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Introduction

The land use issues facing our nation and how we address them are critical. The United States population is expected to grow 48.8 percent by 2050 (from 2000),[1] exerting pressure on availability of natural resources, infrastructure, jobs and the housing required to support a population of nearly 420 million people.[2] How do we house another 138 million people and at the same time preserve our open space, endangered species, clean air and water? How can we adequately provide infrastructure for waste disposal, transportation, water and power? How do we provide affordable housing?

A confluence of forces with primarily good intentions?social, legal, economic and environmental?has taken a sledge hammer to the rights of individual property owners. For over two centuries, our legislation and common law have imposed increasingly restrictive regulations on individual property rights, adopting an "ends-justifies-the-means" philosophy.

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1. U.S. CENSUS BUREAU, U.S. INTERIM PROJECTIONS BY AGE, SEX, RACE, AND HISPANIC ORIGIN, *available at* http://www.census.gov.ipc/www/usinterimproj/natprojtab01b.pdf.

2. U.S. CENSUS BUREAU, U.S. INTERIM PROJECTIONS BY AGE, SEX, RACE, AND HISPANIC ORIGIN, *available at* http://www.census.gov.ipc/www/usinterimproj/natprojtab01a.pdf.

Today municipalities can legally impose a vast range of increasingly restrictive regulations on private property: regulations that dictate the color of the mortar that can be used between bricks;[3] regulations that mandate not only the height, but the color and material of which a fence can be made;[4] regulations that allow the taking of a private home for the sake of a (theoretically) more economically beneficial replacement;[5] and regulations that render fifty percent of city's lots uninhabitable for people but habitable for woodpeckers,[6] all under the mantra of "for the general welfare."[7]

In attempting to address critical issues in land use, we have all but obliterated the Constitutional protection of property rights for the individual. Our Constitution was supposed to provide the fundamental parameters to limit the means by which essential land use objectives were met.[8] It was supposed to ensure that the police power vested in local governments did

3. THE CORNWALL ON HUDSON MASTER PLAN COMMITTEE, DESIGN GUIDELINES FOR THE VILLAGE OF CORNWALL ON HUDSON 11 (2005-2006), *available at* http://www.cornwall-on-hudson.org/Minutes/Master%20Plan%20Committee/CoH%20Plan%20New%20Construction%20Guidelines%206.19.06.pdf.

4. *Id.* at 9.

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

6. Jonathan Spiers, *Town Commissioners Study Paying for Bird Mitigation*, THE STATE PORT PILOT, January 24, 2007, at 3A. The article cites that "2,704 parcels–roughly half of those in the city–are restricted from immediate development . . . ." At issue is whether "the cost to mitigate endangered woodpecker habitat prior to development can be charged to landowners whose properties are affected rather than the city's residents at large." *Id.* This is a quintessential example of what the future holds: A federal agency, Fish and Wildlife, imposes a moratorium on half of a small city's land, bringing the growth of the area to a halt, as well as halting the retirement dreams of many individual landowners. The moratorium was imposed on the small city with no plan in place, forcing responsibility on the city, economic loss on landowners and the city, with no accountability on the federal agency for the havoc it has left behind. If preservation of the woodpeckers is for the general welfare of the people, why is it asserted that only a select number of landowners must pay? Ostensibly, the endangered woodpeckers are being saved for the enjoyment of all, thus all should pay for that enjoyment. Conversely, if saving the woodpecker is important to a select few, then perhaps that select few should pay.

7. Berman v. Parker, 348 U.S. 33 (1954).

8. JAMES W. ELY, JR., THE GUARDIAN OF EVERY OTHER RIGHT 132 (1992). "From its inception, one scholar noted, 'the Court deemed its mission to be the protection of property against depredations by the people and their legislatures. After 1937 it gave up this mission.'" *Id.* (quoting LEO PFEFFER, THIS HONORABLE COURT: A HISTORY OF THE UNITED STATES SUPREME COURT 322 (Beacon Press 1965)).

not expand beyond the property rights endowed by the Fifth and Fourteenth Amendments.[9] It was supposed to protect the individual against abuses of power by the economically or politically advantaged. It was supposed to provide protection for a minimal set of fundamental rights, specifically the right to life, liberty and property.[10] It was supposed to be as important as our fundamental right to free speech, but instead, it has been subject to a mere rational basis test by the Court.[11]

The degradation of property rights has not been without reaction. It is unclear whether this reaction will spur a response in the form of prudent or imprudent property rights reform. Increasingly restrictive regulations have largely been implemented at the expense of a select number of property owners. These encroachments have, until recently, occurred quietly. The results, while legal, have been alarming in their practical application. There is a growing realization that if property regulation continues to be left unchecked, any one of us can wake up tomorrow and find that our home has been taken for the benefit of the public welfare.[12] Outrage[13] and publicity generated from the *Kelo v. City of New London*[14] decision have sparked a fire in a fledgling property rights movement, leading to reactionary legislation in many states.[15] The most notable example is Oregon's Measure 37, where "voters in Oregon approved a sweeping regulatory takings ballot initiative . . . allowing individual landowners to claim compensation from the local com-

9. *Id.*; U.S. Const. amend. V, XIV.

10. U.S. Const. amend. V.

11. David L. Callies, *Public Use: What Should Replace the Rational Basis Test?*, *in* EMINENT DOMAIN USE AND ABUSE: KELO IN CONTEXT 82 (Dwight H. Merriam & Mary Massaron Ross eds., 2006). "The critical issue is: with what standard should the Court replace its overly deferential and clearly misused rational basis test?" *Id.*

12. Kelo v. City of New London, 545 U.S. 469, 505 (2005) (O'Connor, J., dissenting). "Any property may now be taken for the benefit of another private party . . . ." *Id.*

13. *See* Dick M. Carpenter, II & Johnson K Ross, *Victimizing the Vulnerable*, INSTITUTE FOR JUSTICE, June 2007, at 1 (referring to *Kelo v. City of New London* as "one of the most reviled U.S. Supreme Court decisions in history . . .").

14. 545 U.S. 469 (2005).

15. CASTLE COALITION, 50 STATE REPORT CARD: TRACKING EMINENT DOMAIN REFORM LEGISLATION SINCE KELO (August 2007).

munity for any decrease in property value due to planning, environmental or other government safeguards."[16]

What are the "right" regulations? Supporting the demands of population growth while at the same time protecting natural resources will not be achieved by ignoring our fundamental and constitutional right to property. If it is true that providing affordable housing and preserving natural resources are unified objectives of "the people," then all of "the people" should share in the burden of achieving those objectives. How do we preserve a cornerstone of our economy, namely the wealth individuals hold in their property? How do we ensure that the Constitutional right to property is not sacrificed to the latest trend in urban renewal or social engineering?

There appears to be no easy answer. It will take the best and the brightest to deliver compromises that are effective. Without recognition, participation and input from all voices, rational solutions will elude us.

