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Irrational Basis: The Supreme Court, Inner Cities, and the New “Manifest Destiny”

*Dean Allen Floyd, II

Introduction

The courts’ role in urban renewal has been as irrational as inevitable. This was exemplified in the Supreme Court’s recent decision in *Kelo v. City of New London*.¹ In *Kelo*, the Court held that “takings” for the purpose of economic development constitute a public use under the Fifth Amendment. The court’s definition of a “public use,” however, does not conform to the logic of prior decisions on the issue, nor does it square with the historical understanding of a public use. In defining the words “public use” so broadly—and by applying a deferential standard of review to takings cases—the Court has granted municipalities a license to take private property on very tenuous, if not illegitimate, grounds. This decision will likely shape the landscape of urban centers across the country for years to come. And the majority opinion in *Kelo* makes it clear that the Court intended to do precisely just that. More troubling than the majority’s legal reasoning is the policy it is attempting to promote: a perverted variation of the “manifest destiny” concept of the nineteenth century, only inner cities are the new frontier and minorities are the new Indians. And like the Apache, Utes, and Sioux of the old American West, the poor and disempowered will be forced to vacate the communities and properties that rightfully belong to them in the name of progress, or better yet, economic development.

This essay, however, will attempt to provide more than a simple critique of the different opinions written by the Justices in *Kelo*. Rather, the essay will attempt to weave together the logic of judicial and legislative precedent into a substantive, well-defined, and judicially manageable legal standard that courts can apply to achieve maximum clarity and overall fairness. Namely, the essay will offer a new interpretation of the Fifth Amendment’s Public Use Clause that bases the definition of a “public use” upon the degree of governmental regulation with respect to the future use. I will argue that this serves as a more “workable” standard than the one currently employed by the majority and the dissenters in *Kelo*. This is a definition that is not only reinforced by logic, but also the history of the early Republic, state legislation, case law, and the text of the United States Constitution.

This essay consists of five parts. Part I analyzes some of the factors that have contributed to the urban renewal campaign over the last half century. Part II discusses the public-private distinction, and explains how this distinction may affect the conception of a “public use.” Part III analyzes *Kelo*’s majority opinion and the precedent that provided the foundation for the Court’s holding. Part IV sets out the argument for a Fifth Amendment regulatory control standard. Finally, Part V discusses *Kelo*’s implications at the federal, state, and local levels, as well as its implications for Fifth Amendment jurisprudence.

¹ 125 S. Ct. 2655 (2005).

I. The New Frontier

In 1865, Horace Greeley wrote a single phrase in the *New York Tribune* that may have ignited, or at least reflected, a migratory pattern across the vast geographical span of the American terrain: “Go west, young man, go west.”² If Maureen Dowd or Bob Woodward were to write a single phrase that reflected contemporary trends in domestic migration, they might instead say: “Buy urban, young man, buy urban.” Inner cities are becoming the prime destination for many potential homeowners, speculative investors, and developers. The land in urban centers is usually cheaper and located closer to existing infrastructure such as highways, sewers, and public transportation. The cheaper prices have created demand for residential and commercial property in the inner cities, and as a result, the real estate market and related industries have witnessed unprecedented growth. The number of construction jobs, for example, increased from 4.9 million to a record high 7 million between 1996 and 2006.³ Although much of the construction occurs in areas surrounding central cities, the impact of urban renewal on the construction industry, and many others, cannot be underestimated.

Thus, one of the most noticeable trends during the last decade has been the changing demographics of central cities. Since cities still retain many of the jobs within metropolitan areas, many people prefer to live in the city because of the shorter commute times to and from work. Many central cities are attracting the top income-earners in their respective regions. Neighborhoods that were considered taboo only a short time ago are now trendy and fashionable—populated by engineers, patent lawyers, and investment bankers.⁴ “Uptown” Washington, DC, Harlem, and San Francisco are clear examples of this process more popularly known as “gentrification.” In these cities and many others, the race is on to grab as much land as possible before the market prices out even the highest income earners. For those who have already “gotten in,” it is rather certain that they are already winners in this race.

There are other winners in the race to gentrify America’s inner cities. Local governments stand much to gain from new development in central cities. Faced with declining tax bases resulting from decades of middle-class flight from cities to the suburbs, city governments have developed an insatiable appetite for the tax revenue that wealthier residents generate. Many cities also face the additional problem of decreased funding from the states due to the increasing costs of education and healthcare.⁵ In efforts to offset these trends, local governments have created a number of incentives for businesses to relocate to the central city. For example, the District of Columbia has enacted legislation that gives tax deductions to “qualified” high-technology companies that locate

² Horace Greeley, *The New York Tribune*, Jul. 13, 1865.

³ Bureau of Labor Statistics,

http://data.bls.gov/PDQ/servlet/SurveyOutputServlet?&series_id=CEU2000000001 (last visited Mar. 31, 2006)

⁴ See Audrey G. MacFarlane, *The New Inner City: Class Transformation, Concentrated Affluence and the Obligations of the Police Power*, 8 U. Pa. J. Const. L. 1, 3 (2006).

⁵ Robert D. Behn and Elizabeth K. Keating, *The Fiscal Crisis of the States: Recession, Structural Spending Gap, or “Political Disconnect”?*, available at <http://www.ksg.harvard.edu/taubmancenter/pdfs/reports/2005/fiscalcrisis.pdf>

in the city, and has also created geographically-based “enterprise zones” that grant businesses an array of tax benefits.⁶ Many other cities have implemented similar policies. More and more, cities are relying on the private sector for fiscal stability and long-term growth.

A. Public Use and Private Benefit

The private sector has played an increasingly important role in the affairs of state and local government. State and local governments have turned to the private sector not only for a source of revenue, but also for assistance in performing some of the traditional functions of government. Congress has authorized, for instance, private corporations to finance, construct, and operate public works such as tunnels, bridges, highways, and toll roads.⁷ The federal and state governments also contract with private actors for the management and operation of prisons.⁸ Some local governments have delegated the supervision of a particular issue—such as housing or transportation—to private, non-profit corporations.

The dependence of state and local governments on the private sector for the performance of these functions has been largely due to the budget deficits that have become the reality for many governments across the nation. Many governments are simply too poor to undertake many of the activities that would normally be expected of them. Thus, the current trend has involved local governments entering into public-private partnerships for the provision of public goods.⁹ These schemes have allowed private parties to engage in activity that has been traditionally reserved to the states, and also allows them to derive private benefit from this activity. This reliance on the private sector to execute traditionally public functions, however, has blurred the line between the “public” and the “private” spheres of society. But since local governments have had little success breaking the shackles of insolvency, it appears to be a confusion that the courts have chosen to tolerate for the moment. The only problem is that the Court has seemed to confuse everyone on the distinction, including itself.

II. Distinguishing the “Public” From the “Private”

It is not always clear what distinguishes the “public” from the “private.” Both terms connote some concept of ownership. This concept of ownership, or property, is the key tenet on which the public-private distinction rests. Property cannot be private and public at the same time. The “publicness” or “privateness” of property depends on the right of individuals to exclude others from its use and enjoyment. Private property gives the individual that right to exclude; public property generally does not. If property is not

⁶ Targeted Incentives: Enterprise Zones and Revenue Bonds, <http://debiz.dc.gov/dmped/cwp/view.a,1365,q,569383,dmpedNav,|33026|33028!.asp> (last visited Apr. 1, 2006).

