

2016

Kelo Ten Years Later: A City's Unrealized Dream and the Destruction of a Neighborhood Commentary Essays

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https://opencommons.uconn.edu/law_review/337

CONNECTICUT LAW REVIEW

VOLUME 48

JULY 2016

NUMBER 5

Essay

Kelo Ten Years Later: A City's Unrealized Dream and the Destruction of a Neighborhood

HON. PETER T. ZARELLA

In this critique of the essay “Kelo Is Not Dred Scott” written by Attorneys Wesley Horton and Brendon Levesque, Justice Peter Zarella explains how the authors of that essay, along with the Connecticut and United States supreme courts in Kelo v. City of New London, overlooked an important distinction in cases involving the taking of private property through eminent domain: public ownership and control versus private ownership and control. It is this distinction, Justice Zarella claims, that supports use of heightened judicial scrutiny in cases where property is taken for the “public use” of economic development, an approach he advocated in his dissent in Kelo. He further expounds on how such an approach was supported by the case law of both Connecticut and the United States. In addition, this Essay provides a counterpoint to the argument presented by Attorneys Horton and Levesque that economic development takings should be treated no different than other takings by highlighting three ways in which economic development takings are different than takings previously upheld by the courts. Finally, Justice Zarella refutes the claim asserted by Attorneys Horton and Levesque that democracy is an adequate check on eminent domain abuse.

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Kelo Ten Years Later: A City's Unrealized Dream and the Destruction of a Neighborhood

HON. PETER T. ZARELLA*

I. INTRODUCTION

Attorney Horton and Attorney Levesque would have you believe that *Kelo v. City of New London* is a story about a distressed municipality in search of an economic renaissance.¹ They open their essay as the City of New London and New London Development Corporation (NLDC) opened their brief before the United States Supreme Court: by painting a picture of a depressed, seaside city poised to turn around its misfortune. For decades, the city had been plagued by economic decline. It had “an unemployment rate close to double that of the rest of the state, a shrinking population, a dearth of new home and business construction” and its largest employer had just closed.² Moreover, the city’s principal source of funding was property taxes, yet fifty-four percent of the property within the city was tax-exempt.³ Things were about to change for New London, however. It

* Associate Justice, Connecticut Supreme Court; J.D., Suffolk University Law School, 1975; B.S., Northeastern University, 1972. Justice Zarella was appointed as an Associate Justice of the Connecticut Supreme Court by Governor John G. Rowland on January 4, 2001. Prior to joining the state’s high court, he served as an Appellate Court and Superior Court Judge. Before ascending to the bench, he spent over twenty years in private practice and was a partner in the Hartford law firm of Brown, Paindiris & Zarella.

The views and opinions expressed in this Essay are those of the author and do not reflect the position of the Connecticut Supreme Court or the honorable justices thereof. Moreover, this Essay does not express the views of the justices that constituted the *Kelo* panel, including those justices who joined in the dissent.

I wish to express my sincere gratitude to Attorney Cody Friesz for his diligent research, cogent comments, and hours of research and drafting that made this Essay possible. In particular, Attorney Friesz, who currently serves as a law clerk in my chambers, provided great guidance on a topic that has no boundaries, by constantly reminding me of the specific focus of this Essay—a reply to Attorneys Horton and Levesque. Attorney Friesz is a member of the Connecticut and Massachusetts bars and graduated from Suffolk University Law School in 2015. I also wish to express my appreciation to Attorney Holly Boots who has served in my chambers as my permanent law clerk for over ten years. Attorney Boots worked diligently on the original dissent in the *Kelo* matter in 2004 and I wish to take this much delayed opportunity to thank her for all of her efforts over the years. Attorney Boots is a member of the Connecticut and New York bars and received her J.D. from Pace Law School. She also has a Master’s Degree in City and Regional Planning from Harvard University. Lastly, I would like to thank my Executive Legal Assistant, Elizabeth Hammell, for her editorial support.

¹ Wesley W. Horton & Brendon P. Levesque, *Kelo Is Not Dred Scott*, 48 CONN. L. REV. 1405, 1408 (2016).

² *Id.*; see also Brief of the Respondents at 1, *Kelo v. City of New London*, 545 U.S. 469 (2005) (No. 04-108), 2005 WL 429976, at *1.

³ Brief of the Respondents, *supra* note 2, at 1.

had recently appointed the NLDC as its development agent, and the NLDC had crafted a plan that would generate between \$680,000 and \$1.2 million in additional tax revenue annually and create over one thousand temporary and permanent jobs.⁴ The plan called for the construction of a hotel and conference center, office space, and upscale housing in the Fort Trumbull neighborhood.⁵ All that stood in the way of progress were the private homes of Susette Kelo and the other Fort Trumbull residents on development Parcels 3 and 4A.⁶

In reality, however, this is not just a story about New London. Indeed, this is also a tale about the courageous battle of Susette Kelo and her neighbors,⁷ ordinary people fighting to save their piece of the American dream—their homes. Ms. Kelo and her fellow neighbors resisted the condemnation of their homes. When democracy failed to protect them, they turned to the courts, challenging the decision of the City and the NLDC to use eminent domain on a number of grounds. This Essay will address the issue at the heart of Ms. Kelo’s challenge:⁸ namely, whether her home and her neighbors’ homes were taken for a “public use.” As the case moved through the court system, Ms. Kelo’s public use argument

⁴ *Id.* at 1–2, 8. The development plan, according to the NLDC, was expected to create 518 to 867 constructions jobs, 718 to 1,362 direct jobs, and 500 to 940 indirect jobs. *Id.* at 8.

⁵ *Id.* at 6–7.

⁶ The entire Fort Trumbull development area was approximately ninety acres, divided into seven parcels. Parcels 3 and 4A made up 9.4 acres of the development property, and the properties of Susette Kelo and her neighbors covered 1.54 acres. Brief of Petitioners at 3–6, *Kelo v. City of New London*, 545 U.S. 469 (2005) (No. 04-108), 2004 WL 2811059, at *3–6.

⁷ Nine individuals, owning fifteen properties, challenged the decision to use eminent domain. See Complaint at 1–2, *Kelo v. City of New London*, No. 557299, 2002 WL 500238 (Conn. Super. Ct. Mar. 13, 2002) (No. 01CV0557299S), 2000 WL 35542907. Susette had moved into the Fort Trumbull neighborhood in July 1997, about a year and one half before the City and the NLDC approved the Fort Trumbull development plan. *Id.* at 6, 12. Although she had not lived in the neighborhood long, she finally had what she always wanted: a place of her own with a view of the water. When she purchased the home it was overgrown and had been vacant for years. Shortly after moving in, however, she had restored her Victorian home. Brief of Petitioners, *supra* note 6, at 2.

Unlike Susette, a number of the other plaintiffs in *Kelo* had resided in the Fort Trumbull neighborhood most of their lives. In fact, Wilhelmina Dery, who was in her mid-80s when *Kelo* reached the Supreme Court, still resided in the house in which she was born. *Id.* at 1. It was the only place she had ever lived. *Id.* at 2. Wilhelmina’s son, Matt Dery, also lived in the neighborhood with his wife and son. *Id.*

Bill Von Winkle and Richard Beyer did not live in the Fort Trumbull neighborhood, but they both owned property in the area. Von Winkle owned a deli and some rental properties and Beyer was renovating two homes in the area. See Complaint, *supra*, at 10–11, 13.

Byron Athenian had lived in the neighborhood for about eleven years when he received his condemnation notice from the NLDC. He was only four years shy of paying off his mortgage. Pasquale and Margherita Cristofaro had lived in the area for decades, moving in after they lost their previous home to the city’s eminent domain power. *Id.* at 10. Finally, Jim and Laura Guretsky were a young couple who owned a triplex property in the neighborhood. They lived in one of the homes with their two daughters. *Id.* at 14.

⁸ As this Essay is a commentary on Horton & Levesque, *supra* note 1, it will also try to confine its discussion to issues raised in that essay.

evolved, but it could always be broken down into two simple ideas. First, economic development could never be a public use because it was primarily for the benefit of private business.⁹ Second, if economic development *could* be a public use, there must be some reasonable assurance that the taken property would in fact be used for a public use, which, she claimed, was not present in this case.¹⁰ Unfortunately for Ms. Kelo, she could not convince the courts.

When Attorneys Horton and Daniel Krisch¹¹ prepared to defend the City of New London and the NLDC before the Supreme Court, they decided to emphasize how similar *Kelo* was to the Court's previous opinions on eminent domain and public use.¹² They argued that the Court's precedent required that it defer to the legislative determination that economic development was a public use—and that the power of eminent domain could be used to accomplish such development—because the takings were “rationally related to a conceivable public purpose.”¹³ Additionally, the City and the NLDC asserted that there was no “principled” reason to subject economic development to heightened scrutiny.¹⁴ There was no “foundation in either logic or [the] Court's jurisprudence,” they contended, to subject economic development projects, or more accurately, the use of eminent domain to accomplish such projects, to greater scrutiny than in other takings cases.¹⁵

Ultimately, the Court agreed. Justice John Paul Stevens, writing for a majority of the Court, concluded that developing local economies has long been a function of state and local government and that it would be

⁹ See Brief of Petitioners, *supra* note 6, at 11–27 (arguing condemnation for sole purpose of economic development not a public use); Brief of the Plaintiffs-Appellants at 3–13, *Kelo v. City of New London*, 843 A.2d 500 (Conn. 2004) (No. 16742), 2002 WL 34155033, at *3–13 (contending taking for economic development is prohibited taking for private, not public, use).

¹⁰ See Brief of Petitioners, *supra* note 6, at 27 (asserting if economic development is a public use, “there must at least be a reasonable certainty that the condemnations will result in [the purported] public benefits” derived from the development plan); Brief of the Plaintiffs-Appellants, *supra* note 9, at 15–19 (claiming takings could not be upheld because no assurance government would continue to control development and assure public use).

¹¹ Attorneys Wesley Horton and Daniel Krisch represented the City of New London and the NLDC before the United States Supreme Court. Attorney Krisch wrote the brief. See Horton & Levesque, *supra* note 1, at 1412.

¹² *Id.*

¹³ Brief of the Respondents, *supra* note 2, at 13–16 (citations omitted) (expounding the Court's deferential standard in Takings Clause cases). Attorneys Horton and Krisch further argued that under the Court's cases, the fact that the property would be transferred to another private party was inconsequential. *Id.* at 24–28. The only question for the Court to determine, they contended, was whether the City and the NLDC could have rationally concluded that the condemnations at issue would produce some public benefit. *Id.* at 24. The means by which the City and the NLDC chose to implement the plan were not to be of any concern to the Court. *Id.* at 25.

¹⁴ See *id.* at 39 (arguing if condemnation is for proper public purpose, the Court does not consider whether condemnation will achieve its goals).

¹⁵ *Id.* at 40.

“incongruous” to conclude that the benefits the City expected the Fort Trumbull development project to produce were different from, or “less of a public character” than, those public purposes the Court previously had approved.¹⁶ He further insisted it would be a great departure from precedent to adopt a heightened level of scrutiny that would allow courts to consider whether there was a “reasonable certainty” that the purported public benefit would occur in an economic development takings case.¹⁷ “When the legislature’s purpose is legitimate and its means are not irrational, our cases make clear that empirical debates over the wisdom of takings—no less than debates over the wisdom of other kinds of socioeconomic legislation—are not to be carried out in the federal courts.”¹⁸

I agree with the Court, and Attorneys Horton and Krisch, that declaring what constitutes a public use is within the province of the legislature, with only a limited role for the judiciary in reviewing such decisions.¹⁹ I further agree that, under the deferential approach required by case law, economic development is a proper public use. Nevertheless, I cannot agree with the contention that Takings Clause jurisprudence forecloses *any and all* possibilities of heightened scrutiny by the judiciary in reviewing economic development takings. It was possible, within the context of the case law at the time of *Kelo*, for the courts to intervene and question whether a particular taking was being implemented or administered for a public use, and, further, whether the particular economic development project was likely to materialize. I explain how in Part II of this Essay.

