In *Kelo's* Wake

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It can hardly be doubted that, after the Supreme Court's decision in *Kelo v. New London* (2005), the "public use" requirement of the Fifth Amendment's Takings Clause no longer serves as a restraint on the power of government to confiscate private property. Indeed, in some sense, the transmogrification of the "public use" clause into the "public purpose" clause has abolished the right to private property altogether. If "public purpose" is the constitutional test of takings, then ownership is merely conditional. A person's right to property is good only as long as government or another private individual cannot use the property in a way that serves a greater public purpose, whether imaginary or real. Private property is merely held in trust, to be possessed only so long as it is used for the largest conceivable public purpose.

But, of course, the concept of "public purpose" will always be vague and amorphous because it is driven by a jurisprudence that Justice Stevens in his majority decision said is based on the "varied" needs of the community which evolve "over time in response to changed circumstances."[1] In the face of continually evolving needs, what fulfills a public trust today may not fulfill that trust tomorrow. What is striking about Justice Stevens' formulation is the extent to which the "needs of the community" take priority over the rights of individuals. It is true that the power of eminent domain is a necessary incident of sovereignty, but the fifth amendment clearly was intended to protect the private right to property by restraining this sovereign power. Expropriated property can be taken only for "public use" and requires "just compensation." Both are restraints that protect the individual right to private property. There can be no eminent domain actions that merely redistribute property among private parties and whenever property is taken for a public use "just compensation" is required as equitable relief—"to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."[2] As Justice Thomas argued in his dissent, the takings clause contains an "express limit on the power of the government over the individual, no less than with every other liberty expressly enumerated in the Fifth Amendment or the Bill of Rights more generally."[3] Once, however, "public use" is understood as "public purpose," the "needs of the community" inevitably take priority over the rights of individuals. This result is perverse. As Justice Thomas indicates, every provision of the Bill of Rights protects individual rights and there is no constitutional warrant for treating the takings clause as an exception.

Justice O'Connor's Kelo Dissent: Did She Succeed in Distinguishing Midkiff and Berman?

Justice O'Connor in her *Kelo* dissent rightly complained that the majority had abandoned a "long-held, basic limitation on government power" mandated by the takings clause. The *Kelo* majority, according to Justice O'Connor, "[u]nder the banner of economic development," has rendered "all private property . . . vulnerable to being taken and transferred to another private owner, as long as it [is]. . . given to an owner who will use it in a way that the legislature deems more beneficial to the public." This reasoning,

as Justice O'Connor notes "wash[es] out any distinction between private and public use of property—and thereby effectively delete[s] the words 'for public use' from the Takings Clause of the Fifth Amendment."[4]

Although Justice O'Connor's indignation seems genuine, she could not have been surprised by the result. After all, the *Kelo* decision was merely the *terminus ad quem* of a long line of cases loosely called the Supreme Court's "takings jurisprudence." Justice O'Connor's own majority opinion in *Hawaii v. Midkiff* (1984) represented a significant step in the direction of the *Kelo* holding and her attempts to distinguish *Midkiff* are unpersuasive. "There is a sense," Justice O'Connor asserted, "in which this troubling result [in *Kelo*] follows from errant language in *Berman and Midkiff*."[5] She argues, however, that the most egregiously "errant" language of both cases—that "'the public use requirement is conterminous with the scope of a sovereign's police powers"—was merely dicta, "unnecessary to the specific holdings of those decisions."[6] This statement from Justice Douglas' majority opinion in *Berman v. Parker* (1954) was uncritically embraced by Justice O'Connor in her *Midkiff* opinion and it surely provided the doctrinal basis for the permissive deference to legislative judgment that was the hallmark of both cases.

Justice Douglas, writing for a unanimous Court in *Berman*, had stated that "[s]ubject to specific constitutional limitations, when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive. In such cases the legislature, not the judiciary, is the main guardian of the public needs to be served by social legislation."[7] The reason that "public use" was no longer considered one of the "specific constitutional limitations" was because it had now been subsumed within the sovereign's police powers. In the spirit of Progressivism Justice Douglas had identified "public needs" as the object of the police powers whereas the public use clause was clearly meant to protect the individual rights of property owners.

In *Midkiff*, Justice O'Connor agreed that the conflation of public use with police powers demanded that the Court defer to legislative judgment whenever "the exercise of the eminent domain power is rationally related to a conceivable public purpose," regardless of whether the conceivable purpose was different from the legislature's actual purpose.[8] Thus, one could hardly argue that Justice Douglas' legerdemain in *Berman* was not an essential predicate for the extreme form of legislative deference that prevailed in *Midkiff* and dominated the majority opinion in *Kelo*.

Justice O'Connor also claims that *Kelo* was the first time that the Court had approved takings solely for economic development. Every other case, she argued, had involved the elimination of some public harm. *Berman* had involved the eradication of slums and *Midkiff* approved of legislative attempts to eliminate land oligopoly. The legislature's purpose in *Midkiff* was, according to Justice O'Connor, "to reduce the perceived social and economic evils of a land oligopoly" that had developed as a result of Hawaii's unique history.[9] The "land oligopoly" had "created artificial deterrents to the normal functioning of the State's residential land market" and the legislature therefore created a redistribution scheme which condemned residential tracts and transferred "ownership of the fees simple to existing lessees."[10] In a grandiloquent conclusion, Justice O'Connor pronounced that "[r]egulation of oligopoly and the evils associated with it is a classic exercise of a State's police powers."[11] Clearly, Hawaii's use of

eminent domain to regulate "the evils associated" with oligopoly was for the purpose of economic development—to restore "the State's residential land market." Justice O'Connor would surely not argue that oligopoly is an intrinsic evil, worthy of regulation apart from its social and economic consequences. No amount of tergiversation can disguise the fact that the condemnation of the property of large land holders for redistribution was a clear example of takings for economic purposes—as Justice O'Connor herself clearly admitted in *Midkiff*. Thus we have to look skeptically at the disclaimers in her *Kelo* dissent.

Kelo's Dubious Pedigree

The Supreme Court had been building toward the *Kelo* decision at least since *West River Bridge v. Dix* (1848), the first case in which the Supreme Court ruled on the constitutionality of the states' power of eminent domain. In 1795 the State of Vermont had issued an exclusive franchise for one hundred years to the West River Bridge Company to build a toll bridge over West River in Brattleboro. Pursuant to a Vermont law passed in 1839, eminent domain was used to take the West River bridge and convert it into a free bridge.

