Kelo v. New London: Bad Law, Bad Policy, and Bad Judgment

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Introduction

LAST TERM'S FIVE-TO-FOUR, *KELO*[1] DECISION has precipitated a great deal of controversy. Large numbers of Americans were dismayed and angered to find that anyone's unoffending home may be seized and razed to convey the site to a municipally favored redeveloper, on the theory that redevelopment will increase revenues and wages, thus tending to revitalize the community. Public opinion polls indicate that *Kelo*'s broad reading of the Public Use Clause has left the great majority of Americans gasping with disbelief.[2] *Kelo* has precipitated a flood of proposed (and in some cases enacted) legislation to curb this breathtaking expansion of unreviewable and unaccountable government power.[3] A strong public reaction to a Supreme Court ruling is hardly a new phenomenon, but in this case its intensity and its ability to stir legislatures into immediate corrective action are, at least in my experience, unprecedented.

Kelo has also inspired an instant emergence of a cottage industry among government officials, redevelopment professionals, and the usual academic suspects who have reacted to the Supreme Court's decision, by asserting that the legal and civic revolution wrought by the Court

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For a more in depth exposition of the author's views see Gideon Kanner, *The Public Use Clause: Constitutional Mandate or "Hortatory Fluff"?*, 33 PEPP. L. REV. 335 (2006) [hereinafter *Hortatory Fluff*].

1. Kelo v. City of New London, 125 S. Ct. 2655 (2005). For a concise review of *Kelo* in its historical context, see Carla T. Main, *How Eminent Domain Ran Amok*, 133 POL'Y REV. 1, 3 (2005).

2. *See, e.g.*, Paul Shigley, *Backlash Threatens Redevelopment: Eminent Domain Ruling Sparks Legislation, Calls for Reform; State Legislation*, 20 Cal. Plan. & Dev. Rep. 1 (2005) (stating that many "public opinion polls showed widespread opposition" to *Kelo*).

3. Sibley Fleming & Parke Chapman, *Eminent Outrage*, NAT'L REAL EST. INVESTOR, Feb. 1, 2006, at 20 (stating that thirty-eight states have introduced legislation to curb the *Kelo* decision, while seven states and thirty-six local governments have passed anti-*Kelo* legislation).

in the applicability of the eminent domain power was no revolution at all, but merely the invocation of long-standing precedent. In light of what the *Kelo* Court did decide, these assertions bring to mind a scene in the movie *Jumbo*, where Jimmy Durante is caught trying to sneak an elephant out of a circus, and when confronted by a guard, says, "Elephant? What elephant?" [4]

Use vs. Purpose. Shall We Use Justice Stevens' Lawnmower? Or Would It Be "More Natural" to Purpose It?

Kelo worked a radical expansion of the right to take, not by adding to the decisional law, but by jettisoning a long-standing limiting condition. Until *Kelo* came along, under the expanded modern reinterpretation of the "public use" clause, condemnations for involuntary transfer of private property to other private individuals *for their economic benefit* were deemed permissible only as a matter of necessity—originally strict necessity—when the act of condemnation eliminated a social harm, thereby accomplishing a "public purpose." Unfortunately, as time went on, the Court unwittingly made "use" interchangeable with "purpose," and went beyond that by asserting in *Kelo* that the phrase "public purpose" was a "more natural" meaning of the constitutional phrase "public use."[5]

With all due respect, the Court's "more natural" verbal formulation seems to be nothing more than an exercise in overreaching semantic gymnastics. I find it incontestable that, if Justice Stevens, the author of the *Kelo* majority opinion, were to drop in on his neighbor to borrow a lawnmower, he would *not* deem it "more natural" to say, "May I purpose your lawnmower?" No way. He would likely say, "May I *use* your lawnmower?," though he might add, "My *purpose* in using it is to cut my lawn." In other words, "use" goes to the function, whereas "purpose" goes to the user's objective or motivation, i.e., the reason for his intended use. In his definitive work on legal usage, Bryan A. Garner indicates that "purpose" is a word "denoting 'something one sets before oneself as a thing to be done; the end one has in view.' "[6] To put it in familiar constitutional terminology, "purpose" goes to ends, whereas "use" goes to means. In other words, it would be correct to say that "The *purpose* of urban renewal in *Berman v. Parker* [7] was slum

4. BILLY ROSE'S JUMBO (MGM 1962).
5. 125 S. Ct. at 2662.
6. BRYAN A. GARNER, A DICTIONARY OF MODERN LEGAL USAGE 720 (2d ed. 1995).
7. Berman v. Parker, 348 U.S. 26 (1954).

clearance, but the *use* to be made of the condemned property was the construction of new improvements by private redevelopers." In short, the *Kelo* majority not only mangled the law, but also tampered with the plain meaning of the English language, adding that to do so is "more natural."

Defensible Holding, or *Reductio Ad Absurdum*?

Kelo has inspired a widespread and vigorous reaction by the public and press primarily because it is a case of *reductio ad absurdum*, meaning that its premise is flawed in that it deems almost *everything* to be a "public use." So long as developers and municipal functionaries predict that more money will be made from the subject property in the redevelopers' hands than its present owner's then the "public use" requirement is said to be met. This amounts to a sort of municipal do-it-yourself constitutional imprimatur because all the condemning municipality needs to do now is proffer self-manufactured plans for the proposed taking,[8] even though, as discussed *infra*, condemnors are not obliged to carry out their plans and are free to engage in intrinsic fraud to take private property but then not use it as planned.[9]

It is one thing to use eminent domain to create necessary public works, or even arguably to eliminate *serious* social harms that cannot be eliminated in other ways.[10] However, the social harms said to be eliminated in the context of redevelopment, are often (slums being an obvious example) the direct result of local government's extended failure to enforce building codes and safety standards, local government's denial of building permits required to effect needed repairs, and, in some cases, local government's failure to provide adequate law enforcement in areas targeted for redevelopment.[11] Consequently the decline of these areas is accelerated, making their "blight" a self-fulfilling municipal prophecy.

8. *See* 125 S. Ct. at 2665.

9. *See, e.g.*, Capron v. State, 247 Cal. App. 2d 212 (1964); *see infra* note 134.

10. For an example, see Government of Guam v. Moylan, 407 F.2d 567 (9th Cir. 1969), which approved condemnation of a war-ravaged area of the City of Agana to allow replatting preparatory to its reconstruction. Even given its unique facts, I find the *Moylan* reasoning to be a stretch because it was decided a quarter-century after the end of the war, and I find it hard to believe that Agana remained unreconstructed that long.

11. *See generally* Gideon Kanner, *Condemnation Blight: Just How Just Is Just Compensation?*, 48 NOTRE DAME L. REV. 765, 767–68, 769, n.18 and accompanying text (1973); Richmond Elks Hall Ass'n v. Richmond Redev. Agency, 561 F.2d 1327 (9th Cir. 1977); Amen v. City of Dearborn, 363 F. Supp. 1267 (E.D. Mich. 1973); Foster v. Detroit, 254 F. Supp. 655 (E.D. Mich. 1966).

It is quite another matter when the awesome power of eminent domain is invoked to subsidize ventures of private entrepreneurs, with cities asserting an at times unrequited and always chancy hope that the new businesses established on the taken land will increase taxes and enhance the local economy.[12] The idea that hundreds of thousands of families can be driven from their unoffending homes so local cities may get what they hope will be a better financial deal by turning over the taken land to redevelopers, is profoundly immoral and offensive to a society that cherishes the deeply rooted values that attach to private property. That this is done under the banner of "just compensation," but actually without full compensation for all demonstrable economic losses concededly suffered by the displaced home owners, is an outrage. To make matters worse, from a civic point of view, in takings of this kind there is no enforceable assurance that the redeveloper or his vendees or tenants will prosper[13] and conduct themselves in a responsible fashion. There is also no assurance that once the redevelopment project is completed the redevelopers will continue to follow the municipal

12. For an astute judicial critique of the pitfalls of this theory, see Regus v. City of Baldwin Park, 70 Cal. App. 3d 968, 982–83 (Cal. 1977). As Justice Macklin Fleming put it in *Regus*,

> The promoters of such projects promise that in time everyone will benefit, taxpayers, government entities, other property owners, bondholders; all will profit from [the] . . . increased future assessments on the tax rolls, for with the baking of a bigger pie bigger shares will come to all. But the landscape is littered with speculative real estate developments whose profits turned into pie in the sky; particularly where a number of communities have competed with one another to attract the same regional businesses. *Id.*

When such failures occur, the taxpayers are left holding the bag. *See* Pasadena Redev. Agency v. Pooled Money Inv. Bd., 186 Cal. Rptr. 264 (Cal. Ct. App. 1982); *infra*, note 13.

13. For example, in Burbank, California, the city invested $120.7 million in a redevelopment shopping center, planning to receive in the next twenty-five years some $229 million in taxes and $52.7 million as its 50–50 share of the developer's profits. But as it turned out, five years later it became clear the mall "won't produce a dime in profits for the foreseeable future." The redeveloper promised a $10 million payment in the future but to get even that the city had to give up its share of any future profits. Vivien Lou Chen, *The Deal Is Off for Burbank, Mall Developer*, L.A. TIMES, Nov. 13, 1994, at A1.

In fact, redevelopers' usual rosy prognostications notwithstanding, the operation of shopping malls is a business fraught with pitfalls and failures. (This is a favorite land re-use of redevelopers. *See* BERNARD J. FRIEDEN & LYNN E. SAGALYN, DOWNTOWN, INC.—HOW AMERICA REBUILDS CITIES (1989)). Justice Fleming discusses such problems in *Regus. See* Moran, *infra* note 15; Peter T. Kilborn, *An Enormous Landmark Joins Graveyard of Malls*, N.Y. TIMES, Dec. 24, 2003, at A12; Timothy Egan, *Retail Darwinism Puts Old Malls in Jeopardy*, N.Y. TIMES, Jan. 1, 2000, at A20; Morris Newman, *In Rise and Fall of Malls, Weaker Ones Get "Demalled:" Real Estate: Changes in Shopping Patterns Are Facing a Transformation Among Southland's Struggling Retail Centers*, L.A. TIMES, Dec. 14, 1999.

plans, or even continue their prognosticated activity on the taken land.[14] For all the municipal and judicial prattle about projected benefits to the community, after gaining title, the redeveloper is free to make the unfettered, unilateral decision to act as he sees fit on the property, with no effective oversight. In theory, much was made in *Kelo* about the municipal plan underlying the controversial condemnation; the Court bought into these municipal representations, but in fact, there is no mechanism in place whereby the redevelopers or their vendees can be compelled to stick to the plan,[15] particularly after the redevelopment project is built out. This is simply an invitation to abusive use of the eminent domain power. Thus, in *Berman v. Parker*,[16] the seminal redevelopment case, the plan required that at least one-third of the improvements built in the redeveloped area of Southwest Washington, D.C., be low-cost dwelling units renting for no more than $17 per room per month.[17] In fact, as anyone who has visited the "new" Southwest Washington area knows, what was actually built was considerably more upscale.

Just Exactly What Did Those Old Cases Decide?

