

**Statement of Michael D. Ramsey, Professor of Law,
University of San Diego Law School,
Relating to the Protection of Property Rights after *Kelo v. City of New London***

**Subcommittee on Commerce, Trade and Consumer Protection, U.S. House of
Representatives Committee on Energy and Commerce**

I thank the Committee for the opportunity to express my views of the protection of private property rights after the Supreme Court's decision in *Kelo v. City of New London*. My views are, in sum, as follows.

(1) The plain text of the Constitution, and its undisputed historical understanding, is that the government's power to take private property by eminent domain is limited by the Fifth Amendment to situations in which the property will be put to "public use." This means situations in which the property will be used by the government itself to fulfill one of the traditional public functions of government, such as providing a park or a highway, or situations in which the property is operated by a "common carrier," such as a railroad, with an obligation to serve the public.

(2) In *Kelo v. City of New London*, the U.S. Supreme Court greatly reduced this protection for private property. It ruled that the City could seize and demolish private homes to make way for private office buildings and other private development that the City believed would increase its tax revenues and create new jobs, even though the land would be privately owned and not open to the public.

(3) The Court did not pretend to base its conclusion upon the text and historical understanding of the Constitution. Instead, it said that the evolving modern needs of society required that it substitute the phrase "public purpose" for the Constitution's phrase "public use" – so that the government could seize private land any time that seizure would facilitate "economic development." As Justice O'Connor pointed out in dissent, this effectively removes all constitutional limits on the eminent domain power.

(4) The *Kelo* decision is an attack, not only upon private property rights, but upon the whole idea of constitutional rights. If a right written into the text of the Constitution can be altered by five members of the Supreme Court simply because they believe that the evolving modern needs of government require it to give way, then we have no fixed rights, but only those rights the Court is willing to accept at any given time.

(5) Congress can remedy the Court's error in several ways. It cannot directly overrule the Court. However, it can, for example, use its spending power to insist that no federal money be spent in any project that takes private property for private use. It can use its commerce power to prohibit the operation in interstate commerce of any project that take

private property for private use. Using these powers, it can largely restore the rights denied in *Kelo*.

I. The Constitution’s Protection for Private Property

The plain text of the Constitution, and its undisputed historical understanding, is that the government’s power to take private property by eminent domain is limited to situations in which the property will be put to “public use.” The Fifth Amendment, made applicable to states and local governments by the Fourteenth Amendment, provides: “[N]or shall private property be taken for public use, without just compensation.” The most obvious meaning of this provision is that if the government wants to take private property for “public use,” it must pay “just compensation” – thus assuring that the public a whole, not just the property owner, bears the cost.

Although the text does not say so in exactly these words, the clear and undisputed indication is that private property may *not* be taken, *other* than for “public use,” under any circumstances. Otherwise, the clause would be incoherent: it would mean that the government could take private property for private use without paying any compensation at all. No court or commentator reads the clause in that way. Rather, everyone agrees that the Fifth Amendment, as historically understood, imposes two restrictions on the eminent domain power: the property must be taken “for public use” and the government must pay “just compensation.”

The question here, then, is the meaning of “public use.” As a historical matter, that phrase meant exactly what it appears to mean. Most obviously, it refers to situations in which the property will be used by the government itself to fulfill one of the traditional public functions of government, such as providing a park or a highway. Additionally, it may refer to situations in which the property will be operated by a “common carrier,” such as a railroad, with an obligation to serve the public. It emphatically did not include situations in which the government transferred property from one private owner to another. Under no possible meaning of the phrase could that be considered taking land “for *public* use.”

II. The Decision in *Kelo v. City of New London*

In *Kelo v. City of New London*, 125 S.Ct. 2655 (2005), the U.S. Supreme Court greatly reduced the Fifth Amendment’s protection for private property. It ruled that the City could take private homes to make way for private office buildings and other private development that the City believed would increase its tax revenues and create new jobs, even though, after the taking, the land would be privately owned and not open to the public. As the Court explained: “The City has carefully formulated an economic development plan that it believes will provide appreciable benefits to the community, including – but by no means limited to – new jobs and increased tax revenue.” (at p.

2665). In particular, the Court concluded, the plaintiffs' private homes could be seized and demolished, and replaced by private "research and office space" that would "complement" an adjacent facility planned by Pfizer, Inc., the multinational pharmaceuticals company. (at. p. 2659; dissent at p. 2671-72).

The Court specifically held that "promoting economic development" qualifies as a "public use" of property under the Fifth Amendment. As it concluded, "[p]romoting economic development is a traditional and long accepted function of government," and "the City's interest in the economic benefits to be derived from the development" on the land taken from the plaintiffs – by which the Court principally meant increased tax revenue from the expected new commercial use – had enough of a "public character" to satisfy the Amendment. (p. 2665).

The Court added that it would not second-guess the City's determination that the re-development would, in fact, boost economic development and hence tax revenues. As Justice Kennedy acknowledged in concurrence, the Court would uphold a taking "as long as it is rationally related to a conceivable public purpose" (p. 2669). Under this very low standard, it is hard to imagine any seizure of private property being unconstitutional under the "public use" requirement. As Justice O'Connor stated in dissent,

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

[The Court] 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 benefits 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. (pp. 2671, 2675)

III. The Basis of the Court's Decision

The *Kelo* Court did not pretend to base its conclusion upon the words and historical understanding of the Constitution. Instead, it effectively admitted that it was re-writing the key phrase in the Fifth Amendment to produce what it thought was a better outcome. According to the Court, modern needs required it to substitute the phrase "public purpose" for the Constitution's phrase "public use." This would allow the government to seize private land and transfer it to other private parties any time that such transfer would facilitate "economic development," even though neither the government nor the public would end up owning or using the land.

