

HB

318

SENATE COMMITTEE REPORT

DATE: 2/22/06

FURTHER: Finance

DATE TURNED
IN TO OFFICE: _____

Judiciary Committee considered CS FOR HOUSE BILL NO. 318(FIN) am

HB 318 LIMITATION ON EMINENT DOMAIN

"An Act limiting the exercise of eminent domain."

and recommends:

- be replaced with _____ CS _____ (_____)
- adopt previous _____ CS _____ (_____)
- attached amendment(s)
- adopt Letter of Intent by _____ Committee
- further referral to _____ Committee

CS Senate Bill:
 Same Title
 New Title

SCS House Bill:
 Same Title
 Technical Title Change
 New Title w/ SCR # _____

NEW FISCAL NC E(S):

Department	Date	Fiscal	Indet.	Zero	FN#

PREVIOUS FISCAL NOTE(S):

Department	Date	Fiscal	Indet.	Zero	FN#

APPROPRIATION - no fiscal note

SIGNATURES AND RECOMMENDATIONS:	Do PASS	Do NOT PASS	NO REC	AMEND
<i>[Signature]</i>			X	
<i>[Signature]</i>				X
<i>[Signature]</i>			X	
<i>[Signature]</i>				X
CHAIR: <i>[Signature]</i>			✓	

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LEGISLATIVE AFFAIRS AGENCY
STATE OF ALASKA

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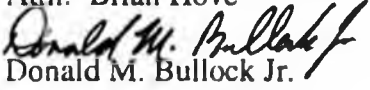
State Capitol
Juneau, Alaska 99801-1182
Deliveries to: 129 6th St., Rm. 329

MEMORANDUM

April 7, 2006

SUBJECT: Amendment nos. 1 and 6 (SCS CSHB 318(JUD), Work Order No. 24-LS1083\C)

TO: Senator Ralph Seekins
Chair of the Senate Judiciary Committee
Attn: Brian Hove

FROM: 
Donald M. Bullock Jr.
Legislative Counsel

Enclosed is a draft version of SCS CSHB 318(JUD) that includes the amendments you submitted with your request. Please review this draft carefully to ensure that it is consistent with the committee's intent.

Please look at amendments #1 and #6. Amendment #1 changed the language on page 4, line 9, of CSHB 318(FIN) am, and amendment #6 deleted page 4, line 9.

The enclosed draft of the bill includes amendment #6 and not amendment #1 because amendment #6 was adopted subsequent to amendment #1. Both amendments relate to legislative action providing for additional exceptions to the limitations on the power of eminent domain. The amendments differ in that amendment #1 only provides an additional exception to the six exceptions in AS 09.55.240(d) and amendment #6 allows for a legislative exception to AS 09.55.240(d) and AS 09.55.240(e).

Also, be aware that an Act providing for the transfer of property under AS 09.55.240(f) as added by amendment #6 may be subject to challenge as a local or special act prohibited under art. II, sec. 19, Constitution of the State of Alaska. An Act pursuant to AS 09.55.240(d)(7) in sec. 3 of CSHB 318(FIN) am, if enacted, may be subject to a similar challenge.

If I may be of further assistance, please advise.

DMB:med
06-287.med

Enclosure

24-LS1083C
Bullock
4/6/06

SENATE CS FOR CS FOR HOUSE BILL NO. 318(JUD)
IN THE LEGISLATURE OF THE STATE OF ALASKA
TWENTY-FOURTH LEGISLATURE - SECOND SESSION

BY THE SENATE JUDICIARY COMMITTEE

Offered:
Referred:

Sponsor(s): REPRESENTATIVES MCGUIRE, HOLM AND HAWKER, Stoltze, Gatto, Wilson, Kohring, LeDoux, Dahlstrom, Kelly, Anderson, Olson, Lynn, Elkins, Foster, Kapsner, Samuels, Ramras, Meyer, Seaton, Rokeberg

A BILL

FOR AN ACT ENTITLED

1 "An Act limiting the exercise of eminent domain."

2 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

3 * Section 1. The uncodified law of the State of Alaska is amended by adding a new section
4 to read:

5 LEGISLATIVE INTENT AND FINDINGS. (a) The legislature finds that

6 (1) the United States Supreme Court decision in Kelo v. City of New London,
7 545 U.S. ___, 125 S.Ct. 2655, 162 L. Ed. 2d 439 (2005) demonstrates that an overly
8 expansive application of eminent domain powers can be a threat to the property rights of all
9 private property owners;

10 (2) it is necessary to provide clarification regarding the exercise of eminent
11 domain in the following two situations:

12 (A) the taking of private property if the purpose is to transfer the
13 property to another private person for economic development;

14 (B) the taking of a landowner's personal residence to develop an indoor
15 or outdoor recreational facility or project.

1 (b) In recognizing that many public projects will have economic effects, the
2 legislature intends by this Act not to

3 (1) restrict those public uses already recognized in state law merely because
4 the project may have an associated economic effect; or

5 (2) provide an absolute bar on transfers of land to private entities, but to place
6 restrictions on when such transfers occur.

7 (c) In this section, "economic development" means development of property for a
8 commercial enterprise carried on for profit or to increase tax revenue, tax base, or
9 employment.

10 * Sec. 2. AS 09.55.240(a) is amended to read:

11 (a) Except as provided in (d) and (e) of this section, the [THE] right of
12 eminent domain may be exercised for the following public uses:

13 (1) all public uses authorized by the government of the United States;

14 (2) public buildings and grounds for the use of the state and all other
15 public uses authorized by the legislature of the state;

16 (3) public buildings and grounds for the use of an organized or
17 unorganized borough, city, town, village, school district, or other municipal division,
18 whether incorporated or unincorporated; canals, aqueducts, flumes, ditches, or pipes
19 conducting water, heat, or gas for the use of the inhabitants of an organized or
20 unorganized borough, city, town, or other municipal division, whether incorporated or
21 unincorporated; raising the banks of streams, removing obstructions from them, and
22 widening, deepening, or straightening their channels; and roads, streets, and alleys,
23 and all other public uses for the benefit of an organized or unorganized borough, city,
24 town, or other municipal division whether incorporated or unincorporated, or its
25 inhabitants, which may be authorized by the legislature;

26 (4) wharves, docks, piers, chutes, booms, ferries, bridges of all kinds,
27 private roads, plant and turnpike roads, railroads, canals, ditches, flumes, aqueducts,
28 and pipes for public transportation, supplying mines and farming neighborhoods with
29 water, and draining and reclaiming land, and for floating logs and lumber on streams
30 not navigable, and sites for reservoirs necessary for collecting and storing water;

31 (5) roads, tunnels, ditches, flumes, pipes, and dumping places for

1 working mines; also outlets, natural or otherwise, for the flow, deposit, or conduct of
 2 tailings or refuse matter from mines; also an occupancy in common by the owners or
 3 possessors of different mines of any place for the flow, deposit, or conduct of tailings
 4 or refuse matter from their several mines, and sites for reservoirs necessary for
 5 collecting and storing water;

6 (6) private roads leading from highways to residences, mines, or farms;

7 (7) telephone lines;

8 (8) fiberoptic lines;

9 (9) [(8)] telegraph lines;

10 (10) [(9)] sewerage of an organized or unorganized borough, city,
 11 town, village, or other municipal division, whether incorporated or unincorporated, or
 12 a subdivision of it, or of a settlement consisting of not less than 10 families, or of
 13 public buildings belonging to the state or to a college or university;

14 (11) [(10)] tramway lines;

15 (12) [(11)] electric power lines;

16 (13) [(12)] for the location of pipelines for gathering, transmitting,
 17 transporting, storing, or delivering natural or artificial gas or oil or any liquid or
 18 gaseous hydrocarbons, including, but not limited to, pumping stations, terminals,
 19 storage tanks, or reservoirs, and related installations.

20 * Sec. 3. AS 09.55.240 is amended by adding new subsections to read:

21 (d) The power of eminent domain may not be exercised to acquire private
 22 property from a private person for the purpose of transferring title to the property to
 23 another private person for economic development purposes. This subsection does not
 24 apply to transfers of private property to another private person if one or more of the
 25 following apply:

26 (1) the landowner consents, either before or after a condemnation
 27 proceeding has been filed, to the use of the property for a private commercial
 28 enterprise or other economic development;

29 (2) the private person has been expressly authorized by statute either to
 30 exercise the power of eminent domain, or to receive an interest in land acquired by the
 31 exercise of eminent domain;

1 (3) the transferred property is used for a private way of necessity to
2 permit essential access for extraction or use of resources;

3 (4) the acquisition is used, in part, for leasing property to a private
4 person that occupies a portion of public property or a public facility, including a
5 private business that occupies a portion of an airport, port, or public building;

6 (5) the property is transferred to a person by oil and gas lease under
7 AS 38.05.180;

8 (6) the property is transferred to a common carrier.

9 (e) The power of eminent domain may not be exercised for the purpose of
10 developing a recreational facility or project if the property to be acquired includes an
11 individual landowner's personal residence or that portion of an individual's property
12 attached to and within 250 linear feet of an individual landowner's personal residence
13 unless the landowner consents either before or after a condemnation proceeding has
14 been filed.

15 (f) Notwithstanding the limitations on the power of eminent domain in (d) and
16 (e) of this section, the legislature may approve the exercise of eminent domain against
17 private property in an Act, the subject of which is limited to the transfer of the
18 property for a purpose otherwise restricted under (d) or (e) of this section.

19 (g) The power of eminent domain may only be delegated by statute.

20 (h) In this section,

21 (1) "common carrier" has the meaning given in AS 04.16.125;

22 (2) "economic development" means development of property for a
23 commercial enterprise carried on for profit or to increase tax revenue, tax base, or
24 employment;

25 (3) "personal residence" means a structure that is the dwelling place of
26 an individual that

27 (A) must be used by the owner, prior owner, or beneficiary of a
28 trust holding legal title to the structure as a dwelling unit, as opposed to a
29 rental, storage, or other commercial space;

30 (B) must be inhabited by the owner, prior owner, or beneficiary
31 of a trust holding legal title to the structure for at least 90 days during the 12-

1 month period immediately before the date an action for the exercise of the
2 power of eminent domain is filed;

3 (C) must constitute an ordinary home for general living
4 purposes, as opposed to a dwelling used only for seasonal recreational or
5 temporary purposes; and

6 (D) may not have been constructed, placed, or occupied for the
7 purpose of avoiding eminent domain proceedings;

8 (4) "private person" means a person that is not a public corporation as
9 defined in AS 45.77.020 or a government as defined in AS 11.81.900;

10 (5) "recreational facility or project"

11 (A) means a facility or project, the primary purpose of which is
12 recreational;

13 (B) includes a park, trail or pedestrian pathway, greenbelt,
14 amusement park, fresh water boat harbor, sports facility, playground,
15 infrastructure, or other facility related to or in support of an indoor or outdoor
16 recreational facility or project;

17 (C) does not include

18 (i) a highway, sidewalk, or path within the right-of-way
19 of a highway;

20 (ii) a path, trail, or lane used as a safe route to a school
21 program;

22 (iii) a wayside or rest stop;

23 (iv) a development, the primary purpose of which is not
24 recreational, such as a path, trail, or lane developed to reduce
25 congestion, or to encourage use of an alternate, gas-saving mode of
26 transportation;

27 (v) a path or trail to or between villages or from a
28 village to a facility or resource;

29 (vi) a stormwater retention or treatment facility or
30 wetland, habitat, or other acquisition required to obtain a permit for a
31 highway, airport, or other public project;

1 (vii) a taking under AS 19.05.110, 19.05.120,
2 AS 19.22.020, AS 27.21.300, AS 35.20.040, 35.20.050, or
3 AS 41.35.060;

4 (viii) a taking not prohibited by law before January 1,
5 2007, under AS 41.21; and

6 (ix) a path, trail, road, or site for which no reasonable
7 alternative exists and which is necessary to preserve or establish public
8 access to or along publicly owned land or water, if the use of the path,
9 trail, road, or site itself is for transportation to or to facilitate use of
10 publicly owned land or water.

11 * Sec. 4. AS 29.35.030(a) is amended to read:

12 (a) Except as provided in (c) of this section, a [A] municipality may, only
13 within its boundaries, exercise the powers of eminent domain and declaration of taking
14 in the performance of a power or function of the municipality under the procedures set
15 out in AS 09.55.250 - 09.55.460. In the case of a second class city, the exercise of the
16 power of eminent domain or declaration of taking must be by ordinance that is
17 submitted to the voters at the next general election or at a special election called for
18 that purpose. A majority of the votes on the question is required for approval of the
19 ordinance.

20 * Sec. 5. AS 29.35.030 is amended by adding new subsections to read:

21 (c) The power of eminent domain may not be exercised to acquire private
22 property from a private person for the purpose of transferring title to the property to
23 another private person for economic development, except as provided by
24 AS 09.55.240(d)(1) - (6), and may not be exercised for purposes expressed in
25 AS 09.55.240(e). However, a municipality may exercise the power of eminent domain
26 to acquire private property from a private person for the purpose of transferring title to
27 the property to another private person for economic development if

28 (1) the municipality does not delegate the power of eminent domain to
29 another person;

30 (2) before issuing the notice in (3) of this subsection, the municipality
31 makes a good faith effort to negotiate the purchase of the property;

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(3) written notice is provided at least 90 days before the public hearing to each owner of land that may be affected by the exercise of eminent domain;

(4) the municipality holds a public hearing on the exercise of eminent domain after adequate public notice;

(5) the governing body of the municipality approves the exercise of eminent domain by a two-thirds majority vote; and

(6) in the case of a second class city, the governing body of the city adopts an ordinance by a two-thirds majority vote, the ordinance is submitted to the voters for approval at the next general election or at a special election called for that purpose, and the exercise of eminent domain is approved by a majority of the votes on the question.

(d) In this section,

(1) "economic development" has the meaning given in AS 09.55.240;

(2) "private person" has the meaning given in AS 09.55.240.

* Sec. 6. The uncodified law of the State of Alaska is amended by adding a new section to read:

APPLICABILITY. This Act applies only to condemnation actions filed on or after the effective date of this Act.

AMENDMENT #1

OFFERED IN THE HOUSE

TO: CS HB 318(FIN) am

- 1 Page 4, line 9:
- 2 Delete "by law"
- 3 Following "transfer":
- 4 Insert "in an Act, the subject of which is limited to the transfer"

AMENDMENT #2

OFFERED IN THE SENATE
TO: CSHB 318(FIN) am

W.D.

- 1 Page 5, line 8:
- 2 Delete "small boat harbor,"

AMENDMENT

#3

ADOPT

OFFERED IN THE SENATE

TO: CSHB 318(FIN) am

- 1 Page 6, line 4:
- 2 Delete "rather than primarily for recreation"

AMENDMENT #4

ADOPT

Researched

OFFERED IN THE SENATE
TO: CSHB 318(FIN) am

1 Page 6, line 19, following "AS 09.55.240(e).":

2 Insert "However, a municipality may exercise the power of eminent domain to acquire
3 private property from a private person for the purpose of transferring title to the property to
4 another private person for economic development and for the purposes expressed in
5 AS 09.55.240(e) if

6 (1) the municipality does not ^{delegat} delegate the power of eminent domain to
7 another person;

8 (2) before issuing the notice in (3) of this subsection, the municipality
9 makes a good faith effort to negotiate the purchase of the property;

10 (3) written notice ^{is} provided at least 90 days before the hearing to
11 each owner of land that may be affected by the exercise of eminent domain;

12 (4) the municipality holds a hearing on the exercise of eminent domain
13 after adequate public notice;

14 (5) the governing body of the municipality approves the exercise of
15 eminent domain by a two-thirds majority vote; and

16 (6) in the case of a second class city, an ordinance is adopted, ^{the}
17 ordinance is submitted to the voters for approval at the next general election or at a
18 special election called for that purpose, and the exercise of eminent domain is
19 approved by a majority of the votes on the question."

in a 2/3 vote
Bethel

AMENDMENT

#5

ADOPT Rescind

OFFERED IN THE SENATE

TO: CSHB 318(FIN) am

- 1 Page 4, following line 15:
- 2 Insert a new subsection to read:
- 3 "(f) Only the state may delegate the power of eminent domain."
- 4
- 5 Reletter the following subsection accordingly.

AMENDMENT

#6

OFFERED IN THE SENATE

TO: CSHB 318(FIN) am

ADOPTED

- 1 Page 4, line 8:
- 2 Delete ";"
- 3 Insert "."
- 4
- 5 Page 4, line 9:
- 6 Delete all material.
- 7
- 8 Page 4, following line 15:
- 9 Insert a new subsection to read:
- 10 "(f) Notwithstanding the limitations on the power of eminent domain in (d)
- 11 and (e) of this section, the legislature may approve the exercise of eminent domain
- 12 against private property in an Act, the subject of which is limited to the transfer of the
- 13 property for a purpose otherwise restricted under (d) or (e) of this section."
- 14
- 15 Reletter the following subsection accordingly.

AMENDMENT

7
ADDED

OFFERED IN THE SENATE

TO: CSHB 318(FIN) am

- 1 Page 3, line 8:
- 2 Delete "fiberoptic lines;"
- 3 Insert "fiberoptic lines;"

AMENDMENT

#8

OFFERED IN THE SENATE

TO: CSHB 318(FIN) am

1 Page 4, line 23, following "owner":

2 Insert ", or by the beneficiary of a trust holding legal title to the structure,"

3

4 Page 4, line 25, following "owner":

5 Insert ", prior owner, or beneficiary of a trust holding legal title to the structure"

AMENDMENT

#9

OFFERED IN THE SENATE
TO: CSHB 318(FIN) am

- 1 Page 5, line 8:
- 2 Delete "small"
- 3 Insert "fresh water"

LEGAL SERVICES

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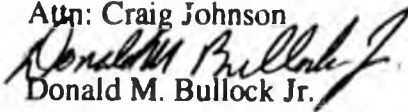
State Capitol
Juneau, Alaska 99801-1182
Deliveries to: 129 6th St., Rm. 329

MEMORANDUM

April 5, 2006

SUBJECT: Replacement amendment for amendments 4, 5, and 6
(CSHB 318(FIN) am, Work Order No. 24-LS1083\XA.21)

TO: Representative Lesil McGuire
Attn: Craig Johnson

FROM: 
Donald M. Bullock Jr.
Legislative Counsel

Enclosed is an amendment that makes changes to amendments 4, 5, and 6 that were adopted by the Senate Judiciary Committee on April 4, 2006.

You should discuss the possibility of the committee rescinding its action on the adoption of amendments 4, 5, and 6 and then consider the adoption of the enclosed amendment that incorporates those three amendments with the changes you submitted to me today.

If I may be of further assistance, please advise.

DMB:lmb
06-129.lmb

Enclosure

LEGAL SERVICES

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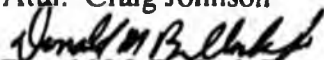
State Capitol
Juneau, Alaska 99801-1182
Deliveries to: 129 6th St., Rm. 329

MEMORANDUM

April 5, 2006

SUBJECT: Changing "personal residence" to "privately owned residence"
(CSHB 318(FIN) am, Work Order No. 24-LS1083XA.16)

TO: Representative Lesil McGuire
Attn: Craig Johnson

FROM: 
Donald M. Bullock Jr.
Legislative Counsel

Enclosed is an amendment to change "personal residence" to "privately owned residence" in sec. 1 of the above referenced bill.

Please note that "personal residence" appears three times on page 4 of the bill, on lines 12, 13, and 21. If you want an amendment to change "personal residence" to "privately owned residence" to match the term used in the legislative intent and findings section of the bill, please let me know. Also, if you wish to make the changes on page 4, please provide the definition you would like for "privately owned residence" to replace the definition of "personal residence" on page 4, line 21, through page 5, line 1.

DMB:med
06-280.med

Enclosure

Brian Hove

From: Cindy Smith
Sent: Wednesday, April 05, 2006 5:42 PM
To: Brian Hove
Subject: amendment XA.21

Just FYI, amendment XA.21 has dropped two provisions from the language of amendments as they were adopted; first, the separate statute language that Senator Guess had moved; second, the amendment has deleted the reference to the "recreation" provisions as it applies to the municipal processes.

Cindy Smith
Office of Senator Hollis French
(907)465-3892
www.akdemocrats.org

AMENDMENT

OFFERED IN THE SENATE

TO: CSHB 318(FIN) am

1 Page 4, line 8:

2 Delete ";

3 Insert ".

4

5 Page 4, line 9:

6 Delete all material.

7

8 Page 4, following line 15:

9 Insert new subsections to read:

10 "(f) Notwithstanding the limitations on the power of eminent domain in (d)
11 and (e) of this section, the legislature may approve the exercise of eminent domain by
12 law.

13 (g) The power of eminent domain may only be delegated by statute."
14

15 Reletter the following subsections accordingly.

16

17 Page 6, line 19, following "AS 09.55.240(e).":

18 Insert "However, a municipality may exercise the power of eminent domain to acquire
19 private property from a private person for the purpose of transferring title to the property to
20 another private person for economic development if

21 (1) the municipality does not delegate the power of eminent domain to
22 another person;

23 (2) before issuing the notice in (3) of this subsection, the municipality



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makes a good faith effort to negotiate the purchase of the property;

Public

(3) written notice is provided at least 90 days before ~~the~~ hearing to each owner of land that may be affected by the exercise of eminent domain;

(4) the municipality holds a public hearing on the exercise of eminent domain after adequate public notice;

(5) the governing body of the municipality approves the exercise of eminent domain by a two-thirds majority vote; and

(6) in the case of a second class city, the governing body of the city adopts an ordinance by a two-thirds majority vote, the ordinance is submitted to the voters for approval at the next general election or at a special election called for that purpose, and the exercise of eminent domain is approved by a majority of the votes on the question."

Summary of Entities With Eminent Domain Power

The following entities have been granted the power of eminent domain:

(1) Electrical or Telephone Cooperatives (AS 10.25.010); (2) Alaska Housing Finance Corporation (AS 18.55.100; AS 18.55.440; AS 18.55.520; AS 18.55.550); (3) regional electrical authorities (AS 18.57.040); (4) Department of Transportation and Public Facilities (AS 02.15.070; AS 19.05.040; AS 19.05.080; AS 19.05.110; AS 19.20.040; AS 19.22.020; AS 19.25.140; AS 19.27.050; AS 35.05.040; AS 35.20.010; AS 35.20.040; AS 44.42.020); (5) Knik Arm Bridge and Toll Authority (AS 19.75.111); (6) Municipalities (AS 29.35.030); (7) Department of Natural Resources (AS 27.21.300; AS 38.05.035(a)(2); AS 38.35.015; AS 38.35.130; AS 41.35.060); (8) Port Authorities (AS 29.35.620); (9) Alaska Natural Gas Development Authority (AS 41.41.200); (10) public utilities (AS 42.05.631); (11) the Alaska Railroad Corporation (AS 42.40.385); (12) Joint Action Agencies (AS 42.45.310); (13) Governor's Office Emergency Powers (AS 26.20.040).

1 (3) the transferred property is used for a private way of necessity to
2 permit essential access for extraction or use of resources;

3 (4) the acquisition is used, in part, for leasing property to a private
4 person that occupies a portion of public property or a public facility, including a
5 private business that occupies a portion of an airport, port, or public building;

6 (5) the property is transferred to a person by oil and gas lease under
7 AS 38.05.180;

8 (6) the property is transferred to a common carrier;

9 (7) the legislature has approved by law the transfer of the property.

10 (e) The power of eminent domain may not be exercised for the purpose of
11 developing a recreational facility or project if the property to be acquired includes an
12 individual landowner's personal residence or that portion of an individual's property
13 attached to and within 250 linear feet of an individual landowner's personal residence
14 unless the landowner consents either before or after a condemnation proceeding has
15 been filed.

16 (f) In this section,

17 (1) "common carrier" has the meaning given in AS 04.16.125;

18 (2) "economic development" means development of property for a
19 commercial enterprise carried on for profit or to increase tax revenue, tax base, or
20 employment;

21 (3) "personal residence" means a structure that is the dwelling place of
22 an individual that

23 (A) must be used by the owner as a dwelling unit, as opposed
24 to a rental, storage, or other commercial space;

25 (B) must be inhabited by the owner for at least 90 days during
26 the 12-month period immediately before the date an action for the exercise of
27 the power of eminent domain is filed;

28 (C) must constitute an ordinary home for general living
29 purposes, as opposed to a dwelling used only for seasonal recreational or
30 temporary purposes; and

31 (D) may not have been constructed, placed, or occupied for the

1 purpose of avoiding eminent domain proceedings;

2 (4) "private person" means a person that is not a public corporation as
3 defined in AS 45.77.020 or a government as defined in AS 11.81.900;

4 (5) "recreational facility or project"

5 (A) means a facility or project, the primary purpose of which is
6 recreational;

7 (B) includes a park, trail or pedestrian pathway, greenbelt,
8 amusement park, small boat harbor, sports facility, playground, infrastructure,
9 or other facility related to or in support of an indoor or outdoor recreational
10 facility or project;

11 (C) does not include

12 (i) a highway, sidewalk, or path within the right-of-way
13 of a highway;

14 (ii) a path, trail, or lane used as a safe route to a school
15 program;

16 (iii) a wayside or rest stop;

17 (iv) a development, the primary purpose of which is not
18 recreational, such as a path, trail, or lane developed to reduce
19 congestion, or to encourage use of an alternate, gas-saving mode of
20 transportation;

21 (v) a path or trail to or between villages or from a
22 village to a facility or resource;

23 (vi) a stormwater retention or treatment facility or
24 wetland, habitat, or other acquisition required to obtain a permit for a
25 highway, airport, or other public project;

26 (vii) a taking under AS 19.05.110, 19.05.120;
27 AS 19.22.020; AS 27.21.300; AS 35.20.040, 35.20.050; or
28 AS 41.35.060;

29 (viii) a taking not prohibited by law before January 1,
30 2007, under AS 41.21; and

31 (ix) a path, trail, road, or site for which no reasonable

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alternative exists and which is necessary to preserve or establish public access to or along publicly owned land or water, if the use of the path, trail, road, or site itself is for transportation to or to facilitate use of publicly owned land or water rather than primarily for recreation.

* Sec. 4. AS 29.35.030(a) is amended to read:

(a) Except as provided in (c) of this section, a [A] municipality may, only within its boundaries, exercise the powers of eminent domain and declaration of taking in the performance of a power or function of the municipality under the procedures set out in AS 09.55.250 - 09.55.460. In the case of a second class city, the exercise of the power of eminent domain or declaration of taking must be by ordinance that is submitted to the voters at the next general election or at a special election called for that purpose. A majority of the votes on the question is required for approval of the ordinance.

