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From Direct "Public Use" to Indirect "Public Benefit": Kelo v. New London's Bridge from Rational Basis to Heightened Scrutiny for Eminent Domain Takings

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I. INTRODUCTION

The Fifth Amendment to the Constitution, made applicable to the states by the Fourteenth Amendment, provides that "private property [shall not] be taken for public use, without just compensation."[1] Implied in these words is the sovereign's eminent domain power: the federal, state, or local government's power to take private property for public use. Since the Supreme Court's decision extending the scope of the federal and state governments' eminent domain power in *Kelo v. City of New London*,[2] the most commonly-asked question has been, "So, could Wal-Mart really take my house now?"[3]

Such concern might be justifiable. Within hours of the Court's decision in *Kelo*, the city of Freeport, Texas moved to seize several "waterfront properties from shrimp processing companies to build a marina development."[4] Two days after the decision, city officials in Boston began like proceedings to seize similar waterfront properties.[5]

Nationwide reaction to stem the public outcry since the Court's landmark decision has been quick and decisive. During the time between the Court's decision on June 23, 2005, and publication of this Note, at least twenty-five state legislatures have introduced, or pledged to

1. U.S. CONST. amend. V.

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

3. Whether framing the issue in this manner should be considered sensationalism, sarcasm, or simply a scare tactic, it is becoming the rallying cry for those opposed to this decision. *See, e.g.*, Megan Barnett, *A Homeowner's Battle: The Supreme Court Will Hear a Case on the Scope of Eminent Domain*, U.S. NEWS & WORLD REP., Feb. 2, 2005, http://www.usnews.com/usnews/biztech/articles/050228/28domain.htm; Carol Lloyd, *Your Casa is Wal-Mart's Casa: Invocation of Eminent Domain by Cities To Seize Property for Private Development is on the Rise*, S.F. CHRON., Feb. 25, 2005, http://www.sfgate.com/cgi-bin/article.cgi?file=/gate/archive/2005/02/25/carollloyd.DTL.

4. Les Christie, *Taking Your Home Away: The Supreme Court Has Ruled that New London Could Take Homes Away from Their Owners. What Next?*, CNN/MONEY, Aug. 3, 2005, http://money.cnn.com/2005/07/25/real_estate/investment_prop/eminent_domain_v_deveopment.

5. *Id.*

introduce, legislation to clarify and/or restrict the power of eminent domain.[6] Contending that the "Supreme Court has undermined a pillar of American society—the sanctity of the home," the United States House of Representatives overwhelmingly approved a bill to block future seizures of private property for use by developers.[7] The 5-4 decision in *Kelo* was so contentious that the CEO of Freestar Media, LLC faxed an apparently serious request to the town of Weare, Connecticut to begin the application process to condemn the land and build a hotel on the present location of Justice David Souter's home, reasoning that the hotel would obviously create a substantially larger tax base for the community.[8] Others targeted Justice Breyer's vacation home in Connecticut for condemnation and use as a state park.[9] Both justices voted with the *Kelo* majority.[10]

The Takings Clause of the Fifth Amendment prohibits the government from taking private property except for "public use."[11] The Public Use Clause of the Fifth Amendment has traditionally limited the reach of eminent domain to takings with a "justifying public purpose."[12] However, *Kelo* was not a case concerning the use of eminent domain for a traditional use such as a road or public building; nor did it concern the use of eminent domain to transfer property to common carriers, such as railroads and hospitals, that make the property available to the public. Although closer, *Kelo* was also not concerned with the public benefits resulting from removal of blight or the opening of market forces.[13] Rather, *Kelo* presented a vital constitutional question the Supreme Court

6. *Id.*; *see also* Associated Press, *States Try to Blunt Property Ruling*, July 19, 2005, *available at* http://www.foxnews.com/story/0,2933,162979,00.html.

7. *See* Associated Press, *House Bill Counters Eminent Domain Ruling*, Nov. 4, 2005, *available at* http://www.cnn.com/2005/POLITICS/11/04/eminent.domain.ap/index.html. The bill, which passed by a vote of 376 to 38, would withhold "for two years all federal economic development funds to states and localities that use economic development as a rationale for property seizures. It also would bar the federal government from using eminent domain powers for economic development." *Id.*

8. Michael Tippett, *Private Property Activists Want Judge's House Given to Developers*, NOWPUBLIC, June 28, 2005, http://www.nowpublic.com/node/12631. Anyone desiring to contribute money to the development plan and actual construction of the hotel may visit http://www.freestarmedia.com/hotellostliberty2.html (last visited Dec. 17, 2005).

9. Associated Press, *Supreme Court Won't Revisit Eminent Domain Case*, Aug. 22, 2005, *available at* http://www.foxnews.com/story/0,2933,166421,00.html.

10. Kelo v. City of New London, 125 S. Ct. 2655, 2655 (2005).

11. U.S. CONST. amend V.

12. Haw. Hous. Auth. v. Midkiff, 467 U.S. 229, 241 (1984).

13. *See* Berman v. Parker, 348 U.S. 26, 36 (1954); *Midkiff*, 467 U.S. at 229.

had never before addressed: whether the Public Use Clause of the Fifth Amendment authorizes the exercise of eminent domain solely for economic development.[14] The Court held that it does.[15] Because the economic development was intended to provide a larger tax base and create additional jobs in an area burdened with a severe economic depression, the Court ruled that these public benefits, although indirect, were correctly categorized by the legislature as a public use.[16]

Courts have traditionally given deference to legislative judgments of what public needs justify the use of the takings power when the public benefit is clearly discernible from the taking.[17] The confusion in the lower courts arises from takings that do *not* directly achieve the government's purpose—takings that involve a separate, unregulated private party to whom the property flows. In such a taking, the public benefit is realized only *if and after* the separate private party benefits from the property.[18] When a taking cannot be said to *directly* achieve the government's objective, it thus becomes more problematic for the judiciary to rely on and defer to the legislature's judgment about whether the benefit *could* rationally accrue; there must be deeper analysis into the government's design, plan, and implementation to ensure that the property of the private owner on the losing end of the taking is not taken in vain.

These two very different scenarios—takings that either directly or indirectly achieve a public benefit—have thus far been jumbled together by a common deferential standard of review until the lower courts are completely unable to settle on any appropriate test to decide their outcome. In reality, these two very different takings stand at opposite ends of a chasm separated only by a legislature's ability to see direct benefits to the public on the one hand, and divine potential indirect benefits flowing through a private third party on the other.

The Supreme Court's decision in *Kelo* expands and conflates the government's eminent domain powers until private use and public use

14. *Kelo*, 125 S. Ct. at 2661.

15. *Id.* at 2669.

16. *Id.* at 2660.

17. Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1014 (1984) (upholding the data-sharing provisions at issue because the "most *direct* beneficiaries" were the subsequent pesticide applicants (emphasis added)).

18. *See generally Midkiff*, 467 U.S. at 229 (allowing takings under the Public Use Clause that could only benefit the general public after benefiting individual lessees); *Berman*, 348 U.S. at 26 (allowing takings that could only benefit the general public after private firms had finished developing the area).

become virtually a compound in one. This Note argues that while legislatures should be allowed deference under a *rational basis standard* to declare takings for a public use in situations where public benefits are directly achieved, they should only be able to claim that takings resulting in indirect benefits to the public are for a "public use" after withstanding a *heightened scrutiny* of the legislature's purpose and plan in the taking. In other words, when the government uses the eminent domain power to achieve an indirect public benefit such as economic redevelopment, courts should apply a higher standard of scrutiny in determining whether the taking is a "public use," thereby spanning the theoretical chasm between takings with direct benefits and takings with indirect benefits (over the New London Bridge, if you will). This test would require the government to show that there is a nexus between the nature of the need for the taking and the scope of the proposed solution—a standard already well-established under regulatory takings.[19]

Part II of this Note provides an overview of takings jurisprudence, discussing categories of eminent domain takings that result in purely direct public benefit and those that result in indirect public benefit. Part III briefly outlines the factual and procedural background of the issues raised in *Kelo*. Part IV critically analyzes the reasoning employed by the *Kelo* majority as well as the dissenting arguments in both the Supreme Court and the Connecticut Supreme Court. It concludes that both courts erred in holding that mere rational basis review is appropriate for a legislature's determination of a public use and that courts have a responsibility, when the proposed public benefit can be achieved only indirectly, to apply a heightened review to the government's plan in order to ensure that the taking is for a public use as the Fifth Amendment guarantees. In applying this heightened scrutiny, courts must determine whether the purpose for the taking will be appropriately accomplished through the scope of the solution and to what degree the taking will achieve its purpose. Part V concludes that the Supreme Court should have overruled the Connecticut Supreme Court and used *Kelo* to establish a higher level of scrutiny for takings resulting in indirect public benefits, namely takings for economic development.

19. *See infra* Part IV.B.2 (discussing Nollan v. Cal. Coastal Comm'n, 483 U.S. 825 (1987) and Dolan v. City of Tigard, 512 U.S. 374 (1994)).

II. BACKGROUND

Alexander Hamilton described "[t]he security of Property" to the Philadelphia Convention of 1787 as one of the "great obj[ects] of Gov[ernment]."[20] The *Kelo* Court weakened the security of property by applying rational basis review to a state legislature's determination that economic development, with only indirect benefits to the public, was a public use. To fully understand the *Kelo* decision, it is necessary to analyze the development of the Court's jurisprudence regarding the Takings Clause in general with specific emphasis given to the development of the Public Use Clause. Following this historical analysis is a discussion of how the distinction between a public and a private use of property is applied to determine if a taking is for a public use. Section B outlines the three general categories of takings that comply with the public use requirement and how the Court has used these categories in cases that deal both with takings that directly result in public benefits and takings that indirectly result in public benefits. Section C then briefly compares the rational basis standard applied in those three categories with the potential outcome under a higher standard of review.

A. Takings Clause and Public Use Clause Analysis

Before the *Kelo* decision brought the spotlight to this area of law, eminent domain takings had already been a growing nationwide controversy. A recent study documented that between 1998 and 2002, there were over 10,000 filed or threatened condemnations that involved transfers of private property to other private parties in forty-one states.[21] News reports throughout the country also documented takings of homes and businesses for use by other private parties, including developers and big-box retail stores.[22] Such condemnations, occurring even before the

20. 3 RECORDS OF THE FEDERAL CONVENTION OF 1787, at 302 (Max Farrand ed., rev. ed. 1966), *quoted in Kelo*, 125 S. Ct. at 2672 (O'Connor, J., concurring).

21. DANA BERLINER, PUBLIC POWER, PRIVATE GAIN: A FIVE YEAR, STATE-BY-STATE REPORT EXAMINING THE ABUSE OF EMINENT DOMAIN (2003), *available at* http://www.castlecoalition.org/report/index.shtml. The study only documented cases available from public sources. Because many private condemnations go unreported in public sources, the actual number of private-to-private eminent domain cases is most likely much higher than the confirmed numbers of the study.

22. *See, e.g.*, Dennis Cauchon, *Pushing the Limits of 'Public Use,'* USA TODAY, Apr. 1, 2004, at A03; Jason George, *Testing the Boundary Lines of Eminent Domain; Long Branch Wants to Seize Old Homes to Make Room for New Ones*, N.Y. TIMES, Mar. 31, 2004; Dean Starkman, *Tracking the Abuse of Eminent Domain*, WALL ST. J., May 7, 2003; Ira Carnahan, *Domain Game*, FORBES, Nov. 25, 2002, *available at* http://www.forbes.com/forbes/2002/

Court considered *Kelo*'s drastic expansion of eminent domain power, "unquestionably blurr[ed] the distinction between public purpose and private benefit and . . . raise[ed] the specter that the power will be used to favor purely private interests."[23] *Kelo* affirmed the fear that private-to-private takings for purely economic gain are valid.

