KELO’S LEGACY: EMINENT DOMAIN
AND THE FUTURE OF PROPERTY
RIGHTS

The most striking thing about *Kelo v New London*,¹ which held that the condemnation of fifteen homes pursuant to an economic development plan qualifies as a "public use" under the Fifth Amendment's Takings Clause,² is that there was significant public surprise and outcry at the outcome. For decades conventional wisdom had held that the phrase "public use" in the Takings Clause placed little, if any, constraint on exercises of the eminent domain power,³ and that any acquisition of property undertaken to further a legitimate public purpose was almost certain to be judged lawful. To be sure,
it was not wholly implausible to believe that the complaining landowners could prevail, and the Institute for Justice, a prominent libertarian public interest law firm, vigorously promoted the landowners’ cause. But expansive language in *Hawaii Housing Authority v Midkiff* and *Berman v Parker*, the two leading precedents addressing the meaning of “public use” under the Fifth Amendment, pointed to the conclusion that the “Property Rights” movement was on the verge of suffering its third straight defeat of the October 2004 Term.

That defeat did come, in a 5–4 decision handed down in late June. The loss, though, was hardly a resounding one. Not only did the city of New London prevail by only the slimmest of margins, but the majority opinion implied, and the one concurring opinion—written by a member of the majority—underscored, that the “public use” limitation constitutes a real check on exercises of governmental power.

Notwithstanding the predictability of the result or the indications that the Court had in fact tightened its standard of review for determining when a taking is for “public use,” *Kelo* sparked a conflagration of outrage that even months later showed no sign of abating. *Kelo*’s detractors expressed fury that moderate-income residents could be forced out of their homes to make way for more upscale development, as well as disbelief that the nation’s highest court would permit such a gross abuse of power. The volume and

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4 See discussion in Part I.B.

5 467 US 229, 241 (1984) (“[W]here the exercise of the eminent domain power is rationally related to a conceivable public purpose, the Court has never held a compensated taking to be proscribed by the Public Use Clause”).

6 348 US 26, 32 (1954) (“[T]he 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”).

7 The first two were *Lingle v Chevron*, 125 S Ct 2074 (2005) (rejecting a claim that a Hawaii rent control statute was invalid under the Takings Clause because it failed to substantially advance a legitimate state interest), and *San Remo Hotel L.P. v City and County of San Francisco*, 125 S Ct 2491 (2005) (holding that federal courts are precluded from adjudicating takings claims that have already been adjudicated in state court).

8 See *Hands Off Our Homes: Property Rights and Eminent Domain*, Economist (Aug 20, 2005) (reporting that “a Supreme Court ruling that allows the government to seize private property has set off a fierce backlash that may yet be as potent as the anti-abortion movement”); The Kelo Decision: Investigating Takings of Homes and Other Private Property: Hearing Before the United States Senate Committee on the Judiciary (Sept 20, 2005) (testimony of Thomas W. Merrill, Charles Keller Beekman Professor of Law, Columbia University) (observing that Kelo “is unique in modern annals of law in terms of the negative response it has evoked”).
ferocity of these objections provoked a swift and sustained response from politicians. Within three weeks of the decision, the United States House of Representatives had agreed (by a vote of 365 to 33) to a nonbinding resolution expressing "grave disapproval" of the majority opinion," and by early 2006, legislation designed to curb governmental condemnation powers was under consideration in almost every state.

The closeness of the *Kelo* vote, the content of the opinions produced, the fierce tenor of the public criticism, and the quickness of politicians across the ideological spectrum to criticize the outcome all suggest that the law of eminent domain could be on the cusp of a transformation. Neither *Kelo* itself nor the prescriptions offered in response, however, provide a coherent framework for limiting the excesses of eminent domain while facilitating socially beneficial condemnations. As a result, at a time of focused attention on the potential importance of secure property rights for both individual dignity and economic growth, the legacy of *Kelo* could be inadequate or even counterproductive protections of property rights.

The costs of nonoptimal legal regimes may be high. The failure to constrain eminent domain leaves the less politically powerful members of society exposed to the autonomy injuries that involuntary transfers of property—particularly transfers for purposes not regarded as legitimate—can entail. Eminent domain can also impose economic losses on owners of condemned properties, because the "just compensation" to which they are constitutionally entitled is generally limited to fair market value, as distinct from the value that the owner would demand to part willingly with her property.

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9 H Res 340 (2005). In addition, the following November the House passed the Private Property Rights Protection Act of 2005, HR 4128, 109th Cong (2005), prohibiting federal agencies from using, and restricting federal economic development assistance to state and local entities that use, eminent domain powers for economic development.

10 See John M. Broder, *States Curbing Right to Seize Private Homes*, NY Times (Feb 21, 2006), at A1 ("In a rare display of unanimity that cuts across partisan and geographic lines, lawmakers in virtually every statehouse across the country are advancing bills and constitutional amendments to limit use of the government's power of eminent domain to seize private property for economic development purposes").


In short, when the government has broad eminent domain powers that can be "lent" to commercial actors, property is no longer protected by a "property rule" requiring voluntary transactions, but instead by a "liability rule" that permits nonconsensual transfers at judicially determined prices.

To protect themselves against forced sales, property owners may divert resources from investment and other constructive activities to monitoring and influencing government in order to protect the security of their property. In addition, broad eminent domain powers may encourage individuals and firms to pursue their financial self-interest through persuading the government to reconfigure property rights. This danger may be especially acute in settings where the acquired property is to be transferred to developers or other commercial interests, thereby creating an opportunity for profit-seeking firms to acquire property for less than they would have to pay in negotiated purchases. On the other side of the ledger, overly stringent limitations on eminent domain can impede the ability of governments to solve holdout and other market failure problems, as well as to regulate industries through the reassignment of property rights.

This article begins by describing the background of Kelo. Part I describes the New London redevelopment plan and explains why, notwithstanding the very serious doctrinal weaknesses of the homeowners' case, victory was not inconceivable. Part II analyzes the decision in Kelo and details how each of the four opinions produced by the Court—the majority by Justice Stevens (joined by Justices Kennedy, Souter, Ginsburg, and Breyer), a concurrence by Justice Kennedy, a dissent by Justice O'Connor (joined by Justices Rehnquist, Scalia, and Thomas), and a dissent by Justice Thomas for himself alone—marks a retreat from the constitutional vision expressed in earlier cases, which in essence held that any but the most casual judicial scrutiny of property condemnations was unwarranted and imprudent. In contrast, the Kelo opinions all exhibit some recognition of the harms that eminent domain projects can inflict, particularly on vulnerable populations. Each also contemplates, albeit to varying degrees, a meaningful role for the judiciary in policing the security of property rights. None of the opinions, however, provides a workable template for distinguishing constitutional

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exercises of the eminent domain power from unconstitutional ones.