This paper will address the first of three categories of regulation and common law that profoundly affect property rights in America. In this first category, "takings" are viewed not simply in their traditional sense, but rather through the lens of a continuum: (a) from the obvious taking which results in a title transfer of property; (b) to the less obvious regulatory taking, whereby a piece of property is rendered valueless because of a new regulation; (c) to the insidious "taking" of property rights found in zoning and subdivision regulations, the latest of these being the "design guideline." The second and third categories of regulation and common law that affect American property rights cover the environmental regulations and procedural jurisprudence that govern land use. These latter categories are

16. AMERICAN PLANNING ASSOCIATION, ATTACK OF THE MEASURE 37 CLONES, *available at* http://www.planning.org/legislation/measure37. The APA keeps running statistics of legislation in regulatory takings areas reporting the following results: State and Local Regulatory Takings Ballot Measures Updated December 6, 2006, Takings Ballot Initiatives–Defeated (3), TAKINGS BALLOT INITIATIVES–PASSED (1), TAKINGS BALLOT INITIATIVES–REMOVED FROM BALLOT (5), EMINENT DOMAIN BALLOT MEASURES–PASSED (10), LOCAL REGULATORY TAKINGS BALLOT MEASURE–DEFEATED (1), LOCAL EMINENT DOMAIN BALLOT MEASURE–PASSED (1). *Id. See also* Ronald D. Utt, *States Vote to Strengthen Property Rights,* BACKGROUNDER, THE HERITAGE FOUNDATION 3 No. 2002 (February 1, 2007). In February of 2006, the Oregon Supreme Court upheld Measure 37.

critically important to the dialogue surrounding the question of "What are the right regulations?" They have contributed equally, if not more, to the degradation of property rights in America than have takings. However, the enormity of each subject requires a separate study and thus neither of them will be addressed here.

I. Eminent Domain Under the Power of the Fifth Amendment: So Just What is the Definition of "Public Use"?

The Supreme Court has moved away from its original narrow definition of public use and has substituted "public purpose" in its stead.[17] In its Fifth Amendment analysis, the Court has expanded the definition of public purpose to include all acts that fall under the auspices of police power.[18] Further, the definition of police power has evolved from that of protecting the public from harm to allowing actions that are for the greater good. In essence, no practical Constitutional protection of property ownership remains. A Constitutional, fundamental right to property has been transformed into a conditional privilege that is subject to the whim of the powerful.[19] Without change, this paves the way for a return to a feudal-like property system, where the right to use is the maximum right, and is subject to the wishes of the sovereign.[20]

An understanding of the evolution of American property rights is best begun with its historical antecedents. The "'acquisition and cultivation of land was the very raison d'etre for the colonies.'"[21] "To Europeans the American continent repre-

17. *See generally* Haw. Hous. Auth. v. Midkiff, 467 U.S. 229 (1984); Berman v. Parker, 348 U.S. 26 (1954); Strickley v. Highland Boy Gold Mining Co., 200 U.S. 527 (1906); Clark v. Nash, 198 U.S. 361 (1905); Fallbrook Irr. Dist. v. Bradley, 164 U.S. 112 (1896).

18. *See generally Midkiff*, 467 U.S. 229.

19. Kelo v. City of New London, 545 U.S. 469, 505 (2005) (O'Connor, J., dissenting). "Any property may now be taken for the benefit of another private party, but the fallout from this decision will not be random. The beneficiaries are likely to be those citizens with disproportionate influence and power in the political process, including large corporations and development firms." *Id.*

20. E.F. Roberts, *The Demise of Property Law*, 57 CORNELL L. REV. 1 (Nov. 1971).

21. JAMES W. ELY, JR., THE GUARDIAN OF EVERY OTHER RIGHT 10 (1992) (quoting WILLI PAUL ADAMS, THE FIRST AMERICAN CONSTITUTIONS: REPUBLICAN IDEOL-

sented a boundless opportunity for speculation and development; indeed the prospect of new land was the main economic inducement for colonization."[22] This desire for land was a factor in an ongoing evolution in the English rejection of the feudal system of land use. After the Norman Conquest, land was held by the King, who in turn gave his trusted allies use rights in the land that were conditioned on provision of services to the King.[23] Ownership remained with the King. Over several centuries, this system of land use evolved:

> In England, as in western Europe generally, land was the principal source of wealth and social status. Yet landownership was tightly concentrated in relatively few hands, and most individuals had no realistic prospect of owning land. Moreover, in theory no person owned land absolutely: All land was held under a tenurial relationship with the crown. Although there was a bewildering variety of tenure arrangements, property ownership was conditional and involved continuing obligations to a superior. By the seventeenth century, these obligations took the form of quitrents, annual payments to the king or overlord. Feudal in origin, the *quitrent* was regarded as a type of taxation.[24]

The settlement of the American colonies required a different view of land ownership. Trading companies used generous land grants as incentives to lure settlers. Outside of New York, most land was granted under the "headright system," granting 50 to 150 acres as titles in fee simple.[25] New York, however, initially instituted a system of patroonships, which granted enormous tracts of land to proprietors. The proprietors in turn leased, rather than sold, portions of the land to individuals, a system with similarities to the feudal system. The desire to own land forced settlers to other colonies and caused severe social unrest, resulting in agrarian riots in 1776.[26] "The unrest in

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OGY AND THE MAKING OF THE STATE CONSTITUTIONS IN THE REVOLUTIONARY ERA 191 (1980)).

22. *Id.*

23. John R. Nolon, *Historical Overview of the American Land Use System: A Diagnostic Approach to Evaluating Governmental Land Use Control, in* LAND USE LAW COURSE SUPPLEMENT FALL 2006 2 (2006).

24. ELY, *supra* note 8, at 11.

25. *Id.* at 11.

26. *Id.* at 12.

New York vividly confirmed the central place of property ownership in colonial thinking."[27]

An examination of the Takings Clause's inclusion in the Bill of Rights reveals very little of the Founders' thinking.[28] Although the States proposed many amendments to the Constitution, none submitted a proposal for the Takings Clause. Instead, James Madison included it in his first proposal of a draft bill of rights that was distilled from the States' inputs.[29] During committee discussion, Madison's proposal was modified slightly from his first version that no person "'be obliged to relinquish his property, where it may be necessary for public use, without a just compensation,'"[30] to "'nor shall private property be taken for public use without just compensation.'"[31] No further changes were made during House and Senate debate, and there is no record of what was said relating to the Takings Clause during the state ratifying conventions.[32] Legal scholars David Dana and Thomas Merrill infer from this uneventful inclusion of the clause that the "Takings Clause most likely was perceived as effecting no change in the legal status quo with respect to government takings of property,"[33] most probably because the notion was already included in the state constitutions[34] and derived from the accepted similar clause in the "time honored guarantees of [the] Magna Carta (1215)."[35]

In one of its earliest decisions relating to the subject, the Court stated that "an ACT of the Legislature (for I cannot call it a law) contrary to the great first principles of the social compact, cannot be considered a rightful exercise of legislative authority."[36] The Court then went on to provide several examples of what would not be rightful exercises of legislative authority, including "a law that takes property from A and gives it to B: It is against all reason and justice, for a people to entrust a Legis-

27. *Id.*
28. DAVID DANA & THOMAS MERRILL, PROPERTY TAKINGS 9 (2002).
29. *Id.* at 10.
30. *Id.* (quoting 1 ANNALS OF CONG. 452 (Joseph Gales ed., 1789)).
31. *Id.* (quoting EDWARD DUMBAUL, THE BILL OF RIGHTS AND WHAT IT MEANS TODAY 162 (2d ed. 1979)).
32. *Id.*
33. *Id.* at 15.
34. ELY, *supra* note 8, at 32.
35. *Id.* at 13.
36. Calder v. Bull, 3 U.S. 386, 388 (1798).

