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ECONOMIC DEVELOPMENT AND THE “PUBLIC USE” CLAUSE: AN EXAMINATION OF KELO V. NEW LONDON

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INTRODUCTION

The Fifth Amendment of the United States Constitution provides, in relevant part, that “private property [shall not] be taken for public use without just compensation.”¹ This “Takings Clause” allows the state to exercise eminent domain to take private property for a public use so long as just compensation is paid to the owner for the taking.² The traditional need for eminent domain is uncontroversial. Government sometimes needs privately-owned land for public works infrastructure like highways or railroads.³ These government functions cannot be exercised “if the obstinacy of a private person, or if any other authority, can prevent the acquisition of the means or instruments by which alone government functions can be performed.”⁴

But while many individuals would accept the expansion of a sewer system or public park as an example of “public use,” courts have broadly interpreted the public use requirement in a manner that arguably renders the limitation meaningless.⁵ This strong claim is now being tested in challenges to the use of eminent domain for the sole purpose of facilitating private economic

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¹ U.S. CONST. amend. V. (stating, “nor shall private property be taken for public use, without just compensation”). The Fifth Amendment’s Public Use Clause applies to the States through the Fourteenth Amendment to the United States Constitution. *See, e.g.*, Hawaii Housing Authority v. Midkiff, 467 U.S. 229, 231 (1984).

² *See* 2A Nichols on Eminent Domain § 7.01[1] (Julius L. Sackman ed., 3d ed. 1998) [hereinafter 2A Nichols].

³ *See* Ralph Nader & Alan Hirsch, *Making Eminent Domain Humane*, 49 VILL. L. REV. 207, 207 n.3 (2004).

⁴ Kohl v. United States, 91 U.S. 367, 371 (1875), *quoted in* Nader & Hirsch, *supra* note 3, at 207 n.6.

⁵ *See* Nader & Hirsch, *supra* note 3, at 208; Thomas W. Merrill, *The Economics of Public Use*, 72 CORNELL L. REV. 61, 61 (1986) (“In practice, however, most observers today think the public use limitation is a dead letter.”); Cass R. Sunstein, *Naked Preferences and the Constitution*, 84 COLUM. L. REV. 1689, 1725 (1984) (“Indeed, the test is even more deferential than the rationality requirements of the due process and equal protection clauses, for the legislative judgment on the point is accepted as nearly conclusive.”).

development.⁶ Meanwhile, the use of eminent domain for economic development is a growing, national controversy.⁷ Dana Berliner and the Institute for Justice documented that between 1998 and 2002, there were over 10,000 filed or threatened condemnations that involved private-to-private transfers of property in forty-one states.⁸ Media exposure of alleged eminent domain abuses has been extensive, including a 60 Minutes report documenting the use of eminent domain to develop a Lakewood, Ohio neighborhood into high-end condominiums and a mall; the acquisition of a Mesa, Arizona brake repair shop to clear land for a new Ace Hardware Store; and the forced removal of property owners on a block near Times Square targeted as the new headquarters for the New York Times.⁹

The traditional school of thought regarding this facet of eminent domain insists that “public use” means “use by the public.”¹⁰ This use would encompass the aforementioned situations where the public actually used the acquired property, like a city park. A second school of thought argues for a more expansive conception of the “public use.”¹¹ Under this conception, the “public use” requirement means “public advantage.” As the Supreme Court explained, “[a]ny eminent domain action which tends to enlarge resources, increase industrial energies, or promote the productive power of any considerable number of inhabitants of a state or community manifestly contributes to the general welfare and prosperity of the whole community and thus

⁶ See, e.g., *Kelo v. City of New London*, 843 A.2d 500 (Conn. 2004).

⁷ See Petition for a Writ of Certiorari at 8, *Kelo v. City of New London*, 843 A.2d 500 (Conn. 2004) (No. 04-108), available at 2004 WL 1659558.

⁸ *Id.* (citing Dana Berliner, *Public Power, Private Gain: A Five Year, State-by-State Report Examining the Abuse of Eminent Domain*, (2003), available at <http://www.ij.org/publications/castle/>).

⁹ *60 Minutes: Eminent Domain* (CBS television broadcast, Dec. 28, 2003) (transcript available at <http://www.cbsnews.com/stories/2004/06/30/60minutes/main626872.shtml?CMP=ILC-SearchStories> (last visited Nov. 26, 2004)).

¹⁰ 2A Nichols, *supra* note 2, § 7.02[2].

¹¹ *Id.*

constitutes a valid public use.”¹² Under this latter view, the scope of eminent domain is “coterminous with the scope of a sovereign’s police powers.”¹³

The United States Supreme Court contributed to the debate, and the rejection of the narrow view of the Public Use Clause, in two cases in the second half of the twentieth century. In *Berman v. Parker*,¹⁴ and again in *Hawaii Housing Authority v. Midkiff*,¹⁵ the Court equated “public use” with “public interest” and affirmed that the Fifth Amendment demands broad deference to the government’s decision to exercise the power of eminent domain.¹⁶ In *Midkiff*, a unanimous Court made clear that “public use” challenges are subject to rational basis review.¹⁷ As Justice O’Connor observed, “When the legislature’s purpose is legitimate and its means are not irrational, our cases make clear that empirical debates over the wisdom of takings—no less so than debates over the wisdom of other kinds of socioeconomic legislation—are not to be carried out in the federal courts.”¹⁸

The power of eminent domain is not unlimited, though. The Constitution still forbids “even a compensated taking of property when executed for no reason other than to confer a private benefit on a particular private party.”¹⁹ *Midkiff* emphasized that “a purely private taking could not withstand the scrutiny of the public use requirement; it would serve no legitimate purpose of government and would thus be void.”²⁰ Of course, this qualification may be

¹² *Id.*

¹³ *Midkiff*, 467 U.S. at 240.

¹⁴ 348 U.S. 26 (1954).

¹⁵ 467 U.S. 229 (1984).

¹⁶ See *Midkiff*, 467 U.S. at 241; see also Nicole Stelle Garnett, *The Public-Use Question as a Takings Problem*, 71 GEO. WASH. L. REV. 934, 935-40 (2003) (explaining *Midkiff* and *Berman*).

¹⁷ 467 U.S. at 242-43.

¹⁸ *Id.*

¹⁹ *Id.* at 244.

²⁰ *Id.*

meaningless if the government is savvy enough to concoct an ostensibly public purpose for its actions.²¹

With these principles in mind, it is easy to see the tension between the prohibition on certain purely private transfers, and the use of eminent domain for the sole purpose of economic redevelopment. This tension is nowhere more evident than in *Kelo v. City of New London*.²² In *Kelo*, a majority of the Supreme Court of Connecticut held that the Public Use Clauses of the United States and Connecticut Constitutions authorized the use of eminent domain for economic development intended to increase tax revenue and improve the economy in the town of Fort Trumbull.²³ The affected property owners appealed the decision to the United States Supreme Court and in September 2004, the Court granted certiorari to answer the following question: “What protection does the Fifth Amendment’s public use requirement provide for individuals whose property is being condemned, not to eliminate slums or blight, but for the sole purpose of ‘economic development’ that will perhaps increase tax revenues and improve the local economy?”²⁴

This purpose of this Note is three-fold. Part I describes the development of the “public use” requirement in further depth.²⁵ This Part focuses on recent court opinions that have closely scrutinized the decisions of legislatures and development agencies that have attempted to use

²¹ See Nader & Hirsch, *supra* note 3, at 212.