That government may not take private land and give it to another private individual is a long-standing principle of constitutional jurisprudence.[24] Over two centuries ago, shortly after ratification of the Bill of Rights, Justice Chase wrote:

> An act of the Legislature (for I cannot call it a law) contrary to the great first principles of the social compact, cannot be considered a rightful exercise of legislative authority. . . . A few instances will suffice to explain what I mean. . . . [A] law that takes property from A. and gives it to B: It is against all reason and justice, for a people to entrust a Legislature with such powers; and, therefore, it cannot be presumed that they have done it.[25]

However, eminent domain is the power to do just that: take private property and transfer it to another for public use. The Takings Clause of the Fifth Amendment was meant to recognize this power and to identify restrictions on its exercise for the protection of private property rights.[26]

1. The Takings Clause

The Fifth Amendment provides that "private property [shall not] be taken for public use, without just compensation."[27] The power to take property is one of the most threatening powers a government has at its disposal. As early as 1795, the Court described eminent domain as "the despotic power."[28]

1125/112_print.html; Stephen Humphries, *The Uninvited Bulldozer Grass-Roots, Rebellion Challenges Rule of Eminent Domain as Local Governments Take Private Land and Sell It to Private Interests*, CHRISTIAN SCIENCE MONITOR, April 26, 2001.

23. Kelo v. City of New London, 843 A.2d 500, 575 (Conn. 2004) (Zarella, J., concurring in part and dissenting in part).

24. *See* Buckner F. Melton, Jr., *Eminent Domain, "Public Use," and the Conundrum of Original Intent*, 36 NAT. RESOURCES J. 59, 61 (1996).

25. Calder v. Bull, 3 U.S. (3 Dall.) 386, 388 (1798) (emphasis omitted), *quoted in Kelo*, 125 S. Ct. at 2662 n.5.

26. *See* JOHN E. NOWAK & RONALD D. ROTUNDA, PRINCIPLES OF CONSTITUTIONAL LAW 258–59 (Thompson-West 2004).

27. U.S. CONST. amend. V.

28. Vanhorne's Lessee v. Dorrance, 2 U.S. (2 Dall.) 304, 312 (1795).

However, the power of eminent domain is not just the power to destroy. Eminent domain serves an important function in allowing state and local governments to take measures to "revitaliz[e] local economies, creat[e] much-needed jobs, and generat[e] revenue that enables cities to provide essential services."[29] Those governments exercising this condemnation power understand that it must be used "prudently."[30] Thus, the question is not whether the power should be allowed, but under what conditions the exercise of this power will be allowed.[31]

The text of the Fifth Amendment "confirms the State's authority to confiscate private property . . . [but] imposes two conditions on the exercise of such authority: the taking must be for a public use and just compensation must be paid to the owner"[32] for the taking. The just compensation requirement spreads the cost of the taking, thereby "prevent[ing] the public from loading upon one individual more than his just share of the burdens of government."[33] However, the key limitation on the government's ability to confiscate private property is the phrase "for public use."[34] "The public use requirement . . . imposes a more basic limitation, circumscribing the very scope of the eminent domain power: Government may compel an individual to forfeit her property for the *public's* use, but not for the benefit of another private person."[35] This

29. Brief for National League of Cities et al. as Amici Curiae Supporting Respondents, at 1, *Kelo*, 125 S. Ct. 2655 (No. 04-108), 2005 WL 166931.

30. *See id.*

31. For example, there is a difference between eminent domain takings, in which the government declares that it is taking property, and regulatory takings, in which the government uses regulation of property to effectuate the equivalent of a taking. The theory of regulatory takings recognizes that "while property may be regulated to a certain extent [by the government], if regulation goes too far it will be recognized as a taking." Pa. Coal Co. v. Mahon 260 U.S. 393, 415 (1922). An entire subsection of takings jurisprudence revolves around the circumstances under and the degree to which the government may regulate property without effectuating a taking requiring a public use and just compensation. *See generally* Loretto v. Teleprompter Manhattan CATV Corp. 458 U.S. 419 (1982) (holding that a statute permitting a permanent physical invasion of property, although small, requires just compensation and a public use); Penn Cent. Transp. Co. v. New York 438 U.S. 104 (1978) (defining the balancing factors to determine if a government regulation classifies as a taking requiring just compensation and a public use).

32. Brown v. Legal Found., 538 U.S. 216, 231–32 (2003) (internal quotation marks omitted).

33. Monongahela Nav. Co. v. United States, 148 U.S. 312, 325 (1893).

34. *Kelo*, 125 S. Ct. at 2678 (Thomas, J., dissenting).

35. *Id.* at 2672 (O'Connor, J., dissenting).

requirement promotes fairness and justice.[36] The question then becomes where to draw the line between a public use and a private use.

2. Private vs. public use and the standard to apply

The distinction between a private or public use revolves around whom the government is trying to "advantage."[37] In regards to Takings Clause analysis, a purely private use taking is never permitted and is typically viewed as "impermissible favoritism" to a private party.[38] To that end, any taking designed "to favor a particular private party, with only incidental or pretextual public benefits," would violate the public use requirement of the Takings Clause and would therefore be a private use.[39] Thus, a taking is either for a public use, or it is unconstitutional.

Whereas early on the Public Use Clause was satisfied when exercised for "the public good, the public necessity or the public utility,"[40] the Court has broadened that definition through its modern interpretations of the clause.[41] Through application of a very deferential standard of review, the Court has merely deferred to the legislature's classification of a public use, rather than define the distinction between public and private. In *Hawaii Housing Authority v. Midkiff*,[42] the Supreme Court reemphasized its earlier decision in *Berman v. Parker*[43] that judicial deference is owed to legislative determinations of public use. In *Midkiff*, the Court stated that the courts' role "in reviewing a legislature's judgment of what constitutes a public use . . . is . . . extremely narrow."[44] The Court emphasized that this deference applies

36. *Cf.* Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 336 (2002) ("The concepts of 'fairness and justice' . . . underlie the Takings Clause." (quoting Palazzolo v. Rhode Island, 533 U.S. 606, 633 (2001) (O'Connor, J., concurring))).

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

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

39. *Id.* Rather than discussing appropriate uses of private property, which would be a much more lengthy discussion—and inevitably lead to an analysis of the Court's recent decision in *Lawrence v. Texas*, 539 U.S. 558 (2003) (holding unconstitutional a Texas statute making it a crime for two persons of the same sex to engage in consensual acts of sodomy in the privacy of a home)—the phrase "private use" for purposes of Takings Clause analysis refers only to the purpose for the taking, i.e. who is the legislature attempting to advantage, a private party or the general public, by taking property from its current owners?

40. *See* NOWAK & ROTUNDA, *supra note* 26, at 286–87.

41. *Id.* at 287–88 (referencing Berman v. Parker, 348 U.S. 26 (1954) and Haw. Hous. Auth. v. Midkiff, 467 U.S. 229 (1984)).

42. 467 U.S. at 242.

43. 348 U.S. at 31–33.

44. 467 U.S. at 240 (internal quotation marks omitted).

equally to determinations made by both Congress and the state legislatures.[45] The federal and local governments are presumed to have the ability to take private property as a function of the "principle of consent inherent in a representative government."[46] Legislatures are further assumed more capable of such decisions than the courts because, as the Supreme Court noted, "in our system of government, legislatures are better able to assess what public purposes should be advanced by an exercise of the taking power."[47]

This point is key in analyzing the propriety of applying mere rational basis scrutiny to a legislature's determination of a public use, as was the case in *Kelo*. In order to indicate the appropriate level of judicial deference to the legislature, and the degree of carefulness the legislature should expect of itself, the Court will apply a standard of review to assess the constitutionality of a law or state action at issue.[48] That standard will be a point somewhere on the spectrum from minimum rationality to per se prohibition.[49] In analyzing the constitutionality of takings, the Court has traditionally applied the most deferential standard of review, rational basis review. The germane question is whether that deference is merited in cases where the benefit to the public will only be indirectly achieved by the taking. Is such a case then a true public use, or could the taking be classified as a private use since the land being taken will be given to other private parties, and therefore be unconstitutional?

Hence, while the academic distinction between private and public use is instructive, the decision as to *who makes* the distinction is critical. Who has the final say on whether the future advantage of a taking will benefit the public sufficient to be classified as a public use to satisfy the Takings Clause, the legislature or the court? Applying a deferential standard of review will typically leave the decision to Congress and state legislatures without any room for review by the judiciary; however, a higher standard would give the courts a larger role in determining whether a taking proposed by a legislature or Congress really is for a public use sufficient to pass constitutional muster.

45. *Id.*

46. Matthew P. Harrington, *"Public Use" and the Original Understanding of the So-Called "Takings" Clause*, 53 HASTINGS L.J. 1245, 1247 (2002).

47. *Midkiff*, 467 U.S. at 244.

48. Laurence H. Tribe, Lawrence v. Texas*: The "Fundamental Right" That Dare Not Speak Its Name*, 117 HARV. L. REV. 1893, 1916 (2004).

49. *Id.*

However, rather than clearly defining the distinction between private and public uses and the standard that will apply, the Court has established "three categories of takings that comply with the public use requirement."[50] Having established that only public use takings will be constitutional, these categories—public ownership takings, use-by-the-public takings, and public purpose takings—demonstrate the Court's takings jurisprudence as it developed from cases in which eminent domain takings would directly result in a benefit to the public to those takings that would only indirectly achieve a public benefit.

B. From Cases Involving Direct Public Benefits to Indirect Public Benefits

Although the direct or indirect nature of the public benefits accomplished by a taking was never explicitly a factor in the Court's determination of constitutionality for any of the three categories, this Note later argues that it should be.[51] Since these three public use categories span the spectrum between achieving direct benefits and indirect public benefits to the public, and since it is more difficult to conclude that indirect public benefits will ultimately benefit the public, the following background helps illustrate why the standard of review used in the respective category should rise to correspond with the increasingly indirect nature of the public benefits achieved in that category.

1. Public ownership takings—direct public benefit

First, public ownership takings are commonly classified as a public use taking and afforded rational basis scrutiny by the judiciary because the benefits to the public are directly achieved. The "sovereign may transfer private property to public ownership—such as for a road, a hospital, or a military base."[52] The resulting benefits of a public ownership taking are immediate, clearly discernible, and provided directly to the public because, regardless of whether the ownership translates into a literal benefit to the public, theoretically the public immediately benefits from the government's ownership of the property taken.

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

51. *See infra* Part IV.A.

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

Early American courts uniformly recognized that government takes property for a public use when it retains ownership of the property. For example, the Massachusetts Supreme Court upheld appropriations by the highway commissioners of a military training field—land already owned by the public.[53] The court explained that when the owners of the land granted it to the town of Cambridge in 1769, the townspeople "became owners of the soil with full power, as such owners, to make any use of the property, which owners of land can make."[54] The U.S. Supreme Court confirmed such reasoning in *Kohl v. United States*,[55] approving takings "for forts, armories, and arsenals, for navy-yards and light-houses, for custom-houses, post-offices, and court-houses, and for other public uses."[56]

Furthermore, Justice Holmes recognized that land taken during WWI for construction and improvement of buildings for "military purposes . . . clearly [was] for a public use" since the buildings facilitated national security during a time of war.[57] Similarly, land taken for the construction of a road was an asset of, and belonged to, the community at large, even though the road was not widely used.[58]

In all of these examples the eminent domain power was used and the public directly benefited from the result because the public—in other words, the people through their government—actually owned the land. Therefore, rather than the public benefiting from the incidental effects of the land use, the taking ensured that the public benefit was directly achieved through the taking, even if that direct benefit was at times theoretical.

2. Use-by-the-public takings—direct public benefit

Second, the "sovereign may transfer private property to private parties, often common carriers,[59] who make the property available for

53. *In re* Wellington, 33 Mass. (16 Pick.) 87 (1834).

54. *Id.* at 99.

55. 91 U.S. 367 (1875).

56. *Id.* at 371.

57. Old Dominion Land Co. v. United States, 269 U.S. 55, 66 (1925).

58. *See generally* Rindge Co. v. County of L.A., 262 U.S. 700, 706 (1923) (noting "[t]hat a taking of property for a highway is a taking for public use has been universally recognized, from time immemorial").

59. A common carrier is a person or company whose business is transportation of people or property. For example, Amtrak is a common carrier because it transports people by train, and Federal Express is a common carrier because it ships packages. When persons pay the carrier's rate, they cannot be refused service arbitrarily.

the public's use—such as with a railroad, a public utility, or a stadium."[60] Even though the property is transferred to a private party in such takings, the government still maintains regulatory control of the property sufficient to ensure complete and open access to the public, thereby ensuring that the taking directly achieves a public benefit. Courts recognized early on that limited circumstances exist in which governments could take private property and give it to private owners—most often common carriers with a duty of access to the public. The public's right of access ensures that the public "uses" the property even though a private person or organization owns the property.

