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NOTE

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> There is nothing which so generally strikes the imagination, and engages the affections of mankind, as the right of property; or that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe . . . .[1]

I. INTRODUCTION: EMINENT DOMAIN AND THE BUNDLE OF STICKS

As students are introduced to the concept of property law, they are taught: "Protection of our property is vital to our sense of security and is a core function of our legal system."[2] At odds with this notion of property protection is the idea, embedded within the United States Constitution, that the government may take property for a public use so long as just compensation is provided.[3] This ideological divide has been the source of constant legal de-

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1. A. JAMES CASNER ET AL., CASES AND TEXT ON PROPERTY 3 (2004) (quoting WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 2 (facsimile of the 1st ed. of 1765-1769, Univ. of Chi. Press 1979) (1766)).

2. *Id.* at 1 ("To achieve proper self-development—to be a person—an individual needs some control over resources in the external environment. The necessary assurances of control take the form of property rights." (quoting Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957 (1982))).

3. U.S. CONST. amend. V ("nor shall private property be taken for public use, without just compensation").

bate and judicial determinations[4] and is the result of a belief within the American system of government that personal interests must occasionally bow to the greater public good.[5]

In the summer of 2005, the Supreme Court decided the case of *Kelo v. City of New London*.[6] In a five-to-four decision, a divided Court confronted the issue of whether the taking of private property for economic development "satisfies the 'public use' requirement of the Fifth Amendment"[7] as applied to the states through the Fourteenth Amendment.[8] Ultimately, the majority decided that it did, stating that the legislative "determination that the area [at issue] was sufficiently distressed to justify a program of economic rejuvenation [was] entitled to [judicial] deference."[9] Writing for the majority, Justice Stevens cited a number of cases

4. For an example of a discussion of property as exclusive dominion, see Carol M. Rose, *Cannons of Property Talk, or, Blackstone's Anxiety*, 108 YALE L.J. 601, 603-04 (1998) ("It may be that this very definition somehow constantly elicits similar argumentative strategies—raising worrisome doubts about existing entitlements or eliciting soothing appeals to usefulness on the one hand or to tradition on the other . . . . When Blackstone described property as exclusive dominion, he may have had little idea of the resonance his words would have for later writers on property. Indeed, the notion of property as exclusive dominion—a notion to which I will refer as the Exclusivity Axiom—is far from self-evident . . . . Blackstone asserted that the law properly recognizes claims by the destitute to some minimal assistance from those who are more prosperous. This position links Blackstone to a traditional view tying property to social and political obligation—a view that clearly creates some tension with the idea of property as absolute or exclusive dominion. Hence it might be best to conclude that for Blackstone, the Exclusivity Axiom was in a sense a trope, a rhetorical figure describing an extreme or ideal type rather than reality . . . . In identifying property with the right to exclude, then, Blackstone struck a central nerve in modern discussions of property, and meditations, transmutations, and fulminations on the theme of exclusivity continue to run through modern cases and commentaries.").

5. *See, e.g.*, Pa. Coal Co. v. Mahon, 260 U.S. 393, 413 (1922) ("Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law. As long recognized some values are enjoyed under an implied limitation and must yield to the police power. But obviously the implied limitation must have its limits or the contract and due process clauses are gone."); *see also* Robert J. Goldstein, *Green Wood in the Bundle of Sticks: Fitting Environmental Ethics and Ecology into Real Property Law*, 25 B.C. ENVTL. AFF. L. REV. 347, 362 (1998) (discussing the "inherent limitation to property rights").

6. Kelo v. City of New London, 545 U.S. 469 (2005).

7. *Id.* at 477. The Fifth Amendment's guarantee "was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." Armstrong v. United States, 364 U.S. 40, 49 (1960).

8. *See* Chicago, B. & Q.R. Co. v. City of Chicago, 166 U.S. 226 (1987).

9. *Kelo*, 545 U.S. at 484 ("Given the comprehensive character of the plan, the thorough deliberation that preceded its adoption, and the limited scope of our review, it is appropriate for us, as it was in *Berman*, to resolve the challenges of the individual owners, not on a piecemeal basis, but rather in light of the entire plan. Because that

for the proposition that "public use" is a broad term, synonymous with "public purpose."[10] The dissent, written by Justice O'Connor, argued that the language cited by the majority for this proposition from the cases *Berman v. Parker*[11] and *Hawaii Housing Authority v. Midkiff*[12] was "errant language"[13] and that the concept of public use is narrower than the concept of public purpose.[14] Because of their differences on this issue, the justices could not agree on the breadth of the power of eminent domain. The majority stated that its opinion dealt with the narrow issue of whether area-wide redevelopment in a distressed urban environment justified exercising eminent domain power.[15] The dissent feared that the majority had broadened the definition of public use so that every American's property would now be subject to condemnation:

> [N]early any lawful use of real private property can be said to generate some incidental benefit to the public. Thus, if predicted (or even guaranteed) positive side-effects are enough to render transfer from one private party to another constitutional, then the words "for public use" do not realistically exclude *any* takings, and thus do not exert any constraint on the eminent domain power . . . . The specter of condemnation hangs over all property. Nothing is to prevent the State from replacing any Motel 6 with a Ritz-Carlton, any home with a shopping mall, or any farm with a factory.[16]

One month prior to the *Kelo* decision, the Supreme Court decided the case of *Lingle v. Chevron U.S.A. Inc.*[17] This landmark decision clarified the current state of regulatory takings[18] juris-

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plan unquestionably serves a public purpose, the takings challenged here satisfy the public use requirement of the *Fifth Amendment*.").

10. *Id.* at 481-82.

11. Berman v. Parker, 348 U.S. 26 (1954).

12. Haw. Hous. Auth. v. Midkiff, 467 U.S. 229 (1984).

13. *Kelo*, 545 U.S. at 501 (O'Connor, J., dissenting).

14. *Id.*

15. *Id.* at 472.

16. *Id.* at 501-03.

17. Lingle v. Chevron U.S.A. Inc., 544 U.S. 528 (2005).

18. A regulatory taking can be defined as "[a] regulation that is so intrusive that it is found to take private property for a public purpose without providing the landowner with just compensation." JOHN R. NOLON, WELL GROUNDED: USING LOCAL LAND USE AUTHORITY TO ACHIEVE SMART GROWTH 454 (2001). The field of regulatory takings began in 1922 when, in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922), "the Supreme Court recognized that, even if the government does not seize or occupy a property, a governmental regulation can work a taking if it 'goes too far.'" Smith v. Mendon, 822 N.E.2d 1214, 1217 (N.Y. 2004).

prudence by compartmentalizing regulatory takings cases into four distinct categories.[19] In doing so, the Court unanimously held that the *Agins* "substantially advances" test[20] has no place in takings jurisprudence because it is essentially a due process analysis.[21] While eliminating the "substantially advances" test from the regulatory takings equation, the Court set out the categories under which a government regulation might constitute a taking of private property.[22] The regulatory takings categories, as set forth in *Lingle*, are: (1) where the individual property owner suffers a permanent physical invasion of property (like that in *Loretto v. Teleprompter Manhattan CATV Corp.*);[23] (2) where a property owner is deprived of all economically beneficial or productive use of his or her land (as in *Lucas v. South Carolina Coastal Council*);[24] (3) where *all* economic use is not taken but the economic impact of the regulation is so severe that the court must turn to a multi-factor balancing test (from *Penn Central Transportation Co. v. New York City*);[25] and (4) where a condition is imposed on the

19. *See Lingle*, 544 U.S. at 548 ("[A] plaintiff seeking to challenge a government regulation as an uncompensated taking of private property may proceed . . . by alleging a 'physical' taking [like that in *Loretto*], a *Lucas*-type 'total regulatory taking,' a *Penn Central* taking, or a land-use exaction violating the standards set forth in *Nollan* and *Dolan*.").