After explaining how the test I proposed in my *Kelo* dissent is consistent with Takings Clause jurisprudence, I address, in Part III, the mistaken claim of the Court and Attorneys Horton and Levesque that there is no significant difference between economic development takings and takings previously sanctioned by the Court. Part IV then answers the somewhat naïve contention of Attorneys Horton and Levesque that democracy is an adequate restraint on eminent domain abuse and the principles of federalism dictate that public use determinations be left to the states. Finally, Part V summarizes the major themes in this Essay and stresses the importance of a greater role for the judiciary in the context of economic development takings.

¹⁶ *Kelo v. City of New London*, 545 U.S. 469, 484–85 (2005). The majority of the Court saw no difference in taking private property for economic development and taking private property for facilitating agriculture and mining, clearing blight, breaking up a land oligopoly, and reducing barriers to entry in a particular market. *Id.*

¹⁷ See *id.* at 487–88 (noting petitioners’ alternative argument and rejecting as foreclosed by precedent).

¹⁸ *Id.* at 488 (quoting *Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229, 242–43 (1984)).

¹⁹ I must note, however, that I agree that the *takings jurisprudence* requires such deference. I am not sure I would reach the same result if I were to answer the question as a matter of first impression.

II. TAKINGS CLAUSE JURISPRUDENCE DOES NOT FORECLOSE THE USE OF HEIGHTENED SCRUTINY IN ECONOMIC DEVELOPMENT TAKINGS CASES

I begin by explaining the approach I applied in *Kelo* and would have applied in all subsequent economic development takings cases. Next, to help readers better understand the origin of my test, I will briefly explain the evolution of Connecticut takings and public use law. Then, I will conduct a concise overview of the relevant United States Supreme Court cases on the Public Use Clause. Finally, I will explain how the test outlined in Part II.A is consistent with the case law summaries in Parts II.B and II.C.

A. Clear and Convincing Likelihood of Development

Relying on early Connecticut cases, I proposed applying a four-part test to the takings carried out by the City and the NLDC.²⁰ It is a modified version of the third step in that four-part test that the New London homeowners asked the United States Supreme Court to adopt. It is also the part of the test Attorneys Horton and Levesque characterize as “almost impossible to satisfy.”²¹ That step, which I call the “likelihood-of-development test,” would have required the City and the NLDC to establish, by clear and convincing evidence, that the economic development plan would *actually* be implemented and therefore, the public

²⁰ See generally *Kelo v. City of New London*, 843 A.2d 500, 587–92 (Conn. 2004) (Zarella, J., dissenting), *aff'd*, 545 U.S. 469 (2005) (setting out more exacting standard for review of economic development takings). First, the court would determine whether the statutory scheme under which the takings are effectuated is facially constitutional. *Id.* at 587. Second, if facially constitutional, the court would consider whether the primary purpose of the particular economic development plan was for private rather than public benefit. *Id.* at 588. Third, if the statutory scheme is facially constitutional and the particular plan is primarily intended to benefit the public, the court would ask if “the specific economic development contemplated by the plan will, in fact, result in a public benefit.” *Id.* Finally, if the court finds for the taking party on the first three questions, the court will decide, under the deferential standard of review, whether the specific condemnation is reasonably necessary to implement the plan. *Id.* at 591.

The party challenging the taking will have the burden in steps one, two, and four. *Id.* at 587–88, 591. Thus, the challenger would need to prove that the statutory scheme was facially unconstitutional, the particular economic development plan was motivated, primarily, by a desire to benefit a private person or business, or that the challengers’ property is not reasonably necessary to accomplish the economic development plan. *Id.* At each of these three stages, the court would employ the established deferential standard of review. *Id.* At the third step, however, the burden of proof would shift to the taking party. *Id.* at 588. Moreover, the taking party would have to prove that the plan will result in the purported public benefit by clear and convincing evidence. *Id.* The burden would be satisfied by establishing, through clear and convincing evidence, that the plan would actually be implemented. *Id.* at 583, 588.

²¹ Horton & Levesque, *supra* note 1, at 1411 n.39; see also Brief of Petitioners, *supra* note 6, at 36–48 (asking the Court to require taking authority prove “there is reasonable certainty that the [economic development] project will proceed and yield the public benefits that are used to justify the condemnation”).

benefits projected to result from the plan and challenged takings would be realized. Such a determination was necessary, I felt, because the court could not determine whether the economic development project was a “public use” without considering whether the proposed development would *in fact* occur.

A majority of the justices of the Connecticut Supreme Court rejected my approach. Additionally, the City and the NLDC urged the United States Supreme Court that this heightened standard of review was inconsistent with its precedent. The Court agreed.²² My colleagues, the City and the NLDC, and the United States Supreme Court justices, however, misunderstood my point. They all concluded that legislatures determine, with only a limited role for the courts, what is or is not a public use, and the courts do not sit to second-guess the wisdom of such determinations.²³ They further concluded that it is not the courts’ role to question whether the project will in fact accomplish the City’s goals, such as increased tax revenue and more jobs, or to evaluate the accuracy of the projected economic outcomes of a project.²⁴ Rather, it is left to legislative bodies to determine the means by which they will carry out their objectives.

My primary concern, however, was much more basic than my esteemed colleagues recognized. It was, quite simply, whether there was clear and convincing evidence the hotel and convention center, office space, and new housing contemplated by the plan would *actually* be built, and therefore, whether the purported public benefits of increased tax revenues and more jobs would be realized. If it was clear the construction would indeed take place, then the court could conclude the use of eminent domain by the City and NLDC was rationally related to a conceivable public purpose,²⁵ thereby satisfying the public use requirements of the United States and Connecticut constitutions,²⁶ provided, of course, that the plan also passed the other parts of the test. On the other hand, if it appeared

²² See *Kelo*, 545 U.S. at 487–88 (concluding that a rule requiring New London to show with reasonable certainty that a public benefit would accrue from a taking represented a great departure from precedent).

²³ See *id.* at 483 (“For more than a century, our public use jurisprudence has wisely eschewed rigid formulas and intrusive scrutiny in favor of affording legislatures broad latitude in determining what public needs justify the use of the taking power.”); *Kelo*, 843 A.2d at 527–28 (holding Connecticut public use jurisprudence was in harmony with federal cases and that the legislature was afforded substantial deference); Brief of the Respondents, *supra* note 2, at 39 (explaining the Supreme Court “has been loath to scrutinize a legislative determination as to whether an economic decision serves a public purpose”).

²⁴ See *Kelo*, 545 U.S. at 488 & n.20 (explaining courts will not entertain empirical debates regarding the wisdom of takings).

²⁵ See *id.* at 488 (declaring so long as the purpose is legitimate and the means are not irrational, federal courts should leave matters of policy to the legislature (quoting *Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229, 242–43 (1984))).

²⁶ U.S. CONST. amend. V; CONN. CONST. art. I, § 11.

the construction was not likely to occur, or at least not within a reasonable time, the court would be compelled to conclude that there was no rational link between the City's use of eminent domain and the public benefits that would purportedly flow from the economic development project. Without such a link, the takings would not be for a public use. With this understanding, let us turn to the Public Use Clause jurisprudence.

B. *Development of Connecticut Public Use Law*

Connecticut law on public use developed in a way that not only allowed for application of the likelihood-of-development test in *Kelo*, but invited use of the test.²⁷ Connecticut's public use jurisprudence begins with *Olmstead v. Camp*, in which the Connecticut Supreme Court rejected a narrow construction of "public use" in the Takings Clause of the Constitution.²⁸ Indeed, the court held public use "may . . . well mean public usefulness, utility or advantage, or what is productive of general benefit; so that any appropriating of private property by the state under its right of eminent domain for purposes of great advantage to the community, is a taking for public use."²⁹ Additionally, *Olmstead* set the framework for judicial deference to the legislature in determining what is or is not a public use.³⁰ The power of eminent domain must be elastic, the court

²⁷ In referencing Connecticut law inviting the application of the likelihood-of-development test:

It is for the Legislature to say whether any given use is [a public use] or not But the question whether in any given instance the use is or *will be administered* as a public or as a private use is a question which must of necessity be determined by the *courts* in accordance with the facts of the particular case in hand.

Conn. Coll. for Women v. Calvert, 88 A. 633, 636 (Conn. 1913) (emphasis added); *see also* Evergreen Cemetery Ass'n v. Beecher, 5 A. 353, 353–54 (Conn. 1886) (accepting use of land for burial places as a public use in general, but noting such use is not public use when the cemetery is private and the public does not have a right to bury there).

²⁸ *See* *Olmstead v. Camp*, 33 Conn. 532, 546 (1866) (declining to adopt defendant's construction of public use which would require that "property must be literally taken by the public as a body into its direct possession and for its actual use"). In *Olmstead*, the owner of a water-powered mill wanted to raise his dam, thereby flooding upstream property. *Id.* at 532–33. The mill was used to grind flour and feed. *Id.* The court ultimately determined the taking of the upstream property was for a public use because

[i]t would be difficult to conceive a greater public benefit than garnering up the waste waters of innumerable streams and rivers and ponds and lakes, and compelling them with a gigantic energy to turn machinery and drive mills, and thereby build up cities and villages, and extend the business, the wealth, the population and the prosperity of the state.

Id. at 551.

²⁹ *Id.* at 546. The court concluded that such a construction was consistent with the meaning given to public use by other courts, legislatures, and legal authorities. *Id.*

³⁰ *See id.* ("If the public interest can in any way be promoted by the taking of private property it must rest in the wisdom of the legislature to determine whether the benefit to the public will be of

concluded, in order to meet the ever changing needs of society.³¹ Defining the confines of the power must depend “on the presumed wisdom of the sovereign authority, supervised, and in cases of gross error or extreme wrong, controlled, by the dispassionate judgment of the courts.”³²

Despite having adopted a broad definition of public use and determining the court will defer to the legislature’s judgment of what constitutes a public use, the Connecticut Supreme Court did not disclaim all responsibility in policing the use of the eminent domain power. In *Olmstead*, the court stated the power was subject to the courts’ control in cases of gross error or extreme wrong, and in subsequent cases, the court reserved for itself the right to determine whether the *actual use* to which taken property was put was a public use.³³ In *Evergreen Cemetery Ass’n v. Beecher*, a cemetery owner sought to expand his burial grounds by acquiring adjoining property through eminent domain, which was permitted by the legislature.³⁴ In that case, the court noted the proper burial of the dead is necessary for the public health.³⁵ The court further recognized such burial requires land, and individuals might not always want to sell their land for such a use.³⁶ Therefore, “of necessity there must remain to the public the right to acquire and use [land].”³⁷ The court also said that the use of the land remains a public use despite the requirement, in many instances, that a fee be paid to obtain burial rights.³⁸ If, however, the cemetery is private and the public neither has nor can acquire burial rights in it, then clearly the land is put to a private use and “the proprietor[] of the[] [private cemetery] cannot take land for such continued private use by right of eminent domain.”³⁹

sufficient importance to render it expedient for them to exercise the right” (quoting *Beekman v. Saratoga & Schenectady R.R. Co.*, 3 Paige Ch. 45, 73 (N.Y. Ch. 1831))). Answering what limits the legislative power under the Takings Clause, the court wrote:

The power requires a degree of elasticity to be capable of meeting new conditions and improvements and the ever increasing necessities of society. The sole dependence must be on the presumed wisdom of the sovereign authority, supervised and in cases of gross error or extreme wrong, controlled, by the dispassionate judgment of the courts.