This category is best explained in *Beekman v. Saratoga & Schenectady Railroad Co.*,[61] wherein the court upheld the use of eminent domain for the construction of a private railroad.[62] As the beneficiary of a government taking, and as an entity providing a service normally provided by the government, the railroad owed the public a duty of nondiscrimination, and it was subject to utility-rate regulation:

> The public have an interest in the use of the road, and the owners of the franchise are liable to respond in damages, if they refuse to transport an individual or his property upon such road, without any reasonable excuse, upon being paid the usual rate of fare.
>
> The legislature may regulate the use of the franchise and limit the amount of the tolls . . . .[63]

Since these takings directly achieve a public benefit, the Court has applied this same deferential standard of review, termed "rational basis," and has come to the same conclusion regarding public utilities. According to the Court, the purpose of a power company, for example, is

> to manufacture, supply, and sell to the public, power produced by water as a motive force. . . . [T]o gather the streams from waste and to draw from them energy, labor without brains, and so to save mankind from toil that it can be spared, is to supply what, next to intellect, is the very foundation of all our achievements and all our welfare. If that purpose is not public, we should be at a loss to say what is.[64]

60. Kelo v. City of New London, 125 S. Ct. 2655, 2673 (2005) (O'Connor, J., dissenting).

61. 3 Paige Ch. 45 (N.Y. Ch. 1831).

62. *Id.*

63. *Id.*

64. Mt. Vernon-Woodberry Cotton Duck Co. v. Ala. Interstate Power Co., 240 U.S. 30, 32 (1916).

Even though the actual new owner of the plant was a private company, the government could still take the land notwithstanding the public use requirement because the purpose and operations of the plant would be of beneficial use to the public, and the government would maintain regulatory control of the plant to ensure the public's access to its product.[65]

Taking land and giving it to a railroad or utility company directly achieved significant public benefits. The public benefit did not flow from a benefit that a private individual or organization received and then passed on to the public—it was direct. Therefore, because the benefit was direct, courts have deferred to legislative judgment and applied only rational basis review in determining whether a public use existed.

3. Public purpose takings—indirect public benefit

Finally, the Supreme Court has "allowed that, under certain circumstances and to meet certain exigencies, takings that serve a *public purpose* also satisfy the Constitution even if the property is destined for subsequent private use."[66] Takings that serve a public purpose take private property and give it to different private ownership free of any government regulation or claim of public ownership—a facial violation of the Public Use Clause. However, the circumstances of each case merit the taking in order to achieve a specific public benefit otherwise unattainable. The two seminal cases in this area are *Berman v. Parker*[67] and *Hawaii Housing Authority v. Midkiff*.[68]

a. Berman v. Parker—*condemnation of blight*. In *Berman*, the Court upheld takings within a blighted area of Washington D.C. The neighborhood had deteriorated to the point that 64.3% of its dwellings were beyond repair.[69] It was overcome with "overcrowding of dwellings," "lack of adequate streets and alleys," and "lack of light and air."[70] Congress determined that the neighborhood was "injurious to the public health, safety, morals, and welfare" and that it was necessary to "eliminate[e] all such injurious conditions by employing all means

65. *Id.*
66. *Kelo*, 125 S. Ct. at 2673 (O'Connor, J., dissenting) (emphasis added).
67. 348 U.S. 26 (1954).
68. 467 U.S. 229 (1984).
69. *Berman*, 348 U.S. at 30.
70. *Id.* at 34.

necessary and appropriate for the purpose," including eminent domain.[71] "Under [Congress's] plan, the area would be condemned and part of it utilized for the construction of streets, schools, and other public facilities."[72] "The remainder of the land would be leased or sold to private parties for the purpose of redevelopment, including the construction of low-cost housing."[73] Thus, the justifying public purpose was to rid the city of the blighted neighborhood, thereby increasing the safety and health of the neighborhood and surrounding areas.

The owner of a department store located in the area, Mr. Berman, challenged the condemnation, pointing out that his store was not itself blighted and argued that the creation of a "better balanced, more attractive community" was not a valid public use.[74] A unanimous Court unequivocally affirmed the public use underlying the taking:

> We do not sit to determine whether a particular housing project is or is not desirable. The concept of the public welfare is broad and inclusive. The values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled. In the present case, the Congress and its authorized agencies have made determinations that take into account a wide variety of values. *It is not for us to reappraise them*. If those who govern the District of Columbia decide that the Nation's Capital should be beautiful as well as sanitary, there is nothing in the Fifth Amendment that stands in the way.[75]

The eventual success of the taking rested on the ability of private third parties to fulfill their obligations to build a neighborhood better than the blight they were destroying. The public would benefit only at the conclusion of the private developers' efforts. The developers obviously benefited from their work on the project; if they did not benefit, the project would come to a standstill and no one would benefit. Thus, only *if and after* the *private party* benefited could the public receive any benefit.

b. Hawaii Housing Authority v. Midkiff—*oligopoly busting*. In

71. *Id.* at 28.

72. Kelo v. City of New London, 125 S. Ct. 2655, 2663 (2005) (O'Connor, J., dissenting) (citing *Berman*, 348 U.S. at 31).

73. *Id.*

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

75. *Id.* at 33 (emphasis added) (citation omitted).

Midkiff, the Court upheld a land condemnation scheme in Hawaii whereby title in real property was taken from lessors and transferred to lessees. At the time, the state and federal governments owned forty-nine percent of Hawaii's land while seventy-two private landowners owned another forty-seven percent of the land.[76] Land ownership was so concentrated that on the state's most urbanized island, Oahu, twenty-two landowners owned 72.5% of the fee simple titles.[77] The Hawaii Legislature found the oligopoly in land ownership was "skewing the State's residential fee simple market, inflating land prices, and injuring the public tranquility and welfare," and therefore enacted a condemnation scheme for redistributing title.[78] After the appropriate requirements under the scheme were met, tenants on the land could request that the Hawaii Housing Authority condemn and purchase the property on which they lived and then sell it to the tenants at the reduced price.[79] The former tenants would then enjoy full rights of alienability with the land and could keep the land, rent it out themselves, or sell it.[80]

The Court found that the "mere fact that property taken outright by eminent domain is transferred in the first instance to private beneficiaries does not condemn that taking as having only a private purpose."[81] Explaining that the Court had rejected the literal requirement that condemned property be put to use only for the general public, as in use-by-the-public takings,[82] Justice O'Connor made clear that "'[i]t is not essential that the entire community, nor even any considerable portion . . . directly enjoy or participate in any improvement in order [for it] to constitute a public use.'"[83]

The purpose of the taking in *Midkiff* was to break the oligopoly of land ownership and open up the real estate market to competitive market forces.[84] That benefit, although indirectly achieved, was achieved through taking land from lessors and transferring it to the lessees. The new owners, although private parties, had full power of alienation over

76. Haw. Hous. Auth. v. Midkiff, 467 U.S. 229, 232 (1984).

77. *Id.*

78. *Id.*

79. *Id.* at 234.

80. *Id.*

81. *Id.* at 243–44.

82. *See supra* Part II.B.

83. *Midkiff*, 467 U.S. at 244 (second alteration in original) (quoting Rindge Co. v. Los Angeles, 262 U.S. 700, 707 (1923)).

84. *Id.* at 241–42.

the land, allowing market forces to then work to the eventual benefit of the public. If the third parties had not acted on their ability to sell and buy the property, the oligopoly might as well have remained in place. However, after the former lessees used their power of alienation to break the oligopoly, competitive forces began to enter the market, and thus the public reaped the benefit—but only *if and after* the *private third parties* benefited.

C. Berman *and* Midkiff *Under Heightened Scrutiny*

The Court has yet to apply a heightened form of scrutiny to a taking classified by the legislature as a public use. Past determinations of public use have either survived or been struck down under rational basis alone. However, not all takings are created equal. As discussed, public use takings can be classified into three categories. These categories span the spectrum from takings resulting in direct benefits to the public and takings resulting in indirect benefits—takings that benefit the public only if and after a private third party benefits. Part of the Court's reluctance to apply a heightened form of scrutiny is that the "legislature, not the judiciary, is the main guardian of the public needs to be served by social legislation."[85]

However, applying a higher form of scrutiny to takings that only indirectly achieve a public benefit will not supplant the judiciary into the legislature's role of deciding social legislation. As this Note will explain,[86] both *Berman* and *Midkiff* would have been upheld under the heightened scrutiny test proposed herein. This demonstrates the robust nature of a heightened scrutiny analysis that allows the judiciary to check the legislature's determination that the public benefits of a taking are sufficient for classification as a public use. *Berman* and *Midkiff* would be upheld; however, *Kelo* would not.

III. *KELO V. CITY OF NEW LONDON*

A. Factual Background

New London is located in southeast Connecticut. The city has been in economic decline for decades and was declared a "distressed

85. Berman v. Parker, 348 U.S. 26, 32 (1954).

86. *See infra* Part IV.B.2.

municipality" in 1990.[87] The Fort Trumbull area was particularly hard-hit when the Federal Government closed a naval center in 1996, costing the area 1500 jobs.[88] "In 1998, the [c]ity's unemployment rate was nearly double that of the State."[89] The city leaders, therefore, targeted this area for redevelopment and revitalization.[90]

In January 2000, New London approved a development plan "projected to create in excess of 1000 jobs, to increase tax and other revenues, and to revitalize an economically distressed city, including its downtown and waterfront areas."[91] In February 1998, Pfizer Inc. announced that it would build a $300 million research facility in the Fort Trumbull area.[92] This development, it was hoped, would serve as a catalyst and give incentive for other businesses to locate in the area.[93]

The city intended to capitalize on the announcement of the Pfizer facility and "the new commerce it was expected to attract."[94] Beyond merely creating jobs and generating tax revenue, "the plan was designed to make the city more attractive and create leisure and recreational opportunities on the waterfront and in the park."[95]

The development plan included "a waterfront hotel and conference center, along with marinas for . . . transient tourist boaters, . . . commercial fishing vessels, . . . and a public walkway along the waterfront."[96] There would be approximately "eighty new residences, organized into an urban neighborhood and linked by a public walkway to the remainder of the development plan."[97] The plan called for "90,000 square feet of high technology research and development office space and parking" located close to the Pfizer facilities.[98] There would be an additional "140,000 square feet of office," parking, and retail space on an adjacent parcel.[99] Space would even be reserved for the United States Coast Guard Museum, which was to be moved "from the nearby United

87. Kelo v. City of New London, 125 S. Ct. 2655, 2658 (2005).
88. *Id.* at 2658.
89. *Id.*
90. *Id.* at 2658–59.
91. Kelo v. City of New London, 843 A.2d 500, 507 (Conn.2004).
92. *Kelo*, 125 S. Ct. at 2659.
93. *Id.*
94. *Id.*
95. *Id.*
96. *Kelo*, 843 A.2d at 509.
97. *Id.*
98. *Id.*
99. *Id.*

States Coast Guard Academy."[100] All of this was calculated to bring a considerable influx of jobs and tax revenue.[101]

However, before development could begin, the city had to assemble the land needed for the project. The city's development agency, New London Development Corporation (NLDC), purchased as much property as people were willing to sell but was unable to purchase all of the required property due to unwilling owners.[102] In November 2000, the city, through the NLDC, initiated condemnation proceedings against those properties.[103]

At the time of the condemnation proceedings, "Susette Kelo [had] lived in the Fort Trumbell area since 1997." Since moving there, she made numerous improvements to her house and rightfully prized its waterfront view."[104] "Wilhemina Dery was born in her Fort Trumbell house in 1918" and had lived there all her life.[105] After marrying her husband Charles, she continued to live in her home over the next sixty years.[106] Ultimately, fifteen properties in the Fort Trumbell area, owned by nine people, became the focus of this condemnation proceeding.[107] The city and the NLDC did not allege that any of these properties were "blighted or otherwise in poor condition."[108] Neither the city nor the NLDC claimed that the land at issue would be owned by the public or that the use of the land would be regulated to ensure access to the public subsequent to the taking. The homes were located in a perfect spot on the waterfront; unfortunately for the residents, the city also considered the location a perfect spot for redevelopment.