20. *See* Agins v. City of Tiburon, 447 U.S. 255, 260 (1980) (The Supreme Court, responding to a facial challenge to two municipal zoning ordinances, established that "[t]he application of a general zoning law to particular property effects a [regulatory] taking if the ordinance does not substantially advance legitimate state interests, or denies an owner economically viable use of his land.") (citation omitted).

21. *Lingle*, 544 U.S. at 540.

22. *Id.* at 538-39.

23. Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 434-35 (1982) (A landlord was required, pursuant to state law, to permit a cable television company to install its cable facilities upon her apartment building. The Court held that where a governmental action results in a permanent physical occupation of the property—no matter how minor—by the government itself or by others, it is a *per se* taking "to the extent of the occupation, without regard to whether the action achieves an important public benefit or has only minimal economic impact on the owner" and the government must therefore provide just compensation.).

24. Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1019 (1992) (holding it to be a *per se* taking when a governmental regulation completely deprives an owner of all economically beneficial or productive use of his property, unless that use is preventable under nuisance law or other background principles that existed at the time the regulation was adopted).

25. Pa. Cent. Transp. Co. v. New York City, 438 U.S. 104, 124 (1978) (Though there is no set formula for evaluating regulatory takings claims, there are "several factors that have particular significance. The economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations are, of course relevant considerations. So, too, is the character of the government action. A 'taking' may more readily be found

issuance of a development approval that requires a landowner to dedicate land to the public, to allow the public access on private land, or to pay a fee in lieu of such requirements thereby violating the "essential nexus" and "rough proportionality" criteria set forth in *Nollan v. California Coastal Commission*[26] and *Dolan v. City of Tigard*.[27] This final category of cases, known as adjudicative land use exactions,[28] most closely implicates the fundamental right of property ownership[29] at issue in eminent domain cases. In fact, the two cases used to define the exactions category, *Nollan* and *Dolan*, describe the right to exclude others from one's land as "one

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when the interference with property can be characterized as a physical invasion by government, than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good.") (citations omitted).

26. Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 837 (1987) ("[C]onstitutional propriety disappears . . . if the condition substituted for the prohibition utterly fails to further the end advanced as the justification for the prohibition. When that essential nexus is eliminated, the situation becomes the same as if California law forbade shouting fire in a crowded theater, but granted dispensations to those willing to contribute $ 100 to the state treasury. . . . In short, unless the permit condition serves the same governmental purpose as the development ban, the building restriction is not a valid regulation of land use but 'an out-and-out plan of extortion.'").

27. Dolan v. City of Tigard, 512 U.S. 374, 391 (1994) ("We think a term such as 'rough proportionality' best encapsulates what we hold to be the requirement of the Fifth Amendment. No precise mathematical calculation is required, but the city must make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development.").

28. Exactions are defined as "land-use decisions conditioning approval of development on the dedication of property to public use." City of Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687, 702 (1999); *see also* Lingle v. Chevron U.S.A., Inc., 544 U.S. 528, 546 (2005) (describing an exaction as a situation where the "government demands that a landowner dedicate an easement allowing public access to her property as a condition of obtaining a development permit").

29. *See generally* Goldstein, *supra* note 5, at 368 (describing ownership as "a bundle of rights and privileges invested with a single name" (quoting Justice Cardozo in Steward Mach. Co. v. Davis, 301 U.S. 548 (1937))) (citation omitted).

of the most essential sticks in the bundle of rights[30] that are commonly characterized as property."[31]

This article proposes a framework for the classification of eminent domain condemnations in line with that of the regulatory takings scheme set forth in *Lingle*.[32] In doing so, it also attempts to explain the majority's decision in *Kelo* and reconcile it with the fears of the dissenters by applying the insight of Justice Kennedy's concurring opinion. In his concurrence, Justice Kennedy clarified that his agreement with the majority did "not foreclose the possibility that a more stringent standard of review than that announced in *Berman* and *Midkiff* might be appropriate for a more narrowly drawn category of takings . . . . [But, t]his is not the occasion for conjecture as to what sort of cases might justify a more demanding standard . . . ."[33]

This article will evaluate the types of cases that may indeed justify a more demanding standard. It argues that, akin to the *Lingle* regulatory takings scheme, there are four discrete categories of eminent domain cases: (1) public ownership of the taken property; (2) actual use by the public of the property; (3) economic development with a significant governmental presence or exigent circumstance; and (4) a fourth category in which a new (higher level of scrutiny) judicial test is warranted. Part II of this article will provide the background information that set the stage for the *Kelo* decision. Part III offers a method for defining each proposed category of eminent domain cases and suggests an approach for the appropriate judicial test of validity for category-four condem-

30. *See generally id.* at 366-74 ("The 'bundle of rights' metaphor is generally attributed either to Supreme Court Justice Benjamin N. Cardozo (1870-1938) or Professor Hohfeld, although it is questionable that either actually first coined that phrase, used it as a legal metaphor, or applied it to property. The first use of this term appears in the 1888 *Treatise on the Law of Eminent Domain in the United States* by John Lewis (1842-1921). 'The dullest individual among the *people* knows and understands that his property in anything is a bundle of rights.' . . . In essence, the 'bundle of rights' divides ownership into its component pieces, with implicitly varying importance, and with only an unstated degree of severability . . . . The bundle concept is valuable for its notion of divisibility and accumulation of diverse and varying 'sticks' that can amount to ownership. There seems to be no fixed formulation for when these incidents rise to the level that some people term ownership.").

31. *Dolan*, 512 U.S. at 384 (quoting Kaiser Aetna v. United States, 444 U.S. 164, 176 (1979)). *See also Nollan*, 483 U.S. at 831; CASNER, *supra* note 1, at 3 ("[T]he essence of private property is always the right to exclude others . . . ." (quoting Morris R. Cohen, *Property and Sovereignty*, 13 CORNELL L.Q. 8-12, 14-30 (1927))).

32. *Lingle*, 544 U.S. 528.

33. Kelo v. City of New London, 545 U.S. 469, 493 (2005) (Kennedy, J., concurring).

nations. Part IV will then conclude by reviewing the reasoning for this new approach to eminent domain.

