

KELO, POPULARITY, AND SUBSTANTIVE DUE PROCESS*

Justice John Paul Stevens (Ret.)

The opinion for the Court in *Kelo v. City of New London, Connecticut*¹ is the most unpopular opinion that I wrote during my thirty-four year tenure on the Supreme Court. Indeed, I think it is the most unpopular opinion that any member of the Court wrote during that period. After it was announced, friends and acquaintances frequently told me that they could not understand how I could have authored such an opinion. Outraged citizens sought to retaliate against Justice Souter for joining my opinion; they rallied and gathered petitions urging the city of Weare, New Hampshire, to condemn his home in order to build the “Lost Liberty Hotel”²—apparently assuming that our holding would authorize such retaliatory action.

The response to *Kelo* included legislative action. Senate and House committees held hearings to consider possible remedies for the injustices thought to be authorized by our holding.³ That process ultimately culminated in an amendment to a federal funding act that restricted use of the act’s funds on state or local projects that would employ the eminent domain power for projects of “economic development that primarily benefit[] private entities.”⁴ Many states have passed laws directly restricting their power to use eminent domain for economic development as well.⁵

The *Kelo* majority opinion remains unpopular. Recently a commentator named Damon W. Root described the decision as the “eminent domain

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1. 545 U.S. 469 (2005).

2. John Tierney, Op-Ed., *Supreme Home Makeover*, N.Y. TIMES, Mar. 14, 2006, at A27; Kathy McCormack, *Protest Hits Close to Home for Justice Souter*, SEATTLE TIMES, Jan. 22, 2006, <http://community.seattletimes.nwsourc.com/archive/?date=20060122&slug=souter22>.

3. *The Kelo Decision: Investigating Takings of Homes and Other Private Property: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. (2005) [hereinafter *Senate Hearing*]; *Protecting Property Rights After Kelo: Hearing Before the Subcomm. on Commerce, Trade, and Consumer Protection of the H. Comm. on Energy and Commerce*, 109th Cong. (2005).

4. Transportation, Treasury, Housing and Urban Development, the Judiciary, the District of Columbia, and Independent Agencies Appropriations Act, Pub. L. No. 109-115, § 726, 119 Stat. 2396, 2494–95 (2005).

5. Ilya Somin, *The Limits of Backlash: Assessing the Political Response to Kelo*, 93 MINN. L. REV. 2100 (2009); CASTLE COALITION, 50 STATE REPORT CARD: TRACKING EMINENT DOMAIN REFORM LEGISLATION SINCE KELO (2007), available at http://www.castlecoalition.org/pdf/publications/report_card/50_State_Report.pdf.

debacle.”⁶ Last month, Justice Scalia, who joined Justice O’Connor’s dissent in *Kelo*,⁷ stated that the Supreme Court had misjudged how far it could “stretch beyond the text of the Constitution” in the *Kelo* decision without provoking overwhelming public criticism and resistance, much as it had done with respect to its prior decisions in the *Dred Scott* case on slavery and in *Roe v. Wade* on abortion.⁸ In Justice Scalia’s view, *Kelo* employed a doomed form of constitutional analysis, through which judges attempt to shape the Constitution to what they believe current society views as right and necessary.

This afternoon, I shall identify three of the reasons why the opinion was so unpopular. I shall then point out that Justice Oliver Wendell Holmes’s broad reading of the text of the Constitution—which allows the states the same broad discretion in making takings decisions that they possess when engaging in other forms of economic regulation—had been endorsed by two unanimous Court opinions, the first in 1954 in *Berman v. Parker*,⁹ and the second in 1984 in *Hawaii Housing Authority v. Midkiff*.¹⁰ Finally, I shall suggest that if the *Kelo* majority did commit error, that error had nothing to do with the text of the Constitution. At most, the majority may have failed to engage in judicial activism by expanding the doctrine of substantive due process to create a new rule limiting the power of sovereign states to condemn private homes—a rule which no one asked the Court to create. Instead, *Kelo* adhered to the doctrine of judicial restraint, which allows state legislatures broad latitude in making economic policy decisions in their respective jurisdictions, and creates a strong presumption against a construction of the Fourteenth Amendment’s Due Process Clause that would make federal judges the final arbiters of policy questions best answered by the voters’ elected representatives.