lature with SUCH powers . . . ."[37] Interestingly enough, the Court's commentary specifically addressed its own authority, and any limits thereto, to invalidate state legislation when it violated the Constitution.[38] For almost the next hundred years, courts came "to see laws or acts which 'took from A to give to B' as the paradigmatic abuse of government authority."[39]

The Court did not however, hold that the right to property is absolute. It addressed the need for eminent domain for legitimate public use, which "mostly involved takings of vacant strips of land for irrigation ditches, and other easements."[40] In *Fallbrook Irrigation Dist. v. Bradley*,[41] an 1896 case, which is often inaccurately cited as a takings case, the Court provided substantial dicta on its definition of public use. It first acknowledged that the state courts were not consistent in the definition of public use, some defining it broadly and some narrowly.[42] Further, that public use "largely depends upon the facts and circumstances surrounding the particular subject-matter in regard to which the character of the use is questioned,"[43] but clearly the need for irrigation in the vast, arid lands of California constituted a public use by any standards.[44] What is most interesting about the *Fallbrook* case is that its subsequent misinterpretation as a case of condemnation ultimately laid the groundwork for today's equating of public use with public purpose:

> Justice Peckham . . . erroneously asserted in *Clark v. Nash* that *Fallbrook* was a condemnation case by a corporation that was seeking to take private property for irrigation (it was nothing of the sort), and where he confused public purpose with public use. . . . [I]t was not a condemnation case as asserted by Justice Peckham in *Clark*, but rather a due process challenge to the district's legitimacy in performing its function of providing water for

37. *Id.* (emphasis in original).

38. *See generally id.*

39. Timothy Sandefur, *The "Backlash" So Far: Will Citizens Get Meaningful Eminent Domain Reform?*, *in* SL049 ALI-ABA COURSE OF STUDY JANUARY 5-7, 2006 703, 710 (2006).

40. Gideon Kanner, *Kelo v. New London: Bad Law, Bad Policy, and Bad Judgment*, 38 URB. LAW 201, 205 (SPRING 2006).

41. 164 U.S. 112 (1896).

42. *Id.* at 158.

43. *Id.* at 160.

44. *See generally id.*

> irrigation, and of its taxation powers to accomplish that purpose. No one sought to condemn any property from Ms. Bradley (the plaintiff). Rather, she sued to enjoin the sale of her land located within district boundaries, which was to be sold because of her refusal to pay a circa $50 assessment lien against it. She advanced the odd argument that the Due Process Clause deprived the district of any power to levy the assessment because it was said to lack a public purpose and was thus illegitimate. . . . Thus, even if viewed erroneously as an eminent domain case, *Fallbrook* spoke a classic instance of use *by the public*, which by any standard was clearly within the ambit of even the most literal construction of the "public use" clause of the Fifth Amendment. Nonetheless, nine years later, in *Clark v. Nash*, Justice Peckham somehow perceived *Fallbrook* to have been an eminent domain case in which a corporation sought to condemn water rights. His error in finding a holding in *Fallbrook* that "public purpose" in the context of a substantive due process case was synonymous with "public use" within the meaning of the Eminent Domain Clause, hardened into law when *Clark* was unwittingly accepted as precedent a year later. . . . in *Strickley v. Highland Boy Gold Mining Co.* in which, without any analysis whatever, he simply relied solely on the holding of *Clark* that in turn relied on the nonexistent *Fallbrook* holding.[45]

Regardless of whether one believes that Kanner's assessment is correct, it is clear that *Strickley v. Highland Boy Gold Mining Co.*[46] laid the groundwork for the transition whereby *use by the general public* as a universal test for the public use was no longer considered adequate by the courts. In *Strickley*, which actually was a condemnation case, Highland Boy Mining Company ("Highland") sought to obtain a right of way for an aerial bucket line to carry ores and other things from the mines for itself and others to the railway station. The facts show that Highland made "diligent inquiry" to find the owner of the placer claim but when unsuccessful, put up the structure and paid into the court the value of the right of way. Strickley, on the other hand, was found to have stood by and watched the erection of the structure without making his right known.[47] Strickley's argument was that the right of way was not for public use but

45. Kanner, *supra* note 40 at 222-23 (citations omitted).

46. 200 U.S. 527 (1906).

47. Strickley v. Highland Boy Mining Co., 200 U.S. 527, 529-30 (1906).

rather was for private use and thus in violation of his Fourteenth Amendment rights. Highland claimed that Utah Statutes specifically defined public uses as on behalf of "smelting, or other reduction of ores, or the working of mines."[48] Thus, the condemnation was, in Highland's view, authorized by state laws. The question for the Court was then to determine if the Utah state law was constitutional. The Court stated that the question was "pretty nearly answered by the recent decision in Clark . . . [that] [i]n discussing what constitutes a public use, it recognized the inadequacy of use by the general public as a universal test."[49] Further, the Court framed the question by stating that if the public welfare of the state demands that the right of way be given, the Constitution "does not require us to say that they are wrong."[50] Thus, the foundation for three distinct threads of takings jurisprudence emerges: first, that public use may be equated with public purpose; second, that the public welfare, or police power, is a legitimate public purpose; and third, that private parties may be the conduit to achieve the public welfare if no other means are available.

A. *Modern Takings Jurisprudence*

Some fifty years later, the Court decided the seminal case of *Berman v. Parker*,[51] allowing the District of Columbia Redevelopment Land Agency (Agency) to condemn an unblighted department store in a blighted neighborhood because "it was hoped that the cycle of decay of the area could be controlled and the birth of future slums prevented."[52] In this astounding decision, the Court cemented all of the basic tenets of today's takings jurisprudence. First, it gave unfettered discretion to the legislature to define the extent of police power and then provided almost absolute deference to that legislation. "The definition [of police power] is essentially the product of legislative determinations addressed to the purposes of government . . . . [W]hen the legislature has spoken, the public interest has been

48. *Id.* at 530.
49. *Id.* at 531.
50. *Id.*
51. 348 U.S. 26 (1954).
52. *Id.* at 35.

declared in terms well-nigh conclusive."[53] In furtherance of broadening the police power, Justice Douglas said:

> The values it [the public welfare] 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.[54]

Second, the *Berman* decision "confused the exercise of the police power with the exercise of the power of eminent domain when [Justice Douglas] asserted that in dealing with eminent domain, the Court was dealing with the police power."[55] Third, the decision sanctioned the taking of property from private owner A and giving it to private owner B because the ends justify the means, "For the power of eminent domain is merely the means to the end. . . . Here one of the means chosen is the use of a private enterprise for the redevelopment of the area."[56] Last, Justice Douglas all but rewrote the Constitution himself, for the only place where the words "public use" are present are in his quoting of the D.C. ordinance and the Fifth Amendment.[57] Thereafter, Justice Douglas used the phrase "public purpose" without even acknowledging a distinction.[58] In sum, "to follow Justice Douglas' notion in *Berman* that the [police powers and eminent domain powers] are one, was to let the broad, and doctrinally ill-defined 'public purpose' police power justification swallow the specific, narrower 'public use' limitation, thereby *de facto* reading it out of the Constitution."[59]

Thirty years later, Justice O'Connor began her analysis in *Hawaii Housing Authority v. Midkiff*[60] by referencing *Berman*.[61] In *Midkiff,* the State of Hawaii sought to remedy a land oligopoly on the island created by a historical feudal land tenure system by condemning property and then transferring it from the lessors to the lessees. The Hawaii Legislature discovered that