* Sec. 5. AS 29.35.030 is amended by adding new subsections to read:

(c) The power of eminent domain may not be exercised to acquire private property from a private person for the purpose of transferring title to the property to another private person for economic development, except as provided by AS 09.55.240(d)(1) - (6), and may not be exercised for purposes expressed in AS 09.55.240(c).

(d) In this section,

- (1) "economic development" has the meaning given in AS 09.55.240;
- (2) "private person" has the meaning given in AS 09.55.240.

* Sec. 6. The uncodified law of the State of Alaska is amended by adding a new section to read:

APPLICABILITY. This Act applies only to condemnation actions filed on or after the effective date of this Act.

AMENDMENT #3

OFFERED IN THE SENATE

TO: CSHB 318(FIN) am

- 1 Page 1, line 14:
- 2 Delete "personal"
- 3 Insert "privately owned"

AMENDMENT

OFFERED IN THE SENATE

TO: CSHB 318 (FIN) am

- 1 Page 6, line 18:
- 2 Delete "AS 09.55.240(d)(1) - (6)"
- 3 Insert "AS 09.55.240(d)(1) - (7)"

Brian Hove

From: Cindy Smith
Sent: Wednesday, March 29, 2006 2:02 PM
To: Brian Hove
Subject: HB318

Craig came by: the state lawyers he works with want to change the word "taking" everywhere it appears to "exercise of eminent domain", which is fine. They also suggested a notice of not less than 90 days by municipalities to affected property owners, which also seems fine.

He said the lawyers were concerned with the language prohibiting delegation by municipalities (something to do with the fact the state does this between departments...) and they suggested it be deleted. I think the committee wanted something, so will work with the drafter to be sure that the muni language doesn't foreclose state options (though I don't really think it does)--

that's pretty much it! So we should have this ready to go tomorrow.

Cindy Smith
Office of Senator Hollis French
(907)465-3892
www.akdemocrats.org

47.17.290(13)

French

local govt following ^{motion and} public hearing

✓

* Public use w/ just compensation

RS economic development ≠ Public use

home is castle -

Tammy Sandovall

LEGAL SERVICES

DIVISION OF LEGAL AND RESEARCH SERVICES
LEGISLATIVE AFFAIRS AGENCY
STATE OF ALASKA

(907) 465-3867 or 465-2450
FAX (907) 465-2029
Mail Stop 3101


State Capitol
Juneau, Alaska 99801-1182
Deliveries to: 129 6th St., Rm. 329

MEMORANDUM

March 22, 2006

SUBJECT: Local and special legislation (CSHB 318(FIN) am,
Work Order No. 24-LS1083\XA.3)

TO: Senator Hollis French
Attn: Cindy Smith

FROM: 
Donald M. Bullock Jr.
Legislative Counsel

Enclosed is the amendment you requested to require a separate bill for approving the use of eminent domain for the transfer of private property to a private person for a reason not explicitly recognized elsewhere.

A bill considered under either the amendment or the existing language in the bill provision it amends may be subject to a challenge under the prohibition against local or special acts in art. II, sec. 19, Constitution of the State of Alaska.¹ Whereas the exceptions to the use of eminent domain for a transfer of property to a private person in AS 09.55.240(d)(1) - (6) in bill sec. 3 are general in nature, the existing language in the bill and the amendment will require the legislature to pass what may be a local or special act speaking to a specific piece of property. An alternative to avoid a challenge under art. II, sec. 19 would be for the legislature to enact an additional general basis for the use of eminent domain similar to those already listed in paragraphs (1) - (6).

If I may be of further assistance, please advise.

DMB:lmb
06-111.lmb

Enclosure

¹ **Local or Special Acts.** The legislature shall pass no local or special act if a general act can be made applicable. Whether a general act can be made applicable shall be subject to judicial determination. Local acts necessitating appropriations by a political subdivision may not become effective unless approved by a majority of the qualified voters voting thereon in the subdivision affected.

Brian Hove

From: Emily Doherty [emily@akcenter.org]
Sent: Thursday, March 23, 2006 4:51 PM
To: Sen. Ralph Seekins
Cc: Brian Hove
Subject: *****SPAM***** HB 318
Attachments: Mr. Dave Norton Testimony.doc

March 23, 2006

Senator Ralph Seekins
Alaska State Legislature
State Capitol
Juneau, AK 99801-1182

Dear Senator Seekins,

House Bill 318, Eminent Domain, is a pretty good bill. However, I have serious concerns regarding the restriction on using eminent domain for recreational projects.

The bill's first component is a response to the highly-publicized Kelo Supreme Court decision. I agree: homes are sacred. However, the bill goes on to prohibit the use of eminent domain to take a primary residence and the surrounding 4 acres or so for recreational facilities. This would create a state statutory prohibition on using Eminent Domain for legitimate public use projects that center on recreation.

Already, we have seen the committees' concerns over small boat harbors, boat ramps, navigable waters, logging and mining projects, and who knows what else will come up which will benefit the public good but be road blocked. Snow machine trails? Sled dog trails? Outdoor recreational facilities in cities and small towns? RS 2477 roads? I'm concerned about the "kitchen sink" approach to this bill.

We have talked with a legal advisor, and she had this to say: "Eminent domain is a power that the government has in the situation where it acquires the land for a public use. To me, recreational use is one of the premier "public uses" to take property for, if there is a plan for the recreational activity or greenbelt/open space aspect of it. *The factors developed in Supreme Court precedent protect an abuse of this use of eminent domain.* The abuse in the Kelo case was that a private developer gained from the use of eminent domain to "revitalize" an area of the city. The factors of the Kelo case should be the only restriction on the use of eminent domain. *By adding everything in—the kitchen sink approach—the Legislature is significantly hampering its ability to use eminent domain in a future case where it is warranted.*"

Supreme Court precedent has already developed strong protections against abuse in taking private property for recreational projects. Why does Alaska need to replicate that, and in doing so, tie the hands of the state and local government in creating future recreational projects that will benefit thousands of Alaskans, and attract tourists? I'd like to see the Committee look at the unintended consequences of this bill on recreation in this state. For now, we are trying to cover all our bases to ensure we have access to public waters and lands, etc. But, we cannot possibly know what the local concerns are regarding this bill. Every single community would want to add several amendments to this bill, should they weigh in. It's likely there will be many projects which benefit ALL Alaskans which will be severely hampered in moving forward, thanks to the recreational restrictions in this bill. Eminent

3/23/2006

Domain is already difficult enough to apply, as it should be.

Finally, Rep. McGuire writes in her sponsor statement, "One of the most appealing aspects of living in Alaska has been the ability to own a part of the Last Frontier. This ownership right is to be protected at the highest level." I agree. I also would add, however, that another of the most appealing aspects of living in Alaska is the ability to recreate-to fish our lakes and streams, to hike, ride our ATVs, bike, dog sled, snow machine or to ski our amazing trail systems, to take off from any one of the hundreds of boat harbors and countless other recreational activities. Recreation is so important to Alaskans. Restricting the use of eminent domain for recreation is a mistake in a state where recreation is the number one reason most of us are here in the first place, especially in light of the fact that the recreational application of eminent domain has never been abused in Alaska.

Thank you for all your time. I hope to hear back from you regarding your position on House Bill 318 at this juncture. I'm also sending a letter which you have already received from Mr. Dave Norton which reflects our position. A shorter version of this letter appeared in the Anchorage Daily News. It's been a very interesting and productive series of hearings and I look forward to the next one. Thank you for your time on this issue.

Sincerely,

Emily Doherty
Alaska Center for the Environment
Legislative Coordinator
(907)274-3674

Chairman Seekins and Members of the Committee:

Please accept this written testimony on HB 318 dealing with eminent domain. I attended your committee's meeting last week via LIO in Anchorage hoping to provide my input. However, the committee ran out of time before I could speak and unfortunately I cannot make the meeting this week due to business commitments.

My name is Dave Norton and I am a partner in a project management consulting business that primarily services the oil and gas industry. I live in Senator French's district at 1208 S Street.

In the '80s I was the Municipal Engineer for the Municipality of Anchorage and dealt with eminent domain issues in the planning and building of roads, parks, and public infrastructure. I support the intent of the bill to curtail the inappropriate use of eminent domain for private development.

However, I do not support the bill's intent to restrict use of eminent domain to develop public facilities, including parks, trails, and sports facilities. Eminent domain has been a traditional and important government planning tool throughout the nation's history of urban development and to curtail its use will hamper the urban areas of Alaska in providing a full range of public amenities expected by the people of Alaska.

Moreover, the bill is technically awkward and potentially flawed. It provides 13 uses of eminent domain, including mine tailings dumps, and 9 exceptions to what is a recreational facility. All the complicated "what's in/what's out" language will make this bill a nightmare to administer.

I also find it difficult to understand the 250 foot set-back provision. What is the basis for this determination? Sound impacts, visual impacts and other environmental conditions are all situational and different case-by-case. Why is not the set-back 500 feet, or 50 feet? The set back limit is arbitrary and not useful for actual project impact planning. It should be replaced with something that focuses on the residence itself and the urban setting of the dwelling. Not many people in urban settings have a 250 foot zone of influence around their residences; this amounts to about 4 acres of land use influence and seems excessive in a city with typical neighborhood development patterns.

I recommend that the committee delete the portion of the bill prohibiting use of eminent domain for recreational purposes and stick to the laudable goal of prohibiting use of eminent domain for private development. The law of unintended consequences will trump this bill and the Legislature will end up dealing with case-by-case situations that will be a waste of lawmakers limited time and should be best left to local authorities.

Thank you for your attention.

Dave Norton
276 2530

Public use now means
public \$

public = right to use
the property.....

Craig Johnson | 0 |

Alaska State Legislature

Session:
State Capitol
Juneau, AK 99801
Phone: (907) 465-2995
Fax: (907) 465-6592



Interim:
716 W 4th Avenue, Suite 430
Anchorage, AK 99501-2133
Phone: (907) 269-0250
Fax: (907) 269-0249

Representative Lesil McGuire
Chair, Judiciary Committee

Craig Johnson

Sponsor Statement HB 318

"An Act limiting the exercise of eminent domain."

HB 318 calls for two very clear policy decisions. The first is whether or not it is appropriate to take a person's private property for economic development and the second is whether it is appropriate to take all or part of one's primary residence for recreational opportunities of another. This legislation is not intended to prohibit the legitimate use of eminent domain; it merely limits its use in these two narrow policy areas.

A recent United States Supreme Court ruling that the eminent domain powers of a government could be used to seize private land for economic development purposes has struck a vital blow to private property rights in this country. Although *Kelo v. New London* is a Connecticut case, its implications are broad. HB 318 will clarify the property rights of Alaskans and prevent a repeat of what transpired in Connecticut.

It is important to note the Supreme Court recognized the right of a state to set their own guidelines for defining eminent domain. I find very little fault with that approach. While I believe the Alaska Constitution protects Alaskans from such an egregious attack on personal property. I fully intend to ensure that our state statutes afford the same protection of property.

HB 318 will prohibit the use of eminent domain for economic gain and clarify that the government be prohibited from taking all or part of a primary residence through eminent domain so that others may have a recreational opportunity. Alaska has thousands of acres of land and it is unacceptable to seize someone's home for recreational purposes.

Eminent domain has a legitimate place in land development, but its use must be controlled within a narrow definition to protect private property rights. If it becomes necessary to seize someone's property, the standards applied should be very high.

The power of eminent domain is inherent in the government and does not depend upon the constitution.

The constitution only acts as limitation on power.

Section 1

Page 1 Line 14

following "(B) the taking of a"
remove "landowner's personal"
add "person's privately owned"

The line would then read:

"(B) the taking of a person's privately owned residence to develop an indoor or outdoor recreational facility or project."

(define that privately owned residence includes a residence the title to which is held in trust that is occupied by the owner or beneficiary of that trust)

Page 2 - Line 16 - 25

Delete all the material on lines 16 - 25 and replace with the following:

(3) public buildings and grounds for the use of the state or a political subdivision of the state; canals, aqueducts, flumes, ditches, or pipes conducting water, heat, or gas for the use of the inhabitants of the state; raising the banks of streams, removing obstructions from them, and widening, deepening, or straightening their channels; and roads, streets, and alleys, and all other public uses which may be authorized by the legislature.

Page 3 - line 10 - 13

Delete all the material on lines 1- 13 and replace with the following:

(10) [(9)] sewerage of a community of 10 or more families, or of public buildings belonging to the state or to a college or university;

Page

(d) The power of eminent domain may not be exercised to acquire private property for the purpose of transferring title to the property to a private person except for the purposes set forth in this chapter.

(e) The power of eminent domain may not be exercised for the purpose of developing a recreational facility or project if the property to be acquired includes an individual landowner's personal residence or that portion of an individual's property attached to and within 250 linear feet of an individual landowner's personal residence unless the landowner consents either before or after a condemnation proceeding has been filed.

Reason for 90 day occupancy?

Must a new buyer live in limbo for 90 days?

CSHB 318 (FIN)

"may be used by the owner or beneficiary of a trust holding legal title to the structure as a dwelling unit" and "must be inhabited by the owner or beneficiary of a trust holding legal title to the structure for at least 90 days."

Craig dropped this
off.

If lay legal drafts
this into
Sec. 3 (F)(3) (A & B)
it would address
Sen. Seeking concerns

Joe

Sec 3 (F)(3) (A & B)

is there any reason
for the 90 day stint?

CS FOR HOUSE BILL NO. 318(FIN) am
IN THE LEGISLATURE OF THE STATE OF ALASKA
TWENTY-FOURTH LEGISLATURE - SECOND SESSION

BY THE HOUSE FINANCE COMMITTEE

Amended: 2/17/06

Offered: 2/10/06

Sponsor(s): REPRESENTATIVES MCGUIRE, HOLM AND HAWKER, Stoltze, Gatto, Wilson, Kohring, LeDoux, Dahlstrom, Kelly, Anderson, Olson, Lynn, Elkins, Foster, Kapsner, Samuels, Ramras, Meyer, Seaton, Rokeberg

A BILL
FOR AN ACT ENTITLED

1 "An Act limiting the exercise of eminent domain."

2 **BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:**

3 * **Section 1.** The uncodified law of the State of Alaska is amended by adding a new section
4 to read:

5 **LEGISLATIVE INTENT AND FINDINGS.** (a) The legislature finds that

6 (1) the United States Supreme Court decision in *Kelo v. City of New London*,
7 545 U.S. ___, 125 S.Ct. 2655, 162 L. Ed. 2d 439 (2005) demonstrates that an overly
8 expansive application of eminent domain powers can be a threat to the property rights of all
9 private property owners;

10 (2) it is necessary to provide clarification regarding the exercise of eminent
11 domain in the following two situations:

12 (A) the taking of private property if the purpose is to transfer the
13 property to another private person for economic development;

14 (B) the taking of a landowner's personal residence to develop an indoor
15 or outdoor recreational facility or project.

1 (b) In recognizing that many public projects will have economic effects, the
2 legislature intends by this Act not to

3 (1) restrict those public uses already recognized in state law merely because
4 the project may have an associated economic effect; or

5 (2) provide an absolute bar on transfers of land to private entities, but to place
6 restrictions on when such transfers occur.

7 (c) In this section, "economic development" means development of property for a
8 commercial enterprise carried on for profit or to increase tax revenue, tax base, or
9 employment.

10 * Sec. 2. AS 09.55.240(a) is amended to read:

11 (a) Except as provided in (d) and (e) of this section, the [THE] right of
12 eminent domain may be exercised for the following public uses:

13 (1) all public uses authorized by the government of the United States;

14 (2) public buildings and grounds for the use of the state and all other
15 public uses authorized by the legislature of the state;

16 (3) public buildings and grounds for the use of an organized or
17 unorganized borough, city, town, village, school district, or other municipal division,
18 whether incorporated or unincorporated; canals, aqueducts, flumes, ditches, or pipes
19 conducting water, heat, or gas for the use of the inhabitants of an organized or
20 unorganized borough, city, town, or other municipal division, whether incorporated or
21 unincorporated; raising the banks of streams, removing obstructions from them, and
22 widening, deepening, or straightening their channels; and roads, streets, and alleys,
23 and all other public uses for the benefit of an organized or unorganized borough, city,
24 town, or other municipal division whether incorporated or unincorporated, or its
25 inhabitants, which may be authorized by the legislature;

26 (4) wharves, docks, piers, chutes, booms, ferries, bridges of all kinds,
27 private roads, plant and turnpike roads, railroads, canals, ditches, flumes, aqueducts,
28 and pipes for public transportation, supplying mines and farming neighborhoods with
29 water, and draining and reclaiming land, and for floating logs and lumber on streams
30 not navigable, and sites for reservoirs necessary for collecting and storing water;

31 (5) roads, tunnels, ditches, flumes, pipes, and dumping places for

1 working mines; also outlets, natural or otherwise, for the flow, deposit, or conduct of
 2 tailings or refuse matter from mines; also an occupancy in common by the owners or
 3 possessors of different mines of any place for the flow, deposit, or conduct of tailings
 4 or refuse matter from their several mines, and sites for reservoirs necessary for
 5 collecting and storing water;

6 (6) private roads leading from highways to residences, mines, or farms;

7 (7) telephone lines;

8 (8) fiberoptic lines;

9 (9) [(8)] telegraph lines;

10 (10) [(9)] sewerage of an organized or unorganized borough, city,
 11 town, village, or other municipal division, whether incorporated or unincorporated, or
 12 a subdivision of it, or of a settlement consisting of not less than 10 families, or of
 13 public buildings belonging to the state or to a college or university;

14 (11) [(10)] tramway lines;

15 (12) [(11)] electric power lines;

16 (13) [(12)] for the location of pipelines for gathering, transmitting,
 17 transporting, storing, or delivering natural or artificial gas or oil or any liquid or
 18 gaseous hydrocarbons, including, but not limited to, pumping stations, terminals,
 19 storage tanks, or reservoirs, and related installations.

20 * Sec. 3. AS 09.55.240 is amended by adding new subsections to read:

21 (d) The power of eminent domain may not be exercised to acquire private
 22 property from a private person for the purpose of transferring title to the property to
 23 another private person for economic development purposes. This subsection does not
 24 apply to transfers of private property to another private person if one or more of the
 25 following apply:

26 (1) the landowner consents, either before or after a condemnation
 27 proceeding has been filed, to the use of the property for a private commercial
 28 enterprise or other economic development;

29 (2) the private person has been expressly authorized by statute either to
 30 exercise the power of eminent domain, or to receive an interest in land acquired by the
 31 exercise of eminent domain;

1 (3) the transferred property is used for a private way of necessity to
2 permit essential access for extraction or use of resources;

3 (4) the acquisition is used, in part, for leasing property to a private
4 person that occupies a portion of public property or a public facility, including a
5 private business that occupies a portion of an airport, port, or public building;

6 (5) the property is transferred to a person by oil and gas lease under
AS 38.05.1¹ *or other municipal body*

(6) the property is transferred to a common carrier;

(7) the legislature has approved by law the transfer of the property.

10 (e) The power of eminent domain may not be exercised for the purpose of
11 develo, ing a recreational facility or project if the property to be acquired includes an
12 individual landowner's personal residence or that portion of an individual's property
13 attached to and within 250 linear feet of an individual landowner's personal residence
14 unless the landowner consents either before or after a condemnation proceeding has
15 been filed.

16 (f) In this section,

17 (1) "common carrier" has the meaning given in AS 04.16.125;

18 (2) "economic development" means development of property for a
19 commercial enterprise carried on for profit or to increase tax revenue, tax base, or
20 employment;

21 (3) "personal residence" means a structure that is the dwelling place of
22 an individual that

23 (A) must be used by the owner as a dwelling unit, as opposed
24 to a rental, storage, or other commercial space;

25 (B) must be inhabited by the owner for at least 90 days during
26 the 12-month period immediately before the date an action for the exercise of
27 the power of eminent domain is filed;

28 (C) must constitute an ordinary home for general living
29 purposes, as opposed to a dwelling used only for seasonal recreational or
30 temporary purposes; and

31 (D) may not have been constructed, placed, or occupied for the

*resource or
the surface
use?*

*13
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no over-ride ↑

private

purpose of avoiding eminent domain proceedings;

(4) "private person" means a person that is not a public corporation as defined in AS 45.77.020 or a government as defined in AS 11.81.900;

(5) "recreational facility or project"

(A) means a facility or project, the primary purpose of which is recreational;

(B) includes a park, trail or pedestrian pathway, greenbelt, amusement park, small boat harbor, sports facility, playground, infrastructure, or other facility ~~related to or in support of~~ an indoor or outdoor recreational facility or project;

(C) does not include

(i) a highway, sidewalk, or path within the right-of-way of a highway;

(ii) a path, trail, or lane used as a safe route to a school program;

(iii) a wayside or rest stop;

(iv) a development, the primary purpose of which is not recreational, such as a path, trail, or lane developed to reduce congestion, or to encourage use of an alternate, gas-saving mode of transportation;

(v) a path or trail to or between villages or from a village to a facility or resource;

(vi) a stormwater retention or treatment facility or wetland, habitat, or other acquisition required to obtain a permit for a highway, airport, or other public project;

(vii) a taking under AS 19.05.110, 19.05.120; AS 19.22.020; AS 27.21.300; AS 35.20.040, 35.20.050; or AS 41.35.060;

(viii) a taking not prohibited by law before January 1, 2007, under AS 41.21; and

(ix) a path, trail, road, or site for which no reasonable

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boat launch
access to
middle of the
main public waters

AML position...

put edit...

DNR

alternative exists and which is necessary to preserve or establish public access to or along publicly owned land or water. If the use of the path, trail, road, or site itself is for transportation to or to facilitate use of publicly owned land or water (rather than primarily for recreation.)

* Sec. 4. AS 29.35.030(a) is amended to read:

(a) Except as provided in (c) of this section, a [A] municipality may, only within its boundaries, exercise the powers of eminent domain and declaration of taking in the performance of a power or function of the municipality under the procedures set out in AS 09.55.250 - 09.55.460. In the case of a second class city, the exercise of the power of eminent domain or declaration of taking must be by ordinance that is submitted to the voters at the next general election or at a special election called for that purpose. A majority of the votes on the question is required for approval of the ordinance.

* Sec. 5. AS 29.35.030 is amended by adding new subsections to read:

(c) The power of eminent domain may not be exercised to acquire private property from a private person for the purpose of transferring title to the property to another private person for economic development, except as provided by AS 09.55.240(d)(1) - ~~(5)~~, and may not be exercised for purposes expressed in AS 09.55.240(e). *(7)*

recreational purposes

(d) In this section,

(1) "economic development" has the meaning given in AS 09.55.240;

(2) "private person" has the meaning given in AS 09.55.240. *- 2*

* Sec. 6. The uncodified law of the State of Alaska is amended by adding a new section to read:

APPLICABILITY. This Act applies only to condemnation actions filed on or after the effective date of this Act.

ZERO FISCAL NOTES

FISCAL NOTE

STATE OF ALASKA
2006 LEGISLATIVE SESSION

Fiscal Note Number: _____
 Bill Version: HB318
 () Publish Date: _____

Revision Date/Time (Note if correction): _____ Dept. Affected: Dept Environmental Cons
 Title Limitation on Eminent Domain . . . RDU Multi
 Component Various
 Sponsor McGuire, Holm, Hawker
 Requester House Judiciary Component No. 633

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2007	FY 2008	FY 2009	FY 2010	FY 2011	FY 2012
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0

CAPITAL EXPENDITURES						
-----------------------------	--	--	--	--	--	--

CHANGE IN REVENUES ()						
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FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type—Do not abbreviate)						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY2006) cost: 0.0
 Mark this box (X) if funding for this bill is included in the Governor's FY 2007 budget proposal:

POSITIONS

Full-time						
Part-time						
Temporary						

ANALYSIS: (Attach a separate page if necessary)

No fiscal impact anticipated.

Prepared by: Tim Barry
 Division: Office of the Commissioner
 Approved by: Kurt Fredriksson
 Agency: Department of Environmental Conservation

Phone 465-5290
 Date/Time 1/11/06 10:30 AM
 Date 1/11/06 11:31 AM

FISCAL NOTE

STATE OF ALASKA
2006 LEGISLATIVE SESSION

Fiscal Note Number: _____
 Bill Version: HB 318
 () Publish Date: _____

Revision Date/Time (Note if correction): _____ Dept. Affected: Commerce
 Title Limitations on Eminent Domain RDU Comm Assist & Ec Dev (405)
 Component Community Advocacy
 Sponsor McGuire et al.
 Requester Judiciary Component No. 2703

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2007	FY 2008	FY 2009	FY 2010	FY 2011	FY 2012
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0

CAPITAL EXPENDITURES						
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CHANGE IN REVENUES ()						
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FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type—Do not abbreviate)						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY2006) cost: 0.0
 Mark this box (X) if funding for this bill is included in the Governor's FY 2007 budget proposal:

POSITIONS

Full-time						
Part-time						
Temporary						

ANALYSIS: (Attach a separate page if necessary)

This legislation limits the powers of eminent domain established in Title 9 and Title 29 for both the State and municipalities. Eminent Domain could not be exercised for purpose of promoting economic development, or to acquire land as part of a economic development project. In addition, eminent domain could not be exercised for purpose of developing a recreational facility or project if the land in question is the primary residence of the owner.

This legislation does not create a fiscal impact on the operations of the department.

Prepared by: Michael Black, Director Phone 269-4535
 Division Community Advocacy Date/Time 1/11/06 9:54 AM
 Approved by: William C. Noll, Commissioner Date 01/11/06
 Agency Commerce, Community, and Economic Development

FISCAL NOTE

STATE OF ALASKA
2006 LEGISLATIVE SESSION

Fiscal Note Number: _____
 Bill Version: HB318-LAW-Trans-1-10-
 () Publish Date: _____

Revision Date/Time (Note if correction): _____ Dept. Affected: LAW
 Title "An Act limiting the exercise of eminent domain." RDU Civil
 Component Transportation
 Sponsor Representative McGuire
 Requester House Judiciary Component No. _____

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2007	FY 2008	FY 2009	FY 2010	FY 2011	FY 2012
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	*****	*****	*****	*****	*****	*****

CAPITAL EXPENDITURES						
-----------------------------	--	--	--	--	--	--

CHANGE IN REVENUES ()						
-------------------------------	--	--	--	--	--	--

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type—Do not abbreviate)						
TOTAL	*****	*****	*****	*****	*****	*****

Estimate of any current year (FY2006) cost: 0.0
 Mark this box (X) if funding for this bill is included in the Governor's FY 2007 budget proposal:

POSITIONS

Full-time						
Part-time						
Temporary						

ANALYSIS: (Attach a separate page if necessary)
 This bill excludes from the exercise of the right of eminent domain, any purpose that would promote economic development or acquire land as part of an economic development. Additionally when the subject of the action is the primary residence of the owner of the property, the right of eminent domain may not be exercised for the purpose of developing a recreational facility or project.