I begin with a brief description of our holding in *Kelo*.

I

In 1990, following decades of economic decline, a Connecticut state agency designated the City of New London as a “distressed municipality.”¹¹ Years of planning activities by state and local agencies led

6. Damon W. Root, *John Paul Stevens’ Faint-Hearted Liberalism*, REASON ONLINE (Oct. 26, 2011), <http://reason.com/archives/2011/10/26/john-paul-stevens-faint-hearte>.

7. *Kelo v. City of New London, Conn.*, 545 U.S. 469, 494 (2005) (O’Connor, J., dissenting).

8. Debra Cassens Weiss, *Scalia Lumps Kelo Decision with Dred Scott and Roe v. Wade*, ABA JOURNAL (Oct. 19, 2011, 8:05 AM), http://www.abajournal.com/news/article/scalia_lumps_kelo_decision_with_dred_scott_and_roe_v_wade.

9. 348 U.S. 26 (1954).

10. 467 U.S. 229 (1984).

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

to the approval in the year 2000 of an integrated redevelopment plan covering ninety acres of property in the Fort Trumbull area of the City.¹² The plan included both commercial uses—such as office space, a hotel, and a new residential community—and non-commercial uses—a museum, a state park, and marinas.¹³ The City’s development agent was able to acquire most of the land in the targeted area by purchase from willing sellers, but because negotiations with nine owners of fifteen parcels were unsuccessful, the City initiated condemnation proceedings to acquire those parcels.¹⁴ Susette Kelo and the other eight owners responded by bringing an action in the New London Superior Court claiming that, even if they received just compensation, the taking of their properties would violate both state law and the federal Constitution.¹⁵

After a seven-day trial, the court granted relief to some but not all of the plaintiffs.¹⁶ Both sides then appealed to the Connecticut Supreme Court. Resolving several separate issues, the majority upheld the entire plan and ruled that the condemnation proceedings could go forward.¹⁷ In a thoughtful partial concurrence and partial dissent on behalf of three members of the state supreme court, Justice Zarella agreed that condemnation for the purpose of redevelopment was permissible and that the City’s plan was valid on its face, but he concluded that the City had failed to prove by clear and convincing evidence that the projected benefits would actually be achieved.¹⁸

We granted certiorari to decide whether the City’s proposed disposition of the petitioners’ property qualified as a “public use” within the meaning of the Fifth Amendment.¹⁹ For the purposes of our decision, the members of the Court did not dispute whether the objectives of the plan would be achieved. My majority opinion for the Court held that a City’s decision to take property for the purpose of economic development was constitutional.²⁰

II

As anticipated, the public reaction to our decision was extremely unfavorable. Despite the fact that the law guarantees just compensation to

12. *Id.* at 473–74.

13. *Id.* at 474.

14. *Id.* at 475.

15. *Id.*; *Kelo v. City of New London*, 843 A.2d 500, 507–08 (Conn. 2004).

16. *Kelo*, 545 U.S. at 475–76.

17. *Id.* at 476.

18. *Kelo*, 843 A.2d at 600–01.

19. *Kelo*, 545 U.S. at 489–90.

20. *Id.*

every person whose property is taken by the government, condemnations of private homes, like the foreclosure of mortgages, inevitably generate emotional concerns about the impartial administration of the law. The character of the litigants in the *Kelo* case cried out for exceptional protection. One of them, Wilhelmina Dery, had lived in her house since her birth in 1918; another, Susette Kelo, who had moved into the area in 1997, had made extensive improvements to her home and prized her view of the water.²¹ None of the properties was blighted or otherwise in poor condition.²² They were condemned solely because they happened to be located in the development area.²³ Despite the guarantee of just compensation, the taking of such property was predictably unpopular.