²² 843 A.2d 500 (Conn. 2004).

²³ *Id.* at 520.

²⁴ See Brief of Amicus Curiae of the Rutherford Institute in Support of Petitioners, *Kelo v. City of New London*, 843 A.2d 500 (Conn. 2004) (No. 04-108), *available at* 2004 WL 2605096.

²⁵ Throughout this Note, I refer to the public use “requirement.” At least one scholar has questioned whether this term appropriately conveys the intent of the Framers of the Fifth Amendment. See Matthew P. Harrington, “Public Use” and the Original Understanding of the So-Called “Takings” Clause, 53 HASTINGS L.J. 1245, 1247 (2002). Professor Harrington argues that “the idea that courts had the power to supervise legislative expropriations would have been unfamiliar to the members of the Congress who drafted the so-called Takings Clause. On the contrary, the members of the founding generation generally understood that the power to take property for public use is reserved to the legislature alone and is a function of the principle of consent inherent in a representative government.” *Id.* at 1247. Harrington later adds, “the term [public use] was meant to be descriptive, rather than

eminent domain for economic development. Part II explains the facts and analyzes the reasoning underlying the Supreme Court of Connecticut decision in *Kelo*. Part III advocates the application of heightened scrutiny to the *Kelo* condemnation, as endorsed by the *Kelo* dissent and other recent decisions. This Part also suggests other approaches the Court may utilize, in an effort to formulate what the pending Supreme Court decision could look like.

I. THE EVOLVING PUBLIC USE REQUIREMENT

As many commentators have observed in one form or another, “the importance of protecting ‘the sacrosanct right of individuals to dominion over their private property’ pervades our nation’s history.”²⁶ The power of eminent domain is equally entrenched, though. In colonial times, the sovereign condemned property to support mills, to create roads, and build bridges and waterways.²⁷ During this early period, “the public use requirement was understood to mean that if property was to be taken, it was necessary that it be used by the public.”²⁸ This view of public use coincides with the narrow view briefly discussed above.

The Supreme Court also held that government has no authority to “take property from A and give it to B.”²⁹ Government could make an exception and delegate the power of eminent domain to railroad and highway construction companies, so long as they kept their respective

proscriptive” and “the Fifth Amendment merely declares that the expropriations require compensation while other takings, such as tax levies or forfeitures, do not.” *Id.* at 1299, 1301.

²⁶ See Brief of Amicus Curiae of the Rutherford Institute at 4, *supra* note 24 (quoting *County of Wayne v. Hathcock*, 684 N.W.2d 765, 769 (Mich. 2004)); *Kelo v. City of New London*, 843 A.2d 500, 577 (Conn. 2004) (Zarella, J., concurring in part, dissenting in part) (“[T]he right of the sovereign to condemn private property also has deep historical roots, purportedly dating back to the Romans.”); see also Harrington, *supra* note 25, at 1247 (2002) (“The origins of the power of eminent domain are to be found in the long struggle for legislative supremacy which marked the history of relations between Crown and Parliament, and which culminated in the American Revolution.”).

²⁷ 2A Nichols, *supra* note 2, § 7.07[3].

²⁸ Sunstein, *supra* note 5, at 1724.

²⁹ *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 388 (1798); Brief Amicus Curiae of James M. Buchanan and Gordon Tullock and Pacific Legal Foundation in Support of Petitioners at 3, *Kelo v. City of New London*, 843 A.2d 500 (Conn. 2004) (No. 04-108), available at 2004 WL 1882158.

projects open to the public.³⁰ “But since government had no legitimate authority merely to distribute ‘resources or opportunities to one group rather than another solely on the ground that those favored have exercised the raw political power to obtain what they want,’ the government could not use eminent domain to benefit private parties.”³¹

But as the country grew in the mid-nineteenth century, and states developed the strong desire to develop natural resources and increase industrial development, some courts began advocating the minority position that “public use” might mean “public benefit.”³² One commentator describes how the Mills Acts presented an opportunity for courts to expand the public use doctrine.³³ These Acts authorized downstream riparian landowners to construct and maintain mills on the condition that upstream landowners would be able to collect damages for any flooding caused by the mills.³⁴ While a minority of courts still employed the narrow school of thought, most courts upheld the mill legislation on the reasoning that great public benefit would result from the private operation of the mills.³⁵

While most late nineteenth and early twentieth century battles over eminent domain were fought in the state courts, the United States Supreme Court, when faced with the issue, generally supported the use of eminent domain for economic development.³⁶ As Wendell E. Pritchett notes, the Court’s expansive interpretation of the Public Use Clause conflicted with its oft-stated

³⁰ See Brief Amicus Curiae of James M. Buchanon, et al., at 3-4, *supra* note 29 (citing *The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 88 (1872)).

³¹ *Id.* at 4 (citing Sunstein, *supra* note 5, at 1689).

³² See Jennifer Maude Klemetsrud, Note, *The Use of Eminent Domain for Economic Benefit*, 75 N.D. L. REV. 783, 793 (1999).

³³ See Klemetsrud, *supra* note 32, at 793 (citing *Head v. Amoskeag Mfg. Co.*, 113 U.S. 9, 17-18 (1884) (providing a complete list of the Mills Acts through 1884)).

³⁴ *Id.* at 793-94.

³⁵ *Id.* at 794.

³⁶ See Wendell E. Pritchett, *The “Public Menace” of Blight: Urban Renewal and the Private Uses of Eminent Domain*, 21 YALE L. & POL’Y REV. 1, 11 (2003).

opposition to government intervention in the economy.³⁷ “Unlike other areas of economic regulation in which the Court continued to view legislative acts with suspicion, in a wide variety of cases, it ceded the authority to determine what constituted a public use to the state courts.”³⁸ In *Rindge Co. v. Los Angeles County*,³⁹ the Court declared that it was “not essential that the entire community, nor even any considerable portion, should directly enjoy or participate in order to constitute a public use.”⁴⁰

As Professor Pritchett observes, the demise of the *Lochner* era in the 1934 case of *Nebbia v. New York*⁴¹ set the tone for dramatic changes in Supreme Court jurisprudence with regard to judicial review of economic regulation, laying the foundation for *Berman v. Parker*⁴² in the process.⁴³ In *Berman*, the Supreme Court solidified the contemporary expansion of the public use doctrine. The case involved a challenge to an urban renewal project in Washington, D.C. conducted pursuant to the District of Columbia Redevelopment Act of 1945.⁴⁴ Landowners argued that the taking was unconstitutional because the condemned property was not slum housing and was to be redeveloped for private, rather than public, use.⁴⁵ In an opinion written by Justice Douglas, the Court unanimously approved the condemnation and granted the redevelopment agency broad discretion for urban renewal.⁴⁶ Douglas wrote that the authority to

³⁷ Pritchett, *supra* note 36, at 11.

³⁸ *Id.* at 12.

³⁹ 262 U.S. 700 (1923).

⁴⁰ *Id.* at 707. See also Pritchett, *supra* note 36, at 12 (discussing *Rindge Co.* and stating that the Court’s “expansive readings of the Fifth Amendment gave encouragement to advocates of urban renewal”). *Id.*

⁴¹ 291 U.S. 502 (1934).

⁴² 348 U.S. 26 (1954).

⁴³ Pritchett, *supra* note 36, at 40-41.

⁴⁴ *Id.* at 28.