II. BACKGROUND: A CENTURY OLD TRADITION

The background of the *Kelo* case is the story of a conflict between a Connecticut city in dire need of economic revitalization and a few of its long-time residents struggling to protect their homes from city condemnation. Compared with the rest of Connecticut, the median household income for residents of the City of New London is 37% less than the rest of the State; the City's poverty rate is 100% higher; and its unemployment rate 24% greater.[34] In 1990, after "[d]ecades of economic decline," the state of Connecticut designated New London as a "distressed municipality"[35] and later reactivated the New London Development Corporation ("NLDC") "to assist the city in planning economic development."[36] By 1998, New London's "unemployment rate was nearly double that of the State, and its population . . . was at its lowest since 1920."[37] In 2000, the city council approved an NLDC development plan focusing on the City's Fort Trumbell area.[38] The plan was "projected to create in excess of 1,000 jobs, to increase tax and other revenues, and to revitalize [the] economically distressed city, including its downtown and waterfront areas."[39] The NLDC was able to negotiate the purchase of most of the real estate in the proposed development area,[40] which "comprise[d] approximately 115 privately owned properties, as well as the 32 acres of land formerly occupied by [a] naval facility."[41] Pursuant to state law and city council authorization, NLDC then exerted eminent domain power to begin condemnation proceedings over the remaining fifteen parcels.[42]

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34. New London, Connecticut, CERC Town Profile 2005, http://products.cerc.com/pdf/tp/newlondon.pdf (last visited Feb. 1, 2006).

35. *Kelo*, 545 U.S. at 473.

36. *Id.* ("These conditions prompted state and local officials to target New London . . . for economic revitalization. To this end, respondent New London Development Corporation (NLDC), a private nonprofit entity established some years earlier to assist the City in planning economic development, was reactivated.").

37. *Id.*

38. *Id.* at 472.

39. *Id.* (citing Kelo v. City of New London, 843 A.2d 500 (Conn. 2004)).

40. *Id.* at 475.

41. *Id.* at 474.

42. *Id.* at 475.

These remaining parcels were owned by the nine petitioners in the *Kelo* case.[43] Among their stories is that of Susette Kelo who "has lived in the Fort Trumbull area since 1997 [and] has made extensive improvements to her house, which she prizes for its water view."[44] There is also the story of Wilhemina Dery whose house, having been owned by her family for over a century,[45] was the place of her birth in 1918 and has served as her home for her entire lifetime.[46] Her husband Charles "moved into the house when they married in 1946" and "[t]heir son lives next door with his family in the house he received as a wedding gift."[47] In total, ten of the fifteen disputed parcels at issue in *Kelo* were "occupied by the owner or a family member."[48] None of the parcels were found to be "blighted[49] or otherwise in poor condition; rather, they were condemned only because they happen to be located in the development area."[50]

Given the circumstances of the *Kelo* petitioners, it is difficult to view this case without immense sympathy for their situation. Indeed, the *Kelo* decision spawned outrage on the part of citizens

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43. *Id.*

44. *Id.*

45. *Id.* at 494 (O'Connor, J., dissenting).

46. *Id.* at 475.

47. *Id.* at 495 (O'Connor, J., dissenting).

48. *Id.* at 475.

49. Although the term "blighted" can be defined more literally, case law indorses a liberal definition:

> Many factors and interrelationships of factors may be significant. These may include such diverse matters as irregularity of the plots, inadequacy of the streets, diversity of land ownership making assemblage of property difficult, imcompatibility [sic] of the existing mixture of residential and industrial property, overcrowding, the incidence of crime, lack of sanitation, the drain an area makes on municipal services, fire hazards, traffic congestion, and pollution. It can encompass areas in the process of deterioration or threatened with it as well as ones already rendered useless, prevention being an important purpose. It is "something more than deteriorated structures. It involves improper land use. Therefore its causes, originating many years ago, include not only outmoded and deteriorated structures, but unwise planning and zoning, poor regulatory code provisions, and inadequate provisions for the flow of traffic." For, the public safety, public health and public welfare, all legitimate objects of the police power, are broad and inclusive. And it may even include vacant land. Nor is it necessary that the degree of deterioration or precise percentage of obsolescence or mathematical measurement of other factors be arrived at with precision, since the combination and effects of such things are highly variable.

Yonkers Cmty. Dev. Agency v. Morris, 335 N.E.2d 327, 332 (N.Y. 1975) (citations omitted).

50. *Kelo*, 545 U.S. at 475.

and lawmakers alike.[51] It is this reaction that reaches to the heart of the conflict between perceived property rights[52] and the power of eminent domain.

At issue in *Kelo* was whether New London's economic development plan qualified as a "public use."[53] While the petitioners called for a narrow interpretation of the Fifth Amendment's public use requirement,[54] arguing "that any taking justified by the promotion of economic development must be treated by the courts as *per se* invalid, or at least presumptively invalid,"[55] the majority reasoned that the Supreme Court has never proscribed public use by limiting it in such a way:

> [T]his "Court long ago rejected any literal requirement that condemned property be put into use for the general public." Indeed, while many state courts in the mid-19th century endorsed "use by the public" as the proper definition of public use, that narrow view steadily eroded over time. Not only was the "use by the public" test difficult to administer (e.g., what proportion of the public need have access to the property? at what price?), but it proved to be impractical given the diverse and always evolving needs of society. Accordingly, when this Court began applying the *Fifth Amendment* to the States at the close of the 19th century, it embraced the broader and more natural interpretation of public use as "public purpose." Thus, in a case upholding a mining company's use of an aerial bucket line to transport ore over property it did not own, Justice Holmes' opinion for the Court stressed "the inadequacy of use by the general public as a universal test." We have repeatedly and consistently rejected that narrow test ever since.[56]

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51. *See* David Schultz, *What's Yours Can be Mine: Are there Any Private Takings After* Kelo v. City of New London?, 24 UCLA J. ENVTL. L. & POL'Y 195, 234 n.2 (2006) (citing a number of articles discussing "the efforts in Congress and the states after the Kelo opinion to condemn it or limit it with legislation," "how the Kelo opinion is causing a backlash against many projects involving the use of eminent domain," and "the adverse reaction many states had to the Kelo opinion and efforts being taken at the state level to place limits on the use of eminent domain for economic development purposes.") (citations omitted).

52. *See generally* Goldstein, *supra* note 5, at 375-87 (enumeration and discussion of the various rights accompanying property ownership including the right to possess, use, consume or destroy, modify, alienate, and transmit).

53. *Kelo*, 545 U.S. at 472 ("The question presented is whether the city's proposed disposition of this property qualifies as a 'public use' within the meaning of the Takings Clause of the Fifth Amendment to the Constitution.").

54. U.S. CONST. amend. V ("nor shall private property be taken for public use, without just compensation").

55. *Kelo*, 545 U.S. at 492 (Kennedy, J., concurring).

56. *Id.* at 479-80 (citations omitted).

