Kelo v. City of New London:
An Inadvertent Landmark Decision?

by

Angela D. Ruppe

A Masters Project submitted to the faculty of the University of North Carolina at Chapel Hill in partial fulfillment of the requirements for the degree of Master of Regional Planning in the Department of City and Regional Planning.

Chapel Hill

2005

Approved by:

__________________________________

ADVISOR
## TABLE OF CONTENTS

I. Introduction .............................................................................................................................. 1

II. Definitions of Takings and Eminent Domain

   Federal....................................................................................................................................... 2
   State.......................................................................................................................................... 3
   Problematic Statutory Definitions............................................................................................. 8

III. Uses of Eminent Domain

   Historic................................................................................................................................. 9
   Modern................................................................................................................................. 10

IV. Criticisms of Eminent Domain

   Definitions of “Blight”............................................................................................................ 18
   Residential Displacement and Financial Costs........................................................................ 19
   Social and Emotional Costs..................................................................................................... 20
   Gentrification......................................................................................................................... 20
   Social Injustice to Minorities and the Poor............................................................................... 21

V. Eminent Domain Jurisprudence Prior to *Kelo*

   The Public Use Controversy.................................................................................................... 23
   Standard of Judicial Review.................................................................................................... 24
   Supreme Court Cases............................................................................................................. 25
   Lower Court Cases................................................................................................................ 28

VI. The *Kelo* Controversy

   The Facts of the Case.............................................................................................................. 36
   The Majority Opinion............................................................................................................. 39
   The Concurrence.................................................................................................................... 42
   The Dissents........................................................................................................................... 44

VII. The Aftermath of *Kelo*

   The Reaction to the Decision.................................................................................................. 47
   Consequences of the Decision.................................................................................................. 53
   Future Directions.................................................................................................................... 56

VIII. Conclusions......................................................................................................................... 58

IX. Bibliography.......................................................................................................................... 60
Land use issues generally are perceived as questions to be resolved by municipal and state governments. Local conditions shape these decisions, and courts usually defer to the judgment of local governments in determining how best to carry out land-use decisions and comprehensive planning efforts. Each land-use action of a local government, though, operates within a larger framework that is bounded by the federal constitution. The Fifth Amendment provides limits on land-use planning through its mandate that the government shall not deprive an individual of property unless it is for “public use” and “with just compensation.” Commonly known as the “Takings Clause,” this legal measure ensures that all levels of government cannot abuse their powers of land-use control and eminent domain. Most land-use controversies do not rise to the federal level, but takings jurisprudence over the past fifty years shows an increasing number of cases which involve questions of government overreaching onto private property rights.

The recent *Kelo v. City of New London* decision (June 2005) adds to the growing line of case law that deals with property rights. *Kelo*’s central issue involves whether a local government may use its powers of eminent domain to condemn property and sell or lease it to a private developer who is operating within a formal economic development plan created by the local government. Grossly simplified by the press as a contest between poor homeowners and a greedy government’s desire to take their homes and give them to private developers, the case excited the popular imagination in a way that is odd for land-use decisions. Bolstered by the growing property rights movement and the emotional elements associated with removing individuals from their homes, the case mushroomed into a bipartisan cause that extended beyond the planning and real estate professions. The Supreme Court’s decision in favor of New London prompted a national cry of outrage and led to a rush to tighten eminent domain laws at all levels. The strong reaction suggests that *Kelo* was a landmark case in the course of takings jurisprudence. Given a solid line of federal precedent, though, *Kelo* is not a remarkable decision. The backlash that it has engendered, though, is notable, and this fallout
promises to have an immediate and direct impact on land-use planning and community development. *Kelo’s* deference to land-use decisions made by local governments may have the unintended consequence of stripping these governments of important legal and financial tools needed for sound, comprehensive community planning.

**Definitions of Takings and Eminent Domain**

*Federal Definitions*

The *Kelo* case hinged upon the Supreme Court’s definition of eminent domain. Derived from English common law, eminent domain is a power assigned to the states and the federal government by implication in the Constitution. The Fifth Amendment provides that “No person shall be . . . deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.” The last provision, known as the “Takings Clause,” allows government to seize private properties for “public use,” as long as the government provides adequate compensation for the value of the taken property. “Public use” exists as the only federal limitation on eminent domain, but legal scholars have found little evidence to explain why the Framers of the Constitution included this phrase and what they intended it to mean.¹ This vague phrase has formed the basis of federal case law for centuries, and courts have struggled with determining the precise constitutional limits on eminent domain imposed by this phrase. Over the years, the “public use” requirement of the “Takings Clause” has been expanded to encompass a variety of development actions undertaken by all levels of government.

---

State Definitions

State law, though, has provided more definite limitations on the power of eminent domain. The federal constitutional definition serves only as a baseline condition for state law; thus, states are free to impose greater restrictions upon the use of eminent domain.\(^2\) Since the power of eminent domain rests with the state, each state must authorize its municipalities to use the power of eminent domain granted by the Constitution. This is done through state constitutions and/or enabling legislation. Following the lead of the federal constitution, forty-nine of the states adopted state constitutional language that parallels the “public use” limitation of the Constitution. North Carolina is the only state without an explicit “takeings clause” in its constitution, but it “implies public use restrictions through common law precedent.”\(^3\)

All states have legislation that authorizes the use of eminent domain by municipalities and provides explicit limitations on the eminent domain process. These statutes set forth a detailed process that the state and its municipalities must follow when exercising their powers of eminent domain. States provide different limitations on the use of eminent domain; many states confine its use only to situations where land must be taken for public improvements or where “blight” is present, whereas others explicitly permit a broader range of uses, such as the taking of land for economic development projects.

North Carolina

North Carolina’s eminent domain statutes follow the general form used by the majority of the states. Section 40A of the North Carolina General Statutes outlines the basic procedure for eminent domain as used by a public or private condemnor. Under N.C.G.S. § 40A-3(b), a municipality may use

\(^2\) The Fourteenth Amendment makes the Fifth Amendment’s restrictions on takings apply to each state.

eminent domain “for the public use or benefit” to condemn private land for improving or constructing streets and sidewalks, playgrounds and parks, sewer and drainage systems, hospitals, libraries, fire stations, municipal office buildings, or any other building to be used by the municipal government. In addition, the power of eminent domain may be exercised by private condemnors, such as railroad or utility companies, to obtain land for the construction of public utilities or transportation systems.4

Once a “public benefit” has been established, the local government must give notice of its intent to condemn the property and must determine an amount to be paid for the property that will provide “just compensation” for the landowner.5 This notice must be sent to the landowner via certified mail and must also contain a statement of the “purpose for which the property is being condemned” and “the date [the] condemnor intends to file the complaint” in court.6 When the municipality institutes the civil action, it shall also deposit the amount it has determined as reasonable compensation with the court.7 Once this occurs, the owner of the property has three options: accept the complaint, allow the title of the property to vest in the municipality, and apply to the court for payment of the “just compensation”; challenge the municipality’s determination of “just compensation” only and allow the title of the property to pass to the municipality; or challenge the eminent domain action entirely by requesting an injunction against the municipality.8 If “just compensation” is challenged, the judge, jury, or an appointed commission will hear the case and award the landowner a sum based on the fair market value of the property prior to the filing of the complaint, plus the legal rate of interest measured

4 N.C.G.S. § 40A-3(a) (2005).
6 Ibid.
9 N.C.G.S. §§ 40A-42(b)(2) and 40A-45 (2005).
10 This is not a statutory remedy in Section 40A. Instead, the statutes assume a “public benefit” and anticipate only a challenge by the landowner to the amount determined by the municipality to be “just compensation.”
from the date that the municipality acquires title to the property.\textsuperscript{11}

In addition to the standard eminent domain process, a “quick take” provision is also available for municipalities. This procedure may be used in actions that involve the taking of property for “such enterprises as electric power generation and distribution systems, sewage collection and treatment systems, gas production and distribution systems, solid waste collection and disposal systems, cable television, and streets.”\textsuperscript{12} Under N.C.G.S. 40A-42(a), a municipality may use this procedure to acquire title to the desired property and the right to immediate possession at the time that it files the complaint and makes the deposit of “just compensation” with the court. This can only be pre-empted by the private landowner filing an injunction prior to the municipality’s filing of a complaint.

In addition to the standard eminent domain procedure in Section 40A, North Carolina law also provides municipalities with the ability to use eminent domain for redevelopment purposes. These redevelopment provisions mirror those of other states and remain on the books as evidence of urban renewal policies. Initiated in 1951 for residential properties and expanded in 1961 to include commercial properties, Chapter 160A’s “Urban Development Law” outlines procedures a municipality may use to take “blighted” property in order to redevelop it for new housing or commercial uses or to take property in order to prevent an area from becoming “blighted.” N.C.G.S. § 160A-501 explains that “blighted areas” are “economic or social liabilities, inimical and injurious to the public health, safety, morals and welfare of the residents of the State, harmful to the social and economic well-being of the entire communities in which they exist, depreciating values therein, reducing tax revenues, and thereby

\textsuperscript{11} N.C.G.S. §§ 40A-52, 40A-53, and 40A-63 (2005). This provision prevents the municipality from having to pay any increase in value associated with the municipality’s future plans for the project. The fair market value prior to the filing of the complaint is usually determined to be the property value that is on the tax records at the time of the civil action. Given that municipalities in North Carolina are not required to conduct property re-evaluations any more frequently than each seven years, this could lead to a result in which “just compensation” is determined to be a property value on the tax records from up to seven years prior to the proceeding.

depreciating further the general community-wide values.” Eminent domain, then, may be used as a means of achieving the “public purposes of acquiring and replanning such areas and of holding and disposing of them in such manner that they shall become available for economically and socially sound redevelopment.”

Under redevelopment law, a municipality must create a redevelopment commission or housing authority that is a body distinct from the governing board. This commission may be comprised of the exact same members as the governing board, but the commission has independent authority to enter into contracts, purchase and sell property, borrow money, and invest the funds that it receives from its redevelopment activities. In order to initiate a redevelopment project that utilizes eminent domain for parcel assembly, the commission or authority must first prepare a redevelopment plan pursuant to N.C.G.S. § 160A-513. This plan must link to the municipality’s comprehensive plan (if one exists) and show land uses for the redevelopment area, along with proposed zoning, street, and building changes. In addition, the plan should include “a statement of a feasible method proposed for the relocation of the families displaced” by the redevelopment activities. The redevelopment plan must be approved by the governing body of the municipality after a public hearing; once this is accomplished, the redevelopment commission or housing authority may begin eminent domain procedures in accordance with Chapter 40A.

One other statutory authorization of eminent domain exists for redevelopment purposes: the “community development” section of Chapter 160A. Under N.C.G.S. § 160A-456(a)(2)(b), “any city council may exercise directly those powers granted by law to municipal redevelopment commissions and those powers granted by law to municipal housing authorities, and may do so whether or not a

---

redevelopment commission or housing authority is in existence in such city.” This law, passed in 1975 after the close of the urban renewal period and the end of federal categorical funding for community development, enables each municipality to acquire residential, commercial, or industrial land via eminent domain, clear these areas, construct site improvements and install infrastructure on these parcels, and sell the tracts “to the highest bidder” for “residential, commercial, industrial, or other use or for the public use . . . in accordance with the redevelopment plan.” Community Development Block Grant (CDBG) funds may be allocated to cover expenses incurred in this redevelopment procedure. These “community development” statutes enable a local government to implement eminent domain as a means by which to achieve redevelopment goals without having to raise the specter of urban renewal through establishment of a redevelopment commission or housing authority. In addition, these statutes permit a municipality to exercise direct control over the use of eminent domain for residential or commercial redevelopment. No separate quasi-governmental body (a commission or authority) exists to make broad redevelopment decisions; thus, a council may exert more power over eminent domain, yet be held more politically accountable for the results of its decisions.