 Passage of this legislation may have a fiscal impact on the Department of Law, but it is not possible to estimate it at this time.

Prepared by: Kathryn Daughhete, Director Phone 465-3673
 Division: Administrative Services Division Date/Time 1/10/06 3:53 PM
 Approved by: Kathryn Daughhete for David Márquez, Attorney General Date 1/10/2006
 Agency: Department of Law

FISCAL NOTE

STATE OF ALASKA
2006 LEGISLATIVE SESSION

Fiscal Note Number: 1
 Bill Version: HB318-DOT-530-01-11-0
 () Publish Date: _____

Title: Limiting Exercise of Eminent Domain Dept. Affected: DOT&PF
 RDU: Administration and Support
 Component: Commissioner's Office
 Sponsor: Rep. McGuire
 Requester: _____ Component No.: 530

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2007	FY 2008	FY 2009	FY 2010	FY 2011	F/ 2012
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	*	*	*	*	*	*

CAPITAL EXPENDITURES						
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CHANGE IN REVENUES ()						
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FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type—Do not abbreviate)						
TOTAL	*	*	*	*	*	*

Estimate of any current year (FY2006) cost: 0.0

Mark this box (X) if funding for this bill is included in the Governor's FY 2007 budget proposal:

POSITIONS

Full-time						
Part-time						
Temporary						

ANALYSIS: (Attach a separate page if necessary)

Based upon currently available information, DOT is unable to determine what fiscal impact, if any, the bill would have on its operating or capital projects budgets.

Prepared by: John Manly
 Division: Communications, DOT&PF
 Approved by: Mike Barton
 Agency: Commissioner, DOT&PF

Phone 465-3904
 Date/Time 1/11/06 8:00 AM
 Date 1/11/2006

FISCAL NOTE

STATE OF ALASKA
2006 LEGISLATIVE SESSION

Fiscal Note Number: _____
 Bill Version: HB318-DNR-CO-01-11-0
 () Publish Date: _____

Revision Date/Time (Note if correction): _____ Dept. Affected: Natural Resources
 Title Limitation on Eminent Domain RDU Resource Development
 Component Commissioner's Office
 Sponsor Rep. McGuire
 Requester (h) JUD Component No. 423

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2007	FY 2008	FY 2009	FY 2010	FY 2011	FY 2012
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	*** INDETERMINATE ****					

CAPITAL EXPENDITURES						
-----------------------------	--	--	--	--	--	--

CHANGE IN REVENUES ()	*** INDETERMINATE ***					
-------------------------------	------------------------------	--	--	--	--	--

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type—Do not abbreviate)						
TOTAL	*** INDETERMINATE ***					

Estimate of any current year (FY2006) cost: 0.0
 Mark this box (X) if funding for this bill is included in the Governor's FY 2007 budget proposal:

POSITIONS

Full-time						
Part-time						
Temporary						

ANALYSIS: (Attach a separate page if necessary)

Prepared by: Nico Bus, Acting Admin Service Director Phone 269-8532
 Division: Commissioner's Office Date/Time 1/11/2006
 Approved by: Mike Menge, Commissioner Date 1/11/2006
 Agency: Natural Resources

LETTERS OF SUPPORT



ALASKA

National Federation of Independent Business

Statement of Support for HB 318

Private Property Rights – Eminent Domain

January 10, 2006

The Alaska Chapter of the National Federation of Independent Business has 2,500 members, making it the largest small-business advocacy group in the state. The legislative agenda of NFIB is determined by ballot. Following are the ballot results for the question regarding the government's power of eminent domain.

Should the government's power of eminent domain be restricted to prevent private property from being seized for private commercial enterprises for the purposes of economic development?

90 % YES

4% NO

6% Undecided

The use of eminent domain to take private property for public purposes can be a valuable tool for public uses such as transportation and utility corridors. However, the courts have steadily expanded the definition of "public purpose" to include economic development projects where private developers and large businesses benefit from eminent domain, in exchange for which the government expects higher tax revenues. Using eminent domain in this way gives rise to abuse and is generally unfair to those who lose their property. Small businesses and small property owners are disproportionately affected, and the benefits only go to a few people. If government can seize property because another owner could generate more taxes, then nobody's property is safe.

Vote YES on House Bill 318

Submitted by Thyes Shaub on behalf of NFIB/Alaska.

Craig Johnson

From: Rep. Lesil McGuire
Sent: Wednesday, January 11, 2006 10:22 AM
To: Craig Johnson
Subject: FW: HB No. 318 **CONSTITUENT**

-----Original Message-----

From: Henry D. Hosford [mailto:hhosford@gci.net]
Sent: Wednesday, January 11, 2006 9:59 AM
To: Rep. Lesil McGuire
Cc: Sen. Ben Stevens
Subject: Hb No. 318

Dear Representative McGuire,

I am writing in support of your pending Bill HB No. 318, "An Act limiting the exercise of eminent domain".

As you have recognized through your efforts in authoring this bill, the condemnation of private property for the benefit of private development, had become abusive, which is why the matter came before the Supreme Court last year. That Court acted wisely in recognizing that their authority was limited a broad interpretation of the Constitutional phrase "public use". However, they further recognized that the states have the Constitutional right to govern themselves with a more specific definition.

This Bill will not restrict the exercise of eminent domain for "public use", as originally intended by the framers of the Constitution. It will curtail the abuse.

The passage of this Bill will curtail irresponsible condemnation of citizens private property. And, it will empower the Legislature to have greater authority in matters of property condemnation in favor of private development and recreational amenities.

A vote against this Bill sends a message of support for unrestricted development. It sends a message of support in favor of private and public development, with a cavalier disregard for peoples' property rights and the environment.

I support your Bill because its not restricting your authority as Legislators representing the citizens of Alaska, in fact, its giving you greater power to prevent the misconduct that's become increasingly more abusive.

This bill allows the property owner the freedom of not having to constantly monitor the public process to see if his/her property may be seized. It shifts the burden to the public planners and developers to work through a more restrictive process to exercise the right of eminent domain.

Very truly yours,

Hank Hosford, President
Old Seward/Oceanview Community Council

HB 0318A

Dear Representative Anderson:

The Federal Government Recreational Trails Program Section G. **Uses not permitted—**
A State may not obligate funds apportioned to carry out this Section for—

1. Condemnation of any kind of interest in property.

Future aggressive land use planning is setting the stage for conflict between the property rights of Alaskan citizens and community activists and other special interests. I urge you to restrain the political game of offering "play projects" to the voters in exchange for rights of property.

The Federal Government recognizes reasonable limits on Eminent Domain for recreation.

Shouldn't our State, where only 1% of the land is in private ownership, also honor this restriction?

Currently it is far too simple for a politician to declare something an "economic engine" or an important "quality of life" project, or mischaracterize it as transportation, and then exercise the power of eminent domain.

Limiting the power of eminent domain to essential needs only will instill confidence in citizens that their life work will not be sold to the highest political bidder.

Please pass legislation that contains the additional limitations on Eminent Domain as contain within HB 0318A.

Respectfully,

Bob Brock

Craig Johnson

From: Rep. Lesil McGuire
Sent: Tuesday, January 10, 2006 4:13 PM
To: Craig Johnson
Subject: FW: Hb 318A

-----Original Message-----

From: George Lukens [mailto:glukens@alaska.com]
Sent: Tuesday, January 10, 2006 12:05 PM
To: Rep. Lesil McGuire
Cc: Sen. Con Bunde; Sen. Ben Stevens
Subject: Hb 318A

Dear Representative:

Please pass HB 318A. It is time the hard won private property of Citizens is protected against the use of Eminent Domain for any taking less than an ESSENTIAL NEED. Recreation or leisure being the least of these to qualify. It is far too easy for a small group of 'favored' insiders to ram through projects requiring eminent domain takings, for personal use activities that it decides would be 'good for the community'. The language of HB 318A is the most comprehensive of all the legislation introduced to best and most fairly accomplish this protection.

Thanks you for your continued good work.

Respectfully,

George E. Lukens, Jr.
758 Oceanview Drive
Anchorage, AK 99515

Craig Johnson

From: Boyd Morgenthaler [morgenthaler@gci.net]
Sent: Tuesday, January 10, 2006 10:38 PM
To: Rep. Lesil McGuire; Sen. Ben Stevens
Cc: Sen. Con Bunde; Rep. Jim Holm; Rep. Bob Lynn
Subject: Please limit the power of eminent domain

January 10, 2005

Letter to the State of Alaska House
 c/o Representative Lesil McGuire
 and
 Letter to the State of Alaska Senate
 c/o Senator Ben Stevens,

Re: Limitation of the power of eminent domain

Ladies and Gentlemen,

Please vote "yes" to limit the power of eminent domain in the State of Alaska. I strongly support both economic development and the recreational limitations on the use of eminent domain. In specific, I support HB-318A, and encourage even further restrictions.

I encourage you to strengthen this legislation by modifying HB-318A Section 1 (d) (2) to expand the restriction regarding a "recreational facility or project" to include any residential property.

Please make the following change:

Section 1 (d) (2) "if the property that is the subject of the action is ~~the primary residence of the owner of the property~~ **intended for residential usage**, the right of eminent domain may not be exercised for the purpose of developing a recreational facility or project, (as written). "

Until June 2005, American's believed that the power of eminent domain was severely restricted to major transportation corridors, primary water, sewer and electrical utilities, national security, and similar essential purposes. With the US Supreme Court's Kelo vs New London decision, we have learned that eminent domain may be used for any purpose unless otherwise restricted by the State. Consequently, no private property in the State of Alaska will be safe from confiscation through eminent domain unless restrictive legislation like HB-318A is enacted.

Failing the enactment of restrictive eminent domain legislation, all property owners must be on constant guard against abusive taking by State or local government. All government is political, so the threat will be constant and political motivation and exploitation will be commonplace. Essentially, all property owners will need to maintain a defensive and combative relationship with their government. That is no way for our society to exist. When the State maintains the unfettered ability to use eminent domain for any purpose, the State is King and effectively has discretionary control of all private land. Private property becomes an illusion, and the State (King) always has dominion of its subjects. Such quasi-control of all private property by the State would fly in the face of over 200 years of American progress for the rights of individual citizens. Surely that is not a desirable situation.

The balance between Property Owner's rights and the State's need for essential development can be reestablished by the passage of legislation that strongly limits the State's power of eminent domain. HB-318 is an excellent step in that direction. I urge you all to vote "yes" and pass HB 318 or even stronger legislation to limit the power of eminent domain in the State of Alaska.

Sincerely,

Boyd Morgenthaler
1180 Shore Drive
Anchorage, AK 99515

907-349-6523 home
907-257-9100 work
Morgenthaler@gci.net

RELEVANT ARTICLES



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Economic Liberty

Private Property

School Choice

First Amendment

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2005

Casey v. Michigan

2004

2003

2002

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2000

1999

1998

1997

1996

1995

1994

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1992

1991

Michigan Legislature Approves Nation's First State Constitutional Amendment To Curb Eminent Domain Abuse

Amendment to Go Before Voters Next Year

WEB RELEASE:
December 14, 2005

CONTACT:
John Kramer
Lisa Knepper
(703) 682-9320
[Private Property]

Arlington, VA—Last night, the Michigan legislature became the first state legislature to pass a proposed constitutional amendment in response to the U.S. Supreme Court decision in *Kelo v. City of New London* and the widespread abuse of eminent domain throughout the state. The Michigan House and Senate approved resolution SJR-E, which will place a constitutional amendment on the ballot to provide greater protections to home and small business owners from eminent domain abuse. The amendment is expected to be voted on by Michigan citizens in November 2006. The resolution passed the House by a vote of 106-0 and the Senate by 31-6.

The amendment prohibits "the taking of private property for transfer to a private entity for the purpose of economic development or enhancement of tax revenues." Moreover, the amendment changes so-called "blight" law within the state. While the amendment does allow for the taking of blighted parcels of property, the burden would now be on the government to demonstrate that a particular piece of property is blighted by clear and convincing evidence. In contrast, under current Michigan law, it is unclear whether whole areas rather than individual pieces of property can be declared blighted, but it is clear the burden is on the property owners to show that the takings are illegitimate.

"This is a solid constitutional amendment," said Scott Bullock, a senior attorney at the Institute for Justice. "Michigan has a bad track record of eminent domain abuse and this proposed amendment goes a long way toward stopping these practices. Putting the burden of proof on

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the government to show that a specific piece of property is blighted is a significant and welcome change. The Michigan legislature should now follow up on this amendment by passing legislation to further reform its blight laws to make sure they are not used as a backdoor way to get property for private development."

"By wholeheartedly endorsing the use of eminent domain for private commercial development, the infamous *Poletown* case from Detroit started the country on the path that led to the Supreme Court's dreadful decision in *Kelo*," said Dana Berliner, another senior attorney at the Institute. "It is especially appropriate for Michigan to renounce that shameful legacy and assure Michiganders that their homes and businesses will not be taken for private development."

"We are confident that the citizens of Michigan will overwhelmingly approve this amendment," said Steven Anderson, Coordinator of the Castle Coalition, the Institute's grassroots advocacy project.

"Developers and some powerful local officials may be in favor of eminent domain abuse, but the average voter is totally opposed to it. Michigan citizens can lead the way by ensuring that home and small business owners are safe from an unholy alliance between politicians and big business."

In the wake of the *Kelo* decision, Alabama and Texas passed initial reforms of their eminent domain laws, curbing the ability of municipalities to take homes and businesses for private profit, and nearly 40 state legislatures are considering eminent domain reforms. The U.S. House of Representatives overwhelmingly passed a bill that would strip federal funding from municipalities that engage in eminent domain abuse, and the U.S. Senate is expected to take up the issue in the new year.

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HJ 60 IH

109th CONGRESS

1st Session

H. J. RES. 60

Proposing an amendment to the Constitution of the United States relating to the permissible uses for which private property may be taken.

IN THE HOUSE OF REPRESENTATIVES**July 14, 2005**

Mr. ADERHOLT introduced the following joint resolution; which was referred to the Committee on the Judiciary

JOINT RESOLUTION

Proposing an amendment to the Constitution of the United States relating to the permissible uses for which private property may be taken.

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled (two-thirds of each House concurring therein), That the following article is proposed as an amendment to the Constitution of the United States, which shall be valid to all intents and purposes as part of the Constitution when ratified by the legislatures of three-fourths of the several States within seven years after the date of its submission for ratification:

Article --

' Neither a State nor the United States may take private property for the purpose of transferring possession of, or control over, that property to another private person, except for a public conveyance or transportation project.'

END

109TH CONGRESS
1ST SESSION

S. 1704

To prohibit the use of Federal funds for the taking of property by eminent domain for economic development.

IN THE SENATE OF THE UNITED STATES

SEPTEMBER 14, 2005

Mr. DORGAN introduced the following bill; which was read twice and referred to the Committee on the Judiciary

A BILL

To prohibit the use of Federal funds for the taking of property by eminent domain for economic development.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. PROHIBITION ON USE OF FEDERAL FUNDS IN**
4 **ECONOMIC DEVELOPMENT RELATING TO**
5 **PROPERTY TAKEN BY EMINENT DOMAIN.**

6 (a) **SHORT TITLE.**—This Act may be cited as the
7 “Private Property Protection Act of 2005”.

8 (b) **PROHIBITION.**—

1 (1) IN GENERAL.—No Federal funds may be
2 used relating to a property that is the subject of a
3 taking by eminent domain.

4 (2) EXCEPTION.—Paragraph (1) shall not
5 apply if the property is being used for public use or
6 a public purpose.

7 (c) PUBLIC USE OR PUBLIC PURPOSE.—Economic
8 development, including an increase in the tax base, tax
9 revenues, or employment, may not be the primary basis
10 for establishing a public use or public purpose under sub-
11 section (b).

12 (d) TAKINGS FOR USE BY PRIVATE INDIVIDUAL OR
13 ENTITY.—Subsection (b) shall include takings of private
14 property for the use of, or ownership by, any private indi-
15 vidual or entity.

○

boston.com

THIS STORY HAS BEEN FORMATTED FOR EASY PRINTING

Lawmakers draft competing proposals on eminent domain

AP Associated Press

By Noreen Gillespie, Associated Press Writer | August 25, 2005

HARTFORD, Conn. — In theory, Rep. Steven Mikutel had no problem with the town of Norwich taking his grandfather's farm for a school.

But more than 40 years later, he says the land is still empty.

Mikutel was one of dozens of people who spoke at a public hearing Thursday about proposed changes to the state's eminent domain laws in the wake of a recent U.S. Supreme Court decision that said government can seize homes for private economic development projects.

"Too often they grab more land, more property, than they actually need," the Griswold Democrat said.

Connecticut's legislature and others across the country are reviewing eminent domain laws. State lawmakers drafted more than a half dozen proposals, which would do anything from pay homeowners more for their homes to halting the practice of seizing for private development.

In June, the high court ruled on a 5-4 vote that the city of New London can take homes for a private riverfront economic development project to increase its tax base. The ruling prompted an emotional backlash from homeowners worried their properties were at risk.

But a legal expert urged lawmakers to tread carefully in considering changes. While people are sympathetic to the homeowners, passing laws that cripple development might not be a wise idea, he warned.

Forcing the government to pay fair market value for properties was originally built into eminent domain laws as a deterrent to using the power, said Jeremy Paul, a University of Connecticut law professor. He suggested lawmakers make it more expensive to take a home.

"That's a much more refined tool than attempting to put a straitjacket on municipalities all around the state," he said.

One of the suggestions in the drafted bills is to pay homeowners one-and-a-half times the fair market value. Hartford Mayor Eddie Perez said that while a private project could draw from revenues, cities would likely have to raise taxes to pay for the new fees.

"Without broad eminent domain powers, cities would never be able to negotiate fairly with landowners who may wish to delay or stall the development," Perez said.

Thursday's hearing was the third held on the issue, and another is planned for September or early October. Some, including House Minority Leader Robert Ward, are urging lawmakers to go into special session to pass a moratorium on seizing property in the meantime.

"Ignoring the potential plight facing all property owners is not acceptable; allowing this practice to continue is wrong," Ward, who was out of town, said in a statement. ■



Widener University

School of Law

September 16, 2005

Representative Lesil McGuire
716 W. 4th Avenue Ste 430
Anchorage, AK 99501-2133

Re: Legislative Response to Kelo v. New London

Dear Representative McGuire:

I enclose a copy of testimony that I recently gave to the Pennsylvania House of Representatives State Government Committee. I thought the testimony might be of interest as you consider your legislative response to the Supreme Court's decision in Kelo v. New London. My testimony suggested various steps that legislatures could take to protect property owners, especially homeowners, from eminent domain abuse. I would be happy to discuss these and any related issues with you or your staff.

Very truly yours,

D. Benjamin Barros
Associate Professor of Law

Enclosure



Widener University

*D. Benjamin Barros
Associate Professor of Law*

Testimony of D. Benjamin Barros Before
the House of Representatives State
Government Committee

Hearing on House Bills 1835 and 1836
Concerning Eminent Domain

August 31, 2005

Mr. Chairman, members of the Committee, thank you for the opportunity to be here today. My name is Ben Barros, and I am an Associate Professor of Law at Widener Law School in Harrisburg. I both teach and write on eminent domain issues. I am familiar with the issues raised in the Supreme Court's decision in *Kelo v. New London* and with the response to that decision in legislatures around the country.

Kelo sparked a tremendous amount of public outrage over the potential for government abuse of the power of eminent domain. I believe that the legislature should respond to this public outrage and enact measures to protect private property from eminent domain abuse. House Bills 1835 and 1836 are an encouraging step in the right direction. Eminent domain, however, is an important tool for local governments, and the legislature must be careful not to overly restrict local governments' ability to take property for legitimate reasons. Your very difficult task is to determine where to strike the right balance.

My testimony today has two parts. First, I will suggest that you consider giving homes additional protection from being taken by eminent domain. Second, I will address some issues raised by the language of House Bills 1835 and 1836 about striking the right balance between protecting private property owners and maintaining local governments' ability to act in the legitimate public interest.

Protecting Homes

Like most of the bills proposed around the country in response to *Kelo*, House Bills 1835 and 1836 apply equally to all kinds of property. *Kelo* involved New London's

attempt to use the power of eminent domain to transfer private property, including people's homes, to a private developer. New London's justification for taking the property was to spur economic development, and the Court concluded that this type of "economic development taking" satisfied the public use requirement of the Constitution's Just Compensation Clause.

Unsurprisingly, the legislative response around the country to *Kelo* has focused on preventing economic development takings by restricting the scope of the type of public use sufficient to justify an exercise of eminent domain. House Bills 1835 and 1836 fit this mold.

I want to suggest that this broad approach misses a key component of the public's outrage over *Kelo*. My sense from reading reactions to *Kelo* and from talking with many people about the issue is that most people are not particularly worked up about economic development takings in a generic sense. Rather, what seems to be at the core of most people's concern is the possibility that their local governments might take their *homes* to clear land for a private developer, as the town of New London did in the project that gave rise to the *Kelo* litigation.

Focusing on homes would be consistent with the common-sense notion that homes are different from other types of property. People become personally attached to their homes. Homes tie people to their communities. Displacement of people from their homes can separate them from family, friends, schools and jobs.

I therefore suggest that you consider giving additional protection to homes in the eminent domain context. While restricting economic development takings is at the forefront of people's minds after *Kelo*, you also should consider protecting homes from

more traditional exercises of eminent domain. People unhappy about their homes being taken for a shopping mall are likely to be only marginally less unhappy if their homes are taken for something that fits the classic picture of a public use, like a highway.

Many other areas of law treat homes differently than other types of property. Most relevant here, the legal system already gives special protection to people's possession of their homes in a number of contexts, such as making it harder for a lender to foreclose on a home than to repossess another type of property. The law also gives special treatment to homes when interests other than possession are at stake. For example, the government is held to a higher standard when it searches a home than when it searches other types of property, like cars or undeveloped land.

Recognizing that homes are special does not mean that local governments should be prohibited in all circumstances from taking homes. There are times when taking homes is vital to the public interest. But there are a number of approaches that you could take to give homes additional protection and encourage government entities to take homes only as a last resort. For example:

- Responding directly to *Kelo*, you could prohibit the taking of homes for economic development, but allow economic development taking of some other types of property.
- You could permit the taking of a home for *any* type of public use only after a finding, reviewable by a court, that there is no alternative course of action that would serve the same public goal at a reasonable cost.
- You could require governments to pay a premium (say 10% or 15%) over fair market value for a taken home, which would both provide an

economic disincentive to take homes when other types of property are available and compensate the homeowners for some of the personal value they placed in their homes.

These approaches – alone or in concert – would help protect homes while maintaining flexibility for local governments to take other types of property. Common sense tells us that homes are different, and deserve special legal treatment in many contexts. Constituent outrage over *Kelo* is tied in large part to concern about the vulnerability of homes, and it therefore would be appropriate for you to consider including special protection of homes in your legislative response to *Kelo*.

Comments on the Proposed Language

I will now turn to the proposed language of House Bills 1835 and 1836. Because the proposed language of two bills is similar, I will direct my comments to House Bill 1835.

At the outset, I note that the proposed bills apply only to local governments, and do not restrict takings by the State of Pennsylvania. There may be good reasons to apply restrictions on eminent domain on the local level, but not the state level. Many commentators, for example, argue that local governments are more subject to special interest influence than state governments. But to give property owners the maximum amount of protection, it may be worth considering applying the same restrictions to the state. This, of course, would require the input of the state agencies that exercise the power of eminent domain.

Subparagraph (i) of House Bill 1835 prohibits the use of eminent domain to "turn [the taken property] over to a nonpublic interest." My first observation is that while I understand the intent of the language, the litigator in me sees ambiguities in the phrase "nonpublic interest." "Private person or entity" might be preferable language.

More broadly, however, there are many circumstances where the use of eminent domain to transfer property to a private person or entity may be appropriate, and the proposed language therefore may be too restrictive. Using eminent domain to transfer property to a private developer to spur economic development may be objectionable, but what about the use of eminent domain to transfer the property to a privately-owned utility? To a private university to expand its campus? To a not-for-profit museum or symphony? To a privately-owned hospital that is greatly needed by the community? To a sports team for a new stadium? I do not mean to suggest that using eminent domain in all of these contexts would be appropriate – I'm particularly suspicious of sports stadium projects myself – but they are all circumstances that you should consider. In some areas, particularly urban areas, it may not be practical to obtain suitable property for these types of projects without using eminent domain.

You should also consider the use of eminent domain to take blighted property and turn it over to a private developer. This type of taking would be barred by House Bill 1835 as it is currently drafted – it would be impractical to expect local governments to put all blighted property that is taken to public use in the classic sense. That may not be a bad thing. The concept of blight has been abused by local governments to justify what are really economic development takings. Clearing blight was also the justification for urban renewal projects that in hindsight destroyed vibrant, if poor, neighborhoods and

replaced them with what many planners now consider to be sterile redevelopment project. (I should note in this context that when I was talking about giving additional protection to homes, I generally meant homes of all sorts, including rented apartments. Except in the context of compensation for taken homes, people in owned and rented homes have similar interests in avoiding displacement.)

On the other hand, local governments should have the power to take truly blighted property. The difficult task is to come up with a definition that separates blighted property from merely economically depressed property. Blighted housing, for example, could be defined to be unfit for human habitation or defined as housing that violates certain housing code provisions. Blighted commercial property could be defined as property that has been vacant for a certain amount of time and has no real prospect of being occupied in the near future. Care also must be given to the treatment of non-blighted property in an otherwise blighted area. The Supreme Court started down the slippery slope towards *Kelo* in the 1954 case *Berman v. Parker*, where the Court permitted the taking of a non-blighted department store as part of a larger clearance of a blighted area.

Defining the circumstances where it is permissible for property taken by eminent domain to end up in private hands is a difficult task, but not an insurmountable one. Beyond tightening up the definition of permissible public use, however, there are a number of other steps that you can take to protect private property owners from abusive uses of eminent domain by making the eminent domain process fairer.

The examples I mentioned before of requiring certain findings to be made or certain premiums to be paid would fall in this category. You also could require some

exercises of eminent domain to be put to a vote by the residents of the municipality. Or you could require a municipality to make a bone fide offer (including a price) to purchase the property before using eminent domain. If the property owner later contests the value of the property, and a court finds that the value is higher than the price initially offered by the municipality, you could allow the property owner to recover attorney's fees or a premium above the court-set value from the municipality. Allowing this type of fee shifting would encourage municipalities to show good faith in their initial offer for the property.

