The *Kelo* Decision:

An Abdication of Judicial Responsibility?

Abstract

This article is based upon John A. Rohr's argument that the oath to uphold the Constitution of the United States is the foundation for ethics in public administration. Further, it contends that the oath, coupled with the framers' values of property rights and the public good, provides a foundation for the institutional ethics of the Supreme Court in takings cases. The purpose of this paper is to explore the arguments surrounding the Takings Clause with regard to the framers' desire to strike a balance between protecting private property rights and the public good as a tool for discussing implications for public policy and administration in a post-*Kelo* environment. Of scholarly and practical utility is the finding that the Court's departure from the language of the Constitution and its severe legislative deference in *Kelo* were an abdication of its judicial responsibility.

The *Kelo* Decision: An Abdication of Judicial Responsibility?

I assert John A. Rohr's argument (1986, 1989, 1998, 2002) that the oath to uphold the Constitution of the United States is the foundation for ethics in public administration. By taking the oath, Rohr (1989, 1998) argues, public administrators are upholding the constitutional or regime values of freedom, property, and equality.[1] When Supreme Court justices take this oath, their primary responsibility is to interpret and uphold the Constitution to the "best of their abilities and understanding," according to the Judiciary Act of 1789.

The framers of the Constitution simultaneously protected the individual right to private property and the state right to advance the public good through the use of eminent domain when they crafted the Takings Clause of the Fifth Amendment, which states that private property shall not be taken for public use without just compensation.[2] Through examining *The Federalist* Papers, I will explore how the framers valued private property rights and the public good in a comparative context. I suggest that using this approach, augmented by the oath justices take to uphold the Constitution, provides a foundation for the institutional ethics of the Supreme Court in takings cases. A review of two key Supreme Court rulings on eminent domain in a historical context will provide the background for my discussion on *Kelo et al. v. City of New London et al.* (545 U.S. 469 [2005]). This will create a theoretical lens through which I consider the implications for accountability due to the Court's abdication of judicial responsibility in *Kelo*, a result of its severe legislative deference in the case.

My analysis is decidedly bounded; I could have focused on strict constructionism and legal realism, the political question doctrine (Cooper, 2007), or textualism and original meaning

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[1] For particularly insightful discussions on regime values, see Rohr, J. A. (1989). *Ethics for bureaucrats* (2nd ed.). New York: Marcel Dekker, Inc., Ch. 2.

[2] Madison's original draft of the Takings Clause stated: "No person shall be…obliged to relinquish his property, where it may be necessary for public use, without just compensation" (Cohen, 2006, p. 532).

v. original intent (Scalia, 1997). The purpose of this paper, however, is to suggest that, of the many considerations of which the Court should be mindful in takings cases, the framers' values, which are best exhibited in *The Federalist* Papers, can serve as a useful ethical foundation. While giving attention to scholarly interpretations of those values may provide further utility at a later date, my current aim is to concentrate solely on the framers' discourse because it is the basis for much of the notable literature on the framing of the Constitution and will enable me to formulate my own conclusions.

Upholding the Constitution

As the Ethical Foundation for Bureaucrats

Rohr (1986, 1989, 1998, 2002) argues that the oath to uphold the Constitution of the United States is the ethical foundation for bureaucrats. He carefully distinguishes bureaucrats from elected or appointed officials to highlight the need for an ethical foundation grounded in the Constitution. Because bureaucrats possess a discretionary power to govern that is absent any formal accountability mechanism to the very people they govern, Rohr continues, in a democratic society, bureaucrats are in need of ethical guidelines that can be applied broadly and consistently throughout the government. His response is an attention to what he calls regime values (Rohr, 1989, 1998).

Taking the oath to uphold the Constitution symbolizes bureaucrats' acceptance to uphold regime values that have spread throughout the United States since the establishment of the Constitution (Rohr, 1989). Not an exhaustive list, Rohr identifies three fundamental values that, as he states, "have been held for several generations by the overwhelming majority of the American people" (p. 74). Freedom, property, and equality are values of the American people, and thus, Rohr's regime values. The interpretations of these values are left to the bureaucrats

who must then determine how they can be utilized in their decision-making processes. Rohr's conclusion is this: "These values are normative because they are regime values, and bureaucrats have taken an oath to uphold the Constitution that brought this regime into being and continues to state symbolically its spirit and meaning" (p. 76).