Part III turns to the question of whether the infirmities of *Kelo* matter much, given the groundswell of political activity the decision has engendered. From one perspective, the spectacle of a highly unpopular Supreme Court decision followed by a rush of reform proposals is a sign that the system is functioning smoothly, and is thus reason for celebration rather than concern. I argue that there is sound reason to fear the political activity the decision has incited will not resolve the controversies surrounding eminent domain, in part because the proposals that have to date garnered the greatest support—most notably restricting the use of eminent domain for "economic development"—threaten to be both overinclusive and underinclusive. The strong possibility that eminent domain controversies will not be settled in the political sphere suggests that pressure on the judiciary to find instances of eminent domain unconstitutional will persist. In Part IV, I examine the ramifications of continued judicial involvement and discuss the potential benefits of multiple vetoes over exercises of the eminent domain power.

I. EMINENT DOMAIN IN NEW LONDON

A. THE REDEVELOPMENT PLAN

The dispute in *Kelo* arose from efforts to revitalize New London, a small Connecticut city that had suffered a steep decline since its nineteenth-century glory days as a thriving commercial seaport. The city’s falling population, high unemployment rate, and lack of industry led a state agency to designate it a “distressed municipality,” and in the late 1990s state and local officials targeted it for economic revival. To assist in the rehabilitation project, the New London Development Corporation (the NLDC), a private, nonstock, nonprofit organization established in 1978 to promote economic development, was reactivated, and Claire Gaudiani, the civically prominent president of Connecticut College, was recruited to serve as the organization’s head. The newly energized NLDC moved quickly, and by February 1998 had helped persuade the Pfizer Corporation, one of the world’s largest pharmaceutical firms (and the employer of Gaudiani’s spouse), to agree to build

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15 125 S. Ct. at 2658–59.
a research facility on the New London waterfront, on a site adjacent to the Fort Trumbull peninsula.\textsuperscript{17} As part of the drive to attract the company, the city and the state of Connecticut pledged to invest over $50 million in the Fort Trumbull neighborhood.\textsuperscript{18}

Soon after Pfizer's announcement, New London's city council authorized the NLDC to begin work on an economic development plan for a 90-acre portion of the Fort Trumbull area.\textsuperscript{19} As part of its planning process, the NLDC conducted a series of neighborhood meetings to educate the public and formulated and submitted plans to a number of state agencies for review.\textsuperscript{20} After obtaining the necessary state regulatory approvals, the NLDC finalized its redevelopment plan, which called for the transformation of the 90-acre tract from a neighborhood of small businesses and lower-middle-class residences into a mix of office, retail, recreational, and upscale residential space. New London's city council adopted the plan in January 2000. Pursuant to state law, it designated the NLDC to act as the city's agent and to acquire the property needed for the development project through negotiated purchases or eminent domain.

Under the plan, some of the land acquired was to be leased to a private developer to be selected at a later date, which would in turn transfer leasehold interests to other business enterprises. The proposed project generated heated controversy, including accusations that the politically powerless were being forced out in order to create opportunities for the better connected. Residents' bruised feelings were hardly assuaged by reports that the impolitic Ms. Gaudiani had defended the planned displacements with the statement: "Anything that's working in our great nation is working because somebody left skin on the sidewalk."\textsuperscript{21}

Most owners of parcels in the redevelopment area agreed to sell, but nine, who owned a total of fifteen residential properties, refused. In late 2000 the NLDC initiated condemnation proceedings. The NLDC elected to bring its condemnation actions

\textsuperscript{17} Id.


\textsuperscript{19} 125 S Ct at 2671 (O'Connor, J, dissenting).

\textsuperscript{20} 125 S Ct at 2659.

\textsuperscript{21} Laura Mansnerus, \textit{All Politics Is Local, and Sadly, Sometimes Personal}, NY Times (July 3, 2005), Sect 14CN, at 1.
pursuant to a Connecticut statute expressly authorizing eminent domain to meet industry and business needs. The resisting property owners, including an octogenarian who had lived in one of the condemned properties since birth and a newcomer to Fort Trumbull who had invested substantial amounts of money and time in improving her home, brought suit in New London Superior Court. The homeowners argued, among other things, that the proposed acquisitions were not for a "public use" and would thus violate the Fifth Amendment. Although the plaintiffs achieved a partial victory at the trial court level, they met with defeat before the Supreme Court of Connecticut. In ruling that none of the challenged condemnations contravened the Fifth Amendment or Connecticut law, the court concluded that "an economic development plan that the appropriate legislative authority rationally has determined will promote significant municipal economic development constitutes a valid public use for the exercise of the eminent domain power."22 Three justices concurred in part and dissented in part. While agreeing with the majority's determination that economic development qualified as a public use, the dissenters argued that the court should "grant the legislature no deference on this issue and place the burden on the taking authority to establish by clear and convincing evidence that the public benefit anticipated in the economic development agreement is reasonably ensured."23 The landowners appealed, and in September 2004 the Supreme Court granted certiorari to determine "whether a city's decision to take property for the purpose of economic development satisfies the 'public use' requirement of the Fifth Amendment."24

B. THE LEGAL BACKGROUND

Convincing the Supreme Court even to hear the case represented something of a coup for the Institute for Justice. For half a century, the Court had vigorously and consistently rejected any suggestion that the Public Use Clause substantially constrained exercises of the eminent domain power. In the 1954 case _Berman_
v Parker, a unanimous Court had upheld the constitutionality of the District of Columbia Redevelopment Act of 1945, an Act of Congress empowering the District of Columbia Redevelopment Land Agency to acquire property for the prevention, reduction, or elimination of blight and its causes, and to transfer the properties obtained to private firms and individuals as well as to public agencies.

Wrote Justice William O. Douglas:

Public safety, public health, morality, peace and quiet, law and order—these are some of the more conspicuous examples of the traditional application of the police power to municipal affairs. . . . In the present case, the Congress and its authorized agencies have made determinations that take into account a wide variety of values. It is not for us to reappraise them. If those who govern the District of Columbia decide that the Nation's Capital should be beautiful as well as sanitary, there is nothing in the Fifth Amendment that stands in the way. 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.

In interpreting the public use requirement, then, the Berman Court concluded that courts should display an extraordinary level of deference to legislative and agency determinations. As Cass Sunstein has observed, the test outlined in Berman "is even more deferential than the rationality requirements of the due process and equal protection clauses, for the legislative judgment on the point is accepted as nearly conclusive." In staking out this bold position, the Court departed from a number of earlier decisions and opinions that had stressed that the determination of what constitutes a "public use" was a matter for judicial consideration.