You could also require a reverter clause, as proposed in subparagraph (iii) of House Bill 1835. As drafted, however, the reverter clause has two potential problems. First, it does not account for the fact that the condemnee has already been paid fair market value as compensation for the taken property. Second, it is unlimited in duration, which presents the possibility of the reverter being exercised two hundred years after the property is initially taken. Based in part on a bill that is pending in California, language along the following lines may be preferable: "if the property ceases to be used for a public purpose within five years of the property's condemnation, the condemnee or its heirs or assigns shall have the right to reacquire the property for the compensated amount plus interest or its current fair market value, whichever is less."

This concludes my prepared remarks, and I'm happy to take your questions.

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**Protection of Homes, Small Businesses, and Private Property Act of 2005
(Introduced in Senate)**

S 1313 IS

109th CONGRESS

1st Session

S. 1313

To protect homes, small businesses, and other private property rights, by limiting the power of eminent domain.

IN THE SENATE OF THE UNITED STATES

June 27, 2005

Mr. CORNYN introduced the following bill; which was read twice and referred to the Committee on the Judiciary

A BILL

To protect homes, small businesses, and other private property rights, by limiting the power of eminent domain.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the 'Protection of Homes, Small Businesses, and Private Property Act of 2005'.

SEC. 2. FINDINGS.

Congress finds the following:

(1) The protection of homes, small businesses, and other private property rights against government seizures and other unreasonable government interference is a fundamental principle and core commitment of our Nation's Founders.

(2) As Thomas Jefferson wrote on April 6, 1816, the protection of such rights is 'the first principle of association, the guarantee to every one of a free exercise of his industry, and the fruits acquired by it'.

(3) The Fifth Amendment of the United States Constitution specifically provides that 'private property' shall not 'be taken for public use without just compensation'.

(4) The Fifth Amendment thus provides an essential guarantee of liberty against the abuse of the power of eminent domain, by permitting government to seize private property only 'for public use'.

(5) On June 23, 2005, the United States Supreme Court issued its decision in *Kelo v. City of New London*, No. 04-108.

(6) As the Court acknowledged, 'it has long been accepted that the sovereign may not take the property of A for the sole purpose of transferring it to another private party B', and that under the Fifth Amendment, the power of eminent domain may be used only 'for public use'.

(7) The Court nevertheless held, by a 5-4 vote, that government may seize the home, small business, or other private property of one owner, and transfer that same property to another private owner, simply by concluding that such a transfer would benefit the community through increased economic development.

(8) The Court's decision in *Kelo* is alarming because, as Justice O'Connor accurately noted in her dissenting opinion, joined by the Chief Justice and Justices Scalia and Thomas, the Court has 'effectively . . . delete[d] the words 'for public use' from the Takings Clause of the Fifth Amendment' and thereby 'refus[ed] to enforce properly the Federal Constitution'.

(9) Under the Court's decision in *Kelo*, Justice O'Connor warns, '[t]he specter of condemnation hangs over all property. 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'.

(10) Justice O'Connor further warns that, under the Court's decision in *Kelo*, '[a]ny property may now be taken for the benefit of another private party', and 'the fallout from this decision will not be random. The beneficiaries are likely to be those citizens with disproportionate influence and power in the

political process, including large corporations and development firms. As for the victims, the government now has license to transfer property from those with fewer resources to those with more. The Founders cannot have intended this perverse result'.

(11) As an amicus brief filed by the National Association for the Advancement of Colored People, AARP, and other organizations noted, '[a]bsent a true public use requirement the takings power will be employed more frequently. The takings that result will disproportionately affect and harm the economically disadvantaged and, in particular, racial and ethnic minorities and the elderly'.

(12) It is appropriate for Congress to take action, consistent with its limited powers under the Constitution, to restore the vital protections of the Fifth Amendment and to protect homes, small businesses, and other private property rights against unreasonable government use of the power of eminent domain.

(13) It would also be appropriate for States to take action to voluntarily limit their own power of eminent domain. As the Court in Kelo noted, 'nothing in our opinion precludes any State from placing further restrictions on its exercise of the takings power'.

SEC. 3. PROTECTION OF HOMES, SMALL BUSINESSES, AND OTHER PRIVATE PROPERTY RIGHTS.

(a) In General- The power of eminent domain shall be available only for public use.

(b) Public Use- In this Act, the term 'public use' shall not be construed to include economic development.

(c) Application- This Act shall apply to--

(1) all exercises of eminent domain power by the Federal Government; and

(2) all exercises of eminent domain power by State and local government through the use of Federal funds.

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The Washington Times

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Alabama limits eminent domain

By Donald Lambro

THE WASHINGTON TIMES

Published August 4, 2005

Alabama yesterday became the first state to enact new protections against local-government seizure of property allowed under a Supreme Court ruling that has triggered an explosive grass-roots counteroffensive across the country.

Republican Gov. Bob Riley signed a bill that was passed unanimously by a special session of the Alabama Legislature, which would prohibit governments from using their eminent-domain authority to take privately owned properties for the purpose of turning them over to retail, industrial, office or residential developers.

Calling the high court's June 23 ruling "misguided" and a "threat to all property owners," Mr. Riley said, "A property rights revolt is sweeping the nation, and Alabama is leading it."

The backlash against the judicial ruling has not received much attention in the national press, although legislative leaders in more than two dozen states have proposed statutes and/or state constitutional amendments to restrict local governments' eminent-domain powers.

Besides Alabama, legislation to ban or restrict the use of eminent domain for private development has been introduced in 16 states: California, Connecticut, Delaware, Florida, Illinois, Kentucky, Massachusetts, Michigan, Minnesota, New Jersey, New York, Oregon, Pennsylvania, Rhode Island, Tennessee and Texas.

Legislators have announced plans to introduce eminent-domain bills in seven more states: Alaska, Louisiana, Oklahoma, Ohio, South Dakota, South Carolina and Wisconsin, and lawmakers in Colorado, Georgia and Virginia plan to act on previously introduced bills.

In addition, public support is being sought for state constitutional prohibitions in several states -- Alabama, California, Florida, Michigan, New Jersey and Texas.

In an elaborate signing ceremony in the State Capitol's historic Old House Chamber, Mr. Riley said, "Alabamians can rest assured that their homes, farms, business and other private property are safe from being seized by government for a shopping center, or a factory, an office building or new residential development."

The signing immediately won praise from leading property rights advocates who had condemned the ruling and have lobbied state legislatures to block such practices.

"Kudos to Alabama political leaders for taking the first step toward protecting their citizens from eminent-domain abuse," said Dana Berliner, a senior attorney at the Institute for Justice, a public policy organization that conducted the first nationwide study of abusive property seizures.

The law came in response to a 5-4 decision by the high court that ruled that the Fifth Amendment's takings clause -- "nor shall private property be taken for public use, without just compensation" -- did not prevent the city of New London, Conn., from taking Susette Kelo's property for the expressed purpose of private development in order to gain higher tax revenue.

Although the Alabama law that the governor signed yesterday would prohibit such

eminent-domain seizures, it contains an exception that would permit takeovers of blighted properties that could be turned over to private interests -- a provision that critics call a loophole for future abuses.

"Alabama's blight law is particularly prone to abuse and must be reformed," Ms. Berliner said. "If legislators close the blight loophole, Alabama will be one of the best states in the country for protecting the rights of home and small business owners."

Jeff Emerson, spokesman for the governor, said yesterday that Mr. Riley would "like to talk to Berliner about this to see how it can be remedied."

The property rights movement, which had been somewhat moribund before the court acted, has spawned what many political strategists expect to be a major issue in the 2006 election cycle.

A number of bills have been introduced in Congress where the issue is winning strong bipartisan support -- from California Rep. Maxine Waters, a liberal Democrat, to Texas Sen. John Cornyn, a conservative Republican.

Polls show unusual unity on strengthening property rights. A Quinnipiac University poll, for example, found that 89 percent of voters in Connecticut want the legislature to limit eminent domain. A University of New Hampshire poll found that 93 percent of state residents were opposed to taking property for private development.

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House bill counters eminent domain ruling

WASHINGTON (AP) -- Contending that the Supreme Court has undermined a pillar of American society -- the sanctity of the home -- the House overwhelmingly approved a bill Thursday to block the court-approved seizure of private property for use by developers.

The bill, passed 376-38, would withhold federal money from state and local governments that use powers of eminent domain to force businesses and homeowners to give up their property for commercial uses.

The Supreme Court, in a 5-4 ruling in June, recognized the power of local governments to seize property needed for private development projects that generate tax revenue. The decision drew criticism from private property, civil rights, farm and religious groups that said it was an abuse of the Fifth Amendment's "takings clause." That language provides for the taking of private property, with fair compensation, for public use.

The court's June decision, said House Judiciary Committee Chairman James Sensenbrenner, R-Wisconsin, changed established constitutional principles by holding that "any property may now be taken for the benefit of another private party."

The ruling in *Kelo v. City of New London* allowed the Connecticut city to exercise state eminent domain law to require several homeowners to cede their property for commercial use.

With this "infamous" decision, said Rep. Phil Gingrey, R-Georgia, "homes and small businesses across the country have been placed in grave jeopardy and threatened by the government wrecking ball."

The bill, said Chip Mellor, president of the Institute for Justice, which represented the *Kelo* homeowners before the Supreme Court, "highlights the fact that this nation's eminent domain and urban renewal laws need serious and substantial changes."

But opponents argued that the federal government should not be interceding in what should be a local issue. "We should not change federal law every time members of Congress disagree with the judgment of a locality when it uses eminent domain for the purpose of economic development," said Rep. Bobby Scott, D-Virginia.

The legislation is the latest, and most far-reaching, of several congressional responses to the court ruling. The House previously passed a measure to bar federal transportation money from going for improvements on land seized for private development. The Senate approved an amendment to a transportation spending bill applying similar restrictions. The bill now moves to the Senate, where Sen. John Cornyn, R-Texas, has introduced companion legislation.

About half the states are also considering changes in their laws to prevent takings for private use.

The Bush administration, backing the House bill, said in a statement that "private property rights are the bedrock of the nation's economy and enjoy constitutionally protected status. They should also receive an appropriate level of protection by the federal government."

The House bill would cut off for two years all federal economic development funds to states and localities that use economic development as a rationale for property seizures. It also would bar the federal government from using eminent domain powers for economic development.

"By subjecting all projects to penalties, we are removing a loophole that localities can exploit by playing a 'shell game' with projects," said Rep. Henry Bonilla, R-Texas, a chief sponsor.

The House, by a voice vote, approved Gingrey's proposal to bar states or localities in pursuit of more tax money from exercising eminent domain over nonprofit or tax-exempt religious organizations. Churches, he said, "should not have to fear because God does not pay enough in taxes."

Eminent domain, the right of government to take property for public use, is typically used for projects that benefit an entire community, such as highways, airports or schools.

Justice John Paul Stevens, who wrote the majority opinion in *Kelo*, said in an August speech that while he had concerns about the results, the ruling was legally correct because the high court has "always allowed local policy-makers wide latitude in determining how best to achieve legitimate public goals."

Several lawmakers who opposed the House bill said eminent domain has long been used by local governments for economic development projects such as the Inner Harbor in Baltimore and the cleaning up of Times Square in New York. The District of Columbia is expected to use eminent domain to secure land for a new baseball stadium for the Washington Nationals.

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Eminent domain is in the spotlight now

Here I was, about to submit my hotel proposal to local officials in Weare, N.H., when a wealthy East Coast developer beat me to it. Either project required condemnation of a luxurious home on acreage we needed for hotel parking. The home, unfortunately (for him), belongs to Supreme Court Justice David Souter.

Logan Clements, the other project sponsor, said he needs only three out of five votes for the town's Board of Selectmen to condemn Justice Souter's property using eminent domain powers. Then they'll make him "an offer he can't refuse." If he balks, condemnation proceedings begin. The Clements proposal for The Lost Liberty Hotel includes a fine restaurant, the Just Desserts Cafe. Since he's so politically connected, I don't stand a chance. Oh, well, that's life. Most news watchers know of the Supreme Court's ruling that local governments could seize a person's home or business and use the property for more lucrative purposes—namely jobs and tax revenues. For many Americans, the *Kelo v. City of New London* eminent domain ruling was a shocker. Even more shocking is the intense negative reaction from both rural and urban property owners.

Just as Oregonians overwhelmingly passed a property rights ballot measure limiting government powers last November, the *Kelo* decision has motivated citizens from coast to coast to explore legislative options that would restrict government's ability to take their property.

These are not knee-jerk reactions to one unpopular Supreme Court decision. The Institute for Justice, which represented homeowner Susette Kelo in the case, says it has documented more than 10,000 instances over a five-year period involving threatened or actual property condemnations that benefited other private parties. It's sad that so many people have been harmed before

**PAULA
EASLEY**

COMMENT



the issue struck home.

Readers of Malcolm Gladwell's intriguing book "The Tipping Point" will recognize the eminent domain/property rights cause as one that has long bubbled under the surface but wouldn't quite make it to the level of a national movement. Gladwell defines the tipping point as that magic moment when an idea, trend or social behavior crosses a threshold, then tips and spreads like wildfire. In a single decision, five Supreme Court lawyers just vaulted the issue of property ownership threats well over the tipping point.

On June 23, after reporting the court's decision, CNN's Lou Dobbs conducted an electronic poll asking under what circumstances local governments should seize homes and businesses. A minuscule 1 percent of respondents said they would approve such actions for private economic development. Call-ins and e-mails to two Washington, D.C., radio shows reflected unanimous opposition to the Supreme Court's ruling. Not one response in favor. I can't recall a single controversial public policy issue resulting in such an overwhelmingly one-sided response.

The Supreme Court majority opinion suggested language in state constitutions and laws could be enacted to protect citizens from overzealous property takings; if local citizens want to stop the practice, they have the power to do so. If they don't

act, government and developers will have free rein to advance projects on any property, not just that of the nonwhite and non-wealthy, as has occurred through urban renewal projects over the last 50 years.

Despite the outcry of home and business owners over the *Kelo* decision, some local government entities are right in the middle of razing working-class and poor neighborhoods to bring in revenues, create jobs and beautify their communities. They are delighted with the case's outcome.

So, what should communities do if they want to revitalize rundown areas? They can adopt procedures that assure respect for the rights of property owners as was done in redeveloping downtown Seattle and elsewhere. Seattle's strategy can be reviewed in a study, "Condemning Condemnation: Alternatives to Eminent Domain," at www.goldwaterinstitute.org/article.php/434.html.

They can support using condemnations only as a last resort. They can require a two-thirds vote of governing bodies to authorize it. State legislatures can impose restrictions on eminent domain use by local governments, as Arizona's legislature did recently.

Possibly the most common-sense response would be for communities to enact remedial measures that would narrowly confine the use of eminent domain powers to the central functions of local government: public buildings, roads, bridges, etc., and let the private sector spearhead the "nice to haves" and redevelopment projects. If eminent domain powers must be exercised, it should be done at home, where local officials have to look the dispossessed straight in the eye.

Paula Easley, an Anchorage public policy consultant, is vice chair Nationwide Public Projects Coalition; president, Alaska Land Rights Coalition; and board member, Resource Development Council of Alaska and Arctic Power. E-mail, paulaeasley@yahoo.com.

This memorandum describes how state legislatures are responding to the U.S. Supreme Court decision delivered on June 23, 2005, in *Kelo v. New London* (04-108). In that case, the court determined that the "public use" provision of the takings clause of the 5th Amendment to the U.S. Constitution permits eminent domain for economic development purposes that provide a "public benefit" pursuant to a Connecticut statute. At the same time, the court acknowledged that nothing in its decision precludes a state from placing further restrictions on the use of eminent domain. This memorandum will discuss the categories of legislation that the National Conference of State Legislatures (NCSL) has observed, and present summaries and links to bills considered since the decision came down.

Categories of Legislation

NCSL has been tracking five types of legislation that state legislatures have either considered or are still considering since the decision in *Kelo* was reported. Each category restricts the use of eminent domain for economic development purposes to some degree, while providing certain exceptions. The limitations may apply to economic development agencies created by local governments, or to municipalities and counties themselves. A broad range of approaches have been employed, from reiterating that eminent domain may be exercised solely for a public use, to prohibiting it for specified purposes.

Authorization for a Public Use. Stipulates that eminent domain may be used only for a "stated public purpose" or a "recognized public use." The legislation may not define what constitutes such purposes or uses. (Delaware enacted this type of approach at the end of its 2005 regular session; see attached summary of "Post-*Kelo v. New London* State Eminent Domain Legislation.")

Restriction of Use to Blighted Properties. Limits the use of eminent domain for economic development purposes to blighted properties only, or to areas where the majority of properties are blighted and the remaining parcels are necessary to complete a redevelopment plan. This approach establishes additional criteria defining what constitutes blight that a local government must satisfy before condemning private property for economic development purposes.

Enhanced Public Notice, Hearing and Negotiation Criteria. Requires local governments to hold public hearings before condemning property for economic

development purposes; notify affected property owners in advance of a hearing; and negotiate in good faith with property owners before condemning land.

Local Government Approval. Requires a vote of the locally elected legislative body before a redevelopment agency may initiate eminent domain for economic development purposes. The vote may have to meet a super-majority threshold. In some instances, the use of eminent domain by a local government may require approval by the state legislature.

Prohibiting Eminent Domain for Specified Purposes. Prohibits the use of eminent domain for economic development (e.g., residential, retail, commercial or industrial); for the primary purpose of generating additional tax revenue; or to transfer private property to another private use. This legislation normally includes exceptions, most frequently for blighted properties. (Alabama enacted this type of approach during its 2005 special session; Texas enacted this type of approach during its second special session; see attached summary.)

Other approaches designed to provide additional time to assess policy options include placing a moratorium on the use of eminent domain for economic development purposes until a specified date, and establishing special legislative committees or task forces to study the issues and report back to the legislature with findings and recommendations. (Ohio enacted both these approaches during its 2005 session; see attached summary.)

A summary of legislation considered by states that were either in session at the time the *Kelo* decision was delivered or convened a special session after the decision came down is attached to this memorandum.

Post-*Kelo v. New London* State Eminent Domain Legislation

Alabama 2005 Special Session

SB 68

Prohibits the use of eminent domain for retail, commercial, residential or apartment development; for purposes of generating tax revenue; or for the transfer of private property to another private party. Contains a blight exception.

(Enacted.)

HB 14

Prohibits the use of eminent domain for retail, commercial, residential or apartment development; for purposes of generating tax revenue; or for the transfer of private property to another private party.

(Passed House; failed in Senate.)

SB 81, SB 89, SB 92

Prohibits the use of eminent domain for retail, commercial, residential or apartment development.

(Failed in Senate.)

HB 102, SB 91

Prohibits the use of eminent domain for an economic development purpose and stipulates that its application may only be used for a public use.

(HB 102 failed in House. SB 91 failed in Senate.)

California

2005 Session

AB 1162

Places a moratorium on the use of eminent domain to acquire owner-occupied residential property for a private use until January 1, 2008.

(Passed Assembly; in Senate committee.)

SCA 12

Stipulates that public use does not include taking owner-occupied residential property for a private use.

(In Senate committee.)

ACA 22, SCA 15, AB 590

ACA 22 and SCA 15 stipulate that private property may only be taken for a stated public use. AB 590 stipulates that "public use" does not include taking non-blighted

property for another private use.

(ACA 22 introduced. SCA 15 introduced. AB 590 in Assembly committee.)

Delaware

2005 Session

SB 217 (with House Amendment 1)

Restricts the use of eminent domain by the state or a political subdivision to a recognized public use.

(Enacted.)

Illinois

2005 Session

HB 4091

Stipulates that the use of eminent domain may only be for a "qualified public use," meaning for public ownership and control. Prohibits eminent domain for private ownership or control, including economic development, unless approved by the state legislature.

(Introduced.)

Michigan

2005 Session

SB 693

Prohibits the use of eminent domain to transfer private property to another private entity unless the property is blighted or qualifies as a public use; public use does not include taking for general economic development or generating additional tax revenue.

(Passed Senate; in House Committee.)

SJR E

Stipulates that if a person's principal residence is taken for public use, the amount of just compensation shall not be less than 125 percent of the property's fair market value; public use does not include taking for general economic development or generating additional tax revenue.

(Passed Senate; in House Committee.)

HB 5060, HB 5078

Prohibits the use of eminent domain to transfer private property to another private entity for the primary benefit of the private entity.

(HB 5060 in House committee. HB 5078 in House Committee.)

Minnesota

2005 Special Session

HF 117, HF 132

Prohibits the use of eminent domain to transfer private property to another private party.

(HF 117 failed to pass. HF 132 failed to pass.)

HF 123

Prohibits the use of eminent domain for economic development purposes.

(Failed to pass.)

New Jersey

2005 Session

SB 2739, AB 4392

Prohibits the use of eminent domain to condemn legally occupied residential property that meets applicable housing codes as part of a redevelopment project.

(In Senate Committee.)

New York

2005 Session

AB 8865, AB 9051, SB 5949

Requires a local government to vote to approve the proposed use of eminent domain to condemn private property for another private use.

(AB 8865 and AB 9051 in Assembly committee. SB 5949 in Senate committee.)

AB 9043, AB 9050, SB 5946

Requires that an economic development plan approved by a local government be prepared when eminent domain is used for economic development purposes.

Requires a public hearing to be held and includes additional public notice requirements. Requires the amount of compensation paid to a property owner when eminent domain is used for economic development purposes be greater than 100 percent of fair market value.

(AB 9043 and AB 9050 in Assembly committee. SB 5946 in Senate Committee.)

SB 5936

Stipulates that eminent domain can be used for economic development purposes only if the area is blighted.

(In Senate committee.)

SB 5938

Stipulates that eminent domain can only be used for specified public projects.

Requires approval of the county legislature or city council if an industrial development agency decides to use eminent domain.

(In Senate committee.)

Ohio

2005 Session

SB 167

Places a moratorium on the use of eminent domain for economic development purposes that would ultimately result in the property being transferred to another private party in an area that is not blighted until December 31, 2006. Creates a task

force to study eminent domain issues.

(Enacted.)

SJR 6

Removes from municipalities the constitutional authority to use eminent domain unless the power is specifically granted to them by the state legislature.

(In Senate committee.)

HB 331

Places a moratorium on the use of eminent domain to condemn non-blighted property for economic development purposes where the property would be transferred to another private use. Creates a legislative task force to study eminent domain issues.

(Introduced.)

HJR 10

Prohibits the use of eminent domain for economic development where the primary purpose is to transfer private property to another private use.

(Introduced.)

Oregon

2005 Session

HB 3505

Authorizes a public body to use eminent domain only if the primary purpose is to allow the public to own or use the property; such property may not be transferred to another private entity.

(Passed House; failed in Senate.)

Pennsylvania

2005 Session

HB 2054

Prohibits the use of eminent domain for private commercial enterprise, with certain exceptions (including for blighted areas or those properties that meet the criteria contained in the state's redevelopment law).

(Passed House; in Senate Committee.)

HB 1835, HB 1836

Prohibits the use of eminent domain to turn private property into a nonpublic interest, or for the purpose of increasing the local government's tax base.

(In House committee.)

HB 2029

Prohibits the use of eminent domain to condemn non-blighted property for retail, commercial, residential or apartment development; for purposes of generating tax revenue; or for the transfer of private property to another private party.

(In House Committee.)

SB 881

Prohibits the use of eminent domain for private commercial enterprise, with certain exceptions (including for blighted areas or those properties that meet the criteria contained in the state's redevelopment law).

(In Senate Committee.)

Texas

2005 Second Special Session

SB 7

Prohibits the use of eminent domain to confer a private benefit on a private party or for economic development purposes, with certain exceptions.

(Enacted.)

HB 12, HB 16

Prohibits the use of eminent domain to confer a private benefit on a private party or for economic development purposes, with certain exceptions.

(Failed in House.)

HJR 11, SJR 5

Prohibits the use of eminent domain for economic development purposes or to confer a private benefit on a private party, with certain exceptions.

(HJR 11 failed in House. SJR 5 failed in Senate.)

2005 First Special Session

HJR 19, SJR 10, SB 62

Prohibits the use of eminent domain for economic development purposes in most instances.

(HJR 19 passed House; failed in Senate. SJR 10 failed in Senate. SB 62 passed both houses; failed in conference committee.)

Wisconsin

2005 Session

AB 657

Prohibits the use of eminent domain to condemn non-blighted property if the property is to be transferred to another private entity.

(Passed Assembly; in Senate committee.)

CONGRESSMAN
JOEL HEFLEY
For Immediate Release

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Aug. 1, 2005

Hefley authors bill to protect private property rights

(Washington, D.C.) — U.S. Rep. Joel Hefley, R-Colo., introduced legislation last Friday that would work to protect the private property rights of American citizens.

Hefley introduced the Eminent Domain Limitation Act of 2005, which would prohibit a state from receiving federal funds for economic development projects if it has not enacted legislation to limit the use of eminent domain.

States must prohibit the use of eminent domain for economic development, and require an entity engaged in a "taking" to show the necessity of the property in question and that no other reasonable alternatives exist. States must also limit the uses for eminent domain to public health and safety, rights-of-way for public utilities and public highways and parks.

"This legislation is strong medicine, I know, but the Supreme Court's decision is the worst thing I have seen from that court in years. It allows local governments to use the lure of future revenues from private economic development projects to run roughshod over private property rights.

"If the court's decision is allowed to stand nobody's property will be safe.

"This bill is not a cure all. However, a basic constitutional right is at stake, and I believe such a strong threat necessitates a strong response."

In June, the U.S. Supreme Court ruled in 5-4 decision that economic development can be considered a public use, allowing local governments to take private property for the purpose of generating income.

— end —

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To: State Legislators Interested in Eminent Domain Issues

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From: Larry Morandi, Group Director
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Date: November 30, 2005

Subject: Eminent Domain

This memorandum describes how state legislatures are responding to the U.S. Supreme Court decision delivered on June 23, 2005, in *Kelo v. New London* (04-108). In that case, the court determined that the "public use" provision of the takings clause of the 5th Amendment to the U.S. Constitution permits eminent domain for economic development purposes that provide a "public benefit" pursuant to a Connecticut statute. At the same time, the court acknowledged that nothing in its decision precludes a state from placing further restrictions on the use of eminent domain. This memorandum will discuss the categories of legislation that the National Conference of State Legislatures (NCSL) has observed, and present summaries and links to bills considered since the decision came down.

Categories of Legislation

NCSL has been tracking five types of legislation that state legislatures have either considered or are still considering since the decision in *Kelo* was reported. Each category restricts the use of eminent domain for economic development purposes to some degree, while providing certain exceptions. The limitations may apply to economic development agencies created by local governments, or to municipalities and counties themselves. A broad range of approaches have been employed, from reiterating that eminent domain may be exercised solely for a public use, to prohibiting it for specified purposes.

