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KELO V. CITY OF NEW LONDON: THE SWEEPING GRANT OF GOVERNMENT POWER AND THE CONDEMNATION OF AMERICAN PROPERTY RIGHTS

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On June 23, 2005, the United States Supreme Court issued its ruling in the now infamous case of *Kelo v. City of New London*.[1] In its first major ruling on eminent domain since 1984,[2] the Court decided whether a city's exercise of its eminent domain power to transfer property to private developers complied with the "public use" requirement of the Fifth Amendment.[3]

In 1984, the Court held that under the Fifth Amendment, a government may use its eminent domain power as long as it is "rationally related to a conceivable public purpose" as defined by the legislature.[4] Because of the Court's ruling, virtually no check on government use (or abuse) of eminent domain to seize property from private individuals and transfer it to private entities now exists.

This article is divided into three main sections. In the first section, I will briefly summarize the development of law concerning eminent domain, focusing mainly on cases cited by the Court in its opinion. In the second section, I will summarize the *Kelo* case, beginning with its factual background and lower court decisions and ending with a summary of the Court's treatment of the case. In the third section, I will analyze and critique the Court's reasoning as well as the alternative approaches offered by the other Justices. In the process, I will argue that the Court's deference to legislative determinations is not only a flawed

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[1] Kelo v. City of New London, 545 U.S. 469 (2005).
[2] *See* Haw. Hous. Auth. v. Midkiff, 467 U.S. 229 (1984).
[3] U.S. CONST. amend. V ("[N]or shall private property be taken for public use, without just compensation.").
[4] *Midkiff*, 467 U.S. at 241.

argument but also threatens to diminish the fundamental right of property.

DEVELOPMENT OF THE LAW

Nowhere in the Constitution is the power of eminent domain enumerated. Rather, the power is implied by the Fifth Amendment,[5] which states, in relevant part, that private property shall not be "taken for public use, without just compensation."[6] The scope of "public use" was not elaborated by the Framers.

Early Court rulings supported the notion that "public use" was interpreted narrowly. In *Calder v. Bull*,[7] Justice Chase declared that a legislative act that purports to "take *property* from A. and give it to B" would be "contrary to the *great first principles* of the *social compact*" and "cannot be considered a *rightful exercise* of *legislative* authority."[8]

By the dawn of the twentieth century, the Court gradually abandoned the natural law principles articulated by Justice Chase in favor of what the Court now refers to as "the broader and more natural interpretation of public use as 'public purpose.'"[9] In *Clark v. Nash*,[10] the Court deter-

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[5] U.S. CONST. amend. V ("No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.").

[6] *Id.*

[7] Calder v. Bull, 3 U.S. 386 (1798).

[8] *Id.* at 388.

[9] Kelo v. City of New London (*Kelo IV*), 545 U.S. 469, 480 (2005); *see, e.g.*, Fallbrook Irrigation Dist. v. Bradley, 164 U.S. 112, 158-64 (1896).

mined whether a taking in which a state government condemned privately owned land to be used as an irrigation ditch to irrigate other privately owned land violated the "public use" requirement of the Fifth Amendment.[11] The Court upheld the taking by deferring to the determinations of the state courts.[12] Similarly, in *Strickley v. Highland Boy Gold Mining Co.*,[13] the Court determined whether a taking in which the state condemned privately owned land to be used as an aerial right of way for a privately held mining company violated the "public use" requirement of the Fifth Amendment.[14] The Court again upheld the taking and emphasized "the inadequacy of use by the general public as a universal test."[15]

By 1916, the abandonment of "use by the general public" as the test for determining "public use" was considered established law.[16] However, the Court maintained that "the question [what is a public use] remains a judicial one which this Court must decide in performing its duty of enforcing the provisions of the Federal Constitution."[17]

In *Berman v. Parker*,[18] the Court considered whether the taking of a non-blighted department store as part of a broader urban renewal project violated the "public use" requirement.[19] Under the proposed redevelopment project, Congress planned to condemn a large blighted area of the District of Columbia for the construction of roads and public buildings and to "lease or sell the remainder as an enti-