To justify the use of eminent domain, the Supreme Court had to find that the taking was for a public purpose sufficient to satisfy the Public Use Clause of the Fifth Amendment. The *Kelo* majority recognized that the "sovereign may not take the property of *A* for the sole purpose of transferring it to another private party *B*, even though *A* is paid just compensation."[109] Thus, the City of New London would not be "allowed

100. *Id.*
101. *Id.*
102. Kelo v. City of New London, 125 S. Ct. 2655, 2658 (2005).
103. *Id.* at 2660.
104. *Id.*
105. *Id.*
106. *Id.*
107. *Id.*
108. *Id.*
109. *Id.* at 2661.

to take property under the mere pretext of a public purpose, when its actual purpose was to bestow a private benefit."[110] However, because the taking was executed "pursuant to a 'carefully considered' development plan,"[111] and because neither of the lower courts nor the Supreme Court found any evidence of an illegitimate purpose, the Court concluded that the "City's development plan was not adopted 'to benefit a particular class of identifiable individuals.'"[112]

Without finding any improper motive on the part of the city to advantage a particular private entity, which would render the taking a private use,[113] the Court correctly found that the only remaining question was whether the development plan "serve[d] a 'public purpose.'"[114] However, instead of analyzing whether the taking was for a public purpose, the Court dismissed the issue as *only* a question of standard of review.[115] Since the Court has a "longstanding policy of deference to legislative judgments in this field,"[116] the simple answer is that the public purpose is whatever the legislature says it is. "Given the comprehensive character of the plan, the thorough deliberation that preceded its adoption, and *the limited scope of [its] review*," the Court found that the "plan unquestionably[117] serves a public purpose, [and therefore] the takings challenged here satisfy the public use requirement of the Fifth Amendment."[118]

Justice Stevens, writing for the *Kelo* majority, claimed that, "over a century of our case law interpreting [the Fifth Amendment] dictates an affirmative answer to [whether the city's proposed condemnations are for a 'public use']."[119] This, in turn, prevented the Court from reaching any alternative conclusion. However, earlier Justice Stevens admitted, if only

110. *Id.*

111. *Id.*

112. *Id.* at 2662 (quoting Haw. Hous. Auth. v. Midkiff, 467 U.S. 229, 245 (1984)).

113. *Id.* at 2669 (Kennedy, J., concurring) (noting that any taking designed "to favor a particular party, with only incidental or pretextual public benefits," would violate the public use requirement of the Takings Clause and would therefore be a private use).

114. *Id.* at 2663 (majority opinion).

115. *Id.* The majority opinion noted that "[t]he disposition of this case therefore turns on the question whether the City's development plan serves a 'public purpose.' Without exception, our cases have defined that concept broadly, reflecting our longstanding policy of deference to legislative judgments in this field." *Id.*

116. *Id.*

117. There is some irony in the Court's use of the word "unquestionably." Is it unquestionable because of its clarity or because the Court simply won't question the legislature?

118. *Kelo*, 125 S. Ct. at 2665 (emphasis added).

119. *Id.* at 2668.

briefly, that the reason the entire majority opinion rests on and defends rational basis review is because "[t]here is . . . no principled way of distinguishing economic development from the other public purposes that we have recognized."[120] It is not that a deferential standard of review is the *only* way to decide this case, but rather that the Court could not or would not consider any other possible means of distinguishing economic development from other already recognized public purposes. This Note seeks to remedy that lack of imagination.

B. Procedural History

In December 2000, the nine property owners brought an action in the New London Superior Court.[121] Among other things, they claimed that taking their properties through eminent domain "would violate the 'public use' restriction in the Fifth Amendment."[122] The trial court, after a seven-day trial, denied a petition for permanent injunctive relief as to some of the parcels in question.[123] The court concluded that, among other things, economic development constitutes a valid public use under the takings clauses of the state and federal constitutions, and that these takings would sufficiently benefit the public.[124] However, the court "granted a permanent restraining order prohibiting the taking of [other properties]" in question because the condemnation of those properties on adjacent parcels was not "reasonably necessary" to accomplish the development plan.[125] Both sides appealed and the Connecticut Supreme Court ruled that all of the city's proposed takings were valid.[126]

The ruling was based in part on a Connecticut General Statute that, as the Supreme Court noted, expressed a legislative determination that the taking of land, even developed land, as part of an economic development project is a "public use" and in the "public interest."[127] In

120. *Id.* at 2665.

121. *Id.* at 2660.

122. *Id.*

123. *Id.*

124. *See id.*

125. *Id.*

126. Kelo v. City of New London 843 A.2d 500, 507–08, 574 (Conn. 2004).

127. CONN. GEN. STAT. § 8-186 (2004).

> It is found and declared that the economic welfare of the state depends upon the continued growth of industry and business within the state; that the acquisition and improvement of unified land and water areas and vacated commercial plants to meet the needs of industry and business should be in accordance with local, regional and state planning objectives; that such acquisition and improvement often cannot be accomplished

accordance with that determination, the Supreme Court further held, relying on *Berman* and *Midkiff*, that such economic development was a valid public use under both the State and the Federal Constitutions.[128]

The three dissenting justices from the Connecticut Supreme Court argued for a "heightened" standard of judicial review for takings justified by economic development. They agreed that the plan was intended to serve a valid public use; however, they would have held all of the takings unconstitutional because the city had not provided "clear and convincing evidence" that the plan's economic benefits would come to fruition.

IV. ANALYSIS: CROSSING THE *NEW LONDON* BRIDGE FROM RATIONAL TO HEIGHTENED SCRUTINY FOR EMINENT DOMAIN TAKINGS

The Court is unable to rely solely on a deferential standard of review for all declarations of public use for eminent domain takings and retain its role as a judicial check on legislative power. This is especially true when dealing with eminent domain cases that do not directly achieve a public benefit.

Takings that indirectly achieve a public benefit require a higher standard of scrutiny. Takings that would indirectly benefit the public (public purpose takings, i.e. for economic development) stand apart from those that directly achieve a public benefit (public ownership takings, use-by-the public takings) because of the level of certainty with which the legislature can ensure the benefit. They should not be considered under the same standard of review because they are fundamentally different. With direct benefits to the public, the court ought to continue to engage in rational basis review since the legislature is better situated to make decisions of social impact.[129] However, with increasing levels of uncertainty comes an increasing responsibility by the judiciary to ensure that private property is not taken without adequate justification.

> through the ordinary operations of private enterprise at competitive rates of progress and economies of cost; that permitting and assisting municipalities to acquire and improve unified land and water areas and to acquire and improve or demolish vacated commercial plants for industrial and business purposes and, in distressed municipalities, to lend funds to businesses and industries within a project area in accordance with such planning objectives are public uses and purposes for which public moneys may be expended; and that the necessity in the public interest for the provisions of this chapter is hereby declared as a matter of legislative determination.

Id.

128. *Kelo*, 843 A.2d at 527–28.

129. *Id.*

A. Getting Beyond the Rational Basis Test for Takings with Indirect Benefits

Rational basis review is inadequate for economic development takings because the only outcome citizens are assured of is that private property *will* be taken and the state will *attempt* to put it to use. The Court had the opportunity in *Kelo v. City of New London* to establish the principle that rising levels of uncertainty should be accompanied by a rising level of scrutiny. The irony in the Court's reluctance to adopt a higher standard for cases of indirect public benefit is that a test by which to gauge whether the taking will substantially advance the government's purpose already exists in the Court's takings jurisprudence—not in eminent domain but in regulatory takings precedent.

The following sections outline the *Kelo* majority's arguments for a continued reliance on rational basis scrutiny and why those justifications are inadequate in cases of takings that would indirectly achieve a public benefit. The Court concluded that as long as conceivable reasons for a state action exist, that action should be upheld under a rational review; and in the alternative, the state may proceed regardless because the state may act under its police power to ensure the benefit of its citizens. However, neither conceivable reasons for a taking nor the state's police power provide the necessary authority for the Court to abdicate responsibility to ensure that the legislature's determination of a public use will indeed produce concrete benefits for the public when that benefit is not clear from the outset. Furthermore, the Court's indiscriminate use of rational basis review for takings has produced significant inconsistencies between the Court's takings jurisprudence and its precedents in other areas, as well as between the federal and state courts, and between different state courts.

1. "Conceivable" reasons

The Court incorrectly upheld the Connecticut legislature's determination that economic development was a public use when it deemed it "rationally related to a conceivable public purpose."[130] Courts have generally upheld takings where they could conceive of any reason why the legislature might have thought the takings necessary. For example, in *Berman* and *Midkiff*, the takings were challenged on the basis that taking private property and giving it to private organizations is

130. *Kelo*, 125 S. Ct. at 2669 (2005) (Kennedy, J., concurring).

not a "public use."[131] However, in those decisions, the Court emphasized the "importance of deferring to legislative judgments about [what constitutes a] public purpose."[132]

Earlier Court precedent even did the legislature's job of conceiving potential reasons.[133] The Court opined that it was sufficient that there were several conceivable reasons why the state legislature might have enacted the law in question, and therefore, there was no need for an actual legitimate motivation.[134]

However, despite the overemphasis on deference to the legislature, *Berman* and *Midkiff* emphasized an important principle of the public use clause: "A purely private taking could not withstand the scrutiny of the public use requirement; it would serve no legitimate purpose of government and would thus be void."[135] The Court has repeatedly concluded that "one person's property may not be taken for the benefit of another private person without a *justifying* public purpose, even though compensation be paid."[136] To protect that principle, those decisions reserved "a role for courts to play in reviewing a legislature's judgment of what constitutes a public use . . . [though] the Court in *Berman* made clear that it is 'an extremely

131. Haw. Hous. Auth. v. Midkiff, 467 U.S. 229, 229 (1984); Berman v. Parker, 348 U.S. 26, 31 (1954).

132. *Kelo*, 125 S. Ct. at 2674 (O'Connor, J., dissenting); s*ee also* Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470 (1987).

> [O]ur inquiry into legislative purpose is not intended as a license to judge the effectiveness of legislation. When considering the Fifth Amendment issues presented by Hawaii's Land Reform Act, we noted that the Act, "like any other, may not be successful in achieving its intended goals. But 'whether *in fact* the provisions will accomplish the objectives is not the question: the [constitutional requirement] is satisfied if . . . the . . . [State] Legislature *rationally could have believed* that the [Act] would promote its objective.'"

Id. at 511 n.3 (Rehnquist, C.J., dissenting) (alteration in original) (quoting *Midkiff*, 467 U.S. at 242).

133. *See* Williamson v. Lee Optical, 348 U.S. 483, 487–88 (1955) (providing reasons not expressly stated by the legislature for why the Oklahoma legislature might have enacted a law forbidding opticians from fitting or duplicating lenses without a prescription from an ophthalmologist or optometrist).

134. *Id.* The Court reasoned that the "Oklahoma law may exact a needless, wasteful requirement in many cases. But it is for the legislature, not the courts, to balance the advantages and disadvantages of the new requirement." *Id.* at 487.

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

136. *Id.* at 241 (emphasis added) (quoting Thompson v. Consol. Gas Util. Corp., 300 U.S. 55, 80 (1937)); *see also* Mo. Pac. Ry. Co. v. Nebraska, 164 U.S. 403, 417 (1896) ("The taking by a state of the private property of one person or corporation, without the owner's consent, for the private use of another, is not due process of law, and is a violation of the fourteenth article of amendment of the constitution of the United States.").

narrow' one."[137] In takings for indirect public benefits, that role should be expanded to pierce past any merely conceivable purposes to find the justifying purpose.