1. *Authorization for a Public Use.* Stipulates that eminent domain may be used only for a "stated public purpose" or a "recognized public use." The legislation may not define what constitutes such purposes or uses. (Delaware enacted this type of approach at the end of its 2005 regular session; see attached summary of "Post-*Kelo v. New London* State Eminent Domain Legislation.")
2. *Restriction of Use to Blighted Properties.* Limits the use of eminent domain for economic development purposes to blighted properties only, or to areas where the majority of properties are blighted and the remaining parcels are necessary to complete a redevelopment plan. This approach establishes additional criteria defining what constitutes blight that a local government must satisfy before condemning private property for economic development purposes.

3. *Enhanced Public Notice, Hearing and Negotiation Criteria.* Requires local governments to hold public hearings before condemning property for economic development purposes; notify affected property owners in advance of a hearing; and negotiate in good faith with property owners before condemning land.
4. *Local Government Approval.* Requires a vote of the locally elected legislative body before a redevelopment agency may initiate eminent domain for economic development purposes. The vote may have to meet a super-majority threshold. In some instances, the use of eminent domain by a local government may require approval by the state legislature.
5. *Prohibiting Eminent Domain for Specified Purposes.* Prohibits the use of eminent domain for economic development (e.g., residential, retail, commercial or industrial); for the primary purpose of generating additional tax revenue; or to transfer private property to another private use. This legislation normally includes exceptions, most frequently for blighted properties. (Alabama enacted this type of approach during its 2005 special session; Texas enacted this type of approach during its second special session; see attached summary.)

Other approaches designed to provide additional time to assess policy options include placing a moratorium on the use of eminent domain for economic development purposes until a specified date, and establishing special legislative committees or task forces to study the issues and report back to the legislature with findings and recommendations. (Ohio enacted both these approaches during its 2005 session; see attached summary.)

A summary of legislation considered by states that were either in session at the time the *Kelo* decision was delivered or convened a special session after the decision came down is attached to this memorandum.

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POST-KELO v. NEW LONDON STATE EMINENT DOMAIN LEGISLATION

Alabama

2005 Special Session

SB 68

Prohibits the use of eminent domain for retail, commercial, residential or apartment development; for purposes of generating tax revenue; or for the transfer of private property to another private party. Contains a blight exception.

(Enacted.)

HB 14

Prohibits the use of eminent domain for retail, commercial, residential or apartment development; for purposes of generating tax revenue; or for the transfer of private property to another private party.

(Passed House; failed in Senate.)

SB 81, SB 89, SB 92

Prohibits the use of eminent domain for retail, commercial, residential or apartment development.

(Failed in Senate.)

HB 102, SB 91

Prohibits the use of eminent domain for an economic development purpose and stipulates that its application may only be used for a public use.

(HB 102 failed in House. SB 91 failed in Senate.)

California

2005 Session

AB 1162

Places a moratorium on the use of eminent domain to acquire owner-occupied residential property for a private use until January 1, 2008.

(Passed Assembly; in Senate committee.)

SCA 12

Stipulates that public use does not include taking owner-occupied residential property for a private use.

(In Senate committee.)

ACA 22, SCA 15, AB 590

ACA 22 and SCA 15 stipulate that private property may only be taken for a stated public use. AB 590 stipulates that "public use" does not include taking non-blighted property for another private use.

(ACA 22 introduced. SCA 15 introduced. AB 590 in Assembly committee.)

Delaware

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SP 217 (with House Amendment 1)

Restricts the use of eminent domain by the state or a political subdivision to a recognized public use.
(Enacted.)

Illinois

2005 Session

HB 4091

Stipulates that the use of eminent domain may only be for a "qualified public use," meaning for public ownership and control. Prohibits eminent domain for private ownership or control, including economic development, unless approved by the state legislature.

(Introduced.)

Michigan

2005 Session

SB 693

Prohibits the use of eminent domain to transfer private property to another private entity unless the property is blighted or qualifies as a public use; public use does not include taking for general economic development or generating additional tax revenue.

(Passed Senate; in House Committee.)

SJR E

Stipulates that if a person's principal residence is taken for public use, the amount of just compensation shall not be less than 125 percent of the property's fair market value; public use does not include taking for general economic development or generating additional tax revenue.

(Passed Senate; in House Committee.)

HB 5060, HB 5078

Prohibits the use of eminent domain to transfer private property to another private entity for the primary benefit of the private entity.

(HB 5060 in House committee. HB 5078 in House Committee.)

Minnesota

2005 Special Session

HF 117, HF 132

Prohibits the use of eminent domain to transfer private property to another private party.

(HF 117 failed to pass. HF 132 failed to pass.)

HF 123

Prohibits the use of eminent domain for economic development purposes.

(Failed to pass.)

New Jersey

2005 Session

SB 2739, AB 4392

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Prohibits the use of eminent domain to condemn legally occupied residential property that meets applicable housing codes as part of a redevelopment project.
(In Senate Committee.)

New York

2005 Session

AB 8865, AB 9051, SB 5949

Requires a local government to vote to approve the proposed use of eminent domain to condemn private property for another private use.
(AB 8865 and AB 9051 in Assembly committee. SB 5949 in Senate committee.)

AB 9043, AB 9050, SB 5946

Requires that an economic development plan approved by a local government be prepared when eminent domain is used for economic development purposes. Requires a public hearing to be held and includes additional public notice requirements. Requires the amount of compensation paid to a property owner when eminent domain is used for economic development purposes be greater than 100 percent of fair market value.
(AB 9043 and AB 9050 in Assembly committee. SB 5946 in Senate Committee.)

SB 5936

Stipulates that eminent domain can be used for economic development purposes only if the area is blighted.
(In Senate committee.)

SB 5938

Stipulates that eminent domain can only be used for specified public projects. Requires approval of the county legislature or city council if an industrial development agency decides to use eminent domain.
(In Senate committee.)

Ohio

2005 Session

SB 167

Places a moratorium on the use of eminent domain for economic development purposes that would ultimately result in the property being transferred to another private party in an area that is not blighted until December 31, 2006. Creates a task force to study eminent domain issues.
(Enacted.)

SJR 6

Removes from municipalities the constitutional authority to use eminent domain unless the power is specifically granted to them by the state legislature.
(In Senate committee.)

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HB 331

Places a moratorium on the use of eminent domain to condemn non-blighted property for economic development purposes where the property would be transferred to another private use. Creates a legislative task force to study eminent domain issues.
(Introduced.)

HJR 10

Prohibits the use of eminent domain for economic development where the primary purpose is to transfer private property to another private use.
(Introduced.)

Oregon

2005 Session

HB 3505

Authorizes a public body to use eminent domain only if the primary purpose is to allow the public to own or use the property; such property may not be transferred to another private entity.
(Passed House; failed in Senate.)

Pennsylvania

2005 Session

HB 2054

Prohibits the use of eminent domain for private commercial enterprise, with certain exceptions (including for blighted areas or those properties that meet the criteria contained in the state's redevelopment law).
(Passed House; in Senate Committee.)

HB 1835, HB 1836

Prohibits the use of eminent domain to turn private property into a nonpublic interest, or for the purpose of increasing the local government's tax base.
(In House committee.)

HB 2029

Prohibits the use of eminent domain to condemn non-blighted property for retail, commercial, residential or apartment development; for purposes of generating tax revenue; or for the transfer of private property to another private party.
(In House Committee.)

SB 881

Prohibits the use of eminent domain for private commercial enterprise, with certain exceptions (including for blighted areas or those properties that meet the criteria contained in the state's redevelopment law).
(In Senate Committee.)

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Texas

2005 Second Special Session

SB 7

Prohibits the use of eminent domain to confer a private benefit on a private party or for economic development purposes, with certain exceptions.

(Enacted.)

HB 12, HB 16

Prohibits the use of eminent domain to confer a private benefit on a private party or for economic development purposes, with certain exceptions.

(Failed in House.)

HJR 11, SJR 5

Prohibits the use of eminent domain for economic development purposes or to confer a private benefit on a private party, with certain exceptions.

(HJR 11 failed in House. SJR 5 failed in Senate.)

2005 First Special Session

HJR 19, SJR 10, SB 62

Prohibits the use of eminent domain for economic development purposes in most instances.

(HJR 19 passed House; failed in Senate. SJR 10 failed in Senate. SB 62 passed both houses; failed in conference committee.)

Wisconsin

2005 Session

AB 657

Prohibits the use of eminent domain to condemn non-blighted property if the property is to be transferred to another private entity.

(Passed Assembly; in Senate committee.)

Westlaw.

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(Cite as: 125 S.Ct. 2655)

P

Supreme Court of the United States
Susette KELO, et al., Petitioners,
v.
CITY OF NEW LONDON, CONNECTICUT, et al.
No. 04-108.

Argued Feb. 22, 2005.
Decided June 23, 2005.
Rehearing Denied Aug. 22, 2005.
See -- U.S. --, 126 S.Ct. 24.

Background: Owners of condemned property challenged city's exercise of eminent domain power on ground takings were not for public use. The Superior Court, Judicial District of New London, Corradino, J., granted partial relief for owners, and cross-appeals were taken. The Supreme Court, Norcott, J., 268 Conn. 1, 843 A.2d 500, upheld takings. Certiorari was granted.

Holding: The Supreme Court, Justice Stevens, held that city's exercise of eminent domain power in furtherance of economic development plan satisfied constitutional "public use" requirement. Affirmed.

Justice Kennedy concurred and filed opinion.

Justice O'Connor dissented and filed opinion in which Chief Justice Rehnquist and Justices Scalia and Thomas joined.

Justice Thomas dissented and filed opinion.

West Headnotes

[1] Eminent Domain ↪61

148k61 Most Cited Cases

Sovereign may not use its eminent domain power to take property of one private party for sole purpose of transferring it to another private party, even if

first party is paid just compensation. U.S.C.A. Const.Amend. 5.

[2] Eminent Domain ↪13

148k13 Most Cited Cases

State may use its eminent domain power to transfer property from one private party to another if purpose of taking is future use by public. U.S.C.A. Const.Amend. 5.

[3] Eminent Domain ↪18.5

148k18.5 Most Cited Cases

City's exercise of eminent domain power in furtherance of economic development plan satisfied constitutional "public use" requirement, even though city was not planning to open condemned land to use by general public, where plan served public purpose. U.S.C.A. Const.Amend. 5.

[4] Eminent Domain ↪13

148k13 Most Cited Cases

[4] Eminent Domain ↪67

148k67 Most Cited Cases

Court defines "public purpose," needed to justify exercise of eminent domain power, broadly, reflecting longstanding policy of judicial deference to legislative judgments in this field. U.S.C.A. Const.Amend. 5.

[5] Eminent Domain ↪18.5

148k18.5 Most Cited Cases

Economic development can qualify as "public use," for eminent domain purposes. U.S.C.A. Const. Amend. 5.

[6] Eminent Domain ↪65.1

148k65.1 Most Cited Cases

No heightened standard of review is warranted when public purpose allegedly justifying use of eminent domain power is economic development.

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[7] Eminent Domain ↩67

148k67 Most Cited Cases

Once court decides question of whether exercise of eminent domain power is for public purpose, amount and character of land to be taken for project and need for particular tract to complete integrated plan rests in discretion of legislative branch.

2656 Syllabus [FN]

FN* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.

After approving an integrated development plan designed to revitalize its ailing economy, respondent city, through its development agent, purchased most of the property earmarked for the project from willing sellers, but initiated condemnation proceedings when petitioners, the owners of the rest of the property, refused to sell. Petitioners brought this state-court action claiming, *inter alia*, that the taking of their properties would violate the "public use" restriction in the Fifth Amendment's Takings Clause. The trial court granted a permanent restraining order prohibiting the taking of the some of the properties, *2657 but denying relief as to others. Relying on cases such as *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 104 S.Ct. 2321, 81 L.Ed.2d 186, and *Berman v. Parker*, 348 U.S. 26, 75 S.Ct. 98, 99 L.Ed. 27, the Connecticut Supreme Court affirmed in part and reversed in part, upholding all of the proposed takings.

Held! The city's proposed disposition of petitioners' property qualifies as a "public use" within the meaning of the Takings Clause. Pp. 2661-2669.

(a) Though the city could not take petitioners' land simply to confer a private benefit on a particular private party, see, e.g., *Midkiff*, 467 U.S., at 245, 104 S.Ct. 2321, the takings at issue here would be executed pursuant to a carefully considered

development plan, which was not adopted "to benefit a particular class of identifiable individuals," *ibid*. Moreover, while the city is not planning to open the condemned land--at least not in its entirety-- to use by the general public, this "Court long ago rejected any literal requirement that condemned property be put into use for the ... public." *Id.*, at 244, 104 S.Ct. 2321. Rather, it has embraced the broader and more natural interpretation of public use as "public purpose." See, e.g., *Fallbrook Irrigation Dist. v. Bradley*, 164 U.S. 112, 158-164, 17 S.Ct. 56, 41 L.Ed. 369. Without exception, the Court has defined that concept broadly, reflecting its longstanding policy of deference to legislative judgments as to what public needs justify the use of the takings power. *Berman*, 348 U.S. 26, 75 S.Ct. 98; *Midkiff*, 467 U.S. 229, 104 S.Ct. 2321; *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 104 S.Ct. 2862, 81 L.Ed.2d 815. Pp. 2661-2664.

(b) The city's determination that the area at issue was sufficiently distressed to justify a program of economic rejuvenation is entitled to deference. The city has carefully formulated a development plan that it believes will provide appreciable benefits to the community, including, but not limited to, new jobs and increased tax revenue. As with other exercises in urban planning and development, the city is trying to coordinate a variety of commercial, residential, and recreational land uses, with the hope that they will form a whole greater than the sum of its parts. To effectuate this plan, the city has invoked a state statute that specifically authorizes the use of eminent domain to promote economic development. Given the plan's comprehensive character, the thorough deliberation that preceded its adoption, and the limited scope of this Court's review in such cases, it is appropriate here, as it was in *Berman*, to resolve the challenges of the individual owners, not on a piecemeal basis, but rather in light of the entire plan. Because that plan unquestionably serves a public purpose, the takings challenged here satisfy the Fifth Amendment. P. 2665.

(c) Petitioners' proposal that the Court adopt a new

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bright-line rule that economic development does not qualify as a public use is supported by neither precedent nor logic. Promoting economic development is a traditional and long accepted governmental function, and there is no principled way of distinguishing it from the other public purposes the Court has recognized. See, e.g., *Berman*, 348 U.S., at 34, 75 S.Ct. 98. Also rejected is petitioners' argument that for takings of this kind the Court should require a "reasonable certainty" that the expected public benefits will actually accrue. Such a rule would represent an even greater departure from the Court's precedent. E.g. *Midkiff*, 467 U.S., at 242, 104 S.Ct. 2321. The disadvantages of a heightened form of review are especially pronounced in this type of case, where orderly implementation of a comprehensive plan requires all interested parties' legal rights to be established before *2658 new construction can commence. The Court declines to second-guess the wisdom of the means the city has selected to effectuate its plan. *Berman*, 348 U.S., at 26, 75 S.Ct. 98. Pp. 2665-2669.

268 Conn. 1, 843 A.2d 500, affirmed.

STEVENS, J., delivered the opinion of the Court, in which KENNEDY, SOUTER, GINSBURG, and BREYER, JJ., joined. KENNEDY, J., filed a concurring opinion. O'CONNOR, J., filed a dissenting opinion in which REHNQUIST, C. J., and SCALIA and THOMAS, JJ., joined. THOMAS, J., filed a dissenting opinion.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF CONNECTICUT

Institute for Justice, William H. Mellor, Scott G. Bullock, Counsel of Record, Dana Berliner, Steven Simpson, Washington, DC, Sawyer Law Firm, LLC, Scott W. Sawyer, New London, CT, Counsel for Petitioners

Wesley W. Horton, Counsel of Record, Daniel J. Krisch, Horton, Shields & Knox, P.C., Hartford, CT, Thomas J. Londregan, Jeffrey T. Londregan, Conway & Londregan, P.C., New London, CT,

Edward B. O'Connell, David P. Condon, Waller, Smith & Palmer, P.C., New London, CT, Counsel for the Respondents.

Justice STEVENS delivered the opinion of the Court.

In 2000, the city of New London approved a development plan that, in the words of the Supreme Court of Connecticut, was "projected to create in excess of 1,000 jobs, to increase tax and other revenues, and to revitalize an economically distressed city, including its downtown and waterfront areas." 268 Conn. 1, 5, 843 A.2d 500, 507 (2004). In assembling the land needed for this project, the city's development agent has purchased property from willing sellers and proposes to use the power of eminent domain to acquire the remainder of the property from unwilling owners in exchange for just compensation. The question presented is whether the city's proposed disposition of this property qualifies as a "public use" within the meaning of the Takings Clause of the Fifth Amendment to the Constitution. [FN1]

FN1. "[N]or shall private property be taken for public use, without just compensation." U.S. Const., Amdt. 5. That Clause is made applicable to the States by the Fourteenth Amendment. See *Chicago, B. & Q.R. Co. v. Chicago*, 166 U.S. 226, 17 S.Ct. 581, 41 L.Ed. 979 (1897).

I

The city of New London (hereinafter City) sits at the junction of the Thames River and the Long Island Sound in southeastern Connecticut. Decades of economic decline led a state agency in 1990 to designate the City a "distressed municipality." In 1996, the Federal Government closed the Naval Undersea Warfare Center, which had been located in the Fort Trumbull area of the City and had employed over 1,500 people. In 1998, the City's unemployment rate was nearly double that of the State, and its population of just under 24,000 residents was at its lowest since 1920.

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These conditions prompted state and local officials to target New London, and *2659 particularly its Fort Trumbull area, for economic revitalization. To this end, respondent New London Development Corporation (NLDC), a private nonprofit entity established some years earlier to assist the City in planning economic development, was reactivated. In January 1998, the State authorized a \$5.35 million bond issue to support the NLDC's planning activities and a \$10 million bond issue toward the creation of a Fort Trumbull State Park. In February, the pharmaceutical company Pfizer Inc. announced that it would build a \$300 million research facility on a site immediately adjacent to Fort Trumbull; local planners hoped that Pfizer would draw new business to the area, thereby serving as a catalyst to the area's rejuvenation. After receiving initial approval from the city council, the NLDC continued its planning activities and held a series of neighborhood meetings to educate the public about the process. In May, the city council authorized the NLDC to formally submit its plans to the relevant state agencies for review. [FN2] Upon obtaining state-level approval, the NLDC finalized an integrated development plan focused on 90 acres of the Fort Trumbull area.

FN2. Various state agencies studied the project's economic, environmental, and social ramifications. As part of this process, a team of consultants evaluated six alternative development proposals for the area, which varied in extensiveness and emphasis. The Office of Planning and Management, one of the primary state agencies undertaking the review, made findings that the project was consistent with relevant state and municipal development policies. See 1 App 89-95.

The Fort Trumbull area is situated on a peninsula that juts into the Thames River. The area comprises approximately 115 privately owned properties, as well as the 32 acres of land formerly occupied by the naval facility (Trumbull State Park now occupies 18 of those 32 acres). The development plan encompasses seven parcels. Parcel 1 is

designated for a waterfront conference hotel at the center of a "small urban village" that will include restaurants and shopping. This parcel will also have marinas for both recreational and commercial uses. A pedestrian "riverwalk" will originate here and continue down the coast, connecting the waterfront areas of the development. Parcel 2 will be the site of approximately 80 new residences organized into an urban neighborhood and linked by public walkway to the remainder of the development, including the state park. This parcel also includes space reserved for a new U.S. Coast Guard Museum. Parcel 3, which is located immediately north of the Pfizer facility, will contain at least 90,000 square feet of research and development office space. Parcel 4A is a 2.4-acre site that will be used either to support the adjacent state park, by providing parking or retail services for visitors, or to support the nearby marina. Parcel 4B will include a renovated marina, as well as the final stretch of the riverwalk. Parcels 5, 6, and 7 will provide land for office and retail space, parking, and water-dependent commercial uses. 1 App. 109-113.

The NLDC intended the development plan to capitalize on the arrival of the Pfizer facility and the new commerce it was expected to attract. In addition to creating jobs, generating tax revenue, and helping to "build momentum for the revitalization of downtown New London," *id.*, at 92, the plan was also designed to make the City more attractive and to create leisure and recreational opportunities on the waterfront and in the park.

The city council approved the plan in January 2000, and designated the NLDC as its development agent in charge of implementation. See Conn. *2660 Gen.Stat. § 8-188 (2005). The city council also authorized the NLDC to purchase property or to acquire property by exercising eminent domain in the City's name. § 8-193. The NLDC successfully negotiated the purchase of most of the real estate in the 90-acre area, but its negotiations with petitioners failed. As a consequence, in November 2000, the NLDC initiated the condemnation

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proceedings that gave rise to this case. [FN3]

FN3. In the remainder of the opinion we will differentiate between the City and the NLDC only where necessary.

II

Petitioner Susette Kelo has lived in the Fort Trumbull area since 1997. She has made extensive improvements to her house, which she prizes for its water view. Petitioner Wilhelmina Dery was born in her Fort Trumbull house in 1918 and has lived there her entire life. Her husband Charles (also a petitioner) has lived in the house since they married some 60 years ago. In all, the nine petitioners own 15 properties in Fort Trumbull--4 in parcel 3 of the development plan and 11 in parcel 4A. Ten of the parcels are occupied by the owner or a family member; the other five are held as investment properties. There is no allegation that any of these properties is blighted or otherwise in poor condition; rather, they were condemned only because they happen to be located in the development area.

In December 2000, petitioners brought this action in the New London Superior Court. They claimed, among other things, that the taking of their properties would violate the "public use" restriction in the Fifth Amendment. After a 7-day bench trial, the Superior Court granted a permanent restraining order prohibiting the taking of the properties located in parcel 4A (park or marina support). It, however, denied petitioners relief as to the properties located in parcel 3 (office space). 2 App. to Pet. for Cert. 343-350. [FN4]

FN4. While this litigation was pending before the Superior Court, the NLDC announced that it would lease some of the parcels to private developers in exchange for their agreement to develop the land according to the terms of the development plan. Specifically, the NLDC was negotiating a 99-year ground lease with Corcoran Jennison, a developer selected from a group of applicants. The

negotiations contemplated a nominal rent of \$1 per year, but no agreement had yet been signed. See 268 Conn. 1, 9, 61, 843 A.2d 500, 509-510, 540 (2004).

After the Superior Court ruled, both sides took appeals to the Supreme Court of Connecticut. That court held, over a dissent, that all of the City's proposed takings were valid. It began by upholding the lower court's determination that the takings were authorized by chapter 132, the State's municipal development statute. See Conn. Gen.Stat. § 8-186 *et seq.* (2005). That statute expresses a legislative determination that the taking of land, even developed land, as part of an economic development project is a "public use" and in the "public interest." 268 Conn., at 18-28, 843 A.2d, at 515- 521. Next, relying on cases such as *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 104 S.Ct. 2321, 81 L.Ed.2d 186 (1984), and *Berman v. Parker*, 348 U.S. 26, 75 S.Ct. 98, 99 L.Ed. 27 (1954), the court held that such economic development qualified as a valid public use under both the Federal and State Constitutions. 268 Conn., at 40, 843 A.2d, at 527.

Finally, adhering to its precedents, the court went on to determine, first, whether the takings of the particular properties at issue were "reasonably necessary" to achieving the City's intended public use, *id.*, at 82, 843 A.2d, at 552-553, and, second, whether the takings were for "reasonably *2661 foreseeable needs," *id.*, at 93, 843 A.2d, at 558-559. The court upheld the trial court's factual findings as to parcel 3, but reversed the trial court as to parcel 4A, agreeing with the City that the intended use of this land was sufficiently definite and had been given "reasonable attention" during the planning process. *Id.*, at 120-121, 843 A.2d, at 574.

The three dissenting justices would have imposed a "heightened" standard of judicial review for takings justified by economic development. Although they agreed that the plan was intended to serve a valid public use, they would have found all the takings unconstitutional because the City had failed to adduce "clear and convincing evidence" that the

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economic benefits of the plan would in fact come to pass. *Id.*, at 144, 146, 843 A.2d, at 587, 588 (Zarella, J., joined by Sullivan, C. J., and Katz, J., concurring in part and dissenting in part).

We 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. 542 U.S. ----, 125 S.Ct. 27, 159 L.Ed.2d 857 (2004).

III

[1][2] Two polar propositions are perfectly clear. On the one hand, it has long been accepted that the sovereign may not take the property of *A* for the sole purpose of transferring it to another private party *B*, even though *A* is paid just compensation. On the other hand, it is equally clear that a State may transfer property from one private party to another if future "use by the public" is the purpose of the taking; the condemnation of land for a railroad with common-carrier duties is a familiar example. Neither of these propositions, however, determines the disposition of this case.

[3] As for the first proposition, the City would no doubt be forbidden from taking petitioners' land for the purpose of conferring a private benefit on a particular private party. See *Midkiff*, 467 U.S., at 245, 104 S.Ct. 2321 ("A purely private taking could not withstand the scrutiny of the public use requirement; it would serve no legitimate purpose of government and would thus be void"); *Missouri Pacific R. Co. v. Nebraska*, 164 U.S. 403, 17 S.Ct. 130, 41 L.Ed. 489 (1896). [FN5] Nor would the City be allowed to take property under the mere pretext of a public purpose, when its actual purpose was to bestow a private benefit. The takings before us, however, would be executed pursuant to a "carefully considered" development plan. 268 Conn., at 54, 843 A.2d, at 536. The trial judge and all the members of the Supreme Court of Connecticut agreed that there was no evidence of an illegitimate purpose in this case. [FN6] Therefore, as was true of the statute *2662 challenged in *Midkiff*, 467 U.S., at 245, 104 S.Ct. 2321, the City's development plan was not adopted "to benefit a

particular class of identifiable individuals."

FN5. See also *Calder v. Bull*, 3 Dall. 386, 388, 1 L.Ed. 648 (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" (emphasis deleted)).

FN6. See 268 Conn., at 159, 843 A.2d, at 595 (Zarella, J., concurring in part and dissenting in part) ("The record clearly demonstrates that the development plan was not intended to serve the interests of Pfizer, Inc., or any other private entity, but rather, to revitalize the local economy by creating temporary and permanent jobs, generating a significant increase in tax revenue, encouraging spin-off economic activities and maximizing public access to the waterfront"). And while 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.