As an Ethical Foundation for the Supreme Court

Rohr (1989) points to the decisions of the Supreme Court as a particularly useful tool for bureaucrats during the process of considering the meaning of regime values. He characterizes the utility of the decisions based on the following four traits, that they are "institutional," "dialectic," "concrete," and "pertinent" (pp. 77-84). Parallel to the basis for my analysis of the Takings Clause on the framers' discourse, Rohr's work centers around the significance of the dialogue and discussion on regime values in deciding cases. Briefly summarized, Supreme Court decisions can assist bureaucrats in their reflections on regime values with regard to their discretionary power because they are conclusive choices made through an insightfully deliberative process on issues that have sustained the interest of the American public. The Court achieves all of this without neglecting historical precedents.

The progression of broadening Rohr's (1989, 1998) framework to apply to the justices of the Supreme Court appears to be a natural one to me. I think I can overcome Rohr's distinction between bureaucrats and appointed officials and extend it to Supreme Court justices because of longevity of service. Like bureaucrats, justices take an oath to uphold the Constitution, and justices' primary responsibility is to interpret it to the "best of their abilities and understanding." It is through their interpretations that justices wield a great degree of discretionary power in governing the people via their decisions, or the "interpretation of the state will," as Frank J.

Goodnow writes (1900, p. 73). Further, justices are not elected officials and therefore not formally accountable to the public (Rosenbloom, 1983).[3]

Who Cares What the Framers Thought?

A Complex Relationship

Unlike any other government actor, Supreme Court justices are charged with the exceptional responsibility of interpreting the Constitution to render judgments that are unable to be overturned by another institution, short of a amending the Constitution. Separation of powers allows both the executive and legislative branches to contradict rulings of the Court, but, generally speaking, the Court has the last word on the constitutionality of issues. As such, justices should actively consider as an ethical standard the framers' values of the individual right to private property and the public good when deciding takings cases. Certainly, this should not be their only consideration, but justices have an obligation, as per the Judiciary Act of 1789, to interpret the Constitution to the "best of their abilities and understanding." The addition of the framers' values to the justices' ethical standard in takings cases serves to broaden the resources to which they have access in order that they may fulfill their judicial responsibility. I contend that the absence of any mention of the framers, with the exception of Justice Thomas in his dissenting opinion in *Kelo*, led to a degree of legislative deference that was so severe as to be an abdication of the Court's judicial responsibility.

I argue that the framers valued private property rights over the public good, but that the relationship between the two concepts is mutually dependent and reinforcing. The complex nature of this relationship is clarified with an examination of the discourse preceding the ratification of the Constitution; *The Federalist* Papers provide insight on the framers' crafting of

[3] To be sure, Rohr's work emphasizes legitimizing bureaucracy. Because the Court lacks a legitimacy problem, the progression of applying his framework to the Court may not appear to be as natural to all readers. The absence of accountability to the public for both bureaucrats and the Court provides the strongest support for my application.

the values of private property rights and the public good.[4] To be clear, I am not using *The Federalist* Papers as a sort of proof text to show that the framers valued one over the other in a simple context. Rather, I am using them to demonstrate the significance of both values and how they are tied to one another.[5]

The concepts of property and the public good are amorphous and difficult to define, particularly for scholars, because of the prevalence of conflicting ideals that often have a rational basis. As a result, the following are the characteristics that I accept in my notions of each. Regarding property, I rely on the Lockean sense of property being that which an individual creates for himself, "the labor of his body and the work of his hands…are properly his" (as cited in Goldwin, 1987). Identifying characteristics of the public good proves a bit more challenging given the nuances between the public good, purpose, interest, etc. Carol W. Lewis (2006) sees the pursuit of the public interest as an exploration, E. Pendleton Herring (1936, p. 78) calls it a "verbal symbol" (p. 78), and Terry L. Cooper (as cited in Lewis, 2006, p. 58) asserts that it "stands out as a kind of question mark before all official decisions and conduct."[6]

In *Federalist 10*, Publius was trying to secure a balance between protecting the public good and private property rights in a large republic.[7] Publius reveals his thoughtful argument that, while factions, or majority interests, are the greatest disease of republican governments, a large republican form of government is the only cure for the disease. He argues that removing

[4] The authors of *The Federalist* Papers chose to write under the pseudonym "Publius," and that is how I will refer to them through the text, rather than identifying them as Madison, Hamilton, or Jay.