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25 348 US 26 (1954)
26 Id at 29–30.
27 Id at 32–33.
29 See, e.g., Cincinnati v Vester, 281 US 439, 446 (1930) ("[T]he question of what is a public use is a judicial one"); Rinjode Co. v County of Los Angeles, 262 US 700, 705 (1923) ("The nature of a use, whether public or private, is ultimately a judicial question"). See also U.S. ex rel Welch, 327 US 546, 556 (Reed, J, concurring) ("This taking is for a public purpose but whether it is or is not is a judicial question"); U.S. ex rel Welch v TVA, 327 US 546, 557 (1946) (Frankfurter, J, concurring) ("This Court has never deviated from the view that under the Constitution a claim that a taking is not 'for public use' is open for judicial consideration, ultimately by this Court"); Philip Nichols, Jr., The Meaning of Public
To be sure, the Court's opinion in *Berman* was in keeping with the highly deferential posture toward governmental measures affecting property and other "economic" rights that was firmly in place by the middle of the twentieth century. In addition, it bears emphasis that in both outcome and reasoning *Berman* marked the extension of trends already well underway in the area of eminent domain law. For decades, the idea that legislative determinations concerning what types of takings constituted public uses should be regarded as conclusive, or nearly so, had been ascendant. Indeed, Justice Black's opinion for the Court eight years earlier in *U.S. ex rel Welch v TVA* approached *Berman* in its deference. The notion that deference to legislative determinations was nearly always warranted had evolved roughly in tandem with the related idea that the term "public use" could be construed to encompass a wide range of public benefits. Thus by the middle of the century many argued that the so-called "public use doctrine," that is, the construct that governments could expropriate private property only for a limited set of otherwise lawful purposes, had outlived whatever utility it may once have had.

Nevertheless, the Court's decision to abjure any serious role in interpreting "public use" proved fateful. While the precise meaning of "public use" had frequently been in doubt—with various courts at various times construing the phrase to denote public ownership, actual use by the public, or the generation of particular kinds of public benefits—and in practice courts had often hesitated to invalidate condemnations on public use grounds, the threat of judicial action had imposed a certain discipline on the exercise of condemnation powers. By embracing near conclusive

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*Use in the Law of Eminent Domain*, 20 BU L Rev 615 (1940) ("[W]hat constitutes a public use, although in the first instance a legislative question, is in the last analysis a question of Constitutional Law to be determined by the courts").


32 327 US 546 (1946).

33 See, e.g., Note, *The Public Use Limitation on Eminent Domain: An Advance Requiem*, 58 Yale L J 599, 614 (1949) (concluding that "doubtless the doctrine will continue to be evoked nostalgically in dicta . . . . Kinder hands, however, would accord it the permanent interment in the digests that is so long overdue").


35 See Nichols, 20 BU L Rev at 624 (cited in note 29).
deference, the Court exposed not only the welfare of property owners but its own reputation to the vagaries of government action. In essence, the Court held, without troubling to provide any convincing justification, that judicial oversight was all but unnecessary to protect the security of property rights against government action.\textsuperscript{36}

Thirty years after \textit{Berman}, the Court declined to reevaluate its interpretation of “public use.” In \textit{Hawaii Housing Authority v Midkiff},\textsuperscript{37} also a unanimous decision, the Court held that the Fifth Amendment did not prohibit the state of Hawaii from implementing a land reform program that transferred property from lessors to tenants for the stated purpose of reducing the concentration of land ownership. In an opinion that hewed closely to \textit{Berman}, Justice O’Connor (who, interestingly, would later dissent in \textit{Kelo}), wrote that the public use requirement is “coterminous with the scope of a sovereign’s police powers,” and while courts do have some role to play “in reviewing a legislature’s judgment of what constitutes a public use,” it is an “extremely narrow” one.\textsuperscript{38} Consequently, the Court accepted without analysis the state legislature’s determination that Hawaii’s small number of landowners constituted a “land oligopoly” that had caused the market for land to malfunction, and agreed that redistribution of land “to correct deficiencies in the market determined by the state legislature to be attributable to land oligopoly is a rational exercise of the eminent domain power.”\textsuperscript{39} In O’Connor’s formulation, the Court had no viable choice but to go along with the legislative program: “[I]n our system of government, legislatures are better able to assess what public purposes should be advanced by an exercise of the taking power. . . . \textit{Thus, if a legislature, state or federal, determines there are substantial reasons for an exercise of the taking power, courts must defer to its determination that the taking will serve a public use.”}\textsuperscript{40}

To make matters even less auspicious for the \textit{Kelo} plaintiffs,

\textsuperscript{36}Cf. McCloskey, 1962 Supreme Court Review at 40 (cited in note 30) (concluding that members of the Court never provided a full public explanation of “the basis for their abnegation” of economic substantive due process and arguing that this omission “leaves, to say the least, a large gap in the rationale that underlies the structure of modern constitutional law”).

\textsuperscript{37}467 US 229 (1984).

\textsuperscript{38}Id at 240

\textsuperscript{39}Id at 243.

\textsuperscript{40}Id at 244 (emphasis added).
Berman and Midkiff were by no means the only Supreme Court precedents that contained reasoning highly damaging to their cause. In Ruckelshaus v Monsanto, decided just one month after Midkiff, the Court had found that any taking that might occur of a pesticide manufacturer's trade secrets, disclosed to the Environmental Protection Agency and made available to competing firms pursuant to federal law, would be for public use, despite the fact that the most obvious and direct beneficiaries of any condemnation would be competitors. Congress's determination that furnishing the information to other private entities would "eliminate costly duplication of research" and thus promote healthy competition in the market for pesticides, the Court had agreed, was "well within the police power of Congress." And in the 1992 decision National Railroad Passenger Corp. v Boston & Maine Corp., the Court had, in the course of upholding a government-orchestrated condemnation that resulted in the transfer of property from one private rail concern to another, emphasized that "the public use requirement of the Takings Clause is coterminous with the regulatory power."

There were even decisions from the early twentieth century that, although old and of uncertain value as precedents, contained language that lent support to the proposition that at least some condemnations whose "public use" was the promotion of economic development were constitutional.

Yet despite the grave doctrinal weaknesses of the landowners' case, it was not beyond imagination that they could win. For one thing, public attitudes toward eminent domain programs had cooled over the years. There was growing recognition that the large-scale urban renewal projects of the 1950s and 1960s had exacted a terrible toll on poor and minority populations, and

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42 Id at 1015.
44 See, e.g., Strickley v Highland Boy Gold Mining Co., 200 US 527 (1906); Clark v Nash, 198 US 361 (1905).
articles sympathetic to property holders injured by eminent domain programs—particularly owners of homes and small businesses—were appearing with regularity in the mainstream press. Exercises of eminent domain that transferred property from one private party to another, better politically connected one drew especially harsh criticism.\footnote{See, e.g., Gary Greenberg, \textit{The Condemned}, Mother Jones (Jan/Feb 2005); Jonathan Rauch, \textit{Bush's Landgrab—and the New York Times}, National Journal (July 27, 2002); Sam Staley, \textit{Wrecking Property Rights}, Reason (Feb 2003).}

Accompanying this shift in popular sentiment were several high-profile decisions in which courts had ruled that particular “economic development” condemnations were not in accord with the “public use” clause of the federal constitution\footnote{See, e.g., \textit{Daniels v Area Plan Comm'n}, 306 F3d 445 (7th Cir 2002); \textit{99 Cents Only Stores v Lancaster Redevelopment Agency}, 237 F Supp 2d 1123 (CD Cal 2001).} or similar provisions of state constitutions.\footnote{See, e.g., \textit{Southwestern Ill. Dev. Auth. v Nat'l City Envtl.}, 768 NE2d 1 (Ill 2002); \textit{Wayne v Hathcock}, 684 NW2d 765 (Mich 2004).} Although these decisions did not of course carry any formal authority with the Court, they had the potential to influence its deliberations, if only as indications of shifting societal attitudes.