The *Kelo* approach also ignored history, because the old precedents said to form the origins of the expansive taking power applied in *Kelo*, mostly involved takings of vacant strips of land for irrigation ditches, and other easements, whereas today's redevelopment displaces hundreds of thousands of people to rebuild "blighted"[18] areas, which dis-

14. *Compare* Yonkers Cmty. Dev. Agency v. Morris, 335 N.E.2d 327 (N.Y. 1975) *with* Yonkers v. Otis Elevator Co., 844 F.2d 42 (2d Cir. 1988) (a few years after condemnation of Morris's land for Otis's manufacturing plant expansion, Otis shut down the plant and left Yonkers, leaving the city holding the bag).

15. Thus, the plan involved in the *Kelo* case called for the construction of a five-star hotel, but that aspect of the plan was abandoned even before *Kelo* was decided by the Supreme Court. Kate Moran, *Developer Says Fort Trumbull Hotel Plan Not Viable Since 2002: Project Became Unrealistic Without Pfizer Commitment*, THE DAY, June 12, 2004, at C4.

16. 348 U.S. 26 (1954).

17. *Id.* at 30–31.

18. I use quotation marks because in today's redevelopment law the terms "blight" or "blighted" are at best terms of art and at worst an outright fraud that the courts, to their everlasting shame, accept as fact. "[B]light removal—an eminent domain category that traditionally has been as slippery as an eel—can always surface . . . as a convenient loophole." Main, *supra*, note 1, at 23; *see also* George Lefcoe, *Finding the Blight That's Right for California Redevelopment Law*, 52 HASTINGS L.J. 991 (2001) (explaining that what the redevelopment community is after is not slums or genuinely blighted parts of town to be rebuilt and rehabilitated, but rather "blight that's right," meaning parts of town that are sufficiently downscale to justify a colorable claim that they are sufficiently blighted to justify their taking, but sufficiently upscale so that after they are condemned, the new commercial improvements built on them will be appealing to

proportionately effects the lower middle class and the poor. Thus, even on the Court's mistaken premise, the doctrine underlying the application of today's law of eminent domain to urban redevelopment perpetuates a legal anachronism because the mass displacement of urban populations bears no relation to the nineteenth and early twentieth century takings of strips of vacant rural land. Unlike those takings, modern redevelopment projects demolish densely populated urban dwellings on a huge scale and displace hundreds of thousands of their inhabitants from their homes and businesses. That this dramatic difference in the factual contexts received no consideration in *Kelo* is yet another indicator that the Court failed to understand and reflect on the impact of its decision on real people in the real world.

Meet Hood Robin: He Takes from the Poor and Gives to the Rich

Worse, because *Kelo* sanctioned a forcible transfer of wealth from the lower middle class to the rich, as pointedly noted by Justice O'Connor in her dissent,[19] it was a case of predatory behavior by the government that most Americans rightly view as anathema. At least Robin Hood robbed the retinue of the Sheriff of Nottingham, not the local lower class citizens. Add to that the *conceded* widespread undercompensation of condemnees,[20] and the process becomes morally intolerable to right-

the affluent population that lives nearby and whose dollars are essential to support the shopping malls and other private businesses established on the taken and razed land).

19. *Kelo*, 125 S. Ct. at 2677 (O'Connor, J., dissenting).

20. *See, e.g.*, JACQUES B. GELIN & DAVID W. MILLER, THE FEDERAL LAW OF EMINENT DOMAIN, 47–99 (1982) (canvassing the various individual losses that are not compensable in eminent domain). Even as big a fan of economic redevelopment as Prof. Thomas W. Merrill, is of the view that "[t]he most striking feature of American compensation law—even in the context of formal condemnations . . . is that just compensation means incomplete compensation."); Thomas W. Merrill, *Incomplete Compensation for Takings*, 11 N.Y.U. Envtl. L.J. 110, 111 (2002) (acutely conscious of that problem, some of the defenders of the *Kelo* decision have made half-hearted concessions that improvement in the law of compensation may indeed be warranted. But that has been all talk, and not much of it. There have been no visible moves by the redevelopment community toward reform of the prevailing unjust "just compensation").

For me, it's a case of I'll-believe-it-when-I-see-it, but in my forty-year long career as an eminent domain lawyer and my thirty-year long service as consultant on eminent domain to the California Law Revision Commission, I have never seen it. I would be pleased if I were to be proven wrong, but it seems like an entirely safe bet that any future legislation of this type will be vigorously opposed by various government entities as it always has been. Thus, for example, the Uniform Eminent Domain Code proposed by the Uniform Law Commissioners was successfully opposed by government entities, and in spite of its modest proposals for (mostly procedural) reform, has been a resounding failure, adopted only by a couple of states, and eventually downgraded to the status of a Model Code. UNIFORM EMINENT DOMAIN CODE (West 1974).

thinking people. Worse still, where a condemnee operates a business on the taken property, and the taking destroys it without any compensation whatsoever—which is the rule in most states—in order to turn over its site to another business person for the latter's profit,[21] the process descends to the level of outright theft.

This is a particularly perverse aspect of *Kelo* because the ostensible purpose of redevelopment is to improve the quality of life in the affected community. Thus, to tell lower middle class inhabitants of redevelopment project areas that they will not only lose their homes and businesses, but will also have to suffer personal and economic disadvantages (such as uprooting of lives and undercompensation) so that the redevelopers and their more fortunate and more affluent vendees can improve their economic position is not far removed from the Vietnam War era line that a village had to be destroyed in order to save it.

Community Benefits or Good Ol' Government Pork?

Further with regard to compensation, the process of eminent domain is replete with instances of colossal waste of public funds.[22] Still, government officials (and alas, judges) engage in unwarranted lamentations that providing full compensation to displaced condemnees, even if limited to payment for their demonstrable *economic* losses, will bring construction of public works to a halt and reduce the public fisc to the state of Carthaginian ruin.[23] In other words, there is plenty of money to waste outright for projects that produce no benefits or are never built, or to spend on "pork" projects created for political reasons[24] that at times

21. *See* John Gibeaut, *The Money Chase*, 85 A.B.A. J. 58 (1999); Dean Starkman, *Take and Give: Condemnation Is Used to Hand One Business Property of Another*, WALL ST. J., Dec. 2, 1998, at A1.

22. See a collection of instances of multi-hundred-million-dollar waste in redevelopment projects and the creation of public works in Gideon Kanner, *Making Laws and Sausages: A Quarter-Century Retrospective on* Penn Central Transportation Co. v. City of New York, 13 WM. & MARY BILL RTS. J. 653, 687 n.142, 762–63, nn. 449–50, 764–65, n.455 [hereinafter Kanner, *Making Laws and Sausages*].

23. This is no hyperbole. *See* e.g., People v. Symons, 357 P.2d 451, 455 (Cal. 1960) (asserting without any evidentiary support whatever that payment of compensation for diminution of value concededly suffered but deemed by the court to be noncompensable, would bring about an "embargo" on the creation of desirable public works). Note that under California law, trial lawyers' similar arguments to the trier of fact that it bring in a low verdict because of the defendant's limited resources constitute prejudicial misconduct that gives rise to reversible error. Hoffman v. Brandt, 421 P.2d 425 (Cal. 1966).

24. *See, e.g.*, City of Los Angeles v. Retlaw Enters., 546 P.2d 1380 (Cal. 1976); Stone v. City of Los Angeles, 51 Cal. App. 3d 987 (Cal. Ct. App. 1975) (illustrating the colossal boondoggle whereby in the 1970s the City of Los Angeles condemned over 17,000 acres of land for what it grandly called a new "Intercontinental" airport that was never built). The taken land is largely leased to sheepherders and pistachio nut growers. Only one short-hop airline has been using this "Intercontinental" airport,

amount to little more than gratification of an influential congressman's clout.[25] But alas, goes the familiar judicial lamentation, there is no money to make the constitutional promise of "just" compensation genuinely just.

Significantly, judicial concerns over excessive spending on public projects go only as far as the boundaries of compensability under the Just Compensation Clause. No other participants in the creation of public projects, to the best of my knowledge, are hectored and lectured from the bench about how they must forego the full extent if *their* compensation, or their profit expectations, lest the cost of their products and services inhibit creation of public works and cause an "embargo" on them.

So What Else Is New?

Before proceeding further, we need to address the question whether *Kelo* was novel? *Kelo*'s supporters say "no" and offer cases like *Berman*,[26] *Ruckleshaus*,[27] and *Boston & Maine*,[28] as precedential instances of the use of eminent domain to transfer property to private parties without the justification of harm elimination. But a reading of these cases shows the contrary.

Berman v. Parker, the leading redevelopment case that permitted large scale eminent domain takings of densely inhabited urban land for transfer to private redevelopers, is hardly supportive of the Court's defenders' position.[29] *Berman* was a major slum clearance project (as

and to get it to do so, the city had to offer it free rent. T.W. McGarry, *An Airport Waiting to Happen: Desert "Superport" to Ease LAX Traffic Is Two-Decade Dream*, L.A. TIMES, May 2, 1988, pt. 2, at 8. As of this writing, that airline has ceased using that airport which is now completely unused.

25. *See* Heather Lende, *Alaska's Road to Nowhere*, N.Y. TIMES, Aug. 20, 2005, at A27 (relating congressional expenditures of hundreds of millions of dollars for useless projects, including a $230 million bridge nearly the size of the Golden Gate Bridge "between Anchorage and a swampy, undeveloped port," and a major road from Juneau that ends in the middle of a wilderness because the federal government, which appropriated $15 million for it, won't finance the completion of its part going "through Skagway's Gold Rush-era park, a national landmark"). *Id.*

Faced with a public uproar when these facts became known, Congress eliminated the specific funding for the Gravina Island Bridge, but let Alaska keep the appropriated money anyway, authorizing it to spend those millions on transportation projects any way it wants, *not* excluding the bridge. *See* Associated Press, *Alaskan Bridge Projects That Drew Ridicule May Be on Ice, But State Will Still Get the Cash*, L.A. TIMES, Nov. 17, 2005, at A26; Carl Hulse, *Two "Bridges to Nowhere" Tumble Down in Congress*, N.Y. TIMES, Nov. 17, 2005, at A19.

26. 348 U.S. 26 (1954).

27. 571 F. Supp. 117 (S.D.N.Y. 1983).

28. 503 U.S. 407 (1992).

29. *See* 348 U.S. at 26.

redevelopment was then called) that razed almost all of Washington's Southwest quarter and displaced its population, usually without compensation since most of the displaced families were poor tenants occupying their modest dwellings on a month-to-month basis, and thus had no compensable property interests. This was done as the court prattled on, deploring the "[m]iserable and disreputable conditions" that "may indeed make living an almost insufferable burden."[30] However, even as under the aegis of its *Berman* decision, the slum dwellers were being forced out of their shabby dwellings and shuttled into even worse but more expensive slums in other parts of Washington.

The controversy arose when Samuel Berman, the owner of a neighborhood department store objected to the taking of his property, arguing: (1) that the taking was not for public use because the redevelopment agency planned to reconvey his property after its taking to private redevelopers for their private profitable use; and (2) that in any event, his property was well maintained and thus did not justify its taking for slum clearance.[31] The Court rejected both arguments.[32] The first was rejected on the grounds that the "public use," which the Court deemed synonymous with "public purpose,"[33] was not the intended use of the subject land after its condemnation, but rather the elimination of the public detriment represented by the existing slum conditions.[34] Berman's second argument was also rejected on the grounds that the redevelopment agency should be able to eliminate slums on an area-wide basis rather than parcel-by-parcel.[35] Thus, the fact that Berman's store was not blighted was no obstacle to its taking for blight elimination. The Court did not explain how the local officials' administrative convenience in carrying out their redevelopment plan got to trump Berman's constitutional rights, or how the fact that one's neighbors' property is blighted allows a disregard of the explicit constitutional rights of an owner of *unblighted* property.