[5] The authors of *The Federalist* Papers had a great deal to say about the public good and private property protections; only instances where the context was relevant to my argument have been included. Any errors in fact are my own.

[6] Lewis's (2006) article provides a comprehensive review of the literature on the public interest.

[7] All quotations are from the following edition of *The Federalist* Papers: Cook, J. E., Ed. (1961). Cleveland, OH: Meridian Books. (Original work published 1787-1788).

the causes of factions, such as destroying liberty or instituting equality of passions and interests, is far worse than the existence of factions, and he therefore believes that republican government must instead control the effects of factions. Factions threaten the protection of the public good because, Publius cautions, decisions are often made that disregard justice and the interests of the minority. Further, factions are the result of the inequalities in private property ownership and the varying interests between individuals who have property and those who do not.

Here lies the most significant evidence that the framers valued the protection of private property rights over the protection of the public good. In opposing the equality of passions, Publius argues that the purpose of government is to protect the inequalities that exist in the capacity for private property ownership in the republic because it is that very inequality that brings about the diversity of opinions. Publius' argument is complex: factions are caused by the inequalities that exist within the population, and a republic must protect those inequalities in order to ensure diversity in the representatives who are chosen; it is the diversity, in turn, which controls the effects of factions. He asserts, "[t]he diversity in the faculties of men from which the rights of property originate, is not less an insuperable obstacle to a uniformity of interests. The protection of these faculties is the first object of Government" (p. 58).

Publius' classic argument, protecting property rights so that the diversity of the capabilities of individuals to own property will ensure the protection of the public good through a diverse pool of representatives, continues in *Federalist 13-14*. In advocating a larger republic, Publius maintains that "the passions of so large a society [can be directed] to the public good" (p. 81) with capable representatives. Such representatives are more likely to be found in a larger republic due to the increased diversity of the pool of individuals and the decreased likelihood for a faction to form given the size of the republic. Coupled with the deliberative nature of a

republic, government will be slow to respond to the public passions to prevent factions from gaining too much influence over the expression of that will, thereby protecting the public good.

Publius resumes his argument in terms of maintaining a standing army in *Federalist 25* to protect individual property. Those who fear that representatives will abuse their power with the presence of a standing army, he asserts, must have faith in the representatives they have chosen. In a republic, the people choose their representatives to guard the public good, and in order that they may protect it, the people must give them the means necessary to do so. Fear cannot allow the people to limit the power of the government to the point that it is unable to protect both private property and the public good.

In *Federalist 27*, Publius furthers the dual protection of private property and the public good, this time in defense of the creation of a federal government, asserting that the public good will be better protected than if guarded by the individual states. In addition to the increase in potential representatives, chosen representatives will have access to the resources of the federal government, facilitating the protection of the public good. Publius' response to objections that federal representatives will neglect the public good in favor of private interests is that, although personal ambitions will be surely prevalent, they cannot be achieved without acting in favor of the public good. Even if representatives' private interests do not immediately align with the public good, they will continue to act in favor of the public good so that they may stay in office, thus fulfilling their ambitions. Publius revisits this concern in *Federalist 37* where he offers as evidence that the framers understood the "deep conviction of the necessity of sacrificing private opinions" (p. 239) in favor of the public good in writing the Constitution. Concerns are further addressed in *Federalist 45*, where Publius says, "the public good…is the supreme object" (p. 309) of the government.

Federalist 51 carries on Publius' discussion of factions in a larger republic, arguing that such forms of government are more capable of governing themselves with the interests of the public good in mind. Again, he states that a large republic in America will foster a diversity of private interests and ideas through its factions but that diversity will decrease the potential for a majority that is not aligned with the public good. Part of the private interest is upholding the public interest, "that the private interest of every individual, may be a centinel over the public rights" (p. 349). Of particular significance is Publius' contention that the public good will always be upheld as a result of the representatives' dependence on the will of the people. They must act in favor of the public good to remain in office, thereby prohibiting the emergence of a majority on unjust principles.