Id. at 551.

³¹ *Id.* at 551.

³² *Id.*

³³ *See id.*; *see also infra* notes 34–44 (reviewing cases in which the court considers the actual use to which the property is put).

³⁴ *See Evergreen Cemetery Ass’n v. Beecher*, 5 A. 353, 353 (Conn. 1886). The cemetery in *Evergreen Cemetery Ass’n* was acting under a statute that delegated the power of eminent domain to cemetery associations, allowing them to expand their burial grounds. *See id.* at 551.

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.* at 354.

The court expounded on *Evergreen Cemetery Ass'n in Connecticut College for Women v. Calvert*. The question in *Connecticut College* regarded the constitutionality of a statute granting the college, a private school, the right of eminent domain.⁴⁰ In resolving this question, the court accepted and approved of the legislature's determination that the education of women was a public use, noting "[i]t is for the legislature to say whether any given use is governmental [i.e., public] in its nature or not."⁴¹ Nevertheless, the court went on to consider, as it did in *Evergreen Cemetery Ass'n*, whether the use would be *administered* as a public or private use.⁴² Paraphrasing *Evergreen Cemetery Ass'n*, the court acknowledged not all women's colleges are open to the public and there was no evidence suggesting the public held the right to gain admission to Connecticut College.⁴³ The court therefore sustained the trial court's determination that the grant of eminent domain to the college was unconstitutional.⁴⁴

⁴⁰ See Conn. Coll. for Women v. Calvert, 88 A. 633, 634 (Conn. 1913). The Connecticut College was a private educational corporation formed to educate women. *Id.* It was managed by a board of trustees and the board was elected by members of the corporation. *Id.* The trustees set tuition fees, made curriculum determinations, and established admissions criteria. *Id.*

⁴¹ *Id.* at 636.

⁴² See *id.* at 638 (describing how the use of state resources administered privately are of benefit to the public to the extent the public uses or has a right to use them); see also *id.* at 636 ("It is for the legislature to say whether any given use is governmental in its nature or not, subject to review by the courts only in exceptional cases of extreme wrong But the question whether in any given instance the use is or will be administered as a public or as a private use is a question which must of necessity be determined by the courts in accordance with the facts of the particular case in hand.").

⁴³ See *id.* at 638 ("There is no allegation in the petition that the public has or can acquire the right to enjoy the benefits of the land sought to be taken, no provision to that effect in the [college's] charter, and the stated corporate purposes of the [college] are not such as to impose upon it, as a necessary legal consequence of its corporate character, the obligation of admitting to its courses of instruction all qualified candidates, to the extent of its capacity, without religious, racial, or social distinction.").

⁴⁴ In reaching its conclusion, the court summarized:

[O]ur General Assembly has discretionary jurisdiction to declare any use public which is greatly for the benefit of the community, and that this discretion is subject to review by the courts only in case of extreme error.

Nevertheless, there must still remain for the courts, in all cases where the use in question is capable of being administered either for a public or for purely private end, the question whether the public has or can acquire the right to the use or benefit of the property sought to be taken.

If the property is to be privately administered, and the public has not and cannot acquire a right to its use or benefit, the power of eminent domain cannot, upon principle and upon authority, be delegated in aid of a governmental use; unless, as in the development of the natural resources of the State, a direct benefit to the State results from the taking, which benefit continues to exist although the property taken be subsequently used for a private use, and then only when such benefit cannot otherwise be fully realized.

Evergreen Cemetery Ass'n and *Connecticut College* recognize that an important distinction exists in eminent domain cases: public versus private ownership of the taken property. When the government takes and continues to hold and use taken property there is little reason to question whether the property was taken for a public use. A deferential approach to reviewing such cases is therefore appropriate. When, however, property is taken by a private party, or taken by the government but transferred to a private party shortly thereafter, there is less reason to presume the property will be put to a public use, and therefore, a less deferential review is needed. *Evergreen Cemetery Ass'n* and *Connecticut College* recognized this distinction and thus employed a higher level of judicial review. Those cases require the courts to consider the *actual use* to which the property will be put or whether the property will be *administered* in a way that is a public use, or at least they did prior to *Kelo*. The courts must query, for example, whether the taken property would be open to the public on equal terms, to use for the burial of their beloved decedents, or whether the property's use would be limited to members of a particular private group, such as a religion or congregation. That the legislature has declared the burial of the dead a public use did not excuse the court from undertaking such consideration. It is this distinction from which I drew the likelihood-of-development test in *Kelo*, where property was taken by a private corporation (the NLDC) for transfer to a private developer. In the context of economic development takings, I concluded the test required the taking party to prove, by clear and convincing evidence, that the development project would actually occur, i.e., the hotel, office buildings, and residential space would be built, thus resulting in the increase in taxes and jobs that constituted the public benefit.

C. *United States Supreme Court Takings Clause/Public Use Jurisprudence*

United States Supreme Court precedent regarding public use, unlike Connecticut jurisprudence, has failed to recognize the important distinction between public ownership and control and private ownership and control in takings cases, and therefore, does not expressly invite the application of the likelihood-of-development test. The Court's failure to recognize this distinction has resulted in a public use test that lags behind the evolution of the eminent domain power, under which property is increasingly taken by or for private parties. Surely, there is a difference between taking private

Id. at 640. Of course, in economic development takings cases, such as *Kelo*, the public benefit was not access to a college education, but instead increased tax revenue and new jobs. Thus, when considering whether the *actual use* to which the property is being put is a public use, the court needs to consider whether the property will be used in a way to create the increased tax revenue and jobs. That is, the court must query whether the proposed economic development plan will be implemented, thereby creating the purported public benefit.

property to construct a public road or build a public library and taking private property to convey it to a private developer to build private homes and private office buildings, with the hope such development will produce the public benefits of jobs and increased taxes. Certainly, the latter should receive more judicial scrutiny than the former; however, they receive the same deference because the Court has never recognized the importance of this distinction. It is interesting to note, however, as discussed in footnote forty-seven below, the Court once acknowledged this difference. Unfortunately, the distinction has been lost to time. Nevertheless, use of the likelihood-of-development test is not foreclosed by the Court's cases. Moreover, as will be explained in Part III, economic development takings are manifestly different than the takings previously upheld by the Court and thus that distinction provides a principled basis for treating economic development takings differently.

In the late-nineteenth and early-twentieth centuries, the Court unequivocally rejected a narrow construction of "public use" that would require the property be owned by the government or accessible to the general public.⁴⁵ Moreover, the Court signaled any definition of "public use" would by necessity be broad and changing with the circumstances when it noted: "It is obvious . . . that what is public use frequently and largely depends upon the facts and circumstances surrounding the particular subject-matter in regard to which the character of the use is questioned."⁴⁶ Around the same time, the Court began deferring to congressional determinations of what is or is not a public use;⁴⁷ and by the

⁴⁵ See, e.g., *Strickley v. Highland Boy Gold Mining Co.*, 200 U.S. 527, 531 (1906) ("In discussing what constitutes a public use, [*Clark v. Nash*] recognized the inadequacy of use by the general public as a universal test."); *Clark v. Nash*, 198 U.S. 361, 367–69 (1905) (noting what constitutes a public use may change depending on the conditions of the area in which a taking occurs); *Fallbrook Irrigation Dist. v. Bradley*, 164 U.S. 112, 160 (1896) (declaring what constitutes public use often depends upon facts and circumstances). Early on, the Court found that property taken and subsequently used by private parties could, nonetheless, have been taken for a public use because of the benefit the public would realize from such takings. *Fallbrook Irrigation Dist.*, 164 U.S. at 161–62. For example, in *Fallbrook Irrigation* and *Clark*, the Court upheld takings of private property to allow for the creation or enhancement of irrigation systems so that adjoining landowners could turn their arid lands into productive lands. See *Clark*, 198 U.S. at 370; *Fallbrook Irrigation Dist.*, 164 U.S. at 161–62. Similarly, in *Strickley*, the Court allowed a taking so a mining company could erect an aerial line across private property to carry its product from the mines on the mountain sides to the railways in the valleys. *Strickley*, 200 U.S. at 531. The Court was not troubled, in any of these cases, by the fact the property would not be owned by the government or open to use by the public.

⁴⁶ *Fallbrook Irrigation Dist.*, 164 U.S. at 159–60.

⁴⁷ See *United States v. Gettysburg Elec. Ry. Co.*, 160 U.S. 668, 680 (1896). In *Gettysburg Electric Railway*, the Court considered whether the taking of land for the preservation and memorialization of the Battle of Gettysburg was a taking for public use. See *id.* at 679–80. In reasoning that such condemnations were for public use, the Court stated, "[W]hen the legislature has declared the use or purpose to be a public one, its judgment will be respected by the courts, unless the use be palpably without reasonable foundation." *Id.* at 680. The Court continued to allow Congress to declare that a

latter half of the twentieth century, the Court expressly dispelled any notion that the same judicial deference would not be afforded to state legislative determinations of public use as well.⁴⁸ The broad meaning of “public use” and judicial deference to legislative bodies reached their apex in *Berman v. Parker*, *Hawaii Housing Authority v. Midkiff*, and *Ruckelshaus v. Monsanto Co.* It was these cases, Justice Stevens argued, that compelled the result in *Kelo*.

In *Berman*, the Court considered a congressional act that allowed an agency to condemn property in blighted or slum neighborhoods in the District of Columbia in order for those areas to be redeveloped by government agencies and private businesses or individuals.⁴⁹ Samuel Berman objected to the taking of his property, a non-blighted department store, arguing the taking was for private, rather than public use.⁵⁰ The Court, however, upheld the taking as a public use, reasoning it is for the legislature to determine what is in the public interest and there is no exception simply because the power of eminent domain is being used.⁵¹ “The role of the judiciary,” the Court said, “in determining whether [eminent domain] is being exercised for a public purpose is an extremely narrow one.”⁵² Congress has plenary power to govern the District of Columbia, and therefore, according to the Court, it can utilize eminent domain to accomplish that object.⁵³ “Once the object [in *Berman*, the governance and welfare of the nation’s capital] is within the authority of

taking’s purpose was a public use and implied that such declarations would be controlling until “shown to involve an impossibility.” See *Old Dominion Land Co. v. United States*, 269 U.S. 55, 66 (1925).

Interestingly, in *Gettysburg Electric Railway*, the Court distinguished between takings in which the government itself exercises the power of eminent domain and those where the power is delegated to a private corporation. See *Gettysburg Elec. Ry.*, 160 U.S. at 680. The Court noted there was little reason to fear eminent domain abuse when the government was taking land. *Id.* It went on to state, however, “[i]t is quite a different view of the question which courts will take when this power is delegated to a private corporation. In that case the presumption that the intended use for which the corporation proposes to take the land is public, is not so strong as where the government intends to use the land itself.” *Id.* It seems the Court has overlooked this distinction in its subsequent eminent domain cases.