Massachusetts

In all states, the power of eminent domain is usually exercised by the state or the local governing board. Other groups may also be statutorily authorized to use eminent domain, such as private transportation or utility corporations, or quasi-governmental entities such as a housing authority or a turnpike authority. In Massachusetts, however, redevelopment law permits additional organizations to use eminent domain for redevelopment purposes. Under M.G.L. Chapter 121A, Section 3, a group of persons may form a corporation “for the purpose of undertaking and carrying out

---

in the city of Boston a project authorized and approved by the Boston Redevelopment Authority or for
the purpose of undertaking and carrying out in any other city or town a project authorized and approved
. . . by the housing board." In addition, a “charitable corporation” may also be “empowered to act as a
Urban Redevelopment Corporation. . . for the purpose of rehabilitating and improving residential
housing.”20 M.G.L. Chapter 121A, Section 11 gives these non-governmental corporations the authority
to use eminent domain to acquire land for redevelopment projects, subject to the approval of the local
housing board. Although the redevelopment purposes mirror those of other states, the delegation of
the power of eminent domain to non-governmental groups provides Massachusetts communities with
additional power to effect community development projects.

**Problematic Statutory Definitions**

Although detailed statutory provisions furnish strict mandates for the process of using eminent
domain, many have been faulted for the wide latitude that their language gives to purposes for using
eminent domain. Particularly notable are varying definitions of “blight” in urban redevelopment
statutes. “Blight” may be described in vague terms that permit a variety of eminent domain actions, or
it may be so detailed as to give a number of small hooks on which to hang justifications for eminent
domain. For example, West Virginia’s redevelopment statutes focus on “slum areas” and “blighted
areas.” A “slum area” is

an area in which there is a predominance of buildings or improvements (or which is
predominantly residential in character), and which, by reason of dilapidation,
deterioration, age or obsolescence, inadequate provision for ventilation, light, air,
sanitation, or open spaces, high density of population and overcrowding, or
the existence of conditions which endanger life or property by fire and other causes,
or any combination of such factors, is conducive to ill health, transmission of disease,
infant mortality, juvenile delinquency and crime, and is detrimental to the
public health, safety, morals, or welfare.21

---

20 M.G.L. Ch. 121A, Sec. 3 (2005).
This language tends to evoke images of inhumane conditions targeted by nineteenth- and early twentieth-century reformers and can be seen as a clear justification for redevelopment of an impoverished area. However, the statutory category of “blighted areas” gives greater latitude to the use of eminent domain. A “blighted area” is

an area (other than a slum area) which by reason of the predominance of defective or inadequate street layout, faulty lot layout in relation to size, adequacy, accessibility or usefulness, insanitary or unsafe conditions, deterioration of site improvement, diversity of ownership, tax or special assessment delinquency exceeding the fair value of the land, defective or unusual conditions of title, improper subdivision or obsolete platting, or the existence of conditions which endanger life or property by fire and other causes, or any combination of such factors, substantially impairs or arrests the sound growth of the community, retards the provision of housing accommodations or constitutes an economic or social liability and is a menace to the public health, safety, morals, or welfare in its present condition and use.22

Phrases such as “substantially impairs or arrests the sound growth of the community” and “constitutes an economic or social liability” can easily be used to encompass a wide range of reasons for eminent domain, including the taking of land for economic development projects. Therefore, state law often provides definitions of the purposes of eminent domain that permit a range of explicitly- and implicitly-authorized activities.

**Uses of Eminent Domain**

*Historic Uses*

Local and state governments rarely exercised eminent domain in the late eighteenth and early nineteenth centuries, primarily because “there were vast tracts of government-controlled land available in the public domain and governmental activities were relatively limited.”23 When governments used

---

22 Ibid.
eminent domain, it was confined almost exclusively to situations in which states condemned land for the construction of roads, railroads, canals, and public parks. In most cases, the public actually did use the improvement constructed on the land that had been taken through eminent domain. Other early American examples illustrate a less-definite connection between condemnation and later public use, such as a local government’s taking of land adjacent to a grist mill in order to promote the commercial operation by allowing the owner to construct a dam across a stream that would flood the transferred land.24 Early twentieth-century uses included condemnation for the purpose of obtaining land for utility pipes and electric and telephone lines, along with the construction of irrigation projects and drainage districts in the arid western states.25 Generally, though, eminent domain was limited to situations in which public improvements related to growth needed to be made or common carriers needed land for transportation improvements.

Modern Uses

Urban Renewal

During the 1930s and 1940s, the federal government passed several laws, such as the Housing Acts of 1937, 1949, and 1954, that sought to encourage municipalities to engage in the clearance of their older housing stock and the subsequent construction of new, modern units. These acts provided local governments with federal funds for redevelopment activities and sanctioned the use of eminent domain by local housing or redevelopment authorities as a primary tool by which to achieve the clearance of large, “substandard” areas.

Known as the “urban renewal” program, this redevelopment effort “stir[red] hopes” by appealing to a variety of interests: “central-city business interests viewed it as a means of boosting

sagging property values; mayors and city councils perceived it as a tool to increase tax revenues; social welfare leaders hoped it would clear the slums and better the living conditions of the poor; and, more specifically, advocates of low- and moderate-income housing thought it would increase the stock of decent, affordable dwellings in the central cities." In practice, though, the legal wording of the acts provided large loopholes through which municipalities could construct new revenue-generating projects without having to build affordable housing for displaced residents. Using federal money, local governments were able to take large swathes of older neighborhoods through eminent domain, justifying their actions as having a “public purpose” because these properties suffered from “blight” and/or were “slum” areas. Federal money also funded the construction of new, high-rent units or commercial projects, since the Housing Acts failed to mandate the construction of affordable residential units. Given the choice between clearance and construction of properties that would not generate high property tax revenue and those that would, municipalities generally chose to redevelop with the “highest and best use” of the properties in mind.

As eminent domain was used to displace a large number of residents who tended to be of low-incomes and of minority or ethnic backgrounds, the procedure became equated with abuses of governmental powers. In many cases, eminent domain became known as “Negro removal,” since it, in an urban redevelopment context, had the effect of forcing African-Americans from their traditional neighborhoods and replacing them with more affluent white residents. Similar problems abounded with residents of other ethnicities. Eminent domain figured prominently in public outcries against the effects of the urban renewal (Title I) program and became seen as a major weapon in the “war on the poor” that appeared to be occurring in most major cities during the mid-twentieth century.

---

27 Ibid, p. 447.
The Boston Redevelopment Authority

One of the most well-known examples of large-scale eminent domain use in the urban renewal program occurred in Boston, MA during the 1950s and early 1960s. Mayor John B. Hynes made the renewal of Boston’s business districts one of his top priorities, and the City Planning Board determined that “the renewal of blighted areas immediately abutting downtown Boston was an essential part of the overall process.”28 The City saw an opportunity to use federal funds to achieve this goal, particularly since the Housing Act of 1954 could provide up to thirty percent of funding for non-residential and industrial projects that were constructed in accordance with a redevelopment plan.29 One major “slum” area that the City sought to clear was the West End, a densely-populated ethnic neighborhood just north of Beacon Hill and Boston’s business and government center. During the mid-1950s, the area housed about seven thousand residents in twenty-eight hundred units.30 City leaders viewed this area as severely “blighted,” citing narrow streets, overcrowded apartments, and fire hazards as reasons for redevelopment. According to one local banker, “There’s only one way you can cure a place like the West End, and that is to wipe it out. It’s a cancer in the long run to the community.”31

The City secured approval for its West End Project in 1956 (three years after the formal announcement of its plan) and assigned responsibility to the Boston Redevelopment Authority (BRA). The BRA’s redevelopment plan involved the construction of five residential complexes that included tower buildings, smaller apartment buildings, and townhouses.32 Almost five hundred apartments were to be created, each of which would rent as a luxury unit, not as affordable housing.33 These units were intended to bring young professionals and families back to the city; once there, city officials believed

29 Ibid.
30 Ibid.
31 Ibid., p. 131.
32 Ibid., p. 132.
33 Ibid.
that these higher-income residents would patronize Boston’s business district instead of shopping and seeking personal services in the suburbs.

Rather than negotiate with individual homeowners and tenants, the BRA decided that the most efficient way to accomplish its goals was to take the entire fifty-two area project area through eminent domain. In April 1958, all property owners in the West End Project area received written notification from the City stating that the BRA had taken over their properties by eminent domain. This, according to the letter, was done in order to eliminate slums and “blight” and demolition of buildings would begin at once. The City did not provide relocation housing for the West End residents, and residents had little expectation of being able to return to the neighborhood due to the nature of the new housing being constructed. Two years later, the area had been entirely cleared and the West End ceased to exist.

The urban renewal project in the West End shocked many individuals in Boston into realizing that the same thing could happen to their neighborhoods. Public outcry against the destruction of the West End ran high, but city officials forged ahead with redevelopment efforts fueled by the power of eminent domain. In 1960, Mayor John Collins hired Ed Logue to head the BRA. Under Logue’s direction, the BRA took a more subtle and sensitive approach to urban renewal, but it still relied frequently on eminent domain to achieve its goals. Notable projects during Logue’s tenure included the razing of Scollay Square for the new Government Center, the construction of the Prudential Center on abandoned Back Bay railyards, and housing redevelopment projects in Allston-Brighton, Charlestown, and the South End.

The Dudley Street Neighborhood Initiative

The activities of the BRA during the 1950s and 1960s placed a sinister cast on the City’s use of eminent domain. Decades later, this planning tool was viewed with suspicion by residents throughout

Boston. The use of eminent domain had become aligned with the specter of big government using its power to take advantage of (and the properties of) its most vulnerable citizens.

In contrast, though, Boston also presents an example of community-sensitive, “ground-up” use of eminent domain for neighborhood redevelopment. Resident-driven community development efforts are rare, and rarer still are those in which residents have been allowed to use eminent domain as a means by which to advance their community development objectives. One notable example of both of the above is the Dudley Street Neighborhood Initiative (DSNI), a non-profit community development group that operates within the Dudley Street area of Roxbury, one of Boston’s poorest neighborhoods. In the 1980s, this neighborhood was characterized by massive disinvestment, a low owner-occupancy rate, high poverty, illegal dumping, and a large number of vacant lots and abandoned housing units.

Working with its own resident-controlled board to create a master plan for the Dudley Street community, DSNI envisioned the creation of a “village concept [that would] ‘foster human growth, where people have choice and opportunity.’”35 This community plan sought “development without displacement” and proposed new construction of between 800 and 1,000 housing units and the rehabilitation of 1,000 units for affordable housing within the immediate neighborhood.36 The problem presented, though, was one of parcel assembly and cost, for the majority of the properties were in tax foreclosure and those that were not owned by the City generally were owned by absentee property holders.37 The number of tax delinquent lots discouraged DSNI, for “foreclosing on them one by one would be a complicated and time-consuming process.”38 Thus, DSNI decided to pursue the remedy of

36 Ibid.
37 Ibid., p. 117. Fifteen acres of land were owned by the City of Boston, and 181 lots were privately owned, with 101 of these lots being tax delinquent.
38 Ibid.
eminent domain which, under Massachusetts law, could be delegated to a non-profit corporation for a redevelopment project.\textsuperscript{39}

As discussed above, Chapter 121A of the Massachusetts General Laws delineates the state's redevelopment law and describes a policy goal of "stimulat[ing] the investment of private capital in blighted areas that in turn will assist in eliminating existing slums."\textsuperscript{40} These statutes permit the formation of an "urban redevelopment corporation" that will carry out a redevelopment project with the approval of the Boston Redevelopment Authority.\textsuperscript{41} An urban redevelopment corporation authorized by the BRA has the power to "lease land, or acquire land by gift, purchase or exchange, or with approval of the housing board, may take land by eminent domain."\textsuperscript{42} In order to accomplish its affordable housing goals, DSNI decided to apply to the City for approval as an "urban development corporation."