Federalist 54 is particularly revealing of how the framers viewed individual property rights when compared with the public good. In discussing the apportionment of the number of federal representatives from the states, Publius gives considerable attention to property in representation. Because individuals are unequal with regard to property ownership and wealth, those with greater wealth are likely to influence the voting of others for their representatives. Unlike individuals, however, a wealthy state is unlikely to influence the vote of another state, just as a wealthy representative is unlikely to influence the vote of another representative. Publius makes a careful distinction that representatives have the opportunity to influence others, but that influence "ought to be secured to them by a superior share of representation" (pp. 370-371). Property rights should have an effect on the representatives that are chosen, "[g]overnment is instituted no less for protection of the property, than of the persons of individuals," (p. 370) but the votes of all state representatives in the federal legislature will be given equal weight so that the public good may be protected.

Federalist 60 echoes the framers' sentiments regarding the protection of the diversity of private property ownership as a means to control factions, although this instance employs a broader approach. Here, Publius asserts that the diversity of property will not only result in the diversity of representatives and their interests, but will also serve to protect diversity throughout the republic in senators and the president via the electors. The republic will be a reflection of the diversity of the population, which prevents against the election of one particular class or industry, thus guarding the public good.

Publius defends the need for a strong, single executive in relation to the protection of private property in *Federalist 70-71* by asserting that what he calls energy in such an executive is a principle characteristic of the definition of good government. He defines executive energy as "first unity, secondly duration, thirdly an adequate provision for its support, [and] fourthly competent powers" (p. 472). Publius defines good government in terms of the executive in that the republic needs a strong executive to ensure the protection of private property from instability and political whims through a consistent execution of the laws. Publius advances this argument in maintaining that while the people generally "intend the PUBLIC GOOD," (p. 482) at times, they are mistaken with regard to "the *means* of promoting it" (p. 482). In such instances, those who have been chosen to protect the public good must be responsible for "withstanding the temporary delusion, in order to give [the people] time and opportunity for a more cool and sedate reflection" (p. 482).

Significance to the Supreme Court in Takings Cases

My analysis so far has shown that the framers of the Constitution did value the individual right to private property over the public good, but the value they placed on each principle is best understood in a mutually dependent and reinforcing context. Private property rights can only be

protected if the public good is guarded and advanced, therefore fostering individuals' capabilities to own private property. The way to ensure the public good is through the protection of property rights, which protects the inequalities of individuals' capabilities that lead to a diverse representation that will protect the public good. The genius of this complex relationship between the protection of individual property rights and the public good is abundantly clear in *Federalist 10*. Publius asserts, "[t]he diversity in the faculties of men from which the rights of property originate, is not less an insuperable obstacle to a uniformity of interests. *The protection of these faculties is the first object of Government* [italics added]" (p. 58). He adds, "[t]o secure the public good, and private rights…is then the *great object to which our enquiries are directed*…. [italics added]" (p. 61). Here, one value does not definitively trump the other. Rather, it is the framers' expression that diverse capabilities in individuals that lead to inequalities in private property ownership make the presence of a majority interest quite difficult to achieve, and to protect that diversity means protecting the public good. The framers' vision of the government's purpose was to simultaneously protect private property rights and the public good, one of which cannot be protected without the other.

The Takings Clause of the Constitution is a reflection of that balance the framers were trying to create between the protection of the individual right to private property and the public good. Recall that the clause prohibits the government from taking private property for public use without just compensation. The public use requirement of the Takings Clause is evidence that they intended for private property rights to be protected with the highest regard. At the same time, the government should be able to advance the public good through redevelopment tools, such as eminent domain, which is why the framers included the just compensation provision of the clause.

So, who cares what the framers thought? The Supreme Court should consider the value they placed on the individual right to private property protection and the public good when ruling on takings cases, a consideration that was notably absent from the majority opinion in *Kelo*. More than any institution in America, the Court should care what the framers thought. Civil servants across the nation take an oath to uphold the Constitution of the United States, but only the Court is tasked with the primary responsibility of interpreting it. The "best of their abilities and understanding" requirement of the Judiciary Act of 1789 compels the Court to care what the framers valued because it calls for a higher standard of understanding the very Constitution the framers crafted. The absence of such a consideration, I suggest, resulted in severe legislative deference and the Court's abdication of its judicial responsibility in *Kelo*.