Be all that as it may, the Court made it clear in *Berman*, and reiterated it in *Kelo*, that "in *Berman*, we endorsed the purpose of transforming

30. *Id.* at 32.
31. *Id.* at 36–37.
32. *Id.* at 36.
33. *Berman*, 348 U.S. 26 (1954). Probably the most remarkable (and unfortunate) aspect of the *Berman* opinion is that though it is said to be the leading modern case construing the constitutional phrase "public use," it barely mentions that phrase, much less construes it. The phrase "public use" is mentioned only once in the Court's entire legal analysis, though it is also included in two quotations, respectively, one from the Fifth Amendment and the other from the pertinent statute.
34. *Id.*
35. *Id.*

a blighted area into a 'well-balanced' community through redevelopment."[36] That was *Berman*'s "public use" said to justify the taking.

In his post-*Kelo* speech, *Judicial Predilections*, Justice Stevens, the author of the *Kelo* majority opinion, confirmed that in *Berman* the Court deemed "the purpose of the entire project, rather than its impact on individuals who happen to own property in the targeted area," to be the rationale for taking of Berman's store.[37] This explanation ignored the principle that "impact on individuals" lies at the core of the Bill of Rights.

Was this justification sound? I don't think so. I would like to believe that no American court would *avowedly* sacrifice the constitutional rights of concededly innocent people. To take an analogous example, it would be shocking if in order to facilitate an efficient area-wide criminal law enforcement effort in a crime-ridden part of town, individual constitutional rights of innocent people were infringed with Court approval. I see no reason why that should not be equally true in the case of area-wide slum clearance. In fact, several buildings in the Southwest Washington area *were* left standing, including two restaurants, a pizza joint, and two historical buildings. I know. I lived across the street from the latter in the 1960s, a decade after *Berman.* More importantly, I find it simply absurd to suggest that individual constitutional rights, expressly protected by the Bill of Rights, must be sacrificed for the sake of convenience of municipal urban planners. Indeed, it is a bedrock principle of constitutional interpretation that the Bill of Rights is "designed to protect the fragile values of a vulnerable citizenry from the overbearing [official] concern for efficiency and efficacy," even, *and particularly* where government objectives are praiseworthy.[38] Be all that as it may, the Court explicitly based its approval of the taking of Berman's store on the harm elimination rationale.[39]

Is "Public Use" Merely the Police Power in Drag?

More important doctrinally and apart from its outcome, *Berman* was a doctrinal disaster area. Justice Douglas, the author of the opinion

36. *See Kelo*, 125 S. Ct. at 2665. *See also Kelo*, 125 S. Ct. at 2666 n.16 (purporting to reject Justice O'Connor's dissenting argument that takings for transfer to private individuals for their private uses are permissible only when "the initial taking eliminates some 'harmful property use' ").

37. John Paul Stevens, Supreme Court Justice, Judicial Predilections, Address at the Clark County Bar Association Meeting (Las Vegas, Nev., Aug. 18, 2005), *in* 6 NEV. L.J. 1 (2005).

38. Stanley v. Illinois, 405 U.S. 645, 656 (1972).

39. 348 U.S. at 34–35.

(whose freewheeling opinion style had earned him the sobriquet "Wild Bill"[40]) simply confused the exercise of the police power with the exercise of the power of eminent domain when he asserted that in dealing with eminent domain, the Court was dealing with the police power. There is no way of telling whether he did so unwittingly or deliberately, but the consequences are the same either way, and they wreaked havoc with legal doctrine. The police power is regulatory and noncompensable, whereas the eminent domain power is avowedly acquisitory and compensable. Or, as the foremost treatise on the subject of the police power puts it, under the police power, property is taken without compensation because it is harmful, but under the eminent domain power it is acquired with compensation because it is useful.[41] This elementary error on the Court's part had far-reaching doctrinal consequences. As Prof. Paul observed, *Berman*'s broad construction of the power of eminent domain "equated the phrase *public use* with more nebulous terms such as *public advantage, public purpose, public benefit*, or *public welfare*"[42]—a string of feel-good phrases of uncertain meaning, that are usually associated with expansive police power, rather than with the (theoretically) limited power of eminent domain. This simply is not law, but rather a sort of verbal goulash that grants judges the power to ignore the black letter "public use" language of the Fifth Amendment to the Constitution. Thus, to follow Justice Douglas' notion in *Berman* that the two powers are one, was to let the broad, and doctrinally ill-defined "public purpose" police power justification swallow the specific, narrower "public use" limitation, thereby *de facto* reading it out of the Constitution. The Court had the raw power to say what it did in *Berman*, but that does not change the fact that its statement on this point of law was grossly in error of a kind that would earn a law student a failing grade—at least before *Berman* was decided.[43] Moreover, in inverse condemnation, where property owners contend that through abuse of the police power government regulations have deprived them

40. BRUCE ALLEN MURPHY, WILD BILL: THE LEGEND AND LIFE OF WILLIAM O. DOUGLAS (2003).

41. ERNST FREUND, THE POLICE POWER: PUBLIC POLICY AND CONSTITUTIONAL RIGHTS 546–47 (1904). It may be useful to recall that the British call eminent domain "compulsory purchase," which leaves no one in doubt that it is categorically different from the regulatory police power under which inherently nothing is purchased.

42. ELLEN FRANKEL PAUL, PROPERTY RIGHTS AND EMINENT DOMAIN 93 (1987) (emphasis added).

43. *See id.* at 91, aptly characterizing Justice Douglas' opinion in *Berman* as a "mighty obfuscation" that "confused the law almost beyond redemption [and] dealt a devastating blow to the public use limitation upon what government can constitutionally take."

of their property rights, courts experience no difficulty keeping these two government powers separate and turning away aggrieved owner-plaintiffs with the explanation that the police power is quite separate from the eminent domain powers.[44] In other words, it seems plain that far from being a doctrinal restructuring of the law, the assertion that the power of eminent domain is the police power, or coterminous with it, was merely a convenient verbal formulation that facilitated the results reached by the Court in *Berman* and later in *Hawaii Housing Authority v. Midkiff.*

Say "Aloha" to the Ol' Homestead and Then Say "Sayonara"

Berman's disregard of the constitutional "public use" standard was reinforced, but paradoxically also limited in the next Supreme Court right-to-take case, *Hawaii Housing Authority v. Midkiff.*[45] In this case the Court considered state legislation providing for land redistribution in Hawaii.[46] The State of Hawaii enacted legislation authorizing the condemnation of titles of landlords who had subdivided their land and leased the resulting parcels as home sites to long-term lessees who built family homes on them.[47] This was a satisfactory arrangement for a long time. The lessor was the Bishop Estate—a charitable trust established by Princess Bernice Pauahi Bishop, the last member of Hawaiian royalty, who during her life held title to the residue of Hawaiian royal lands in trust for the people of Hawaii.[48] The Bishop Estate discharged its duty to make the land useful and productive and to use the income from it to support the Kamehameha schools providing an education to Hawaiian children.[49] To that end, the Estate charged below-market rents deeming that a socially constructive way to pursue its goals.[50] But as time went on and land grew more valuable, land rents crept up and Hawaiian politicians decided to take advantage of that fact as well as of the local suburbanites' desire to own their homes in fee simple, by passing legislation authorizing the condemnation of the Bishop Estate's titles to the subdivided lots and reconveying them to the lessees.[51]

44. *See, e.g.*, City of Des Moines v. Gray Businesses, LLC, 124 P.3d 324, 328–29 (Wash. Ct. App. 2005).
45. 467 U.S. 229 (1984).
46. *Id.*
47. *Id.* at 233.
48. *Horatory Fluff*, 33 PEPP. L. REV. 335, 355 (2006).
49. *Id.*
50. *Id.*
51. 467 U.S. at 233.

The Bishop Estate objected to the taking on the grounds that it was not for a public use, but was rather a classic instance of the traditionally forbidden practice of taking from A and giving to B for B's private use.[52] The U.S. Supreme Court agreed that the primary immediate beneficiaries of the taking would be Bishop Estate's lessees, not the public at large, but held that the taking was nonetheless permissible because it broke up a land oligopoly that created artificial deterrents to normal functioning of the state's residential land market.[53] Thus, the Court reasoned that the *Midkiff* taking did not offend the "public use" clause of the Constitution because it eliminated the skewed, oligopolistic real estate market that the local legislature believed was causing a shortage of fee simple residential land and hence an inflation in prices of available freehold home sites.[54] Of course, this was economic nonsense. Other things being equal, fee titles are inherently more valuable than leasehold estates, so the conversion of the latter into the former could not result in lowering of housing costs. In fact, the land redistribution approved in *Midkiff* not only failed to lower or even stabilize housing prices on Oahu, but on the contrary, led to a dramatic escalation in values. The adverse land market effects described by the Court as the "oligopoly" (and used as justification for the taking)[55] were caused by a prevailing shortage of buildable land, caused by the fact that nearly one-half of the land on Oahu is government-owned and thus unavailable for housing construction, as well as Hawaii's notoriously restrictive land use regulations.[56] The law at issue in *Midkiff* neither did nor could do anything about that. It was a political gesture that created no new housing (but only redistributed titles), that cost the state nothing (the land lessees had to pay for their freehold titles). The Court evidently recognized all this but upheld the taking. It explained that the

52. *Id.* Such transfers have been traditionally deemed illegitimate and unconstitutional. *See, e.g.*, Calder v. Bull, 3 U.S. 386, 388 (1798). Note that in *Kelo* the majority paid lip service to *Calder.* 125 S. Ct. at 2661 n.5.

53. 467 U.S. at 241–42.

54. *Id.*

55. On Oahu, 47% of privately owned land was held by 72 private owners. 467 U.S. at 232. But query whether the Hawaii legislature was merely wrong or irrational in supposing that fee simple title would be cheaper than leaseholds.