As early as 1896, the Supreme Court equated the terms "public use" and "public purpose." In *United States v. Gettysburg Electric Railway Co.*, the Court permitted the taking of a strip of land from a railroad company to preserve the battlefield lines at Gettysburg—not for actual use by the public or a utility benefiting the public but for historic preservation.[57] Upholding a challenged portion of the 1893 Sundry Civil Appropriation Act, the Court held that public use is not limited to takings that effect a use or right to use by the public and stated: "when the legislature has declared the *use or purpose* to be a public one, its judgment will be respected by the courts, unless the use be palpably without reasonable foundation."[58]

In 1905, the Supreme Court allowed the condemnation of a right-of-way through a landowner's property for the transport of water because the neighboring land would otherwise have been worthless.[59] The case, *Clark v. Nash*, is an example of a private-to-private transfer (with no actual use of the condemned property by the public) where a public purpose is nevertheless deemed present. The Court in *Clark* upheld a state statute permitting the condemnation by emphasizing the importance of deference:

> [W]here the right of condemnation is asserted under a state statute, we are always, where it can fairly be done, strongly inclined to hold with the state courts, when they uphold a state statute providing for such condemnation . . . . [The local courts] understand the situation which led to the demand for the enactment of the statute, and they also appreciate the results upon the growth and prosperity of the State, which in all probability would flow from a denial of its validity.[60]

In the 1906 case of *Strickley v. Highland Boy Gold Mining Co.*, the Supreme Court upheld the taking of a right-of-way over private land to allow a mining company to transport ore in aerial buckets.[61] This transfer of property rights was completely private-to-private and concerned the economic development of the state of Utah's mineral resources. In *Strickley*, the plaintiffs argued that the condemned right-of-way was "solely for private use, and that the taking of their land for that purpose [was] contrary to

57. United States v. Gettysburg Elec. Ry. Co., 160 U.S. 668, 681-83 (1896).
58. *Id.* at 680 (emphasis added).
59. Clark v. Nash, 198 U.S. 361, 369 (1905).
60. *Id.* at 368.
61. Strickley v. Highland Boy Gold Mining Co., 200 U.S. 527, 529, 532 (1906).

the Fourteenth Amendment of the Constitution of the United States."[62] The mining company countered by relying upon a Utah statute providing "that 'the right of eminent domain may be exercised in [sic] behalf of the following public uses: . . . (6) Roads, railroads, tramways, tunnels, ditches, flumes, pipes and dumping places to facilitate the milling, smelting or other reduction of ores, or the working of mines.'"[63] At issue in *Strickley* was the constitutionality of this statute.[64] The Supreme Court held:

> "In the opinion of the legislature and the Supreme Court of Utah the public welfare of that State demands that aerial lines between the mines upon its mountain sides and the railways in the valleys below should not be made impossible by the refusal of a private owner to sell the right to cross his land. The Constitution of the United States does not require us to say that they are wrong."[65]

Another case arising in a "purely economic context," and cited by the *Kelo* court,[66] is *Ruckelshaus v. Monsanto*.[67] As *Kelo* discussed, *Monsanto* upheld a provision of the Federal Insecticide, Fungicide, and Rodenticide Act "under which the Environmental Protection Agency ("EPA") could consider the data (including trade secrets) submitted by a prior applicant in evaluating a subsequent application, so long as the second applicant paid just compensation for the data."[68] The public benefit achieved in this case was the expedited entrance of valuable chemical products into the marketplace. The Court held that the "EPA's consideration or disclosure of data submitted . . . to the agency . . . [did] not effect a taking" under the Fifth Amendment.[69] The Court "found sufficient Congress' belief that sparing applicants the cost of time-consuming research eliminated a significant barrier to entry in the pesticide market and thereby enhanced competition."[70]

The *Kelo* decision also cites the case of *Berman v. Parker*.[71] *Berman* upheld the condemnation of a non-blighted parcel located

62. *Id.* at 530.
63. *Id.*
64. *Id.* at 530-31.
65. *Id.* at 531.
66. Kelo v. City of New London, 545 U.S. 469, 482 (2005).
67. Ruckelshaus v. Monsanto, 467 U.S. 986 (1984).
68. *Kelo*, 125 S. Ct. at 482.
69. *Monsanto*, 467 U.S. at 1013.
70. *Kelo*, 545 U.S. at 482.
71. Berman v. Parker, 348 U.S. 26 (1954).

within a blighted area targeted for redevelopment. This case, containing some of the most frequently quoted language regarding the concept of public welfare, holds:

> [Courts should] not sit to determine whether a particular housing project is or is not desirable. The concept of the public welfare is broad and inclusive . . . . The values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled . . . . It is not for [the Court] to reappraise [these values].[72]

The *Kelo* majority also relied on the case of *Hawaii Housing Authority v. Midkiff*[73] where a unanimous Court deferred again to legislative judgment. In *Midkiff*, "the Court considered a Hawaii statute whereby fee title[74] was taken from lessors and transferred to lessees (for just compensation) in order to reduce the concentration of land ownership."[75] Refusing to accept the argument that the public character of a taking was altered solely because the State transferred the taken property to private individuals after condemnation, the Court concluded "that the State's purpose of eliminating the 'social and economic evils of a land oligopoly'[76] qualified as a valid public use" and held that "it is only the taking's purpose, and not its mechanics, that must pass scrutiny under the Public Use Clause."[77]

Arguing further for a policy of legislative deference, the *Kelo* majority cited the case of *Lingle v. Chevron*.[78] As discussed in Part I, *supra*, *Lingle* clearly delineated four categories of regulatory takings cases.[79] *Lingle*'s fourth category of adjudicative land use exactions,[80] typified by the *Nollan* and *Dolan* cases, is significant to the eminent domain discussion. This is because the right to exclude, at issue in both *Nollan* and *Dolan*, is an essential stick

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72. *Id.* at 33 (citation omitted).

73. Haw. Hous. Auth. v. Midkiff, 467 U.S. 229 (1984).

74. BLACK'S LAW DICTIONARY 630 (7th ed. 1999) ("fee simple" is an interest in land that is "the broadest property interest allowed by law;" "fee simple absolute" is "[a]n estate of indefinite or potentially indefinite duration.").

75. *Kelo*, 545 U.S. at 481.

76. *Midkiff*, 467 U.S. at 241.

77. *Id.* at 244-45.

78. *Kelo*, 545 U.S. 487.

79. *See supra* note 19.

80. *See supra* note 28 and accompanying text.

in the "bundle of rights"[81] and it is the right to own the entire bundle that is taken through eminent domain. The *Nollan* Court held that in the case of an adjudicative land use exaction,[82] there must be an "essential nexus" between the condition imposed and the stated purpose of the underlying land use restriction.[83] In *Dolan*, the Court, building on the *Nollan* case, further heightened its standard by holding that an "individualized determination" must be made showing some "rough proportionality" between the burden imposed on the property by the regulation and the negative impact the property's proposed development would have on the public.[84]

III. ANALYSIS: IN SEARCH OF PROPORTIONALITY

Both *Nollan* and *Dolan* dealt with the protection of the right to exclude others—a right that is "one of the most essential sticks in the bundle of rights that are commonly characterized as property."[85] The implication of this fundamental property right is critical to warranting the higher level of scrutiny required by the *Nollan* and *Dolan* cases.[86] The right to exclude is similar to the importance of the property rights impinged by eminent domain,[87] suggesting perhaps that closer scrutiny and less deference (as argued by the *Kelo* petitioners)[88] is necessary in some condemnation cases. Although the *Kelo* majority warns that "[t]he disadvantages of a heightened form of review are especially pronounced in this type of case,"[89] if eminent domain cases are properly categorized, a heightened standard of review—a standard similar to *Dolan*'s rough proportionality but applicable to eminent domain—could be employed in certain economic development situations

81. *See* Goldstein, *supra* note 30 and accompanying text.

82. *See supra* note 28.

83. *See supra* note 26.

84. *See supra* note 27.

85. *Id.* at 384 (quoting Kaiser Aetna v. United States, 444 U.S. 164, 176 (1979)); *see also Nollan*, 483 U.S. at 831.

86. *See* Smith v. Mendon, 822 N.E.2d 1214, 1219-20 (N.Y. 2004) (Because there was no "transfer of the most important 'stick' in the proverbial bundle of property rights, the right to exclude others," the court refused to review the case under the higher scrutiny required by *Nollan* and *Dolan*. Instead, the court turned to the formerly valid *Agins* test that was later overruled in *Lingle* and to the still-valid *Penn Central* standard).

