DOES NEW LONDON BURN AGAIN?[1]: EMINENT DOMAIN, LIBERTY AND POPULISM IN THE WAKE OF *KELO*

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INTRODUCTION

The city of New London, Connecticut lies along the famed Thames River and is home to several naval bases, the Coast Guard Academy, and the longtime residence of the playwright Eugene O'Neill.[2] Once famous for its whaling and shipbuilding industries, New London has traded its mauls and augers for microscopes and gel electrophoresis, following the introduction of modern biotech research into the local economy. Today, New London, along with Groton, Connecticut, houses the worldwide research center of pharmaceutical giant, Pfizer, Inc.[3] Although not as widely known as Pfizer, Wilhelmina Dery and the cast of history her family carries is equally part of New London's fabric.

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[1] The title refers to the infamous Revolutionary War battle of Fort Griswold of September 6, 1781. New London, Connecticut, one of the most important bases for American privateers, was protected by two forts – Fort Griswold in Groton and the yet to be completed Fort Trumbull in New London. During the battle, Benedict Arnold, the most famous American turncoat, landed in New London with British troops and proceeded to burn much of the city, displacing many families from their homes and businesses. After mounting a strong defense of their town, American troops surrendered Fort Griswold to the British and upon surrender were brutally massacred, at least according to American accounts. Michael Meals, *Fort Griswold Home Page*, *at* http://www.revwar.com/ftgriswold (last updated Oct. 4, 2005).

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[2] *See* City of New London, Connecticut Homepage, http://www.ci.new-london.ct.us/ (last visited June 10, 2006).

[3] *See* Pfizer Inc., About Pfizer, http://www.pfizer.com/pfizer/are/mn_about_company.jsp (last updated Jan. 24, 2006).

Wilhelmina Dery's family immigrated to the United States from Italy in 1880 and in 1901 purchased the only home the Derys' had ever known.[4] The house, located in the Fort Trumbull section of New London, became a central fixture of Dery family life. Wilhelmina was born there in 1918 and later lived in the house with her husband during their 59-year marriage. Their son lived next door in a house his grandmother purchased in 1903.[5] In 1997, Susette Kelo purchased her Fort Trumbull home, hoping to lead a comfortable suburban life.[6] Little did Dery and Kelo know what lay ahead: New London Development Corporation would take their homes and they would be thrust into the national spotlight as they encountered a battle over their fate and the economic future of New London.

Previewing the Supreme Court's 2004-2005 docket, few would have guessed that a land use case would spark some of the loudest popular outcry and quickest legislative response of that term. Real estate development does not have quite the same red state/blue state visceral appeal as the use of medical marijuana,[7] religion in the public square,[8] or the juvenile death penalty.[9] But *Kelo v. City of New London* transcended standard political dichotomies by uniting groups as divergent as the libertarian Institute for Justice and Pacific Legal Foundation with the progressive NAACP and the AARP. Outrage at the Supreme Court's decision in *Kelo* was expressed in various ways, such as the sale of sloganeering tee shirts[10] and the farcical attempt to use eminent domain to take Justice Souter's home and develop it into a libertarian resort.[11]

This Note discusses in three ways why people react to eminent domain so passionately. Part I traces the history and development of the states' early interpretation of their own public use clauses and demonstrates that textualism and original intent shed little light on the true meaning of the Clause. Part I also presents two methods of thinking of public use—public control and derived-benefits to the public. Part II discusses how early federal precedent from the 19th century defines public

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4 *See* Brief for the Petitioners at 1–2, Kelo v. City of New London , 125 S.Ct. 2655 (2005) (No. 04-108).

5 *See id.*

6 *See id.*

7 *See* Gonzalez v. Raich, 125 S. Ct. 2195 (2005).

8 *See* McCreary County v. ACLU, 125 S. Ct. 2722 (2005); Van Orden v. Perry, 125 S. Ct. 2854 (2005).

9 *See* Roper v. Simmons, 125 S. Ct. 1183 (2005).

10 *See* Dissenting Opinion: Thomas Dissent, *at* http://www.cafepress.com/dissentingop/687920 (last visited June 10, 2006) (featuring shirts imprinted with "Something has seriously gone awry with this Court's interpretation of the Constitution," *quoting* Kelo v. City of New London, 125 S. Ct. 2655, 2685 (Thomas, J., dissenting)).

11 *See* Press Release, Logan Darrow Clements, Freestar Media LLC (June 28, 2005), http://www.freestarmedia.com/hotellostliberty2.html (last visited April 20, 2006).

use and the gradual expansion of the derived-benefits analysis. Part III suggests that modern federal precedent has reduced the importance of the Public Use Clause, while simultaneously enhancing the just compensation clause, with important policy ramifications. It also discusses state efforts to read the eminent domain power more narrowly than does the Federal government. Part III is followed by a conclusion.

I. THE DEVELOPMENT OF THE DERIVED-BENEFITS ANALYSIS IN EMINENT DOMAIN JURISPRUDENCE IN THE STATE COURTS

The Public Use Clause of the Fifth Amendment of the Federal Constitution governs the law of takings, and is one of the oldest rights guaranteed against the states by the Fourteenth Amendment.[12] Although the Fourteenth Amendment does not contain an independent public use requirement, it incorporates the Fifth Amendment's Public Use Clause.[13] Under the Fifth Amendment, "private property [shall not] be taken for public use, without just compensation."[14] Although the text of the Clause neither affirmatively nor explicitly bans takings for "private use," its history and its subsequent judicial interpretation render a purely private taking unconstitutional.[15]

One might think that the public use requirement would be one of the more historically protected rights because it is one of the oldest incorpo-

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[12] *See* Chi. B. & Q. R. Co. v. Chicago, 166 U.S. 226, 235 (1897); *see also* Hairston v. Danville & W.R. Co., 208 U.S. 598, 605 (1908) ("[I]f the condemnation was for private uses, it is forbidden by the Fourteenth Amendment."); Strickley v. Highland Boy Gold Mining Co., 200 U.S. 527, 530 (1906).

[13] *See* Haw. Hous. Auth. v. Midkiff, 467 U.S. 229, 244 (1984).

[14] U.S. CONST. amend. V.

