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The Public Use Clause: Constitutional Mandate or “Hortatory Fluff”?

By Gideon Kanner*

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I. INTRODUCTION

“*[E]minent domain [is] a legal term meaning ‘we can do anything we want.’*”¹

In *Kelo v. City of New London*,² a divided Supreme Court held 5 to 4 that the Fifth Amendment’s “public use” limitation on condemnation of private property poses no obstacle to takings for “economic development.”³ Unlike slum clearance or blight elimination that lay a claim to the betterment of the community, these takings are about money. They involve condemnation of unoffending private homes, which are then razed and their

* Professor of Law Emeritus, Loyola Law School, Los Angeles and Editor of *Just Compensation*. The author was a co-author of an amicus curiae brief in the U.S. Supreme Court that was filed on behalf of the American Farm Bureau Federation in support of Petitioners, Susette Kelo, et al. Brief for American Farm Bureau Federation as Amici Curiae Supporting Petitioners, *Kelo v. City of New London*, 125 S. Ct. 2655 (2005) (No. 04-108), 2004 WL 2787138.

1. Steve Lopez, *In the Name of Her Father*, TIME, July 14, 1997, at 4.

2. 125 S. Ct. 2655 (2005).

3. *Id.* at 2665.

sites turned over to a private redeveloper who, in the condemning city's opinion and in accordance with its plan, will put them to a more economically productive private use than their current owners.⁴ The rationale of such cases is that some of the private economic benefits expected to be reaped by the redeveloper will trickle down to the community in the form of increased tax revenues and wages, and will thus constitute a "public benefit" which the Court equated with the Fifth Amendment's phrase "public use."⁵ Or, as Michael Kinsley put it with admirable brevity, "The court ruled, 5-4, that yuppification is a valid public purpose."⁶ To reach that result, the Court de facto surrendered virtually all of its power to decide whether the proposed redevelopment constitutes a "public use" to the very municipal agency seeking to condemn the properties in question for its own fiscal benefit at the behest of a private, profit-seeking developer.⁷ Because in making such decisions cities stand to gain financially, they inherently have a built-in conflict of interest.

The principal failing of the *Kelo* decision is that it misreads the case law on which it purports to rely as a seminal precedent,⁸ and by its holding frustrates the usual mode of constitutional analysis. Ordinarily, one examines the limitations imposed by the constitutional provision in question, and juxtaposes them with the statute, regulation, or activity in issue, to determine if the latter is consistent with the former.⁹ Not so in eminent domain, at least not now. Under *Kelo* one must look to the statute in question to determine what it deems to be "public use," and then forego

4. See *id.* at 2658-60 (summarizing the city's plan for the economic development of New London).

5. See *id.* at 2665. Justice O'Connor noted in her dissent that: the Court today significantly expands the meaning of public use. It holds that the sovereign may take private property currently put to ordinary private use, and give it over for new, ordinary private use, so long as the new use is predicted to generate some secondary benefit for the public—such as increased tax revenue, more jobs, maybe even aesthetic pleasure.

Id. at 2675 (O'Connor, J., dissenting).

6. Michael Kinsley, *GOP Judicial Activism Takes a Hit*, L.A. TIMES, June 26, 2005, at M5.

7. The problem inherent in such an arrangement is that at times it is the private redeveloper, not the public body, that initiates the project and calls the shots. For an example of how a project can be initiated by a developer who, unable to acquire desired land by voluntary purchase, turns to the local municipality and gets it to act as his acquisition agent, see *City of Norwood v. Horney*, 830 N.E.2d 381, 383 (Ohio Ct. App. 2005).

8. See *infra* notes 197-208 and accompanying text for a discussion of the Court's failure to understand that *Fallbrook Irrigation Dist. v. Bradley*, 164 U.S. 112 (1896), the case on which it relied as the seminal precedent, was not an eminent domain case. *Kelo*, 125 S. Ct. at 2662. Rather, *Bradley* dealt with the legality of an assessment by a special district and its holding had nothing to do with the issue of what constitutes "public use" within the meaning of the Fifth Amendment in condemnation cases. *Bradley*, 164 U.S. at 178.

9. For an example of this process in action see *Roper v. Simmons*, 125 S. Ct. 1183, 1190, 1194-95, 1200 (2005) (examining the language and history of the Eighth Amendment and holding that the execution of juveniles violates the Eighth Amendment's prohibition against cruel and unusual punishment).

testing it against the pertinent language of the Constitution unless the condemnor's decision is so outlandish as to fail not just the test of rationality, but of being merely rationally related to the conceivable.¹⁰ Of course this is no constitutional standard because as generations of science fiction writers have demonstrated, anything can be conceived, and thus everything is "conceivable." The Court paid lip service to the idea that public benefits which are pretextual will not support a finding of "public use" within the meaning of the Fifth Amendment, but it offered no standards by which one may determine whether the asserted benefits are pretextual.¹¹ The Supreme Court thus de facto relegated the assertedly legislative constitutional determination of what is "public use" to state legislatures and beyond that to local, unelected and thus unaccountable condemning bodies, in derogation of the familiar rule that the interpretation of the Constitution is a judicial, not a legislative task.¹² Moreover, the problem is not so much what is contained in an enabling legislative enactment authorizing an application of the eminent domain power for a particular use, but how it is applied to specific facts by local municipal functionaries who, apart from not being legislators, are often not trained in the law, who serve local private interests, and who lack either the intent or the mandate to pursue the broad public interest, as opposed to the interest of the developer du jour and his political allies in city hall.

The process created by the Supreme Court thus has a built-in circularity.¹³ Under this process, little is left to the courts to do other than de

10. This language was first used in *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 241 (1984), but the Court confined it by stressing that this seemingly limitless standard of review was actually limited. *Id.* at 242 (stating that in order for the public use requirement to be satisfied the state's legislature must have been able to believe rationally that its action would help achieve its objective). The Court admonished that under that broad standard, a purely private taking would fail under the public use limitation of the Constitution. *Id.* at 245. The obvious problem with that "standard" is that under it justifications for condemnation can be conjured up after the fact, on the basis of things that the governing body of the condemning agency never contemplated and, in light of the prevailing local politics, never would. Even at its best, this standard of review does not review what the condemning body does, nor even what it says, but merely what it could have thought, even if it didn't.

11. *Kelo*, 125 S. Ct. at 2661 (finding that the local government would not "be allowed to take property under the mere pretext of a public purpose, when its actual purpose was to bestow a private benefit").

12. See *Marbury v. Madison*, 5 U.S. 137, 177-78 (1803) (stating that it is the judiciary branch's duty to "say what the law is" and that when a law and the Constitution are in opposition it is the judiciary's job to "determine which of [the] conflicting rules governs [a] case.>").

13. As understood by anyone who has attended a legislative session in which the issue of constitutionality of pending legislation is raised, the usual response to such concerns is the assertion by its proponents that constitutionality is an issue for the courts. The result is that legislatures defer to courts and courts defer to the legislatures, thus playing "Alfonse and Gaston" with one another, while the individual constitutional rights in issue go unresolved. See Brady Earnhart, *After You*,

facto rubber-stamp the condemnor's decision. Thus, the Court has constructed a process in which the constitutional mandate of "public use" is reduced to unenforceable "hortatory fluff," as Justice O'Connor put it in her dissenting opinion,¹⁴ because under that extreme level of judicial deference that is now said to be "the law," it is the functionaries of local executive and legislative branches of government that de facto dictate to the Supreme Court what is "public use" within the meaning of the Fifth Amendment. This severely undermines the concept of checks and balances in this important area of constitutional law.

Justice O'Connor's forceful dissent argued that the majority decision, affirming the judgment of the Connecticut Supreme Court, improperly construed the "public use" clause of the Fifth Amendment so expansively as to give the Court's imprimatur to the historically forbidden practice of "tak[ing] property from A. and giv[ing] it to B"¹⁵ Justice Thomas also dissented, stressing that the field of eminent domain law has not been subjected to doctrinal analysis and orderly growth over the years, and that such an analysis was overdue.¹⁶ He also noted that the majority holding would be conducive to municipal favoritism and corruption, and would raise the renewed danger of illegitimate use of urban renewal in a racially discriminatory fashion to remove minority populations from coveted parts of town, so as to earn for itself the sobriquet "Negro removal" as it did in the 1950s.¹⁷

II. THE FACTS: PUBLIC PURPOSE, OR PFIZER'S BENEFIT?

The facts of the controversy were straightforward. The Connecticut City of New London, suffering a from long-standing decline in population, as do many other American cities,¹⁸ as well as from job losses caused by

<http://www.bradyarnhart.com/afteryou.html> ("Alfonse and Gaston were a vaudeville duo . . . who mocked excessive politeness . . .").

14. *Kelo*, 125 S. Ct. at 2673 (O'Connor, J., dissenting).

15. *Id.* at 2671 (O'Connor, J., dissenting) (quoting *Calder v. Bull*, 3 Dall. 386, 388 (1798)).

16. *See id.* at 2681-86 (Thomas, J., dissenting) (noting that several of the Court's previous cases diverged from the original meaning of the public use requirement, and urging the Court to "consider returning to the original meaning of the Public Use Clause . . .").

17. *Id.* at 2686-87 (Thomas, J., dissenting).

18. While exploration of the decline of American cities—the usual justification for redevelopment—would take us afield from the subject of this article and therefore cannot be pursued here to the extent it deserves, it must be noted, if only in passing, that this decline has been ongoing for over a half-century as the direct result of government policies adopted after World War II. Those policies have provided incentives for Americans to leave cities and move to the suburbs, by providing housing subsidies in the form of low interest rates, favorable tax treatment of home ownership, government housing loan guarantees, and highways linking suburbs to cities. BERNARD J. FRIEDEN & LYNNE B. SAGALYN, DOWNTOWN, INC—HOW AMERICA REBUILDS CITIES 11 (1989) [hereinafter FRIEDEN & SAGALYN]. The out-migration from cities was exacerbated by factors such as cities' deindustrialization and the attendant job losses, *id.* at 262, the disastrous decline of urban public schools, forced student busing, and urban riots. *Id.* at 208-09. The outward population flow

recent closures of nearby U.S. Navy installations, decided to redevelop itself.¹⁹ Its problem, however, was that it lacked an upscale population capable of patronizing and thus supporting the projected redevelopment.²⁰ In order to attract such a population, the city chose a 90-acre waterfront area that was not blighted, which meant the city could not proceed under the authority of blight removal statutes and cases such as *Berman v. Parker*.²¹

was further stimulated by rising urban crime and the decline in effective law enforcement, particularly in the 1970s. *Id.*; see also Sam Roberts, *The Year New York Lived Really Dangerously*, N.Y. TIMES, May 15, 2005, § 4, at 3. Additionally, rent control reduced availability of new urban housing acceptable and affordable to the middle class, a shortage aggravated by redevelopment which historically has been an efficient destroyer of low- and moderate-cost urban housing. See *infra* note 172-74 and accompanying text. Thus, for today's government functionaries to bemoan the declining condition of American cities and to urge redevelopment as a cure, is not unlike the federal government's absurd policy which denounces tobacco as detrimental to public health but simultaneously subsidizes, and thus encourages, its production.

For an overview of the severity of the social problems that contributed to the out-migration from the cities, see generally DAVID FRUM, HOW WE GOT HERE – THE '70S: THE DECADE THAT BROUGHT YOU MODERN LIFE (FOR BETTER OR WORSE) (2000). With specific reference to the impact of urban riots on land-use policies, see Roger Biles, *Thinking the Unthinkable About Our Cities: Thirty Years Later*, 25 JOUR. URB. HIST. 57 (1998), exploring the stark choice facing inhabitants of American cities at the time: whether to transform their communities into armed camps or to continue moving to the suburbs. The latter view prevailed.

Though recently there has been some movement back into cities, it largely consists of yuppies who tend to settle in selected trendy neighborhoods, and aging empty-nesters. Neither group holds out much promise for large-scale revival of cities as viable middle class family habitats. See Joel Kotkin, *The New Suburbanism: A Realist's Guide to the American Future*, THE PLANNING CENTER, Nov. 2005, at 9-11 (arguing with support from demographic and historical data that the suburbs are growing and thriving, while cities continue to lose population).

19. *Kelo*, 125 S. Ct. at 2658-59.

20. See *id.*

21. 348 U.S. 26 (1954). In *Berman*, the Supreme Court authorized the condemnation of a well-maintained neighborhood department store, as part of an area-wide slum clearance project, to facilitate the redevelopment of the entire Southwest quadrant of Washington, D.C. by private redevelopers. *Id.* The Court held that the decision to enlist the private sector in this fashion in the slum clearance effort was within the authority of Congress and—in a towering non sequitur—that it was therefore within the Fifth Amendment's "public use" limitation. *Id.* at 31-33. Professor Ellen Frankel Paul has aptly characterized *Berman* as "almost beyond redemption," a decision that confused the regulatory police power (authorizing regulations serving the "public purpose") with the acquisitional power of eminent domain limited by the Constitution to "public use," a linguistically and conceptually narrower limitation on government power. ELLEN FRANKEL PAUL, PROPERTY RIGHTS AND EMINENT DOMAIN 91 (1987). *Berman* confused the two powers by telescoping them into one another, and asserting that in dealing with eminent domain the Court was dealing with the police power, *Berman*, 348 U.S. at 32, a *prima facie* nonsensical statement treating two very different powers of government as one. See Ernst Freund, THE POLICE POWER: PUBLIC POLICY AND CONSTITUTIONAL RIGHTS 546-47 (1904) (explaining that property is taken by the police power without compensation because it is harmful, but it is taken by eminent domain with compensation because it is useful). For a useful judicial discussion of the different scope of the two powers see *City of Concord v. Stafford*, 618 S.E.2d 276, 279 (N.C. App. 2005). This elementary gaffe on the part of the Court was repeated in *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229 (1984) which

Also, the redevelopment area just happened to be located next to a new research facility of Pfizer Corporation, a major pharmaceuticals manufacturer, and the city's redevelopment plan dovetailed with Pfizer's private development plans.²² Thus, New London chose to rely on a statute authorizing so-called economic redevelopment, hoping to increase taxes, add jobs, and bring to the area new, more affluent inhabitants whose local free spending would further contribute to the municipal economy.²³ This approach (as well as conventional redevelopment) is attractive to municipal officials because, when successful, it enables them to point to new construction in otherwise declining cities, and to tap new revenue streams without the need to appropriate municipal funds, or issue general obligation municipal bonds that would require voter approval. Instead, redevelopment agencies issue tax-free revenue bonds that do not have full municipal faith and credit behind them and require no voter approval. Thus, the financing takes place off budget, without the need to impose unpopular new taxes that may be necessary for the city's proper functioning, and indeed outside the usual city annual budgeting and appropriation process.²⁴

Though New London made much of its economic and demographic decline, the rule it successfully contended for is not dependent on the presence of any such deficient urban conditions. Under the *Kelo* holding, unless restrained from doing so by state law, any municipality, even a conspicuously prosperous one, will be able to engage in the process of economic redevelopment. It can do so simply to enhance its already enviable economic conditions by seizing land from its rightful owners and conveying it to more favored persons who prognosticate that they will make more economically productive use of it.

The *Kelo* case had an additional wrinkle that raised the question whether this particular project passed the smell test. One month after the State of Connecticut authorized the sale of \$10 million in bonds to finance the city's redevelopment planning activities, the Pfizer Corporation announced that it would build a \$300 million research facility next to New London's Fort Trumbull area, the site of the subject redevelopment.²⁵ The city worked hand-in-glove with Pfizer,²⁶ hoping to capitalize on the prospective influx of

asserted that the police power and eminent domain power are "coterminous," *id.* at 240, which they inherently are not.

22. *Kelo*, 125 S. Ct. at 2659.

23. Actually, the City of New London delegated the task of implementing the proposed redevelopment to the New London Development Corporation (NLDC), a private nonprofit entity to which the eminent domain power was delegated and which acted as the city's alter ego. In this article, NLDC and the City are collectively referred to as "the City." See *id.* at 2660 n.3.

24. See FRIEDEN & SAGALYN *supra* note 18, at 97-98.

25. *Kelo*, 125 S. Ct. at 2659.

26. Pfizer "backed a \$2 million loan to the Fort Trumbull project for working capital" and street improvements. Eleanor Charles, *Domain Challenged in New London Project*, N.Y. TIMES, Apr. 1, 2001, § 11, at 9.

well-paid Pfizer employees and visitors who would reside and spend their money in the project area after its redevelopment.²⁷ Conversely, Pfizer expected that its presence in the community would stimulate construction of a luxury hotel, upscale housing, and other facilities that would be agreeable to its upscale, well-educated work force.²⁸

The plan called for razing the private structures in the project area and granting Corcoran Jennison, the city’s chosen redeveloper (hereafter developer), a 99-year lease on the subject 90-acre waterfront parcel for \$1 per year.²⁹ The Connecticut state trial court approved the taking, except for one part of the subject area, the so-called Parcel 4A which was evidently sought to be taken for no readily discernible purpose—*either* to “support the adjacent state park,” *or* to “support the nearby marina.”³⁰ Also, the project plan exempted from taking the Italian Dramatic Club located within the boundaries of the project area.³¹ The trial court found that there was no intention on the city’s part to allow “an illegitimate purpose,” and the redevelopment plan was “not adopted to benefit a particular class of identifiable individuals.”³² The Connecticut Supreme Court upheld the taking, but reversed the trial court’s finding that Parcel 4A was not being taken for public use, and upheld its taking too.³³ Thus, we are supposed to take it that the city’s plan meshed with regard to its contemplated uses and its timing with Pfizer’s plans³⁴ as mere coincidence, or, as the trial court and Justice Kennedy would have it, the city merely sought to “take advantage of Pfizer’s presence” and had no “desire to aid [any] particular private entities.”³⁵ But as pointed out in Justice O’Connor’s dissent, the city’s plan was avowedly intended to complement Pfizer’s facility.³⁶ Moreover, giving

27. *Kelo*, 125 S. Ct. at 2659.

28. *See infra* note 39 and accompanying text.

29. *Kelo*, 125 S. Ct. at 2660 n.4.

30. *Id.* at 2659. The U.S. Supreme Court opinion does not provide any explanation of what “support” means in this context and how it would constitute public use.