⁴⁸ See *Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229, 244 (1984) (“[T]he fact that a state legislature, and not the Congress, made the public use determination does not mean that judicial deference is less appropriate.”). Although it was not until *Midkiff* that the Court expressly declared state legislative bodies were entitled to deference, its earlier ruling made it clear the Court would follow such an approach. See, e.g., *Fallbrook Irrigation Dist.*, 164 U.S. at 160 (reasoning the people of California and their elected representatives know the necessity of irrigation better than the Court and such knowledge must be given due weight).

⁴⁹ See *Berman v. Parker*, 348 U.S. 26, 28–29 (1954).

⁵⁰ *Id.* at 31.

⁵¹ See *id.* at 32 (“[W]hen the legislature has spoken, the public interest has been declared in terms well-nigh conclusive.”).

⁵² *Id.* (citing *Old Dominion Land Co.*, 269 U.S. at 66; *United States ex rel. Tenn. Valley Auth. v. Welch*, 327 U.S. 546, 552 (1946)).

⁵³ See *id.* at 31, 33. The Court appears to conclude that the exercise of any congressional power is a “public use” under the Takings Clause. *Id.* at 33.

Congress, the right to realize it through the exercise of eminent domain is clear.”⁵⁴

The Court again employed judicial deference in *Midkiff*. Under consideration in that case was the Land Reform Act, adopted by the Hawaii legislature.⁵⁵ The act was designed to redress failure in the real estate market stemming from a land oligopoly and proposed doing so through a condemnation scheme by which a lessor’s property could be condemned and transferred to the lessee for just compensation.⁵⁶ Landowners in Hawaii challenged the act, arguing the conveyance of land from one private person to another was unconstitutional.⁵⁷ The Court

⁵⁴ *Id.* at 33. I am uncertain whether the Supreme Court reached the right result in *Berman*. If it did, however, it certainly was not for the right reasons. The Court’s reasoning in *Berman* is, at best, circular. In a case in which it was asked to determine whether Congress had transgressed the Fifth Amendment’s Takings Clause by allowing a redevelopment agency to take a non-blighted department store it held:

Subject to specific constitutional limitations, when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive. In such cases the legislature, not the judiciary, is the main guardian of the public needs to be served by social legislation This principle admits of no exception merely because the power of eminent domain is involved.

Id. at 32. Thus, in deciding whether Congress has exceeded the constitutional limits placed on its power of eminent domain, the Court declared that Congress decides the public interest, and apparently therefore the limits of eminent domain, subject to constitutional limits. The Court failed, however, to announce what those limits are, the very task it was called upon to perform. As Justice Thomas noted in his dissent in *Kelo*, this was a superb example of question begging. *Kelo v. City of New London*, 545 U.S. 469, 519 (2005) (Thomas, J., dissenting).

That the Court completely failed to answer the question presented in *Berman* was not the only flaw in its reasoning. The Court also seemed to reason that so long as the object Congress wishes to achieve is within its powers, then eminent domain can be used as a means to accomplish that end. *Berman*, 348 U.S. at 33 (“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.”). This is a perplexing result, as Justice Thomas noted, because the purpose of the Fifth Amendment, generally, and the Takings and Public Use clauses specifically, is to limit government power. *See Kelo*, 545 U.S. at 519 (Thomas, J., dissenting) (“*Berman* also appeared to reason that any exercise by Congress of an enumerated power . . . was *per se* a ‘public use’ under the Fifth Amendment. But the very point of the Public Use Clause is to limit that power.” (citations omitted)). If Congress can use eminent domain to accomplish any object within its enumerated powers, what independent meaning could the Takings Clause have? I should note, similar circular reasoning appeared in the Court’s earlier takings cases as well. *See infra* note 59 and accompanying text.

⁵⁵ *Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229, 232–33 (1984).

⁵⁶ *Id.* When the Hawaiian Islands were originally settled, the Polynesian monarch established a feudal land system in which control over land was assigned to certain high-ranking families. *Id.* at 232. Around the time *Midkiff* reached the United States Supreme Court, land ownership in Hawaii remained largely concentrated. *See id.* In fact, in the mid-1960’s it was discovered that forty-nine percent of the state’s land was owned by the state and federal government and another forty-seven percent was owned by only seventy-two private landowners. *Id.* Thus, the Hawaii legislature adopted the Land Reform Act to dilute the land ownership market. *Id.* at 233.

⁵⁷ *See id.* at 234–35.

upheld the act.⁵⁸ Primarily relying on *Berman*, the Court reasoned that public use and a sovereign's police powers are "coterminous" and that courts have only a narrow role when reviewing legislative determinations as to what is a public use.⁵⁹ "In short, the Court has made clear that it will not substitute its judgment for a legislature's judgment as to what constitutes a public use 'unless the use be palpably without reasonable foundation.'"⁶⁰ The Court further noted that it had never struck down the use of eminent domain when it was rationally related to a conceivable public purpose.⁶¹

A month after *Midkiff*, the Court decided *Ruckelshaus v. Monsanto Co.*, also based largely on judicial deference to the legislature. Monsanto challenged certain provisions of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA).⁶² The challenged provisions allowed the Environmental Protection Agency (EPA) to use data submitted by Monsanto as part of an application to register a pesticide when considering subsequent applications to register similar pesticides manufactured by Monsanto competitors.⁶³ The data concerned the health, safety, and environmental effects of the pesticide and were collected at considerable costs.⁶⁴ Monsanto argued that such use of the data was effectively a taking

⁵⁸ *Id.* at 245. The Court reasoned it was within the state's police power to regulate oligopolies, and therefore, it would not disapprove of the use of eminent domain in exercising such regulatory power. *Id.* at 242.

⁵⁹ *Id.* at 239–41. Many cite *Berman*, as the Court did in *Midkiff*, for the beginning point of the Court's wrongful conflation of the police power and power of eminent domain. See, e.g., *id.* at 237; *Kelo*, 545 U.S. at 519 (Thomas, J., dissenting) ("More fundamentally, *Berman* and *Midkiff* erred by equating the eminent domain power with the police power of States. . . . To construe the Public Use Clause to overlap with the States' police power conflates these two categories." (citations omitted)); David L. Callies et al., *The Moon Court, Land Use, and Property: A Survey of Hawaii Case Law 1993–2010*, 33 U. HAW. L. REV. 635, 654 (2011) (noting Hawaii Land Reform Act was upheld by Supreme Court due to "confusing conflation of police power and public use in *Berman v. Parker*"). The error of the Court's reasoning in this regard, however, can be traced back to the late 1800's. In its early cases, the Court used the Necessary and Proper Clause, as construed by *McCulloch v. Maryland*, to uphold congressional use of eminent domain. See, e.g., *United States v. Gettysburg Elec. Ry. Co.*, 160 U.S. 668, 681 (1896); *Luxton v. N. River Bridge Co.*, 153 U.S. 525, 529–30 (1894). Although the nomenclature was different, the reasoning was similar. For example, in *Gettysburg Electric Railway Co.*, the Court said that Congress need not be expressly granted the right to exercise eminent domain to condemn property for any particular public purpose. *Gettysburg Elec. Ry. Co.*, 160 U.S. at 681. Instead, "it is implied because of its necessity, or because it is appropriate in exercising those [enumerated] powers." *Id.* This reasoning parallels the Court's current jurisprudence: that so long as the legislature's object is within its police powers, eminent domain can be used to accomplish such object. This leaves the Takings Clause with little, if any, independent meaning. See discussion *supra* note 54.

⁶⁰ *Midkiff*, 467 U.S. at 241 (quoting *Gettysburg Elec. Ry. Co.*, 160 U.S. at 680).

⁶¹ *Id.* (citing *Berman v. Parker*, 348 U.S. 26 (1954); *Rindge Co. v. Los Angeles*, 262 U.S. 700 (1923); *Block v. Hirsh*, 256 U.S. 135 (1921)).

⁶² See *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 990 (1984).

⁶³ See *id.* at 990, 993 n.4 (quoting 7 U.S.C. § 136a(c)(1)(D) (1978)).

⁶⁴ See *id.* at 998 ("Monsanto had incurred costs in excess of \$23.6 million in developing the health, safety, and environmental data submitted by it under FIFRA.").

of property for a private use.⁶⁵ In deciding that FIFRA accomplished a public use, the Court cited the now oft-repeated principle that “[t]he role of the courts in second-guessing the legislature’s judgment of what constitutes a public use is extremely narrow. . . . So long as the taking has a conceivable public character, ‘the means by which it will be attained is . . . for Congress to determine.’”⁶⁶ The purpose of FIFRA was to lower barriers to entry into the pesticide market by allowing applicants to use data already collected by others, saving time and money by eliminating the need to duplicate research.⁶⁷ The Court determined that such a “procompetitive purpose” was within Congress’ power and that any taking for this purpose was a public use.⁶⁸

Relying primarily on these three cases, the Court decided *Kelo*. After reviewing *Berman*, *Midkiff*, and *Ruckelshaus*, the Court summarized those holdings: “For more than a century, our public use jurisprudence has wisely eschewed rigid formulas and intrusive scrutiny in favor of affording

⁶⁵ *Id.* at 999.

⁶⁶ *Id.* at 1014–15 (quoting *Berman*, 348 U.S. at 33).

⁶⁷ *Id.* at 1015.

⁶⁸ *Id.* After the Court’s decisions in *Midkiff* and *Ruckelshaus*, the rule the Court had crafted was clear. In essence, it provided that so long as the object the legislature seeks to obtain is within its police powers—i.e., the elimination of blight, regulation of markets, economic development, etc.—it would be a public use and eminent domain could be employed to accomplish such goal. Because the Court had equated the power of eminent domain to the police powers, it established a framework in which the use of eminent domain would be reviewed as all economic and social legislation is reviewed: through the lens of rational basis scrutiny. That is, so long as the use of eminent domain is rationally related to some conceivable public purpose, its use will be upheld by the courts, at least under the federal constitution.

There is no doubt that it is wise for courts to defer to the wisdom of the legislature in regards to economic and social policy. The courts are admittedly institutionally ill-equipped to pass on the wisdom of such policies. The taking of a person’s private property, however, *is not* economic or social legislation. Moreover, as Justice Breyer noted at the oral arguments in *Kelo*, rational basis is used when reviewing economic and social legislation in the absence of a particular constitutional provision designed to secure a particular individual freedom or limit governmental power. Transcript of Oral Argument at 38, *Kelo v. City of New London*, 545 U.S. 469 (2005) (No. 04-108). That is not the case when the use of eminent domain is in question. Indeed, there is a positive, constitutional protection, the Fifth Amendment, targeted specifically at restraining the government’s power to take private property. Thus, eminent domain cases are not suited for the same review as economic and social legislation, at least not when the government will not itself use the taken property.