Ironically, the eminent domain power is not exercised for *conceivable* purposes. The eminent domain power is always exercised to advance *specific* purposes, such as a road, a hospital, economic development. In fact, the established rules governing forced takings of private property universally require an ex ante statement of the "ends" justifying the condemnation.[138] In most states, and for all takings by the federal government, eminent domain is a *judicial* proceeding.[139] After satisfying the prerequisites, the condemning entity files an action against the persons whose property it seeks to take.[140] The condemning entity must submit pleadings that, among other things, describe the land to be taken and, most importantly, set forth the public use for which it is being taken.[141]

The fact that the government must already justify every exercise of eminent domain with an ex ante statement of purpose undermines *Midkiff's* dictum that deference to the dictates of the political branches requires courts to speculate about conceivable justifications for an exercise of eminent domain.[142] Furthermore, the Court has held that such speculation is unnecessary when the government has already articulated its purpose.[143] For example, in *Allegheny Pittsburgh Coal Co. v. County Commission*,[144] the Court considered an equal protection challenge to a county's practice of only reassessing property for tax purposes when title changed hands. The Court invalidated the scheme because similarly situated property owners bore drastically different tax burdens.[145] Three

137. *Midkiff*, 467 U.S. at 240, (quoting Berman v. Parker, 348 U.S. 26, 32 (1954)).

138. 6 JULIUS L. SACKMAN, NICHOLS ON EMINENT DOMAIN § 24.05[1] (rev. 3d ed. 2004).

139. *Id.*

140. *Id.*

141. *Id.* § 26A.02[1] (quoting state statutes); *see also* FED. R. CIV. P. 71A(c)(2) (directing that "the complaint [for condemnation of property] shall contain a short and plain statement of . . . the use for which the property is to be taken").

142. *See Midkiff*, 467 U.S. at 242 (citations omitted) ("Of course, this Act, like any other, may not be successful in achieving its intended goals. But 'whether in fact the provision will accomplish its objectives is not the question: the [constitutional requirement] is satisfied if . . . the . . . [state] Legislature rationally could have believed that the [Act] would promote its objective.'" (quoting W. & S. Life Ins. Co. v. State Bd. of Equalization, 451 U.S. 648, 671–72 (1981))); *see also* Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 466 (1981); Vance v. Bradley, 440 U.S. 93, 112 (1979).

143. Nordlinger v. Hahn, 505 U.S. 1, 15 (1992).

144. 488 U.S. 336 (1989)

145. *Id.* at 341, 343.

years later, in *Nordlinger v. Hahn*,[146] the Court upheld California's Proposition 13, which had a nearly identical effect as the scheme in *Allegheny*.[147]

In distinguishing the cases, the Court relied upon the fact that the county in *Allegheny* had asserted that its assessment scheme was "rationally related to its purpose of assessing properties at true current value."[148] The Court then implied that, when the government articulates a purpose for its action, it will be held to it:

> [T]he Equal Protection Clause does not demand for purposes of rational-basis review that a legislature or governing decisionmaker actually articulate at any time the purpose or rationale supporting its classification . . . . [But] this Court's review does require that a purpose may conceivably or "may reasonably have been the [decisionmaker's] purpose and policy."[149]

Although not required to, when the legislature states its purpose for a taking certain action, they are held to that purpose. Since the process of condemning property for eminent domain takings requires a legislature to state the purpose for the taking, the Court ought not to rely or search after "conceivable reasons" in order to apply a deferential rational basis standard of.

2. The police power is not synonymous with eminent domain

The concept of the state's police power must be divorced from the eminent domain power in order for the Court to properly analyze legislative uses of eminent domain. A factor in the Court's insistence on rational basis scrutiny for "public use" claims, as Justice Thomas points out in his *Kelo* dissent, is its erroneous equation of the eminent domain power with the state's police power.[150] This application of rational basis has been justified by the Court's conclusion that the eminent domain power "is coterminous with the scope of a sovereign's police powers."[151] The Court has further held that if something is "within the

146. 505 U.S. 1 (1992).

147. *Allegheny*, 488 U.S. at 336–37.

148. *Id.* at 343.

149. *Nordinger*, 505 U.S. at 15 (quoting Allied Stores of Ohio, Inc. v. Bowers, 358 U.S. 522, 528–29 (1959)).

150. Kelo v. City of New London, 125 S. Ct. 2655, 2685 (2005) (Thomas, J., dissenting).

151. Haw. Hous. Auth. v. Midkiff, 467 U.S. 229, 240 (1984); *see also* Berman v. Parker, 348 U.S. 26, 31 (1954) ("We deal, in other words, with what has traditionally been known as the police power.").

authority of [a legislature through the police power], the means by which it will be attained is also for Congress to determine."[152] In other words, once something is within the police power of the state, it is automatically afforded rational basis scrutiny. The Court concluded that an exercise of eminent domain is merely one possible means to achieve the entire range of permissible governmental ends and should be afforded rational basis scrutiny as part and parcel of the police power.[153]

This conclusion is flawed and should not be validation for the exclusive use of rational basis review for any and all eminent domain cases. First, there is widespread agreement across academia that the Public Use Clause was intended to limit the range of acceptable "ends" achievable through an exercise of eminent domain.[154] The assertion that eminent domain power and police powers are coterminous is illogical. As Professor Merrill observed,

> This pronouncement has dismayed commentators because the outer limit of the police power has traditionally marked the line between noncompensable regulation and compensable takings of property . . . . Legitimately exercised, the police power requires no compensation. Thus, if public use is truly coterminous with the police power, a state could freely choose between compensation and noncompensation anytime its actions served a "public use." This approach would seemingly overrule the entire takings doctrine in a single stroke.[155]

The Court's case law agrees with the conclusion drawn by Professor Merrill. For example, traditional uses of the state's police power, such as the power to stop a public nuisance, required no compensation

152. *Midkiff*, 467 U.S. at 240 (quoting *Berman*, 348 U.S. at 32).

153. *See Berman*, 348 U.S. at 32 ("Once the object is within the authority of Congress, the right to realize it through the exercise of eminent domain is clear. For the power of eminent domain is merely the means to the end."); *Midkiff*, 467 U.S. at 240.

154. *See, e.g.*, RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 162–81 (1985) (arguing that the Fifth Amendment's Takings Clause was designed to enable the government to condemn land for public uses, not to seize land to advance the broadly defined public interest); Nicole Stelle Garnett, *The Public Use Question as a Takings Problem*, 71 GEO. WASH. L. REV. 934, 939 (2003) (providing an overview of Takings Clause literature); Thomas W. Merrill, *Rent Seeking and the Compensation Principle*, 80 NW. U. L. REV. 1561, 1569 (1986) ("The Supreme Court has largely abandoned the requirement that the power of eminent domain be devoted to public rather than private ends."); Cass R. Sunstein, *Lochner's Legacy*, 87 COLUM. L. REV. 873, 891 (1987) ("The public use requirement traditionally meant that property had actually to be used by the public. But gradually the requirement was expanded to refer to any plausible justification."(internal citations omitted)).

155. Thomas W. Merrill, *The Economics of Public Use*, 72 CORNELL L. REV. 61, 70 (1986).

whatsoever,[156] which is clearly contrary to the takings power, which has always required compensation.[157] Therefore in *Berman*, for example, if the slums to be removed were truly "blighted," then state nuisance law under the authority of the state's police power, not eminent domain, would have been the appropriate remedy. "The question whether the State can take property using the power of eminent domain is therefore distinct from the question whether it can regulate property pursuant to the police power. To construe the Public Use Clause to overlap with the States' police power conflates these two categories."[158]

This obvious distinction between the police power and the eminent domain power undercuts the rationale for applying rational basis review in the public use context. Even Justice O'Connor recognized "the errant language in [the majority opinion she authored in] . . . *Midkiff*."[159] In saying that "the 'public use' requirement was coterminous with the scope of a sovereign's police powers," the Court "simply did not put such language to the constitutional test."[160]

Although rational basis is typically applied when state action made under the authority of the police power is judicially reviewed, it would be illogical to apply rational basis to legislative determinations of public use under the Takings Clause merely because the two state powers *could* be used to solve an identical problem. There are situations in which a deeper analysis must be taken to avoid problematic results inherent in rational basis review of takings cases.

3. Inconsistencies in applying a rational basis review of takings

The Court's application of rational basis review to legislative determinations of a public use for the indirect benefits that may accrue through economic development is inconsistent with the Court's precedent of applying higher scrutiny to protect fundamental property interests. The Court would never "defer to a legislature's determination of the various circumstances that establish, for example, when a search

156. *See* Mugler v. Kansas, 123 U.S. 623, 668–69 (1887).

157. 2 J. KENT, COMMENTARIES ON AMERICAN LAW 275 (1827); J. Madison, *For the National Property Gazette*, (Mar. 27, 1792), *in* 14 PAPERS OF JAMES MADISON 266, 267 (R. Rutland et al. eds., 1983) (arguing that no property "shall be taken *directly* even for public use without indemnification to the owner").

158. Kelo v. City of New London, 125 S. Ct. 2655, 2685–86 (2005) (Thomas, J., dissenting) (citing Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1014 (1992); *Mugler*, 123 U.S. at 668–69).

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

160. *Id.*

of a home would be reasonable."[161] Yet the *Kelo* majority stresses the importance of not "'second-guess[ing] the City's considered judgments' . . . when the issue is, instead, whether the government may take the infinitely more intrusive step of tearing down [an individual's] home[]."[162] Though the Court has adopted a "searching standard of constitutional review for nontraditional property interests, such as welfare benefits," the *Kelo* majority contends that the Court ought to now defer to the legislature's determination of a public use for the purpose of a taking, and "thereby invade[] individuals' traditional rights in real property."[163] The Court's overlapping application of deferential and heightened scrutiny in regards to property interests highlights the irony of the *Kelo* decision. This is not to suggest that any taking of private property should be afforded heightened scrutiny; rather, it suggests that when the only consideration given for the taking of private property is the promise of future public benefits—and then only if and after a private third party benefits—rational basis cannot be the default standard meant to protect the "security of Property."[164] The following sections provide further insight on the inconsistencies that arise from an indiscriminate application of rational basis review when applied to eminent domain takings.

a. Inconsistency between federal and state rulings. Interestingly, lower courts purporting to apply rational basis review sometimes find a taking to be irrational for the same reasons that the Supreme Court would uphold the taking.[165] Other courts interpret state public use provisions to

161. *Id.* at 2684 (citing Payton v. New York, 445 U.S. 573, 589–90 (1980)).

162. *Id.* at 2685 (quoting the majority at 2668). Justice Thomas points out that, if we adopt the majority's viewpoint, then "[t]hough citizens are safe from the government in their homes, the homes themselves are not." *Id.*

163. *Id.* at 2684 (citing Board of Regents of State Colleges v. Roth, 408 U.S. 564 (1972); Goldberg v. Kelly, 397 U.S. 254 (1970)).

164. Hamilton, *supra* note 20.

165. *See, e.g.*, City of Little Rock v. Raines, 411 S.W.2d 486, 494 (Ark. 1967) (distinguishing condemnations to eliminate blight where the transfer to private parties occurs "after the public purpose was accomplished" and condemnations for economic development where the purpose is the transfer to the private business); Sw. Ill. Dev. Auth. v. Nat'l City Envtl., L.L.C., 768 N.E.2d 1, 10–11 (Ill. 2002) (describing economic benefit as "trickle-down" effect); City of Owensboro v. McCormick, 581 S.W.2d 3, 6–7 (Ky. 1979) ("Every legitimate business . . . indirectly benefits the public"); Opinion of the Justices, 131 A.2d 904, 907–08 (Me. 1957) (fact that project may be beneficial "in a broad sense" does not mean there is any direct public use); Ga. Dep't of Transp. v. Jasper County, 586 S.E.2d 853, 856, 857 (S.C. 2003) (property may not be taken "on vague grounds of public benefit to spring from a more profitable use").

require heightened scrutiny.[166] This resistance to the application of rational basis review in public use cases suggests courts' profound discomfort with the logic of *Midkiff* and now *Kelo*.