53. *Id.* at 32.
54. *Id.* at 33.
55. Kanner, *supra* note 40 at 211.
56. Berman v. Parker, 348 U.S. 26, 33 (1954).
57. *Id.* at 29, 31.
58. *See generally id.*
59. Kanner, *supra* note 40 at 211.
60. 467 U.S. 229 (1984).
61. *Id.* at 239.

forty-seven percent of the State's land was in the hands of only seventy-two landowners, concluding that this ownership disparity was responsible for "inflating land prices and injuring the public tranquility and welfare."[62]

Citing *Berman,* O'Connor used the premise "[t]he 'public use' requirement is thus coterminous with the scope of a sovereign's police power,"[63] as the foundation of her analysis. Hence, the entire analysis in *Midkiff* is based upon the review of a police power decision, not a review of deprivation of fundamental rights. O'Connor did admit, "[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."[64] O'Connor again referred to *Berman* to intertwine eminent domain and police power, reaffirming the error that the test for eminent domain takings is the rational basis test.[65] "But where 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."[66] Even the most rudimentary class in Constitutional Law teaches that deprivation of a fundamental right requires strict scrutiny by the Court.

Next, Justice O'Connor addressed the issue of public use, using the words "public purpose" not "public use," just as was done in *Berman.*[67] The analysis goes on to articulate that although the title to the lands passed directly from one private land owner to another; "The Act advances its purposes without the State's taking actual possession of the land. In such cases, government does not itself have to use property to legitimate the taking; it is only the taking's purpose, and not its mechan-

62. *Id.* at 232. Aside from issues surrounding the correctness of the *Midkiff* decision, it is interesting to note that nearly 49 percent of the land was owned by the state and federal government. Perhaps there was not only another source of the oligopoly problem, but a solution that would not require the taking of property from private property owners?

63. *Id.* at 240.

64. *Id.*

65. "But where 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." *Id.* at 241.

66. *Id.* at 241.

67. *See generally Midkiff*, 467 U.S. 229.

ics, that must pass scrutiny under the Public Use Clause."[68] It is also the State's purpose that determines, under the rational basis test, whether the taking was justified. Ultimately, the Court concluded, "[r]egulating 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."[69] In this case, however, as in all other land use decisions, great deference is afforded to local legislative decisions, and no assessment is made on the soundness of those decisions nor is anyone held accountable for the outcomes.

Thus by the time that *Kelo v. City of New London*[70] was decided in 2005, it should have been foreseeable that the Court would decide in favor of the City, not the landowner(s). In 1798, the Court clearly indicated that it was against all reason and justice for people to entrust a Legislature with such powers as taking property from A and giving it to B.[71] By 1896, the Court said the definition of public use "largely depend[ed] upon the facts and circumstances surrounding the particular subject-matter . . . ."[72] In 1905, the Court confused the *Fallbrook* holding as a condemnation case rather than a substantive due process case and then used the *Fallbrook* holding in *Clark*. *Clark* then laid the groundwork for changing the definition of public use to public purpose, and by 1906, the Court cemented the error in *Strickley*. The Court stated that use by the general public is not the test for public use—that if the public welfare demands a right of way that demand is adequate justification, and it is not for the Court to judge the wisdom of any police power justification.[73] In 1954, the Court used the classic "ends justifies the means" holding, giving local government unfettered discretion in defining police power by articulating a list that excluded nothing. The Court then succinctly stated that when dealing with eminent domain, the Court was dealing with police power, and defined public "use" as public "purpose," without so much as an acknowledgement of the change.[74] It is now simply

68. *Id.* at 244.
69. *Id.* at 242 (citations omitted).
70. 545 U.S. 469 (2005).
71. Calder v. Bull, 3 U.S. 386, 388 (1798).
72. Fallbrook Irrigation Dist. v. Bradley, 164 U.S. 112, 158 (1896).
73. Strickley v. Highland Boy Gold Min. Co., 200 U.S. 527, 531 (1906).
74. *See* Berman v. Parker, 348 U.S. 26 (1954).

an accepted definition. The 1984 case of *Midkiff* stated that the public use requirement was "coterminous"[75] with the scope of police power, and clearly articulated that the test is the rational basis test.[76]

B. *The Effect of the "New" Definition of Public Use*

In the now infamous *Kelo v. City of New London*[77] decision, the city of New London used eminent domain to take the property of Susette Kelo and transfer it to a private entity. The case has come to stand for the notion that economic development is a valid public use under the Fifth Amendment. Kelo's home was not blighted, nor was the area blighted. Rather, the justification was that the redevelopment of the area would bring in substantial tax revenue and jobs and would take advantage of the recent relocation of the Pfizer Corporation to New London.[78] The Court simply expanded the definition of public use under the Fifth Amendment allowing the government to transfer property from one private owner to another "simply on the ground that the new owner is expected to make a greater contribution to the local economy."[79] If one analyzes the decision using the rational basis test for reviewing a police power decision, then it makes sense. It is certainly within the local legislative authority to act in the interest of the general health, welfare, safety and morals of the community; it is not within the Court's authority to judge the wisdom of local police power acts—only to review if there is some rational basis for the act. In using *Berman* and *Midkiff,* the Court justifies the transfer of the property from one private owner to another on the grounds that the ends justify the means. Thus there is some rational basis for the "end," constituting a valid police power act. If one agrees that the public use requirement is "coterminous" with the scope of police power as O'Connor stated in the *Midkiff* decision,[80] the *Kelo* holding should have been much ado about nothing.

75. Haw. Hous. Auth. v. Midkiff, 467 U.S. 229, 240 (1984).

76. *See id.*

77. 545 U.S. 469 (2005).

78. *See id.*

79. Ilya Somin, *Robin Hood In Reverse: The Case Against Economic Development Takings*, CATO INSTITUTE POLICY ANALYSIS Feb. 21, 2005 No. 535 at 2, *available at* http://www.cato.org/pub_display.php?pub_id=3678.

80. *Midkiff*, 467 U.S. at 240.

So why was there such an enormous backlash to the *Kelo* decision? Economic development takings were not new, the most egregious of these being the 1981 *Poletown* decision of the Michigan Supreme Court.[81] In *Poletown*, the court justified "destroying an entire neighborhood and condemning the homes of 4,200 people, as well as numerous businesses, churches, and schools, so that the land could be transferred to General Motors for the construction of a new factory."[82] Perhaps the enormous backlash to *Kelo* arose because *Kelo* represents the Supreme Court's ratification, in a single case, of individual threads sown into the Court's decisions since *Clark*. Put together, the synthesis of these threads culminated in a decision that offends some Americans' sense of justice. The decision subjects the largest asset of most middle class Americans to takings by the government with little more justification than an empty promise of greater tax revenue.[83] Worse, programs using takings under the guise of economic development simply do not work as promised.[84] Perhaps the backlash arose because:

> fundamental fairness is said to be an attribute of American constitutional law, particularly where the Bill of Rights is concerned, it is unfortunate that faultless citizens who mind their own business, pay their taxes and do their best to be left alone to pursue happiness in their lives with such modest resources as they have been able to accumulate should occupy a lesser position on the

81. Poletown Neighborhood Council v. City of Detroit, 304 N.W.2d 455 (Mich. 1981). The *Poletown* decision was later reversed in *County of Wayne v. Hathcock*, returning the Michigan court to a narrow definition of public use. *See* County of Wayne v. Hathcock, 684 N.W.2d 765 (Mich. 2004).