The reasoning that resulted in the conflation of the power of eminent domain with the government’s general police powers has another flaw. Surely, the Fifth Amendment does not allow the use of eminent domain to be justified only by the fact that it is employed to accomplish some goal, such as economic development, that is within a state’s police powers. Such reasoning has never been employed when interpreting other positive constitutional protections. For example, the Court does not allow the legislature, city council, or police commissioner to determine what a reasonable search or seizure is under the Fourth Amendment, despite the fact that law enforcement is within the state’s police powers. Interestingly, the Court’s cases have created a puzzling dichotomy. The Court will not defer to a police officer when considering whether her search of a home was reasonable. When the government wants to take that same home, however, the Court will not question the legislature’s judgment.

legislatures broad latitude in determining what public needs justify the use of the takings power.”⁶⁹ Then, continuing on to consider the particular facts of *Kelo*, the Court determined that the economic development plan “unquestionably” served a public purpose because New London believed it would “provide appreciable benefits to the community, including . . . new jobs and increased tax revenue.”⁷⁰ Citing its limited scope of review, the Court concluded the challenged takings were for a public use because they were a means to accomplishing the economic development plan, a plan the city concluded would serve a public purpose.⁷¹ Rejecting *Kelo*’s argument that, at the very least, economic development takings call for a more searching review by the courts—such as utilization of the likelihood-of-development test—Justice Stevens argued that such a holding would represent a great departure from precedent.⁷² “When the legislature’s purpose is legitimate and its means are not irrational, our cases make clear that empirical debates over the wisdom of takings . . . are not to be carried out in the federal courts.”⁷³

D. *Application of the Likelihood-of-Development Test Was Not Foreclosed by Court Precedent*

As illustrated by Parts II.B and II.C above, utilization of a higher standard of scrutiny, such as the likelihood-of-development test, in cases involving economic development takings is not prohibited by either Connecticut or United States supreme courts precedent. In fact, both courts expressly reserve some role for the judiciary in enforcing the public use requirements of the federal and state constitutions.⁷⁴ Indeed, the Connecticut Supreme Court has said: “[w]hether the purpose for which a statute authorizes the condemnation of property constitutes a public use is, in the end, a judicial question to be resolved by the courts.”⁷⁵ Similarly, the United States Supreme Court has held that the judiciary has a narrow role

⁶⁹ *Kelo v. City of New London*, 545 U.S. 469, 483 (2005).

⁷⁰ *Id.* at 483–84.

⁷¹ *Id.* at 484.

⁷² *Id.* at 487–88.

⁷³ *Id.* at 488 (quoting *Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229, 242–43 (1984)).

⁷⁴ *See, e.g., Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1014 (1984) (“The role of the courts in second-guessing the legislature’s judgment of what constitutes a public use is extremely narrow.”); *Old Dominion Land Co. v. United States*, 269 U.S. 55, 66 (1925) (“Congress has declared the purpose to be a public use . . . Its decision is entitled to deference until it is shown to involve an impossibility.”); *Hairston v. Danville & W. Ry. Co.*, 208 U.S. 598, 606 (1908) (“The one and only principle in which all courts seem to agree is that the nature of the uses, whether public or private, is *ultimately a judicial question.*” (emphasis added)); *Gohld Realty Co. v. Hartford*, 104 A.2d 365, 369 (Conn. 1954) (holding what constitutes public use is ultimately a judicial question).

⁷⁵ *Gohld Realty Co.*, 104 A.2d at 369. The *Gohld* court went on to explain that although whether a particular condemnation is for a public use is ultimately a question for the court, great weight must be given to the legislature’s determination of public use. *Id.*

in public use determinations.⁷⁶ Although the Court held the judiciary's task was narrow in the realm of public use determinations, it did not completely disclaim court responsibility in this area.⁷⁷ Presumably, both courts carved out a place for the judiciary because they could imagine instances where the legislature might extend the power of eminent domain beyond its rightful bounds, or cases in which the use of eminent domain was at its outer-bounds, necessitating a closer look by the court. Taking private property for economic development, in which the property is transferred to a private developer and the public benefit to be realized, if any, depends solely on the actions (or inactions) of such developer, is an example of a taking at the outer-bounds of "public use" and the eminent domain power.

Moreover, as evidenced by the discussion in Part II.B above, the Connecticut Supreme Court, despite its broad definition of public use and deferential standard, has not historically viewed its role in takings cases as limited to determining whether "the appropriate legislative authority rationally has determined" that the proposed use will promote a public benefit.⁷⁸ Instead, it has acknowledged that the public use test needs to take account of the evolution of the power and use of eminent domain by recognizing the difference between government takings and use of property and private takings and use of property. Therefore, when the taking is done by a private party or the taken property will be put to use by a private party, the court has reserved for itself the right to determine, based upon the facts of a specific case, whether a particular taking is being *administered or implemented* in a public way; that is, it considers the *actual use* to which the property is put. Such an approach does not require the court to second-guess legislative determinations of public use. In fact, in *Evergreen Cemetery Ass'n* the court accepted the legislature's conclusion that operating a cemetery was a public use,⁷⁹ and in *Connecticut College for Women* it approved of the legislative declaration that the higher education of women constitutes a public use.⁸⁰ Moreover, in neither case did the court question or second-guess the general method chosen by the legislature to effectuate the declared public uses. The court did not opine on the wisdom of using eminent domain by cemeteries to assemble land for burial or by women's colleges for building education facilities. Instead, the court's concern centered around how, in those particular cases, the use was actually to be implemented or administered

⁷⁶ See *Berman v. Parker*, 348 U.S. 26, 32 (1954) ("The role of the judiciary in determining whether [the eminent domain] power is being exercised for a public purpose is an extremely narrow one.").

⁷⁷ *Id.*

⁷⁸ *Kelo v. City of New London*, 545 U.S. 511 (2005), *aff'd*, 545 U.S. 469 (2005).

⁷⁹ *Evergreen Cemetery Ass'n v. Beecher*, 5 A. 353, 353 (Conn. 1886).

⁸⁰ *Conn. Coll. for Women v. Calvert*, 88 A. 633, 636 (Conn. 1913).

and whether it would, *in fact*, be public.⁸¹ Having concluded that there was no evidence to suggest that the public had or could gain a right, on equal terms, to access the cemetery in *Evergreen Cemetery Ass'n* or the college in *Connecticut College for Women*, the court concluded that, despite the proposed uses and the way in which they were to be carried out being generally public in nature, they were, in fact, not public in those specific instances.⁸² Thus, these cases not only allow for but invite the use of the likelihood-of-development test in economic development takings to determine whether the property taken will in fact be administered for a public use. In the context of economic development takings, that will largely entail considering whether there is clear and convincing evidence that the proposed development will be built.

Although the United States Supreme Court's public use jurisprudence did not invite the use of the likelihood-of-development test in the same manner as Connecticut law, it certainly did not prohibit its use.⁸³ The fact that the Court so concluded demonstrates that it completely missed the point. In asking whether or not there is some level of certainty that an economic development plan will actually materialize, courts would not second-guess legislative declarations that economic development is a public use and that eminent domain can therefore be used to accomplish such development. Nor would the court be required to pass on the wisdom of any particular development plan or the accuracy of the projected economic benefits to be realized from such plan. Instead, the court would consider whether there are any facts that indicate the actual plan—not the plan's purported public benefits—will materialize. The court would look for clear and convincing evidence that the structures called for in the plan, whether they be industrial parks, commercial office buildings, retail space, or residential housing, will be constructed and sold, rented, or leased in a reasonable amount of time. Attorneys Horton and Levesque contend that this will be a hard test to meet.⁸⁴ They are undoubtedly correct, but the test is exacting for good reason: the government is taking the private homes and businesses of citizens in order to replace them with facilities to be used by other private parties. As I explained in my dissent in *Kelo*, this is not the only area in which the government is required to meet a high burden of

⁸¹ See *Evergreen Cemetery Ass'n*, 5 A. at 353–54; *Conn. Coll. for Women*, 88 A. at 636, 638–39.

⁸² See *Evergreen Cemetery Ass'n*, 5 A. at 353–54 (stating that a strictly private cemetery association could not take land for continued private use by right of eminent domain, even though it was offering burial acreage for public use); *Conn. Coll. for Women*, 88 A. at 638 (reasoning that despite the fact that giving women higher education is a use that is governmental in nature, there are many colleges for the higher education of women at which the public cannot obtain the right to be educated, and that land cannot be acquired through eminent domain for this continued private use).

⁸³ See *supra* note 74.

⁸⁴ See Horton & Levesque, *supra* note 1, at 1411 n.39.

proof before depriving a person of a constitutional right.⁸⁵ Although the test is exacting, it is not hard to imagine many instances where it could be met by the taking authority. For example, the taking party could satisfy its burden by presenting evidence of commencement and completion dates, a construction schedule, committed financing, tenant commitments, or a signed development agreement that includes conditions for project completion. Surely, if under the circumstances there is no evidence that the plan will actually be carried out, then the takings cannot be for a public use.

I recognize that the United States Supreme Court previously has acknowledged that a legislative plan involving the use of eminent domain may not always accomplish its goals, and that such a possibility does not change the analysis.⁸⁶ “The proper inquiry before the Court is not whether the provisions in fact will accomplish their stated objectives. [The Court’s] review is limited to determining that the purpose is legitimate and that [the legislature] rationally could have believed that the provisions would promote that objective.”⁸⁷ The likelihood-of-development test, however, addresses a distinct question. Moreover, determining whether the development is probable is an indispensable part of evaluating whether the legislature could rationally believe the use of eminent domain would promote the economic development.

First, whether the economic development plan adopted by the City of New London will generate the number of jobs and tax dollars it projects is not the primary concern of the likelihood-of-development test. Instead, the test focuses on the much more fundamental point of whether the plan will be implemented. At the time of the takings in *Kelo* there were a number of factors that indicated the plan would not move forward, at least not at that time. For example, “at the time of the takings, there was no signed agreement to develop the properties, 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.”⁸⁸ In fact, the development plan acknowledged that current commercial rent levels did not support the construction of new office space

⁸⁵ See *Kelo v. City of New London*, 843 A.2d 500, 588–90, 590 n.19 (2004) (Zarella, J., dissenting), *aff’d*, 545 U.S. 469 (2005) (listing cases requiring clear and convincing evidence). For example, clear and convincing evidence is required to prove a claim of adverse possession, for a nonparent to obtain visitation rights, to terminate parental rights, and to take a minor’s testimony outside the presence of a criminal defendant. See *id.* at 589–90.

⁸⁶ See *Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229, 242 (1984) (stating that the Land Reform Act of 1967 may not be successful in achieving its aims, but the efficacy of the statute’s relevant provisions is not the question to decide; the constitutional requirement is satisfied if the state legislature rationally could have believed that the Land Reform Act would promote its objective).

⁸⁷ *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1015 n.18 (1984).

⁸⁸ *Kelo*, 843 A.2d at 596 (Zarella, J., dissenting).

and trial testimony showed that other office space in the area was vacant.⁸⁹

Second, a court cannot determine whether the use of eminent domain is a rational means to accomplish an economic development plan without first determining whether the plan will be pursued or achieved. If, at the time of a taking, the presumption is that development will not move forward unless and until there is an increased demand for office space and an uptick in economic conditions, then the taking of private property, particularly a person's home, to accomplish such development is irrational. It is not the property that is needed to accomplish the economic development. Instead, a change in the economic environment is necessary. Taking the property will not produce such change. For example, if the property in the Fort Trumbull neighborhood was simply to be taken and cleared while the development project idled, awaiting an increased demand for office space in New London or more favorable economic conditions, then it seems that there could be no rational conclusion that the taken property was being put to a public use. Thus, asking whether the proposed use will in fact occur is part and parcel to deciding whether the city "rationally could have believed that the [development plan] would promote its objective."⁹⁰

III. THE VERY NATURE OF ECONOMIC DEVELOPMENT TAKINGS MAKES THEM DISTINCTIVE

Contrary to the contentions of Attorneys Horton and Levesque and the conclusion of the Court in *Kelo*, the facts in *Kelo* were not so similar to previous Supreme Court cases that there was no "principled way of distinguishing economic development from the other public purposes that [the Court had] recognized."⁹¹ I can think of at least three principled ways to distinguish the *Kelo* takings.