⁷ See Transportation and Infrastructure Finance and Innovation Act (TIFIA)

⁸ See Douglas McDonald, et. al., *Private Prisons in the United States*, available at <http://www.abtassoc.com/reports/ES-priv-report.pdf>

⁹ A public good has traditionally been understood by economists as a “non-excludable” good. In other words,

private, then it is non-excludable, and therefore public. This is the most basic characterization of the public-private distinction.

However, there are instances where private property takes on a “public” character, and the same rights normally appended to private ownership are to some degree compromised. For example, federal legislation prohibits discrimination based on race, gender, and ethnicity in accommodations that are privately owned but are made available for the general public use.¹⁰ This stands in complete contrast to a situation in which a private homeowner may exclude people based on all of these classifications. Alternatively, the government may exclude people from public property. Toll roads, military facilities, and other government buildings are only a few examples of excludable public property. In sum, there is “private” property that really possesses a public character and “public” property that shares many of the characteristics of private property. But how does one determine when private property really has a public character, or in other words, serves a public function? The decisions of the Supreme Court provide a satisfactory answer to this very interesting and perplexing question.

A. Private Use, Public Benefit, and Government Regulation

State and federal courts have defined the meaning of a “public use” in many different ways.¹¹ Unfortunately, the definition is still somewhat ambiguous after the Supreme Court’s decision in *Kelo*. There are cases, however, that help to create a useful framework for analyzing the Public Use Clause. *Lucas v. South Carolina Coastal Council* is one such case.¹² In *Lucas*, the petitioner purchased two parcels of land on which he intended to build single-family homes. A few years after the purchase, the S.C. Coastal Council (“Coastal Council”) enacted a regulation that prohibited the “construction of occupable improvements,”¹³ barring the petitioner from developing the land for residential use. The regulation was intended to help preserve the several beaches and sand dunes along the coast, and thus established “critical areas” where development had to be approved by the Council. One of the “critical areas” included the petitioner’s property. The petitioner argued that the regulation constituted a “taking” by depriving his land of all value, and accordingly, filed suit against the Council in the South Carolina Court of Common Pleas.

The Supreme Court heard the case on certiorari. The Court recognized two categories of regulatory takings. The first category includes regulations that require the property owner to suffer a physical invasion of his or her property. The second category, the Court stated, includes regulations that deny the owner all economically viable use of the property. In the Court’s view, the Coastal Council’s regulation fell into the second category of takings. Although the Court ruled that the Coastal Council had the right to regulate the petitioner’s property under the state’s police powers, it ultimately held that the regulation effectuated a taking of the property, and ordered the Council to pay

¹⁰ See Title VII of the Civil Rights Act of 1964, 42 U.S.C. 1980.

¹¹ See

¹² 505 U.S. 1003 (1992)

¹³ *Id.* at 1009.

compensation to the petitioner.¹⁴ The regulation, the Court articulated, had conscripted the petitioner's property "into some form of public service under the guise of mitigating serious public harm."¹⁵

Lucas stands for the basic proposition that the government must compensate landowners for total economic loss resulting from state action. However, the case strikes at a much more fundamental issue. In *Lucas*, the government's regulation of the property essentially transferred the value of the land from the private owner to the public. This implies that government regulation of private property makes the property, to some extent, less private.¹⁶ In some circumstances, such as in *Lucas*, too much government regulation can convert private property into a public use. This is not to say that the petitioner's property became public property as is the case in many takings cases; Lucas kept his land. Rather, the petitioner's property acquired more of a public character as a result of the regulation. Thus, *Lucas* may just as readily stand for the alternate proposition that the more government regulates private property, the less of a privacy interest an individual has in that property. Conversely, the more that the government regulates private property, the greater the interest the public has in the object of the regulation.¹⁷

III. The *Kelo* Standard

Justice John Paul Stevens delivered the opinion of the Court in *Kelo*. In his opinion, Justice Stevens concluded that the City of New London's proposed disposition of the petitioner's property qualified as a "public use" within the meaning of the Fifth Amendment.¹⁸ The Court held more broadly, however, that the Fifth Amendment encompassed takings for the purpose of economic development. This is arguably one of the most expansive interpretations of the Public Use Clause ever rendered by a judicial body.¹⁹ In this section, I will discuss the implications of the Court's broad interpretation of the Public Use Clause, and analyze the precedent that led the Court to this interpretation. I will begin with a recitation of the facts in *Kelo*.

A. The Facts

The city of New London is located in southeastern Connecticut. In 2000, New London had a population of approximately 25, 671.²⁰ The city heavily depended on a naval base

¹⁴ See *id.* at 1014 ("[w]hile property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."); See also *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926) (upholding the constitutionality of city zoning ordinance.).

¹⁵ *Id.* at 1018.

¹⁶ See *U.S. v. General Motors Corp.*, 467 U.S. 986 (1945) ("Governmental action short of acquisition of title or occupancy has been held, if its effects are so complete as to deprive the owner of all or most of his interest in the subject matter, to amount to a taking.")

¹⁷ See generally *Griswold v. Connecticut*, 381 U.S. 479 (1965) (ruling that the use of birth control is protected by a right of privacy.)

¹⁸ *Kelo*, *supra* note 1, 125 S. Ct. 2655, 2657.

¹⁹ Cf. *Poletown Neighborhood Council v. City of Detroit*, 410 Mich. 616 (1981) (upholding a state statute that authorized the condemnation of private property in order to provide commercial sites for private users.)

²⁰ U.S. Census Bureau, available at <http://factfinder.census.gov>

for jobs until the federal government closed it in 1996.²¹ A couple of years later, New London had an unemployment rate that was almost twice as high as the state's unemployment rate.²² A state agency had already designated the city as a "distressed municipality" in 1990.²³ Consequently, the state reactivated a private nonprofit corporation called the New London Development Corporation ("NLDC") to assist the city in economic development planning.²⁴

In February 1998, Pfizer pharmaceutical company decided to build a \$300 million research facility in the Fort Trumbull section of New London—a section of town prized for its views of the Connecticut waterfront.²⁵ City planners viewed Pfizer's facility as a much needed stimulus for economic development. A few months after Pfizer's announcement, the NLDC submitted a comprehensive redevelopment plan to various state agencies for approval.²⁶ These agencies evaluated the economic, environmental, and social impact of the NLDC's proposal.²⁷ Upon review, the state agencies approved the plan, and the NLDC finalized its development plan for a 90 acre plot of the Fort Trumbull section.²⁸

The city council approved the plan in 2000, and authorized the NLDC to exercise eminent domain to acquire the necessary property for the city.²⁹ The NLDC acquired most of the property through negotiation, but could not successfully negotiate a price with nine property owners in the Fort Trumbull area. Susette Kelo, who had made vast improvements to her home, was one of these property owners. As a result, the NLDC initiated condemnation proceedings against Mrs. Kelo and the eight other property owners.³⁰ In doing so, the NLDC never alleged that any of the properties were blighted or in poor condition. In December 2000, the petitioners filed suit against the NLDC in the New London Superior Court.

B. The Majority Opinion

Justice Stevens acknowledges that the Constitution generally forbids the transfer of property from one private owner to another. The two exceptions to this general rule are, in his view, instances where 1) the property will be put into "use by the public" and 2) the property will serve a "public purpose." Stevens rejects the proposition, however, that property must be used by the public in order to serve a "public purpose." Instead, the "public purpose" exception, Stevens argues, must be more broadly interpreted to accommodate "the diverse and always evolving needs of society."³¹ Stevens relies

²¹ Kelo, *supra* note 1, at 2658.