87. *See generally* Goldstein, *supra* note 30 and accompanying text.

88. Kelo v. City of New London, 545 U.S. 469, 487 (2005) ("[P]etitioners maintain that for takings of this kind we should require a 'reasonable certainty' that the expected public benefits will actually accrue.").

89. *Id.* at 488.

without resulting in a "significant impediment to the successful consummation of many such [development] plans,"[90] as the majority fears.

A. Eminent Domain Categories One & Two: A Clear Public Purpose

The first two categories of eminent domain cases are easily identifiable and are explained by Justice O'Connor in her dissenting opinion in *Kelo*.[91] The first category is that of public ownership, where the government takes and retains title to the condemned property.[92] In this category, usually comprising public works or projects, "the sovereign may transfer private property to public ownership."[93] Examples provided by Justice O'Connor of such public works include roads, hospitals, and military bases.[94] The second category is that of actual use of the property by the public, even when private parties may gain title to the governmentally condemned land.[95] In these cases, "the sovereign may transfer private property to private parties, often common carriers, who make the property available for the public's use."[96] Examples of these property transfers include railroads, public utilities, and stadiums.[97]

But as O'Connor states in *Kelo*, "'public ownership' and 'use-by-the-public' are sometimes too constricting and impractical . . . to define the scope of the *Public Use Clause*."[98] The first two categories, as well as the third, described *infra*,[99] warrant the policy of judicial deference to legislative determinations argued in the majority opinion. These three categories share a clear public interest and are free from impermissible private motivation. It is with a fourth category that a court's suspicions of insufficient public purpose are raised and a legislature, subject to a higher level of scrutiny, must show some level of proportionality in weighing the dominant public purpose against the exaction of a person's right to

90. *Id.*
91. *Id.* at 497-98 (O'Connor, J., dissenting).
92. *Id.*
93. *Id.*
94. *Id.*
95. *Id.*
96. *Id.*
97. *Id.*; *see also id.* at 477 ("[A] State may transfer property from one private party to another if future 'use by the public' is the purpose of the taking; the condemnation of land for a railroad with common-carrier duties is a familiar example.").
98. *Id.* at 498 (O'Connor, J., dissenting).
99. *See* discussion *infra* Part III.B.

own. Both the third and fourth categories of eminent domain cases include the situation of economic development projects subject to debate in *Kelo*.[100]

B. Eminent Domain Category Three: Economic Development and Public Exigency

As Justice Kennedy, citing the trial court, wrote in his *Kelo* concurring opinion:

> Where the purpose [of a taking] is economic development and that development is to be carried out by private parties or private parties will be benefited, the court must decide if the stated public purpose—economic advantage to a city sorely in need of it—is only incidental to the benefits that will be confined on private parties of a development plan.[101]

In line with this reasoning, the third proposed category of eminent domain cases contains two situations in which public benefits are not incidental to private benefits. Though the *Kelo* dissent limits it to only circumstances meeting "certain exigencies,"[102] this category should be more expansive.[103] This third category is two-pronged and comprises: (1) economic development with a sig-

100. Writing for the dissent, Justice O'Connor deals flatly with this issue by asking and answering, "Are economic development takings constitutional? I would hold that they are not." *Kelo*, 545 U.S. at 498 (O'Connor, J., dissenting).

101. *Id.* at 491 (Kennedy, J., concurring).

102. *Id.* at 498 (O'Connor, J., dissenting) ("[W]e have allowed that, in certain circumstances and to meet certain exigencies, takings that serve a public purpose also satisfy the Constitution even if the property is destined for subsequent private use.") (citations omitted).

103. For an example of a discussion of the evolution of economic development condemnations, see Yonkers Cmty. Dev. Agency v. Morris, 335 N.E.2d 327, 330 (N.Y. 1975) ("Historically, urban renewal began as an effort to remove 'substandard and insanitary' [sic] conditions which threatened the health and welfare of the public, in other words 'slums' . . . whose eradication was in itself found to constitute a public purpose for which the condemnation powers of government might constitutionally be employed. Gradually, as the complexities of urban conditions became better understood, it has become clear that the areas eligible for such renewal are not limited to 'slums' as that term was formerly applied, and that, among other things, economic underdevelopment and stagnation are also threats to the public sufficient to make their removal cognizable as a public purpose."). *See also Kelo*, 545 U.S. at 486 ("The public end may be as well or better served through an agency of private enterprise than through a department of government—or so the Congress might conclude. We cannot say that public ownership is the sole method of promoting the public purposes of community redevelopment projects." (citing Berman v. Parker, 348 U.S. 26, 34 (1954))).

nificant governmental presence[104] and (2) condemnations that respond to public exigencies.[105]

Courts have long recognized "that the sovereign may not take the property of *A* for the sole purpose of transferring it to another private party *B*, even though *A* is paid just compensation."[106] But not all economic development plans need fall beneath this umbrella of outright invalid private-to-private takings. Where condemnations are carried out in order to achieve significant public objectives, they are not analogous to one-to-one transfers for the sole benefit of the transferee. To determine whether an economic development plan meets the public use requirement[107] and deserves judicial deference to the legislature, a court should look for indications of a significant governmental presence[108] or of exigency.[109] Should the economic development plan arise outside of one of these two third-category situations, the plan (still not outright invalid) can be scrutinized under the higher standard of review in category four.[110] In addition, when a condemnation that does fall into this third category also has the presence of other conditions raising a court's suspicions (that an insufficient public purpose is present),[111] the fourth category is implicated and the higher standard of review applied.[112]

1. Indicia of Governmental Presence

To help define this third category, various development plan elements that indicate a significant governmental presence are employed. Many of these elements are found within the *Kelo* case, including: the existence "of a comprehensive development plan meant to address a serious city-wide depression;"[113] an integrated development plan having both state-level and city-level ap-

104. *See* discussion *infra* Part III.B.1.
105. *See Kelo*, 545 U.S. at 4898-99 (O'Connor, J., dissenting).
106. *Id.* at 477. This sole "private purpose" type of case falls outside the categories of condemnations that can be found valid. *See id.* at 487 ("[A] one-to-one transfer of property, executed outside the confines of an integrated development plan, is not presented in this case . . . . [S]uch an unusual exercise of government power would certainly raise a suspicion that a private purpose was afoot . . . .").
107. U.S. CONST. amend. V ("nor shall private property be taken for public use, without just compensation").
108. *See* discussion *infra* Part III.B.1.
109. *See* discussion *infra* Part III.B.2.
110. *See* discussion *infra* Part III.C.
111. *See* discussion *infra* Part III.B.3.
112. *See* discussion *infra* Part III.C.
113. Kelo v. City of New London, 545 U.S. 469, 493 (2005).

proval;[114] open public meetings to discuss the development;[115] "thorough deliberation" preceding the plan's adoption;[116] a state designation of the municipality as in need of economic redevelopment;[117] and state and local financial investment,[118] especially "the substantial commitment of public funds by the State to the development project before most of the private beneficiaries [are] known."[119] A further relevant indication of governmental presence may be the extent of municipally-provided public infrastructure, for example: public marinas for recreational uses, pedestrian riverwalks and other walkways, state parks, museums, public parking;[120] schools, parks, streets, and other public facilities[121] within the area-wide development plan.