In addition, since 1987 the Court had manifested, albeit intermittently, greater concern about government infringements of property rights, most notably in the area of regulatory takings.\footnote{See \textit{Eastern Enterprises v Apfel}, 524 US 498 (1998); \textit{Dolan v City of Tigard}, 512 US 374 (1994); \textit{Lucas v S.C. Coastal Council}, 505 US 1003 (1992); \textit{Nollan v Cal. Coastal Comm'n}, 483 US 825 (1987).} The Court’s decisions were often puzzling, and the “Property Rights” movement had sustained more losses than victories. Nevertheless, the Court’s greater solicitude for property rights fit uncomfortably with the untempered deference prescribed in \textit{Berman} and applied in rote fashion in \textit{Midkiff} and other cases. Since the time of \textit{Berman}, the Court had become far more willing to engage in the practice of defending constitutional rights from government intrusions.\footnote{See David A. Strauss, \textit{Why Was Lochner Wrong?} 70 U Chi L Rev 373 (2003); G. Edward White, \textit{Historicizing Judicial Scrutiny}, 57 SC L Rev 1 (2005).} Once property rights were placed—even in a sporadic and inchoate way—in the category of rights potentially worthy of such protection, the judicial practice of giving only cursory examination to an entire category of state action involving property rights appeared less robust.

Finally, \textit{Berman’s} extreme deference looked outdated for another reason. As a product of its time, \textit{Berman} manifested great faith in
the merits of bypassing the market through central planning, as well as in the legislature’s proclivity to promote the public interest rather than the agendas of politically influential groups. At the beginning of the twenty-first century, both these suppositions were regarded as highly questionable in a way they had not been fifty (or even twenty) years earlier. And although the Court cannot be said to have systematically incorporated either confidence in market mechanisms or the insights of public choice theory into its jurisprudence, it was not beyond imagining that this profound shift in outlook could have an impact on the Court’s analysis.

II. The Decision in Kelo

In the end, the city of New London prevailed as expected. But even before it became apparent that Kelo would gain a place of honor in the pantheon of highly unpopular Supreme Court decisions, it was clear the case had important ramifications. Gone, even from the majority opinion, was the robotic deference that had been the hallmark of the Court’s eminent domain jurisprudence for over fifty years. The difficulty is that it is not at all clear what has replaced it. All the opinions manifest an awareness of the damage that expropriations can inflict on individual lives. And all display at least some grasp of the potentially huge social costs of untrammeled government power to reconfigure property rights. At the same time, none offers a well thought out framework of constitutional interpretation that addresses these issues.

A. The Majority Opinion

Justice Stevens, writing for the five Justices in the majority, produced an opinion replete with tension, one that claims to be bound by precedent even as it distances itself from it. Justice Stevens quotes liberally from Berman and Midkiff and details at length the Court’s history of “affording legislatures broad latitude in determining what public needs justify the use of the takings power.” The opinion concludes by acknowledging the “hardship that condemnations may entail, notwithstanding the payment of just com-


52 125 S Ct at 2664.
pensation," but insisting that a long line of precedent leaves the Court with no option but to rule against the property owners. Perhaps anticipating that public displeasure is in store, the majority opinion is quick to point to the individual states as a potential source of protection from eminent domain abuse: "We emphasize that nothing in our opinion precludes any State from placing further restrictions on its exercise of the takings power."

At the same time, the majority opinion does not assert that the Court must defer to legislative determinations that an exercise of the takings power will serve a public use. Nor does the majority specify that rational basis review applies to such determinations. Instead, the Court's opinion examines in detail both the content of the redevelopment plan and the circumstances of its creation. The condemnations at issue, it emphasizes, were undertaken pursuant to a comprehensive plan that was carefully formulated to bring about the rejuvenation of a distressed municipality. This plan provided not only for the transfer of property rights from one set of private owners to another, but also for the provision of public spaces, including marinas, pedestrian walkways, and a museum. The majority further notes that the New London plan was the product of "thorough deliberation" involving local government, state agencies, and even the affected neighborhood, whose residents were given the opportunity to attend informational meetings about the planning process. Justice Stevens also takes pains to report that not only the trial judge but also "all the members of the Supreme Court of Connecticut agreed that there was no evidence of an illegitimate purpose in this case." The goal of the plan, the majority pronounces itself satisfied, was to "provide appreciable benefits to the community, including—but by no means limited to—new jobs and increased tax revenue," not to further the interests of Pfizer or other businesses.

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53 Id at 2668.
54 Id.
55 Id at 2661.
56 Id at 2665. Some of the Court's stated reasons for concluding that the development plan's goal was not to promote private interests are unconvincing. The most glaring example is the Court's statement: "$W_hile the City intends to transfer certain of the parcels to a private developer in a long-term lease—which developer, in turn, is expected to lease the office space and so forth to other private tenants—the identities of those private parties were not known when the plan was adopted. It is, of course, difficult to accuse the government of having taken A's property to benefit the private interests of B when the identity of B was unknown." Id at 2661-62 n 6. It is obvious that even if A
Absent from the majority opinion, however, is any serious analysis of why the considerations it discusses matter, the weights they carry, or what other sorts of information might be relevant to an assessment of constitutionality. Consequently, it is unclear precisely what will insulate exercises of the eminent domain power from invalidation, or, conversely, what condemnation practices will likely be held unlawful. The greatest puzzle is the Court’s stance toward condemnations that provide clear benefits to private parties and can be justified as constituting a public use only on the grounds they increase tax revenues, provide employment, or in some other respect promote economic flourishing. In rejecting the home owners’ arguments that the Court should draw a bright line prohibiting the use of the eminent domain power for economic development (or, in the alternate, require a showing of “reasonable certainty” that public benefits will in fact accrue before upholding economic development takings), the majority opinion stresses that “promoting economic development is a traditional and long accepted function of government” and asserts that there is “no principled way of distinguishing economic development from the other public purposes that we have recognized.”

But that broad language, although suggestive, is a far cry from a guarantee that future condemnations for economic development purposes will meet with a favorable reception. In fact, the majority opinion is careful to warn that a taking of one private owner’s property followed by transfer to a second private party “executed outside the confines of an integrated development plan” for the sole reason that the new owner will use the property in a more productive way, thus generating more tax revenue, would be an “unusual exercise of government power” that would “certainly raise a suspicion that a private purpose was afoot.”

This last statement—expressing confidence that courts will be able to readily identify takings that have no conceivable public purpose other than to generate additional taxes—to some degree undermines the earlier claim that there is no practicable way to distinguish economic development takings from other exercises of government has not publicly identified private beneficiaries, there might nonetheless exist informal understandings with private parties. Also, even if the identities of private beneficiaries are in fact unknown at the time a plan is formulated or approved, governments can use redevelopment programs to enrich favorites selected later.

57 Id at 2665.
58 Id at 2667.
the eminent domain power. At the very least, it indicates that there is a subset of economic development takings that perceptibly differs from other sorts of takings and ought to incite greater judicial attention than the average condemnation.