²² *Id.*

²³ *Id.*

²⁴ Kelo, *supra* note 1, at 2659.

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.* at 2659 – 60.

³⁰ *Id.* at 2660.

³¹ *Id.* at 2662.

primarily on three cases to support his broad interpretation of the public purpose: *Berman v. Parker*,³² *Hawaii Housing Authority v. Midkiff*,³³ and *Ruckelshaus v. Monsanto*.³⁴ These cases are summarized below:

Berman v. Parker

In *Berman*, the Planning Commission of the District of Columbia had developed a comprehensive plan for the city. As part of this comprehensive plan, the District sought to redevelop an area of the city where more than sixty-four percent of the houses were beyond repair.³⁵ In order to redevelop the area, the Planning Commission found it necessary to exercise eminent domain to rid the area of the dilapidated housing, which it considered to be a “public harm.”³⁶ However, the plan also required the appropriation of property that was not blighted, which included that of the petitioners. After the acquisition, the District intended to transfer the property to a private party for a strictly private use. As a result of the plan’s approval by a federal agency, the petitioners filed suit against the District of Columbia in a federal district court.³⁷

The Supreme Court eventually heard the case. The petitioners argued that the taking violated the Fifth Amendment because the property would be for a private use rather than a public one. Moreover, the petitioners argued that their property did not pose a risk to public health or safety, thus eliminating the necessity of the acquisition. The Court held, however, that the taking constituted an appropriate exercise of the District’s police powers.³⁸ The District of Columbia, the Court stated, had a legitimate interest in eliminating slums and areas that *tended to produce slums*.³⁹ Thus, the fact that the petitioners’ property was not blighted was inconsequential to the Court. In reaching this conclusion, the Court stated:

Property may of course be taken for this redevelopment which, standing by itself, is innocuous and unoffending. But we have said enough to indicate that it is the need of the area as a whole which Congress and its agencies are evaluating. If owner after owner were permitted to resist these redevelopment programs on the ground that his particular property was not being used against the public interest, integrated plans for redevelopment would suffer greatly.⁴⁰

The redevelopment plan—which aimed to eliminate blight—established the “public purpose” in the Court’s view. Since the taking was in accordance with this plan, the Court thought it necessary to defer to the judgment of the legislature. Furthermore, the

³² 348 U.S. 26 (1954)

³³ 467 U.S. 229 (1984)

³⁴ 467 U.S. 986 (1984)

³⁵ *Berman, supra* note 32, at 30.

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.* at 35. (“Once the object is within the authority of Congress, the right to realize it through the exercise of eminent domain is clear. For the power of eminent domain is merely the means to the end.”)

³⁹ *Id.*

⁴⁰ *Id.*

Court ruled that the District could execute the plan by transferring the property to private individuals.⁴¹ The transfer of the property to private individuals was simply the means by which the District sought to address a public harm. For these reasons, the Court upheld the District's use of eminent domain.

Hawaii Housing Authority v. Midkiff

In this case, the Hawaii state legislature enacted a law that initiated the redistribution of private property. At that time, more than 47 percent of the land in Hawaii was owned by less than 1 percent of the population.⁴² This had the effect of inflating land prices, which in the legislature's estimation, adversely impacted the local economy. The landowners indicated that they would have sold their land earlier, but that federal tax liabilities incurred from the sales deterred them from doing so. In order to avoid these tax liabilities, the legislature passed the Land Reform Act, which authorized the condemnation of the properties and their transfer to tenants. The new law permitted landowners and tenants to enter into negotiations for the purchase price of the land, which would be paid by the government to the landowners. The government would then sell the land to the former tenants. Some of the negotiations failed, however, and the state directed the landowners to enter into compulsory arbitration with the tenants. As a consequence, the landowners brought suit against the state, arguing that the arbitration constituted a Fifth Amendment taking.

The Supreme Court heard the case on certiorari. Justice O'Connor, writing for the majority, relied on *Berman* to prove that the eminent domain power was equal to the state's police power. The legislature, Justice O'Connor stated, had the authority to regulate monopolies and oligopolies under its police powers, and thus the exercise of eminent domain was "merely the means to the end."⁴³ Since legislative exercise of the police power is presumptively valid⁴⁴—and the Court found eminent domain to be part of the police power—the Court stated that it could only play a "narrow" or limited role in reviewing the statute.⁴⁵ The necessity of legislative deference, the Court argued, had been imposed by the Court's earlier decision in *Berman*. Any deviation from this precedent, in the Court's view, "would result in courts deciding on what is and what is not a governmental function."⁴⁶

Ruckelshaus v. Monsanto

In *Monsanto*, a pesticide manufacturer applied for a license to sell and distribute insecticides from the Environmental Protection Agency ("EPA"). The manufacturer included trade secrets and confidential data along with the application. Congress had enacted legislation, however, that authorized the EPA to consider data submitted by one

⁴¹ *Id.* ("The public end may be as well or better served through an agency of private enterprise than through a department of government.")

⁴² *Midkiff, supra* note 32, at 232.

⁴³ *Id.* at 240 (quoting *Berman, supra* note 33, at 33.)

⁴⁴ See *Euclid, supra* note 14, at 388.

⁴⁵ See *Midkiff, supra* note 32, at 240.

⁴⁶ *Id.*

applicant in support of another application related to a similar chemical, provided those applicants offered compensation to the original data submitters.⁴⁷ Additionally, the legislation authorized the EPA to disclose information related to the safety of the product, even though the statute established a general prohibition against the disclosure of trade secrets. The pesticide manufacturer claimed that the publishing of the secrets constituted a taking under the Fifth Amendment, and brought suit against the EPA in a federal court.

The Supreme Court heard the case on certiorari. The respondent, Monsanto, argued that that a federal statute, the Trade Secrets Act, prohibited the disclosure of the information included in his application. The Court, however, held that the respondent could not have had a “reasonable, investment-backed expectation that its information would remain inviolate in the hands of the EPA.”⁴⁸ The Court noted that the practice of data-sharing was “widespread” and “well known” at the time the application was submitted, and that therefore the respondent should have expected the disclosure of the data. Furthermore, the Court found that the government had an interest in reducing the costs of research within the pesticide industry. The Court also found that the disclosure of information served a public purpose by allowing consumers to assess the safety of the product. These public interests, the Court concluded, superseded the respondent’s proprietary interest in the trade secret. Thus, the Court upheld the taking as a valid exercise of Congressional authority.

a. The Significance of *Berman*, *Midkiff*, and *Monsanto*

Berman, *Midkiff*, and *Monsanto* have significant precedential value for three reasons. First, *Berman* established the rule that the government can use eminent domain to redress a public harm. According to *Berman*, the redress of the harm, rather than the actual future use, may provide the requisite public purpose for a Fifth Amendment taking. In other words, property may be condemned and transferred to private ownership so long as the condemnation serves a public purpose. The *Kelo* Court relies on this logic to prove that the NLDC’s redevelopment plan serves a public purpose notwithstanding the fact that the property in question would be privately owned.⁴⁹ The only substantive difference between the two cases—in the Court’s view—is the public purpose the legislatures were trying to advance.

Second, *Berman* reaffirmed the long-standing principle of judicial deference to legislative determinations—a principle that the Court reinforces in *Midkiff*. However, *Midkiff* stretches this principle by equating the eminent domain power to the state’s police power.⁵⁰ This means, in effect, that the Court regards the exercise of eminent domain no differently than any ordinary regulatory action. Thus, the Court applies a rational basis

⁴⁷ *Monsanto*, *supra* note 34, at 991.