Indeed, in a move of Orwellian proportions, the Court specifically rejected “‘use by the public’ as the proper definition of public use.” (p. 2663). Instead, it declared that “the diverse and always evolving needs of society” required it to “embrace[] the broader and more natural interpretation of public use as ‘public purpose.’” (at p. 2663).

Only this re-definition allowed the Court to reach its conclusion that “economic development” in the sense of (supposedly) higher tax revenues satisfied the Fifth Amendment. It is at least plausible to say, as the Court did, that the New London development plan has a “public purpose,” but no possible stretch of language would allow one to say that the City’s plan allowed “public use” of the property.

The Court purported to be following prior precedent in reaching these conclusions. It is true that at least two prior decisions had allowed a transfer of property from one private owner to another, without any guarantee of public use. *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229 (1984); *Berman v. Parker*, 348 U.S. 26 (1954). These decision were themselves in some tension with the plain language of the Constitution, and illustrate the danger of bending constitutional rules even for the best of purposes. But as Justice O’Connor pointed out in her *Kelo* dissent (p. 2674-75), *Midkiff* and *Berman* only created a limited exception to the general rule of “public use.” In both cases, prior to the taking the property had been used in a way that was harmful to the public interest. *Kelo* abandoned any such limitation. No one argued that there was anything injurious about the plaintiffs’ use of their property in *Kelo* (these are “well-maintained homes”) (p. 2675). Instead, *Kelo* allows seizure whenever the government thinks some *better* use (not a non-injurious use) could be made of the property. As Justice O’Connor concluded, this effectively eliminates any constitutional limit on the eminent domain power.

IV. The Effect on Constitutional Law

The *Kelo* decision is an attack, not only upon private property rights, but upon the whole idea of constitutional rights. If a right written into the text of the Constitution can be eliminated by five members of the Supreme Court simply because they believe that “the diverse and always evolving needs of society” require it to give way, then we have no fixed rights, nor, for that matter, any fixed structure of government. Everything depends upon what the Court thinks most useful at any particular moment.

Such an approach is contrary to the basic function of a written Constitution. The reason a phrase such as “public use” is written into the Constitution is so that it – and not some other standard, such as “public purpose” – is the measure of our rights. This approach is also contrary to the basic function of a constitutional court. As Alexander Hamilton argued in *Federalist 78*, “A constitution is, in fact, and must be regarded by the judges as, a fundamental law”; thus he referred to “that inflexible and uniform adherence to the rights of the Constitution, and of individuals, which we perceive to be indispensable in the courts of justice.” Just as courts exceed their authority by inventing

new limits on government that do *not* exist in the written Constitution, they shirk their duty when they fail to enforce rights that *do* exist in the written Constitution.

V. How Congress May Restore Private Property Rights

Congress can remedy the Court's attack upon property rights in several ways. It cannot directly overrule the Court on a matter of constitutional law. In parallel circumstances, the Supreme Court held that Congress lacked power to overturn a constitutional holding by statute, even though Congress sincerely believed that the Court had failed to enforce individual rights guaranteed by the plain text of the Constitution. *Boerne v. Flores*, 521 U.S. 507 (1997) (invalidating part of the Religious Freedom Restoration Act, which sought to correct the Court's perceived misinterpretation of the First Amendment's Free Exercise Clause).

However, Congress has a number of constitutional options available. First, it can declare that, with respect to the exercise of eminent domain power by the U.S. government, the constitutional rule of "public use" remains in force. There is precedent for this approach: the Religious Freedom Restoration Act directed that federal laws would remain subject to the constitutional rule of the Free Exercise Clause, as Congress understood it, despite the Court's contrary holding. No one doubts that this part of the Act is constitutional, and remains in effect: Congress can always limit the scope of federal action.

Congress also has several options for limiting the scope of state and local government exercise of eminent domain power. Under current law, Congress may use its spending power to insist that no federal money be spent in any state or local project that takes private property for private use. *South Dakota v. Dole*, 438 U.S. 203 (1987). If the limitation is strictly linked to state and local projects that themselves use federal money, the limitation would not be at all constitutionally problematic; even the dissenting opinion in *South Dakota* would uphold such a provision. A more aggressive approach would ban any state or local entity that takes private property for private use from receiving any federal money for *any* redevelopment project (or, even more controversially, from receiving any federal money for any purpose). The less direct the link between the federal money and the state or local taking, the more constitutionally-suspect the law would become.

Finally, under current law, Congress can use its commerce power to prohibit any project that takes private property for private use, if the project operates in or substantially affects interstate commerce. Because current law defines Congress' interstate commerce power quite broadly, *Gonzales v. Raich*, 125 S.Ct. 2195 (2005), this would likely reach most "economic development" projects such as the one proposed in New London. Even under the dissent's view in *Raich*, a key element was that the activity in that case was non-economic, and thus (said the dissent) beyond Congress' power. Here, the economic elements would be much greater, and thus the argument for

Congress' power would be correspondingly stronger. It is worth noting, though, that this broad reading of Congress' interstate commerce power (that is, that it reaches all economic activity) remains controversial in some circles, and it is possible that some (though probably not many) redevelopment project could be considered so localized as to be beyond Congress' power.

Respectfully submitted

Michael D. Ramsey
Professor of Law
University of San Diego Law School
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