KELO V. CITY OF NEW LONDON
SUPREME COURT OF THE UNITED STATES

125 S. Ct. 2655
June 23, 2005
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JUSTICE STEVENS/KENNEDY/SOUTER/GINSBURG/BREYER...In 2000, the city of New London [Connecticut] approved a development plan that...was "projected to create in excess of 1,000 jobs, to increase tax and other revenues, and to revitalize an **economically distressed city**, including its downtown and waterfront areas." In assembling the land needed for this project, the city's development agent has purchased property from willing sellers and proposes to use the power of eminent domain to acquire the remainder of the property from unwilling owners in exchange for just compensation. The question presented is whether the city's proposed disposition of this property qualifies as a "public use" within the meaning of the Takings Clause of the 5th Amendment (made applicable to the States through the 14th Amendment) which states:

"Nor shall private property be taken for public use, without just compensation."

Decades of economic decline led a state agency in 1990 to designate the City a "distressed municipality." In 1996, the Federal Government closed the Naval Undersea Warfare Center which had been located in the Fort Trumbull area of the City and had employed over 1,500 people. In 1998, the City's unemployment rate was nearly double that of the State and its population of just under 24,000 residents was at its lowest since 1920.

...In February [1998], the pharmaceutical company, Pfizer, Inc., announced that it would build a $300 million research facility on a site immediately adjacent to Fort Trumbull; local planners hoped that Pfizer would draw new business to the area, thereby serving as a catalyst to the area's rejuvenation. After receiving initial approval from the city council, the [Commission] continued its planning activities, held a series of neighborhood meetings to educate the public about the process and...**finalized an integrated development plan** focused on 90 acres of the Fort Trumbull area.

The Fort Trumbull area...comprises approximately 115 privately owned properties...The development plan encompasses 7 parcels. [Parcels 1, 2, 4B, 5, 6 and 7 are designated for a waterfront conference hotel, restaurants, shopping, marinas for both recreational and commercial uses, a pedestrian riverwalk, 80 new residences, space reserved for a new U.S. Coast Guard Museum, office and retail space, parking, and water-dependent commercial uses.] **Parcel 3, which is located immediately north of the Pfizer facility, will contain...research and development office space. Parcel 4A...will be used either to support the adjacent state park, by providing parking or retail services for visitors, or to support the nearby marina...**

Parcels 3 and 4A are the parcels "at issue" in this case.

The NLDC intended the development plan to capitalize on the arrival of the Pfizer facility and the new commerce it was expected to attract. In addition to creating jobs, generating tax revenue, and helping to "build momentum for the revitalization of downtown New London," the plan was also designed to make the City more attractive and to create leisure and recreational opportunities on the waterfront and in the park...The NLDC successfully negotiated the purchase of most of the real estate in the 90-acre area, but when its negotiations with petitioners failed, the NLDC initiated condemnation proceedings.

Susette Kelo made extensive improvements to her house (which she prizes for its water view)... Wilhelmina Dery was born in her Fort Trumbull house in 1918 and has lived there her entire life. Her husband Charles has lived in the house since they married 60 years ago. In all, **9 petitioners own [4 properties] in parcel 3 [and 11 properties] in parcel 4A...There is no allegation that any of these properties is blighted or otherwise in poor condition**...

So, there are 9 owner-holdouts. Ms. Kelo just happens to be the first named plaintiff, probably by design. Since the first named plaintiff is likely to get the most publicity, the attorney would name the client with the most persuasive case as the lead plaintiff.

Petitioners claimed that the taking of their properties would violate the "public use" restriction in the 5th Amendment...[The Trial Court]...prohibited the taking of the properties in parcel 4A..., but allowed the taking as to the properties in parcel 3...While this litigation was pending, the NLDC announced that it would lease some of the parcels to private developers in exchange for their agreement to develop the land according to the terms of the development plan. Specifically, the NLDC was negotiating a 99-year ground lease with Corcoran Jennison, a developer selected from a group of applicants. The negotiations contemplated a nominal rent of $1 per year...

Both sides took appeals to the Supreme Court of Connecticut which held...that **all** of the City's proposed takings were valid. It began by upholding the lower court's determination that the takings were authorized by...the State's municipal development statute [which] **expresses a legislative determination that the taking of land, even developed land, as part of an economic development project is a "public use" and in the "public interest."**

It is very important to remember that **the Connecticut statute allows** a "taking" for **economic development**.

...[R]elying on...*Hawaii (1984)*[1] and *Berman (1954)*[2], the court held that such economic development qualified as a valid public use under the Federal and State Constitutions...

So, the U.S. Supreme Court gets this case after the Connecticut Supreme Court ruled in favor of all the "takings" and against the landowners and begins by addressing the following issue:

Does a city's decision to take property for the purpose of economic development satisfy the "public use" requirement of the 5th Amendment?

On the one hand, it has long been accepted that the sovereign may not take the property of *A* for the sole purpose of transferring it to another private party *B*, even though *A* is paid just compensation. On the other hand, it is equally clear that a State may transfer property from one private party to another if future "use by the public" is the purpose of the taking; the condemnation of land for a railroad with common-carrier duties is a familiar example. Neither of these propositions, however, determines the disposition of this case.

As for the first proposition, the City would no doubt be forbidden from taking petitioners' land for the purpose of conferring a private benefit on a particular private party. See *Hawaii* ("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")...Nor would the City be allowed to take property under the **mere pretext** of a public purpose, when its actual purpose was to bestow a private benefit.

For a number of reasons, I believe the U.S. Supreme Court would have ruled against SWIDA, one of them being that SWIDA was attempting to "take" under the mere pretext of a public purpose. But, what if SWIDA had put together a wider development plan?

The takings before us, however, would be executed pursuant to a "carefully considered"

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[1]Case 5A-E-9 on this website.

[2]Case 5A-E-8 on this website.

development plan. [All agree]...that there was no evidence of an illegitimate purpose in this case. Therefore, as was true of the statute challenged in *Hawaii,* **the City's development plan was not adopted "to benefit a particular class of identifiable individuals.**"

On the other hand, this is not a case in which the City is planning to open the condemned land -- at least not in its entirety -- to use by the general public. Nor will the private lessees of the land in any sense be required to operate like common carriers, making their services available to all comers. But..., this "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 evolving needs of society. Accordingly, **when this Court began applying the 5th Amendment to the States at the close of the 19th century [through the 14th Amendment], it embraced the broader and more natural interpretation of public use as "public purpose." See *Fallbrook Irrigation Dist. v. Bradley (1896)*[3]**. 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." *Strickley v. Highland Boy Gold Mining Co. (1906)*[4]**. We have repeatedly and consistently rejected that narrow test ever since.