Daniel Webster argued the case for the West River Bridge Company. His principal argument was that the actions of Vermont violated Article I, section 10 of the U.S. Constitution which prohibits a State from passing any "Law impairing the Obligation of Contracts." A franchise, Webster asserted, was a contract, not property, and Vermont's exercise of eminent domain therefore violated the Constitution's express prohibition. "If the provision of the Constitution which forbids the impairing of contracts," Webster argued, "does not extend to the contracts of the State governments, and they are left subject to be destroyed by the eminent domain, then there is an end of public faith."[12] Without "[s]ome safe and well defined limits," Webster averred, "our State governments will be but unlimited despotisms over the private citizens. They will soon resolve themselves into the existing will of existing majority, as to what shall be taken, and what shall be left to any obnoxious natural or artificial person."[13] And in his famous peroration, Webster predicted that if it becomes the "avowed principle that as to the exercise of this power of eminent domain, the Legislature, or their agents, are to be the sole judges of what is to be taken, and to what public use it is to be appropriated, the most leveling ultraisms of Antirentism or Agrarianism or Abolitionism may be successfully advanced."[14]

Webster's arguments were, of course, thoroughly rebuffed. Writing for the Court Justice Daniel argued that the power of eminent domain was an inherent attribute of State sovereignty. "[I]t cannot be justly disputed," Daniel asserted,

> that in every political sovereign community there inheres necessarily the right and the duty of guarding its own existence, and of protecting and promoting the interests and welfare of the community at large. . . . This power, denominated 'eminent domain' of the State, is, as its name imports, paramount to all private rights vested under the government, and these last are, by necessary implication, held in subordination to this power, and must yield in every instance to its proper exercise.[15]

The Constitution, Daniels said, was adopted by sovereign states and, even though it proclaims itself to be the Supreme Law of the Land, "can by no rational interpretation" be construed to diminish the eminent domain powers of the states. It would be an "incredible fatuity," he asserted, to believe that the states intended to "relinquish the power of self-government and self preservation."[16]

All property, Daniel argued, "is derived mediately or immediately from the sovereign power of the political body. . . It can rest on no other foundation, can have no other guarantee." Furthermore "the tenure of property" thus results from "a contract between the State, or the government acting as its agent, and the grantee, and both the parties thereto are bound in good faith to fulfill it." But in all contracts, whether between states and individuals or between individuals, "there enter conditions which arise not out of the literal terms of the contract itself." All contracts "are superinduced by the pre existing and higher authority of the laws of nature, of nations, or of the community to which the parties belong." These superinduced conditions "are always presumed, and must be presumed, to be known and recognized by all, are binding upon all, and need never, therefore, be carried into express stipulation for this could add nothing to their force." Foremost among the superinduced conditions of all contracts is the sovereign's right of eminent domain. This stipulation or reservation is an implied part of every contract; thus no exercise of the eminent domain power can ever be an impairment of contract because every contract contains by implication an eminent domain exception. Thus the power of eminent domain rests unimpaired by the Constitution of the United States and "it remains with the States to the full extent in which it inheres in every sovereign government, to be exercised by them in that degree that shall by them be deemed commensurate with public necessity. . . [T]he wisdom, the modes, the policy, the hardship of any exertion of this power are subjects not within the proper cognizance of this court."[17] Furthermore, any attempt to distinguish franchises from other forms of property is "without warrant in reason,"[18] and the right of eminent domain gives the sovereign the right to promote the public good over the rights of individuals. The sovereign has the right to resume property whenever the public interest requires, not only for the safety of citizens, but even where the interest and expedience of the state require it. Thus, property is merely held in trust to the state, subject to be repossessed whenever the state requires it for the public interest. Justice Daniel's arguments in *West Bridge* stood in marked contrast, of course, with Justice Marshall's opinion in *Fletcher v. Peck* (1810), where Marshall described the restrictions on the legislative power of the states in Article I, Section 10 of the Constitution as "what may be deemed a bill of rights for the people of each state."[19] Marshall, of course, was following Madison—the author of the Fifth Amendment—who argued that "[b]ills of attainder, *ex post facto* laws, and laws impairing the obligation of contracts, are contrary to the first principles of the social compact." These first principles became a "constitutional bulwark in favor of personal security and private rights."[20] Marshall's views, unlike Daniel's, were animated by the recognition that the right to property was a natural right, requiring no mediation from government for its existence. Government is obliged to protect the right to property, but the right itself was a pre-political, natural right.[21]

In 1848 the Takings Clause was a restriction only upon the Federal Government. It would not become a part of the Fourteenth Amendment's due process clause and thus binding upon the states until some fifty years later. Yet Daniel's argument would not have been affected by incorporation. In Justice Daniel's view, any limits upon the power of eminent domain would be a restriction upon the essential sovereign attributes of the states that were never surrendered. If the prohibition against impairing the obligations of contract cannot diminish a state's eminent domain powers, then, in Justice Daniel's irrefragable logic, neither can the public use requirement—especially after it became transmogrified into "public purpose" clause. Justice Daniel adumbrates the doctrine of *Kelo* in almost its undiluted form. Justice Stevens seems to agree with Daniel that a state's sovereign power of eminent domain was never diminished by the adoption of the Constitution and certainly not by the addition of the Fifth Amendment or the Fourteenth Amendment. It is true, however, that Justice Stevens indicates that there may be some restrictions upon economic development takings. Takings must be part of a comprehensive plan as evidence that the takings was not merely a pretext for conferring benefits on private parties. But such frivolous restrictions, as we will see, can have no real impact on takings in the universe of urban renewal or economic development.[22]

The issue that preoccupied the Supreme Court after the incorporation of the takings clause was whether the "public use" clause of the Fifth Amendment, now a part of the Fourteenth Amendment's due process clause, served as a restraint on state police powers. The intersection of these two constitutional clauses would bewilder the Court for many years until it finally resolved the issue on the same basis as the reasoning in *West Bridge*: "the public use requirement is conterminous with the scope of a sovereign's police powers."

Justice Stevens' Invitation to the States to Restrict the Reach of Kelo

In *Kelo*, Justice Stevens almost casually announced that "nothing in our opinion precludes any State from placing further restrictions on its exercise of the takings power."[23] The response to Justice Stevens' invitation was overwhelming. More than forty states have adopted legislation intended to limit the reach of the *Kelo* decision. Not since the Court's decision in *Furman v. Georgia* (1972) has State response to a Supreme Court decision been so pronounced. *Furman* had effectively outlawed all death penalty statutes in the states, but in short order, thirty five states reenacted their laws to meet the new constitutional standards propounded in *Furman*.[24] Thus the *Kelo* decision has provoked more State legislation than any other case in American history, although the legislation it inspired has proven far less effective than the determined effort by the states to preserve the death penalty.

Prior to the *Kelo* decision some observers believed there were signs that the tide was turning against the Court's cavalier approach to the Fifth Amendment that characterized *Berman* and *Midkiff*. In what appeared to be a significant development, the Michigan Supreme Court in 2004 overturned its infamous 1981 *Poletown* decision, a decision that had become "both the most visible symbol of eminent domain abuse and as a precedent justifying nearly unlimited power to condemn private property."[25] *County of Wayne v. Hathcock* (2004) was cited by Justice Stevens in *Kelo* as an example of how states might, as a matter of state constitutional law, establish "requirements that are

stricter than the federal baseline."[26] If the *Kelo* dissenters are correct—as I believe they are—then it is difficult to believe that there is a "federal baseline." If there is, it does not derive from the public use clause which the majority rendered impotent as a restriction on government takings.