⁴⁵ *Id.* at 31; Klemetsrud, *supra* note 32, at 795-96 (describing the case).

⁴⁶ *Berman*, 348 U.S. at 30, 36. Pritchett writes,

Berman was consistent with the New Deal Court’s philosophy that legislatures were best suited to determine the appropriate uses of government power in the area of economic regulation. The DCLRA and other redevelopment agencies, run by planning experts, would apply professional standards to determine which areas required redevelopment and would implement the program in an equitable fashion for the benefit of the city.

classify urban renewal as public use “is essentially the product of legislative determinations addressed to the purposes of government, purposes neither abstractly nor historically capable of complete definition” and “when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive.”⁴⁷

In *Hawaii Housing Authority v. Midkiff*,⁴⁸ the Court confirmed the need for broad deference to legislatures and development agencies on the public use question. *Midkiff* involved an effort by the Hawaii legislature to redistribute property long held by local oligarchs.⁴⁹ The Court observed that the legislature “concluded that concentrated land ownership was responsible for skewing the State’s residential fee simple market, inflating land prices, and injuring the public welfare.”⁵⁰ To combat this situation, the Land Reform Act of 1967 authorized the Hawaiian Housing Authority (HHA) to hold public hearings to determine whether acquisition of property by the State would combat the problems associated with oligopoly.⁵¹

Reviewing the argument of landowners that the HHA scheme violated the public use requirement of the Fifth Amendment, as applied to the states via the Fourteenth Amendment, the Court observed that *Berman* made clear that courts have a narrow role to play in reviewing determinations of public use.⁵² The Court acknowledged that “the Court’s cases have repeatedly stated that ‘one person’s property may not be taken for the benefit of another private person without a justifying public purpose, even though compensation be paid’”⁵³ “But where the exercise of the eminent domain power is rationally related to a conceivable public purpose, the

Pritchett, *supra* note 36, at 46.

⁴⁷ *Berman*, 348 U.S. at 32.

⁴⁸ 467 U.S. 229 (1984).

⁴⁹ *Id.* at 232.

⁵⁰ *Id.*

⁵¹ *Id.* at 233.

⁵² *Id.* at 240.

⁵³ *Id.* at 241 (citing *Thompson v. Consolidated Gas Corp.*, 300 U.S. 55, 80 (1937)).

Court has never held a compensated taking to proscribed by the Public Use Clause.”⁵⁴ By this reasoning, the Court found the Land Reform Act to be constitutional.⁵⁵

By adopting such broad deference to the legislature on the public use question and undertaking rational basis review, the Court has been criticized for abdicating its responsibility to protect property owners from government abuse.⁵⁶ Professor Richard Epstein has argued that the Court has entirely erased “public use” from the Fifth Amendment.⁵⁷ On the state level, the Supreme Court of Michigan issued an infamous decision in *Poletown Neighborhood Council v. City of Detroit*⁵⁸ in 1981 that arguably stretched the public use requirement beyond recognition.

The rest of this section describes several decisions that have closely scrutinized agency decisions, perhaps pulling the concept of “public use” back from the brink of extinction in the process. These federal and state opinions, including the *Poletown* and *Kelo* state court dissents, may represent the swinging of the pendulum back towards narrower deference to legislative determinations of public use. As the Supreme Court prepares to review the requirements of the Public Use Clause once again, these cases may provide guidance as to the role courts should properly play when analyzing takings for economic development.

Evidence of greater scrutiny of legislative determinations of public use may be seen in the recent overruling of the aforementioned *Poletown* decision. In *Poletown*, the Supreme Court of Michigan upheld the use of eminent domain by the city of Detroit to take and remove a non-blighted neighborhood in order to provide for the construction of a General Motors assembly plant.⁵⁹ The taking was found to provide weighty societal benefits, including the alleviation of

⁵⁴ *Midkiff*, 467 U.S. at 241.

⁵⁵ *Id.* at 241-42.

⁵⁶ See Pritchett, *supra* note 36, at 50; Nader & Hirsch, *supra* note 3, at 212.

⁵⁷ RICHARD EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 162 (1985).

⁵⁸ 304 N.W.2d 455 (Mich. 1981).

⁵⁹ *Id.* at 460.

distressed economic conditions in the city, the revitalization of local industries, and a general boost to the tax base.⁶⁰ The dissent argued that takings for economic development generally contained three characteristics that warranted the characterization of public use: extreme public necessity, continuing accountability to the public, and land selection based on facts of independent public significance.⁶¹ The dissent deemed those elements missing in the General Motors situation.⁶²

On July 30, 2004, the Supreme Court of Michigan overruled *Poletown in County of Wayne v. Hathcock*.⁶³ In that case, Wayne County proposed to condemn land to construct a business and technology park to attract business to an economically depressed area.⁶⁴ Addressing a challenge to the taking by property owners, the court concluded that, although the condemnations at issue were authorized by a Michigan statute, they “did not pass muster” under the state constitution.⁶⁵ The court emphasized that “Wayne County intends to transfer the condemned properties to private parties in a manner wholly inconsistent with the common understanding of ‘public use’ at the time our Constitution was ratified.”⁶⁶

After conducting an inquiry into the meaning of “public use” under the state constitution, as well as endorsing the *Poletown* dissent’s three-factor analysis, the court determined that the *Poletown* majority’s conception of a public use was incorrect.⁶⁷ As the court explained,

To justify the exercise of eminent domain solely on the basis of the fact that the use of that property by a private entity seeking its own profit might contribute to the economy’s health is to render impotent our constitutional limitations on the government’s power of eminent domain. . . . After all, if one’s ownership of private property is forever subject to the government’s determination that another

⁶⁰ *Id.* at 459.

⁶¹ *Id.* at 477-78 (Ryan, J., dissenting).

⁶² *Id.* at 480; *see also* Klemetsrud, *supra* note 32, at 797 (describing the case and surrounding controversy).

⁶³ 684 N.W.2d 765 (Mich. 2004).

⁶⁴ *Id.* at 769-70.

⁶⁵ *Id.* at 770.

⁶⁶ *Id.*

⁶⁷ *Id.* at 787.

private party would put one's land to better use, then the ownership of real property is perpetually threatened by the expansion plans of any large discount retailer, 'megastore,' or the like.⁶⁸

While *Hathcock* was decided solely under the Michigan Constitution, the decision reflects the contrast of approaches to the public use requirement among the states. As the petitioners in the *Kelo* case point out in their recently filed Reply Brief to the United States Supreme Court, after *Hathcock*, seven states rely in part on the federal constitution or case law in deciding whether economic development is public use.⁶⁹ The Court may, therefore, find the approach in *Hathcock* persuasive as it prepares to issue guidance to courts interpreting the Fifth Amendment.

*Southwestern Illinois Development Authority (SWIDA) v. National City Environmental, LLC*⁷⁰ is another decision that set aside an exercise of eminent domain as inconsistent with the "public use" requirement. In that case, the development authority had a legislative mandate to promote industrial and commercial activities for the general welfare.⁷¹ A local racetrack filed a "quick take" condemnation application with the development authority to acquire the land of a neighbor to build a parking lot.⁷² After the application was approved, the neighbor, National City Environmental, challenged the determination that the taking was consistent with the Takings Clause of the United States and Illinois Constitutions.⁷³

The Illinois Supreme Court accepted that the authority could legitimately exercise its eminent domain powers to promote commercial development. But the court found that a

⁶⁸ *Id.* at 786.