56. *See* DAVID L. CALLIES, REGULATING PARADISE: LAND USE CONTROLS IN HAWAII 173–74 (1984) (quoting the then dean of the nation's land use bar, the late Richard Babcock, voicing alarm over the fact that Hawaii's land use restrictions "have contributed to one of the nation's most appalling shortages of housing and a substantial increase in the cost of what housing there is"); Opinion, *Housing Supply Needs to Be Increased*, PAC. BUS. NEWS, Oct. 7, 2005, *available at* http://the.honoluluadvertiser.com/article/2003/Oct/05/op/op10a.html/ (last visited Feb. 20, 2006); John B. Ray, *1961 Land-Use Law Prohibitive,* HONOLULU ADVERTISER, Oct. 5, 2003, at B1.

fact that the legislature is wrong in its economic perceptions does not vitiate its enactments.[57]

The insubstantiality of the Hawaii legislature's findings that the prevalence of leaseholds kept housing prices up was promptly demonstrated by the market. As the residential leaseholds were converted into freehold titles and suburban homes became available in fee simple in desirable areas of Oahu, many of them were promptly snapped up by Japanese investors who, taking advantage of the then soaring yen, paid outlandish prices for ordinary, aging suburban bungalows in order to tear them down, build luxurious new homes on their sites, and market them to Japanese tycoons as vacation homes.[58] The upshot was that as a result of the *Midkiff* decision, the supply of available homes on Oahu was reduced, not increased, and instead of going down, housing prices shot up. Instead of gaining fee title to their leased home plots and getting on with their lives as suburban homeowners, the Kahala lessees gained a windfall and became instant millionaires as they sold their aging bungalows to Japanese buyers and rushed out to buy grander replacement homes for themselves. Thus, in the name of land redistribution intended to rectify feudal land title misallocations, and provide lessee-suburbanites with lower cost fee simple titles to their homes, events were set in motion that caused home prices on Oahu to skyrocket, and transferred some of America's choicest residential land into the hands of foreign tycoons.[59]

The *Midkiff* opinion, written by Justice O'Connor, used even stronger language than Justice Douglas' assertions in *Berman.* She stated that the police power was "coterminous" with the eminent domain power, and that the Court's policy was not to interfere with a legislative determination that eminent domain should be used, unless the legislative decision bore no rational relation to the conceivable.[60] However, that seeming death knell for landowners' reliance on the "public use" clause

57. 467 U.S. at 242–43. For commentary on the *Midkiff* case, see PAUL, *supra* note 42, at 99–102.

58. *See, e.g.*, John Duchemin, *Rediscovering Hawaii*, HONOLULU ADVERTISER, Nov. 5, 2000, at 1G.

59. Charlotte Low Allen, *The Golden Land Rush*, INSIGHT ON THE NEWS, Oct. 29, 1990, at 15; *see also* John Duchemin, *Rediscovering Hawaii*, HONOLULU ADVERTISER, Nov. 5, 2000, at 1G (noting that the Japanese preferred long-term investments and were therefore not interested in leaseholds of limited duration, but their motivation changed abruptly when fee simple titles to choice Oahu homes became available).

60. 467 U.S. at 241. In a stroke of poetic justice, Justice O'Connor had to eat those words in *Kelo* where she vainly protested in her dissent that she did not intend to go as far as the *Kelo* majority. 125 S. Ct. at 2674–75 (O'Connor, J., dissenting); *see also* William D. Araiza et al., *The Jurisprudence of Yogi Berra*, 46 EMORY L.J. 697, 709 (1997) (adding a witty perspective on the matter).

as a defense to takings was actually qualified. Notwithstanding, the *Midkiff* opinion concluded by making it clear that the justification for the use of eminent domain invoked by the Court was the elimination of a skewed land market said to be caused by the oligopoly. But *Midkiff* concluded, in spite of Justice O'Connor's expansive language, that the Court would adhere to the classic rule of denying the right to condemn private property where the proposed taking is for a purely private purpose, i.e., a taking for transfer of the property from one private person to another, without the redeeming feature of social harm elimination.[61]

Similarly, in *Ruckelshaus v. Monsanto*,[62] an inverse condemnation case challenging the taking of pesticide manufacturers' trade secrets that the law required to be publicly disclosed, the public harm consisted not of the trade secrets at issue but rather of the barriers to entry into the pesticide business they formed, and of denying the public information needed for maintaining health and safety in the use of those pesticides.[63] The taking and disclosure of the secrets eliminated those harms.

Another commonly misunderstood case is *National Railroad Passenger Corp. v. Boston & Maine Corp.*,[64] which was actually not a real public use case even though the Court treated it as such. Rather, it was a case addressing what in eminent domain law is known as the issue of "more necessary public use." In "more necessary public use" cases *both* competing parties' uses are axiomatically public, and the issue is which one of them should trump the other for the sake of paramount public convenience and necessity. In *Boston & Maine* the right to operate passenger trains on the freight railroad's tracks was taken from the freight railroad and conveyed to the passenger railroad for a (paramount) public use because the freight railroad's track maintenance

61. *Id.* at 245. Justices Blackmun and O'Connor provided us with an unintended bit of amusement. On May 9, 1984, Justice Blackmun (who planned to be in Honolulu at the time scheduled for the filing of the *Midkiff* opinion) wrote to Justice O'Connor, asking her to delay its filing until his return, offering the following justification: "I run into enough flak as it is these days, and I think it would be better if I were out of the state by the time the decision came down." Letter from Justice Blackmun to Justice O'Connor (May 9, 1984) (on file with the Library of Congress, Madison Building, Manuscript Room). Justice O'Connor obliged: "I will be more than happy to get you safely back on the Mainland before lowering the boom by announcement of this decision." Letter from Justice O'Connor's to Justice Blackmun (May 9, 1984) (on file with the Library of Congress, Madison Building, Manuscript Room). However, I don't recall any popular Hawaiian upheaval following the *Midkiff* decision. This may only be an illustration of the Biblical admonition that "[t]he wicked flee when no man pursueth; but the righteous are bold as a lion." *Proverbs* 28:1 (King James).

62. 467 U.S. 986 (1984).

63. 467 U.S. at 1015–16.

64. 503 U.S. 407.

level was inadequate for the operation of faster passenger trains.[65] The taking and transfer of the right of user to the passenger railroad enabled an upgrading of maintenance standards and eliminated these safety and convenience concerns. Thus, *Boston & Maine* also met the *Berman* principle of harm elimination through the use of eminent domain. Indeed, *Boston & Maine* stressed that the Court had permitted the earlier takings in *Midkiff* and *Berman* in order to respectively "eliminate a land oligopoly" and to effectuate a plan to restore the dilapidated sections in the District of Columbia.[66]

Federalism? Be Serious

Although *Kelo*'s defenders have suggested that it was an exercise in federalism, this is hardly the case. The concept of federalism in the law is based on the straightforward principle that governance powers in the United States are divided between state and federal governments. Legislative powers of states are plenary, whereas the federal government is a government of limited powers, subject however to the federal supremacy rule that applies when federal laws are enacted in pursuance of the Constitution.[67] It follows that when Congress enacts legislation that goes beyond those limits, it trespasses on the states' legislative turf and the congressional handiwork is therefore invalid.[68] It is not necessary to go on debating this point, because *Kelo* did not involve the construction of federal legislation said to stray beyond proper congressional powers thus raising federalism concerns, but instead the interpretation of an explicit provision *of the Federal Constitution.* If the interpretation of the *federal* Bill of Rights is not the proper function of the federal judiciary, as it has been ever since *Marbury v. Madison*,[69] then what is? What could be?

A Visit to the "Dark Corner of the Law"

Insofar as doctrinal concerns are involved, Justice Thomas' *Kelo* dissent hit the bull's eye. Far from being a coherent body of legal doctrine,

65. *Id.*
66. 503 U.S. at 422.
67. U.S. CONST. art. VI, § 2; *see* U.S. CONST. amend. XIV, § 5.
68. *See* United States v. Lopez, 514 U.S. 549, 561 n.3 (1995). In other words, the doctrine of federalism is implicated when federal adjudication would be "an intrusion into the state's right to enforce *its own laws* in its own courts." BLACK'S LAW DICTIONARY, at 1128 (B. Garner, ed. 7th ed. 1999) (emphasis added). Obviously, the interpretation and enforcement of *federal* constitutional law cannot be rationally deemed to be a matter of *state* law.
69. 5 U.S. 137 (1803).

the decisional law of eminent domain is the perfect embodiment of the *bon mot* of California's late Chief Justice Roger Traynor, who observed that there are notions embedded in the law that have never been cleaned and pressed and might disintegrate if they were.[70] Eminent domain, the "dark corner of the law" as Lewis Orgel put it in his respected treatise, *Valuation Under Eminent Domain*,[71] exemplifies that concern. Eminent domain has never been the subject of reasoned analytical inquiry by the Supreme Court, whose decisions are a hodge-podge of unconnected and at times contradictory assertions that do not even agree on the basic premises of compensation.[72] For a few years during World War II, the Court issued a series of decisions dealing with compensability and the measure of "just compensation" (which the Court conceded at the time to be "harsh"),[73] but when the war ended, the frequency of eminent domain decisions by the Supreme Court declined sharply,[74] and the Court has never analyzed and systematized the law of eminent domain. The Court's handiwork in this field of law has been the subject of much criticism by a horde of scholars and commentators writing over a period of decades, virtually all agreeing that in terms of its legal doctrine, consistency, and fairness, the law of eminent domain is deficient[75]—"a hopeless mess" as the late California Court of Appeal Justice Roy Gustafson once put it.

70. Roger Traynor, *No Magic Words Could Do It Justice*, 49 CAL. L. REV. 615, 621 (1961).

71. 2 LEWIS ORGEL, VALUATION UNDER THE LAW OF EMINENT DOMAIN § 248 (2d. ed. 1953).

72. See contradictory case juxtapositions collected in Kanner, *Making Laws and Sausages, supra* note 22, at 683.

73. United States v. Gen. Motors Corp., 323 U.S. 373, 382 (1945).

74. See data collected in Gideon Kanner, *Condemnation Blight: Just How Just Is Just Compensation?*, 48 NOTRE DAME L. REV. 765, 803–04 n.196 and associated text (1973).

75. Space limitations preclude even a cursory review of the vast legal literature on this subject. Some of the better works are: RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 182 (1985); Ann E. Gergen, *Why Fair Market Value Fails as Just Compensation*, 14 HAMLINE J. PUB. L. & POL'Y 181 (1993); James Geoffrey Durham, *Efficient Just Compensation as a Limit on Eminent Domain*, 69 MINN. L. REV. 1277 (1985); D. Michael Risinger, *Direct Damages: The Lost Key to Constitutional Just Compensation When Business Premises Are Condemned*, 15 SETON HALL L. REV. 483 (1985); Michael R. Klein, *Eminent Domain: Judicial Response to the Human Disruption*, 1 URB. LAW. 2 (1968); Curtis J. Berger & Patrick J. Rohan, *The Nassau County Study: An Empirical Look into the Practices of Condemnation*, 67 COLUM. L. REV. 430 (1967) (demonstrating a pervasive pattern of undercompensation of condemnees); Allison Dunham, Griggs v. Allegheny County *in Perspective: Thirty Years of Supreme Court Expropriation Law*, 1962 SUP. CT. REV. 63, 106 (1962) (concluding after an extensive study of the preceding thirty years of Supreme Court case law, that the Court's effort had been a failure); and see particularly, Comment, *Eminent Domain Valuations in an Age of Redevelopment*, 67 YALE L. J. 61 (1957).

Beginning with the late nineteenth century, condemnations have been frequently deployed with judicial acquiescence to enrich the robber barons of the day[76] because of the then prevailing belief that maximizing growth and exploitation of natural resources was sound policy for the fast developing United States. The doctrinal deficiencies in the law of "public use" stem from the fact that in order to facilitate the country's growth, particularly in the West, the Court had historically acquiesced in overreaching contentions of the private sector, touted as also serving the public weal by conferring economic benefits not only on the private condemnors but also on the region.[77] Thus, the Court found prognostications by self-interested parties that their enhanced private business operations would aid economic development of the area and be a "public use" as a matter of policy, without providing any analytical tools enabling lower court judges to make a reasoned determination as to where to draw the line separating public and private uses. To put it another way, that period of development in eminent domain law exemplified the notion captured over a half century later by General Motors' CEO "Engine Charlie" Wilson's memorable phrase that "What's good for General Motors is good for the country."[78] This is a sentiment that was literally embraced by the judiciary, albeit not in those precise words, in the notorious and recently overruled *Poletown* case.[79]

Judicial Movers and Shakers, or Humble Servants of the Law?