[15] *See* Mo. Pac. Ry. Co. v. Nebraska, 164 U.S. 403, 417 (1896) ("The taking by a state of the private property of one person or corporation, without the owner's consent, for the private use of another, is not due process of law . . ."); Fallbrook Irrigation Dist. v. Bradley, 164 U.S. 112, 160 (1896) ("To provide for the irrigation of lands in states where there is no color of necessity therefor, within any fair meaning of the term, and simply for the purpose of gratifying the taste of the owner, or his desire to enter upon the cultivation of an entirely new kind of crop, not necessary for the purpose of rendering the ordinary cultivation of the land reasonably remunerative, might be regarded by courts as an improper exercise of legislative will, and the use might not be held to be public in any constitutional sense, no matter how many owners were interested in the scheme."); Cole v. La Grange 113 U.S. 1, 6 (1885) ("The general grant of legislative power in the Constitution of a state does not enable the legislature, in the exercise either of the right of eminent domain, or of the right of taxation, to take private property, without the owner's consent, for any but a public object."); *see also* Calder v. Bull, 3 U.S. (3 Dall.) 386, 388 (1798) ("An ACT of the Legislature (for I cannot call it a law) contrary to the great first principles of the social compact, cannot be considered a rightful exercise of legislative authority . . . A few instances will suffice to explain what I mean . . . [A] law that takes property from A and gives it to B: It is against all reason and justice, for a people to entrust a Legislature with SUCH powers; and therefore, it cannot be presumed that they have done it. The genius, the nature, and the spirit, of our State Governments, amount to a prohibition of such acts of legislation, and the general principles of law and reason forbid them.").

rated rights. Early case law, dealing with textile mills and railroads, however, belies this notion and demonstrates no clear consensus on its meaning. In *Olmstead v. Camp*, a Connecticut Supreme Court case relied upon by the majority in *Kelo*,[16] a property owner running a grist mill, after unsuccessfully bargaining with his neighbor for the use of his neighbor's land, petitioned the Connecticut legislature for permission to make improvements on his land, even though the improvements would result in flooding his neighbor's property.[17] The legislature, through enacting a mill act, granted the mill owner the right to make the improvements.[18]

Perhaps presaging future developments in the interpretation of the Public Use Clause, the Connecticut Supreme Court determined that the Clause had to be understood with a certain degree of elasticity, as to meet new and changing conditions caused by the industrial revolution.[19] The court reasoned that "[i]t [was] of incalculable importance to this state to keep pace with others in the progress of improvements, and to render to its citizens the fullest opportunity for success in industrial competition."[20] This determination led the court to defer to the legislature, which Olmstead reasoned could better make these determinations than the courts.[21] Though the *Olmstead* court was writing about grist mills, it is easy to draw modern-day parallels to the facts of *Kelo*, where the state of Connecticut was attempting to keep pace with other states by offering incentives to biotech companies to draw business development projects to the state.

Though *Kelo's* dissents opine on the evisceration of the plain meaning of the Public Use Clause, the *Olmstead* court grounded its conception of public use in the plain meaning of the term "use." Relying on dictionaries, the *Olmstead* court referred to Webster's definition of "use": "usefulness, utility, advantage, [and] productive of benefit."[22] The Connecticut Supreme Court extrapolated from this definition that the meaning of "public use" is that which is done for the usefulness, utility,

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16 *See* Kelo v. City of New London, 843 A.2d. 500, 522 (Conn. 2004) (*aff'd.* Kelo v. City of New London, 125 S. Ct. 2655 (2005)) ("This court long has taken a flexible approach to construction of the Connecticut public use clause. Indeed, our analysis begins in 1866, when this court, in *Olmstead v. Camp*, first addressed the constitutional concept of public use.").

17 *See generally* Olmstead v. Camp, 33 Conn. 532 (1866).

18 *See id.*

19 *See id.*

20 *See id.* at 550–51 ("It 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.").

21 *See id.* at 551–52 .

22 *See id.* at 546.

advantage, and benefit of the public at large.[23] The *Olmstead* court proceeded to make clear that a valid use of eminent domain need not result in public control or occupancy of the property, stating "[i]n none of the [previous eminent domain] cases . . . does the public as an active agent take and hold and occupy the property in actual possession."[24] By making the touchstone of "public use" the advantage *derived* by the public through the taking rather than the advantage from *control* of the taking,[25] the *Olmstead* court can thus analogize a private grist mill to a highway of "common convenience and necessity."[26] Perhaps then, the debate over the Public Use Clause is better understood by a control-based analysis versus a derived-benefits analysis, rather than by a public versus private distinction. If public use is understood as public control over a taking, then the analysis is necessarily stricter than if it is understood as using a taking to the public advantage.

In a case analogous to *Olmstead*, the Massachusetts Supreme Judicial Court in *Moore v. Sanford* held that Massachusetts' use of eminent domain was a valid public use to better accommodate railroad and commercial interests around Boston Harbor.[27] The *Moore* court rejected a control-based analysis of public use, stating "[i]t is not necessary that the entire community should directly enjoy or participate in an improvement or enterprise, in order to constitute a public use."[28] Moreover, the court found that Massachusetts' Public Use Clause would not be violated even if the Commonwealth sold the reclaimed land to other private individuals, holding that "many enterprises of great public utility are of advantage to individuals. If lands are taken for a public use and for the benefit of the community, it is not of importance that individuals or, as in this case, the Commonwealth, may derive incidental advantage therefrom."[29] The *Moore* court thus lays the groundwork for two propositions: (1) that

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23 *See id.* ("'Public use' may therefore 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.").

24 *See id.* at 550.

25 *See id.* at 550. ("The term 'public use' is synonymous with public benefit or advantage.").

26 *See id.*

27 *See* Moore v. Sanford, 24 N.E.323, 324 (Mass. 1890).

28 *Id.* ("Nor when we consider that acts of incorporation have been granted, and fully recognized as constitutional, which authorized the taking of private property for the purpose of carrying forward enterprises such as the construction of railroads, or others which tend to the prosperity and welfare of large portions of the community, should we be willing to say, even if no improvement of Boston Harbor formed a part of the purpose, that the Legislature might not properly provide for the reclamation of a large body of lands, such as flats, substantially useless in their original condition, for railroad and commercial purposes, by taking, subject to proper compensation, such of them as were necessary for the accomplishment of the object.").

29 *Id.*

courts may look to the benefits derived from a taking rather than the public's exclusive control of a taking; and (2) the Commonwealth can take land and then transfer it to private individuals if the community at large derives a benefit from the taking.

Several other state court cases from *Olmstead's* era arrived at similar conclusions in sustaining the constitutionality of state mill acts. For example, the Minnesota Supreme Court upheld the constitutionality of its Mill Act under its Public Use Clause, though with some reservation.[30] In Kansas, a state not known for abundant sources of water, the Kansas Supreme Court found similar legislation constitutional under its Public Use Clause, citing *Olmstead's* holding approvingly.[31] Similarly, in New Hampshire, the Supreme Judicial Court held that the State's use of eminent domain to flood certain lands to improve the ability to gain water-power for its burgeoning industry was constitutional.[32] Furthermore, the New Hampshire Supreme Court noted that its decision rested on an unbroken understanding of their State's constitution since the 18th century.[33] In *Wilson v. Pittsburgh & Lake Erie R.R. Co.*, the Pennsylvania

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30 *See* Miller v. Troost, 14 Minn. 365, 369 (1869) ("It is true that the incidental benefit to the public from turning to use all the power in running streams may be very great, and that, such is the nature of property in and along these streams, the power cannot be made fully available without such a law as that we are considering; but, to say the least, such a law goes to the extreme limit of legislative power, and had not similar laws, in states having constitutional restraints similar to ours, been uniformly sustained by the courts, we should hesitate long before upholding this one. The decisions, however, are so numerous, and by courts of so great authority, that we are constrained to hold the law to be constitutional.").