Poletown Neighborhood Council v. City of Detroit had approved a sweeping condemnation of private property for transfer to the General Motors Corporation for the sole purpose of economic development. The Michigan Supreme Court cited *Berman* as authority for its extraordinary deference to Detroit's estimate of the public purpose to be served. The Court warned, however, that

> [o]ur determination that this project falls within the public purpose. . . does not mean that every condemnation proposed by an economic development corporation will meet with similar acceptance simply because it may provide some jobs or add to the industrial or commercial base. . . . Where, as here, the condemnation power is exercised in a way that benefits specific and identifiable private interests, a court inspects with heightened scrutiny the claim that the public interest is the predominant interest being advanced. Such public benefit cannot be speculative or marginal but must be clear and significant if it is to be within the legitimate purpose as stated by the Legislature.[27]

But as everyone now realizes—and many at the time argued—Detroit's economic development plan rested on the most tendentious and speculative foundation imaginable. One commentator has reckoned that that the predictions of economic benefit were merely a "mirage."[28] Thus, the court's pious invocation of "heightened scrutiny" was not serious—and could not have intended to be serious.

In overruling *Poletown* the Michigan High Court held that "a generalized economic benefit" is not sufficient "to justify the transfer of condemned property to a private entity" under the Michigan Constitution's public use requirements.[29] And in a ringing peroration the court concluded that

> because *Poletown* itself was such a radical departure from fundamental constitutional principles and over a century of this Court's eminent domain jurisprudence . . . we must overrule *Poletown* in order to vindicate our Constitution, protect the people's property rights, and preserve the legitimacy of the judicial branch as the expositor—not the creator—of fundamental law.[30]

Despite its forceful analysis, however, *Hathcock* did not condemn all economic takings, nor did it impose a categorical ban on eminent domain actions which transfer private property to "private entities." The court did overrule *Poletown's* "heightened scrutiny test" and "instead set forth the three-factor test proposed by Justice Ryan in his dissenting opinion in *Poletown*"[31] which articulated three exceptions to the rule that eminent domain cannot be used to transfer private property to "private entities." The first exception involves "public necessity of the extreme sort" such as highways, railroads and the like where public use is involved and the state regulates the private entity to ensure equal

access to the public. The second exception is where condemned land is transferred to a private entity but "remains accountable to the public in its use of that property." An example here was a petroleum pipeline built by a private entity on condemned property, but the intrastate transport of oil was regulated by the Michigan Public Service Commission. The third exemption seems considerably more problematic: "condemned land may be transferred to a private entity when the selection of the land to be condemned is itself based on public concern."[32] The example is a city's "condemnation of blighted housing and its subsequent resale of those properties to private persons." Here "the city's *controlling purpose* . . . was to remove unfit housing and thereby advance public health and safety; subsequent resale of the land. . . was 'incidental' to this goal."[33] Thus, the court concluded, the condemnation of the land was sufficient to satisfy the public use requirement although the land would never be used by the public: "the condemnation was indeed a 'public use'," despite the fact that the condemned properties would inevitably be put to private use."[34] Obviously what will control this third exception is the definition of "blight." If the definition of blight is capacious then, where the "controlling purpose" is to remove "blight," confiscated property can be conveyed to private parties for a secondary economic development purpose.

In 2006, however, the people of Michigan passed Proposition 4, a constitutional amendment initiative and "accompanying legislation" that "would place into the constitution and into statute the Michigan Supreme Court's interpretation of the State's eminent domain law as laid out in *County of Wayne v. Hathcock* (2004) in order to prevent more expansive future state court rulings or legislation." The Constitutional amendment prohibits the transfer of private property by eminent domain "to another private individual or business for purposes of economic development or increasing tax revenue" and that where property is condemned "to eliminate blight" a "higher standard of proof" is required "to demonstrate that the taking of that property is for a public use." A "preponderance of the evidence" is the new standard for public use takings and a "clear and convincing evidence" standard is required for blight takings. Furthermore, the "clear and convincing evidence" standard is said to a "higher standard" than "preponderance of evidence." Perhaps more importantly, the legislation tightens the definition of blight to forestall the possibility that *Hathcock's* third exception for blight condemnations could be a pretext for economic development takings.[35] Even though, the proposition invokes the authority of *Hathcock*, its specification of standards for determining "public use" seems to be stricter than the standards demanded by *Hathcock.* Proposition 4 surely ranks as one of the most effective reactions to *Kelo*.

Some had vainly hoped that the *Hathcock* decision might serve as a model for the pending decision in *Kelo*. The Supreme Court, however, rejected the analysis of *Hathcock* and "reaffired" *Poletown*, but without *Poletown's* pious imprecations about "heightened scrutiny." Some optimists have taken solace, however, in the fact that perhaps five members of the *Kelo* Court agreed that "heightened judicial solicitude" should be required for some economic takings cases. One commentator argues that "[t]he fact that four (and possibly five) justices had serious misgivings about the Court's ultra-deferential approach to public use issues is a major change from the unanimous endorsement of that very position in *Midkiff*. Although a major defeat for property owners, *Kelo* also represented a small doctrinal step forward for them."[36] This is a valiant

attempt to tease something good out of an egregiously bad decision; but it provides only a thin basis for optimism. If, as Justice Kennedy's concurring opinion alleged, the eminent domain actions of New London satisfied the standards of heightened scrutiny—or did not trigger the need for heightened scrutiny—then it is difficult to imagine what economic takings would not. It cannot be denied, however, that in light of the fact that both *Berman* and *Midkiff* were unanimous decisions, the four dissenting opinions in *Kelo* might represent some limited progress.

State Legislative and Initiative Reaction to Kelo

Public opinion was solidly against the *Kelo* decision. Some national polls showed 80% of the respondents disapproving of the result in *Kelo*.[37] In the wake of this strong public disaffection, state legislatures responded, some seriously, others ineffectively. South Dakota passed legislation that prohibited all uses of eminent domain to "transfer [property] to any private person, nongovernmental entity, or other public-private business entity;" The legislation also prohibited takings "primarily for enhancement of tax revenue."[38] Kansas passed similar legislation, banning "the taking of private property by eminent domain for the purpose of selling, leasing, or otherwise transferring such property to any private entity." The law, however, contained several exemptions, most particularly where the legislature authorizes eminent domain takings "for private economic development purposes." But in the case of economic development takings "the legislature shall consider requiring compensation of at 200% of the fair market value to property owners."[39] This is a large loophole, but presumably the greater political visibility of the legislature's actions will render it less likely to run rough-shod over property rights than municipal governments or redevelopment agencies.