The disposition of this case turns on whether the City's development plan serves a "public purpose" which our cases have defined broadly, reflecting our <u>longstanding policy</u> of deference to legislative judgments in this field.

In *Berman v. Parker (1954)*, this Court upheld a redevelopment plan targeting a blighted area of Washington, D. C., in which most of the housing for the area's 5,000 inhabitants was beyond repair. Under the plan, the area would be condemned and part of it utilized for the construction of streets, schools, and other public facilities. The remainder of the land would be leased or sold to **private parties** for the purpose of redevelopment, including the construction of low-cost housing. The owner of a department store located in the area challenged the condemnation, pointing out that **his store was not itself blighted** and arguing that the creation of a "better balanced, more attractive community" was not a valid public use. Writing for a unanimous Court, Justice Douglas refused to evaluate this claim in isolation, **deferring instead to the legislative and agency judgment that the area "must be planned as a whole" for the plan to be successful**. The Court explained that "community redevelopment programs need not, by force of the Constitution, be on a piecemeal basis -- lot by lot, building by building." The public use underlying the taking was unequivocally affirmed [in *Berman*, to wit]:

> "We do not sit to determine whether a particular housing project is or is not

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[3]Case 5A-E-5 on this website.

[4]Case 5A-E-6 on this website.

> desirable. **The concept of the public welfare is broad and inclusive...The values it represents are spiritual as well as physical, aesthetic as well as monetary**. It is within the power of the legislature to determine that the community should be **beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled**. In the present case, the Congress and its authorized agencies have made determinations that take into account a wide variety of values. **It is not for us to reappraise them**. If those who govern the District of Columbia decide that the Nation's Capital should be **beautiful as well as sanitary**, there is nothing in the 5th Amendment that stands in the way."

In *Hawaii,* the Court considered a statute whereby fee title was taken from lessors and transferred to lessees (for just compensation) in order to reduce the concentration of land ownership... Reaffirming *Berman*'s deferential approach to legislative judgments in this field, we concluded that the State's purpose of eliminating the "social and economic evils of a land oligopoly" qualified as a valid public use. **Our opinion also rejected the contention that the mere fact that the State immediately transferred the properties to private individuals upon condemnation somehow diminished the public character of the taking. "It is only the taking's purpose, and not its mechanics," we explained, that matters in determining public use...**

For more than a century, our public use jurisprudence has wisely [resisted] rigid formulas and intrusive scrutiny in favor of affording legislatures broad latitude in determining what public needs justify the use of the takings power.

Those who govern the City were not confronted with blight, but their determination that the area was [1] sufficiently distressed to justify a program of economic rejuvenation is entitled to our deference. The City has [2] carefully formulated an [3] economic development plan that it believes will provide [4] appreciable benefits to the community, including [5] new jobs and [6] increased tax revenue. The City is endeavoring to coordinate a [7] variety of commercial, residential, and recreational uses of land with the hope that they will form a whole greater than the sum of its parts. To effectuate this plan, the City has invoked a [8] state statute that specifically authorizes the use of eminent domain to promote economic development. Given the [9] comprehensive character of the plan, the [10] thorough deliberation that preceded its adoption, and the limited scope of our review, it is appropriate for us, as it was in *Berman*, to resolve the challenges of the individual owners, not on a piecemeal basis, but rather in light of the entire plan. Because that plan unquestionably serves a public purpose, the takings challenged here satisfy the public use requirement of the 5th Amendment.

In a nutshell, if a city attorney were asked whether the city could "take" certain ground to further an economic plan (with just compensation), that attorney would take a look at the items I have numbered 1-10, above, and advise the city to comply with each one, if possible.

Petitioners urge us to adopt a **NEW** bright-line rule that economic development does not qualify as a public use...**[N]either precedent nor logic supports petitioners' proposal**. **Promoting economic development is a traditional and long accepted function of government.**

If the majority is correct that precedent (stare decisis) supports the "taking" here and that the petitioners' position is something "new," then the national outcry — the injustice of it all — is a bit over the top. As I say, this outcome is nothing "new."

There is, moreover, no principled way of distinguishing economic development from the other public purposes that we have recognized. In our cases upholding takings that facilitated **agriculture and mining**, for example, we emphasized the importance of those industries to the welfare of the States in question, see, *e.g., Strickley*; in *Berman,* we endorsed the purpose of transforming a **blighted area** into a "well-balanced" community through redevelopment; in *Hawaii*, we upheld the interest in breaking up a land **oligopoly** that "created artificial deterrents to the normal functioning of the State's residential land market"...**It would be incongruous to hold that the City's interest in the economic benefits to be derived from the development of the Fort Trumbull area has less of a public character than any of those other interests**...

[T]he government's pursuit of a public purpose will often benefit individual private parties. [In *Hawaii*, lessees who were previously unable to purchase a home could then do so; in *Berman*, private developers participated in the redevelopment.]...We cannot say that public ownership is the sole method of promoting the public purposes of community redevelopment projects.

It is further argued that without a bright-line rule nothing would stop a city from transferring citizen *A*'s property to citizen *B* for the sole reason that citizen *B* will put the property to a more productive use and thus pay more taxes. Such a one-to-one transfer of property, executed outside the confines of an integrated development plan, is not presented in this case. While such an unusual exercise of government power would certainly raise a suspicion that a private purpose was afoot, the hypothetical cases posited by petitioners can be confronted if and when they arise. They do not warrant the crafting of an artificial restriction on the concept of public use.

Wasn't the *Strickley* mining case a "one-to-one" transfer that benefitted the bottom line of the mining company and surely must have, therefore, resulted in "more taxes" for the masses?

Alternatively, petitioners maintain that for takings of this kind we should require a "reasonable certainty" that the expected public benefits will actually accrue. Such a rule, however, would represent an even greater departure from our precedent. "When the legislature's purpose is legitimate and its means are not irrational, our cases make clear that empirical debates over the wisdom of takings -- no less than debates over the wisdom of other kinds of socioeconomic legislation -- are not to be carried out in the federal courts." *Hawaii*...The disadvantages of a heightened form of review are especially pronounced in this type of case. Orderly implementation of a comprehensive redevelopment plan obviously requires that the legal rights of all interested parties be established before new construction can be commenced. A constitutional rule that required postponement of the judicial approval of every condemnation until the likelihood of success of the plan had been assured would unquestionably impose a significant impediment to the successful consummation of many such plans.