In essence, then, the majority opinion intimates that the extraordinary deference standard is a thing of the past, and that some takings—particularly ones similar to those in *Kelo* but perhaps not so carefully planned or documented—might very well not survive judicial review. But left unexplained is precisely why and to what degree the Court is prepared to retreat from the precedents that it insists render it unable to offer relief to the New London home owners. Clearly, the Court is convinced that the security of property rights is important, for it emphasizes that the Constitution imposes restrictions on the use of state power to deliberately advance the interests of one private entity at the expense of another through the reconfiguration of property rights. Yet the majority does not address the issue of what ends are served by this limitation, and without knowing more about what the Court understands to be the dangers of eminent domain—infringements of fundamental human rights, for example, or distortions of the political process wrought by would-be beneficiaries of condemnations—it is hard to predict what sort of alternative to the "super deference" model the Court might be prepared to construct.

B. JUSTICE KENNEDY'S CONCURRENCE

Because Justice Kennedy provided the crucial fifth vote for the majority opinion, his concurring opinion demands particularly careful analysis. Kennedy begins by declaring that governmental takings are permissible so long as they bear a rational relationship to a public purpose. In practice, explains Kennedy, this entails applying a form of the rational basis test normally used in reviewing economic regulation under the Due Process and Equal Protection Clauses. He cites as an example of this sort of review

59 Id at 2661.

60 See Richard A. Posner, *The Supreme Court, 2004 Term—Foreword: A Political Court*, 119 Harv L Rev 31, 95 (2005) (noting that when a Justice casts the "essential fifth vote for the 'majority' opinion while also writing a separate opinion" it creates uncertainty "whether the majority opinion or the concurring opinion should be regarded as the best predictor of how the Court would decide a similar case in the future").
the Court's 1955 decision in *Williamson v Lee Optical*, a curious choice given that in that case the Court pointedly refused to invalidate a statute that had the obvious purpose and effect of protecting ophthalmologists and optometrists from competition from opticians. Justice Kennedy thus expresses confidence that rational basis style review in the context of eminent domain will succeed where other instances of rational basis review have often failed—that is, that it will provide courts with an effective tool with which to stop government actions intended to "favor a particular private party, with only incidental or pretextual public benefits." In the context of the Public Use Clause, states Justice Kennedy, courts can accomplish this by engaging in "meaningful" rational basis review: Faced with a "plausible accusation of impermissible favoritism," courts should take the allegations seriously and "review the record," albeit with the "presumption that the government's actions were reasonable and intended to serve a public purpose." Because in Justice Kennedy's assessment the trial court engaged in this type of respectful but not supine oversight, he agrees that the condemnations in *Kelo* survive constitutional challenge.

But Justice Kennedy's faith in the power of rational basis review—even in its brawnier "meaningful" incarnation—to rein in unconstitutional exercises of the eminent domain power is not absolute. While rejecting the idea that all condemnations justified on economic development grounds should be adjudged or presumed unlawful, Kennedy declines to rule out the possibility that a "more narrowly drawn category" of such takings might merit a "more stringent standard of review." A delineation of what would cause a condemnation of property to fall into this category, however, is left for another day, for Justice Kennedy refuses to engage in "conjecture as to what sort of cases might justify a more de-

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62 See J. M. Balkin, *The Footnote*, 83 Nw U L Rev 275, 315 n 96 (1989): "In *Williamson*, a case about the protection of vision, we witness the virtual elimination of vision (scrutiny). Not only does Justice Douglas [the author of *Williamson* as well as the nearly contemporaneous *Berman* decision] not scrutinize the statute closely, he deliberately looks the other way. He refuses to see what is obvious on the face of the statute—that this regulation was designed to favor ophthalmologists and optometrists over opticians, and in particular, to curtail the growth of cut-rate volume optical services in department stores."
63 Id at 2669 (Kennedy, J, concurring).
64 Id (Kennedy, J, concurring).
65 Id at 2670 (Kennedy, J, concurring).
manding standard." He does list four factors that persuaded him that rational basis style review sufficed in *Kelo*: the condemnations were accomplished pursuant to a comprehensive plan designed to alleviate a "serious city-wide depression"; the economic benefits of the project "cannot be characterized as de minimis"; at the time the comprehensive plan was crafted, it was not yet known who most of the private beneficiaries would be; and New London's compliance with "elaborate procedural requirements" that made easier judicial review of the city's motivations for the condemnations. These enumerated factors, however, raise more questions than they answer about when departure from the rational basis framework might be warranted. Justice Kennedy's discussion suggests he harbors profound anxieties about the prospect of private entities being singled out for overly harsh or generous governmental treatment. But lacking in his opinion is any algorithm for determining when the institutional structures that normally inhibit such abusive governmental conduct are likely to malfunction, thus justifying more intense judicial oversight. As with the majority opinion, Justice Kennedy's concurrence does not so much set out an alternative to the highly deferential approach as imply one might be forthcoming.

C. JUSTICE O'CONNOR'S DISSENT

Of all the opinion writers, Justice O'Connor, in whose dissent Rehnquist, Scalia, and Thomas joined, had the hardest task. O'Connor forthrightly admits that the "troubling result" in *Kelo* follows from what she terms "errant language" in *Berman* and *Midkiff.* As the author of *Midkiff,* Justice O'Connor is determined

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66 Id (Kennedy, J, concurring).

67 Kennedy's concurrence, like the majority opinion, interprets the failure to identify beneficiaries at the time of the adoption of the development plan as evidence that the motivations of the legislature were to promote the public interest, not to create opportunities for favored private entities to profit at the expense of others.

68 125 S Ct at 2670 (Kennedy, J, concurring).

69 Cf. *Eastern Enterprises v Apfel,* 524 US 498, 547-48 (1998) (Kennedy, J, concurring in the judgment and dissenting in part) (noting with approval that although the Court has "been hesitant to subject economic legislation to due process scrutiny as a general matter, the Court has given careful consideration to due process challenges to legislation with retroactive effects" in large part because of the "legislative 'temptation to use retroactive legislation as a means of retribution against unpopular groups or individuals."").

(Citations omitted.)

70 125 S Ct at 2675 (O'Connor, J, dissenting).
to distinguish its facts and articulate grounds on which the New London condemnations are unconstitutional, for she regards the majority opinion as nothing short of a disaster. By failing to lay out clear rules about what takings are permissible, she charges, the Court renders all private property subject to "being taken and transferred to another private owner, so long as it might be upgraded." After *Kelo*, "the specter of condemnation" will haunt every property owner, for nothing "is to prevent the State from replacing any Motel 6 with a Ritz-Carlton, any home with a shopping mall, or any farm with a factory." Those with the fewest resources, she predicts, will suffer most.