31 *See* Venard v. Cross, 8 Kan. 248, 261 (1871) ("The benefits resulting to the community at large from thus utilizing an otherwise wasted power are so great that it is deemed fair to consider the securing of it a public purpose.").

32 *See* Great Falls Mfg. Co. v. Fernald, 47 N.H. 444, 460–61 (1867) ("The business of manufacturers and mechanics in this State is largely dependent for success on the use of water power. To create a water power in a large stream sufficient for manufacturing on an extensive scale, it is generally found necessary to dam the water in the stream itself, and also to raise and retain it in natural or artificial reservoirs connected with the stream, as has been done by these petitioners, in order to ensure an adequate and constant supply at all seasons of the year. In most cases, to do this, the right to flow the land of numerous proprietors be obtained; and an individual, or a few individuals, might defeat or greatly embarrass the whole enterprise by an unreasonable and obstinate refusal to part with the right. In such a case can it be doubted, that, to remove this obstacle to a great public improvement, in which large numbers are interested, would be, in the language of the constitution, 'for the benefit and welfare of the State;' and that a private right taken for that purpose, would be taken for a public use within the legal meaning of that term?")

33 *See id.* at 459. This statement also poses a problem for the petitioners' reasoning in *Kelo*, who suggested that by the time the mill cases were decided at the state level the term public use had been hopelessly corrupted. The New Hampshire case might suggest that there is an alternate reading to the original intent of the framers. For more elaborate discussions on the original meaning of the Takings Clause, *see* Matthew P. Harrington, *"Public Use" and the Original Understanding of the So-Called "Takings" Clause*, 53 HASTINGS L. J. 1245 (2002); John F. Hart, *Colonial Land Use Law and Its Significance for Modern Takings Doctrine*, 109 HARV. L. REV. 1252 (1996); Errol E. Meidinger, *The "Public Uses" of Eminent Domain: History and Policy*, 11 ENVT'L. L. 1, 17–18 (1980).

Supreme Court upheld the legislature's decision to delegate eminent domain power to a railroad company, and the railroad companies' decision to use that power to take land to increase safety and capacity and add water tanks to existing lines.[34] The West Virginia Supreme Court also held that the legislature could delegate eminent domain powers to a company for the purpose of constructing maintenance tubing lines for oil transportation.[35] In *Gilmer v. Lime Point* the Supreme Court of California, though reviewing the construction of a fort for military purposes, which seems to be a valid public use, announced a broad holding that chipped away at a strict control-based analysis.[36] Indeed, the court declared "public use need not be a use general or common to all the people of the state alike."[37]

Likewise, the Nevada Supreme Court upheld the use of eminent domain to further the economic benefits derived from the State's early mining industry.[38] In *Dayton G. & S. Mining Co. v. Seawell*, the court held that economic benefits were a justifiable public use, stating that "[m]ining is the greatest of the industrial pursuits in this state. The mining and milling interests give employment to many men, and the benefits derived from this business are distributed as much, and sometimes more, among the laboring classes than with the owners of the mines and mills."[39] The *Seawell* court justified using eminent domain to support mining interests—the economic lifeblood of the state—by stating that, "[t]he present prosperity of the state is entirely due to the mining developments already made, and the entire people of the state are directly interested in having the future developments unobstructed by the obstinate action of any individual or individuals."[40] The *Seawell* court also made clear that the people's elected representatives in the legislature should be responsible for guarding against eminent domain abuses, even if the courts could construe the statute as constitutionally valid.[41]

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34 *See* Wilson v. Pittsburgh & Lake Erie R.R. Co., 222 Pa. 541, 544-47 (Pa. 1909).

35 *See* W. Va. Transp. v. Volcanic Oil & Coal Co., 5 W. Va. 382, 387 (1872) ("It has been decided time and time again, and is therefore settled by the best authority, that the construction of railroads, turnpikes, canals, ferries, telegraphs, wharves, basins, &c., creating the necessary facilities for intercommunication, constitutes what is generally known by the name of internal improvements, and gives occasion for the exercise of the right of eminent domain.").

36 *See* Gilmer v. Lime Point, 18 Cal. 229, 260 (1861).

37 *See id.* at 253.

38 *See* Dayton G. & S. Mining Co. v. Seawell, 11 Nev. 394, 412 (1876).

39 *Id.* at 409.

40 *Id.* at 409–10.

41 *See id.* at 412 ("We are of opinion that the present law can be enforced by the courts so as to prevent its being used as an instrument of oppression to any one. But if, in its practical operations, it is found to be incompatible with a just preservation of the rights of individuals in private property, it will be the duty of the legislature to repeal the act, and to that tribunal instead of this must the argument of injustice be made.").

But, it is difficult to state a "majority rule" from this era. For instance, the Minnesota Supreme Court went on to contradict its own previous holding in *Miller v. Troost* in *Minnesota Canal & Power Co. v. Koochiching Co.*, where it held that a public interest could not be a public use.[42]

One could also look to Connecticut's neighbor, New York, to show that 19th century courts did not have a singular conception of the term "public use."[43] For example, in *In re Application of Eureka Basin Warehouse & Manufacturing Company*, the New York Court of Appeals held it impermissible for the legislature to grant a private company the use of eminent domain to build wharves and warehouses on the coast of Long Island because it was unclear whether the public would have the right to use the basin at the site of construction.[44] The court explicitly endorsed the view that "public use" meant public control, stating:

> the fact that the use to which the property is intended . . . will tend incidentally to benefit the public by affording additional accommodations for business, commerce or manufactures, is not sufficient to bring the case within the operation of the right of eminent domain, so long as the structures are to remain under private ownership and control, and no right to their use or to direct their management is conferred to the public.[45]

The New York Court of Appeals reiterated this holding in *In re Niagara Falls & Whirlpool Railway* Company, rejecting the railway company's application to employ its statutorily-delegated eminent domain power, because the proposed construction was not directly tied to the public welfare, but would rather only cater to the curiosity of tourists.[46] In almost direct counter-position to the Connecticut Supreme

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[42] *See* Minn. Canal & Power Co. v. Koochiching Co., 107 N.W. 405, 413 (Minn. 1906) ("Where there is simply a public interest, as distinguished from a public use, the power of eminent domain cannot be exercised. The mere fact that the interest is of a public nature, and that the use tends incidentally to benefit the public in some collateral way, confers no right to take private property in invitum. A use is not public unless the public, under proper police regulation, has the right to resort to the property for the use for which it is acquired independently of the mere will or caprice of the person or corporation in which the title of the property would vest upon condemnation.").