31. *Id.* at 2671-72 (O’Connor, J., dissenting). There is no indication in the opinion why the club was so favored.

32. *Id.* at 2661-62.

33. *Kelo v. City of New London*, 843 A.2d 500 (Conn. 2004).

34. *Kelo*, 125 S. Ct. at 2659.

35. *Id.* at 2670 (Kennedy, J., concurring).

36. *Id.* at 2671 (O’Connor, J., dissenting). *See also id.* at 2678 (Thomas, J., dissenting) (explaining that the redevelopment project was “suspiciously agreeable to the Pfizer corporation”). While on the facts I am inclined to agree with Justices O’Connor and Thomas (explaining that the redevelopment project was “suspiciously agreeable to the Pfizer Corporation,” *Id.* at 2678 (Thomas, J., dissenting)) and I believe that this aspect of the New London project was at best dubious, it must be noted in fairness to the Supreme Court that it only accepted the factual findings made by the trial court, as it was required to do. Still, whoever made this dubious decision, this would appear to be an appropriate case for invocation of the tart phrase used recently by a federal district court, that even

this transaction yet another suspicious aspect, the president of the NLDC, who is largely credited with persuading Pfizer to put its new research headquarters on a site adjacent to the redevelopment project, was at the time married to Pfizer's director of research.³⁷

In short, the taking in *Kelo* was manifestly planned with an eye to facilitating the Pfizer Corporation's adjacent development, which was envisioned by the city as the key to the success of its own redevelopment. The question thus virtually asks itself: is this "public use"? Not by my lights, nor, I suggest, by any standard compatible with the English language, at least as that language may be understood by an intelligent, English-speaking person, untutored in the arcane double-talk of eminent domain law. This was a case, not of an independently conceived and executed municipal redevelopment effort that incidentally benefited Pfizer when it came upon the scene, but of a jointly planned project that would avowedly inure to Pfizer's substantial benefit. Without Pfizer's involvement and success the city's project concededly could not work (as there would be no free-spending customers for the planned five-star hotel, or for the upscale condominiums, marina, etc.). Thus the benefit to Pfizer was not incidental but was rather an intrinsic ingredient of the plan whereby the city danced to Pfizer's tune.³⁸ The planning relationship between the city and Pfizer was so

though the city's actions in the redevelopment in issue there failed to pass the smell test, it was constitutionally permissible. *W. Seafood Co. v. City of Freeport*, 346 F. Supp. 2d 892, 901 n.4 (S.D. Tex. 2004).

37. David M. Herszenhorn, *Residents of New London Go to Court, Saying Project Puts Profits Before Homes*, N.Y. TIMES, Dec. 21, 2000, at B5.

38. As astutely observed by Michael Kinsley, "When local government showers a big development with money and favors, it's usually not about sovereignty but about lack of sovereignty. Developers play jurisdictions off against one another, extracting concessions from all that none would actually make a sovereign decision to give." Kinsley, *supra* note 6. A perfect example of such concerns is provided by the veritable wars fought among California municipalities vying with one another to induce a large automobile dealer (or better yet, an entire automobile mall) with its high sales tax cash flow, into their redevelopment projects. See, e.g., Frank Clifford, *Pirating the Auto Retailers*, L.A. TIMES, Nov. 9, 1990, at A1 ("Sales taxes on cars and trucks are a big portion of municipal revenues. So cities are luring dealerships with subsidies and cheap land."); Siok Hian Tay Kelley, *Monrovia Plans Auto Row Next to Duarte's*, L.A. TIMES, Sept. 18, 1988, § 9, at 1; see also Redevelopment: The Unknown Government, Municipal Officials for Redevelopment Reform, 2004, Chap. 6, *Predatory Redevelopment: Sales Tax Shell Game*, at 16-17 [hereinafter MORR Report].

Thus, it is not uncommon that because of competitive pressures and the developers' superior bargaining skills, by the time the horse trading between a city and its chosen redeveloper is done with, the project is not nearly as lucrative to the city as its initial rosy projections suggested. See, e.g., Vivien Lou Chen, *The Deal Is Off for Burbank, Mall Developer*, L.A. TIMES, Nov. 13, 1994, at A1 (comparing the rosy earlier redevelopment projections, when the Burbank Media City Center redevelopment project was started, with the fact that "the mall, which opened in 1991 and into which the city invested \$120.7 million, won't produce a dime in profit for the foreseeable future."); see also Jodi Wilgoren, *Detroit Urban Renewal Without the Renewal*, N.Y. TIMES, July 7, 2002, § 1, at 10.

Finally, shopping malls which are a favorite reuse of land taken for redevelopment can be risky investments. See Peter H. King, *Dream Unravels; Fresno: Rise and Fall of Urban Mall*, L.A. TIMES, Apr. 28, 1988, § 1, at 1; Morris Newman, *In Rise and Fall of Malls, Weaker Ones Get*

intertwined that at best, one cannot tell what was incidental to which, and whether in this case the tail was wagging the dog.³⁹

III. WAS THE *KELO* DECISION NOVEL? LET THE SPINNING BEGIN

The *Kelo* holding discarded the heretofore essential need for elimination of undesirable conditions as a required element of condemnations involving transfer of the taken property to private parties for their economic benefit. Thus, *Kelo* makes a quantum leap in the potential applicability of the law of eminent domain. Yet those who favor the result reached by the Court—evidently realizing the moral indefensibility of their position and discerning the strongly negative public reaction to it—immediately responded with a public relation campaign, spinning the *Kelo* holding and urging that it was not novel at all.

On June 24, 2005, one day after the *Kelo* decision came down, Indianapolis Mayor Bart Peterson asserted on the PBS NewsHour television program that *Kelo* changed nothing at all and merely affirmed the status quo.⁴⁰ Dwight Merriam, a distinguished Connecticut land-use lawyer and frequent CLE lecturer on land-use law, took a similar position in a Law Seminars CLE teleconference program on July 1, 2005, making that assertion his first, emphatically delivered point.⁴¹ And on July 14, 2005, Professor Erwin Chemerinsky (who is a frequent constitutional commentator but is not noted for expertise in eminent domain) appeared on a Los Angeles radio news program to peddle the same "party line," assuring his audience that the *Kelo* holding represented nothing new at all and merely restated the law as it has been in the past.⁴² Not content with that, Professor Chemerinsky also took to the pages of the California Bar Journal, opining that *Kelo* was the most misrepresented case of the year, having been

'Demelled', L.A. TIMES, Dec. 14, 1999, at A1; Timothy Egan, *Retail Darwinism Puts Old Malls in Jeopardy*, N.Y. TIMES, Jan. 1, 2000, at A20; Peter T. Kilborn, *An Enormous Landmark Joins Graveyard of Malls*, N.Y. TIMES, Dec. 24, 2003, at A10; see also *Regus v. City of Baldwin Park*, 139 Cal. Rptr. 196, 205 (Ct. App. 1977) (discussing the economic pitfalls in redevelopment mall operations that, *inter alia*, improperly put public funds at risk); see also *infra* note 186 and accompanying text.

39. Case law takes the position that takings which benefit private parties are permissible under the Public Use clause, provided the private benefit is merely "incidental" to the public purpose. See, e.g., *County of Los Angeles v. Anthony*, 36 Cal. Rptr. 308, 310 (Ct. App. 1964).

40. *NewsHour* (PBS television broadcast June 24, 2005), available at http://www.pbs.org/newshour/bb/law/jan-june05/property_6-24.html.

41. Dwight Merriam, Remarks during a Law Seminars Continuing Legal Education teleconference (July 1, 2005).

42. *The Supreme Court and Its Future* (KPCC radio broadcast July 14, 2005), available at http://www.scp.org/programs/talkcity/listings/2005/07/totc_20050711.shtml.

presented by the media as “a dramatic change in the law, while in reality the Court applied exactly the principle that was articulated decades ago.”⁴³ Murray Kane, a prominent Los Angeles lawyer for redevelopment agencies, was quoted as saying “[w]e don’t see [*Kelo*] as an expansion of eminent domain powers, but as an underpinning of the current powers that cities and redevelopment agencies have.”⁴⁴ Richard K. Tranter, a lawyer in an Ohio firm representing the developer in the notorious Norwood redevelopment case, opined that *Kelo*’s critics were misguided, and offered the canard that condemnees are “generously” compensated.⁴⁵ My favorite, and unintentionally funny, comment came from the Brookings Institution which in a notable example of postmodern babble, expressed its admiration of the *Kelo* decision as enhancing “holistic redevelopment,” whatever that means.⁴⁶ To paraphrase Winston Churchill, never has so much been said by so many in defense of so little—at least little according to them.

Probably the most revealing insight into the mentality of *Kelo*’s supporters was unwittingly provided by Richard Lazarus of Georgetown University, opining in the National Law Journal that the most striking aspect of *Kelo* was that it was considered “such a big deal.”⁴⁷ Eminent domain, he said, unwittingly contradicting reams of legal scholarship published over a period of decades, is a very settled area of law, and the strong public reaction to *Kelo* was an “extraordinary PR job by the property rights movement.”⁴⁸ That someone of Professor Lazarus’ intelligence found it difficult to believe that the people would be aghast at the realization that any developer may come along and, working hand-in-glove with compliant city functionaries, can have their unoffending homes bulldozed to the ground for yet another mall, and that a strong public reaction to such a turn of events had to be inspired by the PR doings of a nefarious “movement” rather than being a spontaneous reaction of sensible people, tells us a great deal more about Professor Lazarus and the American professorial elites of which he is a part than about the law of eminent domain.

43. Erwin Chemerinsky, *Supreme Court: The Calm Before the Storm*, CAL. B.J., Aug. 2005, at 1, 18.

44. David G. Savage, *Justices Back Forced Sale of Property*, L.A. TIMES, Jun.24, 2005 at A1.

45. Richard B. Tranter, *Court Was Right to Uphold Takings*, BROWARD DAILY BUS. REV., Aug. 8, 2005, at 6. On the subject of asserted generosity of compensation, see JACQUES B. GELIN & DAVID W. MILLER, *THE FEDERAL LAW OF EMINENT DOMAIN* 47-99 (Stephen R. Saltzburg & Kenneth R. Redden eds., 1982), cataloging the many economic detriments that are not compensable in eminent domain.

46. *In Support of Eminent Domain*, The Brookings Institution, Jul. 12, 2005, <http://www.brookings.edu/metro/eminentdomain.htm>.

47. Marcia Coyle, *Supreme Court Review: A Changing Landscape*, NAT’L L.J., Aug. 3, 2005, at 7. For a review of the rising ferment in right-to-take decisional law during the years preceding *Kelo*, see cases discussed in Gideon Kanner, *Developments in Right-to-Take Law*, 2002 INST. ON PLAN. ZONING & EMINENT DOMAIN 2-22 through 2-34. Also see *infra* note 158.

48. *Id.*

This oddly counterintuitive position of the American left which traditionally professes to side with "the little guy" in opposition to large corporate interests appears to be rooted in this case in a knee-jerk opposition to whatever it perceives as favored by American conservatives and libertarians.⁴⁹ Thus, liberal San Francisco congresswoman and House Minority Leader Nancy Pelosi, opined that when the Supreme Court ruled against Suzette Kelo it was "almost as if God had spoken."⁵⁰ There is no record of Congresswoman Pelosi similarly ascribing divine attributes to past Supreme Court opinions in which property owners prevailed. God, it would seem, is a San Francisco liberal.

Contrary to all this spinning of *Kelo* as a no-big-deal case, it was greeted with dismay by a broad section of the American public. As Professor Douglas Kmiec put it, "[t]he Court's stature plummeted when it endorsed taking private property for *private* use."⁵¹ A poll conducted by Quinnipiac University showed by a huge margin (89% to 8%) that people are overwhelmingly opposed to the use of eminent domain for economic redevelopment.⁵² Douglas Schwartz, head of the poll was quoted as saying that he has never seen such a lopsided margin on any issue he has polled.⁵³ Similarly, a poll conducted by the University of New Hampshire found that 93% of those polled opposed using eminent domain for private development.⁵⁴

By my lights, if any organized action by a "movement" is afoot here, it is the effort of *Kelo*'s supporters to defuse the wave of popular outrage that has swept the country in response to the *Kelo* decision.⁵⁵ The bland-faced

49. See Matt Welch, *The Left's Eyeing Your Home*, L.A. TIMES, Aug. 14, 2005, at M6.

50. *Id.*

51. Douglas W. Kmiec, *Abandoning Common Sense*, CAL. LAW., Sep. 2005, at 21, 21.

52. Michael Corkery & Ryan Chittum, *Eminent Domain Uproar Imperils Projects*, WALL ST. J., Aug. 3, 2005, at B1.

53. *Id.*

54. Welch, *supra* note 49.

55. For a sampling of the vigorous public reactions, see *Hands Off Our Homes*, ECONOMIST, Aug. 20-26, 2005, at 21, 21-22; Timothy Egan, *Ruling Sets Off Tug of War Over Private Property*, N.Y. TIMES, July 30, 2005, at A1; Maura Kelly Lannan, *Many States See a Push to Limit Property Seizures*, STAR-LEDGER (N.J.), July 20, 2005, at 7; Richard A. Epstein, *Supreme Folly*, WALL ST. J., June 27, 2005, at A14 (describing the *Kelo* ruling as "shameful" and "scandalous and cruel . . ."); Virginia Groark, *Connecticut Case Lit Fires of Rage*, CHI. TRIB., July 18, 2005, at 12; Donald Lambro, *Home, Seized Home*, WASH. TIMES, July 18, 2005, at A16 (reporting a nation-wide legislative backlash); Editorial, *Court Cripples Property Rights*, CINCINNATI ENQUIRER, June 24, 2005, at Editorial Page ("This decision is perverse. The five Justices in the majority should be ashamed"); (emphasis omitted); Editorial, *The Little People Get Hit*, PROVIDENCE J., June 24, 2005, at B4 ("This does not sound like a victory for democracy or fairness . . ."); Editorial, *Dark Days Ahead for Property Owners*, ROCKY MTN. NEWS, June 24, 2005, at 48A ("lamentable decision"); Editorial, *Court Puts Our Property In Jeopardy*, BOWLING GREEN DAILY NEWS June 25, 2005

position that takings overtly serving private economic purposes have been permitted in the past⁵⁶ so what's the fuss all about?, is disingenuous and at best a gross oversimplification of what *Kelo* decided. Actually, there is much in the Court's handiwork that is new and that is subject to valid criticism. Originally, the use of eminent domain to benefit private parties was permitted in what the Supreme Court stressed was a narrow exception, when its use eliminated seriously undesirable conditions, such as obstacles to efficient natural resource exploitation.⁵⁷ Later, this approach was extended to elimination of slums and urban blight, misallocation of land titles, and the like.⁵⁸ *Kelo* abandoned that requirement entirely and, to that extent, is quite novel. *Kelo* thus represents another step down the slippery slope of the U.S. Supreme Court's right-to-take law,⁵⁹ and another battle lost by property

("This assault on [the voters'] property rights is highly offensive to most fair minded people."); Editorial, *Error in Judgment*, INVESTOR'S BUS. DAILY, June 27, 2005, at A18 ("shameful decision"); Edward Hudgins, *Your Castle No More*, WASH. TIMES, June 27, 2005, at A20 ("*Kelo v. New London* is another giant step toward classical corporatism or fascism in America."); Editorial, *Condemnation*, DETROIT FREE PRESS, June 24, 2005 ("The U.S. Supreme Court appeared . . . to declare open season on private property . . .").

In contrast, the two flagship liberal newspapers were cheering editorially for the new Robber Barons. The Washington Post opined that the *Kelo* decision was "quite unjust" but "the court's decision was correct," Editorial, *Eminent Latitude*, WASH. POST, June 24, 2005, at A30. The New York Times opined, in spite of the Times' blatant conflict of interest (it is the beneficiary of a municipal land-acquisition in mid-Manhattan for a new, subsidized headquarters building which it has an option to acquire after 30 years for "nominal consideration"; see Paul Moses, *The Paper of Wreckage: The 'Times' Bulldozes Its Way to a Sweetheart Land Deal You Will Pay For*, Village Voice, Jun. 22, 2002, at 35), and in spite of its acknowledgement that the *Kelo* plan "may hurt a few small property owners," that the municipal victory in *Kelo* was just dandy, asserting that the New London condemnees will be "fully compensated." Editorial, *The Limits of Property Rights*, N.Y. TIMES, June 24, 2005, at A22. This is a false statement, as anyone acquainted with eminent domain compensation law knows full well. See *City of New London v. Foss & Burke, Inc.*, 857 A.2d 370 (Conn. App. 2004) (denying compensation for the full value of a condemnee's fixtures, as well as for its business losses and attorney's fees). Moreover, adding to its hypocritical performance, the New York Times is on record editorially as opposing full indemnity to condemnees. See Editorial, Governor Chiles's Everglades Moment, N.Y. Times, May 12, 1998, at A24 (characterizing Florida law that provides for reimbursement of attorneys' fees to condemnees as "a clever piece of larceny").

56. See *Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229 (1984) (holding that the use of eminent domain to eliminate oligopolistic feudal title misallocations was permissible); *Berman v. Parker*, 348 U.S. 26 (1954) (holding that the taking of land for purposes of slum clearance was permissible); *Strickley v. Highland Boy Gold Mining Co.*, 200 U.S. 527 (1906) (holding that the condemnation of an easement for an aerial tramway serving a mine, to eliminate an obstacle to efficient mineral exploitation, was permissible); *Clark v. Nash*, 198 U.S. 361 (1905) (holding that the exploitation of arid agricultural land, which otherwise would remain unproductive and fallow, justified a taking by a neighbor to enlarge the latter's irrigation ditch).

57. See Jennifer Maude Klemetsrud, *The Use of Eminent Domain for Economic Development*, 75 N.D. L. REV. 783, 793-94 (1999).

58. *Id.*; see also *Gov't of Guam v. Moylan*, 407 F.2d 567 (9th Cir. 1969) (taking of war-ravaged urban land to allow its replating in preparation for reconstruction).