First, in the types of takings previously approved by the Court, the "public use" occurs either simultaneously with the taking or shortly

⁸⁹ See *Kelo v. City of New London*, No. 557299, 2002 WL 500238, at *66 (Conn. Super. Ct. Mar. 13, 2002) (noting how historical values of Class A office buildings had not recovered sufficiently to justify new construction except for use by end users, and referencing a 2001 report stating that new office building construction is generally not feasible), *aff'd in part, rev'd in part*, 843 A.2d 500 (Conn. 2004), *aff'd*, 545 U.S. 469 (2005).

⁹⁰ See *Midkiff*, 467 U.S. at 242 (emphasis omitted). In *Midkiff*, the Court was not concerned with whether the Land Reform Act would achieve its objective of correcting the market failure caused by the land oligopoly. Instead, the proper question was whether Hawaii's legislature could have reasonably believed that the act would achieve such a goal. See also *Ruckelshaus*, 467 U.S. at 1015 n.18 (noting whether congressional act will reduce barrier to entry in pesticide industry is unimportant—what was important was whether Congress could rationally have so concluded).

⁹¹ *Kelo v. City of New London*, 545 U.S. 469, 484 (2005). The Court posited that it would be "incongruous" to suggest a difference exists between taking for economic development and taking to facilitate agriculture and mining, the transformation of a blighted neighborhood, breaking up a land oligopoly, and the elimination of a barrier to entry. *Id.* at 484–85.

thereafter by the volition of the government and not an independent private actor or some other uncontrollable outside factor, such as the economy. The public use in *Berman*, and other redevelopment cases, is accomplished when the blight and the conditions that caused it are removed.⁹² It is true that the government does not always remove the blight itself.⁹³ Nevertheless, by leasing or selling the taken property to accomplish the removal of the blight and the conditions that cause blight, the government ensures that the public use is attained. What a private individual or business does with the property after the blight is removed, although important, is of little concern in the public use determination because the public use has already been accomplished. Contrarily, when property is taken in connection with an economic development plan, what a private developer does with such property after any existing structures are removed is central to the question of whether the property will in fact be put to a public use. If the property is to be immediately developed into a large office complex that will attract new business, thereby creating new jobs and increasing tax revenue, it most certainly will be put to a public use. If, on the other hand, the property is to remain barren and unused until the developer receives commitments from enough end users to justify building the complex, it cannot be said when, *if ever*, the property taken for a concededly public use—economic development—will be put to such use.

In similar fashion, the public use occurred at the time of the takings in *Midkiff*, *Ruckelshaus*, and *National Railroad Passenger Corp. v. Boston & Maine Corp.*, not sometime thereafter. The purported public use in *Midkiff*—breaking up the land oligopoly—occurred when the state housing authority took the lessor’s land and transferred it to the lessee, diluting the concentration of the state’s land controlled by the lessor.⁹⁴ Likewise, the EPA’s taking and use of Monsanto’s health, safety, and environmental data when reviewing a subsequent application for registration of a pesticide accomplished the public use of eliminating a barrier to entry of the pesticide industry—the costly and time consuming research required for registration.⁹⁵ Finally, the public use of facilitating Amtrak rail service was attained when the Interstate Commerce Commission condemned railroad track that Boston & Maine had allowed to fall into disrepair and transferred

⁹² See *Berman v. Parker*, 348 U.S. 26, 28 (1954) (observing Congress’ finding that assembly of real property for purposes of redevelopment, i.e., removal of blight and slum conditions, is a public use); see also, e.g., *County of Wayne v. Hathcock*, 684 N.W.2d 768, 783 (Mich. 2004) (noting in redevelopment cases “the act of condemnation *itself*, rather than the use to which the condemned land eventually would be put, was a public use”).

⁹³ See *Berman*, 348 U.S. at 30 (explaining redevelopment agency transfers property to other public agencies or “redevelopment companies, individuals, or partnerships” for redevelopment (emphasis added)).

⁹⁴ See *Midkiff*, 467 U.S. at 233–34, 242.

⁹⁵ See *Ruckelshaus*, 467 U.S. at 1014–15.

it to another rail company under the condition that it restore the tracks to an acceptable condition.⁹⁶

The second way to distinguish the takings in *Kelo* is that the takings previously condoned by the Court have natural limitations. For example, in order to take property under a redevelopment plan, such as in *Berman*, the property has to be located in an area that is either “slums” or “blighted,”⁹⁷ and in *Midkiff*, takings were to be limited to the estates of the large landowners.⁹⁸ The takings approved in *Kelo*, however, have no natural limitation.⁹⁹ Instead, any property can be taken if a legislative body rationally concludes it could be used to promote the economic development of the community. Under the principles of *Kelo*, no piece of property, blighted or pristine, home or business, is outside the sovereign’s power of eminent domain.

Third, as noted in Justice O’Connor’s dissent in *Kelo*, the pre-

⁹⁶ See Nat’l R.R. Passenger Corp. v. Bos. & Me. Corp., 503 U.S. 407, 412, 422–23 (1992). Boston & Maine Corporation owned a portion of railroad track that Amtrak used to provide rail service between Montreal and Washington, D.C. *Id.* at 411. Amtrak had the right to use the track under an agreement between it and Boston & Maine, which required Boston & Maine to maintain the tracks. *Id.* Over time, however, Boston & Maine entered bankruptcy and was purchased by Guilford Transportation Industries, Inc.; Amtrak claimed this purchase led to track maintenance neglect, delays in rail service, and the eventual suspension of the Montrealer service. *Id.* at 412. Amtrak attempted to negotiate better maintenance, but when those negotiations were unsuccessful, it requested that the Interstate Commerce Commission condemn the tracks. *Id.* at 412–13. Amtrak would then transfer the railway to a third-party railroad, under an agreement that would require the third-party railroad to restore and maintain the tracks to Amtrak’s standards. *Id.* at 412.

It must be noted that in addition to the public use occurring in *National R.R. Passenger Corp.* at the time of the taking as discussed above, the taking also involved a fundamental and long-time public use, the facilitation of rail service. See, e.g., 26 AM. JUR. 2D *Eminent Domain* § 85 (2014) (“[L]and can be condemned for intercity-rail-passenger service where it can be shown that the taking is necessary for that purpose.”).

⁹⁷ See, e.g., *Berman*, 348 U.S. at 28–29 (outlining a provision of the District of Columbia Redevelopment Act providing for elimination of slum, blighted, and substandard housing conditions); *Aposporos v. Urban Redevelopment Comm’n*, 790 A.2d 1167, 1177 (Conn. 2002) (“[U]nder the redevelopment act, it is only with reference to a redevelopment area, i.e., a blighted area, ‘that a local redevelopment agency is authorized to . . . take private property by condemnation.’” (citing *Gohld Realty Co. v. Hartford*, 104 A.2d 365, 369 (Conn. 1954))).

⁹⁸ *Midkiff*, 467 U.S. at 233. The Land Reform Act provides that tenants living in lots situated on large development tracts of land can petition to have the land condemned. *Id.* The state housing authority will then consider whether transferring the property to the tenants would serve the purpose of breaking up the oligopoly. *Id.* at 233–34.

⁹⁹ See, e.g., *Kelo v. City of New London*, 545 U.S. 469, 504–05 (2005) (O’Connor, J., dissenting) (“Today nearly all real property is susceptible to condemnation on the Court’s theory. . . . [N]ow that we have authorized local legislative bodies to decide that a different commercial or industrial use of property will produce greater public benefits than its present use, no homeowner’s, merchant’s or manufacturer’s property, however productive or valuable to its owner, is immune from condemnation for the benefit of other private interests that will put it to a ‘higher’ use.” (quoting *Poletown Neighborhood Council v. City of Detroit*, 304 N.W.2d 455, 464 (Mich. 1981))); *Sw. Ill. Dev. Authority v. Nat’l City Envtl., L.L.C.*, 768 N.E.2d 1, 9 (Ill. 2002) (noting that all lawful business incidentally contributes to regional economic growth).

condemnation use of the property taken in *Berman* and *Midkiff* was harmful to the public.¹⁰⁰ The redevelopment area in *Berman* had deteriorated and become a health and safety risk to the public.¹⁰¹ Of course, *Berman*'s department store was not itself blighted and therefore the use of his specific piece of property was not a public harm. Such narrow thinking, however, misses the forest for the trees. The danger to the public health and safety was caused by the area, not any one individual piece of property, and Congress concluded the way to remediate that harm was to redevelop the entire area and remove the conditions which caused the blight, thereby necessitating, in its mind, the taking of *Berman*'s store. In *Midkiff*, the concentrated ownership of land had caused the residential fee simple market to fail, and in *National Railroad Passenger Corp.*, the neglected tracks produced a public harm by causing the suspension of Amtrak service between Washington, D.C., and Montreal. In *Kelo*, on the other hand, the property owners' use of the land was not harmful.¹⁰² Susette Kelo and the others did not cause the depressed economic conditions in New London by using their property for homes. Neither were their homes deteriorating nor the neighborhood blighted.¹⁰³ In fact, many of the property owners who wished to stay in the Fort Trumbull neighborhood had expended considerable time and money maintaining their homes.¹⁰⁴

I therefore contend that the City and the NLDC were wrong in arguing, and the Court was mistaken in concluding, that there was no difference between the economic development takings at issue in *Kelo* and those takings previously addressed by the Court. There are in fact significant distinctions and it is those differences that require the courts to take on a more meaningful role in protecting private property rights in the context of economic development takings.

IV. DEMOCRACY PLACES NO MEANINGFUL LIMIT ON EMINENT DOMAIN AND ENFORCING THE PUBLIC USE CLAUSE DOES NOT OFFEND THE PRINCIPLES OF FEDERALISM

Attorneys Horton and Levesque argue in their essay,¹⁰⁵ as was argued before the Court,¹⁰⁶ that the democratic process, not some court-created

¹⁰⁰ See *Kelo*, 545 U.S. at 500 (O'Connor, J., dissenting).

¹⁰¹ See *Berman*, 348 U.S. at 28–29, 30–31 (outlining congressional act allowing condemnation of blighted areas and describing particular area at issue in *Berman*).

¹⁰² *Kelo*, 545 U.S. at 500 (O'Connor, J., dissenting).

¹⁰³ *Id.* at 475 (majority opinion).

¹⁰⁴ *Id.*

¹⁰⁵ See Horton & Levesque, *supra* note 1, at 1425 (averring democratic process should make public welfare decisions and electorate will serve as check for unpopular condemnations).

¹⁰⁶ See Brief of the Respondents, *supra* note 2, at 21 (contending Court institutionally ill-suited to determine public use because removed from democratic process).

and administered standard, is the proper limit on public use determinations and adequately protects property owners from eminent domain abuse. Such a contention, however, plainly ignores reality. When the legislature is left to determine public use, the risk that the majority will abuse the political process to capture the power of eminent domain and use it against the interests of less powerful minorities intensifies.¹⁰⁷ The Framers must have had such abuse in mind when they drafted the Takings Clause. Likewise, democracy also can be an insufficient protection for the majority when legislatures or local governments are captured by powerful interest groups that persuade the members of those bodies to use eminent domain to accomplish their goals.¹⁰⁸

History in fact has shown majoritarian oppression in the use of eminent domain, in that takings have disproportionately affected minority, elderly, and poor neighborhoods. Between 1949 and 1973, under the guise of urban renewal, 2,532 redevelopment projects were undertaken in 992 cities across the country.¹⁰⁹ As a result of those projects, one million individuals were displaced.¹¹⁰ Two-thirds of the displaced individuals were African-Americans, at a time when African-Americans made up only twelve percent of the United States population.¹¹¹ This trend continues today. In a survey of 184 development projects in which eminent domain was used or threatened between 2003 and 2007, it was discovered that a greater percentage of the residents in the project areas, vis-à-vis the surrounding communities, were minorities, less educated, and economically

¹⁰⁷ See Charles E. Cohen, *Eminent Domain After Kelo v. City of New London: An Argument for Banning Economic Development Takings*, 29 HARV. J.L. & PUB. POL'Y 491, 547 (2006) (observing many African-American and poor neighborhoods were destroyed under the auspices of urban renewal).