[43] It should be noted that New York was one of the first jurisdictions to find that railroads could use eminent domain to take land for the building of their railroads. *See generally* Bloodgood v. Mohawk & Hudson R. R. Co., 18 Wend. 9 (N.Y. 1837).

[44] *See* In re Application of Eureka Basin Warehouse & Mfg. Co., 96 N.Y. 42, 48 (1884) ("The wharves will not even have the character of wharves on public navigable waters, but will be on an artificial basin constructed on private property, and it would be extremely difficult to determine what parts of the basin were in fact open to the public.").

[45] *Id.* at 48–49.

[46] *See* In re Niagara Falls & Whirlpool R. Co., 15 N.E. 429, 435 (N.Y. 1888).

Court in *Olmstead*, New York's highest court stated that "[t]he expressions *public interest* and *public use* are not synonymous."[47] The court was hesitant to grant such powerful eminent domain rights to railways to fix routes without public supervision or control.[48]

Though the court explicitly rejected a derived-benefits analytical approach, one could argue that the court implicitly used this method to question whether the railway was actually acting in the public interest. The court's language suggests that promoting public welfare is not enough for the constitutional public use requirement, stating that "[t]he establishment of furnaces, mills and manufactures, the building of churches and hotels and other similar enterprises are more or less matters of public concern, and promote, in a general sense, the public welfare [and thus] lie without the domain of public uses for which private ownership may be displaced by compulsory proceedings."[49] Yet, it is possible that the court was not rejecting the premise of a derived-benefits analysis *per se*, but instead using the public use clause as a way of heightening judicial scrutiny of an application for eminent domain.

One could create discrete formal categories defining what constitutes a public railroad and claim that a tourist railroad is not really public. Although the New York Court of Appeals tried to do just that, it time and again ran up against its own reasoning and the limitations of an overly formal analysis when interpreting the public use clause by admitting that parks and pleasure drives have been held to be a valid public use.[50] Ultimately, the *Niagara Falls* court figuratively throws up its hands and recognizes the deficiencies of its own logic, stating that the public use clause is not really definable and that the clause can be better understood by courts through times when they have rejected the use of eminent domain than with the times courts have accepted its use.[51] Perhaps "public use" is purely intuitional, or perhaps the *Niagara Falls* court, even at its early date, was struggling to create a middle-ground analysis between a restrictive control analysis and a deferential derived-benefits analysis.

New York was not the only state to reject the derived-benefits based analysis for determining public use in eminent domain cases. For example, the Michigan Supreme Court in *Ryerson v. Brown*, in voiding one of

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47 *Id.* at 432.

48 *See id.* at 431.("[T]he plan of permitting any persons who might deem it for their interest to do so, to unite and organize a railroad corporation and to fix the route, subject practically no supervision or control by any public authority, and to invade and take private property for the purposes of the road wherever the company should see fit to locate it, is attended with some unquestionable evils.").

49 *Id.* at 432.

50 *See id.* at 432–33.

51 *See id.* at 433. ("It is, as we have said, difficult to make an exact definition of public use. It is easier to define it by negation than by affirmation.").

its Mill Act Statutes, suggested that incidental benefits to the public had to be tied to some sort of necessity before eminent domain could be employed.[52] Moreover, the *Ryerson* Court struggled with its ability to maintain control over the use of eminent domain to ensure that once it had been used for a private advantage, there would be some guarantee that the land taken would remain a public good. Commenting on this perceived flaw in the legislation, the court states:

> [t]here is nothing in the present legislation to indicate that the power obtained under it is to be employed directly for the public use. Any sort of manufacture may be set up under it, and the proprietor is not obligated in any manner to carry it out for the benefit of the locality or the state at large. He is not bound to consider the interest of the locality or of the state; and nothing . . . would preclude his devoting the power to purposes which public opinion would not sanction.[53]

The Michigan Supreme Court does not, however, automatically rule out derived-benefits analysis in all cases.[54] Instead, the court insists that those benefits need to be tied to some sort of explicitly stated public necessity.[55] The *Ryerson* court distinguished its mill cases from railways suggesting that railways were more susceptible to holdouts seeking increased financial gain than from businessmen seeking to open mills.[56] Thus, the Michigan Supreme Court suggests that public use has two requirements: (1) benefit to the public; and (2) a showing that the project cannot be accomplished without eminent domain.

The Illinois Supreme Court reached a similar conclusion in *Gaylord v. Sanitary District of Chicago* when it held that its mill act could not be extended to assist with increasing the navigability of a riverbank that the

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52 *See* Ryerson v. Brown, 35 Mich. 333, 338 (1877) ("If the act were limited in its scope to manufactures which are of local necessity, as grist-mills are in a new country not yet penetrated by railroads, the question would be somewhat different from what it is now. But even in such case it would be essential that the statute should require the use to be public in fact; in other words, that it should contain provisions entitling the public to accommodations.").

53 *See id.* at 338–339.

54 *See id.* at 339 ("We are not disposed to say that incidental benefits to the public could not under any circumstances justify an exercise of the right of eminent domain.").

55 *See id.* ("If, however, the use to which the property is to be devoted were one which would justify an exercise of the power, it would still be imperative that a necessity should exist for its exercise. All the authorities require that there should be a necessity for the appropriation in order to supply some public want, or to advance some public policy; the object to be accomplished must be one which otherwise is impracticable.").

56 *See id.* at 340. ("A railway cannot run around unreasonable land-owners; but no one man and no number of men can prevent the establishment of a machine shop or a saw-mill by refusing to part with the lands they may happen to own. No particular motive power is indispensable.").

mill owner proposed.[57] The court held that it would reject a pure benefits analysis when considering public use, noting that "to constitute a public use, something more than a mere benefit to the public must flow from the contemplated improvement."[58] The court returns, however, to something that runs throughout the cases expressing a desire to exercise stricter judicial constraints on the use of eminent domain when it quotes from *Ryerson* that, "[u]ndoubtedly there may arise circumstances under which it would be convenient if a power to condemn lands for mill purposes might be exercised, but they are so rare that a stretch of governmental power in order to provide for them would be more harmful than beneficial."[59]

Essentially, the question these courts are asking is whether or not the (public) benefits of employing eminent domain outweigh its negative costs to an individual's rights. Of course, one could argue that this type of question is best left to the legislature, and later cases will. But given the doctrine of *Bloodgood*, where a court does not question the means by which the legislature employs use of its eminent domain power, there is something unsatisfactory about leaving the last guardian of the use of eminent domain to the mill-owner or the modern development committee.

Yet in other cases from this era, courts have prohibited the use of eminent domain to build private roads, as did the Alabama Supreme Court in *Sadler v Langham*.[60] The Georgia Supreme Court in *Loughbridge v. Harris* also struck down the use of eminent domain for mill construction.[61] The *Loughbridge* court's rationale is couched in the language of populism:

> [t]he power is delegated to the Legislature, in this particular case, under the constitutional requirements, and cannot be by them delegated to individuals to exercise. The power is one of eminent domain, held by the people, to be used for the people; and when the Legislature clothes individuals with the right to assert it and take private property for such use under it, Courts cannot recognize such an act as coming within the pale of constitutional authority.[62]

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57 *See generally* Gaylord v. Sanitary Dist. of Chicago, 68 N.E. 522 (Ill. 1903).