On the other hand, this is not a case in which the City is planning to open the condemned land--at

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least not in its entirety- to use by the general public. Nor will the private lessees of the land in any sense be required to operate like common carriers, making their services available to all comers. But although such a projected use would be sufficient to satisfy the public use requirement, this "Court long ago rejected any literal requirement that condemned property be put into use for the general public." *Id.*, at 244, 104 S.Ct. 2321. Indeed, while many state courts in the mid-19th century endorsed "use by the public" as the proper definition of public use, that narrow view steadily eroded over time. Not only was the "use by the public" test difficult to administer (*e.g.*, what proportion of the public need have access to the property? at what price?), [FN7] but it proved to be impractical given the diverse and always evolving needs of society. [FN8] Accordingly, when this Court began applying the Fifth Amendment to the States at the close of the 19th century, it embraced the broader and more natural interpretation of public use as "public purpose." See, *e.g.*, *Fallbrook Irrigation Dist. v. Bradley*, 164 U.S. 112, 158-164, 17 S.Ct. 56, 41 L.Ed. 369 (1896). Thus, in a case upholding a mining company's use of an aerial bucket line to transport ore over property it did not own, Justice Holmes' opinion for the Court stressed "the inadequacy of use by the general public as a universal test." *2663 *Strickley v. Highland Boy Gold Mining Co.*, 200 U.S. 527, 531, 26 S.Ct. 301, 50 L.Ed. 581 (1906). [FN9] We have repeatedly and consistently rejected that narrow test ever since. [FN10]

FN7. See, *e.g.*, *Dayton Gold & Silver Mining Co. v. Seawell*, 11 Nev. 394, 410, 1876 WL 4573, *11 (1876) ("If public occupation and enjoyment of the object for which land is to be condemned furnishes the only and true test for the right of eminent domain, then the legislature would certainly have the constitutional authority to condemn the lands of any private citizen for the purpose of building hotels and theaters. Why not? A hotel is used by the public as much as a railroad. The public have the same right, upon payment of a

fixed compensation, to seek rest and refreshment at a public inn as they have to travel upon a railroad").

FN8. From upholding the Mill Acts (which authorized manufacturers dependent on power-producing dams to flood upstream lands in exchange for just compensation), to approving takings necessary for the economic development of the West through mining and irrigation, many state courts either circumvented the "use by the public" test when necessary or abandoned it completely. See Nichols, *The Meaning of Public Use in the Law of Eminent Domain*, 20 B.U.L.Rev. 615, 619-624 (1940) (tracing this development and collecting cases). For example, in rejecting the "use by the public" test as overly restrictive, the Nevada Supreme Court stressed that "[m]ining is the greatest of the industrial pursuits in this state. All other interests are subservient to it. Our mountains are almost barren of timber, and our valleys could never be made profitable for agricultural purposes except for the fact of a home market having been created by the mining developments in different sections of the 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. ... The 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." *Dayton Gold & Silver Mining Co.*, 11 Nev., at 409-410, 1876 WL, at *11.

FN9. See also *Clark v. Nash*, 198 U.S. 361, 25 S.Ct. 676, 49 L.Ed. 1085 (1905) (upholding a statute that authorized the

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owner of arid land to widen a ditch on his neighbor's property so as to permit a nearby stream to irrigate his land).

FN10. See, e.g., *Mt. Vernon-Woodberry Cotton Duck Co. v. Alabama Interstate Power Co.*, 340 U.S. 30, 32, 36 S.Ct. 234, 60 L.Ed. 507 (1916) ("The inadequacy of use by the general public as a universal test is established"); *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1014-1015, 104 S.Ct. 2862, 81 L.Ed.2d 815 (1984) ("This Court, however, has rejected the notion that a use is a public use only if the property taken is put to use for the general public").

[4] The disposition of this case therefore turns on the question whether the City's development plan serves a "public purpose." Without exception, our cases have defined that concept broadly, reflecting our longstanding policy of deference to legislative judgments in this field.

In *Berman v. Parker*, 348 U.S. 26, 75 S.Ct. 98, 99 L.Ed. 27 (1954), this Court upheld a redevelopment plan targeting a blighted area of Washington, D. C., in which most of the housing for the area's 5,000 inhabitants was beyond repair. Under the plan, the area would be condemned and part of it utilized for the construction of streets, schools, and other public facilities. The remainder of the land would be leased or sold to private parties for the purpose of redevelopment, including the construction of low-cost housing.

The owner of a department store located in the area challenged the condemnation, pointing out that his store was not itself blighted and arguing that the creation of a "better balanced, more attractive community" was not a valid public use. *Id.*, at 31, 75 S.Ct. 98. Writing for a unanimous Court, Justice Douglas refused to evaluate this claim in isolation, deferring instead to the legislative and agency judgment that the area "must be planned as a whole" for the plan to be successful. *Id.*, at 34, 75 S.Ct. 98. The Court explained that "community redevelopment programs need not, by force of the

Constitution, be on a piecemeal basis--lot by lot, building by building." *Id.*, at 35, 75 S.Ct. 98. The public use underlying the taking was unequivocally affirmed.

"We do not sit to determine whether a particular housing project is or is not desirable. The concept of the public welfare is broad and inclusive The values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled. In the present case, the Congress and its authorized agencies have made determinations that take into account a wide variety of values. It is not for us to reappraise them. If those who govern the District of Columbia decide that the Nation's Capital should be beautiful as well as sanitary, there is nothing in the Fifth Amendment that stands in the way." *Id.*, at 33, 75 S.Ct. 98.

In *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 104 S.Ct. 2321, 81 L.Ed.2d 186 (1984), the Court considered a Hawaii statute whereby fee title was taken from lessors and transferred to lessees (for just compensation) in order to reduce the concentration of land ownership. We unanimously upheld the statute and rejected the Ninth Circuit's view that it was "a naked attempt on the part of the state of Hawaii to take the property of A and *2664 transfer it to B solely for B's private use and benefit." *Id.*, at 235, 104 S.Ct. 2321 (internal quotation marks omitted). Reaffirming *Berman's* deferential approach to legislative judgments in this field, we concluded that the State's purpose of eliminating the "social and economic evils of a land oligopoly" qualified as a valid public use. 467 U.S., at 241-242, 104 S.Ct. 2321. Our opinion also rejected the contention that the mere fact that the State immediately transferred the properties to private individuals upon condemnation somehow diminished the public character of the taking. "[I]t is only the taking's purpose, and not its mechanics," we explained, that matters in determining public use. *Id.*, at 244, 104 S.Ct. 2321.

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In that same Term we decided another public use case that arose in a purely economic context. In *Ruckelshaus v. Monsanto, Co.*, 467 U.S. 986, 104 S.Ct. 2562, 81 L.Ed.2d 815 (1984), the Court dealt with provisions of the Federal Insecticide, Fungicide, and Rodenticide Act under which the Environmental Protection Agency could consider the data (including trade secrets) submitted by a prior pesticide applicant in evaluating a subsequent application, so long as the second applicant paid just compensation for the data. We acknowledged that the "most direct beneficiaries" of these provisions were the subsequent applicants, *id.*, at 1014, 104 S.Ct. 2862, but we nevertheless upheld the statute under *Berman* and *Midkiff*. We found sufficient Congress' belief that sparing applicants the cost of time-consuming research eliminated a significant barrier to entry in the pesticide market and thereby enhanced competition. 467 U.S., at 1015, 104 S.Ct. 2862.

Viewed as a whole, our jurisprudence has recognized that the needs of society have varied between different parts of the Nation, just as they have evolved over time in response to changed circumstances. Our earliest cases in particular embodied a strong theme of federalism, emphasizing the "great respect" that we owe to state legislatures and state courts in discerning local public needs. See *Hairston v. Danville & Western R. Co.*, 208 U.S. 598, 606- 607, 28 S.Ct. 331, 52 L.Ed. 637 (1908) (noting that these needs were likely to vary depending on a State's "resources, the capacity of the soil, the relative importance of industries to the general public welfare, and the long-established methods and habits of the people"). [FN11] For more than a century, our public use jurisprudence has wisely eschewed rigid formulas and intrusive scrutiny in favor of affording legislatures broad latitude in determining what public needs justify the use of the takings power.

FN11. See also *Clark*, 198 U.S., at 367-368, 25 S.Ct. 676; *Strickley v. Highland Boy Gold Mining Co.*, 200 U.S. 527, 531, 26 S.Ct. 301, 50 L.Ed. 581 (1906) ("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 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. The Constitution of the United States does not require us to say that they are wrong"); *O'Neill v. Leamer*, 239 U.S. 244, 253, 36 S.Ct. 54, 60 L.Ed. 249 (1915) ("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. With the local situation the state court is peculiarly familiar and its judgment is entitled to the highest respect").

IV

Those who govern the City were not confronted with the need to remove blight *2665 in the Fort Trumbull area, but their determination that the area was sufficiently distressed to justify a program of economic rejuvenation is entitled to our deference. The City has carefully formulated an economic development plan that it believes will provide appreciable benefits to the community, including--but by no means limited to--new jobs and increased tax revenue. As with other exercises in urban planning and development, [FN12] the City is endeavoring to coordinate a variety of commercial, residential, and recreational uses of land, with the hope that they will form a whole greater than the sum of its parts. To effectuate this plan, the City has invoked a state statute that specifically authorizes the use of eminent domain to promote economic development. Given the comprehensive character of the plan, the thorough deliberation that preceded its adoption, and the limited scope of our review, it is appropriate for us,

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as it was in *Berman*, to resolve the challenges of the individual owners, not on a piecemeal basis, but rather in light of the entire plan. Because that plan unquestionably serves a public purpose, the takings challenged here satisfy the public use requirement of the Fifth Amendment.

FN12. Cf. *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 47 S.Ct. 114, 71 L.Ed. 303 (1926).

[5] To avoid this result, petitioners urge us to adopt a new bright-line rule that economic development does not qualify as a public use. Putting aside the unpersuasive suggestion that the City's plan will provide only purely economic benefits, neither precedent nor logic supports petitioners' proposal. Promoting economic development is a traditional and long accepted function of government. There is, moreover, no principled way of distinguishing economic development from the other public purposes that we have recognized. In our cases upholding takings that facilitated agriculture and mining, for example, we emphasized the importance of those industries to the welfare of the States in question, see, e.g., *Strickley*, 200 U.S. 527, 26 S.Ct. 301; in *Berman*, we endorsed the purpose of transforming a blighted area into a "well-balanced" community through redevelopment, 348 U.S., at 33, 75 S.Ct. 98; [FN13] in *Midkiff*, we upheld the interest in breaking up a land oligopoly that "created artificial deterrents to the normal functioning of the State's residential land market," 467 U.S., at 242, 104 S.Ct. 2321; and in *Monsanto*, we accepted Congress' purpose of eliminating a "significant barrier to entry in the pesticide market," 467 U.S., at 1014-1015, 104 S.Ct. 2862. It would be incongruous to hold that the City's interest in the economic benefits to be derived from the development of the Fort Trumbull area has less of a public character than any of those other interests. Clearly, there is no basis for exempting economic *2666 development from our traditionally broad understanding of public purpose.

FN13. It is a misreading of *Berman* to suggest that the only public use upheld in

that case was the initial removal of blight. See Reply Brief for Petitioners 8. The public use described in *Berman* extended beyond that to encompass the purpose of *developing* that area to create conditions that would prevent a reversion to blight in the future. See 348 U.S., at 34-35, 75 S.Ct. 98 ("It was not enough, [the experts] believed, to remove existing buildings that were insanitary or unsightly. It was important to redesign the whole area so as to eliminate the conditions that cause slums.... The entire area needed redesigning so that a balanced, integrated plan could be developed for the region, including not only new homes, but also schools, churches, parks, streets, and shopping centers. In this way it was hoped that the cycle of decay of the area could be controlled and the birth of future slums prevented"). Had the public use in *Berman* been defined more narrowly, it would have been difficult to justify the taking of the plaintiff's nonblighted department store.

Petitioners contend that using eminent domain for economic development impermissibly blurs the boundary between public and private takings. Again, our cases foreclose this objection. Quite simply, the government's pursuit of a public purpose will often benefit individual private parties. For example, in *Midkiff*, the forced transfer of property conferred a direct and significant benefit on those lessees who were previously unable to purchase their homes. In *Monsanto*, we recognized that the "most direct beneficiaries" of the data-sharing provisions were the subsequent pesticide applicants, but benefiting them in this way was necessary to promoting competition in the pesticide market. 467 U.S., at 1014, 104 S.Ct. 2862. [FN14] The owner of the department store in *Berman* objected to "taking from one businessman for the benefit of another businessman," 348 U.S., at 33, 75 S.Ct. 98, referring to the fact that under the redevelopment plan land would be leased or sold to private developers for redevelopment. [FN15] Our rejection of that contention has particular relevance

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to the instant case: "The public end may be as well or better served through an agency of private enterprise than through a department of government--or so the Congress might conclude. We cannot say that public ownership is the sole method of promoting the public purposes of community redevelopment projects." *Id.*, at 34, 75 S.Ct. 98. [FN16]

FN14. Any number of cases illustrate that the achievement of a public good often coincides with the immediate benefiting of private parties. See, e.g., *National Railroad Passenger Corporation v. Boston & Maine Corp.*, 503 U.S. 407, 422, 112 S.Ct. 1394, 118 L.Ed.2d 52 (1992) (public purpose of "facilitating Amtrak's rail service" served by taking rail track from one private company and transferring it to another private company); *Brown v. Legal Foundation of Wash.*, 538 U.S. 216, 123 S.Ct. 1406, 155 L.Ed.2d 376 (2003) (provision of legal services to the poor is a valid public purpose). It is worth noting that in *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 104 S.Ct. 2321, 81 L.Ed.2d 186 (1984), *Monsanto*, and *Boston & Maine Corp.*, the property in question retained the same use even after the change of ownership.

FN15. Notably, as in the instant case, the private developers in *Berman* were required by contract to use the property to carry out the redevelopment plan. See 348 U.S., at 30, 75 S.Ct. 98.

FN16. Nor do our cases support Justice O'CONNOR's novel theory that the government may only take property and transfer it to private parties when the initial taking eliminates some "harmful property use." *Post*, at 2675 (dissenting opinion). There was nothing "harmful" about the nonblighted department store at issue in *Berman*. 348 U.S. 26, 75 S.Ct. 98; see also n. 13, *supra*; nothing "harmful" about

the lands at issue in the mining and agriculture cases, see, e.g., *Strickley*, 200 U.S. 527, 25 S.Ct. 301; see also nn. 9, 11, *supra*; and certainly nothing "harmful" about the trade secrets owned by the pesticide manufacturers in *Monsanto*, 467 U.S. 986, 104 S.Ct. 2862. In each case, the public purpose we upheld depended on a private party's *future* use of the concededly nonharmful property that was taken. By focusing on a property's future use, as opposed to its past use, our cases are faithful to the text of the Takings Clause. See U.S. Const., Amdt. 5. ("[N]or shall private property be taken for public use, without just compensation"). Justice O'CONNOR's intimation that a "public purpose" may not be achieved by the action of private parties, see *post*, at 2675, confuses the *purpose* of a taking with its *mechanics*, a mistake we warned of in *Midkiff*, 467 U.S., at 244, 104 S.Ct. 2321. See also *Berman*, 348 U.S., at 33-34, 75 S.Ct. 98 ("The public end may be as well or better served through an agency of private enterprise than through a department of government").

It is further argued that without a bright-line rule nothing would stop a city from transferring citizen A's property to citizen B for the sole reason that citizen B will put the property to a more productive use and thus pay more taxes. Such a one-to-one transfer of property, executed outside the confines of an integrated development plan, is not presented in this case. While such an unusual exercise of government power would certainly raise a suspicion that a private purpose was afoot, [FN17] the hypothetical cases posited by petitioners can be confronted if and when they arise. [FN18] They do not warrant the crafting of an artificial restriction on the concept of public use. [FN19]

FN17. Courts have viewed such aberrations with a skeptical eye. See, e.g., *99 Cents Only Stores v. Lancaster Redevelopment Agency*, 237 F.Supp.2d

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1123 (C.D.Cal.2001); cf. *Cincinnati v. Pester*, 281 U.S. 429, 448, 50 S.Ct. 360, 74 L.Ed. 950 (1930) (taking invalid under state eminent domain statute for lack of a reasoned explanation). These types of takings may also implicate other constitutional guarantees. See *Village of Willowbrook v. O'Hea*, 528 U.S. 562, 120 S.Ct. 1073, 145 L.Ed.2d 1060 (2000) (*per curiam*).

FN18. Cf. *Panhandle Oil Co. v. Mississippi ex rel. Knox*, 277 U.S. 218, 223, 48 S.Ct. 451, 72 L.Ed. 857 (1928) (Holmes, J., dissenting) ("The power to tax is not the power to destroy while this Court sits").

FN19. A parade of horrors is especially unpersuasive in this context, since the Takings Clause largely "operates as a conditional limitation, permitting the government to do what it wants so long as it pays the charge." *Eastern Enterprises v. Apfel*, 544 U.S. 498, 545, 118 S.Ct. 2131, 141 L.Ed.2d 451 (1998) (KENNEDY, J., concurring in judgment and dissenting in part). Speaking of the takings power, Justice Brandeis observed that "[i]t is not sufficient to urge, that the power may be abused, for, such is the nature of all power--such is the tendency of every human institution: and, it might as fairly be said, that the power of taxation, which is only circumscribed by the discretion of the Body, in which it is vested, ought not to be granted, because the Legislature, disregarding its true objects, might, for visionary and useless projects, impose a tax to the amount of nineteen shillings in the pound. We must be content to limit power where we can, and where we cannot, consistently with its use, we must be content to repose a salutary confidence." *Calder*, 3 Dall., at 400, 1 L.Ed. 648 (opinion concurring in result).

[6] Alternatively, petitioners maintain that for takings of this kind we should require a "reasonable certainty" that the expected public benefits will actually accrue. Such a rule, however, would represent an even greater departure from our precedent. "When the legislature's purpose is legitimate and its means are not irrational, our cases make clear that empirical debates over the wisdom of takings--no less than debates over the wisdom of other kinds of socioeconomic legislation--are not to be carried out in the federal court." *Midkiff*, 467 U.S., at 242, 104 S.Ct. 2321. [FN20] Indeed, earlier this Term we explained why similar practical concerns (among others) undermined the use of the "substantially advances" formula in our regulatory takings doctrine. See *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. ----, ----, 125 S.Ct. 2074, 2085, 161 L.Ed.2d 876 (2005) (noting that this formula "would empower--and might often require--courts to substitute their predictive judgments for those of elected legislatures and expert agencies"). *2668 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.

FN20. See also *Boston & Maine Corp.*, 503 U.S., at 422-423, 112 S.Ct. 1394 ("[W]e need not make a specific factual determination whether the condemnation will accomplish its objectives"); *Monsanto*, 467 U.S., at 115, n. 18, 104 S.Ct. 2862 ("Monsanto argues that EPA and, by implication, Congress, misapprehended the true 'barriers to entry' in the pesticide industry and that the challenged provisions of the law create, rather than reduce, barriers to entry Such economic arguments are better

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directed to Congress. The proper inquiry before this Court is not whether the provisions in fact will accomplish their stated objectives. Our review is limited to determining that the purpose is legitimate and that Congress rationally could have believed that the provisions would promote that objective").

[7] Just as we decline to second-guess the City's considered judgments about the efficacy of its development plan, we also decline to second-guess the City's determinations as to what lands it needs to acquire in order to effectuate the project. "It is not for the courts to oversee the choice of the boundary line nor to sit in review on the size of a particular project area. Once the question of the public purpose has been decided, the amount and character of land to be taken for the project and the need for a particular tract to complete the integrated plan rests in the discretion of the legislative branch." *Berman*, 348 U.S., at 35-36, 75 S.Ct. 98.

In affirming the City's authority to take petitioners' properties, we do not minimize the hardship that condemnations may entail, notwithstanding the payment of just compensation. [FN21] We emphasize that nothing in our opinion precludes any State from placing further restrictions on its exercise of the takings power. Indeed, many States already impose "public use" requirements that are stricter than the federal baseline. Some of these requirements have been established as a matter of state constitutional law, [FN22] while others are expressed in state eminent domain statutes that carefully limit the grounds upon which takings may be exercised. [FN23] As the submissions of the parties and their *amici* make clear, the necessity and wisdom of using eminent domain to promote economic development are certainly matters of legitimate public debate. [FN24] This Court's authority, however, extends only to determining whether the City's proposed condemnations are for a "public use" within the meaning of the Fifth Amendment to the Federal Constitution. Because over a century of our case law interpreting that provision dictates an affirmative answer to that

question, we may not grant petitioners the relief that they seek.

FN21. The *amici* raise questions about the fairness of the measure of just compensation. See, e.g., Brief for American Planning Association et al. as *Amici Curiae* 26-30. While important, these questions are not before us in this litigation.

FN22. See, e.g., *County of Wayne v. Hathcock*, 471 Mich. 445, 684 N.W.2d 765 (2004).

FN23. Under California law, for instance, a city may only take land for economic development purposes in blighted areas. Cal. Health & Safety Code Ann. §§ 33030-33037 (West 1997). See, e.g., *Redevelopment Agency of Chula Vista v. Pados Bros.*, 95 Cal.App.4th 309, 115 Cal.Rptr.2d 234 (2002).

FN24. For example, some argue that the need for eminent domain has been greatly exaggerated because private developers can use numerous techniques, including secret negotiations or precommitment strategies, to overcome holdout problems and assemble lands for genuinely profitable projects. See Brief for Jane Jacobs as *Amicus Curiae* 13-15; see also Brief for John Norquist as *Amicus Curiae*. Others argue to the contrary, urging that the need for eminent domain is especially great with regard to older, small cities like New London, where centuries of development have created an extreme overdivision of land and thus a real market impediment to land assembly. See Brief for Connecticut Conference for Municipalities et al. as *Amici Curiae* 13, 21; see also Brief for National League of Cities et al. as *Amici Curiae*.

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Connecticut is affirmed.

It is so ordered.

Justice KENNEDY, concurring.

I join the opinion for the Court and add these further observations.

This Court has declared that a taking should be upheld as consistent with the Public Use Clause, U.S. Const., Amdt. 5., as long as it is "rationally related to a conceivable public purpose." *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 241, 104 S.Ct. 2321, 81 L.Ed.2d 186 (1984); see also *Berman v. Parker*, 348 U.S. 26, 75 S.Ct. 98, 99 L.Ed. 27 (1954). This deferential standard of review echoes the rational-basis test used to review economic regulation under the Due Process and Equal Protection Clauses, see, e.g., *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 313-314, 113 S.Ct. 2096, 124 L.Ed.2d 211 (1993); *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 75 S.Ct. 461, 99 L.Ed. 563 (1955). The determination that a rational-basis standard of review is appropriate does not, however, alter the fact that transfers intended to confer benefits on particular, favored private entities, and with only incidental or pretextual public benefits, are forbidden by the Public Use Clause.

A court applying rational-basis review under the Public Use Clause should strike down a taking that, by a clear showing, is intended to favor a particular private party, with only incidental or pretextual public benefits, just as a court applying rational-basis review under the Equal Protection Clause must strike down a government classification that is clearly intended to injure a particular class of private parties, with only incidental or pretextual public justifications. See *Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 446-447, 450, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985); *Department of Agriculture v. Moreno*, 413 U.S. 528, 533-536, 93 S.Ct. 2821, 37 L.Ed.2d 782 (1973). As the trial court in this case was correct to observe: "Where the purpose [of a taking] is

economic development and that development is to be carried out by private parties or private parties will be benefited, the court must decide if the stated public purpose--economic advantage to a city sorely in need of it--is only incidental to the benefits that will be confined on private parties of a development plan." 2 App. to Pet for Cert. 263. See also *ante* at 2661.

A court confronted with a plausible accusation of impermissible favoritism to private parties should treat the objection as a serious one and review the record to see if it has merit, though with the presumption that the government's actions were reasonable and intended to serve a public purpose. Here, the trial court conducted a careful and extensive inquiry into "whether, in fact, the development plan is of primary benefit to ... the developer [*i.e.*, Corcoran Jennison], and private businesses which may eventually locate in the plan area [*e.g.*, Pfizer], and in that regard, only of incidental benefit to the city." 2 App. to Pet. for Cert. 261. The trial court considered testimony from government officials and corporate officers; *id.* at 266-271; documentary evidence of communications between these parties, *ibid.*; respondents' awareness of New London's depressed economic condition and evidence corroborating the validity of this concern, *id.*, at 272-273, 278-279; the substantial commitment of public funds by the State to the development project before most of the private beneficiaries were known, *id.*, at 276; evidence that respondents reviewed a variety of development plans and chose a private developer from a group of applicants rather than picking out a particular transferee beforehand, *id.*, at 273, 278; *2670 and the fact that the other private beneficiaries of the project are still unknown because the office space proposed to be built has not yet been rented, *id.*, at 278.

The trial court concluded, based on these findings, that benefiting Pfizer was not "the primary motivation or effect of this development plan"; instead, "the primary motivation for [respondents] was to take advantage of Pfizer's presence." *Id.*, at 276. Likewise, the trial court concluded that

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"[t]here is nothing in the record to indicate that ... [respondents] were motivated by a desire to aid [other] particular private entities." *Id.*, at 278. See also *ante*, at 2661-2662. Even the dissenting justices on the Connecticut Supreme Court agreed that respondents' development plan was intended to revitalize the local economy, not to serve the interests of Pfizer, Corcoran Jennison, or any other private party. 268 Conn. 1, 159, 843 A.2d 500, 595 (2004) (Zarella, J., concurring in part and dissenting in part). This case, then, survives the meaningful rational basis review that in my view is required under the Public Use Clause.

Petitioners and their *amici* argue that any taking justified by the promotion of economic development must be treated by the courts as *per se* invalid, or at least presumptively invalid. Petitioners overstate the need for such a rule, however, by making the incorrect assumption that review under *Berman* and *Midkiff* imposes no meaningful judicial limits on the government's power to condemn any property it likes. A broad *per se* rule or a strong presumption of invalidity, furthermore, would prohibit a large number of government takings that have the purpose and expected effect of conferring substantial benefits on the public at large and so do not offend the Public Use Clause.

My agreement with the Court that a presumption of invalidity is not warranted for economic development takings in general, or for the particular takings at issue in this case, does not foreclose the possibility that a more stringent standard of review than that announced in *Berman* and *Midkiff* might be appropriate for a more narrowly drawn category of takings. There may be private transfers in which the risk of undetected impermissible favoritism of private parties is so acute that a presumption (rebuttable or otherwise) of invalidity is warranted under the Public Use Clause. Cf. *Eastern Enterprises v. Apfel*, 524 U.S. 498, 549-550, 118 S.Ct. 2131, 141 L.Ed.2d 451 (1998) (KENNEDY, J., concurring in judgment and dissenting in part) (heightened scrutiny for retroactive legislation under the Due Process Clause). This demanding

level of scrutiny, however, is not required simply because the purpose of the taking is economic development.