82. Somin, *supra* note 79, at 2.

83. *See generally id.* Somin argues that the economic development rationale can justify almost any taking that benefits a commercial enterprise. This has been further exacerbated by the courts' failure to require new owners of property acquired via condemnation to be held accountable through binding legal obligations for economic promises made. Somin's study analyzes the failure of Poletown (promise of 6,150 new jobs with actual result of only 60 percent of that number, the cost of preparing the site for GM was over $200 million to the city of which GM only paid $8 million; 600 small businesses were condemned resulting in a loss of approximately 2,500 jobs–thus a net increase in jobs of only approximately 1,200; plus loss of tax revenue of 600 businesses and 1,200 homes) claims that Poletown did more harm than good to the city of Detroit. *Id.* at 7. Somin goes on to say that the urban renewal programs of the forties and fifties "uprooted hundreds of thousands of people, destroyed numerous communities, and inflicted enormous social and economic costs, with few offsetting benefits." *Id.* at 15.

84. *See generally id.*

> judicial scale of values than do violent, anti-social members of society, whose constitutional rights are assiduously guarded by the courts. . . . But axiomatically innocent people have constitutional rights too, and their legitimate interest should receive a modicum of fair treatment from the judicial system as well, particularly when they are being subjected to the trauma of eviction from their homes and businesses without having done anything to deserve it.[85]

Perhaps the backlash arose because we are quite sure that Madison and the founders never envisioned an end result like *Kelo*.[86]

II. Regulatory Takings

Legislative restrictions on property, even if not a title transfer, may give rise to compensation when the regulation goes too far. However, the Court provides no clear definition of when a "regulation goes too far."[87] The Court says it has "been unable to develop any 'set formula' for determining when 'justice and fairness' require that economic injuries caused by public action be compensated by the government rather than remain disproportionately concentrated on a few persons."[88]

As the Supreme Court was striking down property rights via the use of eminent domain, it was, at least consistently, applying the same lack of respect for property rights in those cases that were not blatant, obvious takings. At least in the eminent domain arena, one could tell that it was a taking. But without so clear a line as a transfer of title, the courts have muddled through defining exactly what constitutes a taking. The Supreme Court says they have "been unable to develop any 'set formula' for determining when 'justice and fairness' require that economic injuries caused by public action be compensated by the government rather than remain disproportionately concentrated on a few persons."[89] The evolution of the decisions

85. Kanner, *supra* note 40, at 230.

86. Kelo v. City of New London, 545 U.S. 469 (2005). "As for the victims, the government now has license to transfer property from those with fewer resources to those with more. The Founders cannot have intended this perverse result." *Id.* at 505. (O'Connor, J., dissenting).

87. Pa. Coal Co. v. Mahon, 260 U.S. 393, 415 (1922).

88. Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 124 (1978).

89. *Id.*

show how the Court, absent a blatant transfer of property, is unclear about defining a taking and testing whether a taking has occurred. A loss of less than total economic value is not considered a taking, although a regulation, if it "goes too far," can be considered a taking.[90] So what is the definition of "too far?"

In 1978, the Court held that the denial of a permit to build an addition to Penn Central Terminal based on the Landmarks Preservation Law did not constitute a taking.[91] New York City had enacted a landmarks preservation law in 1965 that identified selected properties of historic or aesthetic interest within the city. In addition to other facets of the regulation, the Landmarks Preservation Law subjected the designated properties to a variety of building and development restrictions. Most applicable for the purposes of this discussion was that "the Commission must approve in advance any proposal to alter the exterior architectural features of the landmark or to construct any exterior improvement on the landmark site . . . ."[92] Penn Central submitted two separate alternative plans for review under this law to build fifty stories atop Grand Central terminal. The City denied both applications, claiming that the plans were "nothing more than an aesthetic joke"[93] and "that the restrictions on the development of the Terminal site were necessary to promote the legitimate public purpose of protecting landmarks . . . therefore, the appellants could sustain their constitutional claims only by proof that the regulation deprived them of all reasonable beneficial use of the property."[94] Penn Central filed suit claiming the denial of the application was a "taking" requiring just compensation. Penn Central premised their argument to the Court on two factors: first, the air space above the terminal is a valuable property interest and second, the Landmarks Law deprived them of any gainful use of their air rights above the terminal. "[I]rrespective of the value of the remainder of their parcel, the city has 'taken' their right to this [space], thus entitling them to 'just compensation' measured by

90. *Mahon*, 260 U.S. at 415.

91. *Penn Cent. Transp. Co.*, 438 U.S. at 124.

92. *Id.* at 112.

93. *Id.* at 118.

94. *Id.* at 119.

the fair market value of these air rights."[95] Second, "New York City's regulation of individual landmarks is fundamentally different from zoning or from historic-district legislation because the controls imposed by New York City's law apply only to individuals who own selected properties."[96]

The Court reviewed three factors to analyze whether a regulation that destroys the economic value of a property is a taking or not: "the economic impact of the regulation on the claimant . . . the extent to which the regulation has interfered with [the] distinct investment-backed expectations [of the claimant, and] the character of the governmental action."[97] The Court held that there was not a taking of private property that required just compensation. The City's regulation was held to be a valid protection of the people. Penn Central could go on using the terminal and building as it had in the past, but the airspace above the terminal could not be identified and measured as separate from the terminal. Thus, although Penn Central was more severely burdened by the regulation, it was not unfairly singled out as a property owner to bear the burden of the regulation. In other words, Penn Central was not denied *all* economic value from the property, and the regulations were, according to the Court, substantially related to the promotion of the general welfare.

The dissent (Chief Justice Rehnquist and Justice Stevens), however, pointed out that of the over one million buildings and structures in the City of New York, only 400 had been singled out for designation as official landmarks. The designation imposed substantial cost on the land owner with no offsetting benefit. "The question in this case is whether the cost associated with the city of New York's desire to preserve a limited number of 'landmarks' within its borders must be borne by all of its taxpayers or whether it can instead be imposed entirely on the owners of the individual properties."[98] Here, a multimillion dollar loss was imposed on Penn Central. "[I]t [was] uniquely felt and is not offset by any benefits flowing from the preservation

95. *Id.* at 130.

96. *Id.* at 131.

97. *Id.* at 124.

98. *Id.* at 139 (Rehnquist, J., dissenting).

of some 400 other 'landmarks . . . .'"[99] "The city of New York, because of its unadorned admiration for the design [of the Terminal], has decided that the owners of the building must preserve it unchanged for the benefit of sightseeing New Yorkers and tourists."[100] This goes much further than simply preventing noxious uses.

In 1992, the Court did, however, acknowledge that if a landowner was deprived of *all* beneficial use by a regulation, that this was the equivalent of a physical appropriation and was therefore a taking that merited "just compensation."[101] In *Lucas v. South Carolina Coastal Council*,[102] Lucas purchased two beachfront parcels on the Isle of Palms to construct homes, in conformity with the adjacent parcels. Subsequent to the purchase, the South Carolina Coastal Council enacted the Beachfront Management Act, which barred Lucas from building permanent habitable structures on the lots. In an uncharacteristically clear holding in takings jurisprudence, the Court stated that a categorical treatment was appropriate where "regulation denies all economically beneficial or productive use of land."[103] The Court further concluded that

> there are good reasons for our frequently expressed belief that when the owner of real property has been called upon to sacrifice *all* economically beneficial uses in the name of the common good, that is, to leave his [or her] property economically idle, he [or she] has suffered a taking.[104]

Thus, even if the regulation was a valid exercise of police power to protect the health, safety, general welfare and morals of the people, deprivation of all use constituted a taking requiring just compensation.