Most of the new state legislation passed in the wake of *Kelo* was merely cosmetic—a sop to appease public opinion—and will likely have little or no effect on economic development takings. By one account, "only fourteen state legislatures have enacted laws that either ban economic development takings or significantly restrict them."[40] The main problem is the issue of blight takings. Bans on economic takings are vitiated by blight exceptions where the laws that define blight are vague or permissive. Some states define "blight" as any area where there are impediments to "sound growth" or that present "economic" or "social" liabilities. Texas, for example, enacted restrictive legislation in 2005 which, among other things, banned the use of eminent domain if the taking "confers a private benefit on a particular private party" or "is for a public use that is a pretext to confer a private benefit." The statute also prohibited the use of eminent domain "for economic development purposes, unless the economic development is a secondary purpose resulting from. . . urban renewal activities to eliminate an existing affirmative harm on society from slum or blighted areas.[41] Texas, however, did not reform its legal definition of "blight," which includes, inter alia, hazardous conditions that "adversely affects the public health, safety, morals, or welfare. . . or results in an economic or social liability to the municipality."[42] The blight exemption renders the eminent domain restriction illusory, although the law did save the property of the Western Seafood Company, which had been the target of an economic development takings in Freeport, Texas. The case generated considerable notoriety and roiled local politics for several years. After the *Kelo* decision, Western Seafood had little hope of resisting the city. The new legislation's ban on economic development takings, however,

saved the day since the city had never made blight allegations and it seemed impossible to manufacture them after the fact.[43] Other Texas municipalities in the future, however, will undoubtedly invoke "blight" to cover its economic development takings.

Florida also passed highly effective restrictive legislation in 2006. The reform bill, signed by Governor Jeb Bush in May 2006, banned takings for nuisance abatement, blight or revenue enhancement. The legislation, in large measure, resulted from the publicity generated by the plans of Riviera Beach to condemn private homes to convey the property to a private developer to build waterfront condos and a private yacht facility. Since, under Florida law only "blighted" property be could taken by eminent domain, a transparent and wholly dishonest attempt to designate the properties as "blighted" ensued.[44] Florida courts have always been highly deferential to legislative bodies in accepting blight designations. In 2002 the Florida Supreme Court ruled that even "open land" could be designated as "blighted" for purposes of redevelopment.[45]

The legislation ultimately became the impetus for a Florida constitutional amendment, placed on the ballot by the Florida legislature, a move that requires a 60% majority in both chambers. The amendment, passed by a 70% margin, provides that private property taken by eminent domain "may not be conveyed to a natural person or private entity except as provided by general law passed by a three-fifths vote of the membership of each house in the Legislature."[46] This marks probably the most restrictive legislation passed by any State, in part in reaction to *Kelo*, but also in response to the Florida cities that saw the *Kelo* decision as an open invitation to launch economic development projects under the thinnest pretexts of addressing blight.

As a general matter, however, legislatively passed reforms in the wake of *Kelo* tended to be weaker than those passed by initiative. This is not surprising since state legislatures tend to be more interest brokers than bodies that deliberate about the public good or the common interest. But only a few of the citizen-initiated reforms seem likely to have a significant impact on economic development takings. As mentioned previously, much of the new legislation is weakened by the presence of "blight" exemptions. Most states have very broad definition of what constitutes blight. In many States, any land that is not used to its fullest imaginable productive capacity is considered "blighted." The commonsensical understanding of blight—dilapidated, dangerous or unhealthy buildings and land—has been redefined as any land that could be put to better use by the intervention of the state's power of eminent domain. In California, pristine desert land has been designated as blighted and taken for economic development.

California is an example of both the good and the bad—and it must be added, the ugly. In the immediate wake of the *Kelo* decision the California legislature passed several ineffective and mostly cosmetic procedural reforms. In 2006, a citizen-initiated constitutional amendment initiative was placed on the ballot which would have restricted the power of eminent domain to "projects of public use," where "public use" was specifically defined to exclude takings for "economic development or tax revenue enhancement. . . or for any other actual uses that are not public in fact, even though these uses may serve otherwise legitimate public purposes." The initiative specified that "'public use' shall have a distinct and more narrow meaning than the term 'public purpose'." Compensation would also have been required for property damaged or

devalued by regulatory takings.[47] After a protracted and bitter campaign, the measure lost by narrow 52-48 margin. All state government stakeholders—associations of city and county governments, teachers' unions, public employee unions and developers—were arrayed against this reasonable attempt to curb eminent domain abuses. The drafters of this measure undoubtedly overreached, however, by adding regulatory takings into the mix.

Nevertheless, the advocates for reform were not deterred. In 2008, Proposition 98, another constitutional amendment initiative, made its way to the ballot. This proposition narrowed the definition of "public use," mandating that expropriated property could only be transferred to a State agency, a regulated utility or transportation authority. Takings "for the benefit of any private person or entity" was specifically prohibited. This definition of "public use" also prohibited rent control—"limiting the price a private owner may charge another person to purchase, occupy or use his or her real property."[48]

A competing constitutional amendment initiative, sponsored by the California League of Cities, was also on the ballot. This initiative protected only "owner-occupied residences" from being conveyed to private parties by eminent domain. The contest over the competing ballot initiatives was fierce. The proponents of Proposition 99 billed themselves as moderate reformers seeking to curb the excesses of *Kelo* by protecting private homes from government confiscation, but reserving a generous sphere for economic development takings for public purposes in the case of non-owner occupied property. This would, of course, include almost all small businesses and vast tracts of inner city residential housing. Once again the advocates of strong reform overreached, this time on the issue of rent control. It was easy to portray this aspect of Proposition 98 as an attack on the poor and the elderly and the advocates of "moderate reform" used "rentism" to great advantage in securing the passage of Proposition 99.

How moderate was the reform? In recent months two California cities have threatened to rezone areas targeted for redevelopment from residential to business and industrial to avoid Proposition 98 restrictions. Anyone living in a industrial or business zone does not—or so the theory holds—live in an owner-occupied residence. Many observers fear that California courts will acquiesce in this thinly veiled pretext. Even if this pretext doesn't succeed the proposition contains a host of other loopholes that can readily be exploited by redevelopment planners.[49]

Federal Action in Response to Kelo

The Federal Government also reacted to the *Kelo* decision. In November 2005, the House of Representatives passed the Private Property Protection Act by an impressive 376-38 margin. The Senate failed to act on the measure before the expiration of the 109th Congress, and it was reintroduced into the House on February 2007, now renamed as the Strengthening the Ownership of Private Property Act of 2007. So far, it has been bottled up in committee and has little prospect of passage in the Democratically controlled 110th Congress. The bill prohibits Federal economic development assistance for any state or locality that uses the power of eminent domain to obtain property for private commercial development or that fails to pay relocation costs to persons displaced by use of the power of eminent domain for economic development purposes."[50] Even if passed, H.R. 926 will be largely ineffective because it does not bar use of eminent domain for economic

purposes but only those economic development takings where "relocation costs" are not paid. In any case, one intelligent commentator rightly notes that the legislation "is deceptive because of the small amount of federal funds that offending state and local government stand to lose." Economic development grants represent "a mere 1.8% of all federal grants to states and localities."[51]

Another piece of Federal legislation was passed a few weeks later as an amendment to the Transportation Act. Section 726 of this voluminous act mandated that "no funds in this Act may be used to support any Federal, State, or local projects that seek to use the power of eminent domain, unless eminent domain is employed only for a public use. *Provided,* That for purposes of this section, public use shall not be construed to include economic development that primarily benefits private entities."[52] Similar language was inserted in the Housing and Economic Recovery Act of 2008, signed into law in July of 2008. Of course the language of both bills, when interpreted in the light of *Kelo*, restricts very little. In *Kelo*, public use is synonymous with public purpose and almost any project can easily be shown to have the public as its primary beneficiary and private parties or entities as only the secondary or derivative beneficiaries. The deference the Court accords to government actors is almost limitless and what clever bureaucrat cannot articulate a public purpose that only incidentally serves a private interest? This federal legislation is merely symbol without the slightest trace of any substance.