Hypothetically, let's say New London "takes" ground for a county jail. The legal process consumes a year and is approved, but during that year Disney has been in the area. Disney offers New London 20 times what it paid as "just compensation" (at the time) to Ms. Kelo and the other 8 landowners. Can New London sell to Disney and look elsewhere to build its jail?

In affirming the City's authority to take petitioners' properties, we do not minimize the hardship that condemnations may entail in spite of the payment of just compensation. **We emphasize that nothing in our opinion precludes any State from placing further restrictions on its exercise of the takings power. Indeed, many States already impose "public use" requirements that are stricter than the federal baseline**...

Yes, the Court is saying that each State can place whatever limits it wishes on a **State's** "taking" power. I would submit that, when it comes to the ability of a State or County or City to "take," a State could even prohibit it altogether, but I believe I know the outcome to this dilemma. If Illinois severely limits the power of eminent domain and Missouri adopts a liberal Connecticut standard, it won't be long before Illinois repeals those limitations. Follow the money. There you will find a State with broad "taking" power and a booming economy and better education and professional athletics and theme parks, etc., etc., etc.

The necessity and wisdom of using eminent domain to promote economic development are certainly matters of legitimate public debate. This Court's authority, however, extends only to determining whether the City's proposed condemnations are for a "public use" within the meaning of the 5th Amendment. Because over a century of our case law interpreting that provision dictates an affirmative answer to that question, we may not grant petitioners the relief that they seek. The Supreme Court of Connecticut is affirmed.

Correct...the majority did nothing more than confirm, per *stare decisis* principles, that this outcome has been the law for over a century.

CONCURRENCE: JUSTICE KENNEDY...A court confronted with a plausible accusation of impermissible favoritism to private parties should treat the objection as a serious one and review the record to see if it has merit, though with the presumption that the government's actions were reasonable and intended to serve a public purpose...The trial court concluded...that [the primary motivation for the plan was to take advantage of Pfizer's presence, not to benefit Pfizer]...Even the dissenting justices on the Connecticut Supreme Court agreed that respondents' development plan was intended to revitalize the local economy, not to serve the interests of Pfizer, Corcoran Jennison, or any other private party. This case, then, survives the meaningful rational basis review that in my view is required under the *Public Use Clause*...**A broad *per se* rule or a strong presumption of invalidity [where the taking is justified by promotion of economic development], furthermore, would prohibit a large number of government takings that have the purpose and expected effect of conferring substantial benefits on the public at large and so do not offend the *Public***

Use Clause...

DISSENT: JUSTICE **O'CONNOR**/REHNQUIST/SCALIA/THOMAS...Over two centuries ago ...Justice Chase wrote:

> "...A law that takes property from A and gives it to B [is] against all reason and justice..." *Calder v. Bull*.

Today the Court abandons this long-held, basic limitation on government power.

Calder, the first case in this outline, is where I said I'm not sure why future cases (i.e., this dissent) cite to it because *"Kelo* is to *Calder"* as "apples are to oranges." First, New London did not "take" property from A — there was "just compensation." Second, New London did not "give" it to Pfizer or any private entity. All property "taken" was leased to those private concerns that participated. *Calder v. Bull* was a will contest and has nothing to do with the *Kelo* facts or any eminent domain case. It is intellectually dishonest to say it is relevant. For heaven's sake, the majority in *Kelo* would not support "taking anything from Ms. Kelo" and "giving it to Pfizer." That is not what *Kelo* stands for.

Under the banner of economic development, all private property is now vulnerable to being taken and transferred to another private owner, so long as it might be upgraded -- *i.e.*, given to an owner who will use it in a way that the legislature deems more beneficial to the public...

Look...we may or may not agree with over 100 years of jurisprudence on this amendment...but, as far as I can tell, that just is not true. The trial court found this area to be "distressed." It found the plan was carefully formulated and that it would provide **appreciable benefits to the community**, including new jobs and increased tax revenue. It found the plan attempted to coordinate a variety of commercial, residential, and recreational uses of land with the support of a state statute that specifically authorizes the use of eminent domain to promote "economic development." Whether you agree with this jurisprudence or not, the foregoing is a very long way from "all property now being vulnerable." **It is certainly no more vulnerable today than it was in 1896!**

To reason, as the Court does, that the **incidental** public benefits resulting from the subsequent ordinary use of private property render economic development takings "for public use" is to wash out any distinction between private and public use of property -- and thereby effectively to delete the words "for public use" from the...*5th Amendment*...

It is intellectually dishonest to suggest that the majority rested its ruling only on "incidental public benefits." As I recall, the term used was "**appreciable**" and this area was found to be "distressed" on facts that no lower court judge disagreed with. And, let us not forget that **Justice O'Connor wrote the majority opinion in *Hawaii***...a case that "took" ground with just compensation and "gave it to" (sold it to) private parties. That is as close as it gets to "taking property from A and giving it to B" in the sense meant by Justice O'Connor.

Petitioners maintain that,...while the government may take their homes to build a road or a railroad or to eliminate a property use that harms the public,...it cannot take their property for the private use of others...simply because the new owners may make more productive use of [it].

Everyone assumes a taking for a railroad or highway is the type of taking intended by the framers. Did anyone ever stop to think, "Why?" Of course, if we could not condemn land for railroads, we would not likely have railroads. So? Apparently, we look upon railroads and highways as something society at large just flat out needs — they fulfill what we normally think of as a "public use" or "public purpose." Again, I ask, "Why?" Is it because all of us are better off with efficient means of transporting the goods we buy? Is it such a stretch to permit a taking for Hershey to build a warehouse to enable it to more efficiently make use of the highways and railways? Why not? Aren't we all better off if goods get transported cheaper? Just wondering!!!

[The 5th Amendment limitations ("public use" and "just compensation")]...serve to protect "the security of Property," which Alexander Hamilton described to the Philadelphia Convention as one of the "great objects of Government." Together they ensure stable property ownership by providing safeguards against excessive, unpredictable, or unfair use of the government's eminent domain power -- particularly against those owners who, for whatever reasons, may be unable to protect themselves in the political process against the majority's will.