In *Dolan v. City of Tigard*,[105] the Court developed the "essential nexus" test,[106] also known as the rough proportionality test, for exactions cases in which developers are required to transfer property rights to municipalities as a condition of de-

99. *Id.* at 147 (Rehnquist, J., dissenting).
100. *Id.* at 146 (Rehnquist, J., dissenting).
101. Lucas v. S.C. Coastal Council, 505 U.S. 1003 (1992).
102. *Id.*
103. *Id.* at 1015.
104. *Id.* at 1019.
105. 512 U.S. 374 (1994).
106. *Id.* at 391.

velopment approvals. In exaction cases, the Court requires an essential nexus to exist between the legitimate state interest and the permit condition exacted by the city. Further, the "taking" must be roughly proportional to the state interest. Florence Dolan applied for a permit to redevelop the site of her plumbing store, which included substantial expansion of the building and the parking lot. The City granted her permit application on the condition that Ms. Dolan deed portions of the property to the City for a bicycle path and public Greenway. The City claimed the Greenway was for flood control; the Court questioned why a public rather than a private Greenway was required. "It is difficult to see why recreational visitors trampling along petitioner's floodplain easement are sufficiently related to the city's legitimate interest in reducing flooding problems along Fanno Creek, and the city has not attempted to make any individualized determination to support this part of its request."[107]

In sum, if a regulation deprives an owner of *all* of the value of his or her property, it is a taking subject to just compensation. If the regulation or exaction deprives the owner of something less than *all* economic value, it is subject to the essential nexus/rough proportionality test of *Dolan* or the even less exact considerations enumerated in *Penn Central*. Worse, if the regulation deprives an owner of something less than the entire value and is construed as a valid police power regulation, there is no compensable taking.

III. Expanded Police Powers in Zoning Regulations and Its Crossover into Takings

The Court tries to make a distinction between regulations that track the common law of nuisance (which never give rise to takings liabilities)[108] and legislative restrictions on title (which may give rise to compensation claims).[109] Early jurisprudence dictated that laws preventing noxious uses, thus protecting people from specific harm, could not result in a compensable taking. Over a century of jurisprudence, however, has transformed

107. *Id.* at 393.
108. DANA & MERRILL, *supra* note 28, at 111.
109. *Id.* at 113.

this notion of protecting an individual from a specific harm. Today any land use regulations that are established for the general welfare, including aesthetic and architectural regulations, are generally allowable with no compensation provided to the property owner. Further, so long as the restrictive regulation is not arbitrary and capricious, it is treated with great deference by the courts.

In the period following the formation of this country, restrictions on property rights were primarily limited by the law of nuisance. In essence, should one's use of land inflict injury upon another, the use would be subject to an injunction.[110]

By the turn of the century, this narrow restriction on private property rights was expanded via significantly broader uses of police power. In *Eubank v. City of Richmond*,[111] the Supreme Court reviewed local legislation that allowed the committee on streets to establish a building line a specified number of feet from the street. The Court held that this type of regulation was generally not outside of the police power, but that this particular instance, when "part of the property owners fronting on the block determine the extent of use that other owners shall make of their lots . . . ." it was an unreasonable exercise of the police power.[112]

In the 1915 case of *Reinman v. City of Little Rock*,[113] even though it was a long established business, Reinman Stables challenged a new ordinance that prohibited the maintenance and operation of livery stables in densely populated areas of the city. The Court held that it was clearly within the police power of the state to regulate the business and to "declare that in particular circumstances and in particular localities, a livery stable

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110. ELY, *supra* note 8, at 60.

> Much of the nuisance litigation was directed at emerging industrial activity that caused offensive odors or excessive noises. Such obnoxious trades as pigsties and glue factories were treated as per se nuisances . . . . [N]oise caused by rock quarrying or smoke from a flour mill that harmed adjacent landowners could also constitute a nuisance.

Id.

111. 226 U.S. 137 (1912).

112. *Id.* at 143.

113. 237 U.S. 171 (1915).

[should] be deemed a nuisance in fact and in law, provided this power is not exerted arbitrarily . . . ."[114]

> [T]he general subject of the regulation . . . is well within the range of the power of the state to legislate for the health and general welfare of the people. . . . [C]onsiderable latitude of discretion must be accorded to the lawmaking power; and so long as the regulation in question is not shown to be clearly unreasonable and arbitrary, and operates uniformly upon all persons similarly situated in the particular district . . . it cannot be judicially declared that there is a deprivation of property without due process . . . .[115]

A. *Modern Zoning*

In 1922, the United States Department of Commerce issued the State Zoning Enabling Act.[116] As a model law, it was designed to be used by the states, and provide a clear message that "the adoption of zoning laws is within the legal authority of municipal governments."[117] Shortly thereafter, all fifty states adopted some form of zoning regulation.[118]

Two cases in 1925 indicate the shift in thinking about an individual's right to use his or her property. First, in *Goldman v. Crowther*,[119] Goldman conducted a small, basic tailoring business in the basement of his home, which was located in a residential district. All work was done by hand or on an ordinary sewing machine. Goldman was arrested for this activity because it violated Baltimore's zoning ordinance. He then applied for a permit and was denied. On appeal, the court held that the ordinance was void because it deprived Goldman of those

> guaranties [sic] of the state and federal Constitutions which assure to every citizen the right to hold and enjoy and use his property in any manner he pleases, so long as he does not thereby injuriously affect the health, security, or welfare' of his neighbor

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114. *Id.* at 176.

115. *Id.* at 176-77.

116. U.S. DEP'T OF COMMERCE, A STANDARD STATE ZONING ENABLING ACT UNDER WHICH MUNICIPALITIES MAY ADOPT ZONING REGULATIONS (1926), *available at* http://www.planning.org/growingsmart/pdf/SZEnablingAct1926.pdf.

117. JOHN R. NOLON & PATRICIA E. SALKIN, LAND USE IN A NUTSHELL 68 (2006).

118. *Id.*

119. 128 A. 50 (Md. 1925).

> or the public as the words 'health, security, and welfare' have hitherto been understood in this state.[120]

In 1926, the Supreme Court rendered a decision validating the constitutionality of a local zoning ordinance that separated the town into different districts for different uses in the seminal case of *Village of Euclid v. Ambler Realty Co.*[121] The 1922 ordinance enacted a comprehensive zoning plan. It divided the village into six classes of use districts (i.e. single family, multi-family, apartment houses, retail), three classes of height districts (i.e. buildings may be no higher than 35 feet, 50 feet, or 80 feet depending on the district), and four classes of area districts (i.e. single family residential requires 5,000 square foot lot, apartment buildings must have minimum 2,500 square foot lot). At the time of the zoning enactment, Ambler Realty owned sixty-eight acres of land it claimed it had been holding for the purpose of selling for industrial uses, "for which it is especially adapted, being immediately in the path of progressive industrial development . . . ."[122] The zoning ordinance would have severely reduced the value of Ambler's land. The market rate for industrial land was $10,000 per acre versus the residential market rate of only $2,500, and the majority of Ambler's land was now restricted to single family residential. Ambler claimed that "the ordinance attempts to restrict and control the lawful uses of appellee's land, so as to confiscate and destroy a great part of its value . . . ."[123] In this case, which followed so closely on the heels of the State Zoning Enabling Act, the Court stated: "This question involves the validity of what is really the crux of the more recent zoning legislation, namely, the creation and maintenance of residential districts, from which business and trade of every sort . . . are excluded . . . ."[124] The Court further stated:

> The ordinance now under review, and all similar laws . . . must find their justification in some aspect of the police power, asserted for the public welfare. . . . Thus the question whether the power exists to forbid the erection of a building of a particular kind or for

120. *Id.* at 53.
121. 272 U.S. 365 (1926).
122. *Id.*
123. *Id.*
124. *Id.* at 390.