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[10] Clark v. Nash, 198 U.S. 361 (1905).
[11] U.S. CONST. amend. V ("[N]or shall private property be taken for public use, without just compensation."); *Clark*, 198 U.S. at 367.
[12] *See Clark*, 198 U.S. at 369-70.
[13] Strickley v. Highland Boy Gold Mining, Co., 200 U.S. 527 (1906).
[14] *See id.* at 529.
[15] *Id.* at 531.
[16] *See* Mount Vernon-Woodberry Cotton Duck Co. v. Ala. Interstate Power Co., 240 U.S. 30, 32 (1916).
[17] Cincinnati v. Vester, 281 U.S. 439, 446 (1930).
[18] Berman v. Parker, 348 U.S. 26 (1954).
[19] *See id.* at 29-31.

rety or in parts to a redevelopment company, individual, or partnership."[20] Although the petitioner's department store was not blighted, it was nonetheless designated for taking, and the Court upheld the taking.[21] The Court stated that the government's eminent domain power was coterminous with "the police power," the definition of which "is essentially the product of legislative determinations addressed to the purposes of government . . . ."[22] The Court determined that, "[s]ubject to specific constitutional limitations, 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 . . . ."[23] Therefore, "[t]he role of the judiciary in determining whether that power is being exercised for a public purpose is an extremely narrow one."[24]

Three decades later, in *Hawaii Housing Authority v. Midkiff*,[25] the Court again considered the "public use" requirement, this time in response to efforts by the State of Hawaii designed to break up the concentration of land ownership in its state by allowing for the transfer of fee simple title from lessors to lessees, at the election of the lessees, through condemnation proceedings.[26] The Court upheld the taking and reiterated that "[t]he 'public use' requirement is thus coterminous with the scope of a sovereign's police power."[27] Therefore, "where the exercise of the eminent domain power is rationally related to a conceivable public purpose," the Court will not hold "a com-

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[20] *Id.* at 30.
[21] *Id.* at 34.
[22] *Id.* at 32.
[23] *Id.*
[24] *Id.*
[25] Haw. Hous. Auth. v. Midkiff, 467 U.S. 229 (1984).
[26] *See id.* at 231-33.
[27] *Id.* at 240.

pensated taking to be proscribed by the Public Use Clause."[28]

THE *KELO* DECISION

The dispute in *Kelo v. City of New London*[29] emerged from a planned redevelopment of the Fort Trumbell area of New London, Connecticut, which suffered from a poor economy and high unemployment.[30] In wake of its worsening economic condition, the city of New London reactivated the New London Development Corporation (NLDC), a private nonprofit entity established to assist the city of New London in planning economic development.[31]

In 1998, the pharmaceutical giant, Pfizer, Inc., announced that it would open a major research facility in the Fort Trumbell area.[32] Hoping to draw momentum for economic revitalization from Pfizer's arrival, the NLDC drafted an integrated development plan that focused on ninety acres of the Fort Trumbell area, including a waterfront conference hotel, a small urban village consisting of restaurants, shops, office space, residences, several marinas, a pedestrian river walk, a state park, a United States Coast Guard Museum, and other proposed improvements.[33] In addition, the NLDC would enter into long-term ground leases with private developers – for nominal rent – in exchange for the developers' promise "to develop the land according to the" plan drafted by the NLDC.[34] The NLDC believed that the plan would revitalize New London's

[28] *Id.* at 241.
[29] Kelo v. City of New London, 545 U.S. 469 (2005).
[30] *See id.* at 472-73.
[31] *See id.* at 473.
[32] *See id.*
[33] *See id.* at 474.
[34] *See id.* at 476 n.4.

economy by creating new jobs and generating tax revenue.[35]

"[A]pproximately 115 privately owned properties," including those owned by the petitioners, were located in the area designated for redevelopment by the NLDC.[36] Of the fifteen properties in the Fort Trumbell area owned by the petitioners, ten were "occupied by the owner or a family member," whereas "the other five [were] held as investment properties."[37] To acquire the land necessary to realize the ambitious development plan, New London authorized the NLDC to condemn land through eminent domain proceedings.[38]