Sometimes I think some justices are too loose with words that are not necessary. O'Connor says "they" (the "public use" and "just compensation" limitations) provide safeguards against "unpredictable" use of government power. Really? I would say that almost all "takings" are totally unpredictable. I have no idea whether the City will someday need the corner where my business is located for a satellite police station or firehouse. Certainly that is no more nor less predictable than a future "distressed" local economy.

While the *Takings Clause* presupposes that government can take private property without the owner's consent, the just compensation requirement spreads the cost of condemnations and thus "prevents the public from loading upon one individual more than his just share of the burdens of government." *Monongahela Nav. Co. v. United States (1893)*[5]...The public use requirement, in turn, imposes a more basic limitation, circumscribing the very scope of the eminent domain power:

[5]Case 5A-E-3 on this website.

Government may compel an individual to forfeit her property for the *public's* use, but not for the benefit of another private person. This requirement promotes fairness as well as security...

Where is the line between "public" and "private" property use? We give considerable deference to legislatures' determinations about what governmental activities will advantage the public. But were the political branches the sole arbiters of the public-private distinction, the *Public Use Clause* would amount to little more than hortatory fluff. An external, judicial check on how the public use requirement is interpreted, however limited, is necessary if this constraint on government power is to retain any meaning.

Of course, that is true. If the courts "defer" to the "wisdom" of legislators on these issues, then there are no limits. But that was not the attitude of Justice O'Connor in *Hawaii* where she said (in writing for the majority): **"Judicial deference is required because...legislatures are better able to assess what public purposes should be advanced by an exercise of the taking power...*Berman v. Parker.* Thus, if a legislature, state or federal, determines there are substantial reasons for an exercise of the taking power, courts must defer to its determination that the taking will serve a public use."** It is OK to change your mind...I just wish she would acknowledge a mistake or, at a minimum, a change of heart.

Our cases have generally identified three categories of takings that comply with the public use requirement...First, the sovereign may transfer private property to public ownership -- such as for a road, a hospital, or a military base...Second, the sovereign may transfer private property to private parties, often common carriers, who make the property available for the public's use -- such as with a railroad, a public utility, or a stadium...But "public ownership" and "use-by-the-public" are sometimes too constricting...; thus, we have allowed that, in certain circumstances...takings that serve a public purpose also satisfy the Constitution even if the property is destined for subsequent private use. See *Berman* and *Hawaii*.

This case returns us for the first time in over 20 years to the hard question of when a purportedly "public purpose" taking meets the public use requirement. It presents an issue of first impression: Are economic development takings constitutional? I would hold that they are not.

First impression? In my world, **all** takings are "economic development takings," including every recorded "taking" since the Constitution was ratified. Wasn't *Strickley* an economic development taking?

We are guided by two precedents...*Berman* and *Hawaii*...In those decisions, we emphasized the importance of deferring to legislative judgments about public purpose. Because courts are ill-equipped to evaluate the efficacy of proposed legislative initiatives, we rejected as unworkable the idea of courts deciding on what is and is not a governmental function...Likewise, we recognized our inability to evaluate whether...eminent domain is a necessary means by which to pursue the legislature's ends.

Yet for all the emphasis on deference, *Berman* and *Hawaii* hewed to a bedrock principle without which our public use jurisprudence would collapse: "A purely private taking could not withstand the scrutiny of the public use requirement; it would serve no legitimate purpose of government and would thus be void." *Hawaii...*To protect that principle, those decisions reserved "a role for courts to play in reviewing a legislature's judgment of what constitutes a public use...though the Court in *Berman* made clear that it is 'an extremely narrow' one." *Hawaii* (quoting *Berman*).

The Court's holdings in *Berman* and *Hawaii* were true to the principle underlying the *Public Use Clause*. In both those cases, the extraordinary, pre-condemnation use of the targeted property **inflicted affirmative harm on society** -- in *Berman* through blight...and in *Hawaii* through oligopoly...And in both cases, the relevant legislative body had found that eliminating the existing property use was necessary to remedy the harm. Thus a public purpose was realized when the harmful use was eliminated. Because each taking *directly* achieved a public benefit, it did not matter that the property was turned over to private use. **Here, in contrast, New London does not claim that Susette Kelo's and Wilhelmina Dery's well-maintained homes are the source of any social harm**. Indeed, it could not so claim without adopting the absurd argument that any single-family home that might be razed to make way for an apartment building, or any church that might be replaced with a retail store, or any small business that might be more lucrative if it were instead part of a national franchise, is inherently harmful to society and thus within the government's power to condemn.

This is so disingenuous! Justice O'Connor is trying desperately to distinguish her prior opinion in *Hawaii*. Plus, no one claimed Mr. Berman's department store was "the source of any harm." She is splitting hairs. Is there any meaningful difference between "blight" and "distress?" New London was found to be distressed. Thousands of jobs had been lost, etc., etc. Furthermore, the majority has not held that a home could be razed for an apartment building or that a church might be replaced by a retail store...she is exaggerating. Not that someday the Court may interpret the 5th Amendment that way...but, it has not done so yet. Justice O'Connor is simply wrong.

In moving away from our decisions sanctioning the condemnation of harmful property use, the Court today significantly expands the meaning of public use. It holds that the sovereign may take private property currently put to ordinary private use, and give it over for new, ordinary private use, so long as the new use is predicted to generate some secondary benefit for the public -- such as increased tax revenue, more jobs, maybe even aesthetic pleasure. But nearly any lawful use of real private property can be said to generate some incidental benefit to the public. Thus, if predicted (or even guaranteed) positive side-effects are enough to render transfer from one private party to another constitutional, then the words "for public use" do not realistically exclude *any* takings, and thus do not exert any constraint on the eminent domain power.

Go back and review the majority opinion. I don't think Justice O'Connor paid much attention to its true holding.

There is a sense in which this troubling result follows from **errant language** in *Berman* and *Hawaii*.

Well, I suppose that is a partial admission.

In discussing whether takings within a blighted neighborhood were for a public use, *Berman* began by observing: "We deal, in other words, with what traditionally has been known as the police power." From there it declared that "once the object is within the authority of Congress, the right to realize it through the exercise of eminent domain is clear." Following up, we said in *Hawaii* that "the 'public use' requirement is coterminous with the scope of a sovereign's police powers." **This language was unnecessary to the specific holdings of those decisions**.