This is not the occasion for conjecture as to what sort of cases might justify a more demanding standard, but it is appropriate to underscore aspects of the instant case that convince me no departure from *Berman* and *Midkiff* is appropriate here. This taking occurred in the context of a comprehensive development plan meant to address a serious city-wide depression, and the projected economic benefits of the project cannot be characterized as *de minimis*. The identity of most of the private beneficiaries *vis* unknown at the time the city formulated its plans. The city complied with elaborate procedural requirements that facilitate review of the record and inquiry into the city's purposes. In sum, while there may be categories of cases in which the transfers are so suspicious, or the procedures employed so prone to abuse, or the purported benefits are so trivial or implausible, that courts should presume an impermissible private purpose, no such circumstances are present in this case.

* * *

For the foregoing reasons, I join in the Court's opinion.

Justice O'CONNOR, with whom THE CHIEF JUSTICE, Justice SCALIA, and Justice THOMAS join, dissenting.

Over two centuries ago, just after the Bill of Rights was ratified, Justice Chase wrote:

"An ACT of the Legislature (for I do not 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." *Calder v. Bull*, 3 Dall. 386, 388, 1 L.Ed. 648 (1798) (emphasis deleted).

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Today the Court abandons this long-held, basic limitation on government power. Under the banner of economic development, all private property is now vulnerable to being taken and transferred to another private owner, so long as it might be upgraded—*i.e.*, given to an owner who will use it in a way that the legislature deems more beneficial to the public—in the process. To reason, as the Court does, that the incidental public benefits resulting from the subsequent ordinary use of private property render economic development takings "for public use" is to wash out any distinction between private and public use of property—and thereby effectively to delete the words "for public use" from the Takings Clause of the Fifth Amendment. Accordingly I respectfully dissent.

I

Petitioners are nine resident or investment owners of 15 homes in the Fort Trumbull neighborhood of New London, Connecticut. Petitioner Wilhelmina Dery, for example, lives in a house on Walbach Street that has been in her family for over 100 years. She was born in the house in 1918; her husband, petitioner Charles Dery, moved into the house when they married in 1946. Their son lives next door with his family in the house he received as a wedding gift, and joins his parents in this suit. Two petitioners keep rental properties in the neighborhood.

In February 1998, Pfizer Inc., the pharmaceuticals manufacturer, announced that it would build a global research facility near the Fort Trumbull neighborhood. Two months later, New London's city council gave initial approval for the New London Development Corporation (NLDC) to prepare the development plan at issue here. The NLDC is a private, nonprofit corporation whose mission is to assist the city council in economic development planning. It is not elected by popular vote, and its directors and employees are privately appointed. Consistent with its mandate, the NLDC generated an ambitious plan for redeveloping 90 acres of Fort Trumbull in order to "complement the facility that Pfizer was planning to build, create jobs, increase tax and other revenues, encourage

public access to and use of the city's waterfront, and eventually 'build momentum' for the revitalization of the rest of the city." *App. to Pet. for Cert.* 5.

Petitioners own properties in two of the plan's seven parcels—Parcel 3 and Parcel 4A. Under the plan, Parcel 3 is slated for the construction of research and office space as a market develops for such space. It will also retain the existing Italian Dramatic Club (a private cultural organization) *2672 though the homes of three plaintiffs in that parcel are to be demolished. Parcel 4A is slated, mysteriously, for "park support." *Id.*, at 345-346. At oral argument, counsel for respondents conceded the vagueness of this proposed use, and offered that the parcel might eventually be used for parking. *Tr. of Oral Arg.* 36.

To save their homes, petitioners sued New London and the NLDC, to whom New London has delegated eminent domain power. Petitioners maintain that the Fifth Amendment prohibits the NLDC from condemning their properties for the sake of an economic development plan. Petitioners are not hold-outs; they do not seek increased compensation, and none is opposed to new development in the area. Theirs is an objection in principle: They claim that the NLDC's proposed use for their confiscated property is not a "public" one for purposes of the Fifth Amendment. While the government may take their homes to build a road or a railroad or to eliminate a property use that harms the public, say petitioners, it cannot take their property for the private use of other owners simply because the new owners may make more productive use of the property.

II

The Fifth Amendment to the Constitution, made applicable to the States by the Fourteenth Amendment, provides that "private property [shall not] be taken for public use, without just compensation." When interpreting the Constitution, we begin with the unremarkable presumption that every word in the document has independent meaning, "that no word was unnecessarily used, or needlessly added." *Wright v. United States*, 302

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U.S. 583, 588, 58 S.Ct. 395, 82 L.Ed. 439 (1938). In keeping with that presumption, we have read the Fifth Amendment's language to impose two distinct conditions on the exercise of eminent domain: "the taking must be for a 'public use' and 'just compensation' must be paid to the owner." *Brown v. Legal Foundation of Wash.*, 538 U.S. 216, 231-232, 123 S.Ct. 1406, 155 L.Ed.2d 376 (2003).

These two limitations serve to protect "the security of Property," which Alexander Hamilton described to the Philadelphia Convention as one of the "great objects of Gov[ernment]." 1 Records of the Federal Convention of 1787, p. 302 (M. Farrand ed.1934). Together they ensure stable property ownership by providing safeguards against excessive, unpredictable, or unfair use of the government's eminent domain power--particularly against those owners who, for whatever reasons, may be unable to protect themselves in the political process against the majority's will.

While the Takings Clause presupposes that government can take private property without the owner's consent, the just compensation requirement spreads the cost of condemnations and thus "prevents the public from loading upon one individual more than his just share of the burdens of government." *Monongahela Nav. Co. v. United States*, 148 U.S. 312, 325, 13 S.Ct. 622, 37 L.Ed. 463 (1893); see also *Armstrong v. United States*, 364 U.S. 40, 49, 80 S.Ct. 1563, 4 L.Ed.2d 1554 (1960). The public use requirement, in turn, imposes a more basic limitation, circumscribing the very scope of the eminent domain power: Government may compel an individual to forfeit her property for the public's use, but not for the benefit of another private person. This requirement promotes fairness as well as security. Cf. *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302, 336, 122 S.Ct. 1465, 152 L.Ed.2d 517 (2002) ("The concepts of 'fairness and justice' ... underlie the Takings Clause").

*2673 Where is the line between "public" and "private" property use? We give considerable

deference to legislatures' determinations about what governmental activities will advantage the public. But were the political branches the sole arbiters of the public-private distinction, the Public Use Clause would amount to little more than hortatory fluff. An external, judicial check on how the public use requirement is interpreted, however limited, is necessary if this constraint on government power is to retain any meaning. See *Cincinnati v. Vester*, 281 U.S. 439, 446, 50 S.Ct. 360, 74 L.Ed. 950 (1930) ("It is well established that ... the question [of] what is a public use is a judicial one").

Our cases have generally identified three categories of takings that comply with the public use requirement, though it is in the nature of things that the boundaries between these categories are not always firm. Two are relatively straightforward and uncontroversial. First, the sovereign may transfer private property to public ownership--such as for a road, a hospital, or a military base. See, e.g., *Old Dominion Land Co. v. United States*, 269 U.S. 55, 46 S.Ct. 39, 70 L.Ed. 162 (1925); *Rindge Co. v. County of Los Angeles*, 262 U.S. 700, 43 S.Ct. 689, 67 L.Ed. 1186 (1923). Second, the sovereign may transfer private property to private parties, often common carriers, who make the property available for the public's use--such as with a railroad, a public utility, or a stadium. See, e.g., *National Railroad Passenger Corporation v. Boston & Maine Corp.*, 503 U.S. 407, 112 S.Ct. 1394, 118 L.Ed.2d 52 (1992); *Mt. Vernon-Woodberry Cotton Duck Co. v. Alabama Interstate Power Co.*, 240 U.S. 30, 36 S.Ct. 234, 60 L.Ed. 507 (1916). But "public ownership" and "use-by-the-public" are sometimes too constricting and impractical ways to define the scope of the Public Use Clause. Thus we have allowed that, in certain circumstances and to meet certain exigencies, takings that serve a public purpose also satisfy the Constitution even if the property is destined for subsequent private use. See, e.g., *Berman v. Parker*, 348 U.S. 26, 75 S.Ct. 98, 99 L.Ed. 27 (1954); *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 104 S.Ct. 2321, 81 L.Ed.2d 186 (1984).

This case returns us for the first time in over 20

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years to the hard question of when a purportedly "public purpose" taking meets the public use requirement. It presents an issue of first impression: Are economic development takings constitutional? I would hold that they are not. We are guided by two precedents about the taking of real property by eminent domain. In *Berman*, we upheld takings within a blighted neighborhood of Washington, D.C. The neighborhood had so deteriorated that, for example, 64.3% of its dwellings were beyond repair. 348 U.S., at 30, 75 S.Ct. 98. It had become burdened with "overcrowding of dwellings," "lack of adequate streets and alleys," and "lack of light and air." *Id.*, at 34, 75 S.Ct. 98. Congress had determined that the neighborhood had become "injurious to the public health, safety, morals, and welfare" and that it was necessary to "eliminat[e] all such injurious conditions by employing all means necessary and appropriate for the purpose," including eminent domain. *Id.*, at 28, 75 S.Ct. 98. Mr. Berman's department store was not itself blighted. Having approved of Congress' decision to eliminate the harm to the public emanating from the blighted neighborhood, however, we did not second-guess its decision to treat the neighborhood as a whole rather than lot-by-lot. *Id.*, at 34-35, 75 S.Ct. 98; see also *Midkiff*, 467 U.S., at 244, 104 S.Ct. 2321 ("it is only the taking's purpose, and not its mechanics, that must pass scrutiny").

*2674 In *Midkiff*, we upheld a land condemnation scheme in Hawaii whereby title in real property was taken from lessors and transferred to lessees. At that time, the State and Federal Governments owned nearly 49% of the State's land, and another 47% was in the hands of only 72 private landowners. Concentration of land ownership was so dramatic that on the State's most urbanized island, Oahu, 22 landowners owned 72.5% of the fee simple titles. *Id.*, at 232, 104 S.Ct. 2321. The Hawaii Legislature had concluded that the oligopoly in land ownership was "skewing the State's residential fee simple market, inflating land prices, and injuring the public tranquility and welfare," and therefore enacted a condemnation scheme for redistributing title. *Ibid.*

In those decisions, we emphasized the importance of deferring to legislative judgments about public purpose. Because courts are ill-equipped to evaluate the efficacy of proposed legislative initiatives, we rejected as unworkable the idea of courts' "deciding on what is and is not a governmental function and ... 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." *Id.*, at 240-241, 104 S.Ct. 2321 (quoting *United States ex rel. TVA v. Welch*, 327 U.S. 546, 552, 66 S.Ct. 715, 90 L.Ed. 843 (1946)); see *Berman*, *supra*, at 32, 75 S.Ct. 98 ("[T]he legislature, not the judiciary, is the main guardian of the public needs to be served by social legislation"); see also *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. ---, 125 S.Ct. 2074, 161 L.Ed.2d 876 (2005). Likewise, we recognized our inability to evaluate whether, in a given case, eminent domain is a necessary means by which to pursue the legislature's ends. *Midkiff*, *supra*, at 242, 104 S.Ct. 2321; *Berman*, *supra*, at 103, 75 S.Ct. 98.

Yet for all the emphasis on deference, *Berman* and *Midkiff* hewed to a bedrock principle without which our public use jurisprudence would collapse: "A purely private taking could not withstand the scrutiny of the public use requirement; it would serve no legitimate purpose of government and would thus be void." *Midkiff*, 467 U.S., at 245, 104 S.Ct. 2321; *id.*, at 241, 104 S.Ct. 2321 ("[T]he Court's cases have repeatedly stated that 'one person's property may not be taken for the benefit of another private person without a justifying public purpose, even though compensation be paid'" (quoting *Thompson v. Consolidated Gas Util. Corp.*, 300 U.S. 55, 80, 57 S.Ct. 364, 81 L.Ed. 510 (1937))); see also *Missouri Pacific R. Co. v. Nebraska*, 164 U.S. 403, 417, 17 S.Ct. 130, 41 L.Ed. 489 (1896). To protect that principle, those decisions reserved "a role for courts to play in reviewing a legislature's judgment of what constitutes a public use ... [though] the Court in *Berman* made clear that it is 'an extremely narrow' one." *Midkiff*, *supra*, at 240, 104 S.Ct. 2321 (quoting *Berman*, *supra*, at 32, 75 S.Ct. 98).

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The Court's holdings in *Berman* and *Midkiff* were true to the principle underlying the Public Use Clause. In both those cases, the extraordinary, precondemnation use of the targeted property inflicted affirmative harm on society--in *Berman* through blight resulting from extreme poverty and in *Midkiff* through oligopoly resulting from extreme wealth. And in both cases, the relevant legislative body had found that eliminating the existing property use was necessary to remedy the harm. *Berman*, *supra*, at 28-29, 75 S.Ct. 98; *Midkiff*, *supra*, at 232, 104 S.Ct. 2321. Thus a public purpose was realized when the harmful use was eliminated. Because each taking *directly* achieved a public benefit, it did not matter that the property was turned over to private use. Here, in *2675 contrast, New London does not claim that Susette Kelo's and Wilhelmina Dery's well-maintained homes are the source of any social harm. Indeed, it could not so claim without adopting the absurd argument that any single-family home that might be razed to make way for an apartment building, or any church that might be replaced with a retail store, or any small business that might be more lucrative if it were instead part of a national franchise, is inherently harmful to society and thus within the government's power to condemn.

In moving away from our decisions sanctioning the condemnation of harmful property use, the Court today significantly expands the meaning of public use. It holds that the sovereign may take private property currently put to ordinary private use, and give it over for new, ordinary private use, so long as the new use is predicted to generate some secondary benefit for the public--such as increased tax revenue, more jobs, maybe even aesthetic pleasure. But nearly any lawful use of real private property can be said to generate some incidental benefit to the public. Thus, if predicted (or even guaranteed) positive side-effects are enough to render transfer from one private party to another constitutional, then the words "for public use" do not realistically exclude *any* takings, and thus do not exert any constraint on the eminent domain power.

There is a sense in which this troubling result

follows from errant language in *Berman* and *Midkiff*. In discussing whether takings within a blighted neighborhood were for a public use, *Berman* began by observing: "We deal, in other words, with what traditionally has been known as the police power." 348 U.S., at 32, 75 S.Ct. 98. From there it declared that "[o]nce the object is within the authority of Congress, the right to realize it through the exercise of eminent domain is clear." *Id.*, at 33, 75 S.Ct. 98. Following up, we said in *Midkiff* that "[t]he 'public use' requirement is coterminous with the scope of a sovereign's police powers." 467 U.S., at 240, 104 S.Ct. 2321. This language was unnecessary to the specific holdings of those decisions. *Berman* and *Midkiff* simply did not put such language to the constitutional test, because the takings in those cases were within the police power but also for "public use" for the reasons I have described. The case before us now demonstrates why, when deciding if a taking's purpose is constitutional, the police power and "public use" cannot always be equated.

The Court protests that it does not sanction the bare transfer from A to B for B's benefit. It suggests two limitations on what can be taken after today's decision. First, it maintains a role for courts in ferreting out takings whose sole purpose is to bestow a benefit on the private transferee--without detailing how courts are to conduct that complicated inquiry. *Ante*, at 2661. For his part, Justice KENNEDY suggests that courts may divine illicit purpose by a careful review of the record and the process by which a legislature arrived at the decision to take--without specifying what courts should look for in a case with different facts, how they will know if they have found it, and what to do if they do not. *Ante*, at 2669-2670 (concurring opinion). Whatever the details of Justice KENNEDY's as-yet-undisclosed test, it is difficult to envision anyone but the "stupid staff[er]" failing it. See *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1025-1026, n. 12, 112 S.Ct. 2886, 120 L.Ed.2d 798 (1992). The trouble with economic development takings is that private benefit and incidental public benefit are, by definition, merged and mutually reinforcing. In this

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case, for example, any boon for Pfizer or the plan's developer is difficult to disaggregate from the promised *2676 public gains in taxes and jobs. See App. to Pet. for Cert. 275-277.

Even if there were a practical way to isolate the motives behind a given taking, the gesture toward a purpose test is theoretically flawed. If it is true that incidental public benefits from new private use are enough to ensure the "public purpose" in a taking, why should it matter, as far as the Fifth Amendment is concerned, what inspired the taking in the first place? How much the government does or does not desire to benefit a favored private party has no bearing on whether an economic development taking will or will not generate secondary benefit for the public. And whatever the reason for a given condemnation, the effect is the same from the constitutional perspective-- private property is forcibly relinquished to new private ownership.

A second proposed limitation is implicit in the Court's opinion. The logic of today's decision is that eminent domain may only be used to upgrade--not downgrade--property. At best this makes the Public Use Clause redundant with the Due Process Clause, which already prohibits irrational government action. See *Lingle*, 544 U.S. ----, 125 S.Ct. 2074. The Court rightfully admits, however, that the judiciary cannot get bogged down in predictive judgments about whether the public will actually be better off after a property transfer. In any event, this constraint has no realistic import. For who among us can say she already makes the most productive or attractive possible use of her property? The specter of condemnation hangs over all property. 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. Cf. *Bugryn v. Bristol*, 63 Conn.App. 98, 774 A.2d 1042 (2001) (taking the homes and farm of four owners in their 70's and 80's and giving it to an "industrial park"); *99 Cents Only Stores v. Lancaster Redevelopment Agency*, 237 F.Supp.2d 1123 (C.D.Cal.2001) (attempted taking of 99 Cents store to replace with a Costco); *Poletown Neighborhood Council v. Detroit*, 410 Mich. 616,

304 N.W.2d 455 (1981) (taking a working-class, immigrant community in Detroit and giving it to a General Motors assembly plant), overruled by *County of Wayne v. Hathcock*, 471 Mich. 445, 684 N.W.2d 765 (2004); Brief for the Becket Fund for Religious Liberty as *Amicus Curiae* 4-11 (describing takings of religious institutions' properties); Institute for Justice, D. Berliner, Public Power, Private Gain: A Five-Year, State-by-State Report Examining the Abuse of Eminent Domain (2003) (collecting accounts of economic development takings).

The Court also puts special emphasis on a fact peculiar to this case: The NLDC's plan is the product of a relatively careful deliberative process; it proposes to use eminent domain for a multipart, integrated plan rather than for isolated property transfer; it promises an array of incidental benefits (even aesthetic ones), not just increased tax revenue; it comes on the heels of a legislative determination that New London is a depressed municipality. See, e.g., *ante*, at 2666 ("[A] one-to-one transfer of property, executed outside the confines of an integrated development plan, is not presented in this case"). Justice KENNEDY, too, takes great comfort in these facts. *Ante*, at 2670 (concurring opinion). But none has legal significance to blunt the force of today's holding. If legislative prognostications about the secondary public benefits of a new use can legitimate a taking, there is nothing in the Court's rule or in Justice KENNEDY's gloss on that rule to prohibit property transfers generated with less care, that are less comprehensive, that happen to result from less elaborate process, whose only projected *2677 advantage is the incidence of higher taxes, or that hope to transform an already prosperous city into an even more prosperous one.

Finally, in a coda, the Court suggests that property owners should turn to the States, who may or may not choose to impose appropriate limits on economic development takings. *Ante*, at 2668. This is an abdication of our responsibility. States play many important functions in our system of dual sovereignty, but compensating for our refusal to

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enforce properly the Federal Constitution (and a provision meant to curtail state action, no less) is not among them.

It was possible after *Berman* and *Midkiff* to imagine unconstitutional transfers from A to B. Those decisions endorsed government intervention when private property use had veered to such an extreme that the public was suffering as a consequence. Today nearly all real property is susceptible to condemnation on the Court's theory. In the prescient words of a dissenter from the infamous decision in *Poletown*, "[n]ow that we have authorized local legislative bodies to decide that a different commercial or industrial use of property will produce greater public benefits than its present use, no homeowner's, merchant's or manufacturer's property, however productive or valuable to its owner, is immune from condemnation for the benefit of other private interests that will put it to a 'higher' use." 410 Mich., at 644-645, 304 N.W.2d, at 464 (opinion of Fitzgerald, J.). This is why economic development takings "seriously jeopardiz[e] the security of all private property ownership." *Id.*, at 645, 304 N.W.2d, at 465 (Ryan, J., dissenting).

Any property may now be taken for the benefit of another private party, but the fallout from this decision will not be random. The beneficiaries are likely to be those citizens with disproportionate influence and power in the political process, including large corporations and development firms. As for the victims, the government now has license to transfer property from those with fewer resources to those with more. The Founders cannot have intended this perverse result. "[T]hat alone is a just government," wrote James Madison, "which impartially secures to every man, whatever is his own." For the National Gazette, Property, (Mar. 29, 1792), reprinted in 14 Papers of James Madison 266 (R. Rutland et al. eds.1983).

I would hold that the takings in both Parcel 3 and Parcel 4A are unconstitutional, reverse the judgment of the Supreme Court of Connecticut, and

remand for further proceedings.

Justice THOMAS, dissenting.

Long ago, William Blackstone wrote that "the law of the land ... postpone[s] even public necessity to the sacred and inviolable rights of private property." 1 Commentaries on the Laws of England 134-135 (1765) (hereinafter Blackstone). The Framers embodied that principle in the Constitution, allowing the government to take property not for "public necessity," but instead for "public use." Amdt. 5. Defying this understanding, the Court replaces the Public Use Clause with a "[P]ublic [P]urpose" Clause, *ante*, at 2662- 2663 (or perhaps the "Diverse and Always Evolving Needs of Society" Clause, *ante*, at 2662 (capitalization added)), a restriction that is satisfied, the Court instructs, so long as the purpose is "legitimate" and the means "not irrational," *ante*, at 2667 (internal quotation marks omitted). This deferential shift in phraseology enables the Court to hold, against all common sense, that a costly urban-renewal project whose stated purpose is a vague *2678 promise of new jobs and increased tax revenue, but which is also suspiciously agreeable to the Pfizer Corporation, is for a "public use."

I cannot agree. If such "economic development" takings are for a "public use," any taking is, and the Court has erased the Public Use Clause from our Constitution, as Justice O'CONNOR powerfully argues in dissent. *Ante*, at 2671, 2674-2677. I do not believe that this Court can eliminate liberties expressly enumerated in the Constitution and therefore join her dissenting opinion. Regrettably, however, the Court's error runs deeper than this. Today's decision is simply the latest in a string of our cases construing the Public Use Clause to be a virtual nullity, without the slightest nod to its original meaning. In my view, the Public Use Clause, originally understood, is a meaningful limit on the government's eminent domain power. Our cases have strayed from the Clause's original meaning, and I would reconsider them.

I

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The Fifth Amendment provides:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; *nor shall private property be taken for public use, without just compensation*" (Emphasis added.)

It is the last of these liberties, the Takings Clause, that is at issue in this case. In my view, it is "imperative that the Court maintain absolute fidelity to" the Clause's express limit on the power of the government over the individual, no less than with every other liberty expressly enumerated in the Fifth Amendment or the Bill of Rights more generally. *Shepard v. United States*, 544 U.S. ----, ----, 125 S.Ct. 1254, 1264, 161 L.Ed.2d 205 (2005) (THOMAS, J., concurring in part and concurring in judgment) (internal quotation marks omitted).

Though one component of the protection provided by the Takings Clause is that the government can take private property only if it provides "just compensation" for the taking, the Takings Clause also prohibits the government from taking property except "for public use." Were it otherwise, the Takings Clause would either be meaningless or empty. If the Public Use Clause served no function other than to state that the government may take property through its eminent domain power--for public or private uses--then it would be surplusage. See *ante*, at 2672 (O'CONNOR, J., dissenting); see also *Marbury v. Madison*, 1 Cranch 137, 174, 2 L.Ed. 60 (1803) ("It cannot be presumed that any clause in the constitution is intended to be without effect"); *Myers v. United States*, 272 U.S. 52, 151, 47 S.Ct. 21, 71 L.Ed. 160 (1926). Alternatively, the Clause could distinguish those takings that require compensation from those that do not. That interpretation, however, "would permit private property to be taken or appropriated for private use

without any compensation whatever." *Cole v. La Grange*, 113 U.S. 1, 8, 5 S.Ct. 416, 28 L.Ed. 896 (1885) (interpreting same language in the Missouri Public Use Clause). In other words, the Clause would require the government to compensate for takings done "for public use" leaving it free to take property for purely private uses without the payment of '2679 compensation. This would contradict a bedrock principle well established by the time of the founding: that all takings required the payment of compensation. 1 Blackstone 135; 2 J. Kent, Commentaries on American Law 275 (1827) (hereinafter Kent); J. Madison, for the National Property Gazette, (Mar. 27, 1792), in 14 Papers of James Madison 266, 267 (R. Rutland et al. eds.1983) (arguing that no property "shall be taken *directly* even for public use without indemnification to the owner"). [FN1] The Public Use Clause, like the Just Compensation Clause, is therefore an express limit on the government's power of eminent domain.

FN1. Some state constitutions at the time of the founding lacked just compensation clauses and took property even without providing compensation. See *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1056-1057, 112 S.Ct. 2886, 120 L.Ed.2d 798 (1992) (Blackmun, J., dissenting). The Framers of the Fifth Amendment apparently disagreed, for they expressly prohibited uncompensated takings, and the Fifth Amendment was not incorporated against the States until much later. See *id.*, at 1028, n. 15, 112 S.Ct. 2886.

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 legal right to use, the property, as opposed to taking it for any public purpose or necessity whatsoever. At the time of the founding, dictionaries primarily defined the noun "use" as "[t]he act of employing any thing to any purpose." 2 S. JOHNSON, A Dictionary of the English Language 2194 (4th ed. 1773) (hereinafter Johnson). The term "use," moreover, "is from the

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Latin *utor*, which means 'to use, make use of, avail one's self of, employ, apply, enjoy, etc.'" J. Lewis, *Law of Eminent Domain* § 165, p. 224, n. 4 (1888) (hereinafter Lewis). When the government takes property and gives it to a private individual, and the public has no right to use the property, it strains language to say that the public is "employing" the property, regardless of the incidental benefits that might accrue to the public from the private use. The term "public use," then, means that either the government or its citizens as a whole must actually "employ" the taken property. See *id.*, at 223 (reviewing founding-era dictionaries).

Granted, another sense of the word "use" was broader in meaning, extending to "[c]onvenience" or "help," or "[q]ualities that make a thing proper for any purpose." 2 Johnson 2194. Nevertheless, read in context, the term "public use" possesses the narrower meaning. Elsewhere, the Constitution twice employs the word "use," both times in its narrower sense. Claeys, *Public-Use Limitations and Natural Property Rights*, 2004 Mich. St. L.Rev. 877, 897 (hereinafter *Public Use Limitations*). Article I, § 10 provides that "the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States," meaning the Treasury itself will control the taxes, not use it to any beneficial end. And Article I, § 8 grants Congress power "[t]o raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years." Here again, "use" means "employed to raise and support Armies," not anything directed to achieving any military end. The same word in the Public Use Clause should be interpreted to have the same meaning.