Why the typically liberal academics, who usually support the "little guys," would come down on the side of the redeveloper and against the lower middle class landowners being victimized by the New London, Connecticut, redevelopment project, is a mystery whose plumbing I leave to others. But any way you slice it the New London redevelopment project concededly benefited the Pfizer Corporation, a giant pharmaceuticals manufacturer whose $300 million New London re-

76. *See, e.g.*, William C. Bryant, *Eminent Domain—Its Use and Misuse*, 39 U. CIN. L. REV. 259 (1970) (describing how the State of Ohio incurred a crushing debt as a result of its railroad subsidies).

77. Wendell E. Pritchett, *The "Public Menace" of Blight: Urban Renewal and the Private Uses of Eminent Domain*, 21 YALE L. & POL'Y REV. 1, 9–10 (2003).

78. William G. Ross, *The Senate's Constitutional Role in Confirming Cabinet Nominees and Other Executive Officers*, 48 SYRACUSE L. REV. 1123, 1140 (1998).

79. Poletown Neighborhood Council v. City of Detroit, 304 N.W.2d 455 (Mich. 1981) (allowing condemnation of an entire working-class neighborhood for the site of a General Motors Cadillac plant), *overruled by* County of Wayne v. Hathcock, 684 N.W.2d 765 (Mich. 2004).

search facility adjacent to the Fort Trumbull redevelopment project, was the obvious beneficiary.[80] Under the original plan Pfizer, would gain the availability of new office space and other business facilities for companies doing business with them, as well as dwellings attractive to its upscale, well-educated workforce, along with a marina and a fancy, five-star hotel.

The academy's reaction to *Kelo* is familiar. When the Court renders radical, controversial opinions that are offensive to deeply rooted values of the American polity, the Court's liberal defenders dismiss the criticisms as uninformed, and have it that results of the litigation in question flow from settled legal principles. Legal realists' views notwithstanding, we are thus told that judges dutifully follow "the law" that requires them to do what they do, even when their own personal values are contrary to the results of their handiwork.[81] This enables judges to make at times cruel decisions while evading responsibility for them.[82] The familiar rhetorical chestnut that is hauled out of mothballs for such occasions is that judges are like umpires at a baseball game, sworn to call balls and strikes in accordance with a rule book imposed upon them. You could say that this is the "the-devil-made-me-do-it" or if you prefer, the "I-was-only-following-orders" model of controversial precedent-making court decisions.

This approach extends to situations where, in the process of reaching its conclusion, a court not only arrives at controversial results but also runs roughshod over preexisting law. To invoke the vivid prose of Yale's Fred Rodell, courts can "twist . . . logic and mangle . . . history so as to reach a result that is not only reactionary [or radical], but [also] ridiculous."[83] However ridiculous or offensive to widely held values such handiwork is, we are told that it is "the law of the land" that must

80. *Kelo*,125 S. Ct. at 2659. Among other things, the head of the city agency that pursued the *Kelo* case, and is widely credited with securing Pfizer's commitment to construction of its new research center next to the Fort Trumbull redevelopment project, was married at the time to Pfizer's director of research. David Herszenhorn, *Residents of New London Go to Court, Saying Project Puts Profits Before Homes*, N.Y. TIMES, Dec. 21, 2000, at B5.

81. *See* Linda Greenhouse, *Justice Weighs Desire v. Duty (Duty Prevails)*, N.Y. TIMES, Aug. 25, 2005, at A1. This article discusses Justice Stevens's July 18, 2005, speech to the Clark County, Las Vegas Bar Association, in which he explained that although in his personal view New London was pursuing the wrong policy, because "the free play of market forces" was more likely to "produce acceptable results than the best-intentioned plans of public officials," he had to uphold the redevelopment plan in the *Kelo* case under the compulsion of precedent. *Id.*

82. *See* BENJAMIN CARDOZO, THE GROWTH OF THE LAW 66 (1924).

83. Fred Rodell, *Goodbye to Law Reviews—Revisited*, 48 VA. L. REV. 279, 280 (1962).

be respected. Of course, this approach confuses the institutional respect inherently owed to courts, with the respect for their intellectual handiwork that has to be earned on a case-by-case basis by virtue of its doctrinal soundness and moral content.

All this is inconsistent with the equally prevalent, parallel theory holding that judges should not just follow precedent, but, on the contrary, should be movers and shakers and public policy makers who may freely reshape society in accordance with their enlightened vision of modern reality, or simply their ideological preferences.[84] However, that avowedly high degree of judicial policy-making exacts a high price. It tends to blur the line between judging and governance, fuels strident charges that the Court is legislating rather than interpreting the law, and in the long run subjects judges and judicial candidates to unwarranted political pressures, thus eroding judicial independence. A combination of these judicial approaches and of the judges' ability to shift from one to the other legitimizes and thereby facilitates unprincipled inconsistencies in the decisional law. It frees judges of the self-discipline that is essential to good judging, and enables them to render contradictory decisions on the same point of law.[85] One upshot of this state of affairs, as noted by Professor Lino A. Graglia, is that the text of the Constitution has become irrelevant to the subject of constitutional law.[86]

In this instance, the Court's fans have risen to the defense of *Kelo* by asking rhetorically, what's all this popular backlash that is rife with misinformation? Hasn't the U.S. Supreme Court approved takings for private uses in the past by a line of precedents going back to the nineteenth century? So why is the misinformed (or worse, misled) great

84. *See, e.g.*, Mathew O. Tobriner, *Can Young Lawyers Reform Society Through the Courts?* 47 CAL. ST. B. J. 294, 298 (1972) (in this article the late Tobriner, a well-regarded associate justice of the California Supreme Court, calls for a "social revolution," no less, to be worked through the courts at the behest of young lawyers).

85. A perfect example of such judicial inconsistency is provided by the California Supreme Court. In *County of Los Angeles v. Ortiz*, 490 P.2d 1142 (Cal. 1971) the court expressed sympathy for the plight of a condemnee of modest means whose home was taken but his small equity was largely consumed by litigation expenses. *Id.* at 1147 n.8, and accompanying text. The court insisted that in spite of the constitutional "just compensation" mandate (which was being denied to these condemnees by forcing them to accept net compensation that was concededly substantially less than the fair market value of their modest homes), it was precluded from awarding attorneys' or appraisers' fees to make the owners whole, because that power being entirely legislative in nature, could not be exercised by the court. But in *Serrano v. Priest*, 569 P.2d 1303 (Cal. 1977), the *judicial* power to award attorney's fees held to be nonexistent in *Ortiz*, materialized out of thin air and enabled the same court to award them to a more politically correct plaintiff who challenged the constitutionality of school financing through property taxation.

86. Lino A. Graglia, in *Symposium: Has the Supreme Court Gone Too Far?*, 11 WIDENER L. REV. 59 (Oct. 2003).

unwashed complaining so bitterly when the result arrived at in *Kelo* is no different than what the Court has done several times during the past century? The short answer to all this is that the premise of this approach is incorrect because in the old cases thus advanced as seminal precedents, the Court stressed the limited nature of its holdings. It also explicitly imposed limits on takings involving private condemnors seeking benefits said to satisfy the "public use" requirement by virtue of their area-wide economic impact. Those limits were discarded in *Kelo*, thus making it quite novel. Also, this argument ignores the dramatically different nineteenth century factual and policy context in which those seminal Court decisions were handed down, i.e., they did not involve six-figure mass displacements of urban populations—a major distinguishing feature of modern redevelopment takings that had no counterpart in those early takings of usually uninhabited easements that reflected a bygone nineteenth century reality.

Law or Policy? Which Is the Dog and Which the Tail?

It is ironic that in the wake of *Kelo*, Justice Stevens sought to defend his handiwork by arguing that he had to follow "the law" rather than what he believed to be better policy. The irony lies in the fact that the early decisions of the Supreme Court relied on by the *Kelo* majority were not compelled by blackletter law but rather were explicit judicial policy choices, namely, the strong nineteenth century preference for maximally efficient exploitation of the country's natural resources—a policy that is no longer valid in today's environmentally minded world. Why it should continue to govern the very different world of the twenty-first century, Justice Stevens did not take the trouble to explain.

The problem that plagues us until today is that in the process of formulating the right-to-take law as it developed at the end of the nineteenth century, the Court unwittingly conflated the bases for two quite different government powers. It serves the "public purpose" when the government acts for public benefit to promote the general welfare by adopting policies that facilitate productive, beneficial activities. That much was correctly decided in *Fallbrook Irrigation District. v. Bradley.*[87] However, if identifying a legitimate "public purpose" were all there is to the problem, there would be no need for the "public use" clause. But the framers evidently appreciated the danger of an unrestricted taking power,[88] so they added the narrower "public use" limi-

87. 164 U.S. 112 (1896). Note that *Fallbrook* was *not* an eminent domain case as erroneously asserted in the Supreme Court's subsequent decisional law.

88. I offer the wit and wisdom of P. J. O'Rourke who observed: "The whole idea

tation as well as the "just compensation" condition as specific safeguards in expropriation cases, *and no others.* Thus, even if one were to buy into Justice Douglas's and Justice O'Connor's erroneous notion equating eminent domain with the police power, intellectual honesty would also require one to conclude either that the framers must have been absent-minded when they inserted the meaningless Public Use Clause into the Fifth Amendment, or that they circumscribed this particular subcategory of the police power (if that is what it is) more narrowly than the rest of it by specifically requiring "public use," not just public purpose or benefit, when the exercise of governance calls for an act of overt expropriation.

They Said *What*?!

The current state of right-to-take law originated in a massive historical blunder by Justice Peckham (who wrote the *Fallbrook* opinion).[89] The *Fallbrook* holding was *per se* unobjectionable. The blunder occurred nine years later when Justice Peckham, evidently forgot his own holding in the *Fallbrook* case, and erroneously asserted in *Clark v. Nash*[90] that *Fallbrook* was a condemnation case by a corporation that was seeking to take private property for irrigation[91] (it was nothing of the sort), and where he confused public purpose with public use. As a simple, albeit tedious, reading of the verbose *Fallbrook* opinion will readily establish, it was not a condemnation case as asserted by Justice Peckham in *Clark*, but rather a due process challenge to the district's legitimacy in performing its function of providing water for irrigation, and of its taxation powers to accomplish that purpose. No one sought to condemn any property from Ms. Bradley (the plaintiff). Rather, she sued to enjoin the sale of her land located within district boundaries, which was to be sold because of her refusal to pay a circa $50 assessment lien against it.[92] She advanced the odd argument that the Due Process Clause deprived the district of any power to levy the assessment because it was said to lack a public purpose and was thus illegitimate.

of our government is this: If enough people get together and act in concert, they can take something and not pay for it." P.J. O'ROURKE, A PARLIAMENT OF WHORES, 232 (1991).