Justice O'Connor locates the grounds she seeks for differentiating the takings in *Kelo* in the concepts of harm and benefit. She notes that the Court's precedents have identified three categories of lawful takings, the first two of which she characterizes as "relatively straightforward and uncontroversial." The three categories are transfers to public ownership; transfers to private entities, including common carriers, that will permit members of the public to make actual use of the condemned property; and transfers to private entities in situations in which the use of the targeted property is causing societal harm. O'Connor asserts that in both *Midkiff* and *Berman* the "extraordinary, precondemnation use of the targeted property inflicted affirmative harm on society" and that because the takings in those cases "directly achieved a public benefit," the fact that the condemned properties were turned over to private holders is irrelevant. The "well-maintained" homes at issue in *Kelo* are different, argues O'Connor, in that no one can claim they are the "source of any social harm."

There are two problems with this attempt to distinguish *Kelo* from earlier cases. First, the uses of the properties condemned in *Berman* and *Midkiff* were harmful only in the sense that they were part of larger social problems of, respectively, urban blight and land oligopoly. But if the concept of "harm" is that broad, then it is hard to see why it does not also cover general economic distress, the

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[71] Id at 2671 (O'Connor, J, dissenting).
[72] Id at 2676 (O'Connor, J, dissenting).
[73] Id at 2673 (O'Connor, J, dissenting).
[74] Id at 2673–74 (O'Connor, J, dissenting).
[75] Id at 2674 (O'Connor, J, dissenting).
[76] Id at 2675 (O'Connor, J, dissenting).
situation that New London identified as motivation for the condemnations in *Kelo*. Second, the Court's public use precedents extend beyond *Berman* and *Midkiff*. O'Connor's dissent neglects to address them, possibly because the argument that the precondemnation uses of property in those cases were more harmful than the precondemnation uses of the New London homeowners is even harder to make than the analogous argument about the land uses in *Berman* and *Midkiff*. This omission underscores that O'Connor's taxonomy of lawful takings is in tension with the realities of the modern administrative state, with its regulatory schemes that entail reassignments of property rights in circumstances where it would be puzzling to characterize the original owner's use of the property as "harmful."

Most important, Justice O'Connor's harm/benefit framework fails to provide either the clear guidance she faults the majority opinion for omitting or much in the way of protection for the nonaffluent property owners she identifies as eminent domain's most likely victims. If concentrated land ownership in Hawaii counts as a harm to be remedied through eminent domain because it distorts the local real estate market, the category of harm is so large as to be close to useless for the purpose of restricting condemnations. And O'Connor and the other dissenters surely realize that many of the less prosperous individuals they worry about live in neighborhoods that meet almost any definition of "blight," and that a framework under which the condemnations in *Berman* are unproblematic is unlikely to shield them from displacement.

One other feature of Justice O'Connor's opinion bears mention. In labeling as "relatively straightforward and uncontroversial" condemnations for transfer to government entities or common carriers and the like, O'Connor implies that the only problematic condemnations—at least for purposes of the Public Use Clause—are those that result in transfers to private owners who will refuse the public access as of right. Yet Justice O'Connor's chief concern is that condemnations will enrich the already prosperous and influential at the expense of the poorer and less well connected, and it is clear that many of the condemnations she labels "uncontroversial" could have that precise effect. One need not own property in order to

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capture its benefits, and property acquisitions the government claims are in the general interest may instead further private interests.

Justice O'Connor's posture is particularly curious given the obvious possibility that the restrictions she advocates could lead to increased public ownership, as governments circumvent constitutional limitations by opting to retain title to condemned properties. The interpretation of the Public Use Clause O'Connor endorses, in short, could have the perverse consequence of increasing government involvement in redevelopment schemes. It is true that a practice of keeping condemned properties in public ownership can decrease the returns to private parties from lobbying governments for the chance to acquire property at favorable prices. But encouraging public ownership can introduce another variety of social cost, as government proprietors will often fail to manage properties as well as their counterparts in the private sector.

D. JUSTICE THOMAS'S DISSENT

Justice Thomas's separate dissent is the most poignant of the four opinions, for it goes into the greatest detail about those whose "skin was left on the sidewalk" by eminent domain programs. As he observes, over 97 percent of the thousands of people uprooted from their homes by the urban renewal projects undertaken by the District of Columbia Redevelopment Land Agency in the wake of the Berman decision were African-Americans, and similar programs in Baltimore and St. Paul demolished minority communities. Along with the other dissenter, Justice Thomas is convinced Kelo could portend similarly disastrous consequences for the least well off: "Allowing the government to take property solely for public purposes is bad enough, but extending the concept of public purpose to encompass any economically beneficial goal guarantees that these losses will fall disproportionately on poor communities. Those communities are not only systematically less likely to put their lands to the highest and best social use, but are also the least politically powerful."

In his search for limitations on the eminent domain power,

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78 See, e.g., Karen R. Merrill, Public Lands and Political Meaning: Ranchers, the Government, and the Property Between Them (2002) (describing the benefits that ranching interests have derived from publicly owned lands).

79 125 S Ct at 2686–87 (Thomas, J, dissenting).
Justice Thomas, not surprisingly, turns to constitutional text and history. Unfortunately for Thomas, there is not much material for him to work with. After consulting late-eighteenth-century dictionaries, analyzing the text of the Public Use Clause against the backdrop of other constitutional provisions, and surveying early American eminent domain practices, Justice Thomas concludes that the “most natural reading of the Clause is that it allows the government to take property only if the government owns, or the public has a right to use, the property,” as distinct from taking it for any plausible public purpose.80

Still, Thomas draws back from arguing that all exercises of the eminent domain power that do not meet these criteria are unconstitutional. Rather, he is willing to go only so far as to recommend that the Court “revisit” its eminent domain cases and “consider” returning to what he regards as the Fifth Amendment’s original meaning.81 Thomas does not explain whether or how his favored interpretation would protect those imperiled by eminent domain. It may be that whether property ends up in government ownership or is open to use by the public is a reliable—or at least, within the strictures of Thomas’s interpretive commitments, the best attainable—proxy for the threat a condemnation poses to the weak, but Thomas does not argue this. Nor does he explain why he is willing to sign onto Justice O’Connor’s dissent, with its conclusion that condemnations to alleviate “harms” such as “blight” are constitutional.

Whatever construction the Court puts on the term “public use,” maintains Justice Thomas, there is no justification for “affording almost insurmountable deference to legislative conclusions” about which uses are public.82 Courts do not accord similar obeisance to legislative judgments in other contexts involving constitutional rights, including determinations about when the police may carry out searches of homes. This discrepancy convinces Thomas that “something has gone seriously awry with this Court’s interpretation of the Constitution,” for “though citizens are safe from the government in their homes, the homes themselves are not.”83 Justice Thomas does not, however, provide any detail regarding what

80 Id at 2679 (Thomas, J, dissenting).
81 Id at 2686 (Thomas, J, dissenting).
82 Id at 2684 (Thomas, J, dissenting).
83 Id at 2685 (Thomas, J, dissenting).
sort of judicial oversight should replace the "almost insurmountable deference" approach he objects to so strongly.