Tellingly, the phrase "public use" contrasts with the very different phrase "general Welfare" used elsewhere in the Constitution. See *ibid.* ("Congress shall have Power To ... provide for the common Defence and general Welfare of the United States"); preamble (Constitution established "to promote the general Welfare"). *2680 The Framers would have used some such broader term if they had meant the Public Use Clause to have a similarly sweeping

scope. Other founding-era documents made the contrast between these two usages still more explicit. See Sales, *Classical Republicanism and the Fifth Amendment's "Public Use" Requirement*, 49 Duke L.J. 339, 368 (2000) (hereinafter Sales) (noting contrast between, on the one hand, the term "public use" used by 6 of the first 13 States and, on the other, the terms "public exigencies" employed in the Massachusetts Bill of Rights and the Northwest Ordinance, and the term "public necessity" used in the Vermont Constitution of 1786). The Constitution's text, in short, suggests that the Takings Clause authorizes the taking of property only if the public has a right to employ it, not if the public realizes any conceivable benefit from the taking.

The Constitution's common-law background reinforces this understanding. The common law provided an express method of eliminating uses of land that adversely impacted the public welfare: nuisance law. Blackstone and Kent, for instance, both carefully distinguished the law of nuisance from the power of eminent domain. Compare 1 Blackstone 135 (noting government's power to take private property with compensation) with 3 *id.*, at 216 (noting action to remedy "public ... nuisances, which affect the public and are an annoyance to all the king's subjects"); see also 2 Kent 274-276 (distinguishing the two). Blackstone rejected the idea that private property could be taken solely for purposes of any public benefit. "So great ... is the regard of the law for private property," he explained, "that it will not authorize the least violation of it; no, not even for the general good of the whole community." 1 Blackstone 135. He continued: "If a new road ... were to be made through the grounds of a private person, it might perhaps be extensively beneficial to the public; but the law permits no man, or set of men, to do this without the consent of the owner of the land." *Ibid.* Only "by giving [the landowner] full indemnification" could the government take property, and even then "[t]he public [was] now considered as an individual, treating with an individual for an exchange." *Ibid.* When the public took property, in other words, it took it as an

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individual buying property from another typically would: for one's own use. The Public Use Clause, in short, embodied the Framers' understanding that property is a natural, fundamental right, prohibiting the government from "tak[ing] property from A. and giv[ing] it to B." *Calder v. Bull*, 3 Dall. 386, 388, 1 L.Ed. 648 (1798); see also *Wilkinson v. Lebard*, 2 Pet. 627, 658, 7 L.Ed. 542 (1829); *Vanhorne's Lessee v. Dorrance*, 2 Dall. 304, 311, 1 L.Ed. 391 (C.C.D.Pa.1795).

The public purpose interpretation of the Public Use Clause also unnecessarily duplicates a similar inquiry required by the Necessary and Proper Clause. The Takings Clause is a prohibition, not a grant of power: The Constitution does not expressly grant the Federal Government the power to take property for any public purpose whatsoever. Instead, the Government may take property only when necessary and proper to the exercise of an expressly enumerated power. See *Kohl v. United States*, 91 U.S. 367, 371-372, 23 L.Ed. 449 (1876) (noting Federal Government's power under the Necessary and Proper Clause to take property "needed for forts, armories, and arsenals, for navy-yards and light-houses, for custom-houses, post-offices, and court-houses, and for other public uses"). For a law to be within the Necessary and Proper Clause, as I have elsewhere explained, it must bear an "obvious, simple, and direct relation" to an exercise *2681 of Congress' enumerated powers, *Sabri v. United States*, 541 U.S. 600, 613, 124 S.Ct. 1941, 158 L.Ed.2d 891 (2004) (THOMAS, J., concurring in judgment), and it must not "subvert basic principles of" constitutional design, *Gonzales v. Raich*, --- U.S. ---, 125 S.Ct. 2195, 162 L.Ed.2d 1 (2005) (THOMAS, J., dissenting). In other words, a taking is permissible under the Necessary and Proper Clause only if it serves a valid public purpose. Interpreting the Public Use Clause likewise to limit the government to take property only for sufficiently public purposes replicates this inquiry. If this is all the Clause means, it is, once again, surplusage. See *supra*, at 2678. The Clause is thus most naturally read to concern whether the property is used by the public or the government, not whether the purpose

of the taking is legitimately public.

II

Early American eminent domain practice largely bears out this understanding of the Public Use Clause. This practice concerns state limits on eminent domain power, not the Fifth Amendment, since it was not until the late 19th century that the Federal Government began to use the power of eminent domain, and since the Takings Clause did not even arguably limit state power until after the passage of the Fourteenth Amendment. See Note, *The Public Use Limitation on Eminent Domain: An Advance Requiem*, 58 Yale L.J. 599, 599-600, and nn. 3-4 (1949); *Barron ex rel. Tiernan v. Mayor of Baltimore*, 7 Pet. 243, 250-251, 8 L.Ed. 672 (1833) (holding the Takings Clause inapplicable to the States of its own force). Nevertheless, several early state constitutions at the time of the founding likewise limited the power of eminent domain to "public uses." See Sales 367-369, and n. 137 (emphasis deleted). Their practices therefore shed light on the original meaning of the same words contained in the Public Use Clause.

States employed the eminent domain power to provide quintessentially public goods, such as public roads, toll roads, ferries, canals, railroads, and public parks. Lewis §§ 166, 168-171, 175, at 227-228, 234-241, 243. Though use of the eminent domain power was sparse at the time of the founding, many States did have so-called Mill Acts, which authorized the owners of grist mills operated by water power to flood upstream lands with the payment of compensation to the upstream landowner. See, e.g., *id.*, § 178, at 245-246; *Head v. Amoskeag Mfg. Co.*, 113 U.S. 9, 16-19, and n. 2, 5 S.Ct. 441, 28 L.Ed. 889 (1885). Those early grist mills "were regulated by law and compelled to serve the public for a stipulated toll and in regular order," and therefore were actually used by the public. Lewis § 178, at 246, and n. 3; see also *Head, supra*, at 18-19, 5 S.Ct. 441. They were common carriers—quasi-public entities. These were "public uses" in the fullest sense of the word, because the public could legally use and benefit from them equally. See Public Use Limitations 903

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(common-carrier status traditionally afforded to "private beneficiaries of a state franchise or another form of state monopoly, or to companies that operated in conditions of natural monopoly").

To be sure, some early state legislatures tested the limits of their state-law eminent domain power. Some States enacted statutes allowing the taking of property for the purpose of building private roads. See Lewis § 167, at 230. These statutes were mixed; some required the private landowner to keep the road open to the public, and others did not. See *id.*, § 167, at 230-234. Later in the 19th century, moreover, the Mill Acts were employed to grant rights to private manufacturing plants, in addition to grist mills that had common-*2682 carrier duties. See, e.g., M. Horwitz, *The Transformation of American Law 1780-1860*, pp. 51-52 (1977).

These early uses of the eminent domain power are often cited as evidence for the broad "public purpose" interpretation of the Public Use Clause, see e.g., *ante*, at 2662, n. 8 (majority opinion); Brief for Respondents 30; Brief for American Planning Assn. et al. as *Amici Curiae* at 6-7, but in fact the constitutionality of these exercises of eminent domain power under state public use restrictions was a hotly contested question in state courts throughout the 19th and into the 20th century. Some courts construed those clauses to authorize takings for public purposes, but others adhered to the natural meaning of "public use." [FN2] As noted above, the earliest Mill Acts were applied to entities with duties to remain open to the public, and their later extension is not deeply probative of whether that subsequent practice is consistent with the original meaning of the Public Use Clause. See *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 370, 115 S.Ct. 1511, 131 L.Ed.2d 426 (1995) (THOMAS, J., concurring in judgment). At the time of the founding, "[b]usiness corporations were only beginning to upset the old corporate model, in which the *raison d'être* of chartered associations was their service to the public," Horwitz, *supra*, at 49-50, so it was natural to those who framed the first Public Use Clauses to think of mills as inherently public entities. The

disagreement among state courts, and state legislatures' attempts to circumvent public use limits on their eminent domain power, cannot obscure that the Public Use Clause is most naturally read to authorize takings for public use only if the government or the public actually uses the taken property.

FN2. Compare *ante*, at 2662, and n. 8 (majority opinion) (noting that some state courts upheld the validity of applying the Mill Acts to private purposes and arguing that the " 'use by the public' test" "eroded over time"), with, e.g., *Ryerson v. Brown*, 35 Mich. 333, 338-339 (1877) (holding it "essential" to the constitutionality of a Mill Act "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"); *Gaylord v. Sanitary Dist. of Chicago*, 204 Ill. 576, 581-584, 68 N.E. 522, 524 (1903) (same); *Tyler v. Beacher*, 44 Vt. 648, 652-656 (1871) (same); *Sadler v. Langham*, 34 Ala. 311, 332-334 (1859) (striking down taking for purely private road and grist mill); *Varner v. Martin*, 21 W.Va. 534, 546-548, 556-557, 566-567 (1883) (grist mill and private road had to be open to public for them to constitute public use); *Harding v. Goodlett*, 11 Tenn. 41, 3 Yerg. 41, 53 (1832); *Jacobs v. Dearview Water Supply Co.*, 220 Pa. 388, 393-395, 69 A. 870, 872 (1908) (endorsing actual public use standard); *Minnesota Canal & Power Co. v. Koochiching Co.*, 97 Minn. 429, 449-451, 107 N.W. 405, 413 (1906) (same); *Chesapeake Stone Co. v. Moreland*, 126 Ky. 656, 663-667, 104 S.W. 762, 765 (1907) (same); Note, *Public Use in Eminent Domain*, 21 N.Y.U.L.Q. Rev. 285, 286, and n. 11 (1946) (calling the actual public use standard the "majority view" and citing other cases).

III

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Our current Public Use Clause jurisprudence, as the Court notes, has rejected this natural reading of the Clause. *Ante*, at 2662-2663. The Court adopted its modern reading blindly, with little discussion of the Clause's history and original meaning, in two distinct lines of cases: first, in cases adopting the "public purpose" interpretation of the Clause, and second, in cases deferring to legislatures' judgments regarding what constitutes a valid public purpose. Those questionable cases converged in the boundlessly broad and deferential conception of "public use" adopted by this Court in *Berman v. Parker*, 348 U.S. 26, 75 S.Ct. 98, 99 L.Ed. 27 (1954), and *2683 *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 104 S.Ct. 2321, 81 L.Ed.2d 186 (1984), cases that take center stage in the Court's opinion. See *ante*, 2663-2664. The weakness of those two lines of cases, and consequently *Berman* and *Midkiff*, fatally undermines the doctrinal foundations of the Court's decision. Today's questionable application of these cases is further proof that the "public purpose" standard is not susceptible of principled application. This Court's reliance by rote on this standard is ill advised and should be reconsidered.

A

As the Court notes, the "public purpose" interpretation of the Public Use Clause stems from *Fallbrook Irrigation Dist. v. Bradley*, 164 U.S. 112, 161-162, 17 S.Ct. 56, 41 L.Ed. 369 (1896). *Ante*, at 2663. The issue in *Bradley* was whether a condemnation for purposes of constructing an irrigation ditch was for a public use. 164 U.S., at 161, 17 S.Ct. 56. This was a public use, Justice Peckham declared for the Court, because "[t]o 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 landowners, or even to any one section of the State." *Ibid*. That broad statement was dictum, for the law under review also provided that "[a]ll landowners in the district have the right to a proportionate share of the water." *Id.*, at 162, 17 S.Ct. 56. Thus, the "public" did have the right to use the irrigation ditch because all similarly situated members of the public—those who owned

lands irrigated by the ditch—had a right to use it. The Court cited no authority for its dictum, and did not discuss either the Public Use Clause's original meaning or the numerous authorities that had adopted the "actual use" test (though it at least acknowledged the conflict of authority in state courts, see *id.*, at 158, 17 S.Ct. 56; *supra*, at 2682, and n. 2). Instead, the Court reasoned that "[t]he use must be regarded as a public use, or else it would seem to follow that no general scheme of irrigation can be formed or carried into effect." *Bradley, supra*, at 160-161, 17 S.Ct. 56. This is no statement of constitutional principle: Whatever the utility of irrigation districts or the merits of the Court's view that another rule would be "impractical given the diverse and always evolving needs of society," *ante*, at 2662, the Constitution does not embody those policy preferences any more than it "enact [s] Mr. Herbert Spencer's Social Statics." *Lochner v. New York*, 198 U.S. 45, 75, 25 S.Ct. 539, 49 L.Ed. 937 (1905) (Holmes, J., dissenting); but see *id.*, at 58-62, 25 S.Ct. 539 (Peckham, J., for the Court).

This Court's cases followed *Bradley's* test with little analysis. In *Clark v. Nash*, 198 U.S. 361, 25 S.Ct. 676, 49 L.Ed. 1085 (1905) (Peckham, J., for the Court), this Court relied on little more than a citation to *Bradley* in upholding another condemnation for the purpose of laying an irrigation ditch. 198 U.S., at 369-370, 25 S.Ct. 676. As in *Bradley*, use of the "public purpose" test was unnecessary to the result the Court reached. The government condemned the irrigation ditch for the purpose of ensuring access to water in which "[o]ther land owners adjoining the defendant in error ... might share," 198 U.S., at 370, 25 S.Ct. 676, and therefore *Clark* also involved a condemnation for the purpose of ensuring access to a resource to which similarly situated members of the public had a legal right of access. Likewise, in *Strickley v. Highland Boy Gold Mining Co.*, 200 U.S. 527, 26 S.Ct. 301, 50 L.Ed. 581 (1906), the Court upheld a condemnation establishing an aerial right-of-way for a bucket line operated by a mining company, relying on little more than *Clark*, see *2684 *Strickley, supra*, at 531, 26 S.Ct. 301. This case,

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too, could have been disposed of on the narrower ground that "the plaintiff [was] a carrier for itself and others," 200 U.S., at 531-532, 26 S.Ct. 301, and therefore that the bucket line was legally open to the public. Instead, the Court unnecessarily rested its decision on the "inadequacy of use by the general public as a universal test." *Id.*, at 531, 26 S.Ct. 301. This Court's cases quickly incorporated the public purpose standard set forth in *Clark and Strickley* by barren citation. See, e.g., *Rindge Co. v. County of Los Angeles*, 262 U.S. 700, 707, 43 S.Ct. 689, 67 L.Ed. 1186 (1923); *Block v. Hirsh*, 256 U.S. 135, 155, 41 S.Ct. 458, 65 L.Ed. 865 (1921); *Mt. Vernon-Woodberry Cotton Duck Co. v. Alabama Interstate Power Co.*, 240 U.S. 30, 32, 36 S.Ct. 234, 60 L.Ed. 507 (1916); *O'Neill v. Leamer*, 239 U.S. 244, 253, 36 S.Ct. 54, 60 L.Ed. 249 (1915).

B

A second line of this Court's cases also deviated from the Public Use Clause's original meaning by allowing legislatures to define the scope of valid "public uses." *United States v. Gettysburg Electric R. Co.*, 160 U.S. 668, 16 S.Ct. 427, 40 L.Ed. 576 (1896), involved the question whether Congress' decision to condemn certain private land for the purpose of building battlefield memorials at Gettysburg, Pennsylvania, was for a public use. *Id.*, at 679-680, 16 S.Ct. 427. Since the Federal Government was to use the lands in question, *id.*, at 682, 16 S.Ct. 427, there is no doubt that it was a public use under any reasonable standard. Nonetheless, the Court, speaking through Justice Peckham, declared that "when the legislature has declared the use or purpose to be a public one, its judgment will be respected by the courts, unless the use be palpably without reasonable foundation." *Id.*, at 680, 16 S.Ct. 427. As it had with the "public purpose" dictum in *Bradley*, *supra*, the Court quickly incorporated this dictum into its Public Use Clause cases with little discussion. See, e.g., *United States ex rel. TVA v. Welch*, 327 U.S. 546, 552, 66 S.Ct. 715, 90 L.Ed. 843 (1946); *Old Dominion Land Co. v. United States*, 269 U.S. 55, 66, 46 S.Ct. 39, 70 L.Ed. 162 (1925).

There is no justification, however, for affording

almost insurmountable deference to legislative conclusions that a use serves a "public use." To begin with, a court owes no deference to a legislature's judgment concerning the quintessentially legal question of whether the government owns, or the public has a legal right to use, the taken property. Even under the "public purpose" interpretation, moreover, it is most implausible that the Framers intended to defer to legislatures as to what satisfies the Public Use Clause, uniquely among all the express provisions of the Bill of Rights. We would not defer to a legislature's determination of the various circumstances that establish, for example, when a search of a home would be reasonable, see, e.g., *Payton v. New York*, 445 U.S. 573, 589-590, 100 S.Ct. 1371, 63 L.Ed.2d 639 (1980), or when a convicted double-murderer may be shackled during a sentencing proceeding without on-the-record findings, see *Deck v. Missouri*, 544 U.S. ---, 125 S.Ct. 2007, 161 L.Ed.2d 953 (2005), or when state law creates a property interest protected by the Due Process Clause, see, e.g., *Castle Rock v. Gonzales*, --- U.S. ---, 125 S.Ct. 2796, 162 L.Ed.2d 658, 2005 WL 1499788 (2005); *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 576, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972); *Goldberg v. Kelly*, 397 U.S. 254, 262-263, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1970).

Still worse, it is backwards to adopt a searching standard of constitutional review for nontraditional property interests, such as welfare benefits, see, e.g., *Goldberg*, *supra*, *2685 while deferring to the legislature's determination as to what constitutes a public use when it exercises the power of eminent domain, and thereby invades individuals' traditional rights in real property. The Court has elsewhere recognized "the overriding respect for the sanctity of the home that has been embedded in our traditions since the origins of the Republic," *Payton*, *supra*, at 601, 100 S.Ct. 1371, when the issue is only whether the government may search a home. Yet today the Court tells us that we are not to "second-guess the City's considered judgments," *ante*, at 2668, when the issue is, instead, whether the government may take the infinitely more

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intrusive step of tearing down petitioners' homes. Something has gone seriously awry with this Court's interpretation of the Constitution. Though citizens are safe from the government in their homes, the homes themselves are not. Once one accepts, as the Court at least nominally does, *ante*, at ---6, that the Public Use Clause is a limit on the eminent domain power of the Federal Government and the States, there is no justification for the almost complete deference it grants to legislatures as to what satisfies it.

C

These two misguided lines of precedent converged in *Berman v. Parker*, 348 U.S. 26, 75 S.Ct. 98, 99 L.Ed. 27 (1954), and *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 104 S.Ct. 2321, 81 L.Ed.2d 186 (1984). Relying on those lines of cases, the Court in *Berman* and *Midkiff* upheld condemnations for the purposes of slum clearance and land redistribution, respectively. "Subject to specific constitutional limitations," *Berman* proclaimed, "when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive. In such cases the legislature, not the judiciary, is the main guardian of the public needs to be served by social legislation." 348 U.S., at 32, 75 S.Ct. 98. That reasoning was question begging, since the question to be decided was whether the "specific constitutional limitation" of the Public Use Clause prevented the taking of the appellant's (concededly "nonblighted") department store. *Id.*, at 31, 34, 75 S.Ct. 98. *Berman* also appeared to reason that any exercise by Congress of an enumerated power (in this case, its plenary power over the District of Columbia) was *per se* a "public use" under the Fifth Amendment. *Id.*, at 33, 75 S.Ct. 98. But the very point of the Public Use Clause is to limit that power. See *supra*, at 2679.

More fundamentally, *Berman* and *Midkiff* erred by equating the eminent domain power with the police power of States. See *Midkiff*, 467 U.S., at 240, 104 S.Ct. 2321 ("The 'public use' requirement is ... coterminous with the scope of a sovereign's police powers"); *Berman*, 348 U.S., at 32, 75 S.Ct. 98. Traditional uses of that regulatory power, such as

the power to abate a nuisance, required no compensation whatsoever, see *Mugler v. Kansas*, 123 U.S. 623, 668-669, 8 S.Ct. 273, 31 L.Ed. 205 (1887), in sharp contrast to the takings power, which has always required compensation, see *supra*, at 2679, and n. 1. The question whether the State can take property using the power of eminent domain is therefore distinct from the question whether it can regulate property pursuant to the police power. See, e.g., *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1014, 112 S.Ct. 2886, 120 L.Ed.2d 798 (1992); *Mugler*, *supra*, at 668-669, 8 S.Ct. 273. In *Berman*, for example, if the slums at issue were truly "blighted," then state nuisance law, see, e.g., *supra*, at 2680; *Lucas*, *supra*, at 1029, 112 S.Ct. 2886, not the power of eminent domain, would provide the appropriate remedy. To construe the Public Use Clause to overlap with the States' police power conflates these two categories. [FN3]

FN3. Some States also promoted the alienability of property by abolishing the feudal "quit rent" system, *i.e.*, long-term leases under which the proprietor reserved to himself the right to perpetual payment of rents from his tenant. See Vance, *The Quest for Tenure in the United States*, 33 Yale L.J. 248, 256-257, 260-263 (1923). In *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 104 S.Ct. 2321, 81 L.Ed.2d 186 (1984), the Court cited those state policies favoring the alienability of land as evidence that the government's eminent domain power was similarly expansive, see *id.*, at 241-242, and n. 5, 104 S.Ct. 2321. But they were uses of the States' regulatory power, not the takings power, and therefore were irrelevant to the issue in *Midkiff*. This mismatch underscores the error of conflating a State's regulatory power with its taking power.

The "public purpose" test applied by *Berman* and *Midkiff* also cannot be applied in principled manner. "When we depart from the natural import of the term 'public use,' and substitute for the simple idea

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of a public possession and occupation, that of public utility, public interest, common benefit, general advantage or convenience ... we are afloat without any certain principle to guide us." *Bloodgood v. Mohawk & Hudson R. Co.*, 18 Wend. 9, 60-61 (N.Y.1837) (opinion of Tracy, Sen.). Once one permits takings for public purposes in addition to public uses, no coherent principle limits what could constitute a valid public use—at least, none beyond Justice O'CONNOR's (entirely proper) appeal to the text of the Constitution itself. See *ante*, at 2671, 2675-2677 (dissenting opinion). I share the Court's skepticism about a public use standard that requires courts to second-guess the policy wisdom of public works projects. *Ante*, at 2666-2668. The "public purpose" standard this Court has adopted, however, demands the use of such judgment, for the Court concedes that the Public Use Clause would forbid a purely private taking. *Ante*, at 2661-2662. It is difficult to imagine how a court could find that a taking was purely private except by determining that the taking did not, in fact, rationally advance the public interest. Cf. *ante*, at 2675 (O'CONNOR, J., dissenting) (noting the complicated inquiry the Court's test requires). The Court is therefore wrong to criticize the "actual use" test as "difficult to administer." *Ante*, at 2662. It is far easier to analyze whether the government owns or the public has a legal right to use the taken property than to ask whether the taking has a "purely private purpose"—unless the Court means to eliminate public use scrutiny of takings entirely. *Ante*, at 2661-2662, 2666-2667. Obliterating a provision of the Constitution, of course, guarantees that it will not be misapplied.

For all these reasons, I would revisit our Public Use Clause cases and consider returning to the original meaning of the Public Use Clause: that the government may take property only if it actually uses or gives the public a legal right to use the property.

IV

The consequences of today's decision are not difficult to predict, and promise to be harmful.

So-called "urban renewal" programs provide some compensation for the properties they take, but no compensation is possible for the subjective value of these lands to the individuals displaced and the indignity inflicted by uprooting them from their homes. 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 *2687 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. If ever there were justification for intrusive judicial review of constitutional provisions that protect "discrete and insular minorities," *United States v. Carolene Products Co.*, 304 U.S. 144, 152, n. 4, 58 S.Ct. 778, 82 L.Ed. 1234 (1938), surely that principle would apply with great force to the powerless groups and individuals the Public Use Clause protects. The deferential standard this Court has adopted for the Public Use Clause is therefore deeply perverse. It encourages "those citizens with disproportionate influence and power in the political process, including large corporations and development firms" to victimize the weak. *Ante*, at 2676 (O'CONNOR, J., dissenting).

Those incentives have made the legacy of this Court's "public purpose" test an unhappy one. In the 1950's, no doubt emboldened in part by the expansive understanding of "public use" this Court adopted in *Berman*, cities "rushed to draw plans" for downtown development. B. Frieden & L. Sagalyn, *Downtown, Inc. How America Rebuilds Cities* 17 (1989). "Of all the families displaced by urban renewal from 1949 through 1963, 63 percent of those whose race was known were nonwhite, and of these families, 56 percent of nonwhites and 38 percent of whites had incomes low enough to qualify for public housing, which, however, was seldom available to them." *Id.*, at 28, 75 S.Ct. 98. Public works projects in the 1950's and 1960's destroyed predominantly minority communities in St. Paul, Minnesota, and Baltimore, Maryland. *Id.*, at 28-29, 75 S.Ct. 98. In 1981, urban planners in

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Detroit, Michigan, uprooted the largely "lower-income and elderly" Poletown neighborhood for the benefit of the General Motors Corporation. J. Wylie, *Poletown: Community Betrayed* 58 (1989). Urban renewal projects have long been associated with the displacement of blacks; "[i]n cities across the country, urban renewal came to be known as 'Negro removal.' " Pritchett, *The "Public Menace" of Blight: Urban Renewal and the Private Uses of Eminent Domain*, 21 *Yale L. & Pol'y Rev.* 1, 47 (2003). Over 97 percent of the individuals forcibly removed from their homes by the "slum-clearance" project upheld by this Court in *Berman* were black. 348 U.S., at 30, 75 S.Ct. 98. Regrettably, the predictable consequence of the Court's decision will be to exacerbate these effects.

The Court relies almost exclusively on this Court's prior cases to derive today's far-reaching, and dangerous, result. See *ante*, at 2662- 2664. But the principles this Court should employ to dispose of this case are found in the Public Use Clause itself, not in Justice Peckham's high opinion of reclamation laws, see *supra*, at 2663. When faced with a clash of constitutional principle and a line of unreasoned cases wholly divorced from the text, history, and structure of our founding document, we should not hesitate to resolve the tension in favor of the Constitution's original meaning. For the reasons I have given, and for the reasons given in Justice O'CONNOR's dissent, the conflict of principle raised by this boundless use of the eminent domain power should be resolved in petitioners' favor. I would reverse the judgment of the Connecticut Supreme Court.

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