¹⁰⁸ *Id.* at 547–48 (positing outrage after *Kelo* was driven by appearance of powerful minority “tak[ing] control of the machinery of eminent domain” to enrich itself at the expense of a powerless minority). Cohen notes that this can particularly be a problem when the taking targets a small number of condemnees. *Id.* at 547. Further, the specter of a powerful minority taking the property of a powerless minority is likely to always be true in the context of takings for economic development, where the objective is to increase tax revenue or create jobs by putting the taken property to more productive use. *Id.* at 548; see also, e.g., *Kelo*, 545 U.S. at 505 (O'Connor, J., dissenting) (“The beneficiaries are likely to be those citizens with disproportionate influence and power in the political process, including large corporations and development firms. As for the victims, the government now has license to transfer property from those with fewer resources to those with more.”).

¹⁰⁹ MINDY THOMPSON FULLILOVE, INST. FOR JUSTICE, 1 EMINENT DOMAIN & AFRICAN AMERICANS: WHAT IS THE PRICE OF THE COMMONS? 2 (2007), <http://ij.org/wp-content/uploads/2015/03/Perspectives-Fullilove.pdf> [https://perma.cc/J5YJ-JY84].

¹¹⁰ *Id.*

¹¹¹ *Id.* Another commentator has noted that between 1949 and 1963, seventy-eight percent of the 120,000 families displaced by urban renewal were nonwhite. Josh Blackman, *Equal Protection from Eminent Domain: Protecting the Home of Olech's Class of One*, 55 LOY. L. REV. 697, 703 (2009). Justice Thomas gave a slightly different statistic for the same period, stating approximately 177,000 families were displaced by urban renewal and of those families whose race was known, sixty-three percent were nonwhite families. See *Kelo*, 545 U.S. at 522 (Thomas, J., dissenting).

disadvantaged.¹¹²

This impact pervaded takings cases before the courts as well. For example, in *Berman*, the Court acknowledged that African-Americans made up 97.5 percent of the 5,012 residents that would be displaced by the Southwest Washington, D.C., redevelopment project it upheld in that case.¹¹³ Similarly, in *Poletown Neighborhood Council v. City of Detroit*, a neighborhood comprised largely of first- and second-generation Polish-Americans was cleared to make way for a new General Motors factory.¹¹⁴ In order to clear an area for the GM plant, 1,176 structures had to be destroyed and 3,438 people were displaced.¹¹⁵ Moreover, one *amicus curiae* brief informed the Court of a number of development projects, ongoing at the time of *Kelo*, that disproportionately affected minorities.¹¹⁶ Such examples included a project in San Jose, California, in which ninety-five percent of the targeted properties were Hispanic or Asian owned and an economic development area in Ventnor, New Jersey, that encompassed forty-percent of the city's Latino population.¹¹⁷

Additionally, it is not difficult to imagine that in a city plagued by years of economic decline, an unemployment rate twice that of the state, and a lower-than-average median income, those who oppose an economic development plan requiring the condemnation of their homes will find little support from their fellow city residences who are hoping for an economic resurgence. Justice Ryan suggested as much in his *Poletown* dissent when he said:

As the new plant site plans were developed and announced . . . and the demolitionist's iron ball razed neighboring commercial properties such as the already abandoned Chrysler Dodge Main plant, a crescendo of

¹¹² See Dick M. Carpenter & John K. Ross, *Testing O'Connor and Thomas: Does the Use of Eminent Domain Target Poor and Minority Communities?*, 46 URB. STUD. 2447, 2453, 2455 (2009). The project areas residents were 58% minority, compared to 45% in the surrounding communities. *Id.* at 2455. Moreover, a greater percentage of project areas residents held less than a high school diploma, relative to the surrounding community—34% and 24%, respectively—and only 9% of project areas residents, compared to 13% of residents in the surrounding communities, had bachelor's degrees. *Id.* The median income of residents residing in the project areas (\$18,935.71) was also lower than the median income of the surrounding communities (\$23,113.46), and a greater percent of project areas residents lived below the poverty line, 25% compared to 16% in the surrounding communities. *Id.* The survey of these projects further concluded that the difference in the above categories is statistically significant. *Id.*

¹¹³ *Berman v. Parker*, 348 U.S. 26, 30 (1954).

¹¹⁴ 304 N.W.2d 455, 470 (Mich. 1981) (Ryan, J., dissenting), *overruled by* *County of Wayne v. Hathcock*, 684 N.W.2d 765 (Mich. 2004).

¹¹⁵ *Id.* at 464 n.15 (Fitzgerald, J., dissenting).

¹¹⁶ See Brief of NAACP et al. as *Amici Curiae* in Support of Petitioners at 9–11, *Kelo*, 545 U.S. 469 (No. 04-108), 2004 WL 2811057, at *9–11.

¹¹⁷ See *id.* at *10.

supportive applause sustained the city and General Motors and their purpose. Labor leaders, bankers, and businessmen . . . were joined by radio, television, newspaper and political opinion-makers in extolling the virtues of the bold and innovative fashion in which, almost overnight, a new and modern plant would rise from a little known inner-city neighborhood of minimal tax base significance. The promise of new tax revenues, retention of a mighty GM manufacturing facility in the heart of Detroit, new opportunities for satellite businesses, retention of 6,000 or more jobs, and concomitant reduction of unemployment, all fostered a community-wide chorus of support for the project. It was in such an atmosphere that the plaintiffs sued to enjoin the condemnation of their homes.¹¹⁸

Later in his dissent, Justice Ryan noted, “[v]irtually the only discordant sounds of dissent have come from the minuscule minority of citizens most profoundly affected by this case, the Poletown residents whose neighborhood has been destroyed.”¹¹⁹ Justice Ryan’s inclination was supported by a study done by three political scientists who concluded a majority of Detroit voters likely supported the project.¹²⁰

In addition to the difficulty the condemnees may have in garnering public sympathy for the loss of their homes in the face of a plan that promises an economic renaissance, it is unlikely the democratic process will hold municipal leaders accountable.¹²¹ There are many reasons why local politicians are likely to go unpunished for poor economic development plans and abuse of the power of eminent domain. First, the cost-benefit analysis in economic development projects is complex and many voters may be unable, on their own, to determine whether or not a project is cost-effective.¹²² Second, the benefits of these projects—increased tax revenues and jobs or a healthier overall local economy—take years to materialize, if they ever do, and project failure may only be apparent long after the takings when public sentiment has moved on to

¹¹⁸ *Poletown Neighborhood Council*, 304 N.W.2d at 470–71 (1981) (Ryan, J., dissenting). The prospect of the new General Motors factory was undoubtedly popular in the Detroit metropolitan area. Along with the factory came the promise of jobs—6,150 according to GM executives—at a time when the unemployment rate was approximately fourteen percent in Michigan and eighteen percent in Detroit. *Id.* at 465, 467.

¹¹⁹ *Id.* at 482.

¹²⁰ See Ilya Somin, *Overcoming Poletown: County of Wayne v. Hathcock, Economic Development Takings, and the Future of Public Use*, 2004 MICH. ST. L. REV. 1005, 1023.

¹²¹ See *id.* at 1022; see also Donald J. Kochan, “Public Use” and the Independent Judiciary: *Condemnation in an Interest-Group Perspective*, 3 TEX. REV. L. & POL. 49, 82–83 (1998) (positing landowners’ ability to influence election outcome “is vanishingly small”).

¹²² See Somin, *supra* note 120, at 1022.

different policy issues.¹²³ Third, the costs of many economic development takings are widely dispersed among the taxpayers, creating little incentive for individual taxpayers to oppose specific condemnations.¹²⁴

It is not only the powerless minorities, however, who should be concerned. The majority's confidence in the democratic or political process to appropriately limit public use and eminent domain also is misplaced because of the possibility that local governments will be captured by powerful interest groups.¹²⁵ There are a number of reasons why interest groups can easily capture local governments when eminent domain is used to promote economic development. One is that the expansive justification that economic development provides for the use of eminent domain increases the number of groups that can persuade the government to use the power.¹²⁶ Moreover, it creates a vast number of potential projects that can utilize eminent domain as a tool for implementation.¹²⁷ Two, the concentrated benefit that results from economic development takings creates an incentive to capture the eminent domain process.¹²⁸ For example, the primary beneficiary of the assembly and development of a large tract of land would be the developer, who would construct and then sell or lease office, retail, and residential space.¹²⁹ Because developers stand to gain from the development of the taken property, they have the incentive to persuade local authorities to use eminent domain to implement the project.¹³⁰ Three, special interests, such as corporations, developers,

¹²³ See *Vance v. Bradley*, 440 U.S. 93, 113–14 n.1 (1979) (Marshall, J., dissenting) (observing in a different context “the time lag between when the deprivations are imposed and when their effects are felt may diminish the efficacy of this political safeguard”); Somin, *supra* note 120, at 1022. Professor Somin notes that in *Poletown* the General Motors factory was not completed until four years after the takings, which occurred in 1981, and that it was not until the late 1980s that it became clear that the factory would not generate the number of promised jobs. *Id.* at 1022–23.

¹²⁴ Daniel B. Kelly, *The “Public Use” Requirement in Eminent Domain Law: A Rationale Based on Secret Purchases and Private Influence*, 92 CORNELL L. REV. 1, 36–37 (2006) (outlining four reasons why political process is an ineffective check against use of eminent domain for economic development).

¹²⁵ See, e.g., Cohen, *supra* note 107, at 547–48; Kelly, *supra* note 124, at 34–41 (postulating eminent domain for economic development creates incentives for private influence in process due to concentrated benefit, low cost to private party, and disparity in legal and financial resources); Somin, *supra* note 120, at 1021–23 (identifying three reasons local governments are especially subject to capture in economic development takings).

¹²⁶ See Somin, *supra* note 120, at 1021–22.

¹²⁷ See *id.* Professor Somin notes that the greater number of groups that can utilize eminent domain under an economic development justification, combined with the greater number of projects that can, under such a justification, legitimately utilize the condemnation power, makes eminent domain an attractive means for these groups to accomplish their private development objectives. *Id.*

¹²⁸ Kelly, *supra* note 124, at 34–35.

¹²⁹ See *id.* at 34.

¹³⁰ See *id.* at 34–35. The benefit derived from the use of eminent domain for public uses such as roads, parks, and hospitals is juxtaposed with the benefit derived from economic development takings.

and the like, that support economic development projects requiring the use of eminent domain may have more political influence than condemnees because they are repeat players in the political realm.¹³¹ Moreover, because these politically powerful groups are repeat players, they are already organized and have considerable financial resources.¹³² Four, local governments, particularly those in desperate need of economic resurgence, are especially susceptible to being enticed by the promise of more jobs and increased tax revenue.¹³³ Undoubtedly, these are only a few of the reasons politically powerful groups are in a position to co-opt the eminent domain process for use in economic development projects.