> a particular use . . . is to be determined . . . by considering it in connection with the circumstances and the locality.[125]

The Court went on to describe specific justifications under police power. It is noteworthy that the justifications were couched in terms of safety and protection, an attempt to position area and use zoning in terms of old common law nuisance:

> [S]egregation of . . . buildings will make it easier to provide fire apparatus . . . that it will increase the safety and security of home life . . . prevent street accidents . . . decrease noise . . . which produce or intensify nervous disorders . . . .[126]

The decision goes on to elaborate on the "parasitic" nature of apartment buildings which would "utterly destroy[ ]" the residential character of the neighborhood.[127] Under these circumstances, apartment houses that "would be not only entirely unobjectionable but highly desirable, come very near to being nuisances."[128]

In spite of any social change that may have been driving the zoning enactment in the Village of Euclid, the Court says that the "reasons are sufficiently cogent to preclude us from saying, as it must be said before the ordinance can be declared unconstitutional, that such provisions are clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare."[129] Thus, the Supreme Court in essence declared that zoning regulations properly derived from the State Zoning Enabling Act will be found Constitutional.

Once given the green light, it did not take long for municipalities and the Court to move from this timid, nuisance based interpretation of the Zoning Enabling Act to an extraordinarily broad interpretation. By 1925, in the famous *Berman v. Parker*[130] decision, the Court said:

> 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 de-

125. *Id.* at 387-88.
126. *Id.* at 394.
127. *Id.*
128. *Id.* at 395.
129. *Id.*
130. 348 U.S. 26 (1954).

> termine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled.[131]

In the Court's new definition of public welfare, the traditional police power—protection from harm—is almost an afterthought as seen in the last clause "as well as carefully patrolled."[132] The definition of "the general welfare" has become so broad that it would be difficult to find anything that even the most junior legislator would not be able to argue falls under "general welfare." Thus, the only actions that will be excluded are those that can be found to be "clearly arbitrary and unreasonable."[133]

Eighty years later, we do not find anything unusual or troubling about a zoning regulation that segregates a shop from a single family residence or that restricts a tailor shop in a residential neighborhood. It is interesting to note that the modern urban renewal movement now finds this separation of uses environmentally and economically unsound.[134]

But what will the next eighty years bring? In an environment where the only restriction on zoning laws is that they may not be arbitrary and capricious, how far will the rights of individual property owners be restricted? In an environment where zoning laws are enacted at the most local level for local interests, does the "parasitic apartment house" become simply a euphemism for exclusionary zoning?

B. *Form-Based Land Development Regulations: The Regulation of Aesthetics—A Good Idea Gone Too Far?*

The latest trend in degradation of individual property rights, empowered by the expansive definition of police power and supported by judicial deference (or is it abdication?) to local legislation, is form-based land development regulations. These are most notably aesthetic-based regulations most often found under the nomenclature of architectural guidelines, design review, or historic district requirements.

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

132. *Id.*

133. *See id.*

134. James Constantine, *America's New Traditional Neighborhoods*, *in* TRADITIONAL NEIGHBORHOOD DESIGN 8-10 (Jason Miller & R. John Anderson eds., 1997).

Whatever the label chosen, these regulations go far beyond typical zoning regulations relating to lot size, building height, yard setbacks, lot coverage, and the like. Major momentum for the movement is derived from the west coast, where major cities enacted "municipal regulations devolving certain authority on design review boards to make aesthetic determinations."[135] Today these regulations have become more widespread, and address "the details of relationships between buildings and the public realm of the street, the form and mass of buildings in relation to one another, and the scale and type of streets and blocks."[136]

While the holding in *Kelo* sparked outrage on the part of property rights activists, no such reaction has occurred in response to the emergence of the architectural/design review board, even though it can mandate the color a homeowner may paint his or her home, or dictate the type of fence the owner can use, and even determine the color of mortar that can be used between the bricks in a re-pointing. Cases challenging the decisions of these review boards are few and far between and even fewer hold in favor of the plaintiff.

While the goal of these aesthetic based regulations is sometimes admirable (although more often than not they stem from the interest of a grass roots group that is reacting to somebody who just put up a house they do not like), and while these regulations appear to have judicial support, there are serious issues that need to be addressed before declaring victory for this type of regulation.

The application of criteria for any aesthetic based review is by definition subjective. In spite of the subjective nature of the regulations, courts generally allow government control of aesthetics, and they continue to defer to local authority.[137] The term "authority" takes on an interesting connotation. In a case that highlights the incredibly subjective nature of these regulations, an architect designed a home for himself in an exclusive

135. Robert J. Sitowski & Brian W. Ohm, *Form-Based Land Development Regulations*, 38 URB. LAW. 163, 164 (2006).

136. *Id.*

137. Paul Weinberg, *Zoning for Aesthetics: Who Decides What Your House Will Look Like?*, 28 NO. 9 ZONING AND PLANNING LAW REPORT 1 (Salkin & Young eds., 2005).

neighborhood of metropolitan St. Louis. The house complied with all zoning codes but required approval from the architectural board of review. The regulation required that the review be comprised of three architects. Thus, the case is an example of architects reviewing architects. The board denied the application, and the Supreme Court of Missouri upheld the decision because the plaintiff's "highly modernistic residence in this area where traditional Colonial, French Provincial and English Tudor styles of architecture are erected does not appear to be arbitrary and unreasonable when the basic purpose to be served is that of the general welfare of persons in the entire community."[138] The regulation required that the design

> conform to certain minimum architectural standards of appearance and conformity with surrounding structures and that unsightly, grotesque and unsuitable structures, detrimental to the stability of value and the welfare of surrounding property, structures and residents, and to the general welfare and happiness of the community, be avoided, and that appropriate standards of beauty and conformity be fostered and encouraged.[139]

The court held that this ordinance was sufficiently detailed, denying the plaintiff's argument that it should be void for vagueness and "provide[s] no standard nor uniform rule . . . ."[140] Thus, the court holds that "grotesque," "unsuitable" and "appropriate standards of beauty" are sufficiently specific to be considered standards.[141]

In *Novi v. City of Pacifica*,[142] the court held that "ordinances precluding uses that would be detrimental to the 'general welfare' and precluding developments that would be 'monotonous' in design and external appearance are not unconstitutionally vague."[143] So, in Missouri one cannot design a home that is too unique;[144] in California, one cannot design condominium projects that are too similar.[145] How can abuse be prevented when the standards are so vague?