An admission of that "loose language" problem. That is better than overlooking it.

Berman and *Hawaii* simply did not put such language to the constitutional test, because the takings in those cases were within the police power but also for "public use" for the reasons I have described. **The case before us now demonstrates why, when deciding if a taking's purpose is constitutional, the police power and "public use" cannot always be equated**. The Court protests that it does not sanction the bare transfer from A to B for B's benefit. It suggests two limitations on what can be taken after today's decision. First, it maintains a role for courts in ferreting out takings whose sole purpose is to bestow a benefit on the private transferee -- without detailing how courts are to conduct that complicated inquiry...Whatever the details of Justice Kennedy's as-yet-undisclosed test, it is difficult to envision anyone but the "stupid staffer" failing it. The trouble with economic development takings is that private benefit and incidental public benefit are, by definition, merged and mutually reinforcing. In this case, for example, any boon for Pfizer or the plan's developer is difficult to disaggregate from the promised public gains in taxes and jobs. Even if there were a practical way to isolate the motives behind a given taking, the gesture toward a purpose test is theoretically flawed. **If it is true that <u>incidental public benefits</u> from new private use are enough to ensure the "public purpose" in a taking, why should it matter, as far as the *5th Amendment* is concerned, what inspired the taking in the first place?** How much the government does or does not desire to benefit a favored private party has no bearing on whether an economic development taking will or will not generate **secondary benefit** for the public.

Merriam-Webster says "incidental" means "likely to ensue as a chance or minor consequence." Does anyone believe the majority would have upheld these takings if the City of New London could only show that increased jobs and tax revenues would have a chance of happening or that they would likely be only a minor benefit? Where did Justice O'Connor get the idea that "**<u>incidental public benefits</u>" are enough to ensure the "public purpose" in a taking?** The majority opinion refers to "**appreciable benefits** to the community, including new jobs, increased tax revenue, and a variety of commercial, residential, and recreational uses." Secondary benefit? I believe it is unusual for a dissenting Justice to argue against a holding that does not exist. There is no way this Court found that the private interests were the primary focus of these takings. That is just not honest.

And whatever the reason for a given condemnation, the effect is the same from the constitutional

perspective -- private property is forcibly relinquished to new private ownership.

That is true...but, Justice O'Connor, how do you distinguish takings for privately owned railroads and privately owned stadiums, of which you approve? What is your point?

A second proposed limitation is implicit in the Court's opinion. The logic of today's decision is that eminent domain may only be used to upgrade -- not downgrade -- property...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.

First, who ever suggested that a "downgrade" in the use of property was ever required? Sounds a bit over the top. Second, this opinion does not speak to that issue, anyway. One supposes that land condemned for a railroad could rather easily be considered as then downgraded. Third, given the majority's numerous tests, the Ritz-Carlton/shopping mall/factory fear is stated a wee bit simplistically, don't you think?

...Finally, the Court suggests that property owners should turn to the States, who may or may not choose to impose appropriate limits on economic development takings. This is an abdication of our responsibility...

No, Justice O'Connor, it is not an abdication of anything. You still have the ultimate authority to determine the outside limit of governmental power, including that of the States. Rather, it is an acknowledgment that you are not the sole source of power. States may, if they so choose, limit the degree of power the Constitution, according to the Supreme Court, gives to them and, in this manner, give the "power" back to the People. That may or may not be wise, but, nevertheless, it is the State's decision to make.

Justice O'Connor, you also seem to think this is the first time the Court has suggested that States may limit their taking power. Please take a look at the 1906 case of *Strickley v. Highland Boy Gold Mining Company* where Justice Holmes, speaking for the majority, said, "If the state constitution restricts the legislature within narrower bounds that is a local affair and must be left where the state court leaves it..."

Any property may now be taken for the benefit of another private party, but the fallout from this decision will not be random. The beneficiaries are likely to be those citizens with disproportionate influence and power in the political process, including large corporations and development firms. As for the victims, the government now has license to transfer property from those with fewer resources to those with more. The Founders cannot have intended this perverse result. "That alone is a *just* government," wrote James Madison, "which *impartially* secures to every man, whatever is his *own*." National Gazette, Property, (Mar. 29, 1792), reprinted in 14 Papers of James Madison 266. I would hold that [these] takings are unconstitutional.

I'm not entirely sure what Justice O'Connor's quote of James Madison means. I looked up the entire National Gazette article authored by Mr. Madison. It is in your handout. I see a reference to eminent domain. I draw the conclusion that he accepts that concept, although the language of 1792 is difficult to decipher into 2006 terms. Anyway, check it out for yourself. Let's see if Justice Thomas does any better with his dissent.

DISSENT: JUSTICE THOMAS...Long ago, William Blackstone wrote that "the law of the land ...postpones even public necessity to the sacred and inviolable rights of private property." 1 Commentaries on the Laws of England 134-135 (1765). The Framers embodied that principle in the Constitution, allowing the government to take property not for "public necessity," but instead for "public use."

I happen to own a copy of Blackstone's Commentaries. Everything quoted is on page 135 which I have included in your handout for <u>you</u> to read for yourself. Contrary to Justice Thomas's implication, Blackstone fully recognizes England's right to eminent domain. Blackstone used the word "postpones" simply to mean that the government has to prove a few things before it can take for "full indemnification." I also do not understand Justice Thomas's point when he says our Constitution requires a "public use" instead of a "public necessity." I conclude that a requirement of "public use" grants far more power to the government than a requirement of "public necessity." Am I wrong?

Defying this understanding, the Court replaces the *Public Use Clause* with a "Public Purpose" Clause (or perhaps the "Diverse and Always Evolving Needs of Society" Clause), a restriction that is satisfied, the Court instructs, so long as the purpose is "legitimate" and the means "not irrational." This deferential shift in phraseology enables the Court to hold, against all common sense, that a costly urban-renewal project whose stated purpose is a vague promise of new jobs and increased tax revenue, but which is also suspiciously agreeable to the Pfizer Corporation, is for a "public use."

<u>This Court</u> did not replace "use" with "purpose." That was done over 100 years ago in *Fallbrook Irrigation Dist. v. Bradley (1896)*. Check it out for yourself.