Even when the democratic or political process does act as a restraint on the use of eminent domain, it is likely the politically influential targets of a taking that will be afforded its protection. New London provides a prime example. When the municipal development plan at issue in *Kelo* was originally approved, all property and buildings within the Fort Trumbull neighborhood were to be condemned and razed. Nevertheless, the Italian Dramatic Club, a men's social club, was able to obtain a modification in the plan, allowing its clubhouse to remain.¹³⁴ Unfortunately, Byron Athenian, whose home was located immediately adjacent to the Italian Dramatic Club, was unable to secure the same treatment.

Democracy's inability to adequately restrain eminent domain abuse, combined with a definition of public use that essentially leaves property ownership rights subject to the will of the majority or powerful special

Id. at 34. In the former, the beneficiaries are numerous and dispersed; thus, the incentive to abuse the eminent domain process is much less significant. *Id.*

¹³¹ Kochan, *supra* note 121, at 82.

¹³² See *id.* at 80–82 (illustrating how information and transaction costs associated with opposing legislation benefiting special interests make it cost-prohibitive to fight condemnation decisions); Kelly, *supra* note 124, at 39–41 (noting disparate legal and financial resources between developers and homeowners makes it easier for developers to co-opt eminent domain power).

¹³³ Paul Boudreaux, *Eminent Domain, Property Rights, and the Solution of Representation Reinforcement*, 83 DENV. U. L. REV. 1, 4, 18 (2005) (“[M]any local governments, especially the cash-poor central cities, are trying ever harder to raise revenue by attracting businesses and wealthy residents . . . thus making an eminent domain an irresistible tool.”); Adam P. Hellegers, *Eminent Domain as an Economic Development Tool: A Proposal to Reform HUD Displacement Policy*, 2001 L. REV. M.S.U.-D.C.L. 901, 905 (arguing local governments are more susceptible to corporate influence in economic development decisions, in part, because of competition between localities for jobs). Professor Boudreaux observed that eminent domain abuse is driven, in part, by the growing competition among governments to attract businesses to their communities. Boudreaux, *supra*, at 18. Due to the excessive demand for a limited number of “attractive and job-creating companies,” cities have resorted to the use of eminent domain to “lower the cost of doing business in their communities.” *Id.* at 18–19.

¹³⁴ See JEFF BENEDICT, *LITTLE PINK HOUSE: A TRUE STORY OF DEFIANCE AND COURAGE* 65–66 (2009). The Italian Dramatic Club was built by Italian immigrants after World War I and originally served as an Italian cultural center. *Id.* By the late 1990s, however, it had become a political power in New London. *Id.* at 66. In fact, when the Italian Dramatic Club was negotiating for its exemption for the development plan a state court judge negotiated on the club's behalf. *Id.* at 151–53, 163–64.

interests are precisely the reasons courts must have a meaningful role in reviewing public use determinations and condemnations. Reserving a role for the judiciary is not offensive to the separation of powers, nor is it an assault on federalism to allow federal courts to protect property owners when state legislatures and courts fail to do so, as suggested by Attorneys Horton and Levesque.¹³⁵ Indeed, it is fundamental in our constitutional system that the role of the judiciary is to restrain the majority when it exceeds the bounds of its authority or transcends the limits of the Bill of Rights.¹³⁶ Moreover, the Fourteenth Amendment was ratified specifically

¹³⁵ See Horton & Levesque, *supra* note 1, at 1418–19 (arguing federalism should be allowed to work by leaving development of eminent domain and public use jurisprudence to state courts); see also Brief of the Respondents, *supra* note 2, at 21–22 (asserting deferring to state legislatures and municipalities on economic decisions maintains proper balance between state and federal government).

¹³⁶ See, e.g., THE FEDERALIST NO. 78 (Alexander Hamilton).

[T]he courts were designed to be an intermediate body between the people and the legislature, in order, among other things, to keep the latter within the limits assigned to their authority. The interpretation of the laws is the proper and peculiar province of the courts. A constitution is, in fact, and must be regarded by the judges, as a fundamental law. It therefore belongs to them to ascertain its meaning, as well as the meaning of any particular act proceeding from the legislative body. If there should happen to be an irreconcilable variance between the two, . . . the Constitution ought to be preferred to the statute

. . . [W]here the will of the legislature, declared in its statutes, stands in opposition to that of the people, declared in the Constitution, the judges ought to be governed by the latter rather than the former.

. . . .

This independence of the judges is equally requisite to guard the Constitution and the rights of individuals from the effects of those ill humors, which the arts of designing men, or the influence of particular conjunctures, sometimes disseminate among the people themselves, and which, though they speedily give place to better information, and more deliberate reflection, have a tendency, in the meantime, to occasion dangerous innovations in the government, and serious oppressions of the minor party in the community [I]t is not to be inferred from [the principle that the Constitution may be amended], that the representatives of the people, whenever a momentary inclination happens to lay hold of a majority of their constituents, incompatible with the provisions in the existing Constitution, would, on that account, be justifiable in a violation of those provisions

But it is not with a view to infractions of the Constitution only, that the independence of the judges may be an essential safeguard against the effects of occasional ill humors in the society. These sometimes extend no farther than to the injury of the private rights of particular classes of citizens, by unjust and partial laws. Here also the firmness of the judicial magistracy is of vast importance in mitigating the severity and confining the operation of such laws. It not only serves to moderate the immediate mischiefs of those which may have been passed, but it operates as a check upon the legislative body in passing them

Id.

to limit the power of state governments.¹³⁷ It is a complete disregard of these principles to argue that the legislature, limited only by the will of the majority, can declare what is a public use, and therefore, when eminent domain may be employed, unrestrained by the courts, other than to determine whether such decisions are rational and made in good faith.

Of course, it is argued that in other areas of economic and social legislation, despite the judiciary's duty to protect the minority from the will of the majority, courts employ a similar deferential approach. That is, when economic or social legislation is challenged it is reviewed under a rational basis standard: the challenged law, to withstand judicial scrutiny, must only be rationally related to some legitimate government purpose. Conflating legislation that authorizes the taking of private property with general social and economic legislation, however, overlooks a glaring difference. The former involves the taking of private property, a power limited by the Fifth and Fourteenth amendments, and general economic and social legislation do not.

V. CONCLUSION

In summary, the utilization of the likelihood-of-development test in *Kelo* would have been consistent with Connecticut precedent that recognized the need for increased judicial scrutiny when property is taken, owned, and put to use by private, rather than public, parties. Further, utilization of the test would not have been inconsistent with United States Supreme Court precedent. The likelihood-of-development test differentiates between the purported use and actual use to which the taken property will be put, and simply questions whether the actual use will in fact be the purported public use. It does not question the legislative judgment that economic development (the purported use in *Kelo*) is an appropriate public use. Moreover, the test does not second guess the City's and the NLDC's projected increases in jobs and tax revenue. Instead, the test merely questions whether there was sufficient evidence to support a finding that the development plan would *actually* be implemented, meaning that the hotel and convention center, office space, and residential neighborhood would *in fact* be built.

Not only would the likelihood-of-development test have been consistent with court precedent, but economic development takings are distinct from takings previously upheld by the Connecticut and United

¹³⁷ See, e.g., *Fitzpatrick v. Bitzer*, 427 U.S. 445, 453–55 (1976) (observing congressional action under Fourteenth Amendment can abrogate state sovereign immunity because that amendment's ratification limited state power and caused a shift in federal-state balance); *Ex parte Virginia*, 100 U.S. (10 Otto) 339, 346 (1879) (holding Congress could prohibit exclusion of people of color from state juries under Fourteenth Amendment, noting: "The prohibitions of the Fourteenth Amendment are directed to the States, and they are to a degree restrictions of State power.").

States supreme courts. Therefore, there were justifiable and principled reasons for holding the taking authority to a more exacting standard of judicial scrutiny. Economic development takings should be more closely reviewed by the courts because the takings alone do not accomplish a public purpose, there is no natural limitation to such takings, and it is not necessary that the previous use of the taken property be harmful to the public.

Finally, it is unlikely that the democratic process is a meaningful limitation of the eminent domain power. History has demonstrated that eminent domain has disproportionately impacted minority, elderly, and poor neighborhoods. Moreover, local governments are susceptible to capture by powerful interest groups who co-opt the eminent domain process for their own private gain. Finally, relying on the democratic process to restrain the use of eminent domain only ensures that the politically powerful can save their property from condemnation. Meanwhile, those without political clout will be left searching for a new place to reside or conduct their business.

There is no better argument for an increased role of the judiciary in the context of economic development takings than *Kelo* itself. First, the taken properties in *Kelo* were not blighted or rundown. In fact, the plaintiffs had invested substantial time and money in maintaining their properties. Second, the politically powerful Italian Dramatic Club was spared from condemnation while the homes and businesses of Susette Kelo and her neighbors remained slated for destruction. Third, despite mounting public resistance to the Fort Trumbull redevelopment plan, the City and the NLDC pressed forward.

Finally, and most troublingly, ten years after the United States Supreme Court upheld the condemnation of the Fort Trumbull neighborhood, the property remains barren. As I predicted, the development plan never moved forward.¹³⁸ Today, New London remains a

¹³⁸ Attorneys Horton and Levesque would have you believe that the Fort Trumbull development plan failed because of the litigation. Horton & Levesque, *supra* note 1, at 1410. Such a suggestion is disingenuous at best. The litigation did not prevent commencement of all development. Both parcels 1 and 2, where the hotel and conference center and upscale housing were planned, were ready to be developed when the litigation first began. Moreover, Pfizer had agreed, prior to the decision in the trial court, to subsidize a large number of the hotel rooms. *Kelo v. City of New London*, No. 557299, 2002 WL 500238, at *41 (Conn. Super. Ct. Mar. 13, 2002), *aff'd in part, rev'd in part*, 843 A.2d 500 (Conn. 2004), *aff'd*, 545 U.S. 469 (2005). Thus, the litigation presented no roadblock to building the hotel and conference center or the housing. On the other hand, construction of the office space on Parcel 3 was not planned to begin until warranted by market conditions. *Id.* at *67. At the time of trial, however, market demand for Class A office space in New London was soft and it was not feasible to begin new construction. *Id.* at *66–67. Additionally, the developer testified that new construction would not begin without tenants and at that time there were no tenant commitments. *See id.* at *67. Considering these facts together, it seems much more likely that the development plan failed because it was not economically feasible to move forward and the proposed developer was not legally required to do so.

distressed municipality.¹³⁹

¹³⁹ See *Publications: Distressed Municipalities*, CT.GOV, <http://www.ct.gov/ecd/cwp/view.asp?a=1105&q=251248> [<https://perma.cc/T82F-DGXM>] (follow 2015 “Distressed Municipalities” hyperlink) (last visited Nov. 12, 2015) (identifying New London as a distressed municipality). See generally *Quick Facts: Connecticut*, U.S. DEP’T COMMERCE, <http://www.census.gov/quickfacts/table/PST045215/09,0952280> [<https://perma.cc/TBM8-NSR4>] (last visited Apr. 10, 2016). According to the United States Census Bureau, the 2010–2014 median household income for New London was \$41,230. *Id.* Over the same period, the median household income in Connecticut was significantly higher, \$69,899. *Id.* The percentage of individuals living below the federal poverty level was also higher in New London relative to Connecticut, 25.3% and 10.8%, respectively. *Id.*