President Bush's reaction was even weaker than the congressional responses. On June 23, 2006 the President issued Executive Order 13406, "Protecting the Property Rights of the American People." In pertinent part the executive order reads:

> It is the policy of the United States to protect the rights of Americans to their private property, including by limiting the taking of private property by the Federal Government to situations in which the taking is for public use, with just compensation, and for the purpose of benefiting the general public and not merely for the purpose of advancing the economic interest of private parties to be given ownership or use of the property taken.

It is noteworthy that the order does not bar eminent domain proceedings that transfer of property to individuals who are benefited economically by the transfer. It is easy to argue in eminent domain cases—and it is always argued—that private use will ultimately benefit "the general public." Revenue enhancements that result from the transfer of private property to private entities are usually sufficient to satisfy the requirement that the public interest is being served. Professor Somin correctly notes that "it is noteworthy that the Bush Administration apparently chose to issue an executive order that is almost certain to have no effect even in the rare instances where the federal government does involve itself in *Kelo*-like takings."[53]

Response in Federal Courts

In his majority decision in *Kelo*, Justice Stevens implied that there may be exceptions to the "broad latitude" given legislatures "in determining what public needs justify the use of the takings power."[54] One putative exception is where property was taken "under the mere pretext of a public purpose, when its actual purpose was to bestow a private benefit."[55] Courts in this instance would look for a "carefully formulated. . .

economic development plan that it believes will provide appreciable benefits to the community, including—but by no means limited to—new jobs and increased revenue."[56] The "integrated development plan" presumably will insulate legislatures from charges of acting to confer benefits on private parties.[57]

Justice Stevens cites a federal district court case from 2001 as an example of the attempt to transfer property outside the confines of a well integrated plan.[58] This case provided an outrageous example of the abuse of eminent domain power that has become all too common in California. Here the pretext of a public purpose was obvious and particularly unsophisticated. As the district court noted, "Lancaster's naked assertion that it has no plans to initiate eminent domain proceedings against 99 Cents for the sole benefit of Costco is made suspect by the fact that it continues to insist it is within its absolute right to do so."[59] "No judicial deference is required," the court laconically noted, "where the ostensible public use is demonstrably pretextual."[60] "In this case," the court concluded, "the evidence is clear beyond dispute that Lancaster's condemnation efforts rest on nothing more than the desire to achieve the naked transfer of property from one private party to another. . . . [B]y Lancaster's own admissions, it was willing to go to any lengths—even so far as condemning commercially viable, nonblighted real property—simply to keep Costco within the city's boundaries. . . . Such conduct amounts to an unconstitutional taking for purely private purposes."[61]

Justice Stevens also cited *Cincinnati v. Vester* (1930) as a case where the Supreme Court intervened to stop the use of eminent domain for a "private purpose." The reference, however, is ambiguous—if not wholly mysterious. *Vester* is often cited as evidence that legislative deference has not always been part of the Court's "takings jurisprudence." According to Chief Justice Hughes, "[i]t is well established that in considering the application of the 14th Amendment to cases of expropriation of private property, the question what is a public use is a judicial one." The Chief Justice acknowledged that the Court "considers with great respect legislative declarations" and state court rulings, but he was adamant that "the question remains a judicial one."[62] There was no indication, however, that the Court's role was limited to "an unusual exercise of government power" that was "executed outside the confines of an integrated development plan" nor was there any indication in the case that a "private purpose was afoot."[63] Rather, Chief Justice Hughes indicated that judicial review, rather than legislative deference, was the constitutional rule in all takings cases.[64]

How have lower federal courts reacted to the issue of "pretext?" Professor Richard Epstein points to a case decided in 2006, *Didden v. Village of Port Chester*. The facts in this case are complex—indeed bewildering—but Professor Epstein accurately makes the following summary:

> The town of Port Chester named Greg Wasser as the developer in charge of its redevelopment effort. When Bart Didden and Dominick Bologna proposed to put a CVS pharmacy on land they owned in the development zone, Wasser said he would go along only if they paid him $800,000 or gave him a half interest in the project. When Didden and Bologna rebuffed him, Wasser got Port Chester to condemn the land the next day, without

> hearings, so that he could reap the profits from putting a Walgreen's on the same site."[65]

The court of appeals concluded that "to the extend that [Appellants'] assert that the Takings Clause prevents the State from condemning their property for a private use within a redevelopment district, regardless of whether they have been provided with just compensation, the recent Supreme Court decision in *Kelo v. New London*. . . obliges us to conclude that they have articulated no basis upon which relief can be granted." The appeals court treated the issue of eminent domain use for private peculation with supreme indifference: "we agree with the district court that Appellees' voluntary attempts to resolve Appellants' demands was neither an unconstitutional exaction in form of extortion nor an equal protection violation." There apparently was no need for any stringent review because the private benefits were not pretextual—they were manifest.[66] The Supreme Court denied certiorari in 2007. Professor Epstein's acerb criticism of the case—while exaggerated—is accurate. "This sorry form of private abuse, that took place under the shelter of the *Kelo* decision, is reminiscent of the tax collectors under Louis XIV."[67]

The Second Circuit Court of Appeals again took up the issue of "pretext" in a 2008 decision, *Goldstein v. Pataki*, this time with a more serious and sustained analysis—albeit with the same result. At issue in this case was the "Atlantic Yards Project," a publicly subsidized development scheme that would, among other things, build a new stadium in Brooklyn for the New Jersey Nets—presumably to be renamed. Other features of the development included high rise apartment towers and office buildings. Some property owners whose land had been confiscated for the project objected that the "public purpose" designation was merely a pretext for the private benefit of one person, Bruce Ratner, the individual who proposed the project and who serves as the project's primary developer. In addition, Ratner is the principal owner of the New Jersey Nets.

According to the circuit court, "[t]he heart of the complaint . . . is its far-reaching allegation that the Project, from its very inception, has not been driven by legitimate concern for the public benefit on the part of the relevant government officials. . . .In short, the plaintiffs argue that all of the 'public uses' the defendants have advanced for the Project are pretexts for a private taking that violates the Fifth Amendment."[68] But in the court's analysis this pretext claim "bears an especially dubious jurisprudential pedigree."[69] "We must reject the notion," the court argues, "that, in a single sentence, the *Kelo* majority sought sub silento to overrule *Berman*, *Midkiff*, and over a century of precedent and to require federal courts in all cases to give close scrutiny to the mechanics of a taking rationally related to a classic public use as a means to gauge the purity of the motives of the government officials who approved it."[70]

While acknowledging that "[l]egislative decisions to invoke the power to condemn are by their nature political accommodations of competing concerns," the appeals court nevertheless coolly concludes that "where, as here, a redevelopment plan is justified in reference to several classic public uses whose objective basis is not in doubt, we must continue to adhere to the *Midkiff* standard."[71] We recall that in *Midkiff*, Justice O'Connor had stated that "it is only the taking's purpose, and not its mechanics, that must pass scrutiny under the Public Use Clause."[72] In June of 2008 the Supreme Court refused

certiorari. Thus it seems to be the developing doctrine, derived from *Kelo*, that where there is an incidental public benefit, eminent domain takings that benefit private parties can be a significant part of the justification for the taking as long as the private benefit serves only as a means to accomplish "classic public uses."