Although the NLDC succeeded in negotiating the purchase of most of the property located in the Fort Trumbell area, it failed to convince the petitioners to sell.[39] In November 2000, the NLDC began condemnation proceedings to acquire the petitioners' properties.[40] Petitioners filed suit claiming, in part, that the proposed taking of their property for a "public benefit" violated the "public use" requirement of the Fifth Amendment.[41] The trial court granted injunctive relief to the petitioners.[42] On appeal, the Supreme Court of Connecticut held that all the proposed takings were valid.[43] The court concluded, *inter alia*, that the proposed takings qualified as a "public use" under both the Connecticut and United States Constitutions,[44] stating that "economic development projects . . . that have the

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[35] *See id.* at 474.
[36] *See id.* at 473-74.
[37] *Id.* at 475.
[38] *See id.*
[39] *See id.*
[40] *See id.*
[41] *See id.*
[42] *See* Kelo v. City of New London (*Kelo I*), No. 557299, 2002 WL 500238, at *112 (Conn. Super. Ct. Mar. 13, 2002).
[43] Kelo v. City of New London (*Kelo II*), 843 A.2d 500, 574 (Conn. 2004).
[44] *Id.* at 527.

public economic benefits of creating new jobs, increasing tax and other revenues, and contributing to urban revitalization, satisfy the public use clauses of the state and federal constitutions."[45] Following the ruling of the Supreme Court of Connecticut, the petitioners appealed to the Supreme Court of the United States, which granted certiorari.[46]

OPINION OF THE COURT

The Supreme Court focused its inquiry on "whether the city's proposed disposition of this property qualifies as a 'public use' within the meaning of the Takings Clause of the Fifth Amendment . . . ."[47] The Court held that the takings "unquestionably serve[d] a public purpose" and therefore, satisfied the "public use" requirement of the Fifth Amendment.[48]

The Court began its inquiry by dismissing as illegitimate any use of the eminent domain power, which attempts to "take the property of A for the sole purpose of transferring it to . . . B," even if paid just compensation.[49] However, the majority emphasized that the Court had "long ago rejected any literal requirement that condemned property be put into use for the general public."[50] By the Court's reasoning, such a narrow view of the "public use" requirement was not only "difficult to administer" but also "impractical given the diverse and always evolving needs of society."[51] Citing its precedent in *Strickley*[52] and

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[45] *Id.* at 520.
[46] Kelo v. City of New London (*Kelo III*), 542 U.S. 965 (2004).
[47] Kelo v. City of New London, (*Kelo IV*) 545 U.S. 469, 472 (2005).
[48] *Id.* at 484.
[49] *Id.* at 477.
[50] *Id.* at 480 (citing Haw. Hous. Auth. v. Midkiff, 467 U.S. 229, 244 (1984)).
[51] *Id.*

Clark,[53] among other cases, the Court reaffirmed its rejection of the "narrow test" requiring use by the general public.[54] Instead, the Court chose to embrace what it called "the broader and more natural interpretation of public use as 'public purpose.'"[55] Thus, although conceding that New London was not "planning to open the condemned land . . . to use by the general public" and that the private lessees would not "in any sense be required to operate like common carriers, making their services available to all comers,"[56] the Court concluded that these facts alone did not violate the "public use" requirement.

Rather, the Court turned its analysis to whether the development plan served a "public purpose."[57] Relying on its precedents in *Berman* and *Midkiff*,[58] the Court reaffirmed that "[w]ithout exception, our cases have defined [public purpose] broadly, reflecting our longstanding policy of deference to legislative judgments in this field."[59] As long as "the legislature's purpose is legitimate and its means are not irrational" the Court will not pass judgment "over the wisdom of the takings."[60]

The Court rejected the petitioners' argument for the establishment of a "bright line rule"[61] preventing the transfer of condemned property to private entities, holding that its precedents "foreclose[d] this objection" because "the government's pursuit of a public purpose will often benefit

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[52] *See* Strickley v. Highland Boy Gold Mining, Co., 200 U.S. 527, 531 (1906).
[53] *See* Clark v. Nash, 198 U.S. 361, 368 (1905).
[54] *Kelo IV*, 545 U.S. at 480-81.
[55] *Id.* at 480.
[56] *Id.* at 478-79.
[57] *Id.* at 480.
[58] *Id.* at 484-85.
[59] *Id.* at 480.
[60] *Id.* at 488 (quoting Haw. Hous. Auth. v. Midkiff, 467 U.S. 229, 242-43 (1984)).
[61] *Id.* at 484.