While those facts might have been relevant to the measure of just compensation to which the property owners were constitutionally entitled,²⁴ they were not relevant to the question whether urban redevelopment is a constitutionally permissible basis for the condemnation of private property. The harsh consequences of the decision for the original property owners would have been the same if the condemnation had been made in order to construct a public highway or a bridge. Moreover, the constitutional merits of the petitioners' challenge would have been the same if the improvements on the condemned property had been gas stations or pool halls instead of residences. Although the law guarantees payment of just compensation to the property owner, unwilling sellers are seldom satisfied with the price they receive. Condemnations of private homes are categorically disfavored.

A second reason that the decision was unpopular was that public commentary mis-described the motivation for the City's plan. As an example, in his recent criticism of the case, Damon Root described the City's motivation thusly:

At issue was the Pfizer corporation's 1998 plan to build a giant research and development center in New London, Connecticut. As part of the deal, city officials agreed to clear out neighboring property owners via eminent domain, giving a private developer space to complement the Pfizer facility with a new hotel, office towers, and apartments.²⁵

21. *Id.* at 475.

22. *Id.*

23. *Id.*

24. See Akhil Reed Amar, *America's Lived Constitution*, 120 YALE L.J. 1734, 1776–77 (2011) (suggesting that the just compensation for a home should include a “special bonus” to account for sentimental attachments the owner may have to the property, unlike commercially owned property).

25. Root, *supra* note 6.

In fact, the interests of Pfizer, as well as other private entities, were the subject of significant testimony during the trial of the case. Justice Kennedy's description of that evidence in his separate concurring opinion merits quotation:

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. Here, the trial court conducted a careful and extensive inquiry into "whether, in fact, the development plan is of primary benefit to . . . the developer . . . and private businesses which may eventually locate in the plan area [e.g., Pfizer], and in that regard, only of incidental benefit to the city." The trial court considered testimony from government officials and corporate officers; documentary evidence of communications between these parties; respondents' awareness of New London's depressed economic condition and evidence corroborating the validity of this concern; the substantial commitment of public funds by the State to the development project before most of the private beneficiaries were known; evidence that respondents reviewed a variety of development plans and chose a private developer from a group of applicants rather than picking out a particular transferee beforehand; and the fact that the other private beneficiaries of the project are still unknown because the office space proposed to be built has not yet been rented.

The trial court concluded, based on these findings, that benefiting Pfizer was not "the primary motivation or effect of this development plan"; instead, "the primary motivation for [respondents] was to take advantage of Pfizer's presence." Likewise, the trial court concluded that "[t]here is nothing in the record to indicate that . . . [respondents] were motivated by a desire to aid [other] particular private entities." 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, [the private developer], 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.²⁶

26. *Kelo*, 545 U.S. at 491–92 (Kennedy, J., concurring) (citations omitted).

A third reason why the decision continues to be unpopular is that the project was never completed. In 2009, well after the litigation had been concluded, Pfizer decided to close down its New London facility and move out of the city.²⁷ While that post-decision development may suggest that there were significant deficiencies in the proposed plan, fair criticism of the Court's *Kelo* holding must be based on the assumption—not disputed by either the dissenting Justices or the majority—that the projected benefits of the plan would be fully achieved.

In sum, the unpopularity of the decision tells us nothing about either its wisdom or its fidelity to the rule of law.

III

The majority opinion that I authored in the *Kelo* case incorrectly assumed—as Justice Kennedy and each of the dissenting opinions also did—that the case required us to construe the “Takings” or “Public Use” Clause of the Fifth Amendment to the Constitution.²⁸ That Clause, however, simply provides the following: “[N]or shall private property be taken for public use, without just compensation.”²⁹ The Takings Clause says nothing about what sorts of property may be taken by the government or what sorts of reasons may justify the taking. It merely requires the federal government to obey an ancient common law rule requiring the payment of compensation when the government does take private property for public use. It does not itself apply to action of any kind by the states.

It is the Fourteenth Amendment that provides the limits to the states' power to deprive persons of their property. The relevant portion of that Amendment provides: “[N]or shall any State deprive any person of life, liberty, or property, without due process of law”³⁰ In footnote 1 of the *Kelo* majority opinion, I quoted the Fifth Amendment Takings Clause and then stated: “That