created through private, for-profit initiatives). See generally DRUCKER, *supra* note 185, at 60 (citing late nineteenth century philosopher Herbert Spencer in arguing that government lacks legitimacy to implement programs); HAYEK, *supra* note 182, at 119-22 (arguing government's power threatens liberty, constituting reason to prevent government interference in economic matters). When municipalities determine the growth path for an area without resident participation, counterproductive results may ensue as residents and businesses move from the area. See GOLDSMITH, *supra* note 155, at 13. Even so, some market failures exist where individual benefits relative to costs do not induce personal investment, such as environmental pollution or providing the national defense. See EKELUND & TOLLISON, *supra* note 66, at 440. Market failures arise from problems of incomplete ownership rights to certain resources, where users of property held in common do not bear the full costs of its use. See *id.* This creates a conflict between self-interest pursuits and the common good. See *id.* Government has a crucial role to regulate public actions and provide public goods in such situations, as it can more efficiently do so through its taxing powers. See *id.* at 457-58; see also EPSTEIN, *supra* note 28, at 202 (discussing public goods such as general defense that governments can provide more efficiently than through private market forces). But see Boaz, *supra* note 179, at 2 (describing Eastern European socialist countries where pollution and environmental destruction were worse than in ownership societies). Boaz also quotes Czech Republic Prime Minister Vaclav Klaus as saying that the worst environmental damage occurs in countries without private property, markets, or prices. *Id.*

¹⁹⁸ See GOLDSMITH, *supra* note 155, at 93-97 (discussing methods of stimulating market mechanisms with minimal government infusion); Somin, *supra* note 4, at 13A (suggesting economic incentives and regulatory reform to stimulate development in lieu of taking private property); cf. Thomas Jefferson, *Autobiography*, in *WRITINGS* 74 (Merrill D. Peterson ed., 1984) (emphasizing need for minimal government intrusion by commenting that "[w]ere we directed from Washington when to sow, and when to reap, we should soon want bread"); Alexander, *supra* note 183 (suggesting that government's best role is one of enforcement and limited redistribution because greater involvement creates inefficient regulations and expanding bureaucracies).

¹⁹⁹ See discussion *supra* Part I.B.1 (regarding economic and legal environment during Industrial Revolution).

a dismal track record.²⁰⁰ These results indicate that government's limited involvement in market forces, rather than direct interference as *Kelo* endorsed, best achieves economic growth incentives.²⁰¹

2. Eminent Domain Adds Unnecessary Societal Cost Without Demonstrated Benefit

The *Kelo* Court sanctioned government spending that unnecessarily increases society's financial burden without confirmed public benefit.²⁰² The economic effect of increased government spending through eminent domain increases costs to a community in numerous ways.²⁰³ Economic models demonstrate that government adds a level of cost when it tries to affect market behavior.²⁰⁴ Such efforts increase

²⁰⁰ See GOLDSMITH, *supra* note 155, at 6 (showing that social problems increased despite government spending exceeding \$5.5 billion during 1960s); SMILEY, *supra* note 66, at 102 (describing actual harms that ensued from New Deal programs); see *supra* notes 187-91 and accompanying text.

²⁰¹ See *supra* notes 187-91 and accompanying text. Several examples exist where government stimulated economic development without directly implementing plans through eminent domain or creating social programs. See GOLDSMITH, *supra* note 155, at 51-59. One case in point involved the City of Indianapolis under the leadership of Mayor Stephen Goldsmith. *Id.* at 143. Goldsmith recognized that revitalizing this depressed city required economically empowering its citizens and motivating private investment. *Id.* at 29, 143-84. The city accomplished its goals through a program aimed at promoting private enterprise through tax incentives and private ownership. *Id.* at 29-31, 93-97. In the end, businesses moved back into distressed areas, unemployment rates declined 50%, and median incomes increased, all with minimal government spending. *Id.* at 152, 161-62, 177-82; see also *id.* at 178 fig.3 (showing unemployment declined under Goldsmith's initiatives).

²⁰² See *Kelo v. City of New London*, 545 U.S. 469, 487 (2005) (describing petitioners' appeal to require reasonable certainty that public benefits will accrue); EKELUND & TOLLISON, *supra* note 66, at 787 (discussing government bond issues to raise capital for public projects); Merrill, *supra* note 1, at 77-78 (describing expenses involved in eminent domain proceedings).