⁴⁸ *Monsanto*, *supra* note 33, at 1008. (“[T]he Trade Secrets Act is not a guarantee of confidentiality to submitters of data...In an industry that has long been the focus of great public concern and significant government regulation, the possibility was substantial that the Federal Government, which had thus far taken no position on disclosure of health, safety, and environmental data concerning pesticides...would find disclosure to be in the public interest.”)

⁴⁹ *Kelo*, *supra* note 1, at 2666.

⁵⁰ *Midkiff*, *supra* note 32, at 240.

test to takings under which the Court limits its review “to determining that the purpose is legitimate” and that the legislature “could have believed that the provisions would promote [the] objective.”⁵¹ By equating the police power to the eminent domain power, *Midkiff* lowered the threshold for the public use requirement, and helped create the logical foundation for an economic development taking in *Kelo*.

Third, the Court invokes its earlier decision in *Monsanto* to show that economic development serves a public purpose. The Court emphasizes the fact that private parties were the direct beneficiaries of the taking in *Monsanto*, and furthermore, that Congress passed the statute with the intent of conveying economic benefit to private individuals.⁵² In *Monsanto*, however, the conveyance of private economic benefit was only incidental to the achievement of the legislature’s greater objective. Nonetheless, this precedent supposedly establishes the legitimacy of governmentally-induced property transfers from one private party to another.⁵³ The Court thus argues that the property transfer in *Kelo* similarly targeted a public purpose while only incidentally conveying monetary benefits to private individuals.⁵⁴ *Monsanto* represents the final precedent in a litany of cases that demonstrate the evolution of the public use doctrine.

b. The Problem with the Court’s Reliance on Berman, Midkiff, and Monsanto As Precedent

Monsanto lends the most support to the argument that the Public Use Clause authorizes economic development takings. However, the facts of the case are inapposite for this general proposition. *Monsanto* involved a peculiar situation in which Congress enacted legislation that provided notification of the “substantial” possibility of a public disclosure. Thus, in a sense, the respondent never possessed a complete proprietary interest in the trade secret. Rather, the ownership of the trade secret was contingent upon Congress’s finding of a superseding public interest. The respondent understood the conditionality of the trade secret, and this understanding ultimately led the Court to its conclusion in *Monsanto*. These facts are completely different, however, from the situation in *Kelo* where the petitioners did not have any expectation that they could be forcibly deprived of their property. It is unlikely, for that matter, that anyone expects his or her property to be condemned and transferred to another individual. The facts in *Kelo* and *Monsanto* are simply too incongruous for the latter to serve as appropriate legal precedent.

Also, the taking of the respondent’s property in *Monsanto* more closely resembled a traditional “public use” than in *Kelo*. The statute in that case did more than accomplish an abstract “public purpose.” Instead, the statute made the respondent’s confidential

⁵¹ *Kelo*, *supra* note 1, at 2668, quoting *Monsanto*, *supra* note 33, at 1015, n.18; *See id.* at 2667 (“[T]he Takings Clause largely ‘operates as a conditional limitation, permitting the government to do what it wants so long as it pays the charge.’”) The Court thus sees the

⁵² *See Kelo*, *supra* note 33, at 2666.

⁵³ *See id.* (“Quite simply, the government’s pursuit of a public purpose will often benefit individual private parties.”)

⁵⁴ *See id.*

information available for the public use.⁵⁵ As a consequence, anyone applying for a license from the EPA could make use of the information. More importantly, the statute did not confer a right to any individual to exclude others from the use of the property. In *Kelo*, on the other hand, the subsequent property owners would be able to exclude the general public. Although the Court acknowledged in *Monsanto* that the property did not have to be put into use by the general public to qualify as a public use, the property in that case only qualified as a public use because it was put into use by the general public.⁵⁶ Thus, it seems odd for the *Kelo* Court to rely on *Monsanto* to prove that property need not be made available to the general public when that is in fact what happened in *Monsanto*. *Monsanto* does not appear to be the right case for the Court to cite to support its “public purpose” doctrine.

It also seems strange that the Court would rely on such highly unordinary cases with such unusual circumstances. The decisions in *Midkiff* and *Monsanto* are the products of unique legal and historical contexts, and cannot be properly juxtaposed to the facts in *Kelo*. In its own right, *Midkiff* could be considered a *sui generis* takings case whose facts justified a departure from a well-defined and widely accepted legal principle. In *Midkiff*, the Court validated the Hawaii state legislature’s use of eminent domain to put an end to an ancient land regime.⁵⁷ The then existing property scheme in Hawaii was completely different from any other property scheme known under the common law in America.⁵⁸ The old legal system in Hawaii, for example, did not have a concept of private ownership.⁵⁹ This is only one of the many facts that make *Kelo* and *Midkiff* virtually incomparable. The Court must have realized the difficulty in comparing the two cases, and instead elected to extract generalized principles from dicta in *Midkiff*, and to apply those principles to a case with completely dissimilar facts. If the argument for economic development takings were as strong as the Court suggests, the Court should have been able to rely on cases with more analogous facts.

Similarly, the Court cites *Berman* for the “half-true” proposition that the eminent domain power is coterminous with the state’s police power. This proposition is partially true because the state has the ability to promote the social welfare through a variety of acceptable means—eminent domain being one of them.⁶⁰ However, eminent domain is only one category of “acceptable” uses of the police power. The state can also regulate speech, design affirmative action programs, and restrict access to firearms all under the cloak of its police power.⁶¹ And each of these different uses of the police power is subject to different types of judicial review. Most affirmative action programs, for example, are subject to a heightened standard of constitutional review. Likewise, the

⁵⁵ See *Monsanto*, *supra* note 33, at 1016.

⁵⁶ See *id.* at 1014.

⁵⁷ See *Midkiff*, *supra* note 32, at 232.

⁵⁸ See *id.* In Hawaii, all land belonged to chieftains, and therefore there was no distinction between public and private property.

⁵⁹ See *id.*

⁶⁰ See *Berman*, *supra* note 32, at 33.

⁶¹ See *Grutter v. Bollinger*, 539 U.S. 306 (2003); See *Brandenburg v. Ohio*, 395 U.S. 444 (1969); See *Caron v. United States*, 524 U.S. 308 (1998).

eminent domain power requires a more stringent standard of review than the state's regulation of a public nuisance.

There are a few reasons that a higher standard of review must be applied to the exercise of eminent domain. First, the Constitution places express limitations on the eminent domain power.⁶² The Fifth Amendment requires the government to compensate individuals for physical and regulatory appropriations of property, and additionally, such appropriations must be for a "public use." The fact that the Fifth Amendment imposes these conditions on the eminent domain power evinces a presumption against the governmental appropriation of private property. The constitutional framers certainly intended to create this presumption when the Fifth Amendment was ratified in 1791. James Madison—one of the main proponents of the Takings Clause—wrote of the government's ability to confiscate private property:

If there be a government then which prides itself in maintaining the inviolability of property; which provides that none shall be taken directly even for public use without indemnification to the owner, and yet directly violates the property which individuals have in their opinions, their religion, their persons, and their faculties; nay more, which indirectly violates their property, in their actual possessions, in the labor that acquires their daily subsistence, and in the hallowed remnant of time which ought to relieve their fatigues and soothe their cares, the influence will have been anticipated, that such a government is not a pattern for the United States.⁶³

Thus, the founders of the Republic were seriously concerned about government's propensity to neglect property rights if its powers went unchecked. The Fifth Amendment was accordingly adopted as a safeguard against governmental power; it provided some measure of protection against the arbitrary and capricious taking of property that was all too familiar under English rule. The very fact that the Amendment was included in the Bill of Rights, which protects a host of individual rights, suggests that the founders regarded legislative power as a legitimate threat to property rights. The point of the Takings Clause, then, was to elevate the standard for governmental confiscations of property to ensure that the subsequent use of the property would truly be for the public good.