59. As Will Rogers might have put it, the U.S. Supreme Court has never met a condemnation it didn't like and, to my knowledge, no condemnee has won on the issue of lack of public use in the U.S. Supreme Court in the past three-quarters of a century. See cases cited *supra* note 56; see also *Nat'l. R.R. Passenger Corp. v. Boston & Me. Corp.*, 503 U.S. 407 (1992) (upholding a taking of one

owners in the judicial *jihad* against private property rights in America, which began in the New Deal era and has continued in the past quarter-century.

If you wonder who has the better argument in this dispute over what *Kelo* decided, and whether its holding is indeed novel, read the opinions and ask yourself: if it's as cut-and-dried as fans of the *Kelo* decision would have it, why did it take the Supreme Court 100 years to articulate the rule that *mere* municipal prognostications of economically better use by the condemned land's transferee, *without more*, meet the "public use" limitation of the Constitution? Why, unlike past unanimous decisions on this subject, was the *Kelo* Court so sharply divided? And if prior law was all that clear, then why did Justice O'Connor dissent in *Kelo*, protesting the majority's misuse of her opinion in *Hawaii Housing Authority v. Midkiff*,⁶⁰ and why did she argue that in *Midkiff* she did not approve of unrestricted private takings?

More importantly, if *Kelo*'s fans think they are gaining a public relations advantage with their spin, trying to convince the populace that it is business as usual, they are only making an argument that proves too much. If they are right, that would mean only that the populace, thus far ignorant of the ways in which redevelopment is actually used (as opposed to the familiar newspaper fairy tales about slum clearance), has for the first time glimpsed the grim reality and is justifiably incensed at the idea that any influential redeveloper can have anyone kicked out of his or her home or business, and take its site over on no more than a prognostication of its lucrative reuse triggering a trickle-down process into the local economy. If that is supposed to be an argument likely to enlist the people on the side of the new Robber Barons, it is certainly making its appearance in a convincing disguise. It does however illustrate the contempt in which *Kelo*'s fans must hold the intelligence of their fellow Americans.⁶¹ The people's attention may be directed toward enjoying the pleasures of life (which, lest we forget, include

railroad's trackage in order to convey it to another railroad); *United States ex rel. Tenn. Valley Auth. v. Welch*, 327 U.S. 546 (1946) (implementing an expansive Court interpretation of a statute to allow the TVA to condemn land in excess to the reservoir for which other land was being legitimately taken); *Dept. of the Interior v. South Dakota*, 519 U.S. 919 (1996) (summarily reversing *South Dakota v. United States Dept. of the Interior*, 69 F.3d 878 (8th Cir. 1996), where the circuit court denied the federal government the right to condemn land "for Indians," without more). An exception of sorts was *Cincinnati v. Vester*, 281 U.S. 439 (1930), where a municipal condemnation was interdicted on statutory grounds because the city was engaging in the forbidden practice of excess condemnation. See generally ROBERT EUGENE CUSHMAN, *EXCESS CONDEMNATION* (1917) (discussing excess condemnation from the standpoint of the American city).

60. 467 U.S. 229, 245 (1984).

61. One measure of the public reaction to *Kelo* is that it precipitated a flood of proposed legislation to curb its reach. For a comprehensive list of such legislation, see Donald E. Sanders & Patricia Pattison, *The Aftermath of Kelo*, 34 REAL EST. L.J. 157, 171-75 (2005).

enjoyment of their homes), but they are much smarter than *Kelo*'s fans give them credit for, and they do understand that what just happened in America is a watershed event: a judicial endorsement of a government policy that is nothing short of reverse Robin Hoodery, whereby, as Justice O'Connor put it, "the government now has license to transfer property from those with fewer resources to those with more."⁶² The *Kelo* majority opinion is widely and correctly perceived as being in the nature of an unwarranted judicial declaration of war on the American home-owning public, with the public reaction responding appropriately to this development.

One is left to speculate on how much more fierce the public reaction will likely be when the people at large learn that redevelopment not only threatens their homes, but also skims their property taxes, and diverts them from municipal treasuries to redeveloper subsidies. This occurs through the device of so-called TIF (tax increment financing) bonds, which are sold by city redevelopment agencies to high-income investors seeking tax-free income, and their proceeds are used to fund redevelopment. These bonds are then paid off by skimming the new property taxes generated by the redevelopment project area and diverting them away from the usual municipal expenditures (such as schools, fire and police protection, and the like) into the coffers of redevelopment agencies that use those funds to repay the bonds and to fund new redevelopment schemes that inherently subsidize wealthy redevelopers.⁶³

The topsy-turvy morality of the *real* "political ethics"⁶⁴ said to be reflected in the law of eminent domain, the "dark corner of the law" as Lewis Orgel put it a half-century ago in his treatise,⁶⁵ is thus well illustrated by the spectacle of avowedly liberal members of the Supreme Court enlisting themselves in the cause of a new class of Robber Barons using government power to pursue private wealth on the backs of poor tenants and lower-middle-class home owners. The problem is exacerbated by the fact that redevelopment has had a long and inglorious history of open racism and abuse of those on the lower rungs of the socio-economic ladder. The poor

62. *Kelo v. City of New London*, 125 S. Ct. 2655, 2677 (2005) (O'Connor, J., dissenting).

63. Doug Kaplan, *Overmalled, Underschooled*, L.A. TIMES, Dec. 9, 1996, at B11 ("Someone needs to tell the state's 350 redevelopment agencies that . . . the key to economic development in California isn't more shopping centers—it's better schools."). For a concise description of how such municipal high finance works, see FRIEDEN & SAGALYN, *supra* note 18, at 97-98 (characterizing as a "redevelopment director's dream" the fact that this process exempts redevelopment agencies from the annual budget appropriation scrutiny and permits large scale municipal expenditures to take place off budget, without voter approval [or knowledge]). For a detailed description of the complexities of various kinds of financing of redevelopment projects, see DAVID F. BEATTY, ET AL., *REDEVELOPMENT IN CALIFORNIA*, 209-42 (3d ed. 2004). See also MORR Report, *supra* note 38, at 12 (reporting that between 1995 and 2003 bonded indebtedness by California redevelopment agencies rose from \$5 billion to \$56 billion).

64. *United States v. Cors*, 337 U.S. 325, 332 (1949) (stating that eminent domain law is said to be based on "political ethics").

65. 2 LEWIS ORGEL, *VALUATION UNDER THE LAW OF EMINENT DOMAIN* § 248 (1953).

and lower middle-class people, who are forcibly displaced by urban renewal without compensation for all their demonstrable economic losses, are the very people who are supposed to be the objects of a benign government housing policy, but whose vital interests in a family home are in fact ignored. That, to say the least, is an unfortunate display of moral blindness on the part of the majority Justices.

Beyond *Kelo's* shift in legal doctrine, the judicial attitude displayed there, and in its all-too-evident subtext, supports the surmise that the signatories of the majority opinion are at the very least uninformed as to how the power of eminent domain is actually exercised in America, and how it impacts individuals vainly seeking the protection of the constitutional limitations on government power to take private property. They remain mired in a nineteenth century vision of eminent domain law that no longer has validity.⁶⁶

In the end, *Kelo's* fans' reliance on "precedent" does not really support their position (as shown presently), but it does bring to mind Jonathan Swift's celebrated criticism of lawyers:

It is a maxim among these lawyers, that whatever hath been done before may legally be done again: and therefore they take special care to record all the decisions formerly made against common justice, and the general reason of mankind. These, under the name of 'precedents,' they produce as authorities, to justify the most iniquitous opinions; and the judges never fail of decreeing accordingly.⁶⁷

IV. INTO THE "DARK CORNER OF THE LAW"— ONCE MORE WITH FEELING

Kelo was not only about constitutional rights in general and property rights in particular, but also about the meaning of the English language, specifically of the "public use" clause of the Fifth Amendment, whose

66. The line of cases relied on by the *Kelo* majority is rooted in nineteenth century law that developed from occasional takings of strips of farmland for railroad rights-of-way and other easements—a process that usually displaced no one's home and that did not even resemble the modern urban redevelopment and its mass displacement of urban populations that has given rise to social, economic, and other problems unheard of when that nineteenth century law was formulated. For a description of pre-Civil War railroad right-of-way condemnations, when unsophisticated farmers were taken advantage of and induced to give away their land to the railroads gratis, see 1 JOHN SHERMAN, JOHN SHERMAN'S RECOLLECTIONS OF FORTY YEARS IN THE HOUSE, SENATE AND CABINET 81 (Chicago, The Werner Co. 1895).

67. JONATHAN SWIFT, GULLIVER'S TRAVELS 269 (Arthur E. Case ed., Ronald Press Co. 1938) (1726).

meaning in the law has by now been corrupted to a virtually Orwellian extent. I believe there is great merit in Confucius' admonition that the most important function of government is rectification of names; of seeing to it that things are called by their proper names.⁶⁸ Otherwise, the resulting confusion has an adverse effect on civic and even artistic values, makes court judgments unjust, and leaves the people at a complete loss.

As noted, in *Kelo* the Court jettisoned the precondition to the exercise of eminent domain for the benefit of private parties that was first formulated in *Clark v. Nash*⁶⁹ and *Strickley v. Highland Boy Gold Mining Co.*⁷⁰ In those cases, the Court justified takings of easements over strips of private land, in order to benefit private parties seeking to put their own land to economically more productive, but concededly private commercial uses (respectively, expansion of a private irrigation ditch and construction of an aerial tramway serving a privately owned mine), as meeting the "public use" requirement.⁷¹ In allowing such takings, the Court relied on dire necessity to prevent public harm, which it deemed to justify the carving out of a narrow exception to the "public use" limitation.⁷² Without such takings, said the Court, agriculture and mining in Utah would be frustrated, and potentially productive land would remain barren.⁷³ As a result, the Court thought it necessary to go along with the private condemnors who prognosticated otherwise unobtainable economic benefits for the region that would result from their enhanced agricultural and mining activities.⁷⁴ The first step down the slippery slope was thus taken, and "public use" became transmogrified into "public benefit" said to arise indirectly from conferring the power of eminent domain on private parties avowedly acting for their own financial

68. RICHARD WILHELM, CONFUCIUS AND CONFUCIANISM 50-51 (1931).

69. 198 U.S. 361, 369-70 (1905). Note that the *Clark* Court relied on *Fallbrook Irrigation Dist. v. Bradely*, 164 U.S. 122 (1896) because it believed that *Fallbrook* was a condemnation case. See *Clark*, 198 U.S. at 269. However, *Clark* mistakenly relied on *Fallbrook* because *Fallbrook* was not a condemnation case. See *infra* notes 198-202 and accompanying text.

70. 200 U.S. 527, 531 (1906).

71. *Id.*; *Clark*, 198 U.S. at 370.

72. *Strickley*, 200 U.S. at 531 ("While emphasizing the great caution necessary to be shown, [the earlier decision of *Clark*] proved that *there might be exceptional times and places in which the very foundations of public welfare could not be laid without requiring concessions from individuals to each other upon due compensation . . .*") (emphasis added).

73. *Clark*, 198 U.S. at 369-70.

74. *Id.*

[W]e do not desire to be understood by this decision as approving of the broad proposition that private property may be taken in all cases where the taking may promote the public interest and tend to develop the natural resources of the State. We simply say that in this particular case, and upon the facts stated in the findings of the [trial] court, and having reference to the conditions already stated, we are of opinion that the use is a public one, although the taking of the right of way is for the purpose simply of thereby obtaining the water for an individual, *where it is absolutely necessary to enable him to make any use whatever of his land, and which will be valuable and fertile only if water can be obtained.*

Id. (emphasis added).

gain, but prognosticating regional prosperity on a trickle-down theory.⁷⁵ Whatever the soundness *vel non* of that justification, it deviated from the express language of the Constitution which speaks of "public use," not "public benefit."⁷⁶

Moreover, a moment's reflection makes clear that the court's conjectured "absolute necessity" justification⁷⁷ was, at most, of dubious merit. The American West was developed on a vast scale without neighbors preying on one another by the exercise of the power of eminent domain. In other words, the Court's uncritical acceptance of the supposed dire necessity argument was unjustified because it *de facto* envisioned a Hobbesian society in which ranchers, farmers, and miners, rather than relying on their own efforts aided by government regulations adjusting their rights *vis-a-vis* one another, are at war with each other over local land and water resources. It is one thing to say that the government may regulate and even condemn water resources in order to allocate them under a rational, legislative plan, but it is quite another thing to countenance an unvarnished, private grab of a neighbor's land for the benefit of an individual who, for all the pretty words about dire necessity and public benefit, is responsible to no one, save only his own commercial self-interest and his own notions of where enlightened self-interest ends and greed begins.

Whatever the merits (or lack thereof) of this justification of dire necessity, it was either insincere or merely formulated for the occasion,⁷⁸ and it was not applied in later cases. Some dozen years after *Clark* and *Strickley*, the Court made it official—necessity is not a factor in federal law of eminent domain.⁷⁹ Most state courts today tend to hold (while interpreting state statutory necessity requirements) that the determination of necessity is the condemnor's prerogative, subject to only minimal judicial review unless otherwise provided by the legislature.⁸⁰ Nonetheless there are

75. *See id.*

76. U.S. CONST. amend. V.

77. *Clark*, 198 U.S. at 370.

78. For example, the Court spoke "in this particular case." *See supra* note 74. Moreover, as pointed out in Justice Thomas' *Kelo* dissent, in both *Clark* and *Strickley* the taken easements were usable not only by their owners, but also by the public, and this met the use-by-the-public version of the "public use" constitutional limitation. *See Strickley*, 200 U.S. at 532. Thus, the Court's intellectual misadventure, going on about the economic necessity justification for the taking, was unnecessary to the decision. *See Kelo v. City of New London*, 125 S. Ct. 2655, 2683-84 (2005) (Thomas, J., dissenting).

79. *Bragg v. Weaver*, 251 U.S. 57, 58 (1919) (holding that a determination of necessity for a taking is a non-judicial legislative matter, with the condemnee not even entitled to a hearing thereon).

80. *Rindge Co. v. County of Los Angeles*, 262 U.S. 700, 702 (1923) (holding that state law may constitutionally deem the condemnor's self-serving determination of necessity to be conclusive).

occasional judicial decisions finding a lack of necessity. Yet courts are reluctant to interfere with a condemnor's determination of necessity, lest they find themselves called upon to second-guess planning and engineering decisions—such as proper location of project boundaries, the extent of rights of way, and the like—thereby becoming embroiled in technical matters beyond their competence.⁸¹ While this is the conventional wisdom explanation of this facet of eminent domain law, I question its soundness (or possibly its bona fides) for two reasons. First, when the legislature determines that necessity is freely justiciable, the courts experience no difficulty adjudicating condemnors' compliance with the statutory standards of necessity.⁸² Second, and even more revealing, the courts do not even pretend to experience any undue difficulties when reviewing highly technical environmental impact reports that delve into engineering and planning decisions concerning transportation, traffic, water supplies, waste disposal, air quality, pollution sources, endangered species protection, etc., and freely pass judgment on the quality and completeness of the handiwork of engineers, scientists, planners and the like, frequently disagreeing with their conclusions.⁸³ Why courts abruptly lose the capacity to do so when the litigation is labeled "eminent domain" rather than "environmental review" no one has, to the best of my knowledge, attempted to explain. Thus, it is open to question why such judicial self-abnegation is prevalent in eminent domain cases (but in no others). For example, one finds it hard to fathom why the California Supreme Court, at the time a court well regarded for its commitment to fairness, took the harsh, extremist position that determinations of public necessity are not justiciable at all, *not even when the condemnor's resolution of necessity is procured through fraud, bad faith or abuse of discretion.*⁸⁴

The classic elements of public necessity in eminent domain law are codified in Cal. Code Civ. Proc. § 1240.030 as the condemnor's findings that: "(1) The public interest and necessity require the project. (2) The project is planned or located in a manner that will be most compatible with the greatest public good and the least private injury. (3) The property sought to be acquired is necessary for the project." CAL. CIV. PROC. CODE § 1240.030 (a)-(c) (West 1982); See 1 NORMAN E. MATTEONI ET AL., CONDEMNATION PRACTICE IN CALIFORNIA § 6.22 (2d ed. 2002).

81. For example, as the Court noted in *Kelo*:

It is not for the courts . . . to sit in review on the size of a particular project area. Once the question of the public purpose has been decided, the amount and character of land to be taken for the project and the need for a particular tract to complete the integrated plan rests in the discretion of the legislative branch.

Kelo, 125 S. Ct. at 2668 (quoting *Berman v. Parker*, 348 U.S. 26, 35-36 (1954)).

82. See, e.g., *City of Los Angeles v. Keck*, 92 Cal. Rptr. 599 (Cal. Ct. App. 1971) (finding itself unconstrained by statutes making the determination of necessity conclusive, the court refused to accept the city's finding of necessity and charged it with profligacy); see also *SFPP, L.P. v. Burlington Northern & Santa Fe Ry.*, 17 Cal. Rptr. 3d 96 (Cal. Ct. App. 2004) (finding a lack of necessity to condemn).

83. See, e.g., *Fuel Safe Wash. v. F.E.R.C.*, 389 F.3d 1313, 1326 (10th Cir. 2004).

84. *People v. Chevalier*, 340 P.2d 598, 603 (Cal. 1959). To its credit, in 1975, upon learning from the California Law Revision Commission that the court had imputed to it the intent to

V. 1984 PLUS 21, AND COUNTING: "PUBLIC" MEANS "PRIVATE," AND
"USE" MEANS "PURPOSE" OR "BENEFIT," OR WHATEVER

Roughly a half-century after *Clark* and *Strickley* the chickens came home to roost. In *Berman v. Parker*,⁸⁵ the notorious Washington D.C. case that became the granddaddy of modern urban redevelopment law, the justification for the taking was slum clearance. People of my generation remember those black-and-white photos in high school civics books, whose captions lamented the fact that the United States of America, the wealthiest nation in the world, tolerated such slums within sight of the Capitol dome.⁸⁶ In *Berman*, the Court held that it was the elimination of those slums, and of the attendant adverse social conditions, that constituted the "public use," or more accurately, the "public benefit" that justified the condemnation.⁸⁷ The idea that the constitutional phrase "public use" actually meant public use, had, by then, gone the way of the whalebone corset, but *Berman* purported to provide a doctrinal justification for this change.