²⁰³ For general discussions about the effects of taxation, often used to support increased government spending, see EKELUND & TOLLISON, *supra* note 66, at 465 (explaining how taxation increases consumer prices and decreases production, resulting in overall welfare loss to society), and GRIFFITHS, *supra* note 30, at 22-23 (describing how increased taxes raise business costs and reduce individuals' after-tax spendable income). See also Merrill, *supra* note 1, at 77-78 (discussing costs associated with government takings).

²⁰⁴ See BAUMOL & BLINDER, *supra* note 174, at 201-04 (demonstrating effect of government spending and taxation); EKELUND & TOLLISON, *supra* note 66, at 465 fig.19-3 (displaying how government taxation imposes societal cost); cf. Merrill, *supra* note 1, at 77-78 (describing eminent domain as more expensive way of acquiring resources than market exchange).

costs that corporate and individual taxpayers ultimately bear, further reducing their economic purchasing and investment power and threatening real economic growth.²⁰⁵

First, actual government expenditures increase under eminent domain proceedings, beyond those typical of market forces.²⁰⁶ For example, governments first develop legislation to authorize development plans and any required takings.²⁰⁷ Cities must then comply with due process requirements by obtaining appraisals to establish just compensation.²⁰⁸ If the property owners do not acquiesce, governments must then pay the costs of condemnation proceedings and perhaps litigation.²⁰⁹

Additionally, governments must raise capital to pay for eminent domain acquisitions and related costs, generally by raising taxes or issuing public debt.²¹⁰ For example, the State of Connecticut raised capital for the New London area redevelopment by issuing \$15.35 million in bonds.²¹¹ States generally repay their bond debts through increased corporate and individual taxes.²¹² An increased tax burden

²⁰⁵ See EKELUND & TOLLISON, *supra* note 66, at 787 (describing government financing through taxation); GRIFFITHS, *supra* note 30, at 22-23 (describing effects of government borrowing and increased taxes on businesses and individuals).

²⁰⁶ See Merrill, *supra* note 1, at 77-78 (discussing costs involved with eminent domain and reasons why governments desire to utilize market forces); see also Conrad deFiebre, *Bill Takes Aim at Eminent Domain*, STAR TRIBUNE (Minneapolis), Jan. 6, 2006, at 3 (quoting Keith Carlson of Metropolitan Inter-County Association describing taxpayer costs where local Florida governments utilized eminent domain, estimating attorney fees and other non-land expenses at 21% of total project costs).

²⁰⁷ See Merrill, *supra* note 1, at 77-78 (describing conditions under which eminent domain is more costly than market exchange).

²⁰⁸ See *id.*

²⁰⁹ *Id.*; see also E-mail from Scott Bullock, Attorney, Inst. for Justice, to author (Jan. 29, 2006, 13:13 PST) (on file with author) (regarding *Kelo's* estimated litigation costs).

²¹⁰ For example, the City of Detroit incurred public sector costs of over \$200 million to acquire and prepare the Poletown site for GM. *Poletown Neighborhood Council v. City of Detroit*, 304 N.W.2d 455, 469 (1981). Further, as part of the city's inducement for GM to remain in Detroit, the city waived its property tax revenues for 12 years. *Id.* at 470. This eliminated the expected \$15 million in tax revenues, at least initially. *Id.* at 467.

²¹¹ *Kelo v. City of New London*, 545 U.S. 469, 473 (2005). Municipal bonds such as those issued in Connecticut represent government borrowing, or debt. See EKELUND & TOLLISON, *supra* note 66, at 787. Bond purchasers receive regular interest payments from the government, which are generated through tax revenues. See *id.*

²¹² See EKELUND & TOLLISON, *supra* note 66, at 787; see GRIFFITHS, *supra* note 30, at 22 (describing effects of government borrowing).

further reduces reinvestment and expansion opportunities.²¹³

Furthermore, favoring eminent domain over market forces results in a few private owners bearing a greater proportional cost for community benefits.²¹⁴ Unwilling sellers often receive less than the price at which they would willingly sell their property on the open market.²¹⁵ An individual's full costs, including relocation, possible job change, and sentimental value, are not usually covered in just compensation formulae.²¹⁶ Susette Kelo, for example, bought and restored her century-old New London home in a neighborhood where

²¹³ See GRIFFITHS, *supra* note 30, at 22-23 (describing effects of public sector borrowing on businesses through increased taxes on corporations and workers). Increased employment taxes limit a corporation's ability to hire as many workers. *Id.* Individuals pay higher taxes, decreasing income available for consumer spending and investment. *Id.* at 23.