⁶⁹ Reply Brief for Petitioners at 4-5, *Kelo v. City of New London*, 843 A.2d 500 (Conn. 2004) (No. 04-108), available at 2004 WL 1950427.

⁷⁰ 768 N.E.2d 1 (Ill. 2002).

⁷¹ *Id.* at 2.

⁷² *Id.*

⁷³ *Id.*

distinction still exists between “public use” and “public purpose.”⁷⁴ The court added that, “[t]he public must be to some extent entitled to use or enjoy the property, not as a mere favor or by permission of the owner, but by right.”⁷⁵ Furthermore, “[i]t appears [the plaintiff’s] true intentions were to act as a default broker of land for [the racetrack’s] proposed parking plan.”⁷⁶ As a side matter, the *Kelo* majority, as described in the following section, characterized this decision as “an illustration of when a court determines that an economic development plan cannot be said to be for the public’s benefit.”⁷⁷

In another case, *Daniels v. Area Plan Commission*,⁷⁸ the United States Court of Appeals for the Seventh Circuit rejected a county planning commission’s decision to vacate a restrictive covenant in order to develop a shopping center.⁷⁹ The court began its analysis by noting that *Berman* and *Midkiff* counsel against disturbing the agency’s decision unless “it is palpably without reasonable foundation.”⁸⁰ But the court found that in this case, the legislature had not made a specific finding of what constitutes public use.⁸¹ In *Berman* and *Midkiff*, the condemning agencies “were not free to create a public purpose out of whole cloth but instead were limited to findings of public purpose established by the legislature.”⁸² In the process of reaching its holding, the court observed that several courts, including the *SWIDA* court in Illinois, have recently found unconstitutional takings that were for a private use.⁸³

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *SWIDA*, 768 N.E.2d at

⁷⁷ *Kelo*, 843 A.2d at 535.

⁷⁸ 306 F.3d 445 (2002).

⁷⁹ *Id.* at 466-67.

⁸⁰ *Id.* at 460 (citing *Midkiff*, 467 U.S. at 241).

⁸¹ *Id.* at 460-61.

⁸² *Id.* at 461.

⁸³ *Id.* at 460 n.17 (citing, among others, 99 Cents Only Stores v. Lancaster Redevelopment Agency, 237 F. Supp. 2d 1123 (C.D. Cal. 2001)). *See also* Georgia Dep’t of Transp. V. Jasper County, 586 S.E.2d 853 (S.C. 2003) (refusing to allow county to acquire lands to be leased to a private corporation because doing would have been “in derogation of the right to acquire, possess, and defend property”).

While *Daniels* was more concerned with ensuring the legislature had actually defined public use, rather than interjecting a more exacting scrutiny of that decision, the opinion still expresses concern about the undermining of the public use requirement.⁸⁴ In contrast, *Hathcock* and the *Poletown* dissent explicitly argues for heightened scrutiny under the state constitutions.⁸⁵ *SWIDA* also criticizes an egregious transfer of private property under the cloak of “public use.”

The following section describes the *Kelo* case itself. With a complete picture of the *Kelo* case in mind, this Note then advocates applying a stricter scrutiny based partly on the principles from *Hathcock* and the dissent in *Kelo*.

II. KELO V. CITY OF NEW LONDON

The city of New London, Connecticut has fallen on hard times. New London has experienced significant job losses in the past few years, including 1900 government-sector positions and the closure of the United States Naval Undersea Warfare Center, which added another 1000 positions.⁸⁶ In fact, the state office of policy and management has designated the city a “distressed municipality.”⁸⁷

But things began looking better for the denizens of New London in February 1998, when the pharmaceutical company, Pfizer, announced that it was developing a global research facility

⁸⁴ The court observed that the Ninth Circuit has expressly warned that, [if] officials could take private property, even with adequate compensation, simply by deciding behind closed doors that some other use of the property would be a ‘public use,’ and if those officials could later justify their decisions in court merely by positing ‘a conceivable public purpose’ to which the taking is rationally related, the ‘public use’ provision of the Takings Clause would lose all power to restrain government takings.

Daniels, 306 F.3d at 461 (quoting *Armendariz v. Penman*, 75 F.3d 1311, 1321 (9th Cir. 1996)).

⁸⁵ See also *Aaron v. Target Corporation*, 269 F. Supp. 2d 1162 (E.D. Mo. 2003), *rev’d on abstention grounds*, 357 F.3d 768 (8th Cir. 2004) (closely scrutinizing the finding of blight and finding eminent domain would be for private use, solely to benefit the tenant of the property); *Manufactured Housing Communities of Washington v. State*, 13 P.3d 183 (Wash. 2000) (striking down a statute giving mobile home tenants a right of first refusal when the park owner decides to sell as a facially unconstitutional taking because it effected a transfer of a property right—the right of first refusal—to private parties).

⁸⁶ *Kelo*, 843 A.2d at 510.

⁸⁷ *Id.* at 510.

near the Fort Trumbull neighborhood in the city.⁸⁸ On January 18, 2000, the City of New London adopted the Fort Trumbull Municipal Development Plan as prepared by the New London Development Corporation, a private, nonprofit development corporation.⁸⁹ The development plan area is approximately ninety acres in size and includes residential and commercial areas.⁹⁰ As the Supreme Court of Connecticut observed, the development corporation stated that its goals were “to create development that would complement the facility that Pfizer was planning to build, create jobs, increase tax and other revenues, encourage public access to and use of the city’s waterfront, and eventually ‘build momentum’ for the revitalization of the rest of the city. . . .”⁹¹

The only obstacles standing in the way of this municipal utopia were the townspeople themselves. So, in October, 2000, the development corporation voted to use the power of eminent domain to acquire properties within the area whose owners were not willing to sell.⁹² After the corporation initiated condemnation proceedings, Susette Kelo and several of her neighbors filed a complaint challenging the condemnation.⁹³ The trial court dismissed the pending eminent domain actions against four plaintiffs who lived on one parcel of the plan, but upheld the takings of the parcel three properties.⁹⁴ The Supreme Court of Connecticut subsequently granted certiorari to hear the appeal of the remaining homeowners.

The court first addressed whether economic development is a public use under the state and federal constitutions. The court concluded that “economic development projects created and

⁸⁸ *Id.* at 509.

⁸⁹ *Id.*

⁹⁰ *Id.* at 509.

⁹¹ *Id.* The court found that the development plan is expected to generate approximately between: (1) 518 and 867 construction jobs; (2) 718 and 1362 direct jobs; and (3) 500 and 940 indirect jobs. The composite parcels of the development plan also are expected to generate between \$680,554 and \$1,249,843 in property tax revenues for the city.

⁹² *Kelo*, 843 A.2d at 510-11.

⁹³ *Id.* at 511.

implemented pursuant to [the state statute] that have the public economic benefits of creating new jobs, increasing tax and other revenues, and contributing to urban revitalization, satisfy the public use clauses of the state and federal constitutions.”⁹⁵ In support of this conclusion, the majority opinion observed that the state legislature explicitly provided that “permitting and assisting municipalities to acquire and improve unified land and water areas and to acquire and improve or demolish vacated commercial plants for industrial or business purposes . . . are public uses and purposes”⁹⁶ Reviewing the determination of the trial court, the court observed that “the trial court concluded that both this court and the United States Supreme Court have taken a broad, purposive view of the concept of public use, and accordingly have taken a deferential approach to legislative pronouncements of public use.”⁹⁷

After reviewing the history of both Connecticut and federal public use cases and specifically noting the broad deference displayed by Connecticut courts,⁹⁸ the majority turned its analysis to the courts of other states for support of its conclusion.⁹⁹ The court placed particular emphasis on the Michigan Supreme Court’s decision in *Poletown* because “it illustrates amply how the use of eminent domain for a development project that benefits a private entity

⁹⁴ *Id.*

⁹⁵ *Id.* at 519-20.