The *Berman* court faced the novel issue of whether the Public Use Clause of the Fifth Amendment permitted a wholesale taking of hundreds of urban dwellings in the Southwest quadrant of Washington, D.C., razing them, and turning over their sites to private redevelopers who would then build new improvements on the cleared land for their private, profit-making purposes.⁸⁸ The Court held that it did.⁸⁹ Slum clearance was the object of the law, said Justice Douglas in the unanimous *Berman* opinion, and condemnation of the entire area was merely the means chosen by Congress to achieve that end.⁹⁰ Once the object of the legislation is legitimate, it justifies the means chosen to achieve it.⁹¹ Yes, the Court said it: the end justifies the means—a proposition not usually heard in other areas of constitutional law. What happens to the taken land after its acquisition by the condemnor is of no concern to the condemnees because, wrote Justice Douglas, their rights are observed when they receive their "just

countenance fraud in determinations of public necessity in transactions of this type, an incensed legislature abrogated the *Chevalier* holding. See CAL. CIV. PROC. CODE § 1245.255 (West 1982) (stating that resolution not conclusive when procured by "gross abuse of discretion"); see also § 1245.270 (West 1982) (stating that resolution not conclusive when procured by bribery).

85. 348 U.S. 26 (1954).

86. See Linda Wheeler, *Broken Ground, Broken Hearts*, WASH. POST, Jun. 21, 1999, at A1 (describing sympathetically life in pre-*Berman* Southwest Washington).

87. *Berman*, 348 U.S. at 32-33.

88. *Id.* at 28-30.

89. *Id.* at 36.

90. *Id.* at 28.

91. *Id.* at 33.

compensation.”⁹² Of course, this was a false premise on two counts. First, the property owner objected to the taking as not being for public use, not to the measure of compensation.⁹³ Second, like the Holy Roman Empire of yore that was neither holy, nor Roman, nor an empire, the constitutionally promised “just compensation” is neither just nor is it compensation—a state of affairs which is not rationally contestable and whose existence the Court has conceded in moments of candor.⁹⁴ To quote Professor Merrill’s accurate observation, “[t]he most striking feature of American compensation law—even in the context of formal condemnation or expropriation—is that just compensation means incomplete compensation.”⁹⁵ Though the *Kelo* majority took note of this problem in footnote 21,⁹⁶ it declined to address the compensation issues.

The legal bottom line of *Berman* is that when privately-owned land is taken to eliminate adverse social conditions (in that case, slums), it is that elimination, not necessarily the subsequent reuse of the taken land, that satisfies the “public use” requirement.⁹⁷ Notwithstanding that the building housing *Berman*’s store was not blighted, the Court approved of its taking to allow an area-wide redevelopment that would be hampered if the redevelopers had to approach their task in a parcel-by-parcel fashion.⁹⁸

Similarly, in *Hawaii Housing Authority v. Midkiff*,⁹⁹ the undesirable social condition that the local legislature sought to eliminate through the use of eminent domain was said to be an oligopolistic state of freehold title land ownership patterns on the Hawaiian island of Oahu, resulting from remnants

92. *Id.* at 36. Note that in the *Kelo* oral argument, Justice Ginsburg acknowledged that in *Berman*, Justice Douglas “spoke very expansively.” Transcript of Oral Argument at 52, *Kelo v. City of New London*, 125 S. Ct. 2655 (2005) (No. 04-108).

93. *Berman*, 348 U.S. at 31.

94. See *United States v. Gen. Motors Corp.*, 323 U.S. 373, 382 (1945) (stating that the law of eminent domain is “harsh”); *Kimball Laundry Co. v. U.S.*, 338 U.S. 1, 6 (1949) (conceding that “fair market value,” which is the usual measure of “just compensation,” fails to take into consideration factors that buyers and sellers in a voluntary transaction would consider in fixing the agreed upon price, thus inherently undercompensating condemnees). For an exploration of market value and its deficiencies as opposed to just compensation, see generally Gideon Kanner, *Condemnation Blight: Just How Just Is Just Compensation?* 48 NOTRE DAME L. REV. 765, 772-781 (1973). See also Ann E. Gergen, *Why Fair Market Value Fails as Just Compensation*, 14 Hamline J. Pub. L. & Pol’y 181 (1993).

95. Thomas W. Merrill, *Incomplete Compensation for Takings*, 11 N.Y.U. ENVTL. L.J. 110, 111 (2002).

96. *Kelo v. City of New London*, 125 S. Ct. 2655, 2668 n.21 (2005).

97. *Berman*, 348 U.S. at 33.

98. *Id.* at 35. The Court never explained why administrative convenience of redevelopment planners should trump an explicit constitutional provision. Moreover, the Court glossed over the fact that the “area wide” approach to slum clearance was less than uniform. At least two buildings on Southwest Fourth Street (a Civil War hospital and the former home of Ernie Pyle) were left standing. I know. I lived across the street from them in 1962-64. Also, two seafood restaurants and a pizza joint were left standing and were operating a decade after *Berman* was decided.

99. 467 U.S. 229 (1984).

of feudal Royal Hawaiian land tenure.¹⁰⁰ Many Hawaiian home owners could not buy the land on which their homes stood and could only lease their plots under long term leases.¹⁰¹ The land had been left by the last member of Hawaiian royalty, Princess Bernice Pauahi Bishop, to a charitable trust whose function was to keep the land, make it economically productive, and use the proceeds to support the Kamehameha Schools dedicated to providing a superior education to Hawaiian children.¹⁰² To that end the Bishop Estate leased its land, and did so at below-market rates. In an effort to curry favor among the suburban population, the Hawaii legislature had determined that the prevalence of leasehold estates in the real estate market limited availability of freehold land, causing an increase in housing prices, and that conversion of leaseholds into freehold titles would curb that tendency.¹⁰³ Significantly, this Hawaii legislation did not apply to other, similar land trusts whose trustees had devoted their land to agricultural and commercial uses.¹⁰⁴ Of course, this legislative determination was economic nonsense. While ownership of land in fee simple may be satisfying and preferable to home owners for a variety of reasons, leaseholds inherently convey less than the fee simple interest, and are therefore cheaper than freehold titles that convey all the land owner has. Thus, it is difficult to see how the Hawaii legislature could rationally suppose that conversion of leaseholds to freehold titles would cause a drop in the cost of housing, since it could not affect the supply of housing.

As a historical sideline, it should be noted that the market had a rude surprise in store for the would-be Hawaiian reformers. In a classic illustration of Murphy's Law in action, following *Midkiff*, the sudden availability of desirable residential freehold land on Oahu inspired prospering Japanese investors (whose Yen currency was at the time rising as against the sinking dollar) to snap up local homes, particularly in the Kahala neighborhood, Oahu's choice area, for what to them were reasonable sums, but what to the local residents were fortunes.¹⁰⁵ Prices of a million dollars

100. *Id.* at 232-33. "As the unique way titles were held in Hawaii skewed the land market, exercise of the power of eminent domain was justified." *Id.* at 244.

101. *Id.* at 242 (noting that "[t]he land oligopoly has . . . forced thousands of individual homeowners to lease, rather than buy, the land underneath their homes.>").

102. See Georgia Ka'apuni McMillen, *A School of One's Own*, N.Y. TIMES, Aug. 29, 2005, at A19 (describing the tradition and operation of the Kamehameha schools).

103. See *Midkiff v. Tom*, 471 F. Supp. 871, 874 n.13 (D. Haw. 1979).

104. *Midkiff*, 467 U.S. at 229 n.1 (noting that an eligible tenant under the Hawaii statute is "one who, among other things, owns a house on the lot, [and] has a bona fide intent to live on the lot or be a resident of the State . . .").

105. See John Duchemin, *Rediscovering Hawaii*, HONOLULU ADVERTISER, Nov. 5, 2000, at 1G (describing how Japanese investors were able to purchase Hawaiian real estate in the 1980s).

and up were readily paid by Japanese investors for ordinary, aging suburban bungalows which were then torn down by the buyers and replaced with luxurious homes that were sold to Japanese tycoons as vacation homes, and thus were occupied only part-time, adding to Oahu's housing shortage.¹⁰⁶ The upshot of the legislation upheld in *Midkiff* was thus a dramatic increase, not a decrease, in home prices, contributed to by the former Kahala homeowners who, having sold their homes to eager Japanese buyers for a pretty penny, fanned out across Oahu in search of suitable replacement homes, causing the familiar price ripple effect.¹⁰⁷ Thus, the effect of the law was perverse. Instead of lowering, or at least maintaining home prices, it accomplished the opposite. It fueled a wholesale transfer of desirable homes to Japanese investors and provided huge economic incentives for the former land lessees to sell their homes and become instant millionaires. Thus, ironically, the law enacted in the name of providing lessee-homeowners with fee titles to their homesites caused the transfer of some of America's most desirable residential land into the hands of foreigners.

But when the Court spoke in *Midkiff*, all of that still lay in the future, and as Justice O'Connor explained, the fact that the legislature may be wrong, does not make its enactments any less binding.¹⁰⁸ Unfortunately, Justice O'Connor cast her ruling in needlessly extreme language. She opined that the court had not and presumably would not interfere in state takings as long as the legislatively stated public purpose was rationally related to a conceivable public purpose.¹⁰⁹ This is an extreme standard

106. Because the preferred Japanese investment strategy (at least at the time) favored low-yield long-term investments extending over the investors' and their progeny's lifetimes, Japanese investors were not interested in acquiring temporally limited leasehold interests, but their motivation changed abruptly when they could invest in Hawaii freehold titles.

107. See Charlotte Low Allen, *The Golden Land Rush*, INSIGHT ON THE NEWS, Oct. 29, 1990, at 15-19. Allen explains how the "Japanese buyers and the Hermes scarf-draped Caucasian real estate ladies [] skitter through the [Oahu] neighborhood[s] like nene geese every Sunday." *Id.* at 16.

108. Haw. Hous. Auth. v. *Midkiff*, 467 U.S. 229, 242-43. But query whether the Hawaii legislature was merely wrong or irrational by supposing that fee simple titles would be cheaper than leaseholds. Query also whether the adverse title conditions prevailing on Oahu were caused by the "skewed" market, or by widespread pattern of government ownership of land that was thus unavailable for housing construction, to say nothing of the supply-limiting, notoriously restrictive Hawaiian land-use laws. *Id.* at 244. See DAVID L. CALLIES, *REGULATING PARADISE* 173-75 (1994).

109. *Id.* at 241. With all due respect to the courts applying that standard, it is absurd because under it, a court can uphold condemnations for fictitious reasons that never occurred to the persons in charge of the condemning body when it resolved to pursue the condemnation, and that may be contrary to what they intended or would acquiesce in even if it had occurred to them. Under it the courts review, not what the condemnor resolved or intended, but what it might have intended had its members been as ingenious as Supreme Court Justices acting with the benefit of hindsight. As the Ninth Circuit put it:

If officials could take private property, even with adequate compensation, simply by deciding behind closed doors that some other use of the property would be a 'public use,' and if those officials could later justify their decision in court merely by positing 'a conceivable public purpose' to which the taking is rationally related, the 'public use' provision of the Takings Clause would lose all power to restrain government takings.

Armendariz v. Penman, 75 F.3d 1311, 1321 (9th Cir. 1996).

which, in a stroke of poetic justice, O'Connor had to eat in the *Kelo* case where she wound up vainly protesting in her dissent that she did not intend to go that far in her *Midkiff* opinion.¹¹⁰ This brings to mind Yogi Berra's *bon mot* "I really didn't say everything I said."¹¹¹

In a way, it was a case of just deserts for Justice O'Connor because her jurisprudence has been, to put it politely, unmoored to legal doctrine. As *Slate's* Dahlia Lithwick put it,

O'Connor has become famous for her tendency to decide cases narrowly, more in the manner of a biblical judge than a Justice forging new precedent. Her case-by-case approach means that, by necessity, there is little "law" that flows from her decisions. There is only what O'Connor thinks in that specific case.¹¹²

Justice O'Connor's intellectual misadventure thus demonstrates that she who lives by ad hocery dies by it. But, to be fair to Justice O'Connor, in spite of her expansive language in *Midkiff*, she was right in protesting in her *Kelo* dissent because her *Midkiff* opinion clearly and unequivocally concluded that the condemnations in that case were justified by the legislative intent to "attack certain perceived evils of concentrated property ownership in Hawaii."¹¹³ In the end, Justice O'Connor plainly endorsed the traditional view that a purely private taking of land from *A* and giving it to *B* "would serve no legitimate purpose of government" and would be a violation of the "public use" clause.¹¹⁴

In sum, to the extent they allowed condemnation of private property for the use by private parties, both *Berman* and *Midkiff* were based on the idea that the elimination of socially undesirable conditions through the use of eminent domain was constitutionally permissible as a public benefit and as such qualified as a "public use." Remarkably, in footnote 16 of its opinion, the *Kelo* majority denied that the Court had held, as it plainly did in *Berman* and *Midkiff*, that it was the elimination of social harms, not the reuse of the subject properties that justified the condemnations and met the "public purpose" criterion.¹¹⁵ This attempted denial of the obvious employed the linguistic sleight-of-hand of asserting that the activities in *Berman* and

110. See *Kelo v. City of New London*, 125 S. Ct. 2655, 2674-75 (2005).

111. William D. Araiza et al., *The Jurisprudence of Yogi Berra*, 46 EMORY L.J. 697, 717 (1997).

112. Dahlia Lithwick, *Has the Supreme Court Gone Too Far?—A Symposium*, COMMENTARY, Oct. 2003, at 40-41.

113. *Midkiff*, 467 U.S. at 245.

114. *Id.*

115. *Kelo*, 125 S. Ct. at 2666 n.16.

Strickley (involving, respectively, an unblighted department store and a mining operation) were not in themselves harmful.¹¹⁶ Of course they were not. But that was a misreading of these two cases. What was found to be the harm that condemnation sought to eliminate in *Berman* and *Strickley* was, respectively, the obstacle to efficient area-wide slum clearance,¹¹⁷ and the barren, unproductive character of Utah land that, without the use of eminent domain, would frustrate the public benefits flowing from expanded mineral exploitation.¹¹⁸ Remember that the *Strickley* Court viewed the problem from a nineteenth century vantage point which saw intensive exploitation of natural resources to build an expanding country as a great public good.¹¹⁹ Of course, whether these decisions were legally sound, given the clear constitutional language requiring “public use” rather than public prosperity and the like, is subject to debate. Yet there can be no rational question that in these cases, the *Kelo* majority to the contrary notwithstanding, the Court explicitly justified the takings on the basis of dire necessity to eliminate public detriments—the Court’s language can leave no doubt on that score.¹²⁰

And it was that justification of harm elimination through the use of eminent domain that was jettisoned in *Kelo*, thus making it a blockbuster case, the protestations of its fans notwithstanding. The Court’s broad interpretation that had mutated the “public use” clause into a “public purpose” clause, was extended a step further so that it did not matter that Susette Kelo’s and her neighbors’ land and homes, and the area in which they were located, were well maintained and wholly unoffending.¹²¹ Unlike *Berman* where an unblighted property was included in the redevelopment project area in order to permit area-wide elimination of a slum, there was nothing justifying this approach in *Kelo* where there was no blight to begin with that could possibly require elimination on an area-wide basis or otherwise.

In *Kelo*, the City of New London was simply out to increase its cash flow¹²² and thought that its chosen redeveloper would be economically successful, thus generating a trickle-down stream of money and other

116. *Id.*

117. *Berman v. Parker*, 348 U.S. 26, 34-35 (1954).

118. *Strickley v. Highland Boy Gold Mining Co.*, 200 U.S. 527, 529, 531 (1906).

119. *Id.*

120. See *supra* notes 57-58 and accompanying text.

121. See *Kelo*, 125 S. Ct. at 2664-65 (“Those who govern the City were not confronted with the need to remove blight in the Fort Trumbull area . . .”).

122. Though the city understandably made much of its problems caused by its declining population, the closure of local military installations, and its resulting economic problems, the Court’s holding did not make such economic concerns a condition to the exercise of the power of eminent domain. *Id.* at 2665. Its holding allows even wealthy cities enjoying a surplus in public funds to engage in this type of “economic redevelopment.”

benefits to the community in the form of taxes and jobs.¹²³ Such municipal plans and hopes to reverse the long term decline of New London and to facilitate the success of Pfizer's facility, said the Court, were sufficient.¹²⁴ Henceforth, it would be enough to show that the taking is not arbitrary; i.e., that it is based on a municipal redevelopment plan arrived at after a study that prognosticates future economic benefits. Of course, this is no standard at all. *Every* business, whether privately established or municipally sponsored, whether successful or not, begins operations on the basis of some sort of envisioned plan that the entrepreneur believes will succeed. Otherwise he or she would not go into that business at that time and place. It is hard to imagine municipal planning apparatus functionaries so stupid that they could not string together and recite by rote the boilerplate words asserting a rosy economic vision of the future.¹²⁵ Such a vision, being essentially a prognostication of future profits anticipated to be generated by the proposed redevelopment,¹²⁶ and barring some obvious, colossal blunders on the part of the project's promoters, is inherently incapable of empirical refutation without the benefit of hindsight, or without the municipal functionaries candidly disclosing their improper purpose—an event unlikely to occur. Ironically, the courts' usual reason for denying compensation for business losses in eminent domain is that business is so "uncertain in its vicissitudes" that it cannot be reliably valued,¹²⁷ not even when the business has been successfully operating for years. Yet in redevelopment cases, courts blandly accept the condemnor's prognostications about future financial benefits of conjectured businesses that have not even been established.¹²⁸ Though I claim no expertise in securities law, it seems plain to me that were private entrepreneurs to sell stock in their corporation on the basis of a business plan projection resting merely on what is rationally related to the conceivable, they would in short order find themselves charged with securities fraud.

123. *Kelo*, 125 S. Ct. at 2659.

124. *Id.* at 2658-59 (stating that "their determination that the area was sufficiently distressed to justify a program of economic rejuvenation is entitled to our deference.").

125. "Whatever the details of Justice Kennedy's as-yet-undisclosed test, it is difficult to envision anyone but the 'stupid staffer' failing it." *Id.* at 2675 (O'Connor, J., dissenting) (citing *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1025-26 n.12 (1992)).