Landmark Eminent Domain Rulings

Eminent Domain in a Historical Context

"Eminent domain" was first used in the 17th century by Protestant moralist and legal scholar Hugo Grotius who understood it to mean that individual property belonged to the state and that the state had the right to seize that property in the name of the public good (Bauer, 2003; Bixby, 1987; Cypher & Forgey, 2003; Harrington, 2002). Modern interpretations of the term remain similar; the government has the power to force individuals to sell private property to the government for public use (Bixby, 1987; Cypher & Forgey, 2003; Staley & Blair, 2005; Wilcox, 1967). In its earliest applications dating back to the 19th century, the government used eminent domain primarily for land development, including the construction of roads, railroads, irrigation systems, and private mills. With westward expansion and the industrial revolution, takings increased, as did the number of legal disputes (Bixby, 1987; Staley & Blair, 2005; Wilder & Stigter, 1989).

Two opposing views of the meaning of the public use requirement of the Takings Clause developed as a result of the increase in suits against governmental takings: those favoring a broad interpretation and those favoring a narrow interpretation. Courts during the 1800s narrowly applied eminent domain to cases where the public had direct access to the redevelopment (Bixby, 1987; Harrington, 2002; Staley & Blair, 2005; Wilder & Stigter, 1989). Despite the precise nature of the framers' language in limiting eminent domain to public *use*, the Supreme Court's use of discretion accounts for the broader interpretations of public use as public *purpose* or benefit in the 20th century. This becomes a crucial step in my argument.

Advocates of both interpretations of public use agreed that eminent domain should not be used for direct private gain. Two exceptions emerged, however, as the focus in takings cases began to shift toward who would receive the benefits in addition to its purpose. The first, the "indispensability" (Wilder & Stigter, 1989, p. 58) exception, requires that the project must be indispensable to the state's advancement of public welfare and that eminent domain must be indispensable to the project. Second, the "indirect benefit" (Bixby, 1987, p. 623; Wilder & Stigter, 1989, p. 58) exception requires that private gain be secondary to the public good, which thereby prevents incidental public benefits.

Setting the Scene: Key Supreme Court Rulings pre-Kelo

I hope I am not going beyond my evidence in stating that when the public hears the phrase "eminent domain," it invokes ideas of blighted properties and urban renewal, or the traditionally accepted uses of takings such as widening roads and infrastructure-building. Further, the contemporary use of eminent domain invokes notions of governmental distrust and an emphasis on the business good, rather than the public good. In 1954, the Supreme Court upheld the traditional conceptions of eminent domain in *Berman et al., Executors v. Parker, et*

al. (48 U.S. 26 [1954]). Here, the Court ruled that eminent domain was a justifiable state action for Washington, D.C. to advance economic redevelopment in its blighted communities. In addition to the Court's heavy reliance on this case in its most recent takings case, this landmark decision was the first time the Court ruled that urban renewal served the public good under its broad interpretation of the Takings Clause (Bixby, 1987; Cypher & Forgey, 2003; Staley & Blair, 2005; Wilder & Stigter, 1989). More importantly for our discussions on ethics and accountability in the field of public administration, the *Berman* decision was the first time the Court equated the state's power of eminent domain with its police power to maintain health, safety, and morality (Bixby, 1987).

Further, *Berman* is a clear example of the Court's practice of deference to state legislatures in takings cases where public use is at issue. Justice Douglas's opinion for the Court stated, "[t]he role of the judiciary in determining whether that power [eminent domain] is being exercised for a public purpose is an extremely narrow one" (as cited in Bixby, 1987, p. 624). The Court's deference to state legislatures resulted in a call for a more active process of judicial review in takings cases to protect individuals from the political pressures that are prominent such cases (Esposto, 1996; Wilder & Stigter, 1989), which is what the framers were trying to safeguard against when they wrote the Constitution. Recall Publius' remarks in *Federalist 71* that the public must be protected against their own whims and passions by those who have been chosen to protect and promote the public good.