...If such "economic development" takings are for a "public use," any taking is, and the Court has erased the *Public Use Clause* from our Constitution...I do not believe that this Court can eliminate liberties expressly enumerated in the Constitution...Today's decision is simply the latest in a string of our cases construing the *Public Use Clause* to be a virtual nullity, without the slightest nod to its original meaning...Our cases have strayed from the Clause's original meaning, and **I would reconsider them**...

That is far more honest. Thomas would overrule over 100 years of case law. You may agree.

...[T]he Clause could distinguish those takings that require compensation from those that do not.

That interpretation, however, "would permit private property to be taken or appropriated for private use without any compensation whatever." In other words, the Clause would require the government to compensate for takings done "for public use," leaving it free to take property for purely private uses without the payment of compensation. This would contradict a bedrock principle well established by the time of the founding: that all takings required the payment of compensation. 1 Blackstone 135; 2 J. Kent, Commentaries on American Law 275 (1827); J. Madison, for the National Property Gazette, (Mar. 27, 1792), in 14 Papers of James Madison 266, 267 (R. Rutland et al. eds. 1983) (arguing that no property "shall be taken *directly* even for public use without indemnification to the owner"). The *Public Use Clause*, like the *Just Compensation Clause*, is therefore an express limit on the government's power of eminent domain.

In a footnote, Justice Thomas indicates that some state constitutions at the time of the founding lacked just compensation clauses and took property even without providing compensation. So far, everything Justice Thomas cites points to more government power, not less. At least he now acknowledges Blackstone's belief in "just compensation."

The most natural reading of the Clause is that it allows the government to take property only if the government owns, or the public has a legal right to use, the property, as opposed to taking it for any public purpose or necessity whatsoever....When the government takes property and gives it to a private individual, and the public has no right to use the property, it strains language to say that the public is "employing" [i.e., "using"] the property, regardless of the incidental benefits that might accrue to the public from the private use. The term "public use," then, means that either the government or its citizens as a whole must actually "employ" the taken property...

I don't disagree, but it took > 100 years for someone in the U.S. Supreme Court to come up with it.

Tellingly, the phrase "public use" contrasts with the very different phrase "general Welfare" used elsewhere in the Constitution. ("Congress shall have Power To...provide for the common Defence and general Welfare of the United States"); preamble (Constitution established "to promote the general Welfare"). The Framers would have used some such broader term if they had meant the *Public Use Clause* to have a similarly sweeping scope. Other founding-era documents made the contrast between these two usages still more explicit. See Sales, Classical Republicanism and the *5th Amendment's* "Public Use" Requirement, noting contrast between, on the one hand, the term "public use" used by 6 of the first 13 States and, on the other, the terms "public exigencies" employed in the Massachusetts *Bill of Rights* and the Northwest Ordinance, and the term "public necessity" used in the Vermont Constitution of 1786. The Constitution's text, in short, suggests that the *Takings Clause* authorizes the taking of property only if the public has a right to employ it, not if the public realizes any conceivable benefit from the taking. The Constitution's common-law background reinforces this understanding. **The common law provided an express method of eliminating uses of land that <u>adversely impacted the public welfare</u>: nuisance law.** Blackstone and Kent, for instance, both carefully distinguished the law of nuisance from the power of eminent domain. Compare 1 Blackstone 135 (noting government's power to take private property with

compensation), with 3 id., at 216 (noting action to remedy 'public...nuisances, which affect the public and are an annoyance to all the King's subjects'); see also 2 Kent 274-276 (distinguishing the two). Blackstone rejected the idea that private property could be taken solely for purposes of any public benefit: "So great...is the regard of the law for private property that it will not authorize the least violation of it; no, not even for the general good of the whole community. If a new road ...were to be made through the grounds of a private person, it might perhaps be extensively beneficial to the public; but the law permits no man, or set of men, to do this without the consent of the owner of the land." Only "by giving the landowner **full indemnification**" could the government take property, and even then "the public was now considered as an individual, treating with an individual for an exchange." When the public took property, in other words, it took it as an individual buying property from another typically would: for one's own use. The *Public Use Clause*, in short, embodied the Framers' understanding that property is a natural, fundamental right, prohibiting the government from "taking *property* from A and giving it to B." *Calder v. Bull (1798)...*

Lot's of quotes...what is he trying to say? Also, there is the apples/oranges reference, again, to *Calder v. Bull*, a totally irrelevant case.

...The *Takings Clause* is a prohibition, not a grant of power. The Constitution does not expressly grant the Federal Government the power to take property for any public purpose whatsoever. Instead, the Government may take property only when necessary and proper to the exercise of an expressly enumerated power. See *Kohl v. United States (1876)*[6] (noting Federal Government's power under the Necessary and Proper Clause [Article I, Section 8, Clause 18] to take property "needed for forts, armories, and arsenals, for navy-yards and light-houses, for custom-houses, post-offices, and court-houses, and for other public uses"). For a law to be within the Necessary and Proper Clause, as I have elsewhere explained, it must bear an "obvious, simple, and direct relation" to an exercise of Congress' enumerated powers...and it must not "subvert basic principles of" constitutional design...In other words, a taking is permissible under the Necessary and Proper Clause only if it serves a valid public purpose. Interpreting the *Public Use Clause* likewise to limit the government to take property only for sufficiently public purposes replicates this inquiry. If this is all the Clause means, it is, once again, surplusage. The Clause is thus most naturally read to concern whether the property is used by the public or the government, not whether the purpose of the taking is legitimately public.

Early American eminent domain practice largely bears out this understanding of the *Public Use Clause*. This practice concerns state limits on eminent domain power, not the 5th Amendment, since it was not until the late 19th century that the Federal Government began to use the power of eminent domain, and since the *Takings Clause* did not even arguably limit state power until after the passage of the 14th Amendment. See *Tiernan v. Mayor of Baltimore*[7] (holding the *Takings Clause*

[6]Case 5A-E-2 on this website.

[7]Case 5A-E-1 on this website

inapplicable to the States of its own force). Nevertheless, several early state constitutions at the time of the founding likewise limited the power of eminent domain to "public uses." Their practices therefore shed light on the original meaning of the same words contained in the *Public Use Clause*.