The Court has refused to read the Fifth Amendment in this light, however. Instead, the Court has stated that a legislature's finding of a "public purpose" should not be "second-guessed" by the courts.⁶⁴ And the Court is right to suggest this. The legislature should have sole discretion over public policy; the ends that the legislature desires to achieve should not be questioned by the courts. But the means are not necessarily legitimate simply because the ends are. A legislature may determine, for instance, that historical race discrimination has resulted in societal inequalities, and decide to formulate a plan to

⁶² See Amendment V, U.S. Constitution. ("[N]or shall private property be taken for public use, without just compensation.")

⁶³ James Madison, *Federalist No. 10* (1791)

⁶⁴ See *Kelo*, *supra* note 1, at 2673 – 74.

eradicate those inequalities. In redressing these inequalities, however, the legislature could not implement a quota system whereby a fixed number of positions are set aside for members of a particular racial group at a public university.⁶⁵ It would be appropriate for the courts, in this case, to question the means the legislature has chosen rather than the ends.

Similarly, judicial review of eminent domain does not necessarily require the Court to challenge the wisdom of legislative decision-making. However, judicial review of eminent domain does require the Court to ensure that the legislature is pursuing its ends within the scope of the Constitution. The Fifth Amendment provides the basis for this review, and mandates that government confiscations of private property not only be compensated, but also for a public use. The courts cannot permit legislatures to define the “public use” requirement, just as they have not permitted legislatures to define the parameters of Fourth Amendment searches or First Amendment free speech protection. The current interpretation of the Takings Clause, however, provides legislatures a carte blanche with respect to confiscations of private property. Thus, the Takings Clause has served more as an explicit affirmation of the plenary power of the legislative branch than an actual constraint on that power.

IV. Creating a Workable Standard for Fifth Amendment Takings: The Regulation Test

The debate over the Fifth Amendment’s Public Use Clause has long hinged on the definition of the actual words “public use.” As the cases discussed above have shown, it has been difficult for the courts to create a well-defined category of uses that qualify as a public use. Some academics have suggested that the courts simply place a use into the “public use” category if it has traditionally been understood as such.⁶⁶ This approach has presented problems for the courts, as they have struggled to reach any type of consensus on the issue. Courts in a few states, however, have taken a different approach to defining the public use requirement; they have determined the “publicness” of a land use by assessing how heavily the government regulates the property. This appears to be a logical approach, and also one that has a foundation in American history and constitutional case law.

This standard also follows as a logical consequence of the precedent cited by the majority in *Kelo*. There are three particular cases that the Court cites, to prove a “broader and more natural interpretation of public use as ‘public purpose,’” but rather show that the Court found land uses to pass constitutional muster when they were subject to a high degree of government regulation. These three cases are *Fallbrook Irrigation District v. Bradley*⁶⁷, *Strickley v. Highland Boy Gold Mining Co.*⁶⁸, and *Mt. Vernon-Woodberry Cotton Duck Co. v. Alabama Interstate Power Co.*⁶⁹ These cases will be summarized in

⁶⁵ See generally *Regents of University of California v. Bakke*, 438 U.S. 265 (1978) (invalidating use of racial quotas in public university’s admissions process.).

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⁶⁷ 164 U.S. 112 (1896)

⁶⁸ 200 U.S. 572 (1906)

⁶⁹ 240 U.S. 30 (1916)

the following section. The Court's reliance on these cases also reveals a warped view of urban redevelopment that has unfortunately become the accepted view of many policy makers, legal scholars, and legislators. A discussion of the Court's perspective on urban redevelopment will follow the summary of the three aforementioned cases. Subsequently, a few of the more recent cases calling for the government regulation standard will be discussed.

A. Early Supreme Court Takings Cases

Fallbrook Irrigation District v. Bradley

In *Fallbrook*, the California state legislature enacted legislation that established irrigation districts.⁷⁰ The state legislature had determined that the irrigation districts were necessary because of the immense quantity of arid land within the state. This aridness prevented the optimum use of the land for agricultural purposes.⁷¹ In order to finance these districts, the state required the landowners within the irrigation districts to pay an assessment. One landowner refused to pay the assessment, and as a consequence, the district collector enforced the collection by condemning the landowner's property and selling it to the district. The landowner argued that this type of state action constituted a taking in violation of the Fourteenth Amendment, claiming that the confiscation of the property would not serve a "public use."⁷²

The case was eventually heard by the Supreme Court, which held that the taking of the property qualified as a public use. The Court found that the state had an interest in making its land cultivable, and that the irrigation districts provided the only means for the state to do so.⁷³ The Court emphasized the necessity of the irrigation districts, and suggested that the creation of the districts in the absence of such necessity would have been an improper exercise of legislative authority.⁷⁴ Also of importance to the Court was the fact that the Act subjected the irrigation districts to the regulation and control of public municipal corporations.⁷⁵ All of these circumstances led the Court to conclude that the assessments served a public use.

⁷⁰ Fallbrook, *supra* note 68, at 151 – 152.

⁷¹ *Id.*

⁷² See generally Adamson v. California, 332 U.S. 46 (1947) (All takings cases prior to 1947 were brought under the Fourteenth Amendment as opposed to the Fifth Amendment because the latter had not yet been incorporated to apply to state governments.).

⁷³ *Id.* at 162.

⁷⁴ *Id.* at 160. ("To provide for the irrigation of lands in States where there is no color of necessity therefor within any fair meaning of the term, and simply for the purpose of gratifying the taste of the owner, or his desire to enter upon the cultivation of an entirely new kind of crop, not necessary for the purpose of rendering the ordinary cultivation of the land reasonably remunerative, might be regarded by courts as an improper exercise of legislative will, and the use might not be held to be public in any constitutional sense, no matter how many owners were interested in the scheme. On the other hand, in a State like California, which confessedly embraces millions of acres of arid lands, an act of the legislature providing for their irrigation [**64] might well be regarded as an act devoting the water to a public use, and therefore as valid exercise of the legislative power.")

⁷⁵ See *id.* at 159. "The use of all water required for the irrigation of the lands of any district formed under the provisions of this act, together with the rights of way for canals and ditches, sites for reservoirs, and all

Strickley v. Highland Boy Mining Company

In *Strickley*, the Utah legislature passed a statute that authorized the use of eminent domain for designated public uses, including the working of mines.⁷⁶ Accordingly, the respondent, a mining company, condemned a right of way across the petitioner's land for an aerial bucket line. The petitioner filed suit against the mining company in the Utah state court, claiming that the line was not a public necessity, but rather an exclusively private benefit for a corporation.

On certiorari, the Supreme Court determined that the relevant inquiry in the case concerned the constitutionality of the Utah statute. In deferring to the opinion of the state legislature, the Court held that the aerial way provided the only practical means of transporting minerals between the mines and the railways.