The Court's practice of legislative deference to states' use of eminent domain continued to be a core issue in the takings cases it heard. More extreme advocates for judicial review in takings cases argue that the Court's legislative deference and correlation with police power, which were confirmed in *Hawaii Housing Authority v. Midkiff* (467 U.S. 229 [1984]), essentially

have eliminated the public use limitation of the Fifth Amendment (Bixby, 1987; Esposto, 1996; Staley & Blair, 2005). Thirty years after *Berman*, the Supreme Court heard its next takings case in *Midkiff*. Property ownership had become so severely concentrated throughout Hawaii that the state legislature feared it would lead to market failure. The figures are astonishing: Almost 49 percent of the land was owned by the state and federal governments, and an additional 47 percent was owned by 72 private individuals. To diversify property ownership, the state legislature passed a land reform act that enabled renters of single-family homes to ask the housing authority to condemn the property; renters could then purchase the property from the authority. *Midkiff* cited *Berman* extensively and ruled that Hawaii Housing Authority's Land Reform Act of 1967 was an appropriate use of eminent domain (Bixby, 1987; Wilder & Stigter, 1989).

Bolstering the precedents set in *Berman*, the Court's ruling in *Midkiff* was based largely on the Hawaiian legislature's assurances that the taking constituted a public good. While the individual properties were being sold for private development, the state argued that the overall affect of diversifying property ownership met the public use requirement of the Takings Clause. Justice O'Connor's opinion for the Court in *Midkiff* reinforced the *Berman* ruling that the judiciary's role in reviewing state legislative actions in takings cases was a narrow one and that the public use requirement is "coterminous" with the state's police power (as cited in Bixby, 1987, p. 631). The *Midkiff* decision also served to reaffirm the historically broad interpretation of public use. O'Connor acknowledged that although the state's actions may, at first glance, appear to favor private gain, it may have additional public benefits. She stated, "[w]hat in its immediate aspect is only a private transaction may…be raised by its class or character to a public affair" (as cited in Bixby, 1987, p. 633).

The Kelo *Decision*

An overview of the decision.

Unlike the unanimous decisions in *Berman* and *Midkiff*, the Supreme Court was divided 5-4 in the 2005 *Kelo* decision. Justice Stevens delivered the opinion of the Court and was joined by Justices Kennedy, Souter, Ginsburg, and Breyer, with Kennedy filing a concurring opinion. Justice O'Connor filed a dissenting opinion, and Chief Justice Rehnquist and Justices Scalia and Thomas joined; Thomas also filed a dissenting opinion. This four-opinion decision warrants a particularly in-depth discussion because it was based primarily on the Court's precedents set forth in *Berman* and *Midkiff*.

The petitioners in *Kelo* were not really asking the Court to decide on a new issue, but rather to reexamine the eminent domain doctrines established in *Berman* and *Midkiff*. Most notably, they sought to have the Court evaluate the constitutionality of takings for economic development with a "new bright-line rule" (p. 484) that would disqualify such a purpose. Further, the Court again addressed the broad v. narrow interpretation of public use in the Takings Clause, as well as whether the city's redevelopment plan served the public purpose.

In 1990, a state agency designated the city of New London, CT a distressed municipality as a result of economic decline in past decades. In 1996, the federal government closed a naval warfare center that had employed over 1,500 people. Then, in 1998, the city's unemployment rate was twice that of the state, and its population reached a low level equal to that in 1920. The city, and particularly its Fort Trumbull neighborhood, became the focus of economic redevelopment efforts. In early 1998, the state approved a bond for over $5 million in support of the New London Development Corporation (NLDC) for redevelopment planning and a $10 million bond to build a park in the area.

The key to the city's economic redevelopment was that Pfizer, Inc., a pharmaceutical company, announced it would build a $300 million research facility in the area next to Fort Trumbull, which would increase tax revenues and stimulate job growth. Later that year, the NLDC received approval from the state and began focusing on 90 acres in the Fort Trumbull area. This 90-acre area included 115 privately-owned properties and 32 acres of vacant land where the naval center previously existed. The area was divided into seven parcels, and the proposed redevelopment uses included the Pfizer facility, a park, a marina, 80 new residences, a museum, retail stores, and parking.