58 *Id.* at 524.

59 *Id.* at 525.

60 *See* Sadler v. Langham, 34 Ala. 311, 336 (1859).

61 *See* Loughbridge v. Harris, 42 Ga. 500, 505 (1871).

62 *Id.*

This populist rhetoric would later become a fixture over the power to grant individual rights via the power of eminent domain.[63]

II. EARLY MODERN FEDERAL PRECEDENT DEBATES BENEFITS AND CONTROL

A review of state court cases demonstrates that the debate over public use extends from the 19th century, with both sides claiming they represent the majority rule or the truer understanding of the original intent of their respective constitutions. But the U.S. Supreme Court weighed in on the debate as well, and in a long line of cases adopted a derived-benefits analysis that would set the stage for the *Kelo* decision. In *Head v. Amoskeag Manufacturing Company*, the Supreme Court upheld the general validity of state mill acts and cited a string of state cases to support its holding, although the Court declined to address the issue of what constitutes a public use specifically.[64]

In an analogous case, the Supreme Court held in *Fallbrook Irrigation Dist. v. Bradley* that it was a valid public use to condemn land for the construction of an irrigation ditch.[65] The importance of *Bradley* cannot be understated because it is one of the first cases form the U.S. Supreme Court to associate public use with public purpose, endorse a derived-benefits analysis, and openly reject the idea that public use

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63 Perhaps one of the best summations of this populist spirit is found in *Sadler v. Langham*, where, at the end of the opinion, the Alabama Supreme Court quoted a case from New York on judicial ethics, *Oakley v. Aspinwall*, 3 N.Y. 547, 568 (1850), stating "[T]he success of free institutions depends on a rigid adherence to the fundamental law . . . There is always some plausible reason for the latitudinarian constructions which are resorted to for the purpose of acquiring power—some evil to be avoided, or some good to be attained, by pushing the powers of the government beyond their legitimate boundary. It is by yielding to such influences that constitutions are gradually undermined, and finally overthrown. My rule has ever been to follow the fundamental law as it is written, regardless of consequences. If the law does not work well, the people can amend it; and inconveniences can be borne long enough to await that process. But, if the legislature or the courts undertake to cure defects by forced and unnatural constructions, they inflict a wound upon the constitution which nothing can heal. One step taken by the legislature or the judiciary, in enlarging the powers of the government, opens the door for another, which will be sure to follow; and so the process goes on, until all respect for the fundamental law is lost, and the powers of the government are just what those in authority please to call them."

64 *See* Head v. Amoskeag Mfg. Co. 113 U.S. 9, 19–21 (1885) ("The question whether the erection and maintenance of mills for manufacturing purposes under a general mill act, of which any owner of land upon a stream not navigable may avail himself at will, can be upheld as a taking, by delegation of the right of eminent domain, of private property for public use, in the constitutional sense, is so important and far reaching, that it does not become this court to express an opinion upon it, when not required for the determination of the rights of the parties before it. We prefer to rest the decision of this case upon the ground that such a statute, considered as regulating the manner in which the rights of proprietors of lands adjacent to a stream may be asserted and enjoyed, with a due regard to the interests of all, and to the public good, is within the constitutional power of the legislature.").

65 *See* Fallbrook Irrigation Dist. v. Bradley, 164 U.S. 112, 179 (1896).

meant public control.[66] The *Bradley* Court reasoned that there are certain cases where eminent domain is the most practical way of getting land from irrational holdouts stating "the water to be used must be carried for some distance and over or through private property which cannot be taken in invitum if the use to which it is to be put be not public, and if there be no power to take property by condemnation it may be impossible to acquire it at all."[67] Though one might view *Bradley* as too deferential, there is perhaps an alternate analysis that places some strictures on the legislature. Certainly *Bradley* suggests that one must look at the public benefits and not the public's absolute control over a taking when analyzing whether a taking is for public use. The Court's reasoning suggests that necessity should also be of some relevance when making an assessment. In this case, the State's act was necessary to remedy holdout problems and other difficulties that would impede the construction of the irrigation ditch, and thus impede the public benefit.[68] Later cases, however, do not take up the element of necessity as a factor in determining whether a taking is for public use.

The Supreme Court also added another important holding in the realm of public use law in its decision in *U.S. v. Gettysburg Electric Railway Company* where it stated that the standard for review of eminent domain legislation would be the deferential "rational basis" standard. In *Gettysburg*, the Supreme Court found it was a valid public use for the government to take land in order to build a monument on the Gettysburg battle site.[69] Though the actual outcome of the case may not be considered that radical, the broad deference granted to legislatures makes *Gettysburg* an essential case in the understanding of current eminent domain practice.[70] The Court in *Gettysburg* states that "when the legislature has declared the use or purpose to be a public one, its judgment will be

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66 *See id.* at 161–162. ("To irrigate and thus to bring into possible cultivation these large masses of otherwise worthless lands would seem to be a public purpose and a matter of public interest, not confined to the landowners, or even to any one section of the State. The fact that the use of the water is limited to the landowner if not therefore a fatal objection to this legislation. It is not essential that the entire community or even any considerable portion thereof should directly enjoy or participate in an improvement in order to constitute a public use.").

67 *Id.* at 161. (The court goes on to say about the holdout problem that "A private company or corporation without the power to acquire the land in invitum would be of no real benefit, and at any rate the cost of the undertaking would be so greatly enhanced by the knowledge that the land must be acquired by purchase, that it would be practically impossible to build the works or obtain the water. Individual enterprise would be equally ineffectual; no one owner would find it possible to construct and maintain water works and canals any better than private corporations or companies, and unless they had the power of eminent domain they could accomplish nothing. If that power could be conferred upon them it could only be upon the ground that the property they took was to be taken for a public purpose.").

68 *See id.* at 161.

69 *See* United States v. Gettysburg Elec. R. Co., 160 U.S. 668, 686 (1896).