individual private parties."[62] Citing its precedent in *Midkiff*, the Court stressed that a "taking's purpose and not its mechanics" determined "public use."[63]

The Court also rejected the petitioners' argument that economic development takings "should require a 'reasonable certainty' that the expected public benefits will actually accrue."[64] The Court responded that such heightened scrutiny "would represent an even greater departure from our precedent"[65] in which the legislature's stated purpose was subjected only to a rational basis test.[66] The Court determined that "[t]he disadvantages of a heightened form of review are especially pronounced" in economic development takings because the "required postponement of the judicial approval" necessary for such a test would "impose a significant impediment to the successful consummation of many such plans."[67]

ANALYSIS

The *Kelo* ruling presents a twofold, mutually reinforcing problem: (1) no concrete, objective definition of what constitutes a "public use" exists and (2) the "public use" requirement is satisfied solely upon the legislative determination that the use is "public" and that the taking is "legitimate." Thus, the government's power to condemn land through eminent domain is virtually unchecked, and fundamental property rights are at the mercy of the government officials' whims.

To comply with the Fifth Amendment, a taking must be for "public use." The definition of "public use" must be clearly defined to determine the limits on govern-

[62] *Id.* at 485.
[63] *Id.* at 482.
[64] *Id.* at 487.
[65] *Id.* at 487-88.
[66] *Id.*
[67] *Id.* at 488.

ment power. The Court fails to provide such a definition, rather electing to adopt whatever the legislative body determines to be a "public purpose" under its "longstanding policy of deference to legislative judgments . . . ."[68] Indeed, the Court announced that as long as "the legislature's purpose is legitimate and its means are not irrational" the Court will not pass judgment "over the wisdom of [the] takings."[69] In *Kelo*, the sufficient "public purpose" that the NLDC determined was "new jobs and increased tax revenue."[70] In reality, this purported public use was simply the aggregate collection of private benefits (new jobs) and the government benefit of increased revenue (new taxes). The Court announced only one exception to its deference to legislative determinations: circumstances in which the government attempts to condemn privately held land "for the purpose of conferring a private benefit on a particular private party."[71] However, as Justice O'Connor noted, "[t]he trouble with economic development takings is that private benefit and incidental public benefit are, by definition, merged and mutually reinforcing."[72] Thus, as Justice O'Connor noted in her dissent, "it is difficult to envision anyone but the 'stupid staff[er]' failing" the Court's rational basis scrutiny.[73]

For her part, Justice O'Connor suggested a definition of "public use" that attempts to reconcile the majority opinion that she authored in *Midkiff*.[74] Justice O'Connor's proposed test would allow governments to transfer condemned property to private entities only under special cir-

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[68] *Id.* at 480.
[69] *Id.* at 488 (quoting Haw. Hous. Auth. v. Midkiff, 467 U.S. 229, 242-43 (1984)).
[70] *Id.* at 483.
[71] *Id.* at 477 (citing *Midkiff*, 467 U.S. at 245).
[72] *Id.* at 502 (O'Connor, J., dissenting).
[73] *Id.* (citing Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1025-26 n.12 (1992)).
[74] *Midkiff*, 467 U.S. at 231.

cumstances. Thus, takings that transfer condemned property to private entities would still comply with the "public use" requirement if they involve the elimination of "existing property use . . . to remedy harm."[75] Unfortunately, Justice O'Connor's test is equally vulnerable to the deference afforded by the Court to legislative determinations because without a clear definition, "harm" is a subjective standard. In the end, legislatures would merely shift the emphasis of their findings to discover a "harm" rather than a "public purpose." Unless the Court determined a more precise meaning of "harm," or in the alternative, the level of harm needed to justify condemnation, Justice O'Connor's test cannot effectively guarantee the property rights of those whose property is targeted for taking.