126. Ironically, in eminent domain valuation litigation, prognostications of future profits are inadmissible and the courts readily concede their lack of competence to assess future profits. *See, e.g., Andrus v. Allard*, 444 U.S. 51, 66 (1979) ("Prediction of profitability is essentially a matter of reasoned speculation that courts are not especially competent to perform."). The same is true of a property owner's business plans and profit projections. *See id.*

127. *Sawyer v. Commonwealth*, 65 N.E. 52, 53 (Mass. 1902).

128. *See Gideon Kanner, What to Do Until the Bulldozers Come?: Precondemnation Planning for Landowners*, 27 REAL ESTATE L.J. 47, 54 & n.21 (1998).

The simple fact is that, under *Kelo*, municipal determinations of public use are subject to a strong judicial presumption of regularity which in most such cases would trump the condemnee's arguments on the grounds that courts are not to second-guess legislative determinations. It would take a courageous judge to reject these presumptions and accept instead the condemnee's equally crystal-ball-gazing contrary conclusion. Moreover, a municipal finding of necessity and feasibility of the project for which land is being taken is not subject to any judicial review in federal courts, and in most states only to what I like to call subminimal judicial review. Thus, the reference to municipal plans and studies in the *Kelo* majority opinion as justifying the municipal decision to condemn erects an all-but-insurmountable evidentiary barrier for the condemnee and de facto reduces the constitutional "public use" mandate to "hortatory fluff" as Justice O'Connor stated.¹²⁹

VI. ILLUSORY REMEDY

In his concurring opinion, Justice Kennedy made a grandstand gesture by asserting that "[a] court confronted with a plausible accusation of impermissible favoritism to private parties should treat the objection as a serious one and review the record to see if it has merit, though with the presumption that the government's actions were reasonable and intended to serve a public purpose."¹³⁰ The problem with this formulation is that the Court (with Justice Kennedy's concurrence) had already rejected the argument that condemnations of this type should be subject to higher level scrutiny than the current minimal-scrutiny, anything-goes approach that merely looks to what is "rationally related to a conceivable public purpose," to use Justice O'Connor's *Midkiff* line again.¹³¹ One is thus at a loss to understand how one could satisfy Justice Kennedy's criteria without colliding with the no-heightened-level-of-review standard laid down by the majority. Just how "the record" could possibly establish "*undetected* impermissible favoritism"¹³² is obscure.

The majority likewise offered an ineffective remedy by suggesting that undefined municipal "aberrations"¹³³ are to be viewed with "a skeptical

129. *Kelo*, 125 S. Ct. at 2673 (O'Connor, J., dissenting).

130. *Id.* at 2669 (Kennedy, J., concurring).

131. *Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229, 241 (1984). Justice O'Connor qualified this expansive phrase with a clear statement that purely private takings from *A* for *B* would remain illegal. *Id.* at 245. *Kelo*, however, contains no such limitation.

132. 125 S. Ct. at 2670 (emphasis added).

133. *Kelo*, 125 S. Ct. at 2667 n.17. The Court's use of the word "aberrations" in this context suggests that the Justices are unacquainted with prevailing municipal practices and local land-use politics. Sweetheart municipal deals with favored redevelopers are not occasional "aberrations," but rather commonplace events—often the mother's milk of municipal politics and a staple of redevelopment which operates on the [often untrue] assumption that redevelopers won't build in

eye,"¹³⁴ citing *99 Cents Only Stores v. Lancaster Redevelopment Agency*, which enjoined the condemnation of premises occupied by a 99 Cents Only store that the city sought to condemn in order to turn it over to Costco for enlargement of its existing adjacent store.¹³⁵ The *99 Cents Only* court rejected the condemning agency's arguments that an enlarged Costco store would generate more tax revenues than the competing 99 Cents Only store, and that absent the condemnation, Costco would move elsewhere (as it threatened to do), taking its cash flow with it.¹³⁶ The redevelopment agency in *99 Cents Only* was so confident of its litigational prospects that it inadvertently gave the game away by characterizing itself as a mere pawn in the hands of Costco, the proverbial 800-pound gorilla that could have its way with them and with the owners of the 99 Cents Only store.¹³⁷ These arguments, far from bolstering its case, only raised questions as to Lancaster's bona fides¹³⁸—whether it was acting as a government entity pursuing the public interest or merely as an errand boy for Costco's private, profit-making ambitions.

"blighted" areas and therefore must be enticed to do so with land that is either free or offered to them at prices substantially below the cost of municipal acquisition—a process known as "land writedown."

134. *Id.* A "skeptical eye"? What level of scrutiny is that? It would certainly appear to be some sort of heightened scrutiny that the Court explicitly refused to adopt. How then does one satisfy a court that the skepticism is justified? And what kind and what quantum of evidence would be needed to overcome the strong presumption that the condemnor's conduct is proper?

One is also entitled to ask why a reasonable, fair-minded person would not employ such a "skeptical eye" in viewing the fact that NLDC's president (widely credited with persuading Pfizer to put its research headquarters next to the project site and to collaborate with the city, see *supra* notes 25-27 and accompanying text) was married to a Pfizer executive at the time the decision to proceed with the redevelopment was made. See *supra* note 37 and accompanying text. If that alone is not worthy of a penetrating gaze by that "skeptical eye," then what is?

135. 237 F. Supp. 2d 1123, 1131 (C.D. Cal. 2002).

136. *Id.* at 1130.

137. *Id.* at 1129.

138. For example, the agreement between Lancaster, 99 Cents Only's landlord, and Costco had been negotiated in secret and was revealed to 99 Cents Only after it was a "done deal" whereby, *inter alia*, Lancaster "would return to Costco any sales taxes beyond a \$350,000 annual benchmark," and would "reimburse Costco for its \$4.5 million cost of expansion." Christopher Woodard, *Lancaster Snubs Smaller Retailer in Favor of Costco*, L.A. BUS. J., Mar. 6, 2000, at 11. Also, Costco unblushingly played the role of the 800-pound gorilla, as a Lancaster functionary put it, by threatening to shut down its store and leave it empty (thus depriving Lancaster of any revenues from these premises), unless it got its way with its rival 99 Cents Only store. Brief of Appellee at 1, 3, 99 Cents Only Stores, Inc., v. Lancaster Redevelopment Agency, 60 F. App'x 123 (9th Cir. 2003) (No. 01-56338), WL 32120350. Lancaster argued that appeasing Costco's demands was the "public use" justifying its attempted condemnation of the 99 Cents Only premises. *99 Cents Only Stores*, 237 F. Supp. 2d at 1129. The Judge presiding over the *99 Cents Only* case was, to put it mildly, unpersuaded. *Id.* at 1131.

On a doctrinal level, Justice Kennedy's suggestion confuses public use with public necessity. His rose-colored view of the process of challenging unwholesome condemnations is at best naive because it is unlikely that future condemners in cases of this type would repeat Lancaster's and Costco's error of disclosing their improper purpose. Also, the strong presumption of permissible conduct on the condemnor's part, even before *Kelo*, usually motivates trial judges to see no evil, hear no evil, and speak no evil in such cases, even when they fail the "smell test." In any event, Justice Kennedy confused the issue of *how* a project is being implemented with the question of *whether* the project can qualify as public to begin with, irrespective of the mode of its implementation.

More important, neither the majority nor the Kennedy concurrence indicate what admissible evidence would be probative of such illicit motive, how it could be obtained, and how it would transform the vision of that "skeptical eye" into judicial relief. Justice Kennedy's opinion thus inspired Justice O'Connor's apt response that he prescribed a "careful review of the record and the process by which a legislature arrived at the decision to take—without specifying what courts should look for in a case with different facts, how they will know if they have found it, and what to do if they do not."¹³⁹ Confessions of municipal impropriety are unlikely to be volunteered by the guilty parties, and the subjective motivation of municipal decision-makers is not subject to discovery because it is deemed irrelevant.¹⁴⁰ Besides, once the government decision to proceed with a legislatively authorized type of project that is within its powers is made, it does not matter what the subjective motivation of the decision-makers may be in choosing this or that redeveloper.¹⁴¹ In other words, if the project is found to satisfy the newly minted "public purpose" standard, the condemnation need not be pursued by developers who are pure of heart. Boss Tweed would have loved it.

In short, insofar as the nature of the project is concerned, why would it matter whether the redeveloper was selected on the merits because of his sterling performance on prior projects, or because he was the mayor's son-in-law? After all, mayors' sons-in-law have to make a living too. As Justice O'Connor pointed out, the fact that the government means to favor a chosen private party has no bearing on whether that party's development activities will generate area-wide economic benefits sufficient to sustain the taking

139. *Kelo* 125 S. Ct. at 2675 (O'Connor, J., dissenting).

140. See, e.g., *Toso v. City of Santa Barbara*, 162 Cal. Rptr. 210, 216 (Ct. App. 1980).

141. See *Rosenthal & Rosenthal Inc. v. N.Y. State Urban Dev. Corp.*, 605 F. Supp. 612, 618, (S.D.N.Y. 1985), *aff'd*, 771 F.2d 44 (2d Cir. 1985) (refusing to review on the merits the owners' serious charges of impermissible favoritism, i.e., that the boundaries of the redevelopment project in issue were corruptly drawn to confer illegitimate economic benefits on the Mayor's friends, on the grounds that whatever the subjective motivation in choosing the redeveloper, the project was still for redevelopment, a public use, and as such not subject to judicial interdiction).

were it done by a developer untainted by a relationship with the city fathers.¹⁴² In the words of the *Rosenthal & Rosenthal, Inc.* court: "To the extent that the [condemnees] can prove favoritism in the selection of one development over another, there may be a violation of state law, necessitating a new selection [of a redeveloper], but this does not go to [the condemnees'] constitutional claim."¹⁴³ To be sure, "impermissible favoritism" in the conduct of municipal affairs may well cause the *dramatis personae* to find themselves in legal trouble (particularly where consideration changed hands in the process of developer selection), but insofar as the substantive law of eminent domain law is concerned, that would be a matter at most raising but not resolving issues going to necessity.¹⁴⁴ In other words, the purity *vel non* of the redeveloper-city relationship would not make the "public project" any less or more public.¹⁴⁵

If Justice Kennedy disagreed and meant to disapprove the reasoning of *Rosenthal & Rosenthal, Inc.*, he certainly could have said so. But he did not. What all this suggests is that Justice Kennedy had not thought this problem through, that, being a decent person, he was troubled by the result reached by the court, and that he felt the need to say *something* to assuage his feelings and create at least an illusion of potentially available relief. But it also suggests that he is uninformed on the subject of eminent domain law and even less so on the subject of municipal practices in its use. This is understandable, given the Justices' backgrounds and the Court's current workload.¹⁴⁶ With so few eminent domain cases being considered on the

142. *Kelo*, 125 S. Ct. at 2676 (O'Connor, J., dissenting).

143. *Rosenthal & Rosenthal, Inc.*, 605 F. Supp. at 618. Actually, this statement evaded the condemnees' argument. They argued not only that there was favoritism in choosing the redeveloper, but also that the project boundaries were corruptly drawn to encompass their property for the favored redevelopers' use. *Id.* at 616-17.

144. *See, e.g.*, CAL. CIV. PROC. CODE § 1245.270 (West 1982) (even where it is found that a resolution of necessity has been procured by bribery, the resolution is not vitiated but only rendered rebuttable).

145. Thus, it is not uncommon that highways and power transmission lines are built that serve only one private tract of land. *See, e.g.*, William J. Eaton, *Costly Road Aiding Steel Firm Assailed*, L.A. TIMES, Aug. 5, 1970, Part I, at 4 (thirteen-mile interstate highway spur built at a cost of \$47.1 million to serve only one property—a Jones & Laughlin steel plant—to keep a promise made to its owner by the state, in exchange for Jones & Laughlin's promise to locate its plant in Illinois); *see also* 2A NICHOLS ON EMINENT DOMAIN, § 7.07[4][a][iv] (Julius L. Sackman et al. eds., 3d ed. 2005).

146. In the last quarter-century, the Supreme Court has considered, on the merits, only three eminent domain cases that gave rise to issues involving the condemnor's right to take (not including *Kelo*)—hardly a sufficient case load to maintain the Court's level of doctrinal expertise and beyond that, a minimally sophisticated understanding of how the eminent domain law is administered and how it impacts on those affected by it.

This is a generic problem, not necessarily confined to eminent domain. As aptly observed by Stuart Taylor Jr., "[t]he Supreme Court's greatest failing is not ideological bias—it's the justices' increasingly tenuous grasp of how the real world works." Stuart Taylor Jr., *Remote Control*,

merits, it is not surprising that this field of law is unfamiliar to the Justices and their clerks.¹⁴⁷ But whatever it is that Justice Kennedy wanted to say, he would have been well advised to spell out exactly what his doctrinal reasoning was. A call for supplemental briefing of this point would not have been amiss either.¹⁴⁸

Justice Stevens, the author of the majority opinion, evidently developed concerns over the vigorous, negative public reaction to his handiwork, and responded to the public outcry that greeted *Kelo*. In an unprecedented move, Justice Stevens proceeded to justify himself in public at a meeting of the Clark County (Las Vegas) Bar Association.¹⁴⁹ There, he explained that he ruled for New London under compulsion of law, in spite of his individual belief that this “the allocation of economic resources that result from the free play of market forces is more likely to produce acceptable results in the long run than the best-intentioned plans of politicians,” because the New London project “fit the definition of ‘public use.’”¹⁵⁰ But as shown above, the Constitutional text permits no such thing,¹⁵¹ and neither did the Court’s pre-*Kelo* decisional law. In fact, the *Kelo* majority did not follow established precedent. Rather, the Court created a new rule that removed the restriction that allowed immediate reconveyance of the taken land to private parties for economic profit only when doing so eliminated a serious public detriment—something that was concededly not involved in *Kelo*. Justice Stevens’ self-conscious protestation notwithstanding, his opinion vastly expanded the contours of permissible exercise of the power of eminent domain, and if he was sincere in believing otherwise, that would only suggest that he too may not have been fully informed.

ATLANTIC MONTHLY, Sept. 2005, at 37. See also Benjamin Wittes, *Without Precedent*, ATLANTIC MONTHLY, Sept. 2005, 39 (“the Supreme Court’s problem is not merely disconnection from the real world—it’s also arrogance, dishonesty, grandiosity, and lack of respect for principle, history, or logic.”); See also Paul Bator, *What Is Wrong With the Supreme Court?* 51 U. PITT. L. REV. 673, 673 (1990) (arguing that “the Court is in deep institutional trouble.”).

147. Between 1974 and 1992, I taught what at the time was the only regular course on eminent domain law offered annually at an American law school by a full-time faculty member. When I say “eminent domain law,” I mean a nuts-and-bolts course on condemnation, including procedure and valuation, as well as the right to take, not just an occasional seminar on regulatory takings, or the nodding acquaintance with the subject of takings provided by Property or Constitutional Law courses. I learned in the process that there are no legal texts on the subject suitable for use by novices at the law school level. Moreover, it was my observation that upper-crust law students who become law review editors, and thus a part of the population from which courts draw their clerks, rarely if ever take specialized land-use (and in my case, eminent domain) courses—those being “deemed too ‘practical’ and too local in scope for budding legal scholars.” Gideon Kanner, *Hunting the Snark, Not the Quark: Has the U.S. Supreme Court Been Competent in Its Effort to Formulate Coherent Regulatory Takings Law?*, 30 URB. LAW. 307, 339 (1998).

148. This sort of judicial performance is hardly unprecedented. See Kanner, *Hunting the Snark*, *supra* note 147, at 339-41, 343-45 (commenting on other instances of the Court’s misunderstanding of pertinent land-use law and practices, even when they appeared plainly in the record).

149. See *infra* notes 196-97 and accompanying text for a discussion of Justice Stevens’ speech.

150. *Id.*

151. See *supra* note 76 and accompanying text.

VII. SO WHAT DO WE DO NOW?

What are we to make of all this? At the moment, the Court's *laissez faire* attitude appears to have opened the door wider to abusive and corrupt uses of the eminent domain power¹⁵² with the full ramifications of its impact yet to be determined. But for those with even a modicum of understanding of how eminent domain actually works in application, and how municipal functionaries in charge of land acquisition operate, the handwriting is on the wall. The ability of the redevelopment process to enrich well-connected redevelopers who use it for their own benefit at both public and private expense, legitimizing in the process a form of municipal kleptocracy, to borrow an apt term from the Wall Street Journal, appears likely.¹⁵³ The judicial definition of "public use," as that term is used in the Fifth Amendment, has now been pushed to a *reductio ad absurdum* extent, so that it is now difficult to visualize any proposed private, profit-making use that could not be squeezed into *Kelo's* brave, new "public purpose" standard. Promoters of *any* use can now simply prognosticate economic benefits to the community even as they go about stuffing their own pockets, and argue, not that what they have in mind will be successful as judged by sound business standards, but merely by what is "rationally related to the conceivable." The obvious problem with this approach is that once the redevelopers' optimistic prognostications are accepted by congenial municipal functionaries, the latter's determination is not subject to any review worthy of the name, even when it is plainly wrong.¹⁵⁴

Kelo's promise, in effect, is that any property may be forcibly taken for any purpose deemed by redevelopers to be more lucrative than the existing one. This raises more serious concerns apart from the obvious one of encouragement of corruption and overreaching in city government. If the new, municipally-favored Robber Barons become emboldened by the money-making vistas opened up by *Kelo's* promise, this will sooner or later

152. See John Kass, *High Court Ruling Steamrolls Rights of the Little Guy*, CHI. TRIB., Jun. 26, 2005, at C2 (characterizing the post-*Kelo* regime as "The Chicago Way—in which business and real estate become dependent on politics and favors . . . Developers cozy up to politicians, unions cozy up to developers, zoning lawyers take their orders, the political boss gives his OK, and everybody eats."). See also Bill Boyarsky, *Another Look at Subsidies for Redevelopment*, L.A. TIMES, Apr. 8, 1992, at B2 ("[R]edevelopment means campaign contributions to city council members. The land developers and attorneys involved in redevelopment deals are big donors. Wipe out redevelopment and you eliminate a big source of campaign dollars.").