⁹⁶ *Id.* at 520.

⁹⁷ *Id.* at 520-21 (citing *Olmstead v. Camp*, 33 Conn. 532, 546 (1866), *Midkiff*, 467 U.S. at 239-40, and *Berman*, 348 U.S. at 31-32).

⁹⁸ The majority found that the court in *Olmstead* “laid the foundation for our deferential approach to legislative declarations of public use, stating that

‘[t]he question is asked with great pertinence and propriety, what then is the limit of the legislative power under the clause which we have been considering, and what is the exact line between public and private uses? Our reply is that which has heretofore been quoted. From the nature of the case there can be no precise line. *The power requires a degree of elasticity to be capable of meeting new conditions and improvements and the ever increasing necessities of society.* The sole dependence must be on the presumed wisdom of the sovereign authority, supervised, and in cases of gross error or extreme wrong, controlled, by the dispassionate judgment of the courts.’

Kelo, 843 A.2d at 523 (quoting *Olmstead*, 33 Conn. at 551 (emphasis included)).

⁹⁹ *Id.* at 528 (citing, among others, *Oakland v. Oakland Raiders*, 646 P.2d 835 (1982) (concluding that city was not barred as matter of law from taking professional football franchise by eminent domain in order to keep it from moving to another city; remanding for complete determination of public benefit involved)).

nevertheless can rise to a level of constitutionally valid public benefit.”¹⁰⁰ As seen in the previous section, though, the Michigan Supreme Court recently overturned the *Poletown* decision and therefore that case may provide limited persuasive authority.

The court also addressed *Southwestern Illinois Development Authority (SWIDA)* at the behest of the plaintiffs, who urged the court to follow that case and conclude that economic development is not, by itself, a public use that justifies the use of eminent domain.¹⁰¹ In the process of addressing the *SWIDA* decision, the court acknowledged that the courts of Arkansas, Florida, Kentucky, Maine, New Hampshire, South Carolina, and Washington have ruled that economic development is not, by itself, public use for eminent domain purposes.¹⁰² Confronting *SWIDA*, the court disagreed with the plaintiffs that *SWIDA* stands for the proposition that economic development is never a valid public use. “In our view, the facts of [*SWIDA*] merely demonstrate the far outer limit of the use of the eminent domain power for economic development. Indeed, that decision did not strike the statute allowing the agency to use eminent domain; it merely assailed the agency’s exercise of the power within a particularly egregious set of facts.”¹⁰³

Surveying the judicial landscape, the court concluded that “responsible judicial oversight over the ultimate public use question does much to quell the opportunity for abuse of the eminent domain power.”¹⁰⁴ In the court’s formulation, cases like *Penman*, *99 Cents Only Stores*, and *SWIDA* are mere “outliers under the formulation [of the court], which requires public economic

¹⁰⁰ *Id.* at 528 n.39. The majority in *Kelo*, however, declined to follow the Michigan court’s holding that when “the condemnation power is exercised in a way that benefits specific and identifiable private interests, a court inspects with heightened scrutiny the claim that the public interest is the predominant interest being advanced.” *Id.*

¹⁰¹ *Id.* at 531.

¹⁰² *Id.* at 532.

¹⁰³ *Id.* at 535.

¹⁰⁴ *Kelo*, 843 A.2d at 536.

benefit in order for the use of eminent domain to pass constitutional muster.”¹⁰⁵ The court added later in the opinion that “an exercise of the eminent domain power would be an unreasonable violation of the public use clause if the facts and circumstances of the particular case reveal that the taking was primarily intended to benefit a private party, rather than primarily to benefit the public.”¹⁰⁶

The court next addressed the contention of the plaintiffs and the dissent that condemnations of several of the properties lacked “reasonable assurances of future public use.”¹⁰⁷ On the contrary, the court concluded, “terms of the plan providing parcel-specific land uses, to which private developers participating in the project must adhere, provide significant control over the destiny of the parcels.”¹⁰⁸ The court concurrently found the plaintiffs’ reliance on *Casino Reinvestment Development Authority v. Banin*¹⁰⁹ to be misplaced. In *Banin*, a casino development authority attempted to take properties by eminent domain for the ostensible purpose of providing parking and green space for an adjacent hotel owned by Donald Trump.¹¹⁰ After the taking, the land was to be transferred to Trump.¹¹¹ A New Jersey Superior Court concluded “the primary consequence and effect of the taking was to benefit Trump because there was no adequate assurance that the property would be used by Trump for those purposes declared as justifications for the taking.”¹¹² The *Kelo* court distinguished the case because the “oversight and rigorous land use restrictions that are present with the development plan simply did not exist in [*Banin*].”¹¹³

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* at 541.

¹⁰⁷ *Id.* at 543.

¹⁰⁸ *Id.* at 545.

¹⁰⁹ 727 A.2d 102 (N.J. Super. 1998).

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Kelo*, 843 A.2d at 546 (summarizing *Banin*, 727 A.2d 102)

¹¹³ *Id.* at 547.

Writing for a three-judge dissent, Justice Zarella believed the majority reached the wrong result, “in part because it overlooks the fact that private economic development differs in many important respects from how we have defined a public use in the past.”¹¹⁴ The dissent recognized that the concept of public use has evolved over time from the taking of private property for actual use to the taking of property to further some public benefit.¹¹⁵ But Justice Zarella added that the court “must be mindful, not only of the sovereign’s historical power to acquire private property for a public use, but also of our nation’s long-held commitment, shared by this state, to protect private property from unnecessary takings.”¹¹⁶ Here, the dissent recognized “the clash of two bedrock principles of our legal tradition”—the sovereign’s power of eminent domain and “the sacrosanct right of individuals to dominion over their private property.”¹¹⁷

The dissent conducted its own evaluation of the development of the public use principle and observed the modern phenomenon of broad deference to the legislature and broad construction of the clause itself.¹¹⁸ But Justice Zarella wrote that private economic development pursuant to the Connecticut statute can be distinguished in at least two important respects from previous notions of public use. First, “traditional takings almost always are followed by an immediate or reasonably foreseeable public benefit.”¹¹⁹ The dissent observed that in the present case, there may be much more uncertainty over when and how the public may benefit from the

¹¹⁴ *Id.* at 575 (Zarella, J., concurring in part, dissenting in part). Justice Zarella and two other Justices concurred in the parts of the majority opinion regarding the applicability of the public use statute to nonvacant, the constitutionality of delegating the eminent domain power to the development corporation, and the plaintiffs’ equal protection claims. *Id.*

¹¹⁵ *Id.* at 576 (citing 2A Nichols, *supra* note 2, § 7.01[1]).

¹¹⁶ *Id.* at 576-77.

¹¹⁷ *Hathcock*, 684 N.W.2d at 769; see Brief of Amicus Curiae of the Rutherford Institute at 2-3, *supra* note 24.

¹¹⁸ *Kelo*, 843 A.2d at 576-78 (Zarella, J., concurring in part, dissenting in part).