State Court Responses

In the post-*Kelo* "era" some advances have been made in state courts. One of the most cited cases is *City of Norwood v. Horney* decided by the Ohio Supreme Court in July 2006. One observer noted, with almost unbounded enthusiasm, that "since this was the first time a state's highest court had considered economic development takings since *Kelo*, it would show which way the judicial winds were blowing." It was, she concluded "a big victory to the homeowners."[73]

The court in *Norwood* argued that "although economic factors may be considered in determining whether private property may be appropriated, the fact that the appropriation would provide an economic benefit to the government and community, standing alone, does not satisfy the public-use requirement of Section 19, Article I of the Ohio Constitution." This interpretation of the Ohio Constitution, of course, puts significant limits on the reach of *Kelo*. And in another departure from *Kelo*, the Ohio Supreme Court avers that the Ohio Constitution independently requires that "courts shall apply heightened scrutiny" in eminent domain cases.[74]

At issue in the case was a Norwood city ordinance that allowed takings in a "deteriorating area." Under this ordinance an area need not actually be deteriorated, but "may deteriorate in the future." Calling the "deteriorating area" language "a standardless standard," which rests on "a host of subjective factors that invite ad hoc and selective enforcement," the Ohio Supreme Court held that "a municipality has no authority to appropriate private property for only a contemplated or speculative use in the future."[75] The Court did not conclude, however, that the city's actions violated the public use clause of the Ohio Constitution, but rather found a due process violation. The "deteriorating area" standard is "void for vagueness and offends due-process rights because it fails to afford a property owner fair notice and invites subjective interpretation."[76] Thus, since no blight was actually present and consequently there was no possibility of providing evidence that the eminent domain action to prevent future blight "would bring economic value to the city," there was no possibility of showing "the taking was for public use."[77] The key to the decision, however, was the independent state grounds interpretation that economic development alone could not satisfy the Ohio Constitution's requirement for public use.

During the proceeding in this case, the Ohio legislature enacted a moratorium on all non-blight takings where the primary purpose was economic development and resulted in the transfer of property to another private person or entity.[78] The moratorium was set to expire on December 31, 2006 (the *Norwood* decision was handed down on July 26, 2006). The legislation also created a Legislative Task Force to make recommendations to the legislature on eminent domain issues in light of *Kelo*. The Task Force was made up of various stake-holder groups, most of them holding pro-eminent domain positions. It is little surprise that the task force recommended only inconsequential reforms. While purporting to tighten blight regulations, its

recommendations were scarcely less lenient than the previous regulations.[79] In 2007, the Ohio legislature adopted the blight recommendations put forward by the Task Force, but, of course, the new blight definitions will be controlled to some extent by the restrictions adumbrated in the *Norwood* decision. This means that blight takings that are mere pretexts for economic development takings will have to survive strict scrutiny. It remains to be seen, however, how "strict" it will be.

A surprising decision was handed down by the New Jersey Supreme Court in June 2007, *Gallenthin Realty Development Inc. v. Borough of Paulsboro*.[80] New Jersey is infamous for the freewheeling use of its eminent domain authority. As one author notes, New Jersey is "the most densely populated state in the country, where pay-to-play is a way of life, real estate developers are demigods, and condominiums are being shoehorned into every available square foot of land."[81] While the court made a narrow statutory ruling, the holding did nevertheless serve to constrict the legislative definition of blight. As the court noted, the New Jersey Constitution places three restrictions on the State's eminent domain powers: "just compensation;" "no person may be deprived of property without due process of law;" and "the State may take private property only for a 'public use'."[82] In addition, the Blighted Areas Clause of the Constitution provides that "[t]he clearance, replanning, development or redevelopment of blighted areas shall be a public purpose and public use." The Legislature, pursuant to its constitutional authority, passed the Local Redevelopment and Housing Law which empowers municipalities to designate property "in need of redevelopment." The Borough of Paulsboro had interpreted the statute as permitting any redevelopment where property is "stagnant or not fully productive yet potentially valuable for contributing to and serving the general welfare."[83] This interpretation, the court averred, would render

> any property that is operated in a less than optimal manner. . . arguably "blighted." If such an all-encompassing definition of "blight" were adopted, most property in the State would be eligible for redevelopment. . . . At its core, "blight" includes deterioration or stagnation that has a decadent effect on surrounding property. We therefore conclude that Paulsboro's interpretation of [the Local Redevelopment and Housing Law], which would equate "blighted areas" to areas that are not operated in an optimal manner, cannot be reconciled with the New Jersey Constitution.[84]

A subsequent New Jersey court of appeals case, *City of Long Branch v. Anzalone* (Aug. 7, 2008), relying on the *Gallenthin* ruling, held for property owners in a notorious redevelopment case. The City of Long Branch had condemned beach front property to make way for high-priced condominiums along the New Jersey shore. The city was hard pressed to make any realistic case that the middle-class neighborhoods slated for destruction were "blighted" in any intelligible sense of the term. Rather, the city's sole justification was that the redevelopment would serve a public purpose by helping to improve the municipality's sagging economy. Jonathan Last, writing in the *Weekly Standard* described the case as "the perfect storm of the *Kelo* era: a misleading master plan, an unprecedented exception from state environmental regulation, shifting

redevelopment zones, a developer jailed for corruption, [and] a lawyer working both sides of the deal."[85]

The Appellate Division held that "the record lacked substantial evidence that could have supported the New Jersey Constitution's standard for finding blight."[86] As the court noted, "*Gallenthin* explained that the ordinary meaning of 'blight' did not extend to an area in which the only negative condition was suboptimal land use." Instead, the court reasoned, the New Jersey Constitution requires "the area to be characterized by physical or social deterioration that threaten[s] to become intractable"[87] and that the Local Redevelopment and Housing Law "requires a municipality to find that the physical condition of the properties at issue was contributing to social problems not only within the redevelopment area, but also in nearby areas."[88] Property cannot be designated as "blighted" simply because some other use may improve economic conditions. Otherwise, the court concluded, "most property would be continuously subject to forced redevelopment if the threshold requirement were nothing more than the possibility of a more profitable use of land."[89] This reasoning seems to foreclose eminent domain takings solely for economic purposes, and represents a significant limitation on the reach of *Kelo*.