70 *Id.* at 681 ("Any act of Congress which plainly and directly tends to enhance the respect and love of the citizen for the institutions of his country and to quicken and strengthen

respected by the courts, unless the use be palpably without reasonable foundation."[71] The Court would later echo this statement in other eminent domain cases by creating a standard for the judicial scrutiny of eminent domain cases. There are two ways of reading the effects of this statement. By holding that the proper standard of review for the public use clause is the "rational basis" standard of review, one can argue that the Court is ceding its constitutional prerogatives to the legislature. Others could suggest that this holding gives the legislature the proper authority to determine questions on subjects where the court has no competency. But interestingly, the *Gettysburg* Court itself leaves open the question of whether a lower court could still question the necessity of the proposed taking, besides its public use.[72]

The Court acknowledged the reasoning of *Bradley* in *Clark v. Nash* when it held that an individual could use eminent domain for the personal right to build an irrigation ditch through his neighbor's property—and then added subjectivity to the analysis, an element of public use analysis not included before that time.[73] The *Clark* Court rested its decision in the peculiarities of the Western states and their particular topography to justify granting the state extraordinary powers when other states would not have the right to do so.[74] The Court seemed to suggest a variant of the elements of necessity that it mentioned in *Bradley* when it stated "what is a public use may frequently and largely depend upon the facts surrounding the subject."[75] One could, however, equally conclude that "subjectivity" was also a label for deference to individual state legislatures and courts, who might know the circumstances better than would the U.S. Supreme Court. The Court concludes by noting that the states of the West and the East should be treated differently when considering water rights given their different circumstances. The Court's analysis in *Clark* turns the public use analysis into a subjective analysis depending on the peculiarities of a given case.[76]

In *Strickley v. Highland Boy Gold Mining Co.*, the Court would revisit the same Utah statute as in *Clark* and continue their expansive analysis of the public use model to include derived-benefits to the public and not to public control.[77] Though *Clark* dealt with whether a landowner could use his neighbor's land to build an irrigation ditch, *Strickley* in-

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his motives to defend them, and which is germane to and intimately connected with and appropriate to the exercise of some one or all of the powers granted by Congress must be valid.").

71 *Id.* at 680.

72 *See id.* at 685–86.

73 *See* Clark v. Nash, 198 U.S. 361, 370 (1905).

74 *See id.* at 368–369.

75 *Id.* at 369.

76 *See id.* at 370.

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

quired whether eminent domain could be used to condemn land for an aerial line for a mine.[78] The Court, though seemingly disposing of the issue in *Bradley*, took the time to once again reject the "public control" analysis of the public use clause.[79] The Court invited the states to tailor their constitutions to meet individual state conceptions of the proper scope of eminent domain, while keeping a very low standard for the federal constitution.[80]

Continuing with deference to the individual states to tailor policies of eminent domain to their own needs and conditions, the Court upheld the constitutionality of a Massachusetts Mill Act in *Otis Company v. Ludlow Manufacturing Company*.[81] The Court analogized the rights to a stream as the rights out West to mine the earth, when assessing the validity of the ability of the landowner to stop the flow of water to another landowner down stream by stating "water power plays as large a part as mines in Utah, that it would not be very extravagant to say that it enters as an incident into the nature of property in streams as there understood."[82] A comparison of the *Bradley* analysis and the *Otis* analysis might leave the impression that a public use is valid when a state has either an abundance or lack of water. But what is clearer from the *Otis*' judgment is not so much its holding on public use but its holding on "just compensation." By requiring "just compensation" for the taking while upholding "public use,"[83] the *Otis* Court set a trend that would become predominant in later cases of emphasizing the just compensation clause as the sole protection for a landowner from the power of the government.

But the Court did not abandon all elements of the control analysis with its decision in *Union Lime Company v. Chicago and Northwestern Railway Company* when it considered whether the building of an additional rail spur to a limestone quarry was a public use.[84] In that case, the Court suggested that the regulations of a public authority could cure concerns over whether a taking was for a public use.[85] Some of the hesita-

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78 *See id.* ("In the opinion of the legislature and the Supreme Court of Utah the public welfare of that State demands that aerial lines between the mines upon its mountain sides and the railways in the valleys below should not be made impossible by the refusal of a private owner to sell the right to cross his land.").

79 *See id.* ("In discussing what constitutes a public use [*Clark*] recognized the inadequacy of use by the general public as a universal test.").

80 *See id.* ("If the state constitution restricts the legislature within narrower bounds that is a local affair, and must be left where the state court leaves it in a case like the one at bar.")

81 *See* Otis Co. v. Ludlow Mfg. Co., 201 U.S. 140, 156 (1906).

82 *Id.* at 152.

83 *See id.* at 153.

84 *See* Union Lime Co. v. Chicago & N.W. Ry. Co., 233 U.S. 211, 216 (1914).

85 *See id.* at 221–22. ("A spur may, at the outset, lead only to a single industry or establishment; it may be constructed to furnish an outlet for the products of a particular plant; its cost may be defrayed by those in special need of its service at the time. But none the less, by virtue of the conditions under which it is provided, the spur may constitute at all times a part of

tion over the use of eminent domain has been about the ability to get the expected return on the property. In *Union Lime*, the Court states that public regulation acts as an effective check on eminent domain abuses.

Other cases also consider what constitutes a valid public use. In *Rindge Co. v. County of Los Angeles*, the Court found highways to be a valid public use.[86] The Court reaffirmed its previous positions criticizing a narrow control-based analysis and shoring up support for its commitment to legislative deference.[87] *Shoemaker v. United States* also considered the question of public use and determined a taking for a public park was valid.[88] In *O'Neill v. Leamer*, the Court considered the question of whether the construction of a ditch to carry creek water to a lake was of a sufficient public character as not to violate the Due Process Clause of the Fourteenth Amendment.[89] The Court held that such a plan did not violate due process of law because it sufficiently promoted the public well-being.[90] The use of eminent domain to enhance the power industry was also considered a public use.[91] And in *Block v. Hirsch*, the Court allowed takings to help alleviate housing problems in the District of Columbia after World War I.[92]

But this period of case law was not an unbroken history of upholding every use of eminent domain. In *Cincinnati v. Vester*, the Court asked states to define with specificity their condemnation's purpose.[93] Though the Court rests much of its opinion on Ohio state law and emphasizes the same rationale which required deference to the states evident in early cases, the Court states that "[q]uestions relating to the

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the transportation facilities of the carrier which are operated under the obligations of public service and are subject to the regulation of public authority.").

86 *See* Rindge Co. v. County of L.A., 262 U.S. 700, 710 (1923).

87 *See id.* at 707 ("It is not essential that the entire community, nor even any considerable portion, should directly enjoy or participate in any improvement in order to constitute a public use.").

88 *See* Shoemaker v. United States, 147 U.S. 282, 297 (1893) ("[L]and taken in a city for public parks and squares, by authority of law, whether advantageous to the public for recreation, health or business is taken for a public use.").

89 *See* O'Neill v. Leamer, 239 U.S. 244, 249–250 (1915).

90 *See id.* at 253. ("States may take account of their special exigencies, and when the extent of their arid or wet lands is such that a plan for irrigation or reclamation according to districts may fairly be regarded as one which promotes the public interest, there is nothing in the Federal Constitution which denies to them the right to formulate this policy or to exercise the power of eminent domain in carrying it into effect.").

91 *See* Mt. Vernon-Woodberry Cotton Duck Co. v. Ala. Interstate Power Co., 240 U.S. 30, 32 (1916) ("In the organic relations of modern society it may sometimes be hard to draw the line that is supposed to limit the authority of the legislature to exercise or delegate the power of eminent domain. But to gather the streams from waste and to draw from them energy, labor without brains, and so to save mankind from toil that it can be spared, is to supply what, next to intellect, is the very foundation of all our achievements and all our welfare. If that purpose is not public we should be at a loss to say what is.").