Mt. Vernon-Woodberry Cotton Duck Co. v. Alabama Interstate Power Co.

In this case, a power company sought to condemn a private company's land, water, and water rights in order to generate electricity.⁷⁷ The petitioner filed suit against the power company in Alabama state court, arguing that the taking constituted a violation of due process under the Fourteenth Amendment.

The Supreme Court heard the case on certiorari. The petitioner argued that the power company did not seek to condemn its property for a public purpose. Rather, the petitioner argued, the company was only seeking to acquire its property for its own private benefit. The Court rejected this argument, and held that the company's condemnation of the petitioner's property was a legitimate taking of private property for a public purpose.⁷⁸ In reaching its conclusion that the taking was for a public purpose, the Court articulated:

The purpose of the Power Company's incorporation and that for which it seeks to condemn property of the plaintiff in error is to manufacture, supply, and sell to the public, power produced by water as a motive force. In the organic relations of modern society it may sometimes be hard to draw the line that is supposed to limit the authority of the legislature to exercise or delegate the power of eminent domain. But to gather the streams from waste and to draw from the energy, labor without brains, and so to save mankind from toil that it can be spared, is to supply what, next to intellect, is the very foundation of all our achievements and all our welfare.⁷⁹

other property required in fully carrying out the provisions of this act, is hereby declared to be a public use, subject to the regulation and control of the State, in the manner prescribed by law."

⁷⁶ Roads, railroads, tramways, tunnels, ditches, flumes, pipes and dumping places to facilitate the milling, smelting or other reduction of ores, or the working of mines."

⁷⁷ 240 U.S. 30 (1916)

⁷⁸ *Id.* at 32.

⁷⁹ *Id.*

Here, the Court recognized the immense public benefit of electricity production, and noted the impracticality of denying the power company's condemnation. The production of electricity, in the Court's view, was a sufficiently compelling interest to justify the taking of the petitioner's property.

B. The Significance of the Early Eminent Domain Cases

Fallbrook, *Strickley*, and *Mt. Vernon* demonstrate, as Justice Stevens correctly suggested, that property need not be "put to use for the general public"⁸⁰ for a taking to meet constitutional standards. The three cases also show that the Court has historically accorded significant weight to the judgment of state legislatures, and in this regard, *Kelo* is wholly consistent with Supreme Court precedent. However, in all three of these cases, the public purpose was being executed by a public utility or some other type of heavily regulated private entity. The utility or private entity also provided a service or benefit that could not be provided absent the taking of private property. For example, the mining company in *Strickley* could not have provided coal to the general public if it could not transport coal from the mines to the railroads. The Court acknowledged this fact, and thus permitted the taking in that case. This suggests a type of analysis similar to that in *Nollan v. California Coastal Commission*, where the Court ruled that an "essential nexus" must exist between a taking and its proposed public impact.⁸¹ But the overriding concern in all of these cases appears to be the necessity of the good being provided rather than the necessity of the means by which the good will be provided.

The three cases mentioned above all involved goods that were, more or less, necessary for the operation of a modern society. Few would doubt, for example, that irrigation districts and railroads were absolutely necessary to develop the infrastructure of the western states in the late nineteenth century. It is interesting, then, that the Court offers these cases to support the argument that the development plan in *Kelo* served a necessary and "public" purpose. It is difficult, if not inappropriate, to compare the development plan in *Kelo* to the early industries of the American west. At the turn of the nineteenth century, it was clear that timber companies, irrigation districts, and mining companies were all necessary components of the then nascent western economies. They were necessary for the development of the American west in the 1890s just as airports and power plants are necessary for the functioning of metropolitan areas in the twenty-first century. It is not as clear, however, that restaurants, shopping malls, and hotels are "necessary" in that sense. Although a good does not have to be absolutely necessary to serve a public purpose—a park for instance—there appears to be some understanding that the use must affect a significant number of people.

C. Why the Regulation Standard?

⁸⁰ Monsanto, *supra* note 33, at 1014 – 15.

⁸¹ 483 U.S. 825 (1987).

The public has an interest in uses that generate externalities—positive and negative.⁸² Education and healthcare are examples of positive externalities; pollution is an example of a negative one. The government will often intervene in the private arena when the externalities of a particular industry have a significant public impact. Thus, we have witnessed the regulation of several industries in the twentieth century, including but not limited to, telecommunications, electricity, mining, and air transportation.⁸³ The government has been compelled to regulate certain private actors more heavily because their activities bear greater costs to society.

While it is true that the government regulates just about everything, the degree and kind of regulation differs dramatically. The government regulates the private market in four general ways. First, the government can regulate the rates that a private actor can charge.⁸⁴ The government will often regulate the rates for public utilities since they are natural monopolies, and can thus charge higher prices than private actors in a competitive market. Second, the government can apply regulatory standards by which private actors may be excluded from the activity altogether. It will often do this by requiring individuals to acquire a license. The government can also regulate the merger of businesses in certain industries. Third, the government can set regulatory standards for private actors to follow. Under this regulatory scheme, the government may create safety or health requirements with which individuals and businesses must comply. Given all of these different methods of government regulation, the question then becomes what degree or kind of regulation is required to convert a private activity into a public use.

As discussed earlier in this essay, private property may acquire a public character if it is substantially regulated.⁸⁵ Of the three kinds of regulatory methods mentioned above, the first method obviously imposes the most substantial regulation upon private market participants. A distinctive and essential feature of a free market economy is that supply and demand determine the price of goods and services. Regulatory controls, however, significantly restrict the extent to which market forces determine pricing. These regulatory controls are most commonly applied to public utilities because they are of such great importance to public health, welfare, and the economy.⁸⁶ Since public utilities have been regulated in this fashion, courts in several jurisdictions have regarded public utilities as “public uses.”⁸⁷ The courts should then also view any object that is subject to the same kind of government regulation in the same light. Economic activities that generate such tremendous externalities—environmental, economic, social, or otherwise—are generally subject to substantial governmental regulation, and should therefore be permissible uses under the Fifth Amendment.

The third regulatory method—the method that imposes regulatory standards upon private actors—is also particularly relevant. The federal and state governments have imposed all

⁸² An externality is the cost of an activity that is imposed on an unrelated third party.

⁸³ See CHARLES HARAK AND OLIVIA BAE WEIN, ACCESS TO UTILITY SERVICE: REGULATED, DE-REGULATED AND UNREGULATED UTILITIES, DELIVERABLE FUELS, AND TELECOMMUNICATIONS 2 (2004).

⁸⁴ RICHARD J. PIERCE AND ERNEST GELLIHORN, REGULATED INDUSTRIES IN A NUTSHELL 11 (1999).

⁸⁵ See *supra* note 14.

⁸⁶ HARAK, *supra* note 84, at 2.

⁸⁷ See *De Salvo v. Arkansas Louisiana Gas Co.*, 239 F. Supp. 312 (1965);

kinds of regulatory standards on private businesses; pollution emission standards and safety requirements are only a few of the many standards to which private firms are forced to adhere.⁸⁸ The rationale for this type of regulation lies in the belief that all economic activity, regardless of scale or scope, affects the public welfare. There is also an additional belief, based upon the same rationale, that a business that “holds itself out”⁸⁹ to the public as a “public accommodation” must be held to even higher standards. This belief was codified in the Civil Rights Act of 1964, which prohibits discrimination in public facilities.⁹⁰ Congress was compelled to enact this legislation because of the importance of access to facilities such as restaurants, gas stations, and restrooms. These types of facilities are too important to be denied to a large portion of the general public. Thus, the government has applied tougher regulatory standards to entities that have the potential to substantially impact the public welfare.