The Right to Property and the Administrative State

The *Kelo* decision converted an explicit restriction on government into a "license to steal."[90] The Fifth Amendment has clearly become the orphan child of the Bill of Rights. The Supreme Court, of course, would never tolerate rational review analysis for free exercise of religion or freedom of speech, even though there is no indication that the framers of the Bill of Rights expected the right to property to assume a lesser status. In fact, there is considerable evidence that the right to property was considered by the framers to be the most fundamental—at least the most comprehensive—natural right.[91] Even though public opinion decisively opposed the *Kelo* decision, there seems to be a consensus on the part of analysts that, by and large, the so-called "*Kelo* backlash" has been ineffective. The minions of the administrative state, at all levels of government, will soon be at work undermining the limited successes that have been achieved. These bureaucrats know that the right to property, perversely championed by the middle classes, stands as a stumbling block to the expansion of the administrative state which seeks, not the protection of property rights, but the redistribution of property. In the administrative state the "evolving needs of society" always take precedence over the rights of individuals.

This animus to property rights was perfectly characterized by a University of Pennsylvania law professor who, in a much quoted interview, reacted to what she characterized as Justice O'Connor's "cynical" dissent in *Kelo*: "If we look at New London, it's a kind of down-on-its luck, struggling-to-survive city. You say to an electrician, 'We're going to have this great new employment opportunity for you, but this lady won't give up her house.' Well, what right do you have, Mrs. Kelo, from keeping this man from being able to feed his children?" "The sanctity of the individual," this progressive thinker concludes, "cannot exist in isolation from the needs of the community."[92] We might ask Professor Chapman Poindexter, in our turn, why she supposes that the electrician has the right to the fruits of his labor. Shouldn't his right to the product of his labor give way if the "needs of the community," as determined by the

minions of the administrative state, demand otherwise. After all, labor, as the framers of the Bill of Rights well understood, is the origin of the right to property and the expropriation of property is at the same time the expropriation of labor.

Another academic commentator argues that while the reaction to *Kelo* has been largely ineffective, nevertheless its limited success is a cause for regret. "Overall," this luminary argues,

> the post-*Kelo* eminent domain statutes overwhelmingly share two characteristics: they limit the use of eminent domain to transfer private property from one owner to another for economic development purposes and they make exceptions to that prohibition for the eradication of blight. These two components, taken together, are unlikely to meaningfully [*sic*] limit the ability of state and local governments to pursue urban revitalization projects. They are very likely, however, to channel such projects in ways that make them less effective, less efficient, and dramatically less fair.[93]

Professor Blais' last point has some merit. Where redevelopment is limited to eradicating blight, minorities and the poor stand the greatest chance of being displaced by eminent domain takings. But, as Justice Thomas pointed out in his dissent in *Kelo* this is no less true of eminent domain takings solely for the purpose of economic development, where "losses will fall disproportionately on poor communities" because "those communities are not likely to put their lands to the highest and best social use, but are also the least politically powerful."[94]

Professor Blais' main complaint, however, is that blight regulations make "revitalization" projects less efficient and "less effective" because "planners will be precluded from choosing the best, most efficient area for urban revitalization projects."[95] Why should non-blighted, productive areas be off-limits to planners who seek only the most efficient way to promote the public good, understood as "the needs of the community?" Urban planners, this progressive intellectual assures us, should not have "to accept the hand that the free market has dealt them."[96] The free market thus stands as the great stumbling block to administrative state! Free markets, rooted in the idea of the sanctity of private property, depend on the free choices of individuals and provide the ultimate foundation for political freedom. Political and economic freedom would be greatly enhanced by a ban on all economic development takings and all takings that expropriate property for the benefit of private entities. This reform—which has been partially achieved in a few states—would deprive the administrative state of one of its most despotic weapons.

Twenty-five years ago a bold, and refreshingly honest (if somewhat naïve) writer wistfully remarked that "China is a planners' paradise. There is no gap between plan making and plan implementation. . . . What the government plans, it simply does. The institutional framework for plan making is remarkably similar to what most planners say works best."[97] Could this be the *terminus ad quem* of the *Kelo* decision; or is it still only a fanciful dream indulged by the minions of the administrative state?

[1] Kelo v. New London, 545 U.S. 469, 482 (2005).
[2] Armstrong v. U.S., 364 U.S. 40, 49 (1960).
[3] Kelo at 507.
[4] Id. at 494.
[5] Id. at 501.
[6] Id.
[7] 348 U.S. 26, 32 (1954).
[8] 467 U.S. 229, 241 (1984).
[9] Id. at 241-2.
[10] Id. at 223.
[11] Id. at 242.
[12] West River Bridge v. Dix, 47 U.S. (6 How.) 507, 518 (1848).
[13] Id. at 520-21.
[14] Id. at 521.
[15] Id. at 532.
[16] Id.
[17] Id. at 533.
[18] Id. at 535.
[19] Fletcher v. Peck, 10 U.S. [6 Cranch] 87, 138 (1810).
[20] *The Federalist*, No. 44, ed. Clinton Rossiter (1961), 282. Madison took the social compact origins of the Constitution quite seriously. He frequently expressed the opinion that "all power in just and free Government is derived from compact." *The Writings of James Madison*, ed. Gaillard Hunt (1910), 9:569; "compact is the basis and the essence. . . of all free government;" Id. at 573. See id., 602, 605, 355. Richard Epstein, astutely notes that "the takings clause in the Constitution. . . represents a twelve-word distillation of social contract political theory." *Supreme Neglect: How to Revive the Constitutional Protection for Private Property* (2008), p. 34. If Epstein is correct—as I am convinced he is—then Madison clearly intended to express "the first principles of the social compact" in the Fifth Amendment.
[21] James Ely, Jr., "The Marshall Court and Property Rights: A Reappraisal," 33 *John Marshall Law Review* 1023 (2000).
[22] See Erler, "The Decline and Fall of the Right to Property: Government as Universal Landlord," Heritage Foundation, http://www.heritage.org/ Research/Thought/fp15.cfm.
[23] Kelo, at 489.
[24] See Gregg v. Georgia, 428 U.S. 153, 179-80 (1976).
[25] Ilya Somin, "Overcoming *Poletown*: *County of Wayne v. Hathcock*, Economic Development Takings, and the Future of Public Use," 2004 *Michigan State Law Review* 1005, 1006 (2004).
[26] Kelo, at 489.
[27] Poletown Neighborhood Council v. City of Detroit, 304 N.W.2d 455, 459-60 (1981).
[28] Somin, "Overcoming *Poletown*," 1019.
[29] County of Wayne v. Hathcock, 684 N.W.2d 765, 786 (2004).
[30] Id. at 787.
[31] City of Novi v. Robert Adell, Children's Funded Trust, 701 N.W.2d 144, 150 (2005). *City of Novi* was handed down by the Michigan Supreme Court one year after *Hathcock* and one month after the *Kelo* decision. At issue was the condemnation of private property to build a public road that would principally benefit a private corporation, although the road would be open for public use and ownership and control would be retained by the city. The fact that the private corporation initiated and provided funding for the project did not, according to the Court, bear on the issue of public use. Since the condemnation of the property by law had to based on a "public necessity," an interesting question of how much of a "public necessity" was involved in a project that almost exclusively benefited a private entity. On this issue, the Court decided that legislative deference was in order: "The city's decision-making process is not what we review; rather, we look at the resulting outcome. The city is not obligated to show that its plan is the best or only alternative, only that it is a reasonable one. The dissent's insistence that plaintiff has the burden of proving necessity is clearly contrary to the deference the Legislature requires of us" (id., at 153-4). The dissent had argued that "the majority's public necessity analysis dilutes the power and obligation of a reviewing court to protect a private property owner from an unlawful taking by conferring unchecked