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138. Stoyanoff v. Berkeley, 458 S.W.2d 305, 310 (Mo. 1970).
139. *Id.* at 306-07.
140. *Id.*
141. *Id.*
142. 215 Cal. Rptr. 439 (Ct. App. 1985).
143. *Id.* at 439.
144. *Stoyanoff*, 458 S.W.2d at 310.
145. *Novi*, 215 Cal. Rptr. at 439.

In 1998, the California Court continued its support of vague ordinances relative to design reviews. In *Breneric Associates v. City of Del Mar*,[146] the court upheld a statute that stated: "The purpose of design review is to protect the aesthetic quality of the community 'by fostering and encouraging good design which encompasses the use of harmonious materials and colors [and] compatible proportional relationships.'"[147] The Design Review Board (DRB) may deny a permit if "the design is not harmonious with . . .the surrounding neighborhood . . . and if '[t]he proposed development fails to coordinate the components of exterior building design on all elevations with regard to color, materials, architectural form and detailing to achieve design harmony and continuity.'"[148] Just what does "harmonious" mean and by whose standards is it to be measured? How would an applicant be provided notice in order to comply with such legislation? Worse, why should applicants be denied a permit because their tastes are different?

What follows from the lack of specificity in allowable standards is an uneven application of the regulation or, more specifically, abuse. Who was in office at the time and who was appointed to the review board may have a great impact on how such subjective regulations are interpreted. Further, over a longer period of time, officials change, as do the "leanings" of those appointed to review boards. Hence, it would become possible to recognize new homes and renovations simply by the era of the elected politician at the time. Because those who sit on review boards are largely appointed by those currently in office, the environment is prime for zoning of a town based on the NIMBY (not in my back yard) principle as it applies to a select few. Here, a homeowner may be faced with a well-organized neighbor who brings a large crowd to a public hearing. The appointee, who does not want to disappoint his friend who appointed him, notes the large, vocal crowd, and he is swayed to one side or the other of that very subjective regulation.

Further, the checks and balances between legislative and judicial review no longer provide a proper balance. Municipalities implement architectural review regulations under the aus-

146. 81 Cal. Rptr. 2d 324 (Ct. App. 1998).
147. *Id.* at 328.
148. *Id.* (citing Del Mar Municipal Code § 23.08.077).

pices of police power to promote the general health, safety and welfare of its constituents. In turn, the judiciary provides great deference to legislation enacted at the local level, so long as the local legislators can show that the regulations promote the general welfare. Therefore, only in instances of blatant abuses of police power will the judiciary overturn an architectural review board decision.

Are design guidelines a good thing? Who would stand in opposition to regulations which purport to maintain our lifestyle or maintain the beauty of our neighborhoods? The ramifications of these guidelines, however, must be clearly understood. For instance, how costly are these guidelines to the homeowner? A specification that prohibits the use of vinyl siding ($1.52/sf) and requiring all natural materials ($3.74/sf)[149] greatly increases the cost of renovation. In an age where it has now been proven that the middle class is being squeezed, design guidelines are the worst kind of deception: they purport to be saving the middle class from "ugly developments," while in fact what they are doing is pushing the middle class out of their neighborhoods. The very heart of American ideals is freedom and individual expression. Do we not have the right to express ourselves?

V. Concluding Remarks

American property rights are under attack. It has taken almost two centuries to eradicate the fundamental right to property protected (or so we thought) by the Takings Clause. The reality is that today we hold our property subject to the desires of the local legislative body. Any decision that body makes with regard to property will be supported in the courts so long as the decision is not clearly arbitrary. The restriction that a decision may not be arbitrary protects us only from a timing

149. MEANS RESIDENTIAL DETAILS CONSTRUCTION COSTS CONTRACTOR'S PRICING GUIDE 2006 at 111-112 (Robert W. Mewis ed., 2006). In this simple example, the cost of siding a home in cedar will be more than double the cost of siding the same home in vinyl. Considering that many people construct additions on their home to care for elder parents, or provide an apartment to provide additional income to meet a growing tax problem, a municipality that imposes this kind of regulation is certainly imposing a burden. Often these regulations are "spun" in mantra of preserving our lifestyle.

perspective. (Give any politician enough time and he or she can come up with a reason that is not arbitrary.) The standard of review is so low, and the authority endowed to these bodies is so broad, that it is hard to enumerate a list of things they could *not* do. It is the perfect environment for abuse.

History indicates that the "cost" of additional regulation has been borne by a minority of landowners, and if the historical trend continues we are in danger of returning to a feudal property system.[150] The feudal lord will be an entity called a "public-private partnership." The private portion of the partnership will be the entity which has enough power and/or money to influence the local governing body. Only those entities with very deep pockets will survive. Without the protection of the Fifth Amendment, the individual property owner stands little chance of keeping his or her property if the public-private partnership wants it.[151] As Steven Eagle so aptly states, "*Kelo* implicitly suggests that the touchstone has changed from the owner's *right* to use property, subject to the obligation to do no harm, to the owner's affirmative *obligation* to use property in ways that benefits the community—lest that property be taken away and vested in others."[152]

However, the increasing pressures on natural resources and the inability to provide workforce housing leaves little doubt that land use must be regulated. Three principles must return if we are to protect our fundamental right to property as we try to develop appropriate legislation:

- That there is a fundamental right to own and enjoy property, endowed to us by our Constitution;
- That this fundamental right can sometimes come with a negative effect, in that our neighbor may very well paint his or her house purple, even if purple is not to our taste. This is similar to our principled belief in the importance of free speech, even if our sensitivities are offended when someone wears a jacket that says "Fuck The Draft" on it;[153]

150. E.F. Roberts, *supra* note 20.

151. *See* Kelo v. City of New London, 545 U.S. 469 (2005); Poletown Neighborhood Council v. City of Detroit, 304 N.W.2d 455 (Mich. 1981).

152. Steven J. Eagle, *Kelo v. City of New London: A Tale of Pragmatism Betrayed, in* EMINENT DOMAIN USE AND ABUSE: KELO IN CONTEXT 210 (Dwight H. Merriam & Mary Massaron Ross eds., 2006).

153. Cohen v. California, 403 U.S. 15 (1971).

- That benefits provided to all people should not be provided at the expense of a handful of property owners.

We, as an American people, believe in educating all of our children. We vote for this belief through the payment of tax dollars which fund the public school system. A similar model can be developed to support our land use goals. If there is a true need for a regulation that infringes upon an individual's property rights, the affected property owner should be compensated. (Today the reality is such that a regulation may decrease the value of a property by ninety-five percent but will provide no compensation to the owner). The source of compensation for the property owner may come from tax incentives or pooled tax funds established for these purposes. If our society believes that everyone is entitled to benefits such as open space and clean water, then *all* taxpayers should share the burden of providing those benefits. Stealing land (and property rights) from select individuals to provide a benefit for the greater good is antithetical to the Constitution.

Alternatively, abuse of power can be avoided if local municipalities develop specific programs that facilitate neighborhoods in developing their own covenants rather than imposing them by legislative means. In theory at least, if it is truly the wish of all members of a neighborhood, rather than just a vocal minority, to maintain a particular character or architecture, then restrictive covenants are far stronger than zoning laws, and far more inclusive.

There appears to be no easy answer. It will take the best and the brightest to deliver compromises that are effective. We can, however, be sure that without the recognition, participation, and input from all voices, rational solutions will elude us.