DSNI won the reluctant approval of the Boston Redevelopment Authority and was able to obtain a $2 million loan from the Ford Foundation that enabled it to provide "just compensation" for the taking of the needed parcels through eminent domain.\textsuperscript{43} DSNI's ability to condemn these parcels enabled it to begin work on the construction of several groups of affordable housing, which not only ameliorated the problems caused by vacant, abandoned, and dilapidated properties, but encouraged outside investment in the neighborhood, for the new affordable units caused many former Roxbury residents and new low- to moderate-income residents to move into the neighborhood.

The DSNI example shows that resident-controlled eminent domain can be an effective tool in enabling a non-profit organization efficiently and successfully to implement a redevelopment project.

\textsuperscript{39} Interestingly, though, residents initially feared use of eminent domain, for they had seen the devastating effects that eminent domain in urban renewal programs had had on Boston's West End and South End.

\textsuperscript{40} Taylor, p. 1075.

\textsuperscript{41} Ibid. A redevelopment project is defined as "Any undertaking consisting of the construction in a blighted, open, decadent or sub-standard area of decent, safe, and sanitary residential, commercial, industrial, institutional, recreational or governmental buildings and such appurtenant or incidental facilities as shall be in the public interest, and the operation and maintenance of such buildings and facilities after construction."

\textsuperscript{42} Ibid.

\textsuperscript{43} Medoff and Sklar, p. 154.
that improves the physical and social character of a neighborhood. Unlike earlier urban renewal projects in Boston, the Dudley Street project provides an example for the argument that the judicious use of eminent domain can be a valuable tool that promotes sensitive redevelopment and community unification.

**Tax Increment Financing (TIF)**

Closely related to urban renewal programs, tax increment financing is a development management tool that has grown in popularity over the past decade. Originally developed in California in the 1950s, TIF was intended to be “a local method of self-financing the redevelopment of blighted urban areas.” Over time, TIF districts were used to fund numerous capital projects in both “blighted” and non-“blighted” areas. Many states currently have legislation that authorizes the use of TIF for economic development projects. Findings of “blight” are not needed in order to implement this financing tool. For example, West Virginia’s TIF legislation provides that a governing body must adopt an ordinance that includes “findings that the real property within the development or redevelopment project area or district will be benefited by eliminating or preventing the development or spread of slums or blighted, deteriorated or deteriorating areas, discouraging the loss of commerce, industry, or employment, increasing employment, or any combination thereof.”

TIF provides local governments with a means of financing development projects through property tax revenues. In order to implement TIF, a TIF district must be created. Within this district, a base year is determined, and property taxes are frozen within the district at the base year rate. This will extend over a long period of time, often ten to twenty years. After the base year, all additional tax

---

44 Forty-nine states have TIF legislation, including North Carolina, which passed a form of tax increment financing in November 2004. Arizona is the only state that does not authorize TIF as a financing tool.


revenues generated by the development of the project (which assumes increasing property values and thus higher property taxes) belong to the TIF district for the stated period of time. These monies (the “tax increment”) are used to finance various project costs, such as land acquisition and infrastructure improvements. After the time for the TIF district ends, all tax revenues from the redevelopment project then belong entirely to the municipality or county.

TIF enabling legislation usually includes authorization for the use of eminent domain by the redevelopment authority responsible for administering the TIF project. As with urban renewal projects, eminent domain provides an efficient means by which to assemble parcels for large TIF development projects. The use of eminent domain in TIF districts may generate controversy, just as it did in urban renewal projects. In Wheeling, WV in 2003, city officials created a TIF proposal that would cover a large portion of the area south of its historic downtown in order to facilitate a riverside shopping center that would include a standard-design Lowe’s Home Improvement Center and a Wal-Mart. This area was home to several commercial uses and a small but tightly-knit working-class neighborhood. The proposed developer allegedly made it known during purchase overtures to the property owners that the City was prepared to use eminent domain to acquire their homes and businesses. A widespread protest occurred, and the City was forced to back off of its plans to condemn holdout properties. Given the political storm, the City decided to amend the project boundaries and construct the shopping center on a smaller site that specifically excluded the protesting neighborhood.

The Wheeling example underscores the fact that most local governments have an ambivalent relationship with eminent domain. Although it may provide an efficient means of assembling parcels for

---

47 TIF projects may be financed through a “pay-as-you-go” mechanism, in which yearly tax increases (the “tax increment”) is used to pay for a portion of project costs, or by issuing TIF bonds at the beginning of the project. These bonds provide money up front for the project and must be paid off over a period of time designated by statute (usually the length of time in which the TIF district will be in existence). See Property Tax Increment Financing in West Virginia: A Guide for Counties and Class I and II Municipalities (2003).

48 This may have occurred because property owners involved the Institute for Justice, a Washington, D.C. organization that fights against eminent domain abuses, and the National Trust for Historic Preservation.
redevelopment, the political costs of its use may be high. High-profile stories of eminent domain abuses and the historical example of Boston’s West End have created strong negative associations in the popular mind regarding the use of eminent domain. Many contemporary governments will use eminent domain only as a last resort, because the process is highly visible, proceedings are potentially costly, and public opinion is particularly volatile on this issue.\(^49\)

**Criticisms of Eminent Domain**

The success of DSNI suggests that eminent domain can be used by neighborhood organizations to achieve goals of community development. This instance of resident-driven eminent domain, though, proves to be a highly unusual exception to the norm of government-driven examples, such as the BRA example discussed above. Eminent domain in the hands of municipal governments has engendered a significant amount of criticism from displaced residents, legal scholars, and advocates for low-income and minority individuals, all of whom point to eminent domain as a highly-manipulable tool of special interests.

**Definitions of “Blight”**

As previously noted, one criticism of the use of eminent domain focuses on the plasticity of the definition of “blight” in redevelopment statutes and how municipalities may interpret this term selectively to apply to any property that may be important to their social or economic plans. Given “the broad range of conditions and the degree of subjectivity inherent in such an inquiry, cities can characterize almost any area as blighted.”\(^50\) This, combined with a legal presumption of validity in favor of municipal

\(^49\) The American Planning Association recommends that eminent domain only be “reserved for the most serious cases” of barriers to redevelopment. *American Planning Association Policy Guide on Public Redevelopment*, p. 8.

actions, signals that a municipality has a wide degree of latitude in identifying and “taking” a property that it deems necessary for redevelopment.

**Residential Displacement and Financial Costs**

The most significant criticisms of the use of eminent domain focus on the negative impacts on low-income and minority residents whose properties are “taken” for redevelopment. Condemnation of residential property generally results in displacement of residents, many of whom cannot afford the cost of moving to a new unit. Although the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 (42 U.S.C. § 4622) mandates that the municipality offer each displaced property owner a reasonable sum to cover relocation costs, these payments usually do not cover the costs that residents must incur in moving. This relocation assistance does not take into account the difficulty low-income and minority individuals may have in finding a new, affordable unit (given the presence of racism and classism in the housing market and the sheer lack of supply of affordable housing). In addition, the designation of fair market value as “just compensation” for units in a “blighted area” may not provide enough money to enable the property owner to purchase a comparable new unit elsewhere in the current housing market. Other financial hardships that result from displacement may include the fact that “just compensation” may not provide enough money for a property owner to pay off his or her mortgage on the condemned property or that the property may have received CDBG rehabilitation monies, in which case the landowner may be obligated to repay these funds to the government since he or she will not have lived in the residence for the requisite amount of time for the “loan” to be forgiven. In addition, monetary costs may include the loss of jobs for local residents, for the eminent domain action may displace small neighborhood businesses and make it financially impossible for an owner to open his or her business in a new location in another part of the city.
Social and Emotional Costs

In addition to financial costs, the condemnation of a property may impose social and emotional costs on residents through “the destruction of the community itself.”\textsuperscript{51} Greater value inheres in a property beyond its exchange value, for each resident “faces the challenge of making a life on a real estate commodity.”\textsuperscript{52} The taking of property through eminent domain does not compensate residents for the lost use value, or the value assigned to “the bundle of social, familial, business, religious, and ethnic ties and relationships [that are] of subjective, nonpecuniary value to a displaced individual.”\textsuperscript{53} The loss of use value can have a particularly detrimental impact on the lives of low-income residents, for “particularly among the poor, ‘the existence of a matrix of mutually shared values and mutually shared concerns and support are necessary conditions not just to psychic well being, but to physical survival itself.’”\textsuperscript{54} The destruction of these vital social networks through eminent domain ensures that low-income residents will lose pooled resources on which they depend for daily functioning. These “human costs” may not be recaptured in their new residential locations.

Gentrification

Eminent domain may also serve to promote gentrification and displacement in areas surrounding the redevelopment area. Thus, many more residents than those whose properties are “taken” may be impacted by the use of eminent domain, as the prospect of redevelopment may promote increased investment in neighboring areas. Residents of these fringes may be driven out by escalating rents or by the sale of residential rental properties to private developers (who may seek rezonings that will permit commercial redevelopment). Therefore, another group of displaced residents

\textsuperscript{51} Hellegers, p. 941.
\textsuperscript{53} Hellegers, p. 941.
is forced into the housing market at the same time that residents displaced by eminent domain are seeking new housing units. This sudden increase in demand and a corresponding lack of supply of affordable units may mean that many displaced low-income residents end up in units with rents that they cannot afford or are forced to live in overcrowded conditions. In addition, the displaced residents will seek new units with rents comparable to those in which they were living. This suggests that many of them will end up in similar low-income areas, and the elimination of one low-income “blighted area” can “create an even worse slum given the multiplier effects of concentrated poverty.”

Although redevelopment projects claim to replace the affordable units destroyed, “many thousands more units have been destroyed by redevelopment than have been constructed, and of those units constructed, only a small portion have been affordable to low-income residents.” The replacement of affordable units in a redevelopment project also does not take into account the residents of nearby areas that may be displaced by gentrification. As gentrification occurs in central-city sites, the filtering model breaks down, for no new units are created on the fringes of the community. Instead, units that are “filtering down” through the housing market are suddenly improved; thus, the filtering chain is broken and supply is constricted at the lower end of the market. This means that low-income residents will have increasing difficulties in finding new units in the wake of eminent domain and the redevelopment process.

Social Injustice Toward Minorities and the Poor

Eminent domain has also been criticized as promoting social injustice through its deference to the elite interests of a municipality’s “growth machine.” Broad judicial construction of the “public use” doctrine enables business leaders and commercial interests to plan projects that will increase tax

55 Broussard, p. 740.
56 Ibid., p. 739.
revenues (or personal profits) for particular pieces of property. Often, the presence of low-income or minority residents in desirable central city areas hinders profit-maximizing. Although not always driven by racism or classism, evidence exists that indicates that many eminent domain proceedings have been tainted by “racial animosity” or by “bias against the poor.” Statutory provisions like N.C.G.S. 40A-4 provide that “the power to acquire property by condemnation shall not depend on any prior effort to acquire the same property by gift or purchase”; therefore, a municipality may initiate a condemnation action without attempting to negotiate for the purchase of the property. Low-income and minority owners may never be given a chance to sell the property on a voluntary basis, for no requirement exists for the government to acknowledge their ownership other than through the basic due process guarantees of the civil action. Elite interests may acquire the desired property without having to confront the human aspect of the community that will be altered or destroyed by eminent domain. “Blight” in the form of low-income and minority residents can expeditiously be removed and the property conveyed to parties that will maximize its exchange value on the market.