92 *See* Block v. Hirsch, 256 U.S. 135, 158 (1921).

93 *See* Cincinnati v. Vester, 281 U.S. 439, 449 (1930).

constitutional validity of an excess condemnation should not be determined upon conjecture as to the contemplated purpose."[94] The Court in *Vester* suggests perhaps that eminent domain needs to be tied to a quantifiable purpose.

The Court would return to discussing deference to the legislature in several other cases and reach out to create a new rule that a legislature could not only dictate the agencies and the methods of eminent domain but also determine what constitutes a public use. In *Old Dominion Land Co. v. United States*, the Secretary of War took control of leased property upon which the United States military had built structures totaling over one million dollars.[95] The Court declared that Congress could legislatively determine a public use by stating "[w]e shall not inquire whether this purpose was or was not so reasonably incidental to the necessarily hurried transactions during the war as to warrant the taking . . . Congress has declared the purpose to be a public use, by implication if not by express words."[96] The Court would later affirm this holding in *U.S. ex rel. Tennessee Valley Authority v. Welch*, a case that discussed the validity of a taking for the construction of a dam.[97] *Welch* stated that a reviewing court should not interpret an eminent domain statute strictly and affirmed the statement that Congress could declare what is considered a public purpose.[98] The Court reasoned that it was bound to affirm the taking out of deference to the legislature stating that "[a]ny departure from this judicial restraint would result in courts deciding on what is and is not a governmental function and in their invalidating legislation on the basis of their view on that question at the moment of decision, a practice which has proved impracticable in other fields."[99]

III. THE MODERN ERA RESOLVES THE DEBATE?

When entering the modern era of eminent domain cases, the seminal case that resolved the dispute between the "control" and "derived benefits" analysis is *Berman v. Parker*. After *Berman*, the eminent domain cases that followed, including *Kelo*, seem thoroughly unremarkable. In *Berman*, the Court considered whether it was in the legislature's eminent domain power to take a section of Washington D.C. for the purposes of redevelopment.[100] In that section of Washington, the Planning Commission found that in an area that was 97% African-American, 64.3% of the

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94 *See id.* at 447–48.

95 *See* Old Dominion Land Co. v. United States, 269 U.S. 55, 63 (1925).

96 *See id.* at 66.

97 *See generally* United States *ex rel.* Tenn. Valley Auth. v. Welch, 327 U.S. 546, 552 (1946).

98 *See id.*

99 *Id.*

100 *See* Berman v. Parker, 348 U.S. 26, 28 (1954).

dwellings were beyond repair, 18.4% needed major repairs, 60.3% had no baths, 29.3% lacked electricity, 82.2% had no wash basins for laundry, and 83.8% lacked central heating.[101] The Court created several broad holdings. The first was an expansive conception of public use, with Justice Douglas writing for the Court:

> [t]he concept of the public welfare is broad and inclusive. The values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled. In the present case, the Congress and its authorized agencies have made determinations that take into account a wide variety of values. It is not for us to reappraise them.[102]

The Court equates the public use with the public welfare and rejects a control analysis. It thus makes the takings power equivalent to the public regulatory power. The second holding of *Berman* is that Congress will have complete freedom over how it will use the eminent domain power once a statute declares what constitutes a valid public use. *Berman* states, "[o]nce 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."[103] With these two holdings, the Court cedes any control it formerly exercised over the public use clause. There is no analysis of necessity. There is no analysis of the local circumstances. There is no analysis about the effect upon individuals from the taking. In fact, there is no analysis at all.

Subsequent cases followed this holding at both the state and federal level. The Michigan Supreme Court in *Poletown Neighborhood Council v. Detroit* allowed a community to be essentially taken for the construction of a GM plant.[104] With *Poletown,* however, a state no longer had to allege public blight as a factor for making its condemnations and in fact such an issue was never raised at all. This left a wide gap in the case law for municipalities to invoke its eminent domain power. The dissent opined:

> [a]ny business enterprise produces benefits to society at large. Now that we have authorized local legislative bodies to decide that a different commercial or industrial use

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101 *See id.* at 30.

102 *Id.* at 33.

103 *Id.*

104 *See* Poletown Neighborhood Council v. Detroit, 410 Mich. 616, 636 (Mich. 1981).

> 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.[105]

Therefore, the issues for these eminent domain cases is whether a higher use exists and who should determine what constitutes a higher use. Should economic development be top-down or bottom up? Should economic development be enhanced by a municipality or created by it? The social engineering experiment was a radical shift in thought, radical in that its conceptual benefits were speculative and in that the rights involved are the ones we as a nation have traditionally held to be absolute.

The Hawaii state legislature attempted to solve a different problem, not of urban renewal, but to rectify inequities in land distribution.[106] In *Hawaii Housing Authority v. Midkiff,* the Court relied heavily on the finding of the state legislature that 47% of the land in Hawaii was in the hands of only seventy-two landowners.[107] For example, in 1965 the seven largest landowners in the state of Hawaii were the Bernice P. Bishop Estate, the Richard S. Smart (Parker Ranch), the Dole Food Company, the Samuel M. Damon Estate, Alexander and Baldwin Inc., C. Brewer and Company Ltd., and the James Campbell Estate, all of which accounted for 29.5% of all land in Hawaii.[108] The redistribution scheme was meant to convert these leasehold estates into fungible property, which would save the landowners increased federal tax liability while effectuating the state's goal of creating an equitable distribution of land among its citizenry.[109] Policy considerations that were mentioned earlier in this note about the ability of redevelopment commissions to deliver on their promises of renewal and job growth were dispensed with by *Midkiff.* For example, Justice O'Connor takes the position of refusing to second-guess the legislature, stating:

> Of course, this Act, like any other, may not be successful in achieving its intended goals. But whether *in fact* the provision will accomplish its objectives is not the question: 'the [constitutional requirement] is satisfied if . . .

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105 *Id.* at 644–45.

106 *See* Haw. Hous. Auth. v. Midkiff, 467 U.S. 229, 232 (1984).

107 *See id.*

108 *See* Jennifer M. Young, Note, *The Constitutionality of a Naked Transfer: Mandatory Lease-to-Fee Conversions Failure to Satisfy a Requisite Public Purpose in Hawaii Condominium,* 25 U. HAW. L. REV. 561, 564–65 (2003).

109 *See* Midkiff, 467 U.S. at 234.

> the . . . [state] Legislature *rationally could have believed* that the [Act] would promote its objective.'[110]

Thus, the test of the Public Use Clause is confirmed again to be a rational basis test.