As Justice Thomas noted in his dissent, "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 . . . ."[76] Under Justice Thomas' approach, takings would only satisfy the "public use" requirement when the public actually used the property.[77] Thus, the extent of a court's inquiry would be simply to determine "whether the government owns" the subject property or whether "the public has a legal right to use, the taken property."[78] Consequently, the traditional power of eminent domain would remain intact, allowing governments to take land for public buildings and for common carriers who serve the public at large. Private property, however, would be protected against transfers to private entities that do not serve the public at large. This approach would prevent the possibility of transfers designed to confer private benefits on certain, favored private

[75] *Kelo IV*, 545 U.S. at 500.
[76] *Id.* at 508 (Thomas, J., dissenting); *see id.* at 506-11.
[77] *Id.* at 521.
[78] *Id.* at 517.

entities with only "incidental public benefits."[79] Although his formulation is strict, Justice Thomas presents the only concrete, objective definition of "public use" that draws a clear line between what a government can and cannot do.

The Court's decision to abstain from an objective definition of "public use" does not only result in the failure to define the outer limits of government power. At the very least, the Court is guilty of begging the question: the legislature's purpose must be public, but the legislature determines what constitutes a public purpose. Allowing the legislature to determine whether the use is "public" and whether the taking is "legitimate" is both unnecessary and unjust. The public interest, as presented by the legislative body, is already represented in the court proceeding by the government's attorneys. It is unnecessary for a court to represent the government's position as well. Furthermore, legislative determination is unjust because no disinterested review of the proposed taking's legitimacy exists. By way of analogy, it would be as if the law required a court to defer to the prosecutor's determination of a criminal defendant's guilt. In this type of situation, how are landowners afforded any meaningful due process under the Fifth Amendment when the Court has stacked the odds so heavily in favor of the government? As Justice O'Connor stated, "[a]n 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."[80]

Perhaps sensing these problems, Justice Kennedy proposed a "meaningful rational basis" test for a "narrowly drawn category of takings" involving "private transfers in which the risk of undetected impermissible favoritism of private parties is so acute that a presumption (rebuttable or otherwise) of invalidity is warranted under the Public Use

[79] *See id.* at 502 (O'Connor, J., dissenting).
[80] *Id.* at 497.

Clause."[81] Kennedy concludes that the Court "should strike down a taking that, by a clear showing, is intended to favor a particular private party, with only incidental or pretextual public benefits . . . ."[82]

However, it is difficult to see how Justice Kennedy's test is in any way "meaningful." By preserving "the presumption that the government's actions were reasonable and intended to serve a public purpose,"[83] Justice Kennedy's test provides little reason to believe that a property owner could mount a successful challenge to a legislature's stated intentions. Justice O'Connor also criticized Kennedy's test, complaining that it failed to specify "what courts should look for in a case with different facts, how they will know if they have found it, and what to do if they do not."[84] For his part, Justice Kennedy declined to "conjecture as to what sort of cases might justify a more demanding standard . . . ."[85]

However, Justice Kennedy's reservations, as well as the objections of Justices Thomas and O'Connor, indicate the deeper, far more pernicious problem presented by the majority opinion: virtually no check exists on the government's ability to take property from its citizens based on even the slightest pretense.

The *Kelo* decision, however, was not a revolutionary gesture. The majority opinion is unquestionably consistent with takings precedent, as it has evolved over the last two centuries. Instead, the *Kelo* decision represents the dangerous and perverse culmination of that evolution. The result is that the Takings Clause has emerged as a sword of government power rather than a shield for individual property rights.

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[81] *Id.* at 493 (Kennedy, J., concurring).
[82] *Id.* at 491.
[83] *Id.*
[84] *Id.* at 502 (O'Connor, J., dissenting).
[85] *Id.* at 493 (Kennedy, J., concurring).

Dangerously absent from the Court's analysis is the basic acknowledgment that property is a fundamental right that the Takings Clause shields. James Madison, the architect of the Constitution and the original drafter of the Takings Clause,[86] "feared that the government's power to take property, if left unrestricted, could jeopardize private property rights."[87] Thus, this concern was enshrined: "No person shall be . . . deprived of life, liberty, or property, without due process of law. . . ."[88] In 1792, just months after the ratification of the Bill of Rights, James Madison declared, "Government is instituted to protect property of every sort; as well that which lies in the various rights of individuals, as that which the term particularly expresses. This being the end of government, that alone is a *just* government, which *impartially* secures to every man, whatever is his *own*."[89] As Justice Thomas correctly noted in his dissent, the Framers understood property as a "natural, fundamental right,"[90] and as such, "it is 'imperative that the Court maintain absolute fidelity to' the [Public Use] Clause's express limit on the power of the government over the individual, no less than with every other liberty express-

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[86] *See* JAMES MADISON, WRITINGS 443 (Jack N. Rakove ed., Literary Classics of the United States, Inc. 1999).