For example, the Michigan Supreme Court recently overruled its earlier decision in *Poletown Neighborhood Council v. City of Detroit*[167] with its decision in *County of Wayne v. Hathcock*.[168] *Hathcock* held that a generalized economic benefit to the public was not a public use "simply because one entity's profit maximization contributed to the health of the general economy."[169] Indeed, the court went to great lengths to explicitly overrule the *Poletown* opinion, holding that "*Poletown's* conception of a public use—that of 'alleviating unemployment and revitalizing the economic base of the community'—has no support in the Court's eminent domain jurisprudence."[170] Therefore, the condemnation of nonblighted land for an airport technology park for economic development purposes was unconstitutional.[171]

Hathcock stands in stark contrast to the Court's recent decision in *Kelo*. Although the two state supreme courts came to different conclusions on the adequacy of the proposed public use, both condemnations would probably pass constitutional muster under the relaxed, deferential rational basis standard of review the Supreme Court used in *Midkiff*.[172] Neither public benefit is "impossible" or "palpably without reasonable foundation";[173] therefore, glancing over the condemnation through a rational basis review would not uncover the inadequacies of proposed public uses that could more easily be detected through a heightened standard of review.

The Court could not have envisioned, let alone predicted, the extent to which state and local governments would stretch the limits of *Berman* and *Midkiff* to find a public use in the mere economic revitalization of

166. *See* Wilmington Parking Auth. v. Land with Improvements, 521 A.2d 227, 231 (Del. 1987) (holding that the primary purpose is determined by looking at the objective "consequences and effects" of the taking); *see also* City of Jamestown v. Leevers, 552 N.W.2d 365, 372–74 (N.D. 1996) (remanding for determination of primary purpose of condemnation and citing a heightened scrutiny standard despite a finding of public use in general).

167. 304 N.W.2d 455 (Mich. 1981).

168. 684 N.W.2d 765 (Mich. 2004).

169. *Id.* at 786.

170. *Id.* at 787 (footnote omitted).

171. *Id.*

172. *See* Haw. Hous. Auth. v. Midkiff, 467 U.S. 229, 241 (1984) (citations omitted).

173. *Id.*

perfectly viable stand-alone residential neighborhoods and businesses. In both *Kelo* and *Hathcock*, the project area is blight-free.[174] There is no other perceivable problem with the land, other than, in both cases, it stands squarely in the path of government master plans. While the *Hathcock* and *Kelo* opinions represent polar extremes on the sufficiency of public use to support condemnation for the purpose of economic revitalization, there are other egregious examples.[175]

b. Inconsistency between different state court rulings. The Court's application of rational basis review to the *Kelo* decision provides no further guidance to the lower courts than what they already had regarding the appropriate level of judicial deference towards legislative uses of eminent domain for the sole purpose of economic development.[176] In the past, this lack of direction had allowed for numerous and conflicting lower-court decisions. Indeed, nearly every state that had considered the appropriate deference for a legislature's determination of a public use had devised its own test. For example, some state decisions explicitly cited to the U.S. Constitution or federal cases,[177] some interpreted only

174. *See* Kelo v. City of New London, 843 A.2d 500, 520 (Conn. 2004); *Hathcock*, 684 N.W.2d at 796.

175. For examples of state and federal courts (applying state law) finding sufficient public use, see, for example, City of Shreveport v. Shreve Town Corp., 314 F.3d 229 (5th Cir. 2002) (finding that Shreveport's condemnation of Shreve Town Corporation's lot for the purpose of building a parking lot for a new convention center presented an economic benefit to the community, and thus a public purpose); J.C. Penney Corp. v. Carousel Ctr. Co., 306 F. Supp. 2d 274 (N.D.N.Y. 2004) (finding that condemnation of plaintiff's lease in a shopping center in order for the owner to redevelop was not merely for private use); *In re* W. 41 St. Realty L.L.C. v. N.Y. State Urban Dev. Corp., 744 N.Y.S.2d 121 (N.Y. App. Div. 2002) (allowing the condemnation of land across Eighth Ave. from the Port Authority Bus Terminal since benefit to the New York Times—including a new headquarters, condos, subway entrance, auditorium, and gallery space—presented "an evident utility [to] the public" (quoting Bloodgood v. Mohawk & Hudson R.R., 18 Wend. 9, 14 (N.Y. 1837)); Vitucci v. N.Y. City Sch. Constr. Auth., 735 N.Y.S.2d 560, 562 (N.Y. App. Div. 2001) (upholding a condemnation of a business for the purpose of constructing a new school as "further[ing] the public benefit, utility, or advantage" despite the fact that the school was not built, and the defendants instead chose to expand a neighboring food production business).

176. *See Kelo*, 843 A.2d at 593–95; Sw. Ill. Dev. Auth. v. Nat'l City Envtl., L.L.C., 768 N.E.2d 1, 8–9 (Ill. 2002).

177. *See, e.g.*, Daniels v. Area Plan Comm'n, 306 F.3d 445, 459 (7th Cir. 2002); Wilmington Parking Auth. v. Land With Improvements, 521 A.2d 227, 231 (Del. 1986); Randolph v. Wilmington Hous. Auth., 139 A.2d 476, 480 (Del. 1958); Baycol, Inc. v. Downtown Dev. Auth., 315 So. 2d 451, 455 (Fla. 1975); *Sw. Ill. Dev. Auth.*, 768 N.E.2d at 7; Prince George's County v. Collington Crossroads, Inc., 339 A.2d 278, 287 (Md. 1975); Poletown Neighborhood Council v. City of Detroit, 304 N.W. 455, 459 (Mich. 1981); City of Bozeman v. Vaniman, 898 P.2d 1208, 1214 (Mont. 1995); City of Jamestown v. Leevers Supermarkets, Inc., 552 N.W.2d 365, 369, 374 (N.D. 1996).

their state constitution,[178] and others cited to neither.[179] This confusion was not, however, an example of healthy state experimentation.[180] Instead, this division in state court rulings demonstrated that lower courts lacked guidance regarding the appropriate standard of deference to afford a legislature's determination of a public use taking. After *Kelo*, they still lack that guidance.

There are two standards of rational review being employed at the state level: one that actively seeks to validate legislative pronouncements of "public use," and one that digs just beneath the surface seeking what *Midkiff* termed the "justifying public purpose."[181] This variation creates confusion, uncertainty, and unsettled expectations for litigants and the public in general. Several cases illustrate the point that, as *Kelo* and *Hatchcock* demonstrate, state and federal decisions don't hew to any bedrock principle when applying a rational basis review. Consider the following examples.

In *General Building Contractors, L.L.C. v. Board of Shawnee County Comm'rs*,[182] the Kansas Supreme Court held that the Joint Economic Development Organization could condemn privately owned land belonging to General Building Contractors, L.L.C. (GBC) and Mr. Richard Tolbert for the purpose of economic development, specifically the creation of an industrial park and a Target distribution center.[183] While GBC and Tolbert asserted that the taking did not meet the public use test, the court countered by holding that "there is no precise definition of what constitutes a valid public use, and what may be

178. City of Little Rock v. Raines, 411 S.W.2d 486, 491 (Ark. 1967); City of Owensboro v. McCormick, 581 S.W.2d 3, 5 (Ky. 1979); Opinion of the Justices, 131 A.2d 904, 907 (Me. 1957); Opinion of the Justices, 250 N.E.2d 547, 553 (Mass. 1969); Merrill v. City of Manchester, 499 A.2d 216, 217 (N.H. 1985); Ga. Dep't of Transp. v. Jasper County, 586 S.E.2d 853, 855 (S.C. 2003); Petition of Seattle, 638 P.2d 549, 554 (Wash. 1981).

179. Gen. Bldg. Contractors, L.L.C. v. Bd. of Shawnee County Comm'rs, 66 P.3d 873 (Kan. 2003); City of Minneapolis v. Wurtele, 291 N.W.2d 386 (Minn. 1980); Appeal of City of Keene, 693 A.2d 412 (N.H. 1997); *In re* Port of N.Y. Auth., 219 N.E.2d 797 (N.Y. 1966); Cannata v. City of N.Y., 11 N.Y.2d 210 (N.Y. 1962).

180. *See* New State Ice Co. v. Liebmann 285 U.S. 262, 311 (1932) (Brandeis, J. dissenting) (explaining that within the federal system, "a single courageous State may, if its citizens choose, serve as a laboratory[,] and try novel social and economic experiments without risk to the rest of the country").

181. Haw. Hous. Auth. v. Midkiff, 467 U.S. 229, 241 (1984) (quoting Thompson v. Consol. Gas Corp., 300 U.S. 55, 80 (1937)); *see also* Cincinnati v. Vester, 281 U.S. 439, 447 (1930); Madisonville Traction Co. v. St. Bernard Mining Co., 196 U.S. 239, 251–52 (1905); Fallbrook Irrigation Dist. v. Bradley, 164 U.S. 112, 159 (1896)).

182. 66 P.3d 873 (Kan. 2003).

183. *Id.* at 875.

considered a valid public use or purpose changes over time."[184] Given that the definition is so hard to pin down, the court noted that "as long as a governmental action is designed to fulfill a public purpose, the wisdom of the governmental action generally is not subject to review by the courts."[185] The court dismissed the potentially private nature of the taking, stating that "[t]he mere fact that through the ultimate operation of the law the possibility exists that some individual or private corporation might make a profit does not, in and of itself, divest the act of its public use and purpose."[186]

Contrast that decision with a U.S. District Court's later decision in *99 Cents Only Store v. Lancaster Redevelopment Agency.*[187] There the court held that the City of Lancaster and the Lancaster Redevelopment Agency's condemnation of a store to accommodate the expansion of a Costco did not demonstrate a public use since "the only reason [Lancaster] enacted the Resolutions of Necessity was to satisfy the private expansion demands of Costco."[188] The redevelopment agency argued that the prevention of "future blight" was also a motivating factor behind the public purpose, but the court, *unwilling* to simply apply a deferential blind eye, noted that this motivation was unsupported by any authority or factual findings, and thereby was not a valid public purpose.[189] These and several other cases exemplify why courts have and will continue to apply various degrees of rational basis review to disparate ends without a guiding bedrock standard for reviewing public purpose takings.[190]

184. *Id.* at 882.

185. *Id.* at 882 (quoting State *ex rel.* Tomasic v. Unified Gov't of Wyandotte County/Kansas City, 962 P.2d 543, 553 (Kan. 1998) (citations omitted)).

186. *Id.* at 883.

187. 237 F. Supp. 2d 1123 (C.D. Cal. 2001).

188. *Id.* at 1129.

189. *Id.* at 1130.

190. *See, e.g.*, Beach-Courchesne v. City of Diamond Bar, 95 Cal. Rptr. 2d 265 (Cal. Dist. Ct. App. 2000) (holding that lack of evidence that a redevelopment project area was blighted required invalidation of redevelopment plans); Friends of Mammoth v. Town of Mammoth Lakes Redevelopment Agency, 98 Cal. Rptr. 2d 334, 362 (Cal. Dist. Ct. App. 2000) (overturning trial court's determination that the administrative record supported Town's finding that the Project Area was blighted); Sw. Ill. Dev. Auth. v. Nat'l City Envtl., L.L.C., 768 N.E.2d 1 (Ill. 2002) (holding that SWIDA did not have the authority to take property from NCE and convey it to Gateway International Motorsports for more parking space); Casino Reinvestment Dev. Auth. v. Banin, 727 A.2d 102, 111 (N.J. Super. Ct. Law Div. 1998) (invalidating a taking by a casino and holding that it was analogous to giving the developer a blank check with respect to future development on the property for casino hotel purposes).

The Supreme Court must go beyond rational basis scrutiny for takings that result in, if anything, indirect benefits to the public. The Court must also acknowledge that merely conceivable reasons are insufficient for upholding a taking that ought to have clearly established reasons when private property is taken with only the potential for future public benefits. By recognizing that the police power is not synonymous with rational basis review, the Court can correct the current problems inherent in applying a deferential standard to legislative determinations of what constitutes a public use under the Public Use Clause of the Fifth Amendment, namely inconsistency, confusion, and vagueness. By applying the appropriate standard, one that already exists and is currently utilized in the Court's regulatory takings jurisprudence, the Court has the opportunity to clear up the confusion in the lower courts and provide protection for the security of property.

B. Intermediate-Level Scrutiny for Takings Resulting in Indirect Public Benefit

As the foregoing analysis illustrates, rational basis review as presently conducted by state courts (and federal courts applying state standards) leads to conflicting and unsatisfactory results in the realm of government taking for a public use. Often, the exercise of eminent domain is upheld through a vaguely articulated public use, the benefits of which accrue most specifically and directly to private owners. In a few instances, even after applying a rational basis review, courts find the taking lacks any "public use." The difference between these cases' outcomes holds the key to why, in cases involving public benefit takings, courts should apply a more searching standard of review.