153. Editorial, *Eminent Thievery*, WALL ST. J., Jan. 17, 2001, at A26.

154. For an egregious example, see Robert Moses' brazen "finding" that a perfectly fine Manhattan area containing only 2% slums and 10% substandard tenements was "blighted" so as to justify its destruction *in toto* to provide a site for the New York Coliseum—a finding void of meaningful judicial review. FRIEDEN & SAGALYN, *supra* note 18, at 23-24.

inspire violence on the part of angry people being driven without full indemnity from their increasingly irreplaceable homes for the sake of facilitating private money-making schemes of wealthy, municipally well-connected developers. Perhaps the sense of human territoriality has been dissipated by decades of soft living in America to such an extent that recourse to violence will not occur. Then again, who knows?¹⁵⁵ One hopes the ongoing adverse popular reaction to *Kelo* will be only political. But then again, when the 1954 *Berman* decision gave rise to the “Negro removal” problem¹⁵⁶ discussed *post*, no one thought that a scant ten years later American cities would erupt into large-scale riots by a put-upon minority population venting the resentment it felt—rightly or wrongly—over its treatment, including the mass displacements by redevelopment projects.¹⁵⁷ We would do well to keep in mind Justice Holmes’ admonition that “[p]roperty is protected because such protection answers a demand of human nature, and therefore takes the place of a fight.”¹⁵⁸

The legal battle line over improper private takings has now shifted to the state legislatures and state courts. States are free to grant their citizens greater rights than the minimal ones enshrined in the U.S. Constitution—a principle that is applicable to eminent domain.¹⁵⁹

155. See Michael M. Berger, *To Regulate or Not To Regulate—Is that the Question? Reflections on the Supposed Dilemma Between Environmental Protection and Private Property Rights*, 8 LOY. L.A. L. REV. 253, 265-67 (1975) (stressing the prevailing understanding of human territoriality and the risk of violence when private rights in land are insecure).

156. See, e.g., *Starr v. Nashville Hous. Auth.*, 145 F. Supp. 498, 499 (M.D. Tenn. 1956), *aff’d*, 354 U.S. 916 (1957) (directing a highway through a black-owned business area and theater).

157. See FRIEDEN & SAGALYN, *supra* note 18, at 339 (collecting citations to source materials dealing with incidents of violence that followed redevelopment, notably the widespread urban riots of the 1960s).

158. *Davis v. Mills*, 194 U.S. 451, 457 (1904). See Michael M. Berger, *People Are Mad As Hell About Use of Eminent Domain*, L.A. DAILY J., Feb. 1, 2005, at 6. Though large scale violent opposition to proposed takings have mostly taken place in foreign countries like Japan and Mexico, *id.*, the phenomenon of violent reaction to condemnations is hardly unknown here in the United States. Consider the “battle of Chavez Ravine,” where a physical confrontation erupted between inhabitants of a Mexican area of Los Angeles while protesting their displacement from their homes in order to make room for Dodger Stadium. Lawrence J. McQuillan and Lydia D. Ortega, *When Redevelopment Means Razing the Homes of the Poor*, L.A. BUS. J., Aug. 1, 2005, at 39; see also T.W. McGarry, *Postscript: ‘My Grandchildren Go to the Games . . . The Dodgers Are My Favorite Team. But I Just Can’t Go in That Stadium’*, L.A. TIMES, Jul. 12, 1988, Part 2, at 3. There have also been large-scale riots by Minnesota farmers protesting the takings of easements across their farmland for high-voltage electrical power transmission lines. See Mary Losure, *Powerline Blues*, MINNESOTA PUB. RADIO, Dec. 9, 2002, available at http://news.minnesota.publicradio.org/features/200212/08_losurem_powerline/ (this site provides links to numerous photographs of the melees between the Minnesota farmers and the police).

159. *Joslyn Mfg. Co. v. Providence*, 262 U.S. 668, 676-77 (1923) (holding that states are free to provide a higher level of condemnee rights than are available under the minimal constitutional standards of compensability decreed by the U.S. Supreme Court). Several states have enhanced condemnee rights with regard to the right to take, by imposing more stringent requirements for meeting their state constitutional “public use” standards. See, e.g., *Sw. Ill. Dev. Auth. v. Nat’l Envtl. LLC*, 768 N.E.2d 1 (Ill. 2002); *County of Wayne v. Hathcock*, 684 N.W.2d 765 (Mich. 2004); *Bailey v. Myers*, 76 P.3d 898 (Ariz. App. 2003); *Georgia Dep’t of Transp. v. Jasper County*, 586

Finally, the majority ignored the serious concerns voiced by Justice Thomas in the penultimate paragraph of his dissenting opinion in *Kelo*. Justice Thomas was quite right in noting that the law of eminent domain has never been the subject of a coherent doctrinal analysis by the Supreme Court, and that such an analysis is well overdue.¹⁶⁰ A host of legal commentaries attest to the soundness of his conclusion. Moreover, it is incontestable that the history of modern American urban redevelopment has been one of discrimination against, and oppression of, politically powerless urban ethnic and economic minorities. Historically, these affected people have been abused and pushed out of their modest dwellings to make room for upscale commercial facilities and luxury dwellings for the better-off segments of society.¹⁶¹

Southwest Washington D.C., the site of the *Berman* case, provides the proverbial "Exhibit A" for such concerns.¹⁶² There, the largely poor, black residents were pushed out of their homes, into other District of Columbia slums.¹⁶³ Thus, the high-minded judicial prose in the *Berman* opinion, deploring the unfortunate slum dwellers' lot in life and calling for its improvement through redevelopment,¹⁶⁴ proved to be a cruel farce. Far from providing replacement housing for the poor at a \$17 per month per room rent, as falsely represented to the Supreme Court,¹⁶⁵ Southwest Washington was redeveloped into upscale commercial facilities, co-ops, townhouses, and apartments charging rents that were so high that within a few years they inspired a rent strike by affluent tenants.¹⁶⁶

S.E.2d 853 (S.C. 2003); *Casino Reinvestment Dev. Auth. v. Banin*, 727 A.2d 102 (N.J. Super. 1998) (all forbidding condemnations for private commercial uses under the guise of redevelopment).

160. *Kelo v. City of New London*, 125 S. Ct. 2655, 2682-84 (2005). Over the years, scholarly commentaries have been overflowing with criticisms of judicial handiwork in the area of eminent domain law, ranging from polite to acerbic, all agreeing that the decisional law of eminent domain is, to put it mildly, a wretched, inconsistent, and at times incoherent mess. For a tidy collection of citations to such scholarly invective, see Jerrold A. Fadem, *Trial Tactics to Make the Compensation Just to the Owner*, in 1973 INST. ON PLANNING, ZONING & EMINENT DOMAIN 261 (Virginia Shook Randall ed., Matthew Bender & Co.).

161. See Terry J. Tondro, *Urban Renewal Relocation: Problems in Enforcement of Conditions on Federal Grants to Local Agencies*, 117 U. PA. L. REV. 183, 227 (1968) (noting that "[u]pper- and middle-income groups have been able to take advantage of the subsidy involved in urban renewal to displace the poor, who in turn receive no subsidy for their housing.").

162. See the penultimate paragraph of Justice Thomas' dissent, *Kelo*, 125 S. Ct. at 2687.

163. *Berman v. Parker*, 348 U.S. 26, 32-33 (1954).

164. *Id.* at 32-33.

165. See *id.* at 30-31.

166. Joann Lublin, *Tenants' Revolt Hits A Luxury High-Rise; Target Is the FHA*, WALL ST. J., Aug. 13, 1969, at 10. There are many critical commentaries on the abuse of eminent domain in redevelopment. For a sampling, see Michael R. Klein, *Eminent Domain: Judicial Response to the Human Disruption*, 46 U. DET. J. URB. L. 1 (1968); Daniel R. Mandelker, *Public Purpose in Eminent Domain*, 28 TUL. L. REV. 96, 108 n.45 (1954); Henry W. McGee, Jr., *Urban Renewal in the*

The characterization of urban renewal as “Negro removal” was coined in the 1960s¹⁶⁷ and has been used since then to refer to this sort of urban “ethnic cleansing.”¹⁶⁸ Additionally, this phrase has not been limited to use in redevelopment cases. Comedian Dick Gregory hit the rhetorical bull’s eye with his *bon mot* “Urban renewal is Negro removal, but in California we call it freeways.”¹⁶⁹ One of the most revealing bits of pertinent history illustrating Gregory’s insight is the speech, breathtaking in its candid disclosure of the racist animus behind the process of urban condemnation, given by U.S. District Judge Miles Lord, to a gathering of U.S. Attorneys, in which he reminisced about the old days when he and his colleagues

went through the black section between Minneapolis and St. Paul . . . about four blocks wide and we took out the home of every black man in that city. And woman and child . . . Nice little neat black neighborhood, you know, with their churches and all and we

Crucible of Judicial Review, 56 VA. L. REV. 826 (1970); Charles Martin Sevilla, *Asphalt Through the Model Cities: A Study of Highways and the Urban Poor*, 49 U. DET. J. URB. L. 297 (1971); Terry J. Tondro, *Urban Renewal Relocation: Problems in Enforcement of Conditions on Federal Grants to Local Agencies*, 117 U. PA. L. REV. 183, 227 (1968). With particular reference to the systematic, gross undercompensation of condemnees who were routinely offered supposed compensation that was in fact less than the condemnor’s own appraisal reports, see Curtis J. Berger & Patrick J. Rohan, *The Nassau County Study: An Empirical Look Into the Practices of Condemnation*, 67 COLUM. L. REV. 430 (1967), concluding that statistics collected by the authors with collaboration of the county “convey explicit rebuke to a system which took advantage of nearly everyone, but saved the greatest hardships for those—the docile, duressed, uncounselled—most entitled to solicitousness.” *Id.* at 457. See also *Uniform Relocation Assistance and Land Acquisition Policy: Hearings on H.R. 386 AND Related Bills Before the H. Comm. on Public Works*, 90th Cong. 1-615 (1968); *Real Property Acquisition Practices and Adequacy of Compensation in Federal and Federally Assisted Programs: Hearings before the Select Subcomm. on Real Property Acquisition of the H. Comm. on Public Works*, 88th Cong. (1963).

Though formal studies of this type are hard to come by these days, there is a realistic basis for concluding that the practice of making lowball offers for land sought to be acquired by eminent domain continues. This is attested to by the fact that condemnation lawyers typically charge condemnees a fraction of their recovery *over and above the condemnor’s* offer, and they do well. See Ray Rivera, *UDOT: Fair Deals or Land Grabs?*, SALT LAKE TRIB., Oct. 24, 1999, at A1 (reporting that eight out of every ten Utah condemnees who refused UDOT’s offers and litigated their just compensation, recovered more money, with a median increase in compensation of 41% over the offer).

167. Note, *Judicial Review of Displacee Relocation in Urban Renewal*, 77 YALE L.J. 966, 967 n.7 (1968); McGee, *supra* note 166, at 859-60 n.146.

168. Judy Pasternak, *Is It Urban Renewal or Removal?*, L.A. TIMES, Sept. 1, 1995, at A1 (reporting the filing of a class action by the U.S. Department of Justice—one of four such lawsuits against municipalities—this one against the Village of Addison, Illinois—charging it with the misuse of its blight elimination process by focusing its property acquisition efforts on parts of town with a Mexican population, and displacing it in the process).

169. FRIEDEN & SAGALYN, *supra* note 18, at 45 (describing how in Los Angeles, no less than five freeways were routed through the largely Mexican Boyle Heights area). See also James W. Follin, *Coordination of Urban Renewal With the Urban Highway Program Offers Major Economies in Cost and Time*, URB. LAND, Dec. 1956, at 3-6 (explaining the correspondence of “urban renewal” and the “urban highway program”); Gary T. Schwartz, *Urban Freeways and the Interstate System*, 49 S. CAL. L. REV. 406, 484-85 (1976) (stating that “[i]t is also true that in the 1955 designations a disproportionate number of Interstates were routed through low-income neighborhoods.”).

gave them about \$6,000 a house and turned them loose onto society.¹⁷⁰

Fort Worth City Attorney S. G. Johndroe, Jr., delivered the same message. His words may have been not so blunt but the tune was familiar:

Quite frequently, if the city is involved in condemning some property, most of the adjacent property consists of cheap, substandard residential units—rental properties in the majority [of cases]. A substantial number of these highways in the more populous urban areas are constructed in locales for what might be considered a dual purpose—highway purposes and, vicariously, urban renewal purposes. There isn't anything wrong with that, and it appears increasingly to become the rule rather than the exception.¹⁷¹

Such was the reality behind the Berman-style urban renewal process which was widely misrepresented by the press to the country as "slum clearance" assertedly intended to revitalize cities by eliminating the slum inhabitants' wretched living conditions and replacing them with decent dwellings.¹⁷² But in reality, American cities declined, and those displaced by redevelopment were subjected to a double whammy. As mostly month-to-month tenants of modest means, they were routinely uncompensated or undercompensated by hardnosed redevelopment functionaries, while losing the only homes they had.¹⁷³ They were forced to incur the cost of relocation into other blighted areas, which was all they could afford. Redevelopment has historically been a net destroyer of affordable, middle and lower-middle

170. Nicole Stelle Garnett, *The Public-Use Question as a Takings Problem*, 71 GEO. WASH. L. REV. 934, 953 (2003) (quoting FRIEDEN & SAGALYN, *supra* note 18, at 29); see also FRIEDEN & SAGALYN, *supra* note 18, at 28 (deliberate routing of a highway in Nashville through the center of a black community, a black college and sixteen blocks of largely black-owned businesses).

171. S. G. Johndroe, Jr., *Effective Examination*, 1968 8TH INST. ON EMINENT DOMAIN 79, 84-85 (Matthew Bender).

172. See *Berman v. Parker*, 348 U.S. 25, 30 (1954).

173. For a classic horror story that emerged from the Washington redevelopment project, see the infamous *Mame Riley* case, *Riley v. District of Columbia Redevelopment Land Agency*, 246 F.2d 641 (D.C. Cir. 1957), in which the redevelopment agency took Ms. Riley's home (that included a small rented apartment) but undercompensated her to such an extent that she wound up with no roof over her head and no compensation, but still owing a substantial sum to her mortgagee. The court found nothing wrong with that legally; its majority reversed on the factual grounds that the condemning agency's appraiser made erroneous statements at trial as to the payoff rate of the mortgage. *Id.* at 644-45. But Warren Burger, then a Judge on the D.C. Circuit, was willing to overlook the tainted valuation testimony, and dissented, arguing that no relief whatever should be provided to the unfortunate Ms. Riley. *Id.* at 649.

urban class housing,¹⁷⁴ thus making the task of finding replacement dwellings more difficult and more costly.

Now, a half-century later, in a climate of acute scarcity and high cost of decent but affordable dwellings, current redevelopment practices that destroy low and moderately priced housing represent extremely bad public policy. They contribute to sprawl as the displaced population has no alternative but to seek replacement housing elsewhere, which often means having to move to the suburbs and thus contributing to the phenomenon of declining city populations. This process is particularly unfortunate when juxtaposed with state laws requiring that municipalities formulate general plans containing housing elements that call for providing adequate, affordable housing—a mandate honored in breach rather than in obedience.¹⁷⁵ Thus, on the one hand, the government calls for affordable housing construction, but on the other hand it destroys such existing housing through the redevelopment process.

California statutes, for example, require redevelopment agencies to spend 20% of their budgets on housing to replace the housing destroyed in the process of redevelopment.¹⁷⁶ But only a fraction of this amount is actually spent on housing, and of that 12% is spent on administrative overhead.¹⁷⁷ It is unsurprising that this is the case because there is no enforcement apparatus to enforce these provisions of the law.

In short, redevelopment has historically provided downtown business interests with new office buildings at a lower cost than what they would have to pay otherwise, and it has cheapened mall construction for mass merchandisers. But otherwise it is to curing modern urban ills and the decline of cities what bleeding the patient was to seventeenth century medicine. Ever since the end of World War II, it has been relentless government policy to induce, encourage, and subsidize urban populations to leave cities and move to the suburbs where life has been generally more agreeable and housing opportunities have been consistently better, more affordable, and in the long run more lucrative to home owners. Pretending

174. See Charles W. Hartman, *Relocation: Illusory Promises and No Relief*, 57 VA. L. REV. 745, 745-46 (1971) (noting that between 1950 and 1968, 2.38 million housing units were destroyed by redevelopment). By the mid-1960s, some 111,000 families and 17,800 businesses were being displaced by eminent domain *annually*. A COMMISSION REPORT, RELOCATION: UNEQUAL TREATMENT OF PEOPLE AND BUSINESS DISPLACED BY GOVERNMENTS, ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS 11-13 (1965); see also Mandelker, *supra* note 166, at 108 n.45 (collecting materials attesting to the massive failure of condemning entities to provide adequate substitute housing for the persons displaced by redevelopment). As a California Court of Appeal observed, "relocation is the weak link" of redevelopment. *Gonzales v. City of Santa Ana*, 16 Cal. Rptr. 2d 132, 139 (1993).

175. CAL. GOV'T CODE §§ 65302(c), 65580-81 (West 1997); see also Michael M. Berger, *So Far, State's Housing Plan Has Been All Yak, No Shack*, L.A. DAILY J., Mar. 2, 2005, at 6.

176. MORR Report, *supra* note 38, at 26.

177. *Id.* ("Despite the 20% [affordable housing] requirement, the 2002-2003 State Controller's Report summary (page 253) shows barely 3% was spent on low and moderate income housing.")

that the subsidized construction of a few structures—such as downtown office buildings, shopping malls (a favorite redevelopment use), automobile manufacturing facilities, car dealerships, and even gambling casinos—will revitalize American cities whose population has fled (and still is fleeing) to the suburbs, is at best an exercise in irrational futility and at worst an unabashed raid on the public treasury that bears no relation to the high-minded justifications for the use of eminent domain in the redevelopment process.