89. Fallbrook Irrigation Dist. v. Bradley, 164 U.S. 112 (1896). For a more complete discussion of the *Fallbrook* decision, see *Hortatory Fluff, supra*, note 48.

90. 198 U.S. 361 (1905).

91. *Id.* at 369.

92. 164 U.S. at 151. The lower court somehow concluded that the effect of the imposition of the District's monetary assessment on Bradley's land amounted to a deprivation of her property without due process of law. *See id.* at 114, 116.

Ironically, one of her arguments was, *not* that the district's securing of water for its inhabitants was not public, but rather the opposite—that it was too public, in that the District provided water for irrigation to all landowners within its boundaries, whether they needed it or not.[93] Thus, even if viewed erroneously as an eminent domain case, *Fallbrook* spoke a classic instance of use *by the public*, which by any standard was clearly within the ambit of even the most literal construction of the "public use" clause of the Fifth Amendment. Nonetheless, nine years later, in *Clark v. Nash*,[94] Justice Peckham somehow perceived *Fallbrook* to have been an eminent domain case in which a corporation sought to condemn water rights.[95] His error in finding a holding in *Fallbrook* that "public purpose" in the context of a substantive due process case was synonymous with "public use" within the meaning of the Eminent Domain Clause, hardened into law when *Clark* was unwittingly accepted as precedent a year later. This occurred when Justice Holmes wrote the terse opinion in *Strickley v. Highland Boy Gold Mining Co.*[96] in which, without any analysis whatever, he simply relied solely on the holding of *Clark*[97] that in turn relied on the nonexistent *Fallbrook* holding.

More important, neither *Clark* nor *Strickley* embraced the expanded, "broader" interpretation of the taking power ascribed to them in the *Kelo* majority opinion.[98] On the contrary, both *Clark* and *Strickley* were explicit, stating that far from liberally broadening the scope of the taking power, *the Court's intention was to delimit it by reaffirming the boundaries of the public use clause, but allowing only a narrow exception to the public use limitation* that would permit the use of eminent domain for the benefit of private parties in "*exceptional times and places in which the very foundations of public welfare could not be laid"* otherwise.[99] *Clark* was even more explicit in stressing that "*we do not desire to be understood by this decision as approving of the*

93. 164 U.S. at 161.
94. 198 U.S. 361 (1905).
95. [I]n the *Fallbrook* case the question was whether the use of the water was a public use *when a corporation sought to take land by condemnation under a state statute, for the purpose of making reservoirs and digging ditches to supply land owners with the water the company proposed to obtain and save for such purposes.*

Clark, 198 U.S. 361, 369 (emphasis added).
96. 200 U.S. 527 (1906).
97. *Clark*, 198 U.S. at 369.
98. 125 S. Ct. at 2677–78 (Thomas, J., dissenting) (pointing out the imprecision of the majority's terminology equating "public use" with "public purpose," and perhaps even a " 'Diverse and Always Evolving Needs of Society' Clause" made up by the majority).
99. *Strickley*, 200 U.S. at 532 (emphasis added).

broad proposition that private property may be taken in all cases where the taking may promote the public interest."[100] The *Clark* Court went on to stress that its holding was only that in that particular case on the particular facts found by the trial court, the taking was permissible as an exception compelled by absolute necessity, because without the water rights sought being condemned, otherwise valuable and fertile Utah land would remain barren.[101] Thus, to say that *Clark* and *Strickley* broadly expanded the power to take property for private uses is a breathtaking distortion of what the Court actually said in those cases.

It should also be noted that the policy on which both *Clark* and *Strickley* based their holdings was itself unfounded. As history demonstrated, the American West was developed on a vast scale without ranchers, farmers, and miners relying on the eminent domain power to seize their neighbors' land for their own economic benefit. It is one thing for the government to act as a referee, adjusting the competing claims to limited water resources and even acquiring them by eminent domain for the purpose of equitable distribution among private landowners requiring water for irrigation. But it is quite another matter to say that it is "public use" to allow any individual landowners who were so improvident as to acquire land without adequate access or necessary irrigation potential, to have the state make up for their improvidence by allowing them to plunder their neighbors' land.

Thus, today's doctrine that governs the right to take for "public purpose," used in *Kelo* as a "more natural" synonym for "public use," is semantically, historically, and doctrinally baseless. It provides the proverbial "Exhibit A" for Justice Thomas' dissenting observations that the pertinent law had never been properly analyzed and developed. The newly constructed colossus of unrestrained taking power unwittingly stands on proverbial feet of clay. It originated in *Fallbrook*'s substantive due process analysis of "public purpose" law that was concerned with propriety of acts of governance and taxation, and its holding that had nothing to do with the much narrower, specific "public use" limitation on government expropriation power. Justice Peckham's unfortunate mischaracterization of *Fallbrook* in the *Clark* case thus confounded the law. It brings to mind the *Peanuts* cartoon strip in which Lucy stridently informs her little friends that knotty pine is made from oak trees.

100. 198 U.S. at 369–70 (emphasis added).
101. *Id.*

Does Redevelopment Really Revitalize Cities?

That brings us to the inquiry whether redevelopment is as successful as its proponents would have it, revitalizing cities, producing jobs, and raising municipal revenues, thus justifying its negative impacts. Notably, such arguments are typically couched as predictions in broad, sweeping language, without reference to specifics. When specifics are offered, they tend to relate the success of individual projects or the asserted revitalization of specific urban neighborhoods (typically downtown areas), not to the renewal of cities.[102] In fact, redevelopment in America has been something less than the success its proponents always promise but never deliver, and it has been carried out at an unconscionably high social and economic price. It is common that the rosy projections made when redevelopment projects are commenced fall short of reality.[103] Some redevelopment projects fail altogether, leaving the local city and its taxpayers holding the bag. Redevelopment may boost a few downtown business districts (although that may in some cases cause a decline of other parts of town),[104] create a few subsidized industrial plants, car dealerships, or gambling casinos, but as for citywide revitalization, redevelopment has not come close to reversing the condition of American cities that in many cases remain mired in a state of decline.[105]

Space limitations preclude an exploration of the decline of places like Newark, Camden, Bridgeport, Hartford, Flynt, Kansas City, and others. A notable example of such failure is Detroit—the undisputed

102. *See, e.g.*, Bettina Boxall, *Many Have Failed to Rescue the Boulevard, But a Man Who Helped Save Times Square Is . . . Hoping for a Hollywood Revival,* L.A. TIMES, May 11, 1998, at B8 (stating that "[m]any view proposed $385 million retail entertainment complex as key to success").

103. *See, e.g.*, Jesus Sanchez, *Hollywood's Star yet to Shine; Mega Complex at the Highlands Fails to Turn Around District as Lot Sits Empty and Office Vacancies Rise*, L.A. TIMES, May 7, 2002, at C1 (stating that a "[m]ega complex at Highland fails to turn around district as lots sit empty and office vacancies rise").

104. *See, e.g.*, Joseph Berger, *Latino Merchants Warily Eye a New Mall*, N.Y. TIMES, Feb. 12, 2006, at 30 (reporting that in Port Chester, New York, a new redevelopment-created mall is menacing the economic future of small businesses); Gideon Kanner, *Downtown L.A. Is an Urban Myth: City Needs Vital Middle Class to Succeed*, DAILY NEWS OF L.A., Nov. 21, 1999, at Viewpoint Section (Noting that in Los Angeles, the long-delayed downtown Bunker Hill redevelopment project produced a number of new office buildings, but its partial success (some of the land condemned for it in the 1960s is still vacant) sucked the life out of Spring Street, known as "the Wall Street of the West" before the subsidized Bunker Hill project enticed its tenants to move away. Thus, the elimination of blight on Bunker Hill, created blight on Spring Street, suggesting again that there is no such thing as a free lunch.).

105. *See generally* BERNARD I. FRIEDEN & LYNN B. SAGALYN, DOWNTOWN, INC.—HOW AMERICA REBUILDS CITIES (1989) (discussing the displacement caused by urban renewal from 1949 to 1963).

basket case of urban America, which remains such in spite of its repeated decades-old redevelopment efforts.[106] Similarly, in St. Louis,[107] Cleveland,[108] and Philadelphia[109] redevelopment efforts have gone on for many years but, apart from clusters of downtown office buildings, have failed to provide revitalization on a citywide scale. In San Antonio, the revived Riverwalk is delightful, but walk a block or two away from it, and what you see is empty streets lined with shoulder-to-shoulder vacant stores, and occasional empty buildings. In New York, redevelopment has been used (corruptly at times)[110] to enrich well-connected entities seeking new corporate headquarters in Manhattan, such as the New York Stock Exchange,[111] the Bank of America[112] and the New York Times,[113] while genuinely blighted residential neighborhoods have at times been virtually abandoned.

In short, notwithstanding the claims of future benefits made in its favor, redevelopment has provided new office space for commuting suburbanites but has done little or nothing to revitalize cities, as opposed to occasional neighborhoods.

Remember Sprawl? Its Causes and Consequences and Its Relationship to Redevelopment

The major cause of this situation, which redevelopment supporters steadfastly refuse to address, is that ever since the end of World War II it has been relentless government policy to subsidize and encourage

106. Hector Tobar, *Suburban Rush Puts the Brakes on Motor City's Census Drive; Population: Detroit Loses Fight to Stay Above One Million Mark, One More Blow After Decades of Strife and Decay*, L.A. TIMES, Mar. 29, 2001, at A1.

107. Linda Tucci, *In the Arch's Shadow, Signs of Revival*, N.Y. TIMES, Mar. 30, 2005, at C7.

108. Lisa Chamberlain, *Cleveland Pulls Back from Edge*, N.Y. TIMES, Sept. 28, 2005, at C9.

109. *See* Andrew Jacobs, *A City Revived, But With Buildings Falling Right and Left*, N.Y. TIMES, Aug. 30, 2000, at A14.

110. *See* Rosenthal & Rosenthal v. N.Y. State Urb. Dev. Corp., 605 F. Supp. 612, 618 (S.D.N.Y. 1985), *aff'd*, 771 F.2d 44 (2d Cir. 1986) (court refused to address the condemnees' charges that the redevelopment project boundaries had been corruptly drawn to include the subject property and enrich the mayor's political allies).

111. *In re* Fisher, 730 N.Y.S.2d 516 (App. Div. 2001). Actually, the NYSE-city deal came unraveled after 9/11, with the city having to pay some $109 million in its effort to undo the arrangement it had entered into with NYSE and the owners of the proposed new NYSE building site. *Charles V. Bagli*, *45 Wall St. Is Renting Again Where Tower Deal Failed*, N.Y. TIMES, Feb. 8, 2003, at B3.

112. Charles V. Bagli, *Bank Is Close to a Deal for a Tower off Times Square*, N.Y. TIMES, May 27, 2003, at A24; *see* Charles V. Bagli, *Big Projects Are Slowed by Disputes with Labor*, N.Y. TIMES, Jul. 12, 2005, at B4.

113. W. 41st St. Realty LLC v. N.Y. State Urb. Dev. Corp. 744 N.Y.S.2d 121 (App. Div. 2002).

city dwellers to move out of cities and settle in single-family homes in the suburbs, with government-financed highways allowing them to commute to their city jobs. In time, this out-migration of the urban middle class has had an unavoidable impact on cities and has contributed to an assortment of urban pathologies that only served as incentives for more city dwellers to move to the suburbs.