In some cases, the taking of private property for private use is simply too egregious to condone. To suggest even to the common layperson that private property could be taken for use by another private entity would likely elicit reactions of disgust at the injustice.[191] While the argument has been made for applying strict scrutiny to eminent domain proceedings,[192] "hands-off" rational basis scrutiny generally is justified

191. This idea is analogized from what has been referred to as a type of constitutional "gag reflex." *See* Frederick Mark Gedicks, *The Establishment Clause Gag Reflex*, 2004 BYU L. REV. 995.

192. *See* Stephen J. Jones, *Trumping Eminent Domain Law: An Argument for Strict Scrutiny Analysis under the Public Use Requirement of the Fifth Amendment*, 50 SYRACUSE L. REV. 286, 307–11 (2000) (arguing that property rights should be granted fundamental status as part of the privacy penumbra described in *Griswold v. Connecticut*, 381 U.S. 479 (1965) and thus be subject to strict scrutiny).

by the need to guarantee that the legislature, not the courts, determines which policies to pursue.[193] But heightened judicial scrutiny of the exercise of eminent domain would not limit the range of policies available to government. Rather, a more searching inquiry in public use cases merely would serve to draw a line between the legislature's ability to determine social policy and the judiciary's ability to protect the security of property.

Takings with indirect public benefits must undergo heightened scrutiny to ensure protection of private property interests. There must be a higher standard of review to ensure that the government taking in these situations "substantially advances" the government's purpose in achieving the desired end—public benefit.[194] By applying a bright-line test analogized from the Court's regulatory takings jurisprudence, namely the qualitative/quantitative nexus test, the court can establish a rebuttable presumption against the use of eminent domain for public purpose takings when the benefits from the taking are not immediately clear. Such a rule would provide the appropriate check on the legislature's power of eminent domain in fulfillment of the judiciary's constitutional role.

1. Rebuttable presumption against eminent domain for public purpose takings

When declaring a taking to be a public use under the Takings Clause, the government would always start from the assumption that if the taking will directly result in public benefits (a road, a hospital, etc.), it will be afforded deference under a rational basis review of the taking. However, if the government wishes to cross from that established threshold by executing a taking through eminent domain that would only indirectly achieve a public benefit through a private third party (economic development, etc.), the government would have to overcome a rebuttable presumption that the taking is not for a public use sufficient to satisfy the Fifth Amendment.[195] The government, by showing evidence of both a

193. *See* Haw. Hous. Auth. v. Midkiff, 467 U.S. 229, 242–43 (1984).

194. Kelo v. City of New London, 125 S. Ct. 2655, 2667 (2005).

195. *See also* Kelo v. City of New London, 843 A.2d 500, 587 (Conn. 2004) (Zarella, J., concurring in part and dissenting in part). In his dissent, Justice Zarella actually proposes a four-step analysis in which the burden of proof is shifted between the respective parties at various stages in the analysis. Those steps include the following: (1) The party opposing the taking has the burden of proving whether the statutory scheme is facially constitutional. (2) If the proposed economic development is a valid public use sufficient to satisfy the Fifth Amendment, then the party opposing

qualitative and quantitative nexus between the government's purpose for and the scope of the taking, would be able to overcome that presumption, satisfy heightened scrutiny, and bridge the gap between takings with direct and indirect benefits (over the aforementioned "*New London* Bridge").

2. The bright-line rule: a regulatory takings test for public-purpose takings

Courts should, and a few do, examine cases of eminent domain with more care than the rational basis test provides. The concept of applying a higher standard of review to takings cases that do not directly achieve the purpose of the taking is not new; on the contrary, it is a well-established principle of takings jurisprudence. In dealing with regulatory takings, the Court has established a means-oriented test capable of resolving the issue of whether a taking truly accomplishes its purpose. Simply applying that standard as a bright-line rule to takings with indirect benefits would establish a clear test against which courts could standardize and normalize these decisions.

Applying a higher standard of review to public use determinations demands, like substantive scrutiny of economic regulations, an inquiry into the appropriate ends of government action. Once the legislature has declared a taking to be for a "public use," assuming the public use would result in indirect public benefits, the court would not accept the legislature's determination; rather, under a higher standard of review, the court would ask whether the economic development is a "public use" or "in the public interest."

While this initial inquiry does call for a look into the ends proposed by the legislature, the test for such a legislative determination would focus instead on whether eminent domain is the appropriate means by which a government may pursue desired policies. Therefore, the court would analyze both the means and the ends to ensure that the taking is

the taking bears the additional burden of proving, in accordance with the deferential standard of review, that the primary intent of the particular economic plan in to benefit private, rather than public, interests. (3) If the taking party survives that step, they then bear the burden to prove that the specific economic development will, in fact, result in a public benefit by clear and convincing evidence. (4) Finally, if the taking party meets this burden, the party opposing the taking must, again under the deferential standard afforded the legislature, prove that the specific condemnation at issue is not reasonably necessary to implement the plan. *Id.* at 587–91. However, it seems as though the first step is a given argument that a party opposing the taking would make. Furthermore, requiring a demonstration of an essential nexus and a rough proportionality between the government's plan and the plan for the taking accomplishes the remaining three steps.

substantially related to an important and verifiably attainable goal. This means-oriented test for eminent domain can be found in the regulatory takings context, illustrated by the holdings in *Nollan v. California Coastal Commission*[196] and *Dolan v. City of Tigard*.[197] *Nollan* and *Dollan* demonstrate the need to find a qualitative and a quantitative nexus between the taking and its purpose.

a. The qualitative nexus: the essential nexus between the taking and the indirect public benefit. The government must show that its purpose behind the taking is substantially related to the proposed taking in order to demonstrate a qualitative nexus. In *Nollan*, the California Coastal Commission granted a permit to the Nollans to replace a small bungalow on their beachfront lot with a larger house, but conditioned that permit on allowing a public easement to pass across their property such that people walking past their home could see and access the beach.

Justice Scalia explained the importance of identifying the "essential nexus" between the government's purpose and the regulation.[198] If the regulation merely had been a standard regulation to impose an easement for public beach access on the land of whoever built a home along the seashore property, the regulation would have been a taking and the government would have been obligated to pay just compensation. The "evident constitutional propriety disappears, however, if the condition substituted for the prohibition utterly fails to further the end advanced as the justification for the prohibition."[199] The lack of a nexus between a condition imposed by the regulation and the original purpose of the building restriction "converts that purpose to something other than what it was. The purpose then becomes, quite simply, the obtaining of an easement to serve some valid governmental purpose, but without payment of compensation."[200] In short, the purpose becomes what Justice Scalia called "an out-and-out plan of extortion."[201] Thus, this qualitative nexus ensures that the purpose meets the regulation.

Although this holding relates specifically to regulatory takings, its analogous importance to eminent domain is clear: the judiciary, while deferential to the legislature's ability to pronounce a taking as providing

196. 483 U.S. 825 (1987).

197. 512 U.S. 374 (1994).

198. *Nollan*, 483 U.S. at 836–37.

199. *Id.* at 837.

200. *Id.*

201. *Id.* (quoting J.E.D. Assocs., Inc. v. Atkinson, 432 A.2d 12, 14 (N.H. 1981)).

for a "public use," must analyze the qualitative nexus between the government's purpose in the taking and the taking itself to ensure fairness and justice. This nexus concerns the qualitative nature of the taking: does the government's purpose for the taking meet with the taking itself?

For example, in *Berman*, Congress made a "'legislative determination'" that "'conditions existing in the District of Columbia with respect to substandard housing and blighted areas, including the use of buildings in alleys as dwellings for human habitation, are injurious to the public health, safety, morals, and welfare,'" and declared that the policy of the United States was to "'eliminat[e] all such injurious conditions by employing all means necessary and appropriate for the purpose.'"[202] The city knew the exact boundaries of the blighted area and developed a plan to revitalize that exact area.

The Act passed by Congress empowered the District of Columbia Redevelopment Land Agency to acquire the lands through eminent domain or otherwise.[203] The Agency initiated eminent domain proceedings against the properties in question. However, there were no additional requirements placed on the residents, and the Agency did not go outside of its authority to acquire any other lands other than those considered "substandard housing and blighted areas."[204] Had the Agency not remained within the scope of their charter and proposed an additional component to the taking—requiring for example, parcels of land from adjoining neighborhoods for a new park in order to further beautify the area[205]—that would have exceeded the scope of the taking's purpose and been invalid.

Similarly, in *Midkiff*, the purpose of the taking was to open the fee simple market to competitive market forces by divesting ownership of forty-seven percent of the state's land from seventy-two private landowners.[206] Any proposed taking outside of that scope would have been invalid. The Hawaii legislature had considered requiring the large landowners to sell the lands that they were leasing to homeowners. The landowners strongly resisted this scheme, however, pointing to the

202. Berman v. Parker, 348 U.S. 26, 28 (1954) (quoting District of Columbia Redevelopment Act of 1945, 60 Stat. 790, D.C. CODE § 2 (1951)).

203. District of Columbia Redevelopment Act of 1945, 60 Stat. 790, D.C. CODE, §§ 5-701 to 5-719.

204. *See Berman*, 348 U.S. at 28.

205. *Nollan*, 483 U.S. 825.

206. Haw. Hous. Auth. v. Midkiff, 467 U.S. 229, 233 (1984).

significant federal tax liabilities they would incur. Therefore, the legislature created a mechanism for condemning residential tracts and for transferring ownership of the condemned fees simple to existing lessees. By condemning the land in question, the Hawaii Legislature made the land sales involuntary, thereby making the federal tax consequences less severe while still facilitating the redistribution of fees simple.[207] Had the state legislature instituted proceedings to force the sale of the land to the lessors through another mechanism, thereby transferring property to the lessees but also inducing large tax penalties for the lessors, this taking would have exceeded the essential nexus between the purpose behind the government's taking and the need for the taking.

b. The quantitative nexus: a rough proportionality between the taking and the indirect public benefit. Complimenting the *Nollan* decision is the Court's ruling in *Dolan v. City of Tigard*, which requires a "rough proportionality" between the taking imposed by the state and the state's goals, "both in nature and extent."[208] In *Dolan*, an Oregon city refused to grant approval for a building permit to expand a hardware store located on a flood plane unless the owner dedicated certain portions of the property to flood control measures, traffic improvements, and a bike path.[209] The court of appeals approved the ruling of the Land Use Board requiring these exactions, but the Supreme Court reversed and remanded. Justice Rehnquist explained that in *Dolan*, the first step (required by *Nollan*), was satisfied. There were "no such gimmicks . . . associated with the permit conditions imposed by the city," as had been the case in *Nollan*, because there was obviously a nexus between the need for the regulation—"prevention of flooding . . . and the reduction of traffic congestion"—and the regulation exactions.[210]

The city, however, demanded more than was necessary to accomplish its purpose. The city not only wanted Ms. Dolan not to build in the floodplain but also wanted her property "along Fanno Creek for its greenway system. The city [had] never said why a public greenway, as opposed to a private one, was required in the interest of flood

207. To accommodate the needs of both lessors and lessees, the Hawaii Legislature enacted the Land Reform Act of 1967 (Act), HAW. REV. STAT. § 516 (1967).

208. 512 U.S. 374, 391 (1994).

209. *Id.*

210. *Id.* at 387.

control."[211] The purpose met the regulation, but the city's required exaction was more than the regulation needed.

Furthermore, the lower state courts in *Dolan* had been similarly divided on the appropriate standard of review for such regulatory exactions. The Court considered the various state court tests for reviewing exactions and concluded that the test that most closely approximated the correct federal standard required "the municipality to show a 'reasonable relationship' between the required dedication and the impact of the proposed development."[212] The Court expressed concern, however, that the phrase "reasonable relationship" might be confused with the more lax rational basis review and chose instead to impose the "rough proportionality" standard as its approximate equivalent.[213] This quantitative nexus formula does not mean that a "precise mathematical calculation is required, but the city must make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development."[214]

This inquiry, applied to takings, would continue to reflect the prevailing view that the legislature, rather than the judiciary, is better able to determine which projects are in the public's interest. It would reject, however, the conclusion that the court need only satisfy itself that "the exercise of the eminent domain power is rationally related to a conceivable public purpose."[215] Instead, the courts would ask the government to demonstrate that the exercise of eminent domain is substantially related to the important end for which it was employed.