A trend in the 1990s and early 2000s has been to use eminent domain in service of economic development projects that attempt to lure private industry to a particular jurisdiction. Examples abound of national corporations seeking prime locations or profitable businesses wanting to increase their property holdings asking local governments to exercise the power of eminent domain and acquire the desired parcels. In these instances, businesses hold the carrot of jobs, sales taxes, and increased property tax revenues in front of the municipality and threaten with the stick of leaving the jurisdiction for another that will prove more amenable to its demands. Critics of eminent domain argue that these “economic development” actions cannot be justified under the “public use” doctrine, even given the low standard of judicial review that prevails in eminent domain case law. In many cases, public monies are being used to offer incentives to entirely private interests, and neighborhoods are being destroyed to

57 Ibid., p. 740.
justify pursuing the promise of increased revenues from which displaced residents and business owners may or may not benefit. Municipalities play upon the political vulnerability of low-income and minority residents in order to maximize profits, and these residents are left with decreased opportunities and diminished lives.

Eminent Domain Jurisprudence Prior to Kelo

The Public Use Controversy

The most prominent eminent domain cases feature a central element: the need for judicial interpretation of the “public use” wording of federal or state “takings clauses.” As noted above, it has been difficult to determine what the phrase meant in the eighteenth century, and as state courts heard cases in the nineteenth century, they gave broad interpretations to the phrase and “vacillated between support for an expansive use of eminent domain and a fear that condemnation would be abused to the detriment of individual property rights.”58 “Public use” controversies during the nineteenth century often involved drainage ditches, mill dams, and transportation routes. Eminent domain in these cases generally could be seen as being linked to potential public use of the condemned property. In the 1923 case of Rindge Co. v. Los Angeles County, though, the Supreme Court determined 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.”59

The Court's broad reading in Rindge Co. gave impetus to the urban renewal movement in the mid-twentieth century, in which local governments used the elimination of “blight” to justify the use of eminent domain powers and the clearing of large tracts of (usually) central-city land. This new focus on “blight” led to a significant change in state-level eminent domain jurisprudence: in New York City

58 Prichett, p. 9.
59 Ibid., p. 12.
Housing Authority v. Muller, New York shifted the focus away from the intended “public use” of the property to the condition of the property prior to condemnation and the “public good” that eminent domain would serve in ending “blighted” conditions.\textsuperscript{60} Actual “public use” became of less importance than the “public purpose” served by the eradication of “blight.” In 1954, a landmark Supreme Court decision, Berman v. Parker, conflated the two terms, and since that time, “public use” has been defined broadly by courts at all levels.

**Standard of Judicial Review**

Another major issue in eminent domain cases of the twentieth and twenty-first centuries is which standard of judicial review should apply to eminent domain cases. Courts usually apply the lowest standard, rational basis review, to most eminent domain cases. Under this standard, the government entity that exercises eminent domain is entitled to a presumption of validity. This means that the court will assume that the government’s actions serve a compelling public interest and are valid unless the plaintiff can prove otherwise. In general, courts are unwilling under this standard to delve into motives or question methods so long as they appear rational. Rational basis review creates a high barrier to plaintiffs to overcome, and most eminent domain cases will be decided in favor of the government unless a plaintiff can show arbitrary and capricious actions that amount to abuse of the eminent domain power.

A number of cases have featured plaintiffs calling for a different standard of judicial review. They seek heightened scrutiny, or greater inquiry by the court into motives behind the use of eminent domain. In addition, many plaintiffs want a presumption of invalidity to apply to government actions, which would shift the burden of proof over to the government and make it responsible for defending its

\textsuperscript{60} Pritchett, p. 26.
actions to the court. So far, the Supreme Court has declined to apply heightened scrutiny to any eminent domain case.

**Supreme Court Cases**

*Berman v. Parker* (1954)

The expansion of the “public use” doctrine was bolstered at the federal level by the Supreme Court’s 1954 decision in *Berman v. Parker*. The *Berman* case involved a group of landowners in Southwest Washington, D.C. who challenged the District of Columbia’s plan to declare most of the city’s southwestern quadrant a “blighted” area, acquire the area through eminent domain, raze the properties, and initiate a massive redevelopment project that would replace lower- and middle-class communities with upscale housing and federal office space. This redevelopment project was to be conducted primarily by private enterprise after the District conveyed the cleared land to private developers. Berman, the owner of a department store, protested the District’s declaration that his property was “blighted,” and challenged the District’s determination to take his property and convey it to a private entity for redevelopment.

In *Berman*, the Court upheld the District of Columbia Redevelopment Act of 1945 by giving a broad reading of the “public use” clause. The Court declined to involve itself in Congress’ interpretation of “blight” by stating, “Subject to specific constitutional limitations, when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive. In such cases the legislature, not the judiciary, is the main guardian of the public needs to be served by social legislation.”61 In addition, the Court recognized the validity of broad-scale redevelopment and refused to sever Berman’s property from the area as a whole. The Supreme Court’s deferential approach to legislative determinations of blight also resulted in a key permutation of the “public use” doctrine: instead of framing the issue in

---

terms of an ultimate public use, the Court chose to address the question in terms of whether the redevelopment project would serve a “public purpose.”\(^\text{62}\) Thus, \textit{Berman} “expanded the public use concept to include almost any governmental activity in which there is an intention to enlarge public resources through capital prosperity, improved private industry, and greater regional employment.”\(^\text{63}\) After \textit{Berman}, only a public benefit determined by the legislature had to be shown to withstand judicial scrutiny, and “by leaving the task of identifying the public purpose ends and selecting the means by which to achieve those ends to legislative will, the Court gave virtually unfettered eminent domain authority to the taking government agency.”\(^\text{64}\)

\textit{Hawaii Housing Authority v. Midkiff (1984)}

\textit{Berman} controlled the scope of eminent domain power for thirty years, long after the urban renewal movement had died away. In 1984, though, the Supreme Court upheld the “public purpose” doctrine and expanded it further in \textit{Hawaii Housing Authority v. Midkiff}. The \textit{Midkiff} case focused on the Hawaii government’s attempt to force private landowners with extensive holdings to sell some of their properties in order to open up the land market in the state.\(^\text{65}\) In \textit{Midkiff}, the Hawaiian government placed itself in the role of encouraging two private entities to negotiate over land and, when negotiations failed, endeavoring to “take” the land through eminent domain and convey it to the individual who had been renting the land from the owner. Thus, the government was brokering a deal between two private parties and, the plaintiff alleged, could not use eminent domain to further any “public purpose.”

\(^\text{62}\) \textit{Ibid.}, p. 33.
\(^\text{63}\) Hellegers, p. 943.
\(^\text{64}\) \textit{Ibid.}, p. 944.
\(^\text{65}\) In 1984, 22 landowners controlled over 72% of the state’s land. These individuals had inherited their large holdings from ancestors who had been members of the Hawaiian royal family or Hawaiian chiefs. The concentration of ownership skewed Hawaii’s real estate market to the degree that the state government determined that properties had to be sold in order to permit equitable access and provide for the public welfare.
The Court, however, disagreed with this interpretation. Following *Berman*, the Court stated that “it [would] not substitute its judgment for a legislature’s judgment as to what constitutes a public use ‘unless the use be palpably without reasonable foundation.’” In addition, the Court declared that “the ‘public use’ requirement is . . . coterminous with the scope of a sovereign’s police powers,” which would make the Court’s role in judging the state’s actions “an extremely narrow one.” It then went on to declare that “The mere fact that property taken outright by eminent domain is transferred in the first instance to private beneficiaries does not condemn that taking as having only a private purpose. . . . ‘What in its immediate aspect [is] only a private transaction may . . . be raised by its class or character to a public affair.’” The *Midkiff* case, therefore, revalidated *Berman*’s “public purpose” doctrine and made it clear that eminent domain may be used for actions that benefit private parties, as long as some type of public benefit may attach to the proceeding in the future. Whether this public benefit is realized is not under the purview of the judiciary.

*After Midkiff*, governments only had to show that their decisions to use eminent domain were based on a speculative benefit to some portion of the public. *Midkiff* was decided under a rational basis standard of review, and the Court made clear that it would not second-guess the legislature that authorized the use of eminent domain or a government’s use of eminent domain pursuant to these statutes, as long as the statutes passed Constitutional muster. No major decision has overturned the *Midkiff* decision. Therefore, at the federal level, eminent domain jurisprudence permits expansive interpretation of the “public use” requirement and allows wide latitude to municipal actions under rational basis review.

---

68 Ibid., p. 243-244. The statement quoted by the Court within the quote is from *Block v. Hirsch*, 256 U.S. 155.
Lower Court Cases


One of the most well-known state eminent domain cases came out of Michigan in 1981. The *Poletown* case centered on General Motors’ demand to the City of Detroit for a large parcel of suburban land for a new Cadillac assembly plant. Without this land, the company intimated, it would be forced to move this particular operation away from Detroit, taking over 6,000 jobs with it, because its current central city plant was obsolete and would prove too costly to retrofit. General Motors requested that Detroit assemble a rectangular parcel of at least 450 acres that was located along a rail line and near a freeway. The City was to obtain the property through eminent domain and convey it to the company for redevelopment. Detroit found a location that fit the criteria, but it was in an area that included a large number of residences, small businesses, and churches. The neighborhood association sued the City over its use of eminent domain, alleging that taking their land and conveying it to General Motors for an assembly plant did not constitute “public use” under Michigan’s constitution.

The court opened its opinion by framing the issue in a way that was favorable to the City: “Can a municipality use the power of eminent domain granted to it by the Economic Development Corporations Act . . . to condemn property for transfer to a private corporation to build a plant to promote industry and commerce, thereby adding jobs and taxes to the economic base of the municipality and state?” The characterization of General Motors’ new plant suggested that the court viewed eminent domain for economic development in a positive light, and the court went on to reject the plaintiff’s argument that “public use” did not equal “public purpose,” claiming that the terms had been used interchangeably in Michigan law “in an effort to describe the protean concept of public benefit.” In addition, the court approvingly cited the language of the Economic Development

---

70 Ibid, p. 630.
Corporations Act, which claimed that retention of local industries and other economic development activities “constitute[d] the performance of essential public purposes and functions for th[e] state and its municipalities.”

Thus, “the Legislature has determined that governmental action of the type contemplated here meets a public need and serves an essential public purpose. The Court’s role after such a determination is made is limited.”

The court then ruled in favor of the City of Detroit, citing Berman v. Parker as a significant influence (although this federal case law was not controlling). The Poletown court did, however, state that “Our determination that this project falls within the public purpose . . . does not mean that every condemnation proposed by an economic development corporation will meet with similar acceptance simply because it may provide some jobs or add to the industrial or commercial base. If the public benefit was not so clear and significant, we would hesitate to sanction approval of such a project.”

Poletown was a major eminent domain case both for Michigan and other states. Poletown was widely regarded as having overturned years of precedent regarding interpretation of the “public use” clause in the state constitution and, as the dissent claimed, creating “judicial mischief” by “subordinat[ing] a constitutional right to private corporate interests.”

Although its precedent only applied in Michigan, the case was read by other states as permitting eminent domain for economic development purposes. Local governments in other states explored the limits of “public use” in their jurisdictions, and numerous state cases after 1981 referred to the Poletown decision (not as controlling precedent, but as persuasive authority).