Public utilities must comply with even tougher regulatory standards than public accommodations.⁹¹ Such entities are traditionally considered “common carriers” under the law, and must supply their services to the general public in a nondiscriminatory fashion. In defining the parameters of the “common carrier” doctrine, the Supreme Court of California stated:

The distinctive characteristic of a common carrier is that he undertakes to carry for all people indifferently; and hence he is regarded, in some respects, as a public servant. In order to impress upon one the character and impose upon him the liabilities of a common carrier, his conduct must amount to a public offer to carry for all who tender him such goods as he is accustomed to carry. The definition has not always been thus restricted, but the law applicable to common carriers is peculiarly rigorous, and it ought not to be extended to persons who have not expressly assumed that character, or by their conduct and from the nature of their business justified the belief on the part of the public that they intended to assume it.⁹²

Hence, public utilities, by virtue of their willingness to provide goods and services of great necessity to the public, are subject to a more “rigorous” degree of governmental regulation than ordinary businesses. Most private businesses, for example, could simply refuse to deal with a customer for any reason as long as it is not based on that customer’s race, gender, national origin, or disability. Public utilities, on the other hand, “cannot refuse to deal without an accepted justification.”⁹³ The courts have made it clear that only a few narrow business-related exceptions will suffice for discrimination by public utilities. In this sense, heavily regulated businesses are more public than ordinary private businesses.

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⁸⁹ 42 U.S.C. § 2000a (2006)

⁹⁰ Civil Rights Act of 1964, P.L. 88-352.

⁹¹ PIERCE, *supra* note 85, at 11.

⁹² Samuelson v. Public Utilities Com., 36 Cal. 2d 722 (1951)

⁹³ PIERCE, *supra* note 13, at 11.

To be sure, there are uses other than public utilities that fit within the regulatory control framework. But how public (or regulated) must a private actor be before it can qualify as a public use? The answer is an intuitive one, but at the same time, not easily ascertainable. It is clear, at the very least, that a private entity must share some of the characteristics of a common carrier. In chief, the entity must provide a good or service of public necessity in a non-discriminatory way. This rule still presents a problem, however. Many gas stations supply a good—gasoline—that is of great necessity to the general public, and in some states, gasoline prices are even subject to state regulation.⁹⁴ It is unlikely, however, that one would consider the confiscation of private property for the construction of a gas station a taking for a “public use.” If anything, this type of taking would be more akin to the one objected to in *Kelo*. In these situations, the trick is to create an acute standard that separates “regulated” businesses that serve a public use from those that do not. In order to gain a greater appreciation of this framework, consider the following examples:

1. The Chicago Skyway Project

In 2004, the City of Chicago leased the Chicago Skyway Toll Bridge System to a private investment group, Cintra-Macquarie, Inc.⁹⁵ The company paid the city approximately \$1.825 billion for the right to toll the road for 99 years. The company must operate the road no differently than the state would—the only discriminatory factor is the price it costs to use the road. Additionally, the actual tolls charged by the Skyway are subject to regulation by the Illinois State Toll Highway Authority.⁹⁶

2. New Jersey Turnpike

The New Jersey state legislature introduced a bill in 2006 that would authorize the state to sell the New Jersey Turnpike and the Garden State Parkway to private investment companies.⁹⁷ The road would be still be available for the general public use and the legislature would be able to regulate the prices charged by the private operator.

3. Pontiac General Hospital

In 1993, the Pontiac General Hospital in Pontiac, Michigan converted its status from a public hospital to a private, non-profit hospital. The non-profit organization that acquired control of the hospital agreed to lease the hospital from the city for a fee of \$1 million per year. The hospital can respond to market forces and adjust its rates in order to turn a sustainable profit. However, the Michigan Public Health Commission has the power to regulate the rates the hospital can charge.

⁹⁴ Hawaii regulated the price of gasoline after Hurricane Katrina in August 2005.

⁹⁵ *Cintra-Macquarie to take over Chicago Skyway for \$1.8b*, Oct. 15, 2004, available at

<http://www.tollroadsnews.com/cgi-bin/a.cgi/SmoU9h7xEdmRW6r2jfFwDw> (last visited May 4, 2006).

⁹⁶ See Illinois State Toll Highway Authority, available at

http://www.illinoistollway.com/portal/page?_pageid=57,1302812,57_1302815&_dad=portal&_schema=PORTAL

⁹⁷ See Robert Poole and Peter Samuel, *New York Post*, Mar. 28, 2006 (last visited May 4, 2006).

4. Private Prisons In Nebraska

The Nebraska state legislature recently passed a bill that authorizes its Department of Correctional Services to enter into contracts with private businesses for the operation and management of prisons.⁹⁸ The legislation requires the private operators to conduct drug tests of inmates, to comply with all rules and regulations of the Department, and to train its employees according to guidelines set by the Department. Additionally, the legislation prohibits the private operator from calculating inmate release and parole eligibility dates and setting the wages of inmates.

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In each of these examples, the government retained significant regulatory control of the property. Although each of the uses benefits a private owner, the state has limited the extent to which the former can truly behave as a private market participant. In the first three examples, the state regulated the prices that the private actor could charge in the same way that many states regulate the prices that phone companies, power generators, or other utilities can charge. These properties must also be made available to the public in a non-discriminatory way, notwithstanding the prices that consumers are charged. In the last example, the Nebraska legislature retained control over many of the important operations of the prison. Even though the property is not available to the general public,⁹⁹ the state possesses sufficient control of the property for it to qualify as a “public use” under this framework.

The use of the confiscated property in *Kelo*, however, would not qualify as a public use under a regulatory control standard. First, the private users would not provide any good or service of public necessity. Restaurants, for example, are not monopolies, and provide goods that can be easily substituted for similar, but different, goods. Second, the rates and prices of the private users would not be subject to state regulation. Small shops, restaurants, and bars generally operate in competitive markets, and thus, the government sees no reason to regulate the prices they charge. If consumers find the prices to be excessive, they can simply choose to patronize a different business. The same is not true of a power company or a hospital whose rates are regulated because the consumer cannot easily substitute the good or service being provided. The taking in *Kelo* simply would not pass constitutional muster under this legal standard.

Of course, this is not the standard that the Court applied in *Kelo*. However, courts in several jurisdictions have incorporated the regulatory control test into their Public Use jurisprudence. This fact reflects a growing concern among members of the judiciary that some type of safeguard is needed against legislative appropriations of private property. The following cases are illustrative of this trend.

⁹⁸ See Neb. Rev. Stat. §§ 47-801 – 807

⁹⁹ See Midkiff, *supra* note 32, at 2321.

*Southwestern Illinois Development Authority v. National City Environmental, L.L.C.*¹⁰⁰

In *National City*, a state agency, created by the state legislature, condemned the petitioner's property in order to provide parking for a privately-owned automotive sports facility. The agency had been created by the state legislature for the purpose of promoting recreational activities, which the state hoped would also reduce unemployment and enhance the local economy.¹⁰¹ The condemnation in this case was not according to any comprehensive plan. As a result of the condemnation, the petitioner sued the state agency in Illinois state court.