This test would fit easily into standard eminent domain procedures. The established procedures for taking property simplify means-ends analysis by traditionally requiring that the public either (1) subsequently own the property taken, or (2) has full use of the property. In *Kelo*, the purpose justifying the taking, namely economic development, is the "ends" portion of the public use equation, just as the "impact of the proposed development" is used for rough proportionality review of exactions.[216]

211. *Id.* at 393.

212. *Id.* at 390.

213. *Id.*

214. *Id.*

215. Haw. Hous. Auth. v. Midkiff, 467 U.S. 229, 241 (1984) (citations omitted).

216. *Dolan*, 512 U.S. at 390.

The government should be required to make some sort of individualized determination of the need for the particular parcel in question before condemning private property. At a bare minimum,

> a condemnor should be expected to establish that the public at large will be benefited by the exercise of eminent domain and that less intrusive means of acquiring property are not availing. Generalized statements as to the necessity for a taking, sometimes veering toward mere speculation, should not be regarded as adequate.[217]

C. Application to Kelo

When the facts of *Kelo* are viewed under the light of heightened scrutiny, the government fails to justify the taking. There is no nexus between the government's purpose in the taking—to redevelop the property, increasing tax revenue and available jobs, thereby helping revitalize the city—and the actual taking.

There is no such assurance sufficient to prove a qualitative nexus in *Kelo*. The fundamental problem with economic development of a city that has been legislatively designated economically distressed[218] is that there are no boundaries by which to limit the prospective taking. The NLDC has authority to acquire the Fort Trumbull properties at issue in *Kelo* for economic development reasons, but there is no indication in the record or the case that developing this particular area will benefit the city any more than another private residential area. Referring again to *Nollan*, there was no essential nexus in that case because the regulatory taking did not match the purpose of the taking. However, in *Kelo*, since the entire town is economically depressed, and the stated purpose is for economic development, not only are there no limitations to the potential scope of the takings, there is no way to know if the takings fit the scope of that purpose. The NLDC could easily condemn any property for any purpose in any part of the city's limits in the name of economic development because the entire town is economically distressed.

There was no evidence at the trial court level of a rough proportionality between what is being taken and what is being received in its place. Justice Zarella, in his dissenting opinion at the Connecticut

217. James W. Ely, Jr., *Can the Despotic Power be Tamed? Reconsidering the Public Use Limitation on Eminent Domain*, A.B.A. PROBATE & PROP. (Nov./Dec. 2003), *available at* http://www.abanet.org/rppt/publications/magazine/2003/nd/ely.html.

218. Kelo v. City of New London, 125 S. Ct. 2655, 2658 (2005) (designating the city of New London a "distressed municipality.").

Supreme Court cited evidence presented to the trial court to indicate that even viewing future events in the light most beneficial to the state, there is little evidence that the public benefit would actually be achieved. To the contrary, the evidence "establishe[d] that . . . there was no signed agreement to develop the properties" with set terms,[219] "the economic climate was poor and the development plan contained no conditions pertaining to future development agreements that would ensure achievement of the intended public benefit if development were to occur."[220]

By leasing the land for $1 per year for ninety-nine years, the city is locked into a long-term commitment to a single developer, who is now in a "position to reap substantial financial rewards without a corresponding penalty if the developer did not perform as expected."[221] Additionally, there is little to no demand for the office space that is being created.[222] "Finally, and perhaps most significantly, the expected public investment in the project area" was "close to $80 million."[223] The ceiling for a potential increase in annual tax revenue was $680,544 to $1,249,843.[224]

219. Kelo v. City of New London, 843 A.2d 500, 596 (Conn. 2004) (Zarella, J., concurring in part dissenting in part). To better understand the importance of having a signed development agreement with the selected developer prior to the taking, Justice Zarella offers the following hypothetical example:

> Six months after the takings are completed, an interested developer is located. The developer contends that the economic conditions of the town and region are such that the project is not economically feasible unless the development agreement requires the town and the taking authority to do the following: (1) remediate the environmental conditions affecting the property, (2) replace the road and utility infrastructure, and (3) take measures to reduce the risk of coastal flooding, all at a cost of more than $70 million. Additionally, the developer insists that the town abate property taxes on the development for a period of years and, rather than require the developer to purchase the improved property at fair market value, enter into an agreement with the developer to lease the property for ninety-nine years for the sum of $1 per year. Furthermore, the developer agrees to commence construction only after he is able to find viable tenants for the property or when a particular economic index for the area indicates demand for the uses, such as when the vacancy rate for class A office space drops below a certain level.
>
> As I understand the majority's view, after according deference to the taking authority, the takings in the above scenario, which occur six months before any of the terms of the development agreement are known, would withstand a challenge by property owners who wish to remain in their homes.

Id. at 601–02.

220. *Id.* at 596.

221. *Id.* at 597.

222. *Id.*

223. *Id.* at 598.

224. *Id.*

At its best, this can "hardly . . . be considered a major financial benefit to the public."[225]

Similarly, the record contained no evidence that the indirect benefits given as reasons for why this taking was a "public use," "namely, spin-off economic activities and between 500 and 940 indirect new jobs," would ever be realized.[226] Furthermore, there was no "evidence as to when in the next thirty years such benefits might be realized."[227]

Kelo would not have survived a heightened scrutiny review based on an qualitative/quantitative test analogized from the Court's own regulatory takings jurisprudence. In fact, *Kelo* would not have survived a rational basis review under the jurisprudence of several states in which the courts review, at the very least, whether proposed economic development will, in fact, occur.[228] The only chance *Kelo* had of surviving was under a completely deferential standard of review to the legislative pronouncement of its "public use," regardless of outcome or future precedent.

The *Kelo* majority, including Justice Kennedy's concurrence, "put[] special emphasis on the facts peculiar to this case."[229] Key among them was that the NLDC's plan was a product of careful deliberation, it

225. *Id.*

226. *Id.* at 599.

227. *Id.*

228. *See* Walker v. Shasta Power Co., 160 F. 856, 860 (9th Cir. 1908) (noting that a corporation's right of eminent domain is not tested solely by description of public uses and private purposes contained in articles of incorporation, but may be determined "by evidence . . . showing the actual purpose in view"); Evergreen Cemetery Ass'n v. Beecher, 5 A. 353 (Conn. 1886); Linggi v. Garovotti, 286 P.2d 15 (Cal. 1955) (noting that a private party authorized by statute to acquire easement by eminent domain for sewer connection to existing public sewer system must make strong evidentiary showing establishing that taking will benefit public); Conn. Coll. for Women v. Calvert, 88 A. 633 (Conn. 1913); Wilton v. St. Johns County, 123 So. 527, 534 (Fla. 1929) ("[C]ourts have the ultimate power and duty to determine . . . whether [condemnation in any given case] is in fact for a public or a private use."); Brown v. Gerald, 61 A. 785, 788 (Me. 1905) (noting that actual purpose of taking authorized by power company's charter was "open to judicial inquiry"); Kirkwood v. Venable, 173 S.W.2d 8 (Mo. 1943) (stating that inasmuch as evidence indicated that condemned property was needed for public park, was suitable for public park and would be used by city for public park, court determined that condemnation was for public use); Kansas City v. Liebi, 252 S.W. 404 (Mo. 1923) (stating that evidence established that protective ordinance restricting use of and condemning rights to property would prevent overcrowding and make city more attractive, thereby promoting health, general welfare, growth and general prosperity of city, and that considerable part of community would actually use or benefit from contemplated improvement); Charlotte v. Heath, 40 S.E.2d 600 (N.C. 1946) (noting that evidence established that intended use of right of way allowing property owners living outside city limits to connect to sewer lines would be public); State *ex rel.* Harlan v. Centralia-Chehalis Elec. Ry. & Power Co., 85 P. 344 (Wash. 1906).

229. Kelo v. City of New London, 125 S. Ct. 2655, 2676 (2005) (O'Connor, J., dissenting).

proposed to use eminent domain as part of an integrated plan instead of merely an isolated property transfer, it promised several incidental benefits including aesthetic improvements in addition to mere increased tax revenue, and it was in response to a "legislative determination that New London is a depressed municipality."[230]

All of these facts helped establish that the development plan was not intended primarily to serve the interests of Pfizer, Inc., or any other private entity[231] but, "rather, to revitalize the local economy by creating temporary and permanent jobs, generating a significant increase in tax revenue, encouraging spin-off economic activities and maximizing public access to the waterfront."[232] However, that fact alone is insufficient to determine whether the transfer of property from one private entity to another satisfies the Public Use Clause of the Fifth Amendment, nor is it of any precedential worth. As Justice O'Connor explained:

> If legislative prognostications about the secondary public benefits of a new use can legitimate a taking, there is nothing in the Court's rule or in Justice Kennedy's gloss on that rule to prohibit property transfers generated with less care, that are less comprehensive, that happen to result from less elaborate process, whose only projected advantage is the incidence of higher taxes, or that hope to transform an already prosperous city into an even more prosperous one.[233]

The conclusion that the development plan was intended primarily to benefit the public, per se, is insufficient to justify the takings.[234]

230. *Id.*

231. In all fairness, the city had begun plans for redevelopment of the area before Pfizer, Inc. approached the city regarding construction of their research facility. Furthermore, while the city intended to transfer certain of the parcels to a private developer in a long-term lease, which developer, in turn, was expected to lease the office space and so forth to other private tenants, the identities of which not being known when the plan was adopted. As the Court stated, "[i]t is, of course, difficult to accuse the government of having taken A's property to benefit the private interests of B when the identity of B was unknown." *Id.* at 2662 n.6.

232. *Kelo*, 125 S. Ct. at 2662 n.6 (quoting Kelo v. City of New London, 843 A.2d 500, 595 (Conn. 2004) (Zarella, J., concurring in part and dissenting in part) (internal quotation marks omitted)).

233. *Id.* at 2676–77 (O'Connor, J., dissenting).

234. *See supra* Part IV.B.3 discussing the qualitative and quantitative requirements of the *Nollan/Dolan* test.

V. CONCLUSION

Kelo v. City of New London is the broadest expansion of eminent domain power in this nation's history. Ironically, the broadest expansion was accomplished with the least amount of work. Since the Court allowed rational basis scrutiny to remain the standard, even in cases clearly distinguishable from precedent by the indirect nature of their results, the "specter of condemnation hangs over all property."[235] Although the majority ignored it, and Justice Kennedy's concurrence discounted it, no legal limitation to eminent domain power prevents a state from "replacing any Motel 6 with a Ritz-Carlton, any home with a shopping mall, . . . any farm with a factory,"[236] any church with a Costco,[237] or any home with a parking lot.[238] Rehearing on this case has been denied,[239] but the issue is far from settled. The Supreme Court should revisit this precedent and apply a heightened scrutiny in order to ensure the protection and the security of property.

Trent Christensen

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

236. *Id.*; *see, e.g.*, 99 Cents Only Stores v. Lancaster Redevelopment Agency, 237 F.Supp.2d 1123 (C.D. Cal. 2001) (discussing an attempted taking of 99 Cents store to replace with a Costco); Poletown Neighborhood Council v. Detroit, 304 N.W.2d 455 (1981) (taking a working-class, immigrant community in Detroit and giving it to a General Motors assembly plant), *overruled by* County of Wayne v. Hathcock, 684 N.W.2d 765 (2004); *cf.* Bugryn v. City of Bristol, 774 A.2d 1042 (2001) (taking the homes and farm of four owners in their seventies and eightees and giving it to an "industrial park").

237. Cottonwood Christian Ctr. v. Cypress Redev. Agency, 218 F. Supp. 2d 1203, 1225 (C.D. Cal. 2002).

238. *Kelo*, 125 S. Ct. at 2672 (O'Connor, J., dissenting) (citing Transcript of Oral Argument at 36, *Kelo*, 125 S. Ct. 2655 (No. 04-108)).

239. Kelo v. City of New London, 126 S. Ct. 24 (2005).