Without a thriving urban middle class that has a stake in maintaining the quality of life on its home turf, and that controls city hall through traditional political means, municipal services erode and cities decline as family habitats, making suburbs still more attractive. The fact that the purchase of a suburban family home also turned out to be a spectacular personal investment for millions of Americans, and for that reason alone has inspired many urban dwellers to abandon cities for suburban living, has exacerbated the problem. Add to that the many disincentives to life in the city, such as urban riots that began in the 1960s, the catastrophic decline of urban public schools, forced student busing, the rise of the urban underclass and of the homeless roaming the streets, the upsurge in crime (particularly in the 1970s), the deindustrialization of cities with attendant job losses,[114] and what we have is a prescription for municipal decline that bids fair to continue plaguing us unless major government policy reversals are made to provide incentives to urban living and disincentives to suburban living—at this time a highly unlikely prospect.

As if all that were not enough, redevelopment has been a relentless mass destroyer of low- and moderate-cost urban housing for decades, displacing huge numbers of people,[115] and siphoning off incremental property tax revenues generated by cities' redevelopment areas away from traditional municipal services and into redeveloper subsidies.[116]

114. *See* Steven Ohlemacher, *Inner Cities Continue to Hemorrhage Jobs*, Yahoo! News, Nov. 28, 2005, http://news.yahoo.com/s/ap/20051128/ap_on_go_city_jobs &printer=1;_ylt=Ai5H (last visited Feb. 20, 2006).

115. *See* Charles W. Hartman, *Relocation: Illusory Promises and No Relief*, 57 VA. L. REV. 745, 745–46 (1971), noting that between 1950 and 1968, 2.38 million housing units were destroyed by redevelopment. By the mid-1960s, some 111,000 families and 17,800 businesses were being displaced annually. Advisory Committee on Intergovernmental Relations, *Relocation: Unequal Treatment of People and Business Displaced by Government*, (1965).

116. *See* Municipal Officials [California] for Redevelopment Reform, *Redevelopment: The Unknown Government* (2004), at 6–9, http://missionviejoca.org/rug_2004.pdf [hereinafter MORR] (last visited Feb. 20, 2006) (recounting the massive diversion of municipal funds to redevelopers, and noting a skyrocketing increase in California's bonded redevelopment indebtedness—from $5 billion to $65 billion between 1995 and 2003; *id.* at 12). Tax revenue diversion is only a part of the story. In *Kelo*, the redeveloper was granted a ninety-nine-year lease on a ninety-acre waterfront parcel for a rent of $1 per year. Sweetheart deals like that are common.

Thus, the notion that the effects of these half-century old, government directed or facilitated megatrends can be reversed locally by the construction of a few clusters of subsidized downtown high-rise office buildings (that mostly house offices of commuting suburbanites who would not be caught dead living in the city) is wishful thinking. Moreover, all one needs to do is follow the local news to realize that often construction of new dwellings in better parts of cities is as unwelcome there as elsewhere, and that the NIMBY ("Not In My Back Yard") ethic is alive and well there too, causing housing costs to go up relentlessly and eventually inspiring city dwellers to move ever farther out of the city cores.[117]

For the government to encourage, subsidize, and facilitate this ongoing urban tragedy, while at the same time pursuing redevelopment that destroys ever more urban affordable housing, and forces more urban dwellers from their homes, makes as much sense as seventeenth century physicians' belief that bleeding patients was curative, and when their duly bled patients grew weaker, bleeding them some more.

A Few Words on Policy

A few things that transcend eminent domain law need to be said before concluding.

First, the thread that runs through American constitutional law, particularly as pertaining to the Bill of Rights, is a sometimes voiced and sometimes unspoken attitude of distrust of government, at least reservations about its goodness. That is what the checks and balances principle is all about. Government may be a positive force in our lives, doing good things that individuals are unable to do for themselves and for their society. But as Lord Acton enduringly warned, power tends to corrupt and absolute power corrupts absolutely. Therefore, even benignly motivated government activities need to be delimited to reassure ourselves that its awesome power stays within the channel of the law. For all the constructive things that government can accomplish, government at times invades our privacy, impairs our freedom of speech

117. *See* David Brooks, *A Nation of Villages*, N.Y. TIMES, Jan. 19, 2006, at A27; Motoko Rich & David Leonhardt, *Shaking off the Rust/New Suburbs Are Born*, N.Y. TIMES, Dec. 22, 2005, at F1 (reporting that under the relentless pressure of rising desirable urban housing cost, city dwellers are moving beyond the exurban fringe in search of affordable housing); Julia Vitullo-Martin, *Landmark This*?, N.Y. POST, Oct. 2, 2005, *available at* http://www.manhattan-institute.org/html/_nypost-landmark_this.htm (commenting on the practice of stretching landmark designation laws beyond the bounds of reason in order to prevent construction of new, badly needed housing) (last visited Feb. 20, 2006).

and religion, overreaches in terms of criminal law enforcement, imposes unreasonable regulatory measures, engages in invidious religious or ethnic discrimination, etc. In all these situations Americans have recourse to the law, and the courts respond to the pleas of aggrieved citizens by reviewing and passing judgment on the complained-of government activities. In that context, it is difficult to see why only in the abuse-prone field of eminent domain, unoffending individuals should be subjected to de facto, unreviewable exercise of government power that strikes them where they are most vulnerable: their homes, which are supposed to be, and are, recognized by law, policy, and custom as their places of security and repose. *A fortiori* so when that power is being exercised, not for the creation of necessary public works, but primarily for the economic benefit of redevelopers, mass merchandisers, and gambling casino operators, who at the very least should be required to pay their full share of the cost of doing business, but instead get a free ride on the backs of displaced condemnees and taxpayers.

Second, a heightened level of scrutiny of government activities is particularly called for when, as the Supreme Court stressed in *U.S. Trust Co. of New York v. New Jersey*,[118] the government acts in its own economic self-interest.[119] Bearing that in mind, I find it incomprehensible that the Court retreated intellectually and morally when it came to the exercise of the government's awesome, abuse-prone eminent domain power. This is the same government that the courts freely scrutinize for its tendency to impair citizens' constitutional rights when it pursues its economic self-interest. However, in the area of eminent domain we are left to believe that the government is an embodiment of civic virtue to such an extent that its economically self-serving activity is well nigh beyond the courts' constitutional power and duty to examine.

Third, it is a long and well-settled principle of constitutional law that legislatures are bound by the Constitution as interpreted by the courts (not vice versa), and may not define and alter their own powers by changing the constitutional meaning.[120] Significantly, *Boerne* was a case that held a statute to be unconstitutional because in enacting it, Congress purported to establish the substantive meaning of the Fourteenth Amendment, thus usurping a judicial function.[121] It is difficult to see why a similar legislative misadventure, purporting to define the meaning of the substantive constitutional term "public use" should be subject

118. 431 U.S. 1 (1977).
119. *Id.* at 25–26.
120. *See* City of Boerne v. Flores, 521 U.S. 507, 529 (1997).
121. *Id.* at 519.

to different reasoning. "Under this approach," said the Supreme Court in *Boerne*, "it is difficult to conceive of a principle that would limit congressional power."[122] It is equally difficult to conceive how a legislative body, or worse, an unelected, parochially minded, local municipal redevelopment agency, can define the meaning of the constitutional phrase "public use," and thereby de facto oust the courts from their traditional function of constitutional interpretation.

Fourth, because fundamental fairness is said to be an attribute of American constitutional law, particularly where the Bill of Rights is concerned, it is unfortunate that faultless citizens who mind their own business, pay their taxes, and do their best to be left alone to pursue happiness in their lives with such modest resources as they have been able to accumulate, should occupy a lesser position on the judicial scale of values than do violent, anti-social members of society, whose constitutional rights are assiduously guarded by the courts. I am not oblivious to the vital need of a civilized society to treat persons accused of criminal wrongdoing with fairness and to provide them with legal safeguards. But axiomatically innocent people have constitutional rights too, and their legitimate interest should receive a modicum of fair treatment from the judicial system as well, particularly when they are being subjected to the trauma of eviction from their homes and businesses without having done anything to deserve it. Instead, they are the object of an inhospitable judicial attitude, and on occasion explicit judicial expressions of impatience with, or even contempt for their rights, even though they only seek enforcement of the blackletter law ostensibly protecting their rights under the Fifth Amendment's Eminent Domain Clause.[123]

Fifth, for courts to operate in a manner that earns them respect from the population—something that in the long run is indispensable to their effective functioning—they have to husband their civic capital. There

122. *Id.* at 529.

123. For an egregious example of this unfortunate judicial attitude, see Yonkers Cmty. Dev. Agency v. Morris, 335 N.E.2d 327, 334 (N.Y. 1975) (chastising Mr. Morris for his insistence that his conceded rights be observed). *Morris* is commented on in Sonya Bekoff Molho & Gideon Kanner, *Urban Renewal: Laissez-Faire for the Poor, Welfare for the Rich*, 8 PAC. L.J. 627, 636–39 (1977). Though Mr. Morris' procedural rights were concededly violated, out of twelve judges who reviewed his case, only one intermediate appellate judge thought that he should get so much as a hearing on his objections to the taking of his property for the benefit of Otis Elevator Co. *See* Yonkers Cmty. Dev. v. Morris, 357 N.Y.S.2d 887, 890–91 (App. Div. 1974). As it turned out, Mr. Morris was right and the court was wrong; the taking turned out to be of no "public benefit" to the city because a few years later Otis shut down its Yonkers plant and moved elsewhere.

are times when, under genuine compulsion of blackletter constitutional law, courts have to render unpopular decisions. That goes with the territory, and at those times judges can properly draw on that civic capital to remind their critics that it is the sovereign people that have spoken through the medium of the supreme law of the land, requiring judges to give effect to its explicit commands. But when courts ignore or distort the plain language of the Constitution and reach policy-driven results preferred by judges, while engaging in transparent semantic manipulation of the constitutional language, and tell the protesting populace that judges had no alternative but to rule as they did, they are trifling with their stature in society, and in the long run are inviting a popular reaction that we all may come to regret. For courts to insist that policy plays no role in their formulation of "the law,"[124] in cases where the contrary is all too apparent, simply enrages the public. The aftermath of *Kelo* sends a clear warning in that regard that should be heeded.[125]

Sixth, nothing I say here should be understood as an argument favoring active, supervisory judicial involvement in the decision-making process leading up to the creation of public works. By their background and experience most judges are not competent to perform the function of evaluating and judging the engineering, economic, and demographic issues that underlie decisions to create public projects using the power of eminent domain when public necessity requires it. That much should not be subject to argument. Nonetheless, it should be noted that judges seem to have no problem passing judgment on just such matters when reviewing environmental impact reports. There, they freely critique and reject decisions of scientific and technological experts as incomplete or mistaken, without claiming an inability to do so.

Beyond that, though judges claim to be powerless to judge the proffered justification for creation of public projects when condemnees challenge them, once eminent domain cases enter their valuation phase, judges experience no problems executing an about-face and asserting, as they overtly do at times, that they must engage in the process of public works planning by limiting "just" compensation. Otherwise, they say, an "embargo" on public works will have to be declared, as the California Supreme Court absurdly asserted.[126]

124. *See Kelo*, 125 S. Ct. at 2668.