¹¹⁹ *Id.* at 578 (citing *Gohld Realty Co. v. Hartford*, 104 A.2d 365 (1954) (condemnation of properties followed soon thereafter by relocation of project area residents and demolition of substandard structures)).

municipal development plan.¹²⁰ Second, “the public benefit derived from a conventional taking typically flows from the actions of the taking party.”¹²¹ In contrast, “takings for private economic development require the taking party to transfer ownership of the condemned land to private developers who subsequently execute a plan to accomplish the public purpose.”¹²²

The dissent acknowledged criticism that courts have abdicated their role as interpreter of the law by showing such broad deference to legislative determinations of public use. In response, the dissent sought to draw a distinction between public use determinations made by state legislative bodies and determinations made by local public authorities.¹²³ Justice Zarella recognized that *Berman* and *Midkiff* counsel broad deference to legislative determinations of public use, but this deference does not require complete abdication of judicial responsibility.¹²⁴ With respect to determinations by local public agencies, the dissent noted the majority’s observation that Connecticut courts “limit their review to whether the decision of the taking agency was unreasonable, had been made in bad faith or constituted an abuse of power.”¹²⁵

Where the dissent differed from the majority was on the issue of “whether the *actual* use to be implemented will serve the public purpose described in the development plan at issue in the present case.”¹²⁶ Unlike the majority, the dissent argued that this aspect of the analysis “must focus not only on the possible statutory, contractual and planning constraints that would ensure a public use, but also on the *temporal* question of whether there is any reasonable prospect that the

¹²⁰ *Id.* at 578-79.

¹²¹ *Id.* at 579 (citing *Midkiff*, 467 U.S. at 229).

¹²² *Id.* The dissent added, “Because public agencies must work hand in glove with private developers to achieve plan objectives, the taking agency may employ the power to favor purely private interests.” *Id.* (citing *SWIDA*, 768 N.E.2d at 1).

¹²³ *Id.* at 581.

¹²⁴ *Kelo*, 843 A.2d at 582 (“[C]ourts are empowered to resolve disputes when such determinations are challenged.”) (Zarella, J., concurring in part, dissenting in part).

¹²⁵ *Id.* at 582 (referring to Part IV A of the majority opinion).

¹²⁶ *Id.* (emphasis included).

expected development will, *in fact*, occur.”¹²⁷ This is a far more active role for the judiciary to play and one that, according to the dissent, has been accepted practice for nearly half a century.¹²⁸ Furthermore, the dissent argued that the importance of judicial review of actual use of condemned property should not be understated. “Economic growth is a far more indirect and nebulous benefit than the building of roads and courthouses or the elimination of urban blight” and economic development is “just as likely to be viewed as a bonanza to the developers who build them as they are a benefit to the public.”¹²⁹

Finally, the dissent argued that “justice demands no less” than heightened judicial review when private property is taken for economic redevelopment.¹³⁰ Justice Zarella recognized that other jurisdictions with concerns similar to those enumerated above have attempted to fashion a more exacting standard of judicial scrutiny.¹³¹ The dissent also noted “the suggestion has been made that property rights should be elevated to the status of a ‘fundamental’ right and that a strict scrutiny analysis should be conducted when property is taken for private economic development.”¹³² With the above concerns in mind, the dissent proposed that judicial review of condemnations for economic development “should consist of a four step process in which the burden of proof is shifted between the respective parties at various stages in the analysis.”¹³³

¹²⁷ *Id.* at 583 (emphasis included).

¹²⁸ *Id.* at 585 (citing numerous state and federal cases from the last century). As an example of how this inquiry is undertaken, the dissent referred to an early twentieth century case from the Washington Supreme Court. In *State ex rel. Tacoma Industrial Co. v. White River Power Co.*, 82 P. 150 (1905), the respondent filed a petition to condemn certain property to provide electricity to public users throughout Washington. The court examined all the evidence and failed to find any fixed and definite plans regarding how the public will benefit, specifically noting that the company is not under any contract or obligation to furnish electricity to any person. *Id.*

¹²⁹ *Kelo*, 843 A.2d at 585 (Zarella, J., concurring in part, dissenting in part).

¹³⁰ *Id.* at 587.

¹³¹ The dissent specifically observed the stricter standard proposed by the *Poletown* dissent, which required a showing of (1) *public* necessity of the extreme sort, (2) continuing accountability to the *public*, and (3) selection of land according to facts of independent *public* significance. *Id.* (citing *Poletown*, 304 N.W.2d at 455 (Ryan, J., dissenting) (emphasis included)).

¹³² *Id.* (citing Stephen J. Jones, Note, *Trumping Eminent Domain Law: An Argument for Strict Scrutiny Analysis Under the Public Use Requirement of the Fifth Amendment*, 50 SYRACUSE L. REV. 285, 314 (2000)).

¹³³ *Id.*

“Judicial review should begin with consideration of whether the statutory scheme is facially constitutional.”¹³⁴ Because of the broad deference endorsed by *Berman, Midkiff*, and the many state courts who have spoken on the issue, this should not be a difficult burden. But, if the challenging party succeeds, the inquiry ends and no taking should be permitted.¹³⁵

Assuming the proposed economic development is a valid use, the party opposing the taking then bears the additional burden of proving that the primary intent of the particular economic development plan is to benefit private, rather than public, interests.¹³⁶ Like the first prong of the standard, the inquiry should end if this burden is met.¹³⁷ If the court finds the plan is constitutional under the first two prongs, though, the burden “should shift to the taking party to prove that the specific economic development contemplated by the plan will, in fact, result in public benefit.”¹³⁸ This requirement is meant to address the concern noted above about the nebulous, speculative result of economic development and the need for some guarantee that the public will, in reality, benefit.

Under the dissent’s test, the level of proof necessary to meet the burden of establishing that the anticipated economic development will result in public benefit should be clear and convincing evidence.¹³⁹ The dissent believed this high standard was necessary because of the harsh social costs resulting from dispossessing someone from their home. “The fact that certain families have lived in their homes for decades and wish to remain should not, in my view, be summarily dismissed as part of a cost-benefit analysis typically performed by the legislature.”¹⁴⁰

¹³⁴ *Id.*

¹³⁵ *Id.* at 587-88.

¹³⁶ *Kelo*, 843 A.2d at 588 (Zarella, J., concurring in part, dissenting in part).

¹³⁷ *Id.*

¹³⁸ *Id.* The dissent adds that, “shifting the burden of proof is appropriate at this point in the inquiry because the taking party has greater access than the opposing party to information regarding develop interest in the properties and the progress of negotiations relating to the disposition of the properties.” *Id.*

¹³⁹ *Id.*

¹⁴⁰ *Id.*

Finally, if the above requirements are satisfied, the burden shifts back to the party opposing the taking to prove that the specific condemnation at issue is not reasonably necessary to implement the plan.¹⁴¹ Applying these principles, the dissent agreed with the majority that the legislative determination of public use is constitutional and the primary purpose to benefit the public. But the dissent found a lack of clear and convincing evidence that the properties will, in fact, be developed to achieve a public purpose.¹⁴² That ended the inquiry for the dissent.

The following section elaborates on the application of the foregoing elements of heightened scrutiny to the facts in *Kelo*. This section further analyzes how the approaches of other jurisdictions and commentators might apply to *Kelo*. I perform this analysis, along with a discussion of the principles underlying the need for heightened scrutiny, in order to anticipate how the Supreme Court might answer the question presented.

