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

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

(7) telephone lines;

(8) fiberoptic lines;

(9) [(8)] telegraph lines;

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

(11) [(10)] tramway lines;

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

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

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

(d) 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 purposes. This subsection does not apply to transfers of private property to another private person if one or more of the following apply:

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

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

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

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

(5) the property is transferred to a person by oil and gas lease under AS 38.05.1[illegible];

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

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

(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.

(f) In this section,

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

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

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

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

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

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

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

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

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)~~ (7), and may not be exercised for purposes expressed in AS 09.55.240(e).

(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.

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 ( )						

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
Phone 465-5290
Division: Office of the Commissioner
Date/Time 1/11/06 10:30 AM
Approved by: Kurt Fredriksson
Date 1/11/06 11:31 AM
Agency: Department of Environmental Conservation

(Revised 9/7/2005 OMB)

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						
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	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

(Revised 9/7/2005 OMB)

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 Daughhetee, Director
Phone 465-3673
Division Administrative Services Division
Date/Time 1/10/06 3:58 PM
Approved by: Kathryn Daughhetee for David Márquez, Attorney General
Date 1/10/2006
Agency Department of Law

(Revised 9/7/2005 OMB)

FISCAL NOTE

STATE OF ALASKA
2006 LEGISLATIVE SESSION

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

Dept. Affected: DOT&PF
Title: Limiting Exercise of Eminent Domain
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	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)*

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
Phone 465-3904
Division: Communications, DOT&PF
Date/Time 1/11/06 8:00 AM
Approved by: Mike Barton
Date 1/11/2006
Agency: Commissioner, DOT&PF

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

(Revised 9/7/2005 OMB)

LETTERS OF SUPPORT

NFIB
The Voice of Small Business®

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 <u>essential needs only</u> 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

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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Donat

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.

Printer Friendly Version Forward to a Friend

Institute for Justice | 901 N. Glebe Road | Suite 900 | Arlington, VA 22203
Tel 703.682.9320 | Fax 703.682.9321

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

II

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.

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

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

(a) SHORT TITLE.—This Act may be cited as the "Private Property Protection Act of 2005".

(b) PROHIBITION.—

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

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

(c) PUBLIC USE OR PUBLIC PURPOSE.—Economic development, including an increase in the tax base, tax revenues, or employment, may not be the primary basis for establishing a public use or public purpose under subsection (b).

(d) TAKINGS FOR USE BY PRIVATE INDIVIDUAL OR ENTITY.—Subsection (b) shall include takings of private property for the use of, or ownership by, any private individual or entity.

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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

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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

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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 1936. 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.

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
www.washingtontimes.com

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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CNN.com

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.

Find this article at:
http://www.cnn.com/2005/POLITICS/11/04/eminent.domain.ap/index.html

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Eminent domain is in the spotlight now

PAULA EASLEY

COMMENT

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 5-4 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 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 couldn'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 nonwealthy, 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/454.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

2372 RAYBURN HOB
WASHINGTON, D.C. 20515
(202) 225-4422

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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NATIONAL CONFERENCE of STATE LEGISLATURES

The Forum for America's Ideas

To: State Legislators Interested in Eminent Domain Issues

From: Larry Morandi, Group Director
Environment, Energy & Transportation

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.

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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 st tes 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.)

Westlaw.

125 S.Ct. 2655 Page 1

125 S.Ct. 2655, 162 L.Ed.2d 439, 73 USLW 4552, 60 ERC 1769, 35 Envtl. L. Rep. 20,134, 05 Cal. Daily Op. Serv. 5466, 2005 Daily Journal D.A.R. 7475, 18 Fla. L. Weekly Fed. S 437

(Cite as: 125 S.Ct. 2655)

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.

125 S.Ct. 2655, 162 L.Ed.2d 439, 73 USLW 4552, 60 ERC 1769, 35 Envtl. L. Rep. 20,134, 05 Cal. Daily Op. Serv. 5466, 2005 Daily Journal D.A.R. 7475, 18 Fla. L. Weekly Fed. S 437

(Cite as: 125 S.Ct. 2655)

[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

125 S.Ct. 2655, 162 L.Ed.2d 439, 73 USLW 4552, 60 ERC 1769, 35 Envtl. L. Rep. 20,134, 05 Cal. Daily Op. Serv. 5466, 2005 Daily Journal D.A.R. 7475, 18 Fla. L. Weekly Fed. S 437

(Cite as: 125 S.Ct. 2655)

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.

125 S.Ct. 2655, 162 L.Ed.2d 439, 73 USLW 4552, 60 ERC 1769, 35 Envtl. L. Rep. 20,134, 05 Cal. Daily Op. Serv. 5466, 2005 Daily Journal D.A.R. 7475, 18 Fla. L. Weekly Fed. S 437

(Cite as: 125 S.Ct. 2655)

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

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

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

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

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.*, 240 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.

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. 2862, 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,

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

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, 26 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 ***2667** 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

1123 (C.D.Cal.2001); cf. *Cincinnati v. Vester*, 281 U.S. 439, 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. Olech*, 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 horribles 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*, 524 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 Iredell 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 salutory 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 courts." *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 1015, 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

> 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*.

***2669** The judgment of the Supreme Court of

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

"[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 minimus*. The identity of most of the private beneficiaries were 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 ***2671** 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 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." *Calder v. Bull*, 3 Dall. 386, 388, 1 L.Ed. 648 (1798) (emphasis deleted).

125 S.Ct. 2655, 162 L.Ed.2d 439, 73 USLW 4552, 60 ERC 1769, 35 Envtl. L. Rep. 20,134, 05 Cal. Daily Op. Serv. 5466, 2005 Daily Journal D.A.R. 7475, 18 Fla. L. Weekly Fed. S 437

(Cite as: 125 S.Ct. 2655)

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

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 obj[ects] 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

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).

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

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 [illegible] peculiar to this case: The NLDC's plan is [illegible] 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

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.

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