States employed the eminent domain power to provide quintessentially public goods, such as public roads, toll roads, ferries, canals, railroads, and public parks. Though use of the eminent domain power was sparse at the time of the founding, many States did have so-called Mill Acts, which authorized the owners of grist mills operated by water power to flood upstream lands with the payment of compensation to the upstream landowner. **Those early grist mills were regulated by law and compelled to serve the public for a stipulated toll and in regular order**, and therefore were actually used by the public. They were common carriers -- quasi-public entities. These were "public uses" in the fullest sense of the word, because the public could legally use and benefit from them equally.

Justice Thomas attempts to distinguish the early Mill Acts. He must do so because if the Mill Acts amount to the same interpretation we have today, then his "original intent argument" fails. So, he suggests the distinguishing feature is that **"those early grist mills were regulated by law and compelled to serve the public for a stipulated toll and in regular order."** Please. The Developer in *Kelo* had to agree to the comprehensive development plan, had to invest his money (and lots of it) into that plan, had to abide by the zoning laws of that plan, had to open the doors of businesses created to the public, had to agree that the title to the land would remain in the City and had to agree that after 99 years his investment would vanish in thin air. I would say he was "regulated by law and compelled to serve the public," no less so than the mill owners.

To be sure, some early state legislatures tested the limits of their state-law eminent domain power. Some States enacted statutes allowing the taking of property for the purpose of building private roads. These statutes were mixed; some required the private landowner to keep the road open to the public, and others did not. Later in the 19th century, moreover, the Mill Acts were employed to grant rights to private manufacturing plants, in addition to grist mills that had common-carrier duties. These early uses of the eminent domain power are often cited as evidence for the broad "public purpose" interpretation of the *Public Use Clause*, but in fact the constitutionality of these exercises of eminent domain power under state public use restrictions was a hotly contested question in state courts throughout the 19th and into the 20th century. Some courts construed those clauses to authorize takings for public purposes, but others adhered to the natural meaning of "public use." As noted above, the earliest Mill Acts were applied to entities with duties to remain open to the public, and their later extension is not deeply probative of whether that subsequent practice is consistent with the original meaning of the *Public Use Clause*. At the time of the founding, "business corporations were only beginning to upset the old corporate model, in which the raison d'etre of chartered associations was their service to the public," so it was natural to those who framed the first Public Use Clauses to think of mills as inherently public entities. The disagreement among state courts, and state legislatures' attempts to circumvent public use limits on their eminent domain power, cannot obscure that the *Public Use Clause* is most naturally read to authorize takings for public use only if the government or the public actually uses the taken property.

Sounds weak to me.

Our current *Public Use Clause* jurisprudence, as the Court notes, has rejected this natural reading of the Clause. The Court adopted its modern reading blindly, with little discussion of the Clause's history and original meaning, in two distinct lines of cases: first, in cases adopting the "public purpose" interpretation of the Clause, and second, in cases deferring to legislatures' judgments regarding what constitutes a valid public purpose. Those questionable cases converged in the boundlessly broad and deferential conception of "public use" adopted by this Court in *Berman* and *Hawaii,* cases that take center stage in the Court's opinion.

The weakness of those two lines of cases, and consequently *Berman* and *Hawaii*, fatally undermines the doctrinal foundations of the Court's decision. Today's questionable application of these cases is further proof that the "public purpose" standard is not susceptible of principled application. This Court's reliance by rote on this standard is ill advised and should be reconsidered.

As the Court notes, the "public purpose" interpretation of the *Public Use Clause* stems from *Fallbrook Irrigation Dist. v. Bradley* [where] the issue was whether a condemnation for purposes of constructing an irrigation ditch was a "public use." This was a public use, Justice Peckham declared for the Court, because "to irrigate and thus to bring into possible cultivation these large masses of otherwise worthless lands would seem to be a public purpose and a matter of public interest, not confined to landowners, or even to any one section of the State." That broad statement was dictum, for the law under review also provided that "all landowners in the district have the right to a proportionate share of the water." Thus, the "public" did have the right to use the irrigation ditch because all similarly situated members of the public -- those who owned lands irrigated by the ditch – had a right to use it. The Court cited no authority for its dictum, and did not discuss either the *Public Use Clause*'s original meaning or the numerous authorities that had adopted the "actual use" test (though it at least acknowledged the conflict of authority in state courts). Instead, the Court reasoned that "the use must be regarded as a public use, or else it would seem to follow that no general scheme of irrigation can be formed or carried into effect." This is no statement of constitutional principle: Whatever the utility of irrigation districts or the merits of the Court's view that another rule would be "impractical given the diverse and always evolving needs of society," the Constitution does not embody those policy preferences any more than it "enacts Mr. Herbert Spencer's Social Statics."

This Court's cases followed *Bradley*'s test with little analysis. In *Clark v. Nash (1905)*, this Court relied on little more than a citation to *Bradley* in upholding another condemnation for the purpose of laying an irrigation ditch. As in *Bradley*, use of the "public purpose" test was unnecessary to the result the Court reached. The government condemned the irrigation ditch for the purpose of ensuring access to water in which "other land owners adjoining the defendant in error...might share" and therefore *Clark* also involved a condemnation for the purpose of ensuring access to a resource to which similarly situated members of the public had a legal right of access. Likewise, in *Strickley*, the Court upheld a condemnation establishing an aerial right-of-way for a bucket line operated by a mining company, relying on little more than *Clark.* This case, too, could have been disposed of on the narrower ground that "the plaintiff was a carrier for itself and others" and therefore that the

bucket line was legally open to the public. Instead, the Court unnecessarily rested its decision on the "inadequacy of use by the general public as a universal test." This Court's cases quickly incorporated the public purpose standard set forth in *Clark* and *Strickley* by barren citation.

A second line of this Court's cases also deviated from the *Public Use Clause*'s original meaning by allowing legislatures to define the scope of valid "public uses." *United States v. Gettysburg Electric R. Co. (1896)*, involved the question whether Congress' decision to condemn certain private land for the purpose of building battlefield memorials at Gettysburg, Pennsylvania, was for a public use. Since the Federal Government was to use the lands in question, there is no doubt that it was a public use under any reasonable standard. Nonetheless, the Court, speaking through Justice Peckham, declared that "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." As it had with the "public purpose" dictum in *Bradley,* the Court quickly incorporated this dictum into its *Public Use Clause* cases with little discussion.

There is no justification, however, for affording almost insurmountable deference to legislative conclusions that a use serves a "public use." To begin with, a court owes no deference to a legislature's judgment concerning the quintessentially legal question of whether the government owns, or the public has a legal right to use, the taken property. Even under the "public purpose" interpretation, moreover, it is most implausible that the Framers intended to defer to legislatures as to what satisfies the *Public Use Clause*, uniquely among all the express provisions of the *Bill of Rights*...