It must be stressed that these days redevelopment usually has nothing to do with "slum clearance." That is so because the population living in or near slum or genuinely blighted areas is poor and therefore incapable of patronizing and supporting the upscale stores and other commercial facilities that are usually built on redevelopment sites.¹⁷⁸ Thus, today's would-be redevelopers won't consider genuinely blighted parts of town, but rather what has been aptly termed "blight that's right"—i.e., parts of town that are sufficiently downscale to support a colorable claim of being "blighted," but good enough for commercial redevelopment that will attract free-spending customers to the new businesses built on the redeveloped land.¹⁷⁹

As for the visions of a more affluent municipal tomorrow generated by redevelopment revenues, the process is hardly beer and skittles. As a matter of common sense, in spite of the municipal government's participation in the forcible acquisition of land for redevelopment, and its acting as friendly financier for the redevelopers, redevelopment is no more than development with the prefix "re" attached to it. It is an entrepreneurial activity that like all other such activities carries with it the risk of failure,¹⁸⁰ thereby leaving

178. Associated Press, *Wrecking Ball to Launch Big Philadelphia Face Lift*, L.A. TIMES, Mar. 21, 2002, at A24 ("In some neighborhoods, empty buildings stretch for blocks. Even in Center City—the downtown area that is home to the Liberty Bell and Independence Hall, as well as thriving restaurants—sit near-vacant and decaying townhouses."). Though of late there has begun a trickle of persons returning to cities which are responding by providing new housing opportunities in the form of apartments, see Daniel Yi, *Home Builders Looking Inward*, L.A. TIMES, May, 24, 2005, at B1, this urban influx tends to consist of empty nesters and young singles, thus leaving open the question whether this trend will result in the revival of cities as a habitat for middle class families that are the backbone of successful urban societies. See Joel Kotkin, *Hip Loftsters Will Stay Lonely, for Suburbs Still Seduce*, L.A. TIMES, Aug. 14, 2005, at M1.

179. FRIEDEN & SAGALYN, *supra* note 18, at 23; see also George Lefcoe, *Finding the Blight That's Right for California Redevelopment Law*, 52 HASTINGS L.J. 991, 1003-04 (2001).

180. Redevelopment projects have failed in Yonkers, N.Y., Manhattan (the abortive New York Stock Exchange caper that cost the city \$109 million with nothing to show for it), California (redevelopment projects failed in Fresno, North Hollywood, Redondo Beach, Hawthorne, and Pasadena), and Minneapolis, *Johnson v. Minneapolis*, 667 N.W.2d 109 (Minn. 2003). See generally Gideon Kanner, *Making Laws and Sausages: A Quarter-Century Retrospective on Penn Central Transportation Co. v. City of New York*, 13 WM. & MARY. BILL RTS. J. 653, 687 n.142 (2005). For examples of other condemnations that wasted fortunes and failed to achieve their announced

the municipal taxpayers holding the bag when a project fails¹⁸¹ while the local city hall movers and shakers go on to promote some other dubious scheme in an effort to provide the city with something for nothing—i.e., a new source of funds without the need to confront the electorate and raise taxes as may be necessary for proper municipal operations. Municipal functionaries are usually something less than virtuosi when it comes to profit-making land development deals, so it is not surprising that redevelopment deals usually favor the redevelopers at public expense, and that redevelopment has a history of delays, cost overruns, and failures.

Of course, one cannot very well ask the courts to involve themselves in the supervision of such activities to assure sound business practices by municipalities. Judges are no more inclined and qualified to do so than other government actors. But it is troubling to see the courts blithely or even enthusiastically encouraging the various reckless redevelopment schemes without any indication of awareness by judges that they are facilitating a risky and economically predatory process that not only harms the condemnees who are often viewed from the bench as second-class citizens, but also puts the taxpayers' interests into serious jeopardy.¹⁸² It need not be that way. In risky enterprises the risk should be borne by the parties who stand to benefit from the redevelopment enterprise,¹⁸³ not by the public, and certainly not by the victims of the process who—adding insult to injury in the case of displaced businesses—are told by the courts that their business losses are entirely noncompensable.¹⁸⁴ For a refreshing judicial departure from the prevailing see-no-evil, etc. judicial complacency in dealing with redevelopment, see *Regus v. City of Baldwin Park*,¹⁸⁵ containing an astute judicial assessment of the usual redevelopment process, authored by California Court of Appeal Associate Justice Macklin Fleming, which bears repeating:

[U]nrestricted use of redevelopment powers fosters speculative competition between municipalities in their attempts to attract private enterprise, speculation which they can finance in part with

purposes, see *id.* at 763, n.450, and Gideon Kanner, *What to Do Until the Bulldozers Come?—Precondemnation Planning for Landowners*, 27 REAL EST. L. J. 47, 54 nn.21 & 22 (1998).

181. Compare *Yonkers Cmty. Dev. Agency v. Morris*, 335 N.E.2d 327 (N.Y. 1975) with *Yonkers v. Otis Elevator Co.*, 844 F.2d 42 (2d Cir. 1988) (city condemned land for expansion of the Otis plant, but later Otis shut down the plant and left town, leaving the city holding the bag). For other instances of costly redevelopment and other public project failures, see, e.g., Kanner, *Making Laws and Sausages*, *supra* note 180, at 693 n.165, 763 n.450.

182. Thus, in California the bonded indebtedness run up by redevelopment agencies has soared from \$5 billion in 1995 to \$56 billion in 2003. MORR Report, *supra* note 38, at 12.

183. "He who takes the benefit must bear the burden." CAL. CIV. CODE § 3521 (West 1997).

184. *Cmty. Redevelopment Agency v. Abrams*, 543 P.2d 905, 922 (Cal. 1977); but see CAL. CIV. PROC. CODE § 1253.510 (1982) (enacted in 1976 on recommendation of the California Law Revision Commission to abrogate the unjust and defective judge-made noncompensability rule).

185. 139 Cal. Rptr. 196 (Ct. App. 1977).

other people's money. When the extraordinary powers of legislation designed to combat blight and renew decayed urban areas are used as a fiscal device to promote industrial, commercial, and business development in a project area that is merely underdeveloped rather than blighted, competitive speculation may be turned loose. By misemploying the extraordinary powers of urban renewal a redevelopment agency captures pending tax revenues which it can then use as a grubstake to subsidize commercial development within the project area in the hope of striking it rich. Such schemes contemplate borrowing money by issuing bonds on the strength of assured future tax revenues, money which is then used to acquire, improve, and resell property within the project area at a loss as an inducement to business enterprises such as K-Mart to locate within the project area rather than in neighboring communities. In essence, tax revenues are used as subsidies to attract new business. The immediate gainers are the subsidized businesses. The immediate losers are the taxpayers and government entities outside the project area, who are required to pay the normal running expenses of government operation without the assistance of new tax revenues from the project area.

The promoters of such projects promise that in time everyone will benefit, taxpayers, government entities, other property owners, bondholders; all will profit from increased development of property and increased future assessments on the tax rolls, for with the baking of a bigger pie bigger shares will come to all. But the landscape is littered with speculative real estate developments whose profits turned into pie in the sky; particularly where a number of communities have competed with one another to attract the same regional businesses. Undoubtedly, it was for these reasons that the Legislature restricted urban renewal to blighted areas, and, when faced with abuses in 1976, further tightened its restrictions.

At bench, City's projected redevelopment plan possesses a particularly speculative cast in that the businesses it hopes to attract through redevelopment are primarily those of consumption rather than production, businesses such as hotels and shopping centers whose acquisition does not increase the total wealth of a region as a whole but merely redistributes the existing supply by capturing business from rival communities. The success of such strategy

assumes the absence of effective counter-measures by rival communities targeted for displacement. Private enterprises may embark on such speculative competitive enterprises. Under present laws, public entities may not.¹⁸⁶

As suggested by Justice Fleming, redevelopment can be a zero-sum game. To the extent municipality *A* is able to execute a redevelopment plan and construct shopping malls, and the like, adjacent municipality *B*, or other nearby areas, cannot construct similar facilities since a single region has only so many consumers with so many discretionary dollars to spend. This process thus effectively captures government power to limit the business potential for competing facilities.

The Uniform Relocation Assistance Act,¹⁸⁷ adopted by Congress in 1970 as a reaction to numerous horror stories of mass undercompensation and other abuses of American condemnees,¹⁸⁸ curbed some of the worst abuses, but on the whole proved to be pretty much a “toothless tiger” because of the limited scope of its benefits and its prohibition on condemnees’ lawsuits seeking its enforcement.¹⁸⁹ Thus, de facto, the Act makes condemnees dependent on a particular condemnor’s good faith in providing benefits under it. Some states follow the Act’s provisions only when federal funds are used for a particular project, leaving their citizens whose property is taken for other projects in the same unfortunate condition that existed before the passage of the Act.¹⁹⁰

The basic problem of undercompensation has also defied solution because of the economics of litigation. Unless the “spread” between the condemnor’s and condemnees’ appraisals is large enough to make litigation worthwhile, small condemnees—people like Suzette Kelo and her neighbors—have no realistic recourse to the judicial valuation process because (absent the unlikely appearance on the scene of a pro bono “angel”) the cost of appraisals and litigation is likely to consume all or most of the recovery above the condemnor’s offer. Therefore it is not surprising that in the vast majority of cases the targeted condemnees in downscale parts of town feel compelled to accept the government offers, concluding bitterly that “you can’t fight city hall.”

186. *Id.* at 982-83.

187. 42 U.S.C. §§ 4501-55 (2000).

188. See, e.g., *Uniform Relocation Assistance and Land Acquisition Policy: Hearings on H.R. 386 AND Related Bills Before the H. Comm. on Public Works*, 90th Cong. 1-615 (1968).

189. Kanner, *Making Laws and Sausages*, *supra* note 180, at 686. See generally Catherine R. Lazuran, *Annotation: Uniform Relocation: Assistance and Real Property Acquisition Policies Act of 1970*, 33 A.L.R. FED. 9 (1977) (analyzing case law construing the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970).

190. See Peter W. Salsich, Jr., *Displacement and Urban Reinvestment: A Mount Laurel Perspective*, 53 U. CIN. L. REV. 333, 347-47 (1984) (discussing how the courts’ narrow interpretation of the URA has resulted in governmental “buck-passing”).

Justice O'Connor also deserves credit for taking note in her *Kelo* dissent of the reality that lucrative *Kelo*-like sweetheart deals¹⁹¹ are not likely to be casually handed out by municipal politicians to total strangers.¹⁹² More likely, their beneficiaries will be individuals who are politically and economically well connected with the local political structure,¹⁹³ who thus stand to become the new Robber Barons, not unlike the nineteenth century railroad tycoons who amassed fortunes while their companies abused the condemnation process with judicial acquiescence¹⁹⁴ It is obvious that today an unwholesomely close relationship exists between municipal officials and land-use functionaries on the one hand, and large redevelopers on the other. Morally speaking, municipal politics is frequently the basement, if not the sewer, of American politics, so the potential for municipal corruption is now greatly increased, without any meaningful checks on such abuses.

While all this admittedly goes to the wisdom of policies pursued by municipalities, and thus in theory would seem to involve matters that the courts should not be concerned with, there is still a legitimate question for the courts. Namely, the courts need to determine whether these speculative public-private ventures deserve being treated as presumptively valid, or whether, as Justice Kennedy suggests in his concurrence, some of these situations require a more skeptical standard of review aimed at determining whether these activities are indeed "public use" or merely camouflage for private enrichment at public cost.¹⁹⁵

VIII. LAW OR POLICY?

On August 18, 2005, Justice Stevens made a remarkable speech to the Clark County (Las Vegas) Bar Association, in which he discussed several

191. The redeveloper chosen in *Kelo* was negotiating a contract to get exclusive possession and control of a 90-acre waterfront parcel, on a 99-year lease, with rent payable at \$1 per year. *Kelo v. City of New London*, 125 S. Ct. 2655, 2660 n.4 (2005). Sweetheart deals like that are common. Indeed, the linchpin of redevelopment is the resale of the taken and cleared land to redevelopers for less than the municipal cost of acquisition. See generally William H. Simon, *The Community Economic Development Movement*, 2002 WIS. L. REV. 377, 380-81 (discussing how the redevelopment process is characterized by substantial "write downs" and "sweetheart deals" for private developers as an incentive to develop an area).

192. *Kelo*, 125 S. Ct. at 2677.

193. *Id.*

194. See Weston L. Johnson, Note, *Benefits and Just Compensation in California*, 20 HASTINGS L.J. 764, 765-66 (1969) (describing abuses in early railroad condemnations in California); see also KEVIN STARR, *INVENTING THE DREAM 200* (Oxford University Press 1985) (discussing how such abuse was particularly common in California, which suffered from a notoriously incestuous relationship between its judiciary and railroad management).

195. *Kelo*, 125 S. Ct. at 2670.

controversial decisions of the 2004 term, including *Kelo*.¹⁹⁶ As for *Kelo*, his defense of the Court's handiwork consisted primarily of the assertion that

since 1896 our cases (including an opinion by Justice Holmes) have interpreted the term "public use" to mean "public purpose", and we have upheld takings that served a valid public purpose even though the property was either initially or ultimately transferred to private owners. Moreover, in evaluating the validity of comprehensive programs, we have focused on the purpose of the entire project, rather than its impact on individuals who happen to own property in the targeted area.¹⁹⁷

Unfortunately, this justification mangles history and does not accurately depict what the Court had done in 1896, or how that judicial effort affected the law of eminent domain in subsequent cases. To begin with, the 1896 case, *Fallbrook Irrigation District v. Bradley*,¹⁹⁸ was not truly an eminent domain case, and really had nothing to do with the Fifth Amendment's "public use" clause. *Fallbrook* was a lawsuit by an Englishwoman invoking federal diversity jurisdiction to enjoin the sale of her 40-acre lot by the Irrigation District for her failure to pay a \$51.31 assessment imposed on it.¹⁹⁹ Her rather quaint theory was that providing irrigation by the District was not a permissible public purpose, and hence the assessment against her land was invalid on substantive due process grounds. "It is communism and confiscation under the guise of law," argued her counsel, Joseph H. Choate.²⁰⁰ The *Fallbrook* court had no difficulty rejecting that argument by

196. Justice John Paul Stevens, U.S. Supreme Court Justice, Judicial Predilections, Address Before the Clark County Bar Association (Aug. 18, 2005) [hereinafter *Judicial Predilections*].

197. *Id.* Evidently Justice Stevens was referring to *Fallbrook Irrigation District v. Bradley*, 164 U.S. 112 (1896), which was not even a condemnation case, but one in which a property owner whose land lay within an irrigation district sought to enjoin the sale of her property for nonpayment of an assessment duly levied on her land by the District.

In the interest of accuracy, it should be noted that in 1896 the Court also decided *United States v. Gettysburg Elec. Ry. Co.*, 160 U.S. 668 (1896), a right-to-take case. But the use sought to be made of the condemned property in that case was for a national park covering the Gettysburg battlefield, as clear a use by the public as can be imagined, and as can be attested to by anyone who ever visited that national shrine.

198. 164 U.S. 112 (1896). In *Kelo*, the Court cited to *Fallbrook* for the proposition that "when this Court 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.'" *Kelo*, 125 S. Ct. at 2662 (emphasis added). No explanation was offered why so departing from the constitutional language was "more natural." I believe to a total certainty, beyond the possibility of quibble, that were Justice Stevens to drop in on his neighbor to borrow a lawnmower, he would *not* say "May I purpose your lawnmower?" He would more naturally say, "May I use your lawnmower?"

199. *Fallbrook*, 164 U.S. at 114-22. The opening sentence of of the *Fallbrook* opinion reads: "The decision in this case involves the validity of the irrigation act enacted by the legislature of the State of California . . ." *Id.* at 151. No one was trying to condemn anything from anybody.

200. *Id.* at 126.

pointing out that under state law, irrigation of arid land was indeed a public purpose by the terms of the state constitution and laws,²⁰¹ that there was nothing in the Due Process Clause to the contrary, and thus the assessment was legal. The Court also noted that what the irrigation district was doing met “public purpose” criteria, thus making the assessment proper.²⁰²

More important, whatever Justice Peckham may have said by way of stray dictum about “public use,” which was not in issue, the *Fallbrook* opinion made it clear that “[a]ll landowners in the district have a right to a proportionate share of the water, and no one landowner is favored above his fellow in his right to the use of the water.”²⁰³ Thus, even if one were to make the same error that Justice Peckham made later in *Clark*—where he wrongly characterized the *Fallbrook* issue as “whether the use of the water was a public use when a corporation sought to take land by condemnation under a state statute”²⁰⁴—the use of the water would still be plainly *by the public*. Ironically, Ms. Bradley argued that this universal availability of water to all landowners in the district was illegal in the sense that it was too public because water was supplied to all, whether they needed it or not.²⁰⁵ One is left to wonder whether anyone on the Court, particularly all those smart clerks who are supposed to check out citations for the Justices, actually read the holding of *Fallbrook*, and its subsequent misuse in *Clark v. Nash*, before proclaiming it to be the seminal authority in the *Kelo* opinion.²⁰⁶

The *Fallbrook* language noted by Justice Stevens properly spoke of “public purpose”—*not* “public use”—because that was at issue in that case inasmuch as *Fallbrook* was not a condemnation case but one challenging government taxation powers. Nothing in *Fallbrook*, certainly nothing at

201. *Id.* at 159.

202. *Id.* at 164.

203. *Id.* at 162 (emphasis added).

204. *Clark v. Nash*, 198 U.S. 361, 369 (1905) (emphasis added). This judicial statement was triply in error: (a) there was no “corporation”—the District was a government entity; (b) there was not even a semblance of private use—as noted, “[a]ll landowners in the district” had the right to use the water, *Fallbrook*, 164 U.S. at 162; and (c) *Fallbrook* was *not* a case in which “the corporation” sought to take land by condemnation—it was a lawsuit by a landowner challenging the validity of an assessment.

205. *Fallbrook*, 164 U.S. at 156.

206. In *Kelo*, the Court stated that *Fallbrook* changed the law from “public use” to “public purpose.” *Kelo v. City of New London*, 125 S. Ct. 2655, 2663-64 (2005). It did no such thing. It was not a condemnation case nor even an inverse condemnation case—it was a due process challenge to the validity of legislation.

page 159 thereof (mistakenly cited by Justice Peckham in *Clark*),²⁰⁷ decided any condemnation issues, for none were before the court. This entire judicial “public use/public purpose” edifice was thus built on the nonexistent *Fallbrook* holding, and thus has no doctrinal or historical foundation whatsoever.²⁰⁸

Nor is Justice Stevens assisted by his reference to Justice Holmes’ views in *Strickley v. Highland Boy Gold Mining Co.*²⁰⁹ In *Strickley*, Justice Holmes followed the factually and legally erroneous *Clark v. Nash* opinion without examining its origins.²¹⁰ This is understandable, particularly in those days when the Justices were unassisted by a multiplicity of clerks as they are now, and certainly could not be blamed for accepting the then one-year-old and seemingly clear holding in *Clark*.