III. The Political Response

For all that the opinions in *Kelo* both manifest and sow confusion about the meaning of "public use" and the role of the judiciary in securing property rights, these conceptual struggles may be unimportant if the boundaries of the eminent domain power are refined in the political arena. This seemed plausible in the immediate aftermath of *Kelo*, for within days of the decision it was clear that public opinion ran strongly against the outcome and that political actors were mobilizing in response. Indeed, Justice Stevens, in a widely reported speech in August 2005 defending the Court's ruling, expressed the belief that the clamor "that greeted *Kelo* is some evidence that the political process is up to the task of addressing" eminent domain issues.84

If Stevens is correct, that would be good news for the Supreme Court, battered from charges that its decision in *Kelo* amounts to an abdication of its institutional responsibilities. Political resolution of eminent domain controversies could recast the Court's opinion in *Kelo* as a prudent act of restraint that served as a catalyst for popular deliberation.85 In refusing to venture into a potential property rights quagmire, the argument might go, the Court recognized the limits of its own capacities and ensured that decisions about the limits of the eminent domain power would be made by the institutions best suited to grappling with the complex economic and moral issues involved. After all, the legislative and constitutional amendment processes are, at least in theory, highly responsive to and thus well equipped to balance the competing interests of a broad set of individuals and institutions. Moreover, the political process is, again in theory, better able to effect rapid reform. This is not to say that decisions by the Court cannot and

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84 Justice John Paul Stevens, Judicial Predilections, Address to the Clark County Bar Association (Aug 18, 2005).

85 Cf. Posner, 119 Harv L Rev at 98 (cited in note 60): "Paradoxically, the strong adverse public and legislative reactions to the *Kelo* decision are evidence of its pragmatic soundness. When the Court declines to invalidate an unpopular government power, it tosses the issue back into the democratic arena. The opponents of a broad interpretation of 'public use' now know that the Court will not give them the victory they seek. They will have to roll up their sleeves and fight the battle in Congress and state legislatures—where they may well succeed."
have not brought about radical transformations—the huge shifts in Contract, Commerce, and Due Process Clause doctrine in the first decade of the New Deal attest to that—but only that the methodology of constitutional interpretation tends to produce incremental rather than discontinuous change. If the current regime of eminent domain is seriously deficient—as the furor triggered by *Kelo* suggests it may be—then it seems reasonable to look to statutes and constitutional amendments for relief.

Nevertheless, there is reason for skepticism that the political sphere will satisfactorily resolve eminent domain controversies. For one thing, while the political process responds to popular concerns, it also responds to organized interest groups. Consequently, the same forces that lead to dubious eminent domain practices in the first place may impede efforts to curb them. If a significant portion of redevelopment schemes result from questionable dealings between government and business interests, as many are convinced could be the case, then there exist highly motivated and organized constituencies with a strong interest in maintaining the present system. Another reason to question the capacity of the political arena to settle eminent domain controversies is that much of whatever reform occurs will likely take place at the state and local level. Since it is highly improbable that all jurisdictions will be covered, then to the extent that the interests of property owners are insufficiently safeguarded under the present system, some portion of the population will be left without adequate security. This same concern holds with respect to suggestions that judicial interpretations of state constitutional provisions will provide a bulwark against abusive eminent domain practices.

An examination of the substance of the most prominent reform

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89 See, e.g., Posner, 119 Harv L Rev at 97 (cited in note 60) (concluding that while it is uncertain whether examples of "what appear to be foolish, wasteful, and exploitive redevelopment plans" are representative, it "would not be surprising to discover that redevelopment plans are for the most part unholy collusions between the real estate industry and local politicians").

90 See Broder, NY Times (cited in note 10).
proposals furnishes still more cause for doubt. Many of these proposals seek to restrict or prohibit condemnations for "economic development." Although definitions of "economic development" vary—indeed, it is sometimes left undefined—the term is generally understood to cover those property transfers from one private entity to another that are intended to increase tax revenue or employment or to promote economic growth rather than to eliminate some existing harm. In essence, these proposals attempt to codify some of the restrictions on eminent domain urged in Justice O'Connor's dissent. As such, they suffer from the same defects as the O'Connor opinion, and threaten to frustrate a number of socially useful exercises of the condemnation power while offering only incomplete protection against its dangers. Restricting the government's power to reallocate property among private entities can impair its ability to regulate commerce and industry. While it is incontrovertible that not all such reconfigurations of property rights will promote the general welfare, the social costs of erring too far on the side of interdiction can be high. In addition, restrictions on transfers to private firms can inhibit the formation of public-private partnerships to carry out innovative land use planning, thus encouraging governments to undertake projects designed to promote economic growth themselves instead of drawing on the expertise of the private sector. The focus on transfers to private firms has the additional drawback of providing no measure of protection for those whose property is taken for transfer to government or common carriers and the like.

It is also important to recognize that forbidding condemnations for "economic development" will not relieve the judiciary of any obligation to police the boundaries of the eminent domain power. "Economic development" is not a self-executing concept, but one that will require substantial judicial interpretation. Inevitably, judges will be called on to decide whether a particular project involving condemnations serves some higher public purpose or is simply an "economic development" project motivated "only" by the desire to increase overall wealth. Should widespread restrictions on eminent domain for "economic development" be adopted,

91 Id.
93 See discussion in Part II.C.
continual judicial scrutiny of condemnations will be necessary.

Other widely heralded reforms are also likely to prove of limited value. Two in particular merit discussion: changing eminent domain procedures to provide for more and better process, including increased public participation, and granting condemnees who suffer consequential damages and subjective losses compensation in excess of the constitutionally mandated "fair market value." These measures have garnered the endorsement of several prominent organizations, including the American Planning Association. 

Both process and compensation reforms are justified on the grounds that they will raise the costs associated with eminent domain, thereby encouraging governments to negotiate with property owners rather than condemn. Increased process is said to have the additional benefit of furnishing useful information to decision makers, especially about the magnitude and intensity of opposition to proposed exercises of eminent domain.

With respect to process reforms, it is hard to argue with the proposition that many eminent domain procedures are antiquated and could stand improvement. It is important to recognize, though, that many highly controversial exercises of eminent domain—including the one in New London—had no dearth of process, and that there is no clear reason to believe that improved process will yield benefits that justify the costs of reform. As for providing greater compensation, unless the total amount proffered equals or exceeds the price at which an owner becomes a willing seller, it is unlikely that those who lose their property will be satisfied with the outcome. That figure is, of course, known only to the owner and hard—in fact, in some instances impossible—for a third party to determine absent a consensual transaction. The formidable difficulties inherent in the valuation of property, particularly property with hard to measure attributes, mean that even under a supercompensatory regime many owners of condemned properties will believe themselves inadequately compensated. At the same time, if the amounts paid out exceed the prices that property holders would require to consummate voluntary sales, then another problem


95 See Merrill (cited in note 8) (observing that "as an administrative law professor I am struck by how outdated eminent domain processes appear to be... Eminent domain procedures were developed in the nineteenth century, and have scarcely been modified since").

will surface: Owners will have incentives to devote resources to trying to get their properties condemned.97 In short, compensation reforms are unlikely to provide a satisfactory solution, but instead to lead to overcompensation in some instances while failing to quell controversy in others.