2. Indicia of Exigencies

The second prong of this third category comprises condemnations that respond to public exigencies. In her dissenting opinion in *Kelo*, Justice O'Connor writes: "[W]e have allowed that, in certain circumstances and to meet certain exigencies, takings that serve a public purpose also satisfy the Constitution even if the property is destined for subsequent private use."[122] There are a number of exigent circumstances that may indicate a situation in which condemnation is necessary and valid. By looking at prior cases, it is possible to construct a list of factors that can be used by courts analogously to determine when the power of eminent domain serves a requisite public purpose.

The first of these factors asks whether there is an imminent threat to a national historic treasure. For example, in *Gettysburg Electric Railway*, the exigency was the "imminent danger that portions of [the Gettysburg] battlefield may be irreparably defaced by the construction of a railway over [the historic site] . . . ."[123] In this case, there was a clear danger that portions of the battlefield could be permanently harmed by the construction of a railroad. To prevent this harm to the public, Congress authorized condem-

114. *Id.* at 473-74.
115. *Id.*
116. *Id.* at 484.
117. *Id.* at 473.
118. *Id.* at 473-74.
119. *Id.* at 491-92.
120. *Id.* at 474.
121. *See* Berman v. Parker, 348 U.S. 26, 35 (1954).
122. *Kelo,* 545 U.S. at 498 (2005) (O'Connor, J., dissenting).
123. United States v. Gettysburg Elec. Ry. Co., 160 U.S. 668, 685 (1896).

nation of the railroad's right-of-way over that land. In the Court's words: "No narrow view of the character of this proposed use should be taken. Its national character and importance, we think, are plain. The power to condemn for this purpose need not be plainly and unmistakably deduced from any one of the particularly specified powers."[124] In this case, there was no intended physical use by the public, no public access, and no intent to construct a public project (for example, a monument to the fallen war heroes). Without swift and decisive action by the government, however, a cultural and historical asset would have been endangered. This was an exigency deemed sufficient by the Court to justify the condemnation of the railroad's right-of-way. The Court noted the words of Chief Justice Marshall in *McCulloch v. Maryland*: "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adequate to that end, which are not prohibited but consistent with the letter and spirit of the constitution, are constitutional."[125] This case stands for the proposition that substantial and long-term damage to the patrimony of the people justifies the exercise of the power of eminent domain.

The next factor asks whether a taking is required to eliminate conditions that substantially impede economic expansion at a critical moment in time. In *Strickley v. Highland Boy Gold Mining Co.*, the issue was whether a state statute allowed the condemnation of a right-of-way over privately-owned land to allow a private mining company to transport its ore to market.[126] The Utah state statute permitted the condemnation of private land on behalf of several uses including "dumping places to facilitate the milling, smelting or other reduction of ores, or the working of mines."[127] The plaintiff objected to the condemnation of a right-of-way over his property to allow the defendant, a private mining company, to place towers on his lands and construct an aerial bucket line over the property to transport ore from the defendant's mine, over the plaintiff's land, to the railway station. The case involved conditions that thwarted the private sector's exploitation of the state of Utah's mineral resources, which was closely related to the ability of the state and its economic enterprises to expand and develop at

124. *Id.* at 683.

125. *Id.* at 681 (quoting McCulloch v. Maryland, 17 U.S. 316, 421 (1819)) (internal quotation marks omitted).

126. *See* Strickley v. Highland Boy Gold Mining Co., 200 U.S. 527 (1906).

127. *Id.* at 530.

a critical time in the history of the West. The state court sustained the taking of the right-of-way even though the mining company itself paid the required just compensation. Mr. Justice Holmes wrote this decision for the *Strickley* court citing *Clark v. Nash*,[128] a case that previously upheld the constitutionality of the Utah statute, for the proposition that "there might be exceptional times and places in which the very foundations of public welfare could not be laid without requiring concessions from individuals to each other upon due compensation which under other circumstances would be left wholly to voluntary consent."[129]

Another indication of exigent circumstances is where land is held in a manner that perpetuates great economic discrimination.[130] As the *Kelo* court noted, the exigency in *Hawaii Housing Authority v. Midkiff* was an extreme "[c]oncentration of land ownership."[131] The state of Hawaii adopted the Land Reform Act of 1967,[132] which permitted the Hawaii Housing Authority ("the Authority") to condemn title to residential land and transfer ownership of it to individuals who leased and lived on the land. The legislature was concerned about the economic effect of the concentration of land ownership in a state where the government owned nearly half of the land and fully forty-seven percent of the land was owned by only seventy-two private individuals.[133] In the words of Justice O'Connor, who wrote for a unanimous Court in upholding the statute, "[t]he legislature concluded that concentrated land ownership was responsible for skewing the State's residential fee simple market,[134] inflating land prices, and injuring the public tranquility and welfare."[135] The statute created a condemnation scheme under which fee simple title[136] of designated private lands could be condemned by the Authority and trans-

128. Clark v. Nash, 198 U.S. 361 (1905).

129. *Strickley*, 200 U.S. at 531.

130. *See, e.g.*, Haw. Hous. Auth. v. Midkiff, 467 U.S. 229 (1984).

131. Kelo v. City of New London, 545 U.S. 469, 499 (2005) (O'Connor, J., dissenting).

132. HAW. REV. STAT. §§ 516-1 to 516-204 (1967).

133. *Kelo*, 545 U.S. at 499 (O'Connor, J., dissenting) (The "[c]oncentration of land ownership was so dramatic that on [Hawaii's] most urbanized island, Oahu, 22 landowners owned 72.5% of the fee simple titles. The Hawaii Legislature . . . concluded that the oligopoly in land ownership was 'skewing the State's residential fee simple market, inflating land prices, and injuring the public tranquility and welfare,' and therefore enacted a condemnation scheme for redistributing title.") (citation omitted).

134. *See* BLACK'S LAW DICTIONARY, *supra* note 74.

135. *Midkiff*, 467 U.S. at 232.

136. *See* BLACK'S LAW DICTIONARY, *supra* note 74.

ferred to the lessees of those lands. The Authority, in turn, was authorized to lend these purchasers up to ninety percent of the purchase price.

Justice O'Connor based the Court's decision in *Midkiff* on *Berman v. Parker*, a case providing another example of exigent circumstances: where substandard conditions perpetuate poverty and block economic revitalization.[137] In *Berman v. Parker* the Court, again unanimously, upheld both the taking of the plaintiff's unblighted land to further the redevelopment of slum areas and the sale of the plaintiff's land to private developers for urban redevelopment purposes.[138] Writing for the Court in *Midkiff*, O'Connor noted:

> [W]here the exercise of the eminent domain power is rationally related to a conceivable public purpose, the Court has never held a compensated taking to be proscribed by the Public Use Clause. On this basis, we have no trouble concluding that the Hawaii Act is constitutional. The people of Hawaii have attempted, much as the settlers of the original 13 Colonies did, to reduce the perceived social and economic evils of a land oligopoly traceable to their monarch. The land oligopoly has, according to the Hawaii Legislature, created artificial deterrents to the normal function of the State's residential land market and forced thousands of individual homeowners to lease, rather than buy, the land underneath their homes. Regulating oligopoly and the evils associated with it is a classic exercise of a State's police powers. We cannot disapprove of Hawaii's exercise of this power.[139]

Though these are some of the factors indicating exigent circumstances ascertainable from case law relevant to *Kelo*, this list is far from exhaustive. It is important to remember that "[t]he versatility of circumstances often mocks a natural desire for defin-

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137. *See generally* Berman v. Parker, 348 U.S. 26 (1954).