Insofar as Justice Stevens supported the idea that the needs of the “entire project” take precedence over the “impact on individuals who happen to own property in the targeted area,”²¹¹ he disregarded the Supreme Court’s holding (by Justice Holmes as it happens) that in eminent domain cases the Constitution deals with people, not with tracts of land.²¹² Also, Justice Stevens failed to recognize Justice Potter Stewart’s more recent and similarly astute point that property does not have rights—people do.²¹³ It is therefore difficult to see, and Justice Stevens provides no explanation, why the needs of “the project” should take precedence over people’s constitutional rights any more than the needs of efficient, area-wide criminal law enforcement should trump the guarantees of the Fourth and the Fifth Amendment. Finally, though in eminent domain cases that challenge “public use” the identity of the transferee may be significant, the issue is not, as Justice Stevens apparently believed, whether the property is transferred to other private owners. It has always been hornbook law that privately owned public utilities, pipelines, railroads, universities, and even private individuals can exercise the power of eminent domain when authorized to do so by the

207. *Clark*, 198 U.S. at 369. Thus, embarrassing as that may be, it appears that Justice Peckham did not understand or remember his own decision in the *Fallbrook* case when he wrote in *Clark v. Nash* that *Fallbrook* was a condemnation case by a “corporation.” *Id.*

208. I would not ordinarily dream of saying this on my own in public print, but what Justice Peckham did in *Clark* does call to mind the immortal line of Yale’s beloved Professor Fred Rodell who once suggested that the proper way to criticize a defective court opinion might be to say “Justice Fussbudget, in a long-winded and vacuous opinion, managed to twist his logic and mangle his history so as to reach a result that was not only reactionary but ridiculous.” Fred Rodell, *Goodbye to Law Reviews – Revisited*, 48 VA. L. REV. 279, 280 (1962).

209. 200 U.S. 527 (1906).

210. *Id.* at 531.

211. Judicial Predilections, *supra* note 196.

212. *Boston Chamber of Commerce v. Boston*, 217 U.S. 189, 195 (1910).

213. *Lynch v. Household Fin. Corp.*, 405 U.S. 538, 552 (1972).

legislature.²¹⁴ It is the *use* of the taken land, not the identity of the taker or user, that is decisive of whether the taking is for "public use."

Whether or not there are collateral benefits to the public in a private taking is in no way decisive of the *use* to which the taken property is being put. At least in the slum clearance cases, one can say that the "public purpose" is the elimination of a social evil, as in *Berman*. But where one's ownership is in no way objectionable and the taking is no more than a candid municipal effort at lucrative "yuppification," as Michael Kinsley put it,²¹⁵ the "public" part of the asserted "public purpose" becomes difficult to discern. It is disgraceful that the application this sort of thing permits the wealthy to take advantage of the poor or of members of the lower middle class. At least Robin Hood robbed the retinue of the Sheriff of Nottingham, not the local villeins.

In the end Justice Stevens properly draws a distinction between policy and law, arguing that the courts must follow the latter in disregard of the former.²¹⁶ While correct as an abstract proposition (that the Court often honors in breach),²¹⁷ with all due respect, this approach presupposes that the decisional "law" of eminent domain on which the Court relied in *Kelo* is divorced from policy, and that the Court is keeping the two separated. But as shown above, in the cases relied on by Justice Stevens, public policy (efficient resource exploitation, slum elimination, etc.) was the core reason used as justification for the use of eminent domain, originally *as a narrow exception to the "public use" limitation*.²¹⁸ Why similar policy considerations should not animate development of eminent domain law in the twenty-first century, precisely as it did in the nineteenth century, has not been explained.

But even if you think I am wrong on this point, a problem still remains. Every principle, legal or otherwise, can be carried to unjustifiable extremes. In *Kelo* the Court failed to confront the question of when does the extension of even a sound legal principle cross the line into *reductio ad absurdum* territory. The reason why *Kelo* has been the subject of such intense and widespread criticism across the country is that as is clear to the vast majority of Americans, it did precisely that. Such failure has rightly caused

214. CAL. CIV. CODE § 1001 (West 1982); *see also* Linggi v. Garovotti, 286 P.2d 15, 17-18 (1955).

215. Kinsley, *supra* note 6.

216. *Kelo v. City of New London*, 125 S. Ct. 2655, 2688 (2005).

217. I resist the temptation to digress, but it seems only proper to mention that the Supreme Court certainly does use policy to shape the law, with regularity. The subjects of death penalty and affirmative action come to mind as conspicuous examples.

218. *See supra* notes 72 and 74.

widespread anger and dismay that, in a wooden application of an outmoded rule, the revered Supreme Court of the United States could be guilty of such an appalling lack of judgment and common sense.

Finally, the *Kelo* decision, made without reference to the compensation element (on which the *Berman* decision ultimately hinged), is morally and legally deficient. It is bad enough, for any reason, that someone like Wilhelmina Derry, an eighty-seven-year-old widow is thrown out of the only home she has ever known. But to do so for the enrichment of other private parties without genuinely just compensation (or even *any* compensation in the cases of displaced businesses) is utterly indefensible. While the Court noted the existence of the undercompensation problem, it refused to deal with it.²¹⁹ Far from making the Court's decision defensible, such acknowledgment only brings to mind one of Ambrose Bierce's acerbic comments on the law:

An Associate Justice of the Supreme Court was sitting by a river when a Traveler approached and said:

"I wish to cross. Will it be lawful to use this boat?"

"It will," was the reply; "it is my boat."

The Traveler thanked him, and pushing the boat into the water embarked and rowed away. But the boat sank and he was drowned.

"Heartless man!" said an Indignant Spectator. "Why did you not tell him that your boat had a hole in it?"

"The matter of the boat's condition," said the great jurist, "was not before me."²²⁰

IX. CONCLUSION

*"Eminent domain for private development is nothing more than a market shortcut and nothing less than government-sanctioned bullying of the people who least deserve it."*²²¹

219. *Id.* at 2668 n.21.

220. AMBROSE BIERCE, *A Defective Petition*, in *THE COLLECTED WRITINGS OF AMBROSE BIERCE*, 612 (5th ed. 1970).

221. Welch, *supra* note 49.

Are there any limits to the plastic definition of the constitutional term "public use" left after *Kelo*, or did the Supreme Court grant Professor Merrill his wish?²²² The answer—or perhaps more accurately, non-answer—that the Supreme Court gave us may as well have come from George Orwell ("public" means "private" and "use" means "purpose," or "prognosticated municipal prosperity"),²²³ or, as your teenager might put it, "Whatever!"—i.e., whatever each of the countless municipalities in each of the fifty states may say it is. Whatever that may be, it isn't the principled constitutional law that through the Bill of Rights is supposed to protect all citizens' basic liberties from an overreaching government, much less from a self-serving, government-business, profit-seeking alliance. No Americans, no matter how poor and powerless, should be forcibly thrown out of their own homes and undercompensated in the process; certainly not because another private party wants to make money from their land without observing the basic societal nicety of buying it in a voluntary transaction.²²⁴ *A fortiori*, it is nothing short of scandalous that small business people should see their businesses destroyed in a process that solemnly promises "just compensation," but in the event leaves them uncompensated for the value of their businesses.²²⁵

222. Professor Thomas W. Merrill has argued, presumably with a straight face, that attempts to impose *any* substantive limit on the public use requirement by the judiciary are in the nature of a "siren song," and that the only limits on the exercise of eminent domain should be procedural. Thomas W. Merrill, *The Misplaced Flight to Substance*, 19 PROB. & PROP., (No. 2), Mar.-Apr. 2005, at 16, 18. Thus, Professor Merrill implicitly posits that the constitutional framers must have been absent-minded when they inserted so meaningless a phrase into the Bill of Rights. In fact, Professor Merrill's proposed nostrums are already a large part of the law of eminent domain where they do nothing to bring about the benefits he envisions. For a vivid example of how courts can simply run roughshod over legislative procedural safeguards, see *Yonkers Cmty. Dev. Agency v. Morris*, 335 N.E.2d 327 (N.Y. 1975). See also Sonya Bekoff Molho & Gideon Kanner, *Urban Renewal: Laissez-Faire for the Poor, Welfare For the Rich*, 8 PAC. L.J. 627, 636-40 (1977) (commenting on *Morris*).

In the end, Professor Merrill's argument brings to mind the line of *My Fair Lady's* Professor Henry Higgins who opined that "the French never care what they do, actually, as long as they pronounce it correctly." MY FAIR LADY (Warner Brothers 1964).

223. GEORGE ORWELL, *Politics and the English Language* (1946), reprinted in 4 THE COLLECTED ESSAYS, JOURNALISM AND LETTERS OF GEORGE ORWELL 127, 133 (Sonia Orwell & Ian Angus eds., 1968).

224. I am not oblivious to the holdout problem, but the fact is that for several centuries Americans have managed to build great cities and great private structures without resorting to forced displacement of their less powerful fellow citizens. See Brief of John Norquist, President of the Congress for New Urbanism as Amicus Curiae Supporting Petitioners, *Kelo v. City of New London*, 125 S. Ct. 2655 (2005) (No. 04-108), 2004 WL 2811055. In the worst holdout cases it is only a case of the old saw that all prayers are answered, but sometimes the answer is "no." Where is it written that developers must always have their way?

225. A particularly vicious aspect of this noncompensability rule are cases in which business property is condemned and turned over to other business owners including at times the displaced business owner's competitors. See Dean Starkman, *Take and Give: Condemnation Is Used to Hand*

That the former business people's land is then turned over to other, more municipally favored business people so *they* can profit from it is morally intolerable, but that is just what the rule articulated in *Kelo* has endorsed.

Involuntary acquisition of people's homes should be unthinkable without ample procedural safeguards and payment of full, genuinely "just compensation" that actually recompenses those being displaced for *all* their demonstrable economic losses. That the courts have failed to insist on that as a constitutional minimum before allowing such takings—if only to deem it a part of the full cost of the project, or at least of the redevelopers' cost of doing business—is a pervasive scandal in American law. Such practices do indeed smack of kleptocracy, and justifiably bring the courts, and the judicial system they administer, into public disrepute.

When viewed historically, the body of the U.S. Supreme Court decisional law interpreting the public use clause of the Fifth Amendment is not only a classic illustration of the slippery slope phenomenon, but also a prime example of wooden judicial reasoning that stubbornly fails to differentiate between the expressly voiced policy factors that inspired the decisional law that emerged from occasional nineteenth century easement takings—such as railroad rights of way across farmland or other sparsely occupied territory that usually displaced no one—and today's mass displacement of urban populations. Justice Thomas hit the bull's eye in his dissent by pointedly noting that the Supreme Court's public use jurisprudence is defective because the legal "doctrine" that emerges from it—if one can properly use that term—is not the product of reasoned development in the law but rather of blindly adopted rulings "with little discussion of the [Eminent Domain] Clause's history and original meaning . . ." ²²⁶ Over forty years ago Professor Allison Dunham concluded, after a study of three decades of Supreme Court eminent domain law, that the Supreme Court's efforts in this field have been a failure. ²²⁷ Little has changed since then—less still has changed for the better. Most commentaries agree that the law of eminent domain, including its right-to-take aspects, is defective. ²²⁸ Justice Thomas was also right in insisting that

One Business Property of Another, WALL ST. J., Dec. 2, 1998, at A1; see also D. Michael Risinger, *Direct Damages: The Lost Key to Constitutional Just Compensation When Business Premises Are Condemned*, 15 SETON HALL L. REV. 483, 526-40 (1985) (demonstrating that in the entire twentieth century no commentator or treatise author (save one student note) has supported the judicial denial of compensation for condemnees' business losses); Gideon Kanner, *When Is "Property" Not "Property Itself": A Critical Examination of the Bases of Denial of Compensation for Loss of Business Goodwill*, 6 CAL. W. L. REV. 57, 61-64 (1969).

226. *Kelo v. City of New London*, 125 S. Ct. 2655, 2682 (Thomas, J., dissenting). The preceding discussion of the misguided *Fallbrook-Clark-Strickley* progression is Exhibit A for Justice Thomas' concerns. See *supra* notes 198-218 and accompanying text.

227. Allison Dunham, *Griggs v. Allegheny County in Perspective: Thirty Years of Supreme Court Expropriation Law*, 1962 SUP. CT. REV. 63, 106 (1962).

228. See, e.g., James G. Durham, *Efficient Just Compensation as a Limit on Eminent Domain*, 69 MINN. L. REV. 1277 (1985); Joseph J. Lazzarotti, *Public Use or Public Abuse*, 68 UMKC L. REV. 49

America's twenty-first century law of eminent domain should rest on a doctrinally sounder foundation than "Justice Peckham's high opinion of [nineteenth century] reclamation laws"²²⁹

To the extent the Supreme Court's majority has chosen to tamper with the meaning of language in disregard of society's moral fundamentals, it has abdicated its responsibility for enforcement of a vital part of the Bill of Rights, abandoning that task to the self-serving decisions of a horde of unaccountable, faceless municipal politicians and bureaucrats.²³⁰

The Constitution does not require courts to facilitate predatory behavior by business-government alliances seeking to increase their cash flow by depriving people of modest means of their homes. The Public Use clause is not "hortatory fluff." Its plain meaning deserves judicial respect, no less than other cherished constitutional provisions. Those who seek its protection deserve a better judicial reception than the "thinly disguised contempt" for their vital interests that is their frequent litigational lot.²³¹ Thus, Justice Stevens' extrajudicial effort to depict himself as compelled by law to endorse the enrichment of the developer and Pfizer by driving Suzette Kelo and her neighbors from their modest homes without full compensation, in no way justifies his irresponsible and profoundly immoral handiwork.²³²

(1999); Edward D. McKirdy, *The New Eminent Domain: Public Use Defense Vanishing in Wake of Growing Privatization of Power*, 155 N.J.L.J. 1145 (1999); Jennifer Maude Klemetsrud, Note, *The Use of Eminent Domain for Economic Development*, 75 N.D. L. REV. 783 (1999); Jennifer J. Kruckeberg, Note, *Can Government Buy Everything?: The Takings Clause and the Erosion of the "Public Use" Requirement*, 87 MINN. L. REV. 543 (2002); Laura Mansnerus, *Public Use, Private Use and Judicial Review in Eminent Domain*, 58 N.Y.U. L. REV. 409 (1983). For an extensive collection of critical commentaries see Michael DeBow, *Unjust Compensation: The Continuing Need for Reform*, 46 S.C. L. Rev. 579, 580 n.7 (1995).

229. *Kelo*, 125 S. Ct. at 2687 (referring to Justice Peckham's opinion in *Fallbrook Irrigation Dist. v. Bradley*, 164 U.S. 112 (1896), which spawned the line of cases relied on by the Supreme Court, without noting that *Fallbrook* was not a condemnation case, that the irrigation district was a government entity, and that the public (land owners within the irrigation district) would have the use of the benefits of the irrigation project, thus making it an unobjectionable, use-by-the-public case).

230. To illustrate the disconnection between redevelopment functionaries and the community, on July 22, 2005, I was a guest on an Adelphia cable TV talk show seen in the Los Angeles area. *Week in Review with Bob Jimenez* (KADL Adelphia Channel television broadcast July 22, 2005). This segment, from Episode #3198, was devoted to *Kelo* and eminent domain in general. *Id.* The panel consisted of the host and four accomplished members of the professional and business communities (an investment banker, an attorney, a political analyst, and the head of a government-oriented think tank). *Id.* In order to dramatize the unaccountability of the local redevelopment apparatus, I offered each panelist \$100 if they could name any members of the Los Angeles Redevelopment Agency. *Id.* None took me up on my offer. *Id.* *Res ipsa loquitur.*

231. *Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning Agency*, 911 F.2d 1331, 1346 (9th Cir. 1990) (Kozinski, J., dissenting) (commenting on the judicial reception given to small property owners complaining of uncompensated takings by the government).

232. This may sound cynical, but if my 40 years as an appellate lawyer in the field of eminent domain have taught me anything, it is that when a judge starts going on about how unfortunate it is

X. EPILOGUE

In a front-page story dated November 21, 2005,²³³ The New York Times reports that in spite of the city's victory in the Supreme Court, the New London redevelopment project is going nowhere as investors and lenders are backing away due to the negative publicity. The developer refuses to go ahead with construction of the waterfront hotel because—now they tell us—". . . Pfizer, which built a major research center next to the site in the late 1990's and pushed for the Fort Trumbull redevelopment, has backed away from a commitment to help pay for the hotel as the lawsuit dragged on."²³⁴ Some renters are voicing their perceptions with their feet, and are moving in, not out.²³⁵

In the meantime, the State is out \$73 million, with nothing to show for it so far.²³⁶ "Elegant street lamps, intended to illuminate a gentrified new riverfront, instead shine over empty lots where buildings have been leveled but not replaced."²³⁷

Your tax money at work.

that he must uphold "the law" which requires him to rule in a manner that is unfair to the property owners, it is a safe bet that he is about to make a ruling that is not only offensive to prevailing notions of fairness, but as often as not, is also not consistent with properly analyzed law. Nor is my view unique. Justice Cardozo put it more eloquently:

Judges march at times to pitiless conclusions under the prod of a remorseless logic which is supposed to leave them no alternative. They deplore the sacrificial rite. They perform it, none the less, with averted gaze, convinced as they plunge the knife that they obey the bidding of their office. The victim is offered up to the gods of jurisprudence on the altar of regularity. . . . I suspect that many of these sacrifices would have been discovered to be needless if a sounder analysis of the growth of the law, a deeper and truer comprehension of its methods, had opened the priestly ears to the call of other voices.

BENJAMIN N. CARDOZO, *THE GROWTH OF THE LAW* 66 (Greenwood Press 1975) (1924).

233. William Yardley, *After Eminent Domain Victory, Disputed Project Goes Nowhere*, N.Y. TIMES, Nov. 21, 2005, at A1.

234. *Id.* at A22 (emphasis added).

235. *Id.*

236. *Id.*

237. *Id.*