[87] Daniel B. Kelly, *The "Public Use" Requirement in Eminent Domain Law: A Rationale Based on Secret Purchases and Private Influence*, 92 CORNELL L. REV. 1,9 (2006) (citing JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 314-15 (1996) ("noting that Madison's 'concern about the security of private rights was rooted in a palpable fear that economic legislation was jeopardizing fundamental rights of property' and that 'by 1787 a decade of state legislation had enabled Madison to perceive how economic and financial issues could forge broad coalitions across society, which could then actively manipulate the legislature to secure their desired ends'")).

[88] U.S. CONST. amend. V.

[89] MADISON, *supra* note 86, at 515.

[90] *Kelo IV*, 545 U.S. at 510 (Thomas, J., dissenting).

ly enumerated in the Fifth Amendment or the Bill of Rights more generally."[91]

Confronted with the conflict between an expansive government power and an express fundamental right, deference should have been paid to the petitioners' property rights rather than the City's determinations of "public purpose." Although the Court pays tribute to Justice Chase's famous statement in *Calder v. Bull*,[92] which forbids "a law that takes *property* from A and gives it to B,"[93] the Court would do well to acknowledge Justice Chase's immediately preceding statement, which forbids "a law that makes a man *a Judge in his own cause*."[94] Instead, the Court has chosen to make the government the judge in its own cause in determining the existence of a "public use" and for the very purpose of taking property from A and giving it B.

In *Kelo*, the Court breached its duty to protect fundamental individual rights from the government's ambitious and intrusive designs. Although greatly expanding the definition of "public use," the Court simultaneously refused to include any corresponding protection of individual property rights in its analysis. At the very least, the Court's analysis should have balanced legislative interests against the individual property rights of the affected landowners. Although the Court imposes strict demands and heightened scrutiny in virtually every other scenario in which government action impedes on constitutional rights, the Court has proved remarkably timid about applying such protections to property rights in takings cases. However, as James Madison said, "[i]f the United States mean to obtain or deserve the full praise due to wise and just governments,

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[91] *Id.* at 507 (internal quotations omitted).
[92] *Id.* at 478 n.5 (majority opinion).
[93] Calder v. Bull, 3 U.S. 386, 388 (1798).
[94] *Id.*

they will equally respect the rights of property, and the property in rights . . . ."[95]

CONCLUSION

The Court's decision in *Kelo v. City of New London* will stand as a case in which the Court failed to acknowledge and to protect fundamental property rights guaranteed under the Constitution. Instead, the Court chose to defer entirely to the judgment of the legislative entities whose aim was to deprive its citizens of their fundamental rights and to transfer their property to other private entities, all in the name of creating "new jobs and increased tax revenue."[96] Confronted with these facts, the Court should have applied a heightened standard of review to protect private property owners against this highly questionable application of the eminent domain power. The Court refused, and in so doing, "all private property is now vulnerable to being taken and transferred to another private owner . . . who will use it in a way that the legislature deems more beneficial to the public . . . ."[97]

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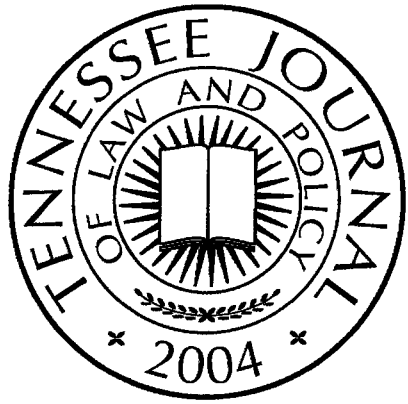
[95] MADISON, *supra* note 86, at 517.
[96] *Kelo IV*, 545 U.S. at 483.
[97] *Id.* at 494 (O'Connor, J., dissenting).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