On appeal, the Illinois Supreme Court held that the taking was unconstitutional. The court concluded that the taking was for a private rather than a public use, and that any public benefit flowing from the use was not sufficient for the taking to withstand constitutional scrutiny. Furthermore, the court stated that the taking was impermissible because the private owner had the right to exclude the public from the property. The public, the court stated, "must be able to use or enjoy the property, not as a mere favor or by permission of the owner, but by right."¹⁰² Thus, the fact that the new owner did not have to permit access to its property in a non-discriminatory manner led the court to invalidate the condemnation.¹⁰³

*County of Wayne v. Hathcock*¹⁰⁴

Perhaps the most celebrated takings case among property rights advocates, *Hathcock* involved a county seeking to condemn the respondents' property for the construction of a business and technology park. The county sought to condemn the property under one of its charter provisions, which authorized takings of private property for economic development purposes. Accordingly, the respondents filed suit against the county in Michigan state court.

The Supreme Court of Michigan heard the case on appeal, and ruled that the taking violated the Michigan constitution. In order for the taking to serve a public purpose, the court stated, the use had to be of necessity to the general public. The court found that the proposed use did not meet this requirement. Also, the court held that the property in question was not for a public use because it was not subject to government regulation or oversight. In the court's view, a public use existed where "the public retained a measure of control over the property." This was evidently not the case in *Hathcock*, as the court found the taking to be an unconstitutional deprivation of property.

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¹⁰⁰ 199 Ill. 2d 225 (2002).

¹⁰¹ *Id.*

¹⁰² *Id.* at 238.

¹⁰³ In this instance, the sports facility owner was not held to the "peculiarly rigorous" non-discrimination requirement that applied to the carrier in *Samuelson*. Accordingly, the court found that it could not be a public use.

¹⁰⁴ 471 Mich. 445 (2004).

Hathcock overturned a seminal decision of the Michigan Supreme Court, *Poletown Neighborhood Council v. City of Detroit*, which authorized condemnations for the purpose of economic development.¹⁰⁵ *Poletown* had been regarded by many as the ultimate affirmation of judicial deference, and the Supreme Court of Connecticut cited the case in support of its argument that economic development takings were consistent with the Fifth Amendment. Paradoxically, the Supreme Court did not mention either case in the *Kelo* opinion. This was likely because the Court did not want to risk the legitimacy of its decision by relying on recently invalidated precedent.

At any rate, the cases above are emblematic of a divergent view of the public use doctrine. After decades of broad interpretation of the Public Use Clause, courts have begun to institute standards that considerably narrow the scope of legislative power. Some of these standards focus on the public's access to the use, the public necessity of the use, and lastly, the regulation of the use. In many cases, the intensity of the regulation reflects the necessity as well as the accessibility of the use. Thus, regulatory control serves as an appropriate and workable benchmark for courts to determine the constitutionality of government takings.

The regulatory control standard also provides advantages other than its "manageability." First, the standard affords legislatures the flexibility to make creative uses of both public and private resources. Many states and local governments have entered into partnerships with the private sector because of their inability to undertake projects that serve the public interest. This is evidenced in the privatization of toll roads and similar programs across the country. A more rigid standard, such as government ownership, would not allow such arrangements to follow the taking of private property. Second, the standard better protects against violation of constitutional rights than the Supreme Court's current formulation. There is a panoply of rights attached to property that the government regulates that is not present under private ownership.¹⁰⁶ A regulatory standard would ensure that some of the rights normally associated with public property are transferred to post-condemnation uses. The strength of the regulatory standard is that it more fairly balances the interest of the public against the interest of private property owners.

V. The Aftermath of *Kelo*

The *Kelo* decision has created unpredictable alliances and unfettered chaos in the American political arena and beyond. One the one hand, there are organizations such as the Institute for Justice, a libertarian-conservative advocacy group, and the NAACP, a liberal advocacy group, which have joined forces to combat the proponents of liberal eminent domain use. On the other hand, the decision has produced a schism between federal and state policymakers. In Congress, many representatives have supported legislation calling for tighter restrictions on the use of eminent domain in efforts not to

¹⁰⁵ 410 Mich. 616 (1981)

¹⁰⁶ See *supra* note

appear anti-American homeowner.¹⁰⁷ At the state and local level, representatives have assembled plans similar to the one in *Kelo* in efforts to appear to be pro-education, pro-services, and pro-growth. These conflicting interests have led to a political mess that may not be cleaned up for years to come.

The decision has also made things messy on the grassroots level. Aggressive developers are now armed with a judicial stamp of approval, as well as legislative backing, in their quest for land and profit. This means that the rights of individual property owners are now more fragile and precarious than ever. Even before the Court announced its decision in *Kelo*, local governments had condemned private property to build casinos, shopping centers, and retail stores.¹⁰⁸ Between 1998 and 2002 alone, there were at least 10,000 condemnations in the United States.¹⁰⁹

In theory, all property owners are at risk of having their property forcibly taken from them by the government for a private use. But those made most vulnerable by the Court's decision are inner city residents rather than suburban dwellers. In many cities, these residents are poor, members of minority groups, or often both. They are also usually the segment of the local population that has the least influence in the political process. The fact that these people are often powerless, and watch their neighborhoods grow inhabited and transformed by the wealthy and powerful, creates tensions in local communities between new and old residents.¹¹⁰ *Kelo* may, in effect, accelerate the gentrification process in inner cities and exacerbate many of the social problems that America has suffered for years.

Lastly, *Kelo* has thrown the law on takings into a perpetual state of confusion. In one sense, the law is very clear: property must be taken for a public use and just compensation must be given to the owner. Both the Public Use Clause and the Just Compensation Clause are constitutional restraints on the power of the legislative branch, and the parameters of this power are defined by the judiciary. However, the law also requires the courts to defer to the legislative branch on matters of public policy, including the determination of public uses. Since the legislative branch defines the public use, it also defines the limits of its power with respect to eminent domain. It is hard to believe that the constitutional drafters intended the Fifth Amendment to have this effect; they probably would have written it differently or perhaps not written it at all. At the end of the day, however, this is the law that our courts are obligated to apply.

This precedent may seem illogical at the very least. But the irrationality of the legal reasoning pales in comparison to the irrationality of the policy behind it. Justice Stevens

¹⁰⁷ See generally Supreme Court's *Kelo* Decision and Potential Congressional Responses, *Hearing Before the Subcommittee on the Constitution of the Committee on the Judiciary House of Representatives*, (Sept. 22, 2005)

¹⁰⁸ See Dana Berliner, *Public Power, Private Gain*, available at http://www.castlecoalition.org/pdf/report/ED_report.pdf (last visited May 4, 2006).

¹⁰⁹ *Id.*

¹¹⁰ See Sara Gebhardt, *Living with the Tensions of Gentrification*, WASHINGTON POST, Nov. 12, 2005, at page T09, available at http://www.washingtonpost.com/wp-dyn/content/article/2005/11/11/AR200511100820.html?nav=rss_rentals, last visited May 4, 2006.

made it clear in the majority opinion that the needs of society are “diverse” and “always evolving.” In his view, the needs of society have evolved from railroads and canals to shopping centers and restaurants. The *Kelo* majority takes this view, in all likelihood, because it views the redevelopment of inner cities as the “manifest destiny” of the twenty-first century. This view of development is particularly difficult to rationalize given the differences between American society in the nineteenth century and American society today. But perhaps *Kelo* cannot be rationalized—not for want of history or precedent—but simply, as a friend once told me, because “the irrational cannot be rationalized.”¹¹¹

¹¹¹ Chaz P. Arnett, Harvard Law School J.D. 2006.