deference on a taking entity's declaration of necessity" (id., at 163). This decision, coupled with the Court's deferential stance in the third category of exceptions adopted by the *Hathcock* majority, renders the reaction to *Poletown* somewhat less forceful than many commentators portrayed it.
[32] Hathcock at 783.
[33] Id.
[34] Id.
[35] Michigan Ballot Proposal #4 (2006).
[36] Ilya Somin, "The Limits of Backlash: Assessing the Political Response to *Kelo*," *Minnesota Law Review*, forthcoming. [6]
[37] For an extensive analysis of public response to *Kelo*, see id. at [7-10].
[38] So. Dak. H.B. 1080 (2006).
[39] Kan. SB. 323 (2006)
[40] Somin, *The Limits of Backlash* [17].
[41] Tex. Govt Code 2206.001(b).
[42] Tex. Local Gov. Code 374.
[43] For a full account of the Western Seafood case, see Carla T. Main, *Bulldozed: "Kelo," Eminent Domain, and the American Lust for Land* (2007); see also Lynn E. Blais, "Urban Revitalization in the Post-*Kelo* Era," 34 *Fordham Urban Law Journal* 657, 657-60 (2007).
[44] See Carla T. Main, *Bulldozed: Kelo, Eminent Domain, and the American Lust for Land*, pp. 152-3; Dan Corace, *Government Pirates* (2008), pp. 51-61; George Lefcoe, "Redevelopment Takings After *Kelo*: What's Blight Got to Do with It?" 17 *Southern California Journal of Law and Social Justice* (2008), forthcoming.
[45] Panama City Beach Community Redevelopment Agency v. State of Florida, 831 So. 2d 662, 668 (2002).
[46] Florida Const., Art. 10, Sec. 6.
[47] Calif. Prop. 90 (2006).
[48] Calif. Prop. 98 (2008).
[49] Calif. Const. Art. 1, Sec. 19. Owner-occupied residences can be confiscated and conveyed to a private person "when State or local government exercises the power of eminent domain for the purpose of protecting public health and safety; preventing serious, repeated criminal activity . . . for the purpose of acquiring private property for a public work or improvement." "Public work or improvement" is defined as "facilities or infrastructure for the delivery of public services such as education, politic, fire protection, parks, recreation, emergency medical, public health, libraries, flood protection, streets or highways, public transit, railroad, airports and seaports; utility, common carrier or other similar projects such as energy-related, communication-related, water-related and wastewater-related facilities or infrastructure."
[50] H.R. 926.
[51] Somin, "Limits of Backlash," [39].
[52] PL 109-115 (Nov. 30, 2005).
[53] Somin, "Limits of Backlash," [43].
[54] Kelo, at 483.
[55] Id. at 478.
[56] Id. at 483.
[57] Id. at 487.
[58] 99 Cents Only Stores v. Lancaster Redevelopment Agency, 237 F. Supp. 2d 1123 (CD Cal. 2001).
[59] Id. at 1128.
[60] Id. at 1129.
[61] Id.
[62] 281 US 439, 446 (1930).
[63] Kelo, at 487.
[64] Curiously, Justice Stevens also cited *Village of Westbrook v. Olech*, 528 U.S. 562 (2000) as a case where takings "implicate other constitutional guarantees." *Olech* was not a takings case, but did challenge a taking on equal protection grounds. The Village of Westbrook had demanded a greater easement from Olech than from similarly situated property owners. Where an individual property owner alleges irrational and arbitrary actions on the part of government, the individual can constitute a "class of one" for making an equal protection claim. This case did not challenge the constitutionality of the taking but only the unequal taking. This decision is hardly relevant to cases where the constitutionality of the taking itself is at issue.

[65] Richard A. Epstein, *Supreme Neglect: How to Revive Constitutional Protection for Private Property* (2008), pp. 76-77.
[66] Didden v. Village of Port Chester, 173 Fed. Appx. 931, 933 (2006)
[67] Epstein, *Supreme Neglect*, p. 77.
[68] Goldstein v. Pataki, 516 F.3d 50, 54 (2008).
[69] Id. at 62.
[70] Id. at 63.
[71] Id.
[72] Midkiff, at 244.
[73] Main, *Bulldozed*, 275.
[74] Norwood v. Horney, 853 N.E.2d 1115, 1123 (2006).
[75] Id. at 1145.
[76] Id.
[77] Id.
[78] Ohio General Assembly, Senate Bill 167, Sec. 2.
[79] See *Final Report of the Task Force to Study Eminent Domain* (Aug. 2006).
[80] 924 A.2d 447 (2007).
[81] Main, *Bulldozed*, p. 192.
[82] Gallenthin, at 454.
[83] Id. at 460.
[84] Id.
[85] *Weekly Standard*, Feb. 12, 2006.
[86] City of Long Branch v. Anzalone (Aug. 7, 2008), at 40.
[87] Id. at 47.
[88] Id. at 52.
[89] Id. at 53.
[90] See Leonard Levy, *A License to Steal: The Forfeiture of Property* 192 (1996). Civil forfeiture of real property is based on the legal fiction that property can be complicit in crime. Levy—an unabashed liberal in other matters—agreed with Justice Thomas' dissent in *U.S. v. James Daniel Good Real Property*, 114 U.S. 492, 521 (1993) that "the legal fiction upon which the civil forfeiture doctrine is based." should be reexamined and the Court should "reevaluate our generally deferential approach to legislative judgments in this area of civil forfeiture."
[91] See James W. Ely, Jr., *The Guardian of Every Other Right: A Constitutional History of Property Rights* (1992); Erler, "The Great Fence to Liberty: The Right to Property in the American Founding," Ellen Frankel Paul & Howard Dickman, eds., *Liberty, Property, and the Foundations of the American Constitution* (1989), pp. 43-63).
[92] Ritu Kalra, "Property Rights and Wrongs," *Wharton Alumni Magazine* (Fall 2005), p. 25 (interview with Professor Georgette Chapman Poindexter).
[93] Lynn E. Blais, "Urban Revitalization in the Post-*Kelo* Era," 34 *Fordham Urban Law Journal* 657, 676 (2007).
[94] *Kelo*, at 521.
[95] Blais, "Urban Revitalization," at 685.
[96] Id. at 681.
[97] David Callies, "Land Use Controls: Of Enterprise Zones, Takings, Plans and Growth Controls," 14 *Urban Lawyer* 781, 845 (1982), quoted in Dennis J. Coyle, *Property Rights and the Constitution: Shaping Society Through Land Use Regulation* (1993), p. 213.