125. For the extent to which state legislatures have responded to *Kelo*, see Donald E. Sanders & Patricia Pattison, *The Aftermath of* Kelo, 34 REAL EST. L.J. 157, 171–75 (canvassing all states for post-*Kelo* legislation being introduced to rectify its holding). For continuous update on the state of local and state legislation, see http://castlecoalition.org/legislation/index.asp (last visited Feb. 20, 2006).

126. People v. Chevalier, 340 P.2d 598 (Cal. 1959); *see also* Albers v. County of

What judges *are* competent to do is to interpret the Constitution in a reasonable fashion that does not ignore or distort its language, and to determine whether the Constitution is actually being complied with by the other two branches of government.[127] This is particularly true when functionaries of those branches haul innocent individuals into the judges' courtrooms in an avowed effort to fatten their own bottom line. If nothing else, the courts should insist that people being evicted from their homes and businesses under these circumstances should be indemnified for all their demonstrable economic losses, and that the redevelopers, who are in this game to make money, should be required to bear their fair share of the true cost of doing business, at least when that is what it takes to make their victims whole. Imposing that obligation on redevelopers and their municipal allies, and thus confronting them with the true cost of their plans would go a long way toward limiting redevelopment projects to those genuinely needed and dis-

Los Angeles, 398 P.2d 129, 136 (Cal. 1965) (quoting Bacich v. Bd. of Control, 144 P.2d 818, 823 (Cal. 1943), which states that "fears have been expressed that compensation allowed too liberally will seriously impede, if not stop, beneficial public improvements because of the greatly increased cost." The court gave no indication as to *who* was expressing those "fears," on the basis of what evidence, and whether the "fears" had any substance). Note that outside of eminent domain, courts take the position that imposing liability on the government is a good thing because it provides disincentives to government officials' unlawful acts. Johnson v. State, 447 P.2d 352, 358 (Cal. 1968); *see also*, Owen v. City of Independence, 445 U.S. 622, 652 (1980) (stating that government liability may encourage greater protection of constitutional rights). No judicial fears of an "embargo" in those cases. *See generally* Connor v. Great Western Savings & Loan Ass'n, 447 P.2d 609, 618 (Cal. 1968) (dismissing concerns that imposition of novel liability on lenders for defective construction of homes financed by them would be overly expensive, with a single brief sentence: "These are conjectural claims." The dreaded "embargo" only appears to rear its menacing head when condemnees ask for the constitutionally promised *just* compensation that in theory is supposed to put them in the same position pecuniarily they would have been in absent the condemnation); Olson v. United States, 292 U.S. 246, 255 (1934) (discussing the value of property at the time of a taking and constitutional safeguards of compensation).

But when the shoe is on the other foot, and condemnees correctly point out that condemnors are wasting large sums of money taking land on projects that cannot be built, courts voice no concerns about any adverse impact on the fisc, and approve such wasteful takings. For an example, see Thomas J. Posey, Note, *This Land Is My Land: The Need for a Feasibility Test in Evaluation of Takings for Public Necessity*, 78 CHI.-KENT L. REV. 1403 (2003).

127. *See* City of Boerne v. Flores, 521 U.S. 507, 536 (1997) (the legislature determines "in the first instance . . . whether and what legislation is needed . . . and its conclusions are entitled too much deference." But the legislative discretion is subject to judicial review under *Marbury v. Madison* that grants the courts the power to determine whether the legislature has exceeded its authority under the Constitution). It seems plain to say, if only in the context of eminent domain law, that the legislative determination is "well nigh conclusive" on the meaning of the constitutional term "public use," contradicts this basic principle.

couraging raids on the public treasury.[128] This much, one would think, should be the courts' unhesitatingly performed, sworn duty. For judges to turn their back on that duty in this area of constitutional law and to assert without any blackletter requirement that government decisions on this particular matter of constitutional import need not even be rational, but merely rationally related to the conceivable, is an unjustifiable act of dereliction of the courts' duty.

Finally, I should note that because of my criticism of judicial performance in this area of the law, and the occasionally acerbic way of expressing myself, some readers may conclude that I lack respect for the Supreme Court. Though the deficiencies in its performance are there for all to see, I plead "not guilty" to that charge. Quite the contrary, having spent forty years as an appellate lawyer in this field, and having seen a great deal of good along with the bad, I hold all our courts in high institutional regard, and it is for that reason that I also hold judges to high standards of intellectual and moral performance.

Conclusion

The Supreme Court obviously had the raw power to hand down the unfortunate *Kelo* decision in spite of its flawed historical and doctrinal footing and its lack of moral substance. But there is nothing in the Constitution that *required* the Court to do so any more that in other areas of constitutional law where judicial, not legislative, supremacy is the watchword when it comes to constitutional interpretation. *Kelo* was a case of active judicial expansion of preexisting policy-driven eminent domain decisions that tampered with the meaning of words to reach an unjust result preferred by the Court's majority. In doing so the majority surrendered the vital function of constitutional review to an unaccountable, self-serving business-government alliance.

There is no question that many American cities are in dire straits, but that is the direct result of government policies that over the past half-century have encouraged, subsidized, and at times pressured urban populations to leave cities and move to the suburbs, with a predictably adverse impact on the cities they left behind. In that context, redevelopment has frequently been a costly failure because it has only encouraged more city dwellers, whose dwellings were taken and destroyed, to continue moving to the suburbs. Though redevelopment may upgrade a few, usually downtown, neighborhoods and enrich selected

128. *See* James Geoffrey Durham, *Efficient Just Compensation as a Limit on Eminent Domain*, 69 MINN. L. REV. 1277 (1985).

redevelopers and other favored business people, it has not arrested the decline of American cities as a whole, nor restored them as family habitats. Cities continue losing population, and prevailing redevelopment practices have not been able to reverse that trend.[129] For the Supreme Court to abandon the principle of checks and balances and to weigh in on the side of government policies that have contributed so heavily to the prevailing unfortunate conditions of American cities, indicates that the Court is seriously out of touch with reality.[130]

The current state of eminent domain law encourages profligate local projects that, all too often, in the name of pursuing ambitious but improvident projects and revitalization of cities, can squander fortunes. This occurs even as the Court refuses to consider the state of "just compensation" law, so as to confront municipalities and their client-redevelopers with the true cost of their own decision making. This facilitates improvident government spending and harms both the tax-paying public and the put-upon condemnees.

Kelo's mistaken failure to exercise the judicial power of constitutional review need not inhibit us from engaging in the civic virtue of speaking truth to power. As a California judicial wit once put it, we may be bound by higher judicial authority but we aren't bound and gagged. It is incumbent on fair-minded citizens, particularly those who are knowledgeable in this field of law, to speak out candidly and forcefully, and not leave the field to court critics who may not much care about developments in legal doctrine nor be very fastidious about assailing judges and their handiwork on ideological or political grounds.

Finally, one cannot conclude this discussion of the *Kelo* case without taking note of events that have come to light after the Supreme Court's opinion came down. Faced with a wave of public outrage, New London has promised the Connecticut governor to observe a moratorium and not to evict Suzette Kelo and her neighbors resisting the taking.[131] The city and the New London Development Corporation (the private entity

129. JOEL KOTKIN, THE NEW SUBURBANISM: A REALIST'S GUIDE TO THE AMERICAN FUTURE, THE PLANNING CENTER, 9–20 (2005), *available at* http://joelkotkin.com/urban_affairs/the%20Suburbanism.pdf (last visited Feb. 20, 2006); *see* David Brooks, *A Nation of Villages*, N.Y. TIMES, Jan. 19, 2006, at A23 ("The flow of people moving into the cities is but a trickle compared with the torrent moving to exurbia.").

130. As *National Journal*'s Stuart Taylor, Jr., put it: "The Supreme Court's greatest failure is not ideological bias. It's the Justices' increasingly tenuous grasp of how the real world works." Stuart Taylor, Jr., *Remote Control: The Supreme Court's Greatest Failure Is Not Ideological Bias—It's the Justices' Increasingly Tenuous Grasp of How the Real World Works*, ATLANTIC MONTHLY, Sept. 2005, at 37.

131. William Yardley, *After Eminent Domain Victory, Disputed Project Goes Nowhere*, N.Y. TIMES, Nov. 21, 2005, at A1.

to whom the city had delegated its eminent domain power) have had a falling out and are at loggerheads, NLDC is running out of money, the city is trying to relocate its planned Coast Guard museum, and renters are moving into the project area.[132]

Between the city and the State of Connecticut, over $70 million has been spent thus far, with nothing to show for it except the destruction of a viable, affordable residential neighborhood and a tidal wave of public ill will directed at redevelopment in general and the Fort Trumbull project in particular. Neither developers nor financiers are eager to become involved in this project that has become the poster child for eminent domain abuses in America.[133] The redevelopment plan that figured so prominently in the Supreme Court's opinion as a justification for the taking[134] is in the process of change with the shifting winds of economics and politics.

132. *Id.*

133. *Id.*; *see, e.g.*, Ted Mann, *Fort Trumbull: City Still Unsure Where Governor Rell Stands on Plan*, THE DAY (New London), Dec. 30, 2005; Ted Mann, *Fort Trumbull Deal Gives Museum New Site*, THE DAY, Dec. 30, 2005.

134. It would take us beyond the scope of this article to explore the subject in detail, but one should mention the familiar rule of eminent domain law that once title to the condemned land is transferred to the condemning agency, the latter may do as it pleases with the acquired land, the same as any other land owner, irrespective of its plans and promises at the time of acquisition. *See, e.g.*, Capron v. State, 247 Cal. App. 2d 212 (Cal. Ct. App. 1964) (land taken for a mental hospital that was never built); County of Los Angeles v. Anthony, 224 Cal. App. 2d 103 (Cal. Ct. App. 1964) (land across the street from the Hollywood Bowl taken for a county motion picture museum that was never built); Arechiga v. Housing Auth., 324 P.2d 973 (Cal. Ct. App. 1958) (land of poor Mexican homeowners was taken ostensibly for public housing, but later turned over to the Brooklyn Dodgers for a baseball stadium to induce them to move to Los Angeles); Levine v. Jessup, 326 P.2d 238 (Cal. Ct. App. 1958) (land taken for construction of a new domestic relations courthouse that was never built); *see also* Beistline v. San Diego, 256 F.2d 421 (9th Cir. 1958) (land taken for redevelopment not used for the project but sold to a private party instead).

In short, the Supreme Court relied on the city's representations as to its plans for the Fort Trumbull area, bowing to "predictive judgments" of "expert agencies," but it failed to realize that those "judgments" have all the substance of cotton candy. The Court was simply demonstrating its lack of understanding of the reality that redevelopment plans are not enforceable and not worth the proverbial paper they are written on when it comes to their implementation after the condemnation process is complete. Whatever they may tell the courts, redevelopment agencies are free to disregard their vaunted "plans," and do with the acquired land whatever they please. *Kelo*, 125 S. Ct. at 2665, 2667; *see* Jonathan V. Last, *Razing New Jersey, in Which Developers in League with City Hall Have Come up with a Curious Definition of Blight*, WEEKLY STANDARD, Feb. 13, 2006, vol. 11, issue 21, at Features Section.