IV. Judicial Protection of Property Rights

Should the political process fail to defuse public anger over condemnations, there will likely continue to be pressure on the Court to subject exercises of eminent domain power to meaningful judicial review. The Court may well accede to this pressure, for if history is any guide it will be responsive to the popular will.98 Such a development could be a positive one. For although judges may not have superior capabilities when it comes to making complicated assessments of economic and moral issues, the imposition of multiple vetoes over condemnations of property can serve as a powerful deterrent to socially undesirable behavior.

A. THE BENEFITS OF MULTIPLE VETEOS

Defenders of judicial deference to determinations of what constitutes “public use” often bolster their position by arguing that courts are less skilled than legislatures, agencies, and private entities that exercise eminent domain powers at figuring out whether transfers of property rights will produce social benefits. Indeed, in its eminent domain jurisprudence the Court has sounded this theme on a number of occasions. The comparative incompetence of judges, or so the argument goes, means that courts should shrink from second-guessing decisions to condemn properties for purported public uses. In support of this claim, many proponents point to the doctrinal confusion that sometimes reigned in the nineteenth and early twentieth centuries, when courts on occasion engaged in protracted inquiries into the precise meaning of “public use.” As Thomas W. Merrill puts it, history suggests that “lawyers and judges are not particularly good at anticipating the ways in

98 See Michael J. Klarman, From Jim Crow to Civil Rights: The Supreme Court and the Struggle for Racial Equality 449 (2004) (“Constitutional law generally has sufficient flexibility to accommodate dominant public opinion, which the justices have little inclination, and limited power, to resist”). See also Barry Friedman, The Politics of Judicial Review, 84 Tex L Rev 257 (2005).
which reconfigurations of ownership rights may produce significant public benefits," nor do they excel at "articulating abstractions that will capture a high percentage of the situations in which reconfiguration would be desirable."^99

What this argument fails to recognize is that judicial oversight can add value even if judges have inferior ability to calculate the social costs and benefits of eminent domain. This is because the existence of multiple veto points in rearranging property rights addresses what Barry Weingast has characterized as "the fundamental political dilemma of an economic system."^100 Governments that are strong enough to create property rights are also capable of expropriating the wealth of their citizenry.\(^{101}\) Thus a well functioning society requires not just the establishment of property rights and an adequate law of contracts, but also a secure political foundation that restricts the state’s capacity to alter these rights and legal regimes.\(^{102}\) One way in which constitutions restrict public interference with private rights is to establish multiple veto points by requiring multiple actors within the government to agree before the government can act.

In the context of property condemnations, the mere fact that there is some probability that a taking will be enjoined will make eminent domain a less promising prospect for extracting wealth through influencing the government. As a result, would-be beneficiaries of eminent domain will have incentives to devote their resources to activities other than lobbying governments to condemn the property of others. In turn, the knowledge that their property rights are secured by more than one branch of the government will spur property owners to devote more resources to investment and innovation, instead of monitoring the political process and seeking to protect themselves.\(^{103}\) This knowledge will also

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^99 Merrill (cited in note 8).


^101 Id.

^102 Id.

make property owners feel less vulnerable to dislocations and more in control of their destinies.

Whether judges are skilled at distinguishing reconfigurations of property rights that increase overall welfare from those that decrease it, in sum, may be of secondary importance. What matters is not that their doctrinal formulations invariably separate the socially beneficial from the socially harmful, but that judicial involvement increases the number of government actors who have to agree in order for rearrangements of property rights to occur. In short, one cannot justify putting the scope of eminent domain into the hands of the other branches merely by arguing that they have an advantage over courts in making determinations about the merits of proposed condemnations.

B. THE MERITS OF JUDICIAL OVERSIGHT

By telling property owners to look almost wholly to the non-judicial branches for limitations on eminent domain, the near total deference standard protected only against the most obvious and egregious abuses. As a result, judicial review of condemnations provided little protection, and the potential benefits of judicial involvement went unrealized. By contrast, the sort of oversight hinted at in the *Kelo* majority opinion—and espoused more explicitly in Kennedy’s concurrence—promises to invalidate a larger set of condemnations. Taken together, the majority opinion and the concurrence can be read as signaling a willingness to enjoin condemnations in situations where there is convincing evidence of government favoritism or animus, or where there is no plausible claim that the overall public interest is being served. If that is correct, then the legacy of *Kelo* may be to lay the foundation for the adoption of a form of genuine rational basis review—as distinct from the Potemkin rational basis scrutiny typified by *Midkiff*—of exercises of the eminent domain power, with perhaps even the prospect of more searching review in selected instances.

Such an approach could have significant benefits. It would prevent some, although admittedly not all, condemnations that stem from questionable relationships between government and business. It might even stop some eminent domain practices that are well intentioned but ill-advised and cruelly disruptive, as was the case with many of the urban renewal programs of the 1950s and 1960s. The strongest argument for this approach, however, is one
of elimination, for none of the alternatives is as attractive. The near abdication of judicial oversight contained in *Berman* and *Mid-kiff* is all but unthinkable in the wake of the public response to *Kelo*, and in any event every Justice has rejected it outright or retreated from it. The approaches of both *Kelo* dissents threaten to frustrate legitimate government aims while failing to protect the vulnerable. And varieties of heightened scrutiny have the drawback of asking courts to engage in the sorts of cost-benefit and moral analysis normally left to the other branches.

V. Conclusion

In retrospect, the Court’s decision to apply near total deference to legislative and agency determinations of “public use” was a risky move. After decades of insisting that judicial oversight was for all practical purposes unnecessary for guaranteeing the adequate security of property rights, the Court found itself with little room to maneuver in the face of burgeoning public ire regarding condemnation practices. When confronted with *Kelo*, with its obvious implications for the property rights of millions of Americans, all the Justices retreated from the near total deference model. But the sweeping character of the Court’s own precedents, together with the formidable challenge of reining in eminent domain’s excesses without quashing its benefits, hampered their ability to devise alternatives.

The result was a majority opinion that suggests that courts examine carefully the circumstances of condemnations while failing to provide guidance on how this inquiry should proceed. The concurrence by Justice Kennedy is more explicit in its vision of a substantial judicial role for preventing condemnations designed to promote private interests rather than the public welfare, expressing confidence that the rational basis standard will provide a vigorous check in most situations and leaving open the possibility of more stringent review for particularly suspicious transactions. But as with the majority opinion, the concurrence offers little in the way of analysis regarding under what circumstances and in what ways eminent domain abuses are likely to occur, thus creating a need for judicial oversight. Not surprisingly, these efforts were insufficient to stem public fury at the Court’s perceived failure to vindicate its role of defender of constitutional rights.

These failures may not matter if the uproar over *Kelo* leads to
a quick resolution in the political arena. But although predictions are of course fallible, it is hard to imagine that political fixes will dissipate the controversy over eminent domain anytime soon. This means the Court may again be called upon to confront questions about the meaning of public use and the role of the judiciary in securing property rights. Indeed, given the public reaction to *Kelo*, the Court may welcome the opportunity. If it does so, it will be confronted with the task that it so studiously avoided in *Kelo*, namely, to begin the work of constructing an alternative to the near total deference framework that it embraced so fully and declined to reexamine for so long.