III. THE ADOPTION OF HEIGHTENED SCRUTINY

Before discussing why the Court should apply a variant of heightened scrutiny to the exercise of eminent domain for economic development, it is necessary to analyze one aspect of the issue that is of some importance to Oregon administrative law. I am referring to the government delegation of eminent domain authority to private parties. As one scholar notes, this particular delegation to nongovernmental entities has “a longstanding pedigree.”¹⁴³ In *Cherokee Nation v. Southern Kansas Railway Co.*,¹⁴⁴ the Supreme Court rejected a federal constitutional challenge to the delegation of the eminent domain power.¹⁴⁵ And government regularly delegates power to private companies performing the function of “public utilities.”¹⁴⁶

¹⁴¹ *Id.* at 591.

¹⁴² *Id.* at 592.

¹⁴³ Garnett, *supra* note 16, at 974.

¹⁴⁴ 135 U.S. 641 (1890).

¹⁴⁵ *Id.* at 656-58.

¹⁴⁶ Garnett, *supra* note 16, at 974.

As seen in some of the cases described above, property owners have argued that de facto delegation itself violates the public use aspect of the takings power. In the *SWIDA* case, the Illinois Supreme Court was concerned that the development authority was basically “selling” the power of eminent domain for a profit.¹⁴⁷ In addition, the Seventh Circuit spoke to the delegation issue in *Daniels* when it refused to defer to the county’s administrative decision to void a covenant because the legislature had delegated the duty of defining “public use” to the agency.¹⁴⁸

Professor Nicole Stelle Garnett argues that the focus on delegation and the approach undertaken in *Daniels* presents practical problems. Addressing the *Daniels* decision, she argues that “[n]ot only is a decision of a county planning commission difficult to classify as ‘legislative’ or ‘administrative,’ but most states permit local governments to contract with other governmental entities for their services—including the exercise of eminent domain powers.”¹⁴⁹ Instead, Garnett proposes a “reasonable necessity test” where “a reviewing court might ask the condemning entity to justify its decision to delegate the power of eminent domain and review whether such a delegation was in fact ‘reasonably necessary’ to advance a public purpose for which the land is being condemned.”¹⁵⁰ Garnett notes that the *SWIDA* court conducted a similar analysis of the justification of the condemnation in that case.¹⁵¹

Beyond concern about the abuse of eminent domain delegation authority, other reasons support closer review of condemnations for economic development—whether it be a “reasonable necessity test” or a multi-factored analysis. As Professor Sunstein has observed, the eminent domain clause “is an effort to apply the general prohibition on naked preferences to several

¹⁴⁷ *SWIDA*, 768 N.E.2d at 8, 11; see Garnett, *supra* note 16, at 975-76 (discussing challenges to delegation).

¹⁴⁸ *Daniels*, 306 F.3d at 460-61; see Garnett, *supra* note 16, at 975-76.

¹⁴⁹ Garnett, *supra* note 16, at 977.

¹⁵⁰ *Id.* at 977.

¹⁵¹ *Id.* at 977-78 (citing *SWIDA* 768 N.E.2d at 10).

specific instances of government action about which the framers were most concerned.”¹⁵² A “naked preference” refers to “the distribution of resources or opportunities to one group rather than another solely on the ground that those favored have exercised the raw political power to obtain what they want.”¹⁵³ Sunstein posits that, after *Berman*, “the public use requirement is met by standards that conform to the weak version of the prohibition on naked preferences.”¹⁵⁴ The prohibition of naked preferences is also closely related to “the central constitutional concern of ensuring against capture of government power by faction.”¹⁵⁵

Closely associated with these concerns are the problems described in public choice theory. This theory maintains that interest groups are primarily driven by “rent-seeking” behavior.¹⁵⁶ One advocate for strict scrutiny explains that, “[u]nder public choice theory, special interests exchange votes and financial support, quid pro quo, to candidates for an implied promise of desired legislation, such as eminent domain actions.”¹⁵⁷ In addition, economists argue that “rent-seeking” is economically inefficient, because “it encourages groups to invest their resources and energy into nonproductive activity such as lobbying rather than into wealth-creating activity or innovation.”¹⁵⁸

If the Public Use Clause was intended to limit the effect of faction and rent-seeking behavior, and the “public use” aspect has been read out of the clause, heightened judicial scrutiny has the potential to restore meaningful protections against eminent domain abuse. However, two issues immediately come to mind when pondering adoption of heightened scrutiny

¹⁵² Sunstein, *supra* note 5, at 1692.

¹⁵³ *Id.* at 1659.

¹⁵⁴ *Id.* at 1725.

¹⁵⁵ *Id.* at 1690 (citing *The Federalist* Nos. 10, 51 (J. Madison)).

¹⁵⁶ See Jones, *supra* note 130, at 302 (explaining public choice theory); Pritchett, *supra* note 35, at 50.

¹⁵⁷ Jones, *supra* note 130, at 302 (citing RICHARD A. POSNER, *THE PROBLEMS OF JURISPRUDENCE* 354-55 (1993)).

¹⁵⁸ Brief Amicus Curiae of James M. Buchanon, et al., at 11, *supra* note 28.

by the Court. First, should *Nollan v. California Coastal Commission*¹⁵⁹ and *Dolan v. City of Tigard*¹⁶⁰ play a role in the crafting of a heightened review standard in *Kelo*? And, second, how would the Court reconcile heightened scrutiny with *Berman* and *Midkiff*?

As mentioned briefly above, Professor Garnett has proposed the use of a “reasonable necessity” test to review the means and ends of decisions to exercise eminent domain for economic development. Discussing *Nollan* and *Dolan*, Garnett writes that “in both the eminent-domain and exactions contexts, the government seeks to acquire property to advance a particular public policy,” but “[i]n an exactions case, the government must link the means by which property is acquired to the ends for which it will be used; in an eminent-domain case, it need not.”¹⁶¹ Advocating the application of *Nollan/Dolan* type analysis, Garnett writes,

[A] court reviewing a public-use challenge could require a showing similar to that demanded in an exactions case: Can the government link the means by which and purpose for which it seeks to acquire land? That is, can the government demonstrate that a given exercise of eminent domain was ‘reasonably necessary’ to advance, or ‘related in nature and extent’ to, the public purpose for which the condemnation power was invoked?¹⁶²

As Garnett correctly notes, this inquiry into the “real” purpose and motive is susceptible to being labeled “Lochneresque.”¹⁶³ But, “the need to ensure that condemned property will in fact be used as the government promises is at least as acute in the public-use context as in the exactions context.”¹⁶⁴ The Court has also recently evidenced a willingness to utilize economic

¹⁵⁹ 483 U.S. 825 (1987).

¹⁶⁰ 512 U.S. 374 (1994).

¹⁶¹ Garnett, *supra* note 16, at 936-37.

¹⁶² *Id.* at 964. Garnett adds that “[t]he fact that the government must already justify every exercise of eminent domain with an ex ante statement of purpose undercuts *Midkiff*’s insistence that a proper respect for the prerogatives of the political branches requires courts to speculate about conceivable justifications for an exercise of eminent domain.” *Id.*

¹⁶³ *Id.* at 962 (citing *Dolan*, 512 U.S. at 405 (Stevens, J., dissenting) (warning that “[e]ven more consequential than its incorrect disposition of this case . . . is the Court’s resurrection of a species of substantive due process analysis that it firmly rejected decades ago.”)).