The Court will not overrule a legislature or its delegated authority unless a specified choice in land use is wholly arbitrary.[111] This standard renders the Public Use Clause a fail safe only against outlandishly dictatorial abuses of power. The Supreme Court states in its eminent domain jurisprudence that only when and if a legislature acts specifically against a landowner without any purpose whatsoever will it step in and overrule that legislature's determination. The Court holds that "[w]hen 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."[112] The legislature thus has the complete power over redevelopment and the power of the individual is minimized despite policy concerns. The Court abstains from taking a position in the policy debate over whether individual rights or economic redevelopment.

The Court follows the same analysis in both *Ruckelshaus v. Monsanto Co.* and *National R.R. Passenger Corp. v. Boston & Me. Corp.* and follows the *Berman/Midkiff* line of analysis. In *Ruckelshaus*, the Court states "the scope of the 'public use' requirement of the Taking Clause is coterminous with the scope of a sovereign's police powers. The role of the courts in second-guessing the legislature's judgment of what constitutes a public use is extremely narrow."[113] The Court reiterates this holding in *National Railroad* by stating:

> . . . [i]n both *Midkiff* and *Berman*, as in the present case, condemnation resulted in the transfer of ownership from one private party to another, with the basic use of the property by the government remaining unchanged. The Court held these exercises of the condemnation power to be constitutional, as long as the condemning authorities were rational in their positions that some public purpose was served.[114]

With these two holdings, the ground was set for the *Kelo* decision.

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110 *See id.* at 242–43.

111 *See id.* at 243.

112 *Id.*

113 Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1014 (1984).

114 National R.R. Passenger Corp v. Boston & Me. Corp., 503 U.S. 407, 422 (1992).

The *Kelo* decision, then, is unremarkable because most of the precedent that led up to it had resolved the issues involved. Though the *Kelo* Court had the opportunity to require heightened scrutiny for private transfers, it kept true to previous holdings that a court should analyze the question of whether legislature's purpose is for the public and not to analyze the methodology of the transfer. For example, the *Kelo* Court states that "[the] intimation that a 'public purpose' may not be achieved by the action of private parties confuses the purpose of a taking with its mechanics."[115] The Court goes on to state that "the mere fact that the State immediately transferred the properties to private individuals upon condemnation somehow diminished the public character of the taking. 'It is only the taking's purpose, and not its mechanics,' we explained, that matters in determining public use."[116] Though economic development might be considered a public purpose, it does not even address the policy concerns that occur with a purely private to private taking.

> The Court rejected the invitation to use a heightened form of review because the disadvantages of a heightened form of review are especially pronounced in this type of case. Orderly implementation of a comprehensive redevelopment plan obviously requires that the legal rights of all interested parties be established before new construction can be commenced. A constitutional rule that required postponement of the judicial approval of every condemnation until the likelihood of success of the plan had been assured would unquestionably impose a significant impediment to the successful consummation of many such plans.[117]

Of course, those homeowners who are involved in the taking will not likely be thanking the Court for its efficiency.

But the reader might be led to the view that there is no meaningful difference between whether a person gets evicted from their home for a public school or for another person's house, or for a corporation's development park. After all, all end with the same result: a displaced individual, but a supposed benefit to the entire community-at-large. Once one admits that the taking is for a public use, the means themselves are revealed to be unimportant. And theoretically, the individual has adequate compensation. Not only does the just compensation clause require fair market value for a taking, but the individual will also indirectly benefit

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115 Kelo v. City of New London, 125 S. Ct. 2655, 2666 (2005).

116 *Id.* at 2667.

117 *Id.* at 2668.

through a revitalized community that now enjoys a new school, more upscale housing, or simply a revitalized local economy, in general.

It is certainly a fair criticism to query, "But at what cost?" If a group of people live and work in a city or town and make up the fabric of the community, it might feel unfair or irresponsible to remove them from the places that they built, lived in, and maintained. People like the Dery's are responsible for making the city of New London what it was, while Pfizer will be able to reap the benefits of their creation.[118]

Furthermore, since the only protection for a landowner is the just compensation clause, it will rarely be the wealthy or the politically powerful who will suffer the consequences of redevelopment. The land of the poor and disconnected is cheaper. Yet those who do not risk suffering the costs of eminent domain will be the same who will disproportionately reap the benefits when their communities are "cleansed" of the parts that are impeding economic growth. Courts and legislatures must ensure that when a taking occurs the entire community actually benefits. The public use clause exists to make sure that the minority, whether politically or economically, has the right to have ownership of their piece of the community.[119]

The question is then what the judicial branch can do to protect the individual. States, of course, may use their own constitutions to interpret whether takings pass their public use clauses. The Michigan case that overrules *Poletown, County of Wayne v. Hathcock* offers just such an approach. In *Hathcock*, the Michigan Supreme Court considered whether a taking was for public use when the property was being seized for the construction of a technology park.[120] The *Hathcock* decision utilized a three-part test to determine whether eminent domain jurisprudence constituted a taking for public use. The factors are as follows: "(1) where public necessity of the extreme sort" requires collective action; (2) where the property remains subject to public oversight after transfer to a private entity; and (3) where the property is selected because of 'acts of independent public significance,' rather than the interests of the private entity to which the property is eventually transferred."[121] The Court ultimately rejected this as violating its state's public use clause.[122]

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118 *See generally* Wendell E. Pritchet, *The "Public Menace" of Blight: Urban Renewal and the Private Uses of Eminent Domain*, 21 YALE L. & POL'Y. REV. 1 (2003).

119 *See generally* Margaret Jane Radin, *The Liberal Conception of Property: Cross Currents in the Jurisprudence of Takings*, 88 COLUM. L. REV. 1667 (1988).

120 *See* County of Wayne v. Hathcock, 684 N.W.2d 765 (Mich. 2004).

121 *Id.* at 783.

122 *See id.* at 788. Other states have also interpreted their own constitutions more strictly than the federal constitution in the realm of eminent domain. *See, e.g.*, Southwestern Ill. Dev. Auth. v. Nat'l City Envtl. L.L.C., 768 N.E.2d 1 (Ill. 2002); Ga. DOT v. Jasper County, 355 S.C. 631 (S.C. 2003). *See also* Board of County Com'rs of Muskogee County v. Lowery, 2006 O.K. 31 (2006) (declaring, post-*Kelo*, that under the Oklahoma Constitution the use of an

CONCLUSION

Kelo is not a radical decision, but it may not be the right one. The question of what is a public use leads to a struggle over individual rights versus the community's rights. It asks whether anyone can be adequately compensated for the home they have lived in for nearly a century. And it asks what the limits of state power are. From the earliest history of the clause, no clear reading could be established over benefits or control. And out of this muddled history emerges a tale of public use that describes gradual assumptions of state power at the expense of the individual rights. There are, however, options for those who want to put the fires in New London out through their legislature and their state courts. For the time being, the Supreme Court has made its decision. The people are left with its consequences.

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eminent domain for a right of way for a pipeline to supply a private power company was not public use. This interpretation is stricter than even the *Hathcock* standard mentioned above.).