²¹⁴ See *Armstrong v. United States*, 364 U.S. 40, 49 (1960) (explaining principal purpose of Takings Clause as preventing government from forcing some people to bear public burdens which should be borne by all); Whitehead & Hardin, *supra* note 11, at 88 (citing Richard Posner's analysis that amount paid for taken property will be insufficient to fully compensate owner); sources cited *infra* note 215 and accompanying text.

²¹⁵ See *United States v. 564.54 Acres of Land*, 441 U.S. 506, 511 (1979) (holding that paying fair market value as just compensation for eminent domain takings does not include special value to current owner arising from adapting property to owner's particular use); COOTER & ULEN, *supra* note 181, at 175-77 (explaining by example that market values paid for eminent domain takings are usually lower than willing sellers would charge); EPSTEIN, *supra* note 28, at 164-65 (discussing bargaining inefficiencies which result from government takings). To fully compensate an existing owner, the amount paid should be the fair market price between a willing buyer and seller. Cramer, *supra* note 165, at 430. In an eminent domain proceeding, however, the "seller" is not willing. *Id.* Presumably, if the landowner were willing to sell at the fair market price, he would have done so, avoiding proceedings altogether. *Id.* Governments essentially appropriate the surplus that would otherwise accrue between willing buyers and sellers. See COOTER & ULEN, *supra* note 181, at 176-77; EPSTEIN, *supra* note 28, at 164. This occurs when governments compensate private owners at market value rates rather than at the price the individual would willingly sell. See COOTER & ULEN, *supra* note 181, at 176. Compensation also fails to account for replacement cost or sentimental value, causing further inequity. See Cramer, *supra* note 165, at 430.

²¹⁶ See *Kelo*, 545 U.S. at 521-22 (Thomas, J., dissenting) (arguing compensation will not cover subjective value of uprooting property owners from homes and neighborhoods); Cramer, *supra* note 165, at 430 (discussing failure of just compensation to adequately cover costs of replacement and sentimental value); Doug Bandow, *Legal Plundering* (Nov. 9, 2004), <http://www.cato.org/cgi-bin/scripts/printtech.cgi/research/articles/bandow-041109.html> (commenting that moving expenses, business goodwill, advantageous locations, and real values are not fully considered in determining just compensation).

some families have resided for over one hundred years.²¹⁷ The City's offer to pay fair market value did not compensate these homeowners for years of home improvements or the emotional ties invested in their homes.²¹⁸ Further, poor and middle-income property owners cannot afford the monetary costs involved with disputing a city's compensation calculation, and they are even less able to afford the costs associated with defending themselves against improper takings.²¹⁹

For the costs involved, it is difficult to determine the actual public benefit that takings, such as those condoned in *Kelo*, will actually generate.²²⁰ For example, it is unclear whether office space allocated within New London's plan actually attracted new businesses, or merely served relocation needs for existing ones.²²¹ In other instances where courts upheld eminent domain powers for development efforts, the intended public benefits failed to materialize.²²² The GM assembly

²¹⁷ *Kelo*, 545 U.S. at 494; Melanie Kirkpatrick, *The Weekend Interview: Home for Christmas*, WALL ST. J., Dec. 24, 2005, at A8, available at <http://www.opinionjournal.com/editorial/feature.html?id=110007723>.

²¹⁸ See Kirkpatrick, *supra* note 217 (describing *Kelo*'s efforts to renovate her home); Dana Berliner, *Public Power, Private Gain: The Abuse of Eminent Domain*, http://www.ij.org/private_property/connecticut/ED-Report-DBerliner.doc (last visited Jan. 25, 2007) (giving examples where market compensation inadequately covers real life issues experienced by homeowners forced to move).