138. *Id.* at 36. The *Kelo* court discussed the neighborhood at issue in *Berman*:

> The neighborhood had so deteriorated that, for example, 64.3% of its dwellings were beyond repair. It had become burdened with "overcrowding of dwellings," "lack of adequate streets and alleys," and "lack of light and air." Congress had determined that the neighborhood had become "injurious to the public health, safety, morals, and welfare" and that it was necessary to "eliminate all such injurious conditions by employing all means necessary and appropriate for the purpose," including eminent domain.

Kelo, 545 U.S. at 498 (O'Connor, J., dissenting) (citations omitted).

139. *Midkiff*, 467 U.S. at 241-42 (citations omitted).

itiveness"[140] and so each case will turn upon its own facts to determine the extent to which condemnation is, if at all, necessary.

Two conclusions can be made from reviewing these exigency cases of the Supreme Court. First, each of these cases allowed the taking of private land to accomplish a public objective that was unique to that place and time. The range of topics is broad, but the contextual circumstance is narrow—a legislatively determined public need of the first order. These are not inconsequential matters and, where they are not, the Court has no trouble sustaining the condemnation of private land, nor even the transfer of that land to private parties who pay all or part of the compensation award.[141] Second, within this realm of takings, the Court made it clear that its role was narrow and deferential. As Justice O'Connor wrote in *Midkiff*, "[t]here is, of course, a role for courts to play in reviewing a legislature's judgment of what constitutes a public use, even when the eminent domain power is equated with the police power. But the Court in *Berman* made clear that it is 'an extremely narrow' one."[142]

3. Factors Raising Suspicion

When a condemnation effected to achieve economic development falls into the third category of economic development takings, but involves circumstances raising a court's suspicions that an insufficient public purpose is present, the case then converts into a fourth category case of eminent domain, and a higher judicial standard is applied.[143] The purpose for this safety net is to protect property rights against economic development plans that meet all of the requirements of category three but are nonetheless suspect and therefore deserve closer judicial scrutiny.

An example of such a scenario occurred in the case of *Bailey v. Meyers*.[144] There, the "Town Center" redevelopment plan for Mesa City, Arizona did not originally include the land on which the plaintiff, Randall Bailey, operated his family business.[145] After the owner of an Ace Hardware store expressed interest in relocating his store to a street corner just outside of the redevelopment area, the City Council passed resolutions ex-

140. Weiner v. United States, 357 U.S. 349, 352 (1958).
141. *See, e.g.*, Strickley v. Highland Boy Gold Mining Co., 200 U.S. 527 (1906).
142. *Midkiff*, 467 U.S. at 240.
143. *See* discussion *infra* Part III.C.
144. Bailey v. Myers, 76 P.3d 898 (Ariz. Ct. App. 2003).
145. *Id.* at 899.

panding the redevelopment area to include the Bailey's property, which meant that the Bailey's business would be condemned.[146] The City Council's justification was that it wanted to create "an attractive and revitalized 'gateway' to the downtown area."[147] To the Arizona Court of Appeals, the existence of the city's comprehensive plan and the public benefits flowing from the redevelopment were not enough to legitimize the taking.[148]

As the legal community has noted, "the facts of the case were . . . important: the original comprehensive plan did not include the property in dispute. Instead, the plan was amended, seemingly at the request of another private business that wanted the property. The facts here looked suspicious to the court."[149] Undoubtedly, a court faced with a case such as *Bailey* would be apprehensive about affording its legislature complete deference in planning for redevelopment. Circumstances, however, will not always be so clear.

Factors typically raising a court's suspicions include: a lack of opportunities for public input and reaction to a development plan;[150] the absence of significant studies by state agencies regarding "the project's economic, environmental, and social ramifications;"[151] and no showing that a variety of development plans were reviewed and that the private developer chosen was from a group of applicants rather than preselected.[152] It is also suspicious if the identities of many of the private beneficiaries were known at the time the city formulated its plans.[153] Further, it is suspicious if: a city refuses to comply with "procedural requirements that facilitate review of the record and inquiry into the city's purposes;"[154] there is anything in the record indicating that the city was primarily "motivated by a desire to aid . . . particular private entities;"[155] an integrated development plan is lacking;[156] careful deliberation did not precede the development plan's adoption;[157] there is a lack of anything on the record indicating a sub-

146. *Id.* at 899-900.
147. *Id.* at 900.
148. *Id.* at 904.
149. Schultz, *supra* note 51, at 233.
150. *See* Kelo v. City of New London, 545 U.S. 469, 473-74 (2005).
151. *Id.*
152. *See id.* at 492.
153. *See id.*
154. *Id.* at 493.
155. *Id.* at 492.
156. *See id.* at 487.
157. *See id.* at 484.

stantial public benefit; or the original development plan was revised or expanded to include the property at issue.[158]

C. Eminent Domain Category Four & The Proportional Benefit Test

In his concurring opinion in *Kelo*, Justice Kennedy explained that his agreement with the majority did "not foreclose the possibility that a more stringent standard of review than that [of deference to the legislature] announced in *Berman* and *Midkiff* might be appropriate for a more narrowly drawn category of takings . . . . This demanding level of scrutiny, however, is not required simply because the purpose of the taking is economic development."[159] Between the third category of economic development takings and those private transfers considered to be outright invalid,[160] lies the fourth and final eminent domain category—the "more narrowly drawn category of takings" forecasted by Kennedy.[161] Not meeting the requirements of category three, this fourth category comprises condemnations for the purpose of economic development where there is a lack of evidence of a significant governmental presence or exigency, or, in the case of plans meeting those requirements, transfers that otherwise raise a court's suspicions "that a private purpose [is] afoot."[162]

In her dissenting opinion, Justice O'Connor responds to the majority's decision and Kennedy's concurrence by expressing fear that although the particular facts in *Kelo* might provide a legitimate public purpose, the precedent set by the case could allow "property transfers generated with less care, that are less comprehensive, that happen to result from [a] less elaborate process, whose only projected advantage is the incidence of higher taxes, or that hope to transform an already prosperous city into an even more prosperous one."[163] These words from Justice O'Connor characterize situations in which a significant governmental presence or public exigency is lacking. Indeed, if courts are not required to hold such property transfers subject to a higher level of scrutiny, Justice O'Connor's fears could be realized. However, by

158. *See* Bailey v. Myers, 76 P.3d 898 (Ariz. Ct. App. 2003).

159. *Kelo*, 545 U.S. at 493 (Kennedy, J., concurring).

160. *See* Haw. Hous. Auth. v. Midkiff, 467 U.S. 229, 245 (1984) ("A purely private taking could not withstand the scrutiny of the public use requirement; it would serve no legitimate purpose of government and would thus be void.").

161. *Kelo*, 545 U.S. at 493 (Kennedy, J., concurring).

162. *Id.* at 487.

163. *Id.* at 504 (O'Connor, J., dissenting).

creating a fourth category for these transfers and a higher standard of review, individual property interests can be guarded while allowing only economic development condemnations that are legitimately for a public use and not merely incidental to private benefits to proceed.