¹⁶⁴ *Id.*

substantive due process in the right situation.¹⁶⁵ As Garnett concedes, though, “[s]o long as courts continue to refuse to second guess the ends of government action, however, mean-ends review will provide only a limited, but important, structural constraint on the power of eminent domain.”¹⁶⁶

An alternative route for the Court would be to adopt a multi-factor, burden-shifting analysis similar to that advocated by the state court dissenters in *Kelo*. As the *Kelo* dissent recognized, this type of analysis can be conducted without offending the principles from *Berman* and *Midkiff*. As described in the previous section, previous notions of public use arguably differ from takings for economic development in two ways: traditional takings almost always are followed by an immediate or reasonably foreseeable benefit, and the benefit typically flows from the actions of the taking party.¹⁶⁷ In contrast, in takings for economic development, “the taking is just the first link in a long and tenuous chain of causation subject to numerous and uncertain contingencies before the public receives any benefit.”¹⁶⁸

The analysis proposed by the dissent, then, may not necessarily conflict with prior Court precedent. Recall that the dissent first asks whether the enabling legislation is facially constitutional.¹⁶⁹ Then, both the dissent and majority advocate inquiry into whether the subjective intent was to primarily benefit a private party.¹⁷⁰ The dissent goes further, though,

¹⁶⁵ See, e.g., *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996) (“The sanction imposed in this case cannot be justified on the ground that it was necessary to deter future misconduct without considering whether less drastic remedies could be expected to achieve that goal.”).

¹⁶⁶ Garnett, *supra* note 16, at 982.

¹⁶⁷ *Kelo*, 843 A.2d at 578-79 (Zarella, J., concurring in part, dissenting in part).

¹⁶⁸ See Petition for a Writ of Certiorari at 28, *supra* note 7.

¹⁶⁹ *Kelo*, 843 A.2d at 587-88 (Zarella, J., concurring in part, dissenting in part).

¹⁷⁰ *Id.* at 588.

and inquires whether the development will, in fact, result in public benefit.¹⁷¹ Finally, the dissent asks whether the taking is reasonably necessary.¹⁷²

Applying the extra steps advocated by the dissent to *Kelo* facts, the Supreme Court might concur with Justice Zarella that “at the time of the takings, there was no signed agreement to develop the properties, the economic climate was poor and the development plan contained no conditions pertaining to future development agreements that would ensure achievement of the intended public benefit if development were to occur.”¹⁷³ This inquiry recognizes the great value attached to homeownership, and therefore seeks to ensure that a taking will actually be worth the bargain for the general public. The purpose is to ensure that development agencies do not support the type of rent-seeking behavior practiced by economically strong factions that disadvantage homeowners with less political “pull.”

Indeed, other commentators have argued that crucial differences should be recognized between traditional use of eminent domain power for a highway, railroad or canal to be used by the public in the long-term, “and the exercise of eminent domain power to transfer land to a private party based on its mere unenforceable promises to employ a certain number of people.”¹⁷⁴ Ralph Nader and Alan Hirsch argue that is well settled in other parts of constitutional law that government justification for an action must be proportionally stronger when the infringement of a strong right or interest is at stake.¹⁷⁵

¹⁷¹ *Id.*

¹⁷² *Id.* at 591.

¹⁷³ *Id.* at 596.

¹⁷⁴ Nader & Hirsch, *supra* note 3, at 220.

¹⁷⁵ *Id.* at 225. Ralph Nader and Alan Hirsch argue that courts should subject eminent domain actions to strict scrutiny where three conditions are present: “1) the land is transferred to another party rather than held by the public; 2) the individual interest of those whose land is taken is particularly strong and monetary compensation cannot significantly compensate for the loss; and 3) the party whose land is taken is relatively powerless politically.” *Id.* at 224. See also Charles L. Black, Jr., *Symposium: Celebrating the Bicentennial of the Bill of Rights (1791-1991)*—Keynote, 65 ST. JOHN’S L. REV. 17 (1991).

Heightened scrutiny of economic development takings also takes into account the argument that compensation does not always eliminate the demoralization costs associated with eminent domain.¹⁷⁶ When development agencies uproot thousands of individuals from established neighborhoods as in the *Poletown* situation, or even a smaller number of firmly-rooted homeowners, courts should take the resulting psychological toll into account by at least asking whether development will, in fact, occur and perhaps asking whether the taking is substantially connected to the public purpose.¹⁷⁷

From a different perspective, though, heightened scrutiny of development agency decisions may lead to unwanted restrictions on public policy choices. As Professor Thomas W. Merrill recently wrote, one way to combat urban sprawl and reduce greenfield development “is to have a government redevelopment agency, like the one in New London, acquire tracts of land in declining inner city areas, using eminent domain if necessary, and retransfer the land to developers.”¹⁷⁸ Merrill writes that heightened scrutiny, as seen in the *Hathcock* decision, would appear to restrict this use of eminent domain.¹⁷⁹ Similarly, an unduly narrow conception of public use may limit the ability of agencies to condemn conservation easements on environmentally sensitive land.¹⁸⁰

CONCLUSION

As the *Kelo* dissent notes, “[b]ecause public agencies must work hand in glove with private developers to achieve plan objectives, that taking agency may employ the power to favor

¹⁷⁶ See Garnett, *supra* note 16, at 944-49 (discussing demoralization costs and citing Frank Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of “Just Compensation” Law*, 80 HARV. L. REV. 1165, 1214 (1967)); see also Nader & Hirsch, *supra* note 3, at 217-18 (“*Poletown* powerfully illustrates the fatal flaws in current eminent domain doctrine: the rubber-stamping of any proffered “public use” of condemned land and the indifference to the severe suffering that such seizures can impose.”).

¹⁷⁷ See Nader & Hirsch, *supra* note 3, at 224-25 (advocating courts to look for a “substantial connection” when certain conditions are present).

¹⁷⁸ Thomas W. Merrill, *The Goods, the Bads, and the Ugly*, LEGAL AFFAIRS, January/February 2005, at 18.

¹⁷⁹ *Id.*

purely private interests.”¹⁸¹ Courts may ensure that eminent domain is not abused in this manner by enforcing the longstanding principle that “a purely private taking could not withstand the scrutiny of the public use requirement.”¹⁸² In this sense, the *Kelo* majority is correct when it wrote that responsible judicial oversight can do much to quell abuse of eminent domain. Of course, the difficulty of fashioning a uniform standard for what constitutes a “purely, private taking” is at the heart of *Kelo* and similar cases.

The Court has the opportunity to set an example of responsible judicial oversight by adopting a heightened standard of scrutiny along the lines of the *Poletown* and *Kelo* dissents. This type of scrutiny might aim to discover whether the public will, in reality, be the beneficiary of development, whether an extreme public necessity exists, and whether the land was chosen because its inhabitants are politically powerless minorities. Responsible oversight of this variety would ensure that courts do not discount the interests of unorganized community members by engaging in strict formalism. Of course, the countervailing concerns expressed by Professor Merrill above may cause the Court to hesitate before placing too tight a “straightjacket on governments in devising solutions to difficult social problems.”¹⁸³

¹⁸⁰ *Id.*

¹⁸¹ *Kelo*, 843 A.2d at 579 (Zarella, J., concurring in part, dissenting in part).

¹⁸² *Midkiff*, 467 U.S. at 245.

¹⁸³ *See* Merrill, *supra* note 178, at 18.