²¹⁹ See Gallagher, *supra* note 165, at 1861-62 (discussing challenges facing individual property owners that prevent them from effectively opposing government takings); see *Kelo*, 545 U.S. at 521-22 (Thomas, J., dissenting) (fearing that property value losses will fall disproportionately on low income communities). Most homeowners cannot afford legal costs required to pursue action against the government. Petitioners' estimated costs in *Kelo*, for example, were nearly \$700,000, a prohibitive amount for low- to middle-income homeowners who are trying to keep their homes rather than obtaining cash through a sale. See E-mail from Scott Bullock, *supra* note 209. Litigation costs may exceed the owners' property values, which governments recognize and use to their advantage. See *id.*

²²⁰ See *Kelo*, 545 U.S. at 502 (O'Connor, J., dissenting) (criticizing Justice Kennedy's suggestion that courts will be able to discern between private and public benefit). The benefits expected from other eminent domain proceedings have not reached their intended objectives. See Gideon Kanner, *Do-Gooders' Designs Twist Takings Clause*, NAT'L L. J., Jan. 8, 1996, at A19-20 (describing failure of land oligopoly breakup attempted in *Midkiff*); Somin, *supra* note 4, at 13A (describing lower employment than expected from GM plant identified in *Poletown*).

²²¹ See *Kelo*, 545 U.S. at 473-74.

²²² For example, the Court's support for eliminating the Hawaiian land oligopoly in *Midkiff* as a valid public use produced counterproductive results. Kanner, *supra* note 220, at A19-20. The Hawaiian Land Reform Act under review in *Midkiff* aimed to remove a land oligopoly to enable willing buyers to purchase property at fair prices.

plant involved in *Poletown v. City of Detroit*, for instance, provided only half of the anticipated 6000 jobs.²²³ Yet the project displaced over 4000 residents.²²⁴

Strict scrutiny analysis would protect individuals and minority groups from disproportionately bearing the cost of such tenuous benefits.²²⁵ The Court would presumably find that limited government will stimulate investment and minimize costs more effectively.²²⁶ On that basis, the Court would have ample reason to invalidate government actions that infringe protected property rights such as those the Court allowed in *Kelo*.²²⁷

CONCLUSION

The United States' market economy successfully generated the economic prosperity enjoyed by American citizens since this great nation's founding.²²⁸ Fundamental property right protections, carefully crafted by the Founders to advance wealth creation, bolster this economic system.²²⁹ The *Kelo* Court threatened the continued success of this model by failing to carefully scrutinize government actions that infringe upon constitutionally protected property rights.²³⁰ In failing to apply heightened review, the *Kelo* Court failed to uphold the Founders' intent to protect economic freedoms and the rights of minorities.²³¹ The *Kelo* Court also failed to consider whether the actual benefits of New London's takings would exceed the diminished private investment and layers of costs associated with the City's

Haw. Hous. Auth. v. Midkiff, 467 U.S. 229, 242 (1984). Instead, the actual beneficiaries in the scheme were Japanese investors who purchased existing, modest homes at a premium when the yen was favorable to the U.S. dollar. Kanner, *supra* note 220, at A19. They razed the existing homes and built lavish estates, which they marketed to other Japanese as vacation homes. *Id.* This exacerbated the Hawaiian housing problem by increasing prices and reducing the availability of affordable homes. *Id.*; see also *supra* note 220 and accompanying text.

²²³ See Somin, *supra* note 4, at 13A (describing GM's actual employment pattern in Detroit).

²²⁴ *Id.*

²²⁵ See discussion *supra* Part III.A.

²²⁶ See *Kelo* Author, *supra* note 156 (quoting Justice Stevens's belief that market forces will create better long-run results than government action).

²²⁷ See discussion *supra* Part III.C.

²²⁸ See discussion *supra* Part III.B-C.

²²⁹ See discussion *supra* Parts I.A., III.B.

²³⁰ See MILES ET AL., *supra* note 31, at 393; see also discussion *supra* Part III.A-C.

²³¹ See discussion *supra* Part III.A-B.

eminent domain actions.²³² Michigan's Supreme Court recognized its duty to protect its citizens' property rights, overruling *Poletown* through careful analysis of the legislative purpose behind takings for economic development.²³³ Perhaps the U.S. Supreme Court will have a similar opportunity to remedy its misstep in *Kelo*. The future of American prosperity and economic freedom depends upon it.

²³² See discussion *supra* Part III.C.

²³³ See *County of Wayne v. Hathcock*, 684 N.W.2d 765, 786-87 (Mich. 2004) (overturning *Poletown*, holding that justifying eminent domain solely for private entities seeking profit renders constitutional limitations impotent).