What the *Kelo* dissent fears is a *de minimis* public purpose becoming the basis for taking private homes and businesses. To prevent this from happening, a court would need to do more than simply review whether "the legislature's purpose is legitimate and its means are not irrational."[164] A court should instead raise the bar by requiring the government to proportionally weigh a dominant public purpose[165] against "the severity of the burden that government imposes upon private property rights."[166] In this fourth category of eminent domain cases, courts could apply a test similar to *Nollan*'s "essential nexus"[167] and *Dolan*'s "rough proportionality"[168] (the fourth category in the *regulatory* takings scheme), and impose a burden of proof on the government to demonstrate that the taking achieves a public purpose. The minority in the Supreme Court of Connecticut *Kelo* decision argued for a "clear and convincing evidence" test,[169] which seems similar to *Dolan*'s "rough proportionality" standard.[170] This test, however, steers too close to the "mathematical precision" rejected by the Court in *Dolan*.[171] Instead, courts should address the fourth category of eminent domain cases in the following way: A court's suspicion is raised and a higher level of scrutiny is warranted when condemnation in pursuit of economic development objectives does not involve a significant governmental presence, clear public exigencies are absent, or conditions exist otherwise indicating

164. *Id.* at 488.

165. *See, e.g.,* Yonkers Cmty. Dev. Agency v. Morris, 335 N.E.2d 327, 331 (N.Y. 1975).

166. Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 539 (2005).

167. The *Nollan* court first used the term "essential nexus," which is now a standard term in takings jurisprudence. *See supra* note 26.

168. For the *Dolan* court's explanation of its creation of the "rough proportionality" test, see *supra* note 27. Development projects passing the rough proportionality test fit within the fourth category in the regulatory takings scheme.

169. *Kelo*, 545 U.S. at 477 ("The three dissenting justices would have imposed a 'heightened' standard of judicial review for takings justified by economic development. Although they agreed that the plan was intended to serve a valid public use, they would have found all the takings unconstitutional because the City had failed to adduce 'clear and convincing evidence' that the economic benefits of the plan would in fact come to pass.").

170. *See* Dolan v. City of Tigard, 512 U.S. 374, 391 (1994).

171. *See supra* note 27.

that public benefits might be incidental to the private purpose of the taking. In these cases, the condemnor must show to the court's satisfaction that the taking of an individual's title to property serves an important and meaningful public purpose.

The *Dolan* Court, eschewing deference to the legislature, heightened the standard of review for regulatory takings and required the government to "make some sort of individualized determination that the required dedication [was] related both in nature and extent to the impact of the proposed development."[172] Similarly, by using a more intermediate level of scrutiny[173] and by placing the burden on the government instead of the challenger, the fundamental property rights affected by eminent domain are offered greater protection. By requiring the condemnor to demonstrate the particular public benefits to be achieved, a court can be satisfied that there is sufficient weight to balance the taking of fee simple absolute title[174] (the complete "bundle of rights"[175]), thus achieving the required proportionality between the property owner's loss and the public's gain. In doing so, a court avoids permitting the type of takings feared by the *Kelo* dissent[176] while still making available the Public Use Clause[177] to cases involving economic development. If a category four case cannot satisfy this important and meaningful public purpose standard, then the taking will be found to impermissibly encroach upon property rights and will be held invalid.

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172. *Id.*

173. A level similar in kind to the intermediate level of scrutiny required in some constitutional law cases falling under the guard of the Equal Protection Clause, U.S. CONST. amend. XIV. For example, "[t]o withstand constitutional challenge, previous cases establish that classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives." Craig v. Boren, 429 U.S. 190, 197 (1976).

174. *See supra* note 74.

175. *See* Kaiser Aetna v. United States, 444 U.S. 164, 176 (1979).

176. Kelo v. City of New London, 545 U.S. 469, 504 (2005) (O'Connor, J., dissenting) ("property transfers generated with less care, that are less comprehensive, that happen to result from [a] less elaborate process, whose only projected advantage is the incidence of higher taxes, or that hope to transform an already prosperous city into an even more prosperous one.").

177. U.S. CONST. amend. V. ("nor shall private property be taken for public use without just compensation").

IV. CONCLUSION: THE EXERCISE OF PRACTICAL JUDGMENT

Ultimately, categorizing and addressing eminent domain cases should not be approached with the mathematical precision cautioned against in *Dolan*.[178] The distinctions between categories three and four, and impermissible private-to-private transfers are difficult to characterize with bright line definitions. But, as Justice O'Connor points out, "it is in the nature of things that the boundaries between these categories are not always firm."[179] Rather, "[t]hese matters call for the exercise of a considerable degree of practical judgment, common sense and sound discretion."[180]

What is proposed in this article is a framework for the classification of eminent domain condemnations in line with that of the regulatory takings scheme set forth in *Lingle*[181] that meets the fears of the *Kelo* dissenters. Akin to the regulatory takings scheme, there are four discrete categories of eminent domain cases: (1) public ownership of taken property; (2) actual use by the public of property; (3) economic development with a significant governmental presence or exigent circumstance; and (4) a fourth higher level of scrutiny category where, in cases of economic development lacking a significant governmental presence, social exigency, or otherwise raising suspicions, the taking of an individual's title to property must serve an important and meaningful public purpose. Through this framework, condemnations are limited to three clear categories where the public interest is great and one where the condemnor must demonstrate the public interest achieved to the courts satisfaction. By holding other takings to be invalid, this exposes those takings that are privately motivated, that fall outside of the century-old understanding of public use, and quiets the alarm sounded because of concerns of an overbroad reading of the *Kelo* case.[182]

178. Dolan v. City of Tigard, 512 U.S. 374, 391 (1994).
179. *Kelo*, 545 U.S. at 497 (O'Connor, J., dissenting).
180. Yonkers Cmty. Dev. Agency v. Morris, 335 N.E.2d 327, 332 (N.Y. 1975).
181. Lingle v. Chevron U.S.A. Inc., 544 U.S. 528 (2005).
182. Justice O'Connor feared such an overbroad reading:
> [N]early any lawful use of real private property can be said to generate some incidental benefit to the public. Thus, if predicted (or even guaranteed) positive side-effects are enough to render transfer from one private party to another constitutional, then the words "for public use" do not realistically exclude *any* takings, and thus do not exert any constraint on the eminent domain power . . . . The specter of condemnation hangs over

As noted by the *Kelo* dissent, Alexander Hamilton described "the security of Property" as one of the "great objects of Government."[183] For this reason and because of the plight of citizens like Suzette Kelo and Wilhemina Dery, a higher standard of review is necessary to protect property from the impermissible exertion of the eminent domain power. Implementing a higher judicial standard for evaluating category four eminent domain cases provides a reasonable check on the broad authority of many local governments and serves as a middle ground to meet the concerns of the *Kelo* dissent while still allowing the Public Use Clause[184] to be utilized for economic development.

> all property. Nothing is to prevent the State from replacing any Motel 6 with a Ritz-Carlton, any home with a shopping mall, or any farm with a factory.

Kelo, 545 U.S at 501-03 (O'Connor, J., dissenting).

183. *Id.* at 496 (O'Connor, J., dissenting).

184. U.S. CONST. amend. V ("nor shall private property be taken for public use without just compensation").