The Court's enduring policies of deference and broad interpretation.

The city and the NLDC collaborated to design the redevelopment plan with the Pfizer facility as the focal point to stimulate the economy through tax revenue and new jobs. The plan also incorporated recreational facilities, such as the marina, park, and museum. It should be noted that the purposes of the redevelopment plan were described by the Court in the order I listed them, with Pfizer's economic benefits first, followed by benefits to which the public would have direct access.

This is the issue at the heart of the case because the city, and in turn the Court, are once again granting a great degree of deference to state and local legislative actions and their interpretations of public use. The city and NLDC interpreted public use in the broadest sense of the term by listing the benefits gained by building the Pfizer facility ahead of the direct public use of the recreational facilities. The fact that the Court accepted the redevelopment plan's purpose without further examination is not surprising, giving its historical practice of such

deference. It is, however, an early indication of the Court's decision to continue practicing deference to legislative determinations of public use.[8]

Citing both *Berman* and *Midkiff*, the Court's opinion conclusively solidified its practice of legislative deference and its broad interpretation of public use as public purpose. Justice Stevens's opinion stated, "[w]ithout exception, our cases have defined that concept [public use] broadly, reflecting our longstanding policy of deference to legislative judgments in this field" (p. 480). Stevens acknowledged that the redevelopment plan did not seek to open all of the land taken under eminent domain to the public, but cited the difficulties in enforcing the narrow interpretation of public use, such as how much of the public should have access to the land and at what price. He bolstered his argument in favor of the broad interpretation due to the diverse and ever-changing redevelopment needs of communities.

Does economic development serve the public purpose, or more precisely, as the Constitution says, the public use?

In adhering to its practice of legislative deference, the Court cited a Connecticut municipal redevelopment statute, which states that the taking of developed land for economic development satisfies the public use requirement and is to be determined by the legislature (§8-186 *et seq*.). The state statute, combined with the *Berman* ruling that economic development does serve the public purpose, is, in essence the extent of the Court's direct ruling on whether economic development served the public purpose in *Kelo*. As it did in *Midkiff*, the Court focused its evaluation on the broader issue of the purpose of the taking, not its "mechanics" (p. 499).

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[8] To be sure, both precedent and federalism support the Court's practice of legislative deference, particularly involving property cases. It is not the practice of legislative deference with which I take issue; rather, it is the severity of deference granted in *Kelo*.

Stevens's opinion stated, "[t]hose who govern the City were not confronted with the need to remove blight in the Fort Trumbull area, but their determination that the area was sufficiently distressed to justify a program of economic rejuvenation is entitled to our deference" (p. 483). The Court acknowledged the city's right to improve the economic conditions of the Fort Trumbull area. Coupling the state statute granting it the right to use eminent domain for economic development takings with the Court's narrow role in reviewing takings cases, the Court ruled that the plan "unquestionably" (p. 484) served the public purpose and the takings satisfied the public use requirement of the Takings Clause.

A higher standard for takings cases?

The petitioners in *Kelo* urged the Court to institute a higher standard of judicial review in economic development takings cases in light of the difficulty that arises from differentiating between public and private takings. The Court dismissed the petitioners' claims and argued that economic development has traditionally been a governmental function and cited the importance of the states' rights and abilities to advance it. Further, the Court held that while the lines between public and private takings may be blurred and that the state's actions in favor of the public purpose may benefit private parties, as long as the public benefits from the economic development, the taking is constitutional. Perhaps in an effort to reconcile his constitutional judgment with his policy judgment (Dorf, 2005; Main, 2005), Stevens all but encouraged states to enact stricter legislative actions, stating, "[w]e emphasize that nothing in our opinion precludes any State from placing further restrictions on its exercise of the takings power" (p. 489).

Justice Kennedy's concurring opinion clarified the degree to which the public and private parties involved in the taking should benefit when he reiterated the incidental benefit principle.

Kennedy explicitly stated that takings where the public benefit is only incidental are "forbidden" (p. 490) by the public use requirement of the Takings Clause. He continued to say that when accusations are made that takings were implemented in strong favor of the private parties involved, the Court has a responsibility to examine the case closely. This closer examination, however, should be conducted under the presumption that the taking was for public use and that the government's actions were reasonable.