---

72 Ibid, p. 632.
73 Ibid, p. 634.
74 Ibid, p. 684.
This California case involved a corporate demand that was similar to the one made by General Motors in the *Poletown* case. Costco was a major anchor tenant in Lancaster’s “power center” shopping complex, and it sought to increase its store area. Rather than expand to the rear of its leased property, Costco and the shopping center owner negotiated with the City of Lancaster to condemn the adjacent property, which was leased by 99 Cents Only. Costco threatened to leave Lancaster if the deal did not go through. The City never informed 99 Cents Only about this plan, and filed to take the store’s leasehold property through eminent domain. 99 Cents Only brought suit, alleging that the taking was illegal because the City’s plans did not constitute a “public use” of the property.75

The court applied rational basis review to the case, following California precedent (and citing *Midkiff*’s example). This case was viewed as an egregious misuse of eminent domain that would effect a transfer of property from one private party for the exclusive benefit of another private party. Particularly notable was Lancaster’s defense of “future blight” as a justification for its actions. Under this theory, the City asserted that if the shopping center were to lose Costco as an anchor tenant, adjacent businesses would suffer and the shopping center would decline into a “blighted” condition. The court disposed of this argument quickly, noting that the City had made no evidentiary findings of “future blight” in the eminent domain proceedings, and that the concept of “future blight” has no support as a “public use” under California law.76 In a case such as this, “no judicial deference is required . . . where the ostensible public use is demonstrably pretextual.”77 Thus, *99 Cents Only* stands as a case regarding clear eminent domain abuse.

---

75Although Lancaster stopped the eminent domain action during the litigation, the court refused to grant the City summary judgment because it did not believe that the eminent domain issue was moot. The case continued in the absence of eminent domain proceedings because the court suspected that the City might restart the process in the future (perhaps with another adjacent property). The case ended in summary judgment for 99 Cents Only, with the court permanently enjoining the City from instituting eminent domain proceedings against the 99 Cents Only property for the purpose of facilitating a Costco expansion.


77Ibid, p. 1129.
Housing and Redevelopment Authority of the City of Richfield v. Walser Auto Sales (2001)

The Walser case is another case that deals with the use of eminent domain to convey property to a large corporation. Best Buy sought to construct its corporate headquarters in Richfield, MN, a suburb of Minneapolis. The company sought a prime location at the junction of two major highways and negotiated with residents and the City to acquire the land. Although many residents of the area eagerly accepted Best Buy’s offer to purchase their properties—especially since Best Buy offered them more than the market value of their homes—Walser Auto Sales resisted Best Buy’s overtures. As a result, the City of Richfield declared the area “blighted” and instituted condemnation proceedings against the auto dealership. Walser Auto Sales brought suit, alleging its property was not “blighted” and that the taking was not for a “public use.”

As in the Poletown case, the court determined that “public use” and “public purpose” had become synonymous under Minnesota law. It cited City of Duluth v. State (1986) for the proposition that “even though a public entity, using its eminent domain powers, turns over parcels to a private entity for use by that private entity, the condemnation will, nevertheless, be constitutional if a public purpose is furthered by such a transfer of land.” The court also examined the City’s findings of “blight,” which rested upon “incompatible land uses, such as the proximity of auto dealerships to residential areas,” “traffic safety concerns caused by the demonstration driving of cars in the neighborhood,” “customers short-cutting through the neighborhood to get to the car dealerships,” and “excessive noise, created by APA systems used to contact people out on the car lots.” In addition, a report on the small businesses in the area concluded that the neighborhood’s commercial spaces were “functionally obsolete,” and that the area suffered from the lack of “adequate parking facilities (resulting

79 Housing and Redevelopment Authority of the City of Richfield v. Walser Auto Sales, 630 NW2d 662 (2001).
80 Ibid.
in cars parked on sidewalks)" and "hazardous traffic patterns." The court accepted this evidence as adequate for a finding of a “blighted" area and upheld the City’s use of eminent domain in the project area, since the eradication of blight serves a "public purpose." The Walser case often is cited as an example of how much latitude statutory definitions of “blight” give to municipal governments who seek to use eminent domain.


In this case, an Illinois state redevelopment authority allocated a portion of a bond referendum to a private entity to develop a motorsports training complex as part of a local economic development project. The complex created many new jobs for the community and brought racing to a new track that seated 50,000 people. The racing events proved so popular that Gateway, the private corporation that developed the motorsports complex, sought to expand its parking facilities. Although Gateway could have constructed a parking garage on its property, it determined that a less expensive alternative would be to develop surface parking on an adjacent 148.5-acre tract owned by National City Environmental (NCE), a metal recycling business. NCE refused to discuss a purchase with Gateway, and Gateway appealed to the redevelopment authority to use its power of eminent domain to take the NCE property and transfer it to Gateway. The redevelopment authority did so, and NCE brought suit, claiming that the redevelopment agency exceeded its authority under the Illinois constitution by taking the property and transferring it to Gateway for a parking facility that did not constitute a “public use.”

The redevelopment authority argued that its condemnation was legal because a “public purpose” would “be served through (1) the fostering of economic development, (2) the promotion of

81 Ibid.
82 Minn. Stat. § 469.002, subd. 11 defines “blighted area” as “Any area with buildings or improvements which, by reason of dilapidation, obsolescence, overcrowding, faulty arrangement or design, lack of ventilation, light, and sanitary facilities, excessive land coverage, deleterious land use, or obsolete layout, or any combination of these or other factors, are detrimental to the safety, health, morals, or welfare of the community.”
public safety, and (3) the prevention or elimination of blight."\textsuperscript{83} Although the court agreed that the line between “public use” and “public purpose” had “blurred” over the years, it claimed that a distinction still existed in Illinois law. Citing state precedent, the court stated that under the concept of “public use,” “the 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.”\textsuperscript{84} Although the court acknowledged the legitimacy of eminent domain as a means of eradicating “blight,” it determined that the new racetrack complex was open to the public, “but not ‘by right.’”\textsuperscript{85} In addition, the court stated that “economic development is an important public purpose,” but that Gateway’s proposed parking facility would “result not in a public use, but in private profits.”\textsuperscript{86} In spite of the fact that the new parking facility might create an “expansion in revenue [that] could potentially trickle down and bring corresponding revenue increases to the region, revenue expansion alone does not justify an improper and unacceptable expansion of the eminent domain power of the government.”\textsuperscript{87} Therefore, the actions of the redevelopment authority were found to be illegal under the “public use” doctrine. This decision is noteworthy due to the distinction the court draws between “public use” and “public purpose” and its determination that “public use” still required some degree of “by right” access by the public at large.

\textit{County of Wayne v. Hathcock, et al. (2004)}

One of the most recent eminent domain cases is \textit{Hathcock}, a decision by the Michigan Supreme Court that reversed the 1981 \textit{Poletown} decision. This case involved Wayne County’s attempt to create a 1,300-acre business and technology park on land near Detroit’s airport. The County managed to acquire over 500 acres for the new park, which officials anticipated would create 30,000

\textsuperscript{84} \textit{Ibid.}, p. 238.
\textsuperscript{85} \textit{Ibid.}
\textsuperscript{86} \textit{Ibid.}, p. 239.
\textsuperscript{87} \textit{Ibid.}, p. 241.
jobs and bring $350 million in tax revenues for the economically-depressed area.\textsuperscript{88} Many holdouts remained in the proposed project area, and the County determined that the use of eminent domain would be necessary for the acquisition of these remaining properties. The owners of nineteen of these parcels sued the County over its use of eminent domain, arguing that the acquisition of their properties was not necessary and that the economic development project did not constitute a “public purpose” under Michigan law.

In deciding \textit{Hathcock}, the Michigan Supreme Court split its deliberations into two questions: (1) Was the condemnation authorized under state statutes?, and (2) Did the takings violate the Michigan constitution? The controlling state statute, M.C.L. 213.23, authorizes a government agency or public corporation “to take private property necessary for a public improvement or for the purposes of its incorporation or for public purposes within the scope of its powers for the use or benefit of the public . . . .”\textsuperscript{89} The court used rational basis review in its analysis and determined that Wayne County’s stated purposes for condemnation—job creation, increased investment and tax revenues, and support for development opportunities—were legitimate objectives under the “public purpose” language of the statute. Therefore, the eminent domain proceedings statutorily were legal.

The case hinged, however, on the court’s constitutional analysis. Even though it had determined that Wayne County’s economic development plans did serve a “public purpose” under the statute, these same reasons had to be evaluated against the “public use” language in the Michigan constitution. The state’s “takings clause” states that “Private property shall not be taken for public use without just compensation therefore being first made or secured in a manner prescribed by law.”\textsuperscript{90} Constitutional analysis in Michigan rests on “the common understanding of the constitutional text . . . at

\textsuperscript{89} \textit{Ibid}, p. 456.
the time of ratification."91 This means that a court must determine how the phrase “public use” would have been generally understood in 1963, when Michigan voters ratified the latest version of the state constitution. Interestingly, the Hathcock analysis draws upon the Poletown dissent for its examination of pre-1963 case law and also uses the dissenting justice’s categories of “public use.” According to the court, in 1963, condemnation of private property and subsequent transfer to a private entity would only pass the “public use” test in three instances: (1) when necessary for commercial activities such as the construction of railroads, highways, and canals; (2) when the private entity receiving the property remains accountable to the public, such as in the case of a gas or oil pipeline; and (3) when the “selection of the land to be condemned is itself based on public concern,” such as “blighted” properties that endanger public health and welfare.92 Given these criteria, the court determined that Wayne County’s condemnation for office park development did not meet the category of “public use” under the state constitution. Thus, the court invalidated Wayne County’s use of eminent domain.

Although Hathcock turned on a unique aspect of Michigan state law (i.e., the state method of constitutional interpretation), it was widely viewed as a resounding victory against the use of eminent domain for economic development when the government transfers the taken property to a private developer. The Michigan Supreme Court devoted a significant amount of space in the opinion to a denunciation of the Poletown decision as bad case law that is “most notable for its radical and unabashed departure from the entirety of this Court’s pre-1963 eminent domain jurisprudence.”93 According to the court, “Poletown’s ‘economic benefit’ rationale would validate practically any exercise of the power of eminent domain on behalf of a private entity. After all, if one’s ownership of private property is forever subject to the government’s determination that another private party would put one’s land to better use, then the ownership of real property is perpetually threatened by the expansion plans

91 Hathcock, p. 468-469.
92 Ibid, p. 475.
93 Ibid, p. 479.
of any large discount retailer, ‘megastore,’ or the like.”94 In breaking with Poletown, though, the Michigan Supreme Court did not entirely rule out the use of eminent domain for economic development (i.e., it still may be legal as long as it falls into the three “public use” categories outlined by the court). This is a subtlety of the decision that escaped some members of the press and public, but the Hathcock decision’s overturning of precedent strengthened property rights arguments across the United States and created an atmosphere that led many groups to believe that the Supreme Court’s line of eminent domain jurisprudence might be ripe for overturning.

The Kelo Controversy

In late 2000, the Kelo case began in the lower Connecticut state courts. Little attention initially was paid to this case, which challenged the City of New London’s initiation of condemnation proceedings against a small group of holdout landowners. As it worked its way up through the courts, however, Kelo began to attract as much notice as the Hathcock case in Michigan, primarily because it turned on the central issue of whether governments could condemn property for economic development purposes. The Supreme Court of Connecticut heard the case in 2004, and upheld the City’s action. The Supreme Court issued a writ of certiorari in 2004, and heard the case in February 2005.


In the last decades of the twentieth century, New London, Connecticut experienced a severe economic decline due to the loss of its industrial base. In 1990, the state declared it a “distressed municipality,” and in 1996, the city suffered a significant economic setback when the Naval Undersea

94 Ibid, p. 482.
Warfare Center closed, causing a loss of over 1,500 jobs. By 1998, unemployment had risen to a level twice that of the state average, and the city’s population had dropped to the lowest level since 1920. City leaders saw the need for long-term economic development planning, and they focused their efforts on the Fort Trumbull area, which was adjacent to the waterfront. In 1998, they reactivated the New London Economic Development Corporation (NLDC) and issued over $15 million in bonds to facilitate the NLDC’s planning activities and to create the Fort Trumbull State Park.