Agreed.

...The Court has elsewhere recognized "the overriding respect for the sanctity of the home that has been embedded in our traditions since the origins of the Republic," *Payton,* when the issue is only whether the government may search a home. Yet today the Court tells us that we are not to "second-guess the City's considered judgments" when the issue is, instead, whether the government may take the infinitely more intrusive step of tearing down petitioners' homes. Something has gone seriously awry with this Court's interpretation of the Constitution. Though citizens are safe from the government in their homes, the homes themselves are not. Once one accepts, as the Court at least nominally does, that the *Public Use Clause* is a limit on the eminent domain power of the Federal Government and the States, there is no justification for the almost complete deference it grants to legislatures as to what satisfies it.

These two misguided lines of precedent converged in *Berman* and *Hawaii*..."Subject to specific constitutional limitations," *Berman* proclaimed, "when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive. In such cases the legislature, not the judiciary, is the main guardian of the public needs to be served by social legislation." That reasoning was question begging, since the question to be decided was whether the "specific constitutional limitation" of the *Public Use Clause* prevented the taking of the appellant's (concededly "non-blighted") department store. *Berman* also appeared to reason that any exercise by Congress of an enumerated power (in this case, its plenary power over the District of Columbia) was *per se* a

"public use" under the *5th Amendment*. But the very point of the *Public Use Clause* is to limit that power.

More fundamentally, *Berman* and *Hawaii* erred by equating the eminent domain power with the police power of States. ("The 'public use' requirement is...coterminous with the scope of a sovereign's police powers"). Traditional uses of that regulatory power, such as the power to abate a nuisance, required no compensation whatsoever, in sharp contrast to the takings power, which has always required compensation. The question whether the State can take property using the power of eminent domain is therefore distinct from the question whether it can regulate property pursuant to the police power. In *Berman*, for example, if the slums at issue were truly "blighted," then state nuisance law, not the power of eminent domain, would provide the appropriate remedy. To construe the *Public Use Clause* to overlap with the States' police power conflates these two categories.

The "public purpose" test applied by *Berman* and *Hawaii* also cannot be applied in principled manner. "When we depart from the natural import of the term 'public use,' and substitute for the simple idea of a public possession and occupation, that of public utility, public interest, common benefit, general advantage or convenience...we are afloat without any certain principle to guide us." Once one permits takings for public purposes in addition to public uses, no coherent principle limits what could constitute a valid public use, at least none beyond Justice O'Connor's (entirely proper) appeal to the text of the Constitution itself. I share the Court's skepticism about a public use standard that requires courts to second-guess the policy wisdom of public works projects. The "public purpose" standard this Court has adopted, however, demands the use of such judgment, for the Court concedes that the *Public Use Clause* would forbid a purely private taking. It is difficult to imagine how a court could find that a taking was purely private except by determining that the taking did not, in fact, rationally advance the public interest. The Court is therefore wrong to criticize the "actual use" test as "difficult to administer." It is far easier to analyze whether the government owns or the public has a legal right to use the taken property than to ask whether the taking has a "purely private purpose," unless the Court means to eliminate public use scrutiny of takings entirely. Obliterating a provision of the Constitution, of course, guarantees that it will not be misapplied.

For all these reasons, I would revisit our *Public Use Clause* cases and consider returning to the original meaning [that] the government may take property only if it actually uses or gives the public a legal right to use the property.

The consequences of today's decision are not difficult to predict, and promise to be harmful. So-called "urban renewal" programs provide some compensation for the properties they take, but no compensation is possible for the subjective value of these lands to the individuals displaced and the indignity inflicted by uprooting them from their homes. Allowing the government to take property solely for public purposes is bad enough, but extending the concept of public purpose to encompass any economically beneficial goal guarantees that these losses will fall disproportionately on poor communities. Those communities are not only systematically less likely to put their lands to the highest and best social use, but are also the least politically powerful. If ever there were justification for intrusive judicial review of constitutional provisions that protect "discrete and insular minorities," surely that principle would apply with great force to the powerless groups and individuals the *Public Use Clause* protects. The deferential standard this Court has adopted for the

Public Use Clause is therefore deeply perverse. It encourages "those citizens with disproportionate influence and power in the political process, including large corporations and development firms" to victimize the weak.

That, of course, is one side to the argument. However, consider the other possibility. If the "weak" have a place to go, aren't they empowered to a degree if the development turns into jobs for them and "just compensation" for their property? Are the weak really better off if "big business" goes to a less burdensome state? It is just not that simple, is it?

Those incentives have made the legacy of this Court's "public purpose" test an unhappy one. In the 1950s, no doubt emboldened in part by the expansive understanding of "public use" this Court adopted in *Berman*, cities "rushed to draw plans" for downtown development. "Of all the families displaced by urban renewal from 1949 through 1963, 63 percent of those whose race was known were nonwhite, and of these families, 56 percent of nonwhites and 38 percent of whites had incomes low enough to qualify for public housing, which, however, was seldom available to them." Public works projects in the 1950s and 1960s destroyed predominantly minority communities in St. Paul, Minnesota, and Baltimore, Maryland. In 1981, urban planners in Detroit, Michigan, uprooted the largely "lower-income and elderly" Poletown neighborhood for the benefit of the General Motors Corporation. Urban renewal projects have long been associated with the displacement of blacks; "in cities across the country, urban renewal came to be known as 'Negro removal.'" Over 97 percent of the individuals forcibly removed from their homes by the "slum-clearance" project upheld by this Court in *Berman* were black. Regrettably, the predictable consequence of the Court's decision will be to exacerbate these effects.

The Court relies almost exclusively on this Court's prior cases to derive today's far-reaching, and dangerous, result. But the principles this Court should employ to dispose of this case are found in the *Public Use Clause* itself, not in Justice Peckham's high opinion of reclamation laws. When faced with a clash of constitutional principle and a line of unreasoned cases wholly divorced from the text, history, and structure of our founding document, we should not hesitate to resolve the tension in favor of the Constitution's original meaning. For the reasons I have given, and for the reasons given in Justice O'Connor's dissent, the conflict of principle raised by this boundless use of the eminent domain power should be resolved in petitioners' favor.