Here, the petitioners' argument was two-fold: Their property was not blighted, and the proposed development on their property was not for the public use, in the narrow interpretation of the term excluding economic development. The Court responded that it was not feasible to examine economic development takings on an individual basis. Although not all of the land in the taking was blighted, that the community was declared distressed and the redevelopment plan sought to revitalize the community was sufficient. Stevens stated, "[j]ust as we decline to second-guess the City's considered judgments about the efficacy of its development plan, we also decline to second-guess the City's determinations as to what land it needs to acquire to effectuate the project" (p. 488).

Because the Court found the city's redevelopment plan to be comprehensive and the petitioners' legal rights had been protected, heightening the review would cause an unnecessary and unfeasible burden on the implementation of the redevelopment efforts. Essentially, the petitioners were asking the Court to require a direct, visible public benefit for each individual property that was taken. Not only did the Court view the petitioners' new bright-line review as imposing unreasonable time constraints on the state, but it also disqualified the argument on the basis of the existing statute that protected the state's use of eminent domain, therefore invalidating additional, individual assurances.

The dissenting opinions

Recall that Justice O'Connor delivered the dissenting opinion for the Court, and she was joined by Chief Justice Rehnquist and Justices Scalia and Thomas. O'Connor's shifting opinion from *Midkiff* twenty years prior is provides evidence that, as the prevalence of takings increased and boundaries to its application broadened, contestability increased, thereby causing a need to revisit the issue in court.

O'Connor's dissent embraced the idea that after the *Kelo* decision, private property would be unsafe from private development, as it could be condemned in a taking simply because the state identified an alternative use that would be more beneficial to the public or a range of parties. O'Connor equated the *Kelo* decision to "effectively delet[ing] the words 'for public use' from the Takings Clause of the Fifth Amendment" (p. 494). She argued that since nearly all private property could potentially generate some form of public benefit, the Court's decision to extend its practice of legislative deference without an additional heightened judicial review eliminated any constraints on governmental takings. Scholarly literature has echoed O'Connor's concerns (Christensen, 2005; Main, 2005).

O'Connor distinguished between the perceived and actual reasons for the petitioners' suit against the city in order to clarify the basis for her opinion. It was not that the petitioners were opposed to the redevelopment efforts or holding out for higher compensation; they were opposed to the lack of a direct public benefit. A key problem addressed in the dissenters' argument was the idea that, after *Kelo*, private property could be taken merely because someone else, another private owner, could be more productive or beneficial with it in the eyes of the government. I was fortunate enough to have the opportunity to communicate with Susette Kelo, one of the petitioners in the case. She contended, "[p]rivate property is still private property and public use

is NOT giving that property away so someone else can make money [her emphasis]" (personal communication, December 7, 2006).

As such, O'Connor favored establishing some mechanism to evaluate private property in economic development takings individually. Citing *Berman*, she argued that because all of the properties were blighted, the public benefit was clear. In *Kelo*, however, this was not the case. Although O'Connor failed to provide an alternative solution, she was cautious of the government's expanded power to condemn unblighted private property purely for economic development.

The dissent gave much more attention to the specific details of the city's redevelopment plan than did the majority opinion. Two of the seven parcels of land scheduled for redevelopment were occupied by the petitioners. In one parcel, the three existing homes were to be condemned, but the existing Italian Dramatic Club would remain; future plans for this parcel were vague and slated for office space as the market developed. Future plans for the other parcel where petitioners resided were more ambiguous, as it was listed as "park support" (p. 495). The dissent cited oral arguments during which the city conceded that the area could potentially be used for parking, a use the dissent argued did not meet the public use requirement of the Takings Clause.

Recall that in the *Midkiff* opinion, O'Connor stated that the state's power to invoke eminent domain was coterminous with that of its police power. In her *Kelo* dissent, she argued that the coterminousness of the two terms sometimes lacks constitutional muster that requires additional consideration. She explains that in *Midkiff*, the takings were both within the police power and for the public purpose and therefore did not put the coterminous language to the constitutional test. Moreover, in *Midkiff*, O'Connor advocated for the judiciary to play a narrow