Shortly after this bond issue, Pfizer Pharmaceuticals announced that it planned to construct a $300 million research facility adjacent to the proposed Fort Trumbull State Park. The City seized on this opportunity and began creating a long-range community revitalization plan, hoping that the Pfizer project would catalyze investment in the Fort Trumbull area. In 2000, they finalized a plan that was “projected to create in excess of 1,000 jobs, to increase tax and other revenues, and to revitalize an economically distressed city, including its downtown and waterfront areas.” This planning effort focused mainly on seven large development parcels within a 90-acre planning area. Parcel 1 was designated for a waterfront hotel, retail center, riverwalk, and marina. Parcel 2 was to be the location of a small “urban village” comprised of 80 new residential units and a U.S. Coast Guard Museum, and Parcel 3 was to contain over 90,000 square feet of research and development space (intended to complement the Pfizer facility). Parcel 4 was intended for park and/or marina “support,” which might include parking areas, and Parcels 5, 6, and 7 were slated for office and retail development. The City Council approved this plan in January 2000.

The NLDC spent most of 2000 negotiating purchases with landowners in the development parcels. Most of these negotiations were successful, but by late 2000, nine holdouts remained. These individuals owned 15 properties in the proposed development area, ten of which were occupied by the

---

95 Kelo v. City of New London et al., 545 U.S. 2655 (2005). The version cited is the slip opinion, which has different pagination from the published opinion.
owner or a close family member, and five of which were investment properties. Many of these owners had resided in the Fort Trumbull area for years and were unwilling to let go of their properties due to strong emotional associations. The City began condemnation proceedings against these owners in November 2000. No findings of “blight” were made against these properties; instead, the City relied upon a Connecticut statute that determined that the taking of land for economic development projects constituted a “public use” and was in the “public interest.”97 In December 2000, the owners filed suit, alleging that the City’s actions violated the “Takings Clause” of the Fifth Amendment and requesting that the taking of the properties be enjoined. Their legal action claimed that the takings were not a permissible “public use” because the City planned to lease the parcels to a private developer for redevelopment under the new plan. At the time of filing, the City had not selected a particular developer to undertake the redevelopment project.

The New London Superior Court granted a permanent injunction against the taking of properties in Parcel 4 (the park “support” parcel), but refused to issue injunctions regarding the other properties, all of which lay in the proposed Parcel 3 (scheduled for research and development space). The plaintiffs appealed to the Supreme Court of Connecticut, which upheld the takings under the Connecticut statutes relied upon by the City and which also used Berman and Midkiff to determine that economic development constituted a valid “public use” under the Constitution.98 Interestingly, the three dissenting justices concurred in the determination that New London’s economic development plan was a valid “public use,” but found all of the takings unconstitutional because not enough evidence existed that the proposed benefits of the plan would ever be realized.99

98 The court also reversed the lower court’s decision about Parcel 4, holding that the City’s plans for redevelopment of this parcel were definite enough to determine that it was for a valid “public use.”
The Majority Opinion

Justice John Paul Stevens wrote the majority opinion and was joined by Justices Breyer, Ginsberg, and Souter. The Court initially considered the question of “public use” and determined that a long line of precedent, culminating with Berman and Midkiff, held that “public use” did not necessarily mean that the seized property literally had to be used by the public or made available to the public through a common carrier. Instead, the Court recognized that when it “began applying the Fifth Amendment to the States at the close of the nineteenth century, it embraced the broader and more natural interpretation of public use as “public purpose.””100 Therefore, “the disposition of [Kelo] . . . turns on the question whether the City’s development plan serves a ‘public purpose.’”101 The Court noted that the “public purpose” concept is broad, and that it “reflect[s] our longstanding policy of deference to legislative judgments in this field.”102 Thus, instead of applying a mechanical test for “public use,” the Court should follow precedent and “esche[w] rigid formulas and intrusive scrutiny in favor of affording legislatures broad latitude in determining what public needs justify the use of the takings power.”103

In its analysis of whether New London’s actions met the “public purpose” requirement, the Court noted with approval that the City had “carefully formulated an economic development plan that it believes will provide appreciable benefits to the community, including—but by no means limited to—new jobs and increased revenue.”104 This language proves important to the decision, because it reflects the majority’s view that the condemnation proceeding and subsequent lease of the property to a private developer was not just confined to an economic development purpose. Although the City invoked the authority of the Connecticut statute that authorizes the use of eminent domain for the

100 Ibid, p. 9.
102 Ibid.
103 Ibid., p. 13.
104 Ibid.
promotion of economic development projects, the Court suggests that other components of the plan, such as the proposed marina and state park, help distinguish New London’s eminent domain action use as more than just an act undertaken in order to generate increased tax revenue. This, combined with the comprehensiveness of New London’s economic development plan, the fact that it had been created over time and had been subject to public review before adoption, and the “limited scope of review” mandated by precedent, led the Court to declare that the “plan unquestionably serves a public purpose.”

The plaintiffs, in their brief, had urged the Court to adopt a bright-line test that would bar government entities from using eminent domain for economic development purposes. They asked the Court to use Michigan’s Hathcock case as persuasive authority, but the majority refused to follow this line of thought. The Court reiterated its judgment that the New London case did not present an exclusive economic development scenario (and thus that question was not before the Court), but it did state that “promoting economic development is a traditional and long accepted function of government.” The Court also cited several historical cases, including Berman, and declared that these cases also involved economic development as a secondary component. In a footnote, the Court claimed that “It is a misreading of Berman to suggest that the only public use upheld in that case was the initial removal of blight. . . . The public use described in Berman extended beyond that to encompass the purpose of developing that area to create conditions that would prevent a reversion to blight in the future.” Interestingly, the Court left open the question of whether it would have judged in the same manner an eminent domain proceeding and subsequent transfer to a private party solely for economic development: “Had the public use in Berman been defined more narrowly, it would have

105 Ibid.
108 Ibid.
been difficult to justify the taking of the plaintiff’s nonblighted department store.”\textsuperscript{109} In addition, the statement that “a one-to-one transfer of property, executed outside of the confines of an integrated development plan, is not presented in this case,” may signal a willingness for the Court to rule differently on another set of facts in the future. If a case is presented in which a government entity executes a taking and transfer of the property to a developer for an economic development project that is not in accordance with a comprehensive plan, this may be deemed an arbitrary action that cannot be construed as being for a “public purpose.”

The Court also addressed another key argument made by the plaintiffs: speculative future benefits cannot be considered a valid “public use.” The plaintiffs wanted the Court to “require a ‘reasonable certainty’ that the expected public benefits will actually accrue.”\textsuperscript{110} In the Court’s opinion, however, this type of rule would cut against established precedent. In refusing to adopt this test, the Court quoted from the \textit{Midkiff} decision: “‘When the legislature’s purpose is legitimate and its means are not irrational, our cases make clear that empirical debates over the wisdom of takings—no less than debates over the wisdom of other kinds of socioeconomic legislation—are not to be carried out in the federal courts.’”\textsuperscript{111} Deference to legislative action is necessary (given the assumption of validity attached to government actions under rational basis review) in order to maintain the balance of power between the three branches of government. Delving into the motives of the legislature or questioning the efficacy of its chosen method of action would constitute overreaching by the Court. The Court therefore upheld the Supreme Court of Connecticut’s decision that the City of New London’s actions were permissible under state and federal law.

After announcing its holding, the Court inserted a small discussion about the potential impacts of its decision. It emphasized the distinction between the federal “Takings Clause” and state legislative

\textsuperscript{109} Ibid.
\textsuperscript{110} Ibid, p. 17.
\textsuperscript{111} Ibid.
and constitutional requirements, stating that “Nothing in our opinion precludes any State from placing further restrictions on its exercise of the takings power.”\textsuperscript{112} The availability of statutory and constitutional amendments provides a means of altering the outcome of the Court’s opinion if state legislatures disagree with the broad holding. According to the Court, “As the submissions of the parties and their \textit{amici} make clear, the necessity and wisdom of using eminent domain to promote economic development are certainly matters of legitimate public debate.”\textsuperscript{113} This language emphasizes the need for the question to be decided by a body that is politically accountable to the people, not by a high court that is staffed by lifetime political appointees.

\textbf{The Concurrence}

Justice Anthony Kennedy provided the swing vote in \textit{Kelo}, siding with the majority, but writing a separate concurring opinion. Kennedy’s concurrence explicitly addresses an issue of which the majority made no mention: the appropriate standard of review for takings cases. According to Kennedy, takings precedent establishes a rational basis standard of review, but “a court applying rational-basis review under the Public Use Clause should strike down a taking that, by a clear showing, is intended to favor a particular private party, with only incidental or pretextual public benefits . . . .”\textsuperscript{114} Kennedy reviewed the evidence presented and found that the fact that the City operated under a development plan and did not select a particular developer to which to transfer the taken property prior to the eminent domain proceeding suggests that the primary motive was not to enrich a particular private interest. In addition, he addressed the allegation that the City intended the entire economic development project to lure Pfizer to the Fort Trumbull area, concluding that the lower courts had been

\textsuperscript{112} \textit{Ibid}, p. 19.
\textsuperscript{113} \textit{Ibid}.
\textsuperscript{114}This citation is to a slip opinion that paginates the opinion, concurrence, and dissents separately. All citations in this section refer to Justice Kennedy’s concurrence only. \textit{Kelo v. New London}, p. 1.
correct in determining that the City’s “primary motivation . . . was to take advantage of Pfizer’s presence.”$$^{115}$$ Therefore, the eminent domain proceeding survived rational basis review and was a valid “public use.”

Kennedy also addressed the plaintiffs’ claim that the Court should adopt a bright-line test regarding the use of eminent domain for economic development purposes. The plaintiffs encouraged the Court to adopt a new standard that would presume that the actions of a government entity were invalid in an economic development takings case. Under this standard, the government entity would bear the burden of proving that its actions were justified. Kennedy, however, countered their argument by questioning statements that they made about the Berman and Midkiff cases:

Petitioners overstate the need for such a rule, however, by making the incorrect assumption that review under Berman and Midkiff imposes no meaningful judicial limits on the government’s power to condemn any property it likes. A broad per se rule or a strong presumption of invalidity, furthermore, would prohibit a large number of government takings that have the purpose and expected effect of conferring substantial benefits on the public at large and so do not offend the Public Use Clause.$$^{116}$

Kennedy’s concurrence is intriguing due to his suggestion that in the future, the Court may wish to adopt a higher standard of review for some takings cases. Although he agrees with the majority that current case law does not mandate this and that the City’s actions survive rational basis review, he states that this

does not foreclose the possibility that a more stringent standard of review than that announced in Berman and Midkiff might be appropriate for a more narrowly drawn category of takings. There may be private transfers in which the risk of undetected impermissible favoritism of private parties is so acute that a presumption (rebuttable or otherwise) of invalidity is warranted under the Public Use Clause. . . . This demanding level of scrutiny, however, is not required simply because the purpose of the taking is economic development.$$^{117}$

$$^{115}$$Ibid, p. 3.

$$^{116}$$Ibid.

$$^{117}$$Ibid, pp. 3-4.
Therefore, Kennedy also shies away from a bright-line test regarding economic development, but offers dicta which suggest a possible narrowing of takings precedent.

The Dissents

Justice Sandra Day O’Connor authored the main dissent, which was joined by Justice Scalia and Chief Justice Rehnquist. According to O’Connor, the Court’s holding marks a change in takings law. She asserts that

Today the Court abandons [a] long-held, basic limitation on government power. Under the banner of economic development, all private property is now vulnerable to being taken and transferred to another private owner, so long as it might be upgraded—i.e., given to an owner who will use it in a way that the legislature deems more beneficial to the public—in the process. To reason, as the Court does, that the incidental public benefits resulting from the subsequent ordinary use of private property render economic development takings “for public use” is to wash out any distinction between private and public use of property—and thereby effectively to delete the words “for public use” from the Takings Clause of the Fifth Amendment.118

In support of this passionate opening, O’Connor offers a re-reading of the majority opinion that she wrote in Hawaii Housing Authority v. Midkiff. This is done on the basis of “errant language” in this opinion that conflated the power of eminent domain with the police power of the state. She claims that in both Berman and Midkiff, “the extraordinary, precondemnation use of the targeted property inflicted affirmative harm on society—in Berman through blight resulting from extreme poverty and in Midkiff through oligopoly resulting from extreme wealth.”119 In each case, “a public purpose was realized when the harmful use was eliminated. Because each taking directly achieved a public benefit, it did not matter that the property was turned over to private use.”120 Therefore, under this new interpretation, proof of social harm is required when a property is condemned and subsequently transferred to a

118 As stated above, the slip opinion paginates each section separately. The citations in this section refer to Justice O’Connor’s dissent only. Kelo v. City of New London, p. 1.
119 Ibid., p. 8.
120 Ibid.
private party for redevelopment. O’Connor claims that the City of New London did not provide any
evidence of pre-condemnation social harm, because no evidentiary findings were made regarding
“blight” or conditions that would endanger the public welfare. Thus, the eminent domain procedure did
not constitute a “public use” under the Constitution.

O’Connor also complains that Justice Kennedy’s suggestion that the Court should impose
stricter scrutiny in some takings cases is not accompanied by an explanation of “how courts are to
conduct this complicated inquiry.” Kennedy’s “as-yet-undisclosed test,” she claims, is “theoretically
flawed” because “If it is true that incidental public benefits from new private use are enough to ensure
the ‘public purpose’ in a taking, why should it matter, as far as the Fifth Amendment is concerned, what
inspired the taking in the first place? . . . And whatever the reason for a given condemnation, the effect
is the same from the constitutional perspective—private property is forcibly relinquished to new private
ownership.”

In addition, O’Connor takes issue with what she calls a logical conclusion of the majority’s
decision: “that eminent domain may only be used to upgrade—not downgrade—property.” Since
the Court cannot involve itself in “predictive judgments” about whether any potential benefits actually
will materialize, she believes that the majority’s holding leaves all property owners vulnerable to
government power: “For who among us can say she already makes the most productive or attractive
possible use of her property? The specter of condemnation hangs over all property. Nothing is to
prevent the State from replacing any Motel 6 with a Ritz-Carlton, any home with a shopping mall, or
any farm with a factory.” O’Connor believes that correct interpretation of the “public use” concept
provides more safeguards to property owners, particularly those who lack political power. She predicts

121 Ibid, p. 9.
122 Ibid, pp. 9-10.
123 Ibid, p. 10.
that the majority’s decision will result in takings that benefit “those citizens with disproportionate
influence and power in the political process, including large corporations and development firms.”

Therefore, the *Kelo* holding will jeopardize all private property and pervert the intentions of the Framers
of the Constitution by allowing virtually unfettered government takings power.

Justice Clarence Thomas filed an additional dissent in which he applied a strict constructionist
argument to the case. The bulk of his dissent analyzes constitutional language and recounts the
case law history surrounding eminent domain. Thomas believes that “the Public Use Clause is most
naturally read to authorize takings for public use only if the government or the public actually uses the
taken property”; therefore, “our current Public Use Clause jurisprudence . . . has rejected this natural
reading of the Clause.” Since modern takings case law misreads the “takings clause,” “this Court’s
reliance by rote on this standard is ill advised and should be reconsidered.”

At the end of his dissent, Justice Thomas focuses on the implications of the majority’s holding.
He claims that “Once one permits takings for public purposes in addition to public uses, no coherent
principle limits what could constitute a valid public use—at least, none beyond . . . the text of the
Constitution itself.” Without the proper limitations of the Public Use Clause, “extending the concept
of public purpose to encompass any economically beneficial goal guarantees that these losses will fall
disproportionately on poor communities. Those communities are not only systematically less likely to
put their lands to the highest and best social use, but are also the least politically powerful.”

---

126 In a strict constructionist interpretation of the Constitution, all words of the text are examined in light of their meaning at
the time of the Constitution’s ratification. Compliance with the Framers’ original intentions is key to this type of reading.
127 Justice Thomas’ dissent receives separate pagination in the slip opinion. All citations in this section refer to his dissent.
129 *Ibid*, p. 16.
Because the majority’s decision is most likely to impact “powerless groups and individuals,” a stricter standard of review should be required in order to protect their interests.\textsuperscript{131}

The Aftermath of \textit{Kelo}

\textbf{The Reaction to the Decision}

The 5-4 decision that was handed down in June 2005 sparked an immediate and fierce reaction, particularly in non-legal circles. The \textit{Kelo} decision demonstrated a respect for precedent and logically followed a line of takings jurisprudence that stretched back to the nineteenth century; therefore, “the initial reaction by lawyers familiar with the case was one of unsurprise.”\textsuperscript{132} Members of the media, though, latched on to Justice O’Connor’s heated language in her dissent, and articles that grossly simplified the decision rapidly appeared. Headlines such as “Homes May Be ‘Taken’ for Private Projects” trumpeted the idea that the \textit{Kelo} decision had destroyed the sanctity of the American home and undermined all private property rights.\textsuperscript{133} Internet forums buzzed about the injustice contained in the decision, and legislators around the country quickly took notice. Many of these early reactions treated the \textit{Kelo} decision as a landmark case that radically altered American eminent domain law, generally reducing to the idea that “cities now have wide power to bulldoze residences for projects such as shopping malls and hotel complexes in order to generate tax revenue.”\textsuperscript{134} Few stopped to note the interaction of federal and state law, and even fewer realized that the decision changed almost nothing in terms of what was legally permitted under the Constitution.

\textsuperscript{131} \textit{Ibid.}
\textsuperscript{134} \textit{Ibid.}
The volume and the tone of the reaction to *Kelo* can only be described as a major backlash, fueled by what Professor Thomas W. Merrill identifies as “five myths about *Kelo*”:

1. *Kelo* breaks new ground by authorizing the use of eminent domain solely for economic development;

2. *Kelo* authorizes condemnations where the only justification is a change in use of the property that will create new jobs or generate higher tax revenues;

3. *Kelo* dilutes the standard of review for determining whether a particular taking is for a public use;

4. The original understanding of the Takings Clause limits the use of eminent domain to cases of government ownership or public access; and

5. Takings for economic development pose a particular threat to “discrete and insular minorities.”

What is distinctive about this reaction is the degree to which it has mobilized state legislatures to consider laws meant to curb the eminent domain powers of state agencies and local governments. As Justice Stevens noted in the majority opinion, states do have the right to enact laws that prove more restrictive than the Supreme Court’s decision. By November 2005, more than half of the states and the United States House of Representatives and the United States Senate had pending legislation intended to limit the use of eminent domain.

**State Responses**

Several states, such as Alabama, California, Florida, Louisiana, Michigan, New Jersey, Ohio, and Texas, sought to address the issue through amendments to their state constitutions that would bar the use of eminent domain for private development projects. Others introduced legislation that

---

135 Merrill 2005, p. 3.
would provide limits in different ways. In Delaware, the House and Senate passed a bill that would restrict the ultimate project use to a “recognized public use.”\(^{137}\) Utah removed the authority of economic development agencies to use eminent domain for property acquisition.\(^{138}\) Massachusetts looked at a bill to prohibit the taking of private property unless the property is deemed a “blighted” area.\(^{139}\) Alabama unanimously passed a bill that would proscribe the use of eminent domain for “retail, office, commercial, or residential development.”\(^{140}\) In addition, Georgia considered a bill that would prohibit the use of eminent domain in projects intended to improve tax revenues.\(^{141}\)

Legislation pending before the Pennsylvania House and Senate attempts to address both economic development projects and definitions of “blight.” Pennsylvania Senate Bill 881 would prohibit the use of eminent domain for “private enterprise,” which is defined as “a for-profit or not-for-profit entity or organization” that is not a purely “public charity.”\(^{142}\) Exceptions only would be permitted for situations in which the “condemnee consents to the use of the property for private enterprise,” for use by common carriers, for condemnations by a housing authority or urban redevelopment authority, and in situations that pose a threat to public health or safety.\(^{143}\) In addition, a property can only be declared “blighted” if it is regarded as a public nuisance; is an attractive nuisance; is “dilapidated, unsanitary, unsafe, vermin-infested,” or in violation of housing codes; is a fire hazard; is abandoned; has been tax delinquent for two years; “has become a place for accumulation of trash and debris or a haven for rodents or other vermin”; or has “environmentally hazardous conditions.”\(^{144}\)

---


138 Baldas, p. 2.

139 Ibid.

140 Ibid and Community Development Digest (August 9, 2005): 5.

141 Baldas, p. 2.


143 Ibid, § 204.

144 Ibid, § 205.
2054 poses similar restrictions, with the exception that eminent domain is prohibited for “private commercial enterprise,” which is not listed in the definitions section, but is designated as not including “a hospital or medical center that is operated not for profit.”

The Pennsylvania bills have come under attack from some advocacy groups, such as 10,000 Friends of Pennsylvania, which urges legislators to temper their rush to pass legislation that responds to *Kelo*:

> We support the thorough analysis of the use of eminent domain in Pennsylvania to ensure that it is being applied fairly and toward the improvement of our communities. Both chambers have only begun to analyze laws that have been in place for 60 years in Pennsylvania. Reacting—and voting—swiftly and without a full understanding of the use of eminent domain in the state or the implication or proposed changes may result in extremes in both policy and outcome.

The policy statement issued by 10,000 Friends of Pennsylvania highlights eight concerns about the pending legislation:

1. The proposals should respond to Pennsylvania’s situation, not Connecticut’s;
2. Eminent domain is an important tool for revitalization, through its judicious use to assemble parcels large enough for urban redevelopment;
3. Declining downtowns need public incentives for private development; the Commonwealth should encourage private investment, not chase it away;
4. The definition of blight should be consistent across state laws, or it will promote sprawl development;
5. The proposals should consider all property owners’ rights, not just the rights of a few;
6. Any proposed changes should be applied uniformly;
7. The proposals would force communities to wait until they reach the point of no return before using eminent domain; and

---

8. Public participation and safeguards for rights are already built into the process.\textsuperscript{147}

These concerns may be generalized beyond Pennsylvania to pending legislation in other states. Many advocacy groups and planning professionals feel that \textit{Kelo} has initiated a wave of state legislation that, although intended to protect individual property rights, may have unintended long-term consequences for community development and the economic health of different jurisdictions.

\textit{The Federal Response}

In September 2005, the United States Senate Committee on the Judiciary held a set of hearings called “The Kelo Decision: Investigating Takings of Homes and Other Private Property.” Suzette Kelo, the lead plaintiff in the \textit{Kelo} case, addressed the committee and urged its members to “do what judges and local legislators so far have refused to do for me and for thousands of people like me across the nation: protect our homes.”\textsuperscript{148} In addition, she claimed that her personal battle against the City of New London “has rightfully grown into something much larger—the fight to restore the American Dream and the sacredness and security of each one of our homes.”\textsuperscript{149} Other testimony was offered, particularly by legal experts, but Ms. Kelo’s emotional speech appears to have had an impact on Congress.

On November 3, the United States House of Representatives passed a bill by a margin of 376-38 that will impose limits on federal funding of projects that use eminent domain.\textsuperscript{150} This bill, titled the Private Property Rights Protection Act of 2005, contains sections prohibiting “eminent domain abuse”

\begin{thebibliography}{9}

\bibitem{147} \textit{Ibid}, pp. 3-5.
\bibitem{149} \textit{Ibid}.
\end{thebibliography}
by the states and federal government.\textsuperscript{151} In both, eminent domain may not be exercised “over property to be used for economic development or over property that is subsequently used for economic development”; for a state or local government, this is qualified by whether it “receives Federal economic development funds during any fiscal year in which it does so.”\textsuperscript{152} If a state or local government engages in this prohibited practice, it will become ineligible for any federal economic development funds for the next two fiscal years.\textsuperscript{153} The bill also contains special sections that provide the same protection for agricultural lands and religious and non-profit organizations, all of which apparently are considered vulnerable to takings due to the fact that they are either tax-exempt or may have a lower rate of taxation. Under this bill, “economic development” means “taking private property, without the consent of the owner, and conveying or leasing such property from one private person or entity to another private person or entity for commercial enterprise carried on for profit, or to increase tax revenue, tax base, employment, or general economic health,” but carries the exceptions of public ownership, common carriers, public utilities, harmful land uses, abandoned property, or “leasing property to a private person or entity that occupies an incidental part of public property or a public facility.”\textsuperscript{154} It is unclear whether “economic development” has to be the primary reason for a project in order for the penalty to attach. In addition, “federal economic funds” is defined broadly as “any Federal funds distributed to or through States or political subdivisions of States . . . designed to improve or increase the size of the economies of States or political subdivisions.”\textsuperscript{155} Opponents of this bill argued that the sweeping definition of economic development would stymie important revitalization efforts, and that land use matters fundamentally are local issues, not issues that should be intruded upon by broad federal legislation.

\textsuperscript{151} United States House of Representatives Bill No. 4128 (2005).
\textsuperscript{152} \textit{Ibid}, §§ 2 and 3.
\textsuperscript{153} \textit{Ibid}.
\textsuperscript{154} \textit{Ibid}, § 8.
\textsuperscript{155} \textit{Ibid}.
Consequences of the Decision

The Kelo Ruling

As noted above, the Supreme Court’s actual ruling on Kelo altered very little in takings law. After Kelo, Berman and Midkiff remain as modern controlling precedent, the standard of review is still rational basis review, and “public use” continues to be read broadly to include “public purpose.” In many ways, this is a conservative decision that shows great respect for precedent and respects the rights of the states to make decisions involving issues that are unique to their circumstances. It is ironic that political conservatives and members of the property rights movement decry the ruling as a testament to liberal support of “big government.” Although the decision does uphold broad government discretion, it neither limits nor expands it. As before, only abuses of eminent domain will be illegal under Kelo. Kelo is a very static decision that, in many ways, only causes a ripple in takings jurisprudence.

The Reaction to Kelo

The popular and political response to Kelo has been surprisingly strong, remarkably misguided, and intriguing in terms of the unexpected alliances and divisions that it has engendered. Conservatives and liberals have joined forces against the Kelo decision, bringing together ardent property rights advocates who oppose “big government” and advocates for the poor and politically disempowered groups who fervently believe in the power of government to ameliorate social ills. To see liberal support for a position taken by Justices Scalia and Thomas is rare indeed. In addition, the decision has divided the ranks of planning professionals, some of whom support the argument advanced by Justice O’Connor, and others who view state and local government discretion as necessary for major planning activities.
As the “myths of Kelo” continue and prompt narrow, reflexive legislative action, the planning profession and the public may see significant long-term consequences that do not bode well for future quality of life, especially in urban areas. The reaction to Kelo cuts against one of the dispositive elements cited by the majority: the importance of comprehensive development plans. New statutory limitations on eminent domain—particularly something as stringent as the new Alabama law—may make it difficult and costly for local governments to engage in growth planning. Without the ability to ensure that large parcels of land may be assembled through condemnation proceedings, there may be little point in creating redevelopment plans for a broad area, such as Fort Trumbull. As 10,000 Friends of Pennsylvania points out, “investors cannot be attracted into risky markets without an assurance that investment will reach ‘critical mass’ stage.”\footnote{10,000 Friends of Pennsylvania, p. 3.} Being unable to eliminate holdouts can place governments in an untenable position, for no developer will want to take on a project without guarantees for reasonably-priced land acquisition, and most local governments are not in a position to become lead developers of revitalization projects.

Justice O’Connor’s argument in her dissent appears to sanction the use of eminent domain for economic development projects that occur on “blighted” properties. Many of the state reactions to Kelo have followed her line of reasoning, creating exceptions for properties with severe disinvestment. Although this will provide latitude for many large-scale redevelopment projects, it may also have the unintended consequence of exacerbating pressures on low-income residents in central city areas (which, ironically, Justice O’Connor sought to alleviate in her dissent). The proscription on economic development projects in non-“blighted” areas will deter greenfield development if parcel assemblage is too costly. If local governments have to justify economic development projects through findings of “blight,” they logically will promote projects in poorer areas. In addition, they may have to wait until these areas meet the definition of “blight,” which could make conditions worse within the potential
project area. Although projects in "blighted" areas could have the effect of revitalizing neighborhoods, they will also dislocate large numbers of low-income residents who cluster in low-rent areas. Unless guarantees are made that low-income residents will all have housing in the new project, politically-powerless individuals will be disproportionately affected. Middle- and upper-class residents who do not reside in "blighted" areas and who can afford new units in a redevelopment project, though, can rest assured that their properties will not be taken under Justice O'Connor's reasoning.

At the same time, it is possible that new state restrictions on eminent domain could work to promote sprawl and undermine Smart Growth efforts in many communities. If parcel assemblage is an issue in an urban redevelopment project, investors may be unwilling to commit to the project, since they know that high acquisition costs may lie ahead without the availability of eminent domain. Instead, greenfield development, where large parcels may be acquired at lower costs, may prove more attractive. This could have the effect of driving private investment away from central cities and inner-ring suburbs. Communities that are working to contain suburban development by redirecting investment to central urban areas may find themselves unable to carry out their Smart Growth plans.

Another potential problem for planners is differences in state law that may discourage investment in one state, while making investment in a neighboring jurisdiction more attractive. If a state adopts a highly-restrictive law regarding eminent domain and economic development and an adjacent state does not have these restrictions, a major private investor may find itself more willing to commit to a project in the less-restrictive state. In a global market where communities find themselves fighting frantically for competitive economic advantages, this may bring significant risks of economic decline (and limitations on how a community can address this decline).

In addition, federal legislation that would effectively punish communities for using eminent domain in economic development projects may significantly discourage redevelopment projects. Since it is unclear whether any type of economic development will trigger the withholding of federal funds
(even if economic development is a secondary benefit of the project), local governments may be wary of planning projects that could include the use of eminent domain. Many large-scale projects cannot occur without federal funds, and it is unclear from the definition of “economic development funds” in the House bill whether this includes Community Development Block Grant funds. If so, local governments may find it virtually impossible to conduct many types of redevelopment projects that involve mixed-use development (since commercial uses could be seen as efforts to increase the tax base and/or as impermissible benefits to private parties).

One other long-term effect of the *Kelo* reaction may involve creeping limits on the discretion of local governments. If states introduce presumptions of invalidity in judicial review of eminent domain actions, it may be easy for this presumption also to be introduced in other areas. Such a practice would blur the line between the different levels and branches of government. One of the reasons that the presumption of validity exists for local land-use actions is because these decisions are seen as being based on local conditions. It is not the place of a court or a state to inquire too deeply into what a local government chooses to do with the enabling legislation. Land-use decisions at the local level respond to unique conditions that the state or a court is not in a position fully to understand. Instituting a presumption of invalidity, therefore, would detract from a local government’s ability to deal with highly-localized conditions. Planners and governing officials could significantly be constrained by a tightening of the standard of judicial review required in eminent domain or other land-use cases.

**Future Directions**

The pace of legislative action after the *Kelo* decision should slow so that adequate time may be given to a detailed re-evaluation of current eminent domain law in different states. No law exists outside of a framework of others, and special attention must be paid to context and the reach of a concept in state law. For example, provisions about “blighted” properties are not confined solely to a
section of eminent domain statutes in most states. Eminent domain, "blight," urban redevelopment, economic development, and tax increment financing statutes all are intricately intertwined. A change in one statutory series may necessitate changes in others. It would be rash to alter singular provisions and have contradictory terms or gaps in procedures on the books.

In addition, other courses of action may be pursued beyond prohibitive regulatory measures. Alterations in compensatory measures could bring an additional element of fairness to the eminent domain process. Most state law provides only compensation equal to the fair market value of a property and relocation expenses. New compensation formulas could be derived that might provide payment for social and emotional costs, although admittedly this would be difficult to value in the marketplace. Another related compensatory mechanism could be the inclusion of "clawback provisions" in contracts with private developers. These contractual clauses would provide compensation for local governments if developers failed to follow through on their plans, or if an economic development project significantly failed to generate promised jobs and revenue.

A different type of solution could involve what Thomas Merrill defines as "procedural reforms."157 This strategy would provide greater accountability to the public by ensuring that eminent domain could only be undertaken by local or state officials who hold elective office. State and local agencies, such as redevelopment authorities or turnpike authorities, would no longer have the power to make unilateral decisions with the assurance that no political consequences would result. In addition, Merrill suggests that the elimination of "quick take" procedures, which put the burden on landowners to file suit before the government can institute a condemnation and to prove that the government's action does not constitute a "public use," would help redress eminent domain abuse.158

157 Merrill 2005, p. 4.
158 Ibid.
Another future direction involves a radically different measure: bringing an eminent domain case with different facts before the Supreme Court. The majority opinion made several suggestions that a case that did not involve a comprehensive redevelopment plan or ancillary uses (such as a park and a marina) might relate to the “public purpose” concept in a different manner. Although the Court probably would resist overturning eminent domain precedent, its relatively narrow decision points to room for future cases involving eminent domain and economic development. A different case might result in a broad statement about eminent domain and economic development, but a more practical outcome would be alteration in the present standard of review. Even without a bright-line test regarding eminent domain and economic development, future plaintiffs could benefit from a heightened level of scrutiny in takings cases.

Conclusions

The *Kelo* decision has become a paradoxical legal decision. It reads as a fairly routine upholding of precedent; however, its outcome has been the catalyst for a surprisingly-strong public reaction and intense legislative activity. Spurred by Justice O’Connor’s dissent, which provides a revisionary reading of precedent and hyperbolic language that glosses over many of the subtleties of the majority’s opinion, public opinion now views *Kelo* as a watershed moment in the history of American property rights. Egregious oversimplifications have made *Kelo* into a banner case for the growing property rights movement, and the aftermath of the decision points to how strong this movement has become. Politicians now are proceeding to bolster political standing by pushing through reflexive legislation that may prove harmful to local governments’ future planning activities and economies. Little time has been taken for comprehensive studies and public input regarding new prohibitory legislation at the state and federal levels of government.
The *Kelo* case has also demonstrated how little the public and many professionals in the planning profession know about the structure and process of the American legal system. It is only in a nation unaware of the basic relationship between state and federal law that an explosion of the magnitude associated with *Kelo* could occur. The American media, politicians, and public have turned *Kelo*, despite its lack of new legal direction, into a landmark decision.


Community Development Digest. 9 August 2005.


Housing and Redevelopment Authority of the City of Richfield v. Walser Auto Sales, 630 NW2d 662 (2001).


Massachusetts General Laws, Chapter 79 (2005).


Massachusetts General Laws, Chapter 121B (2005).


West Virginia Code, Chapter 7, Article 11B (2005).

West Virginia Code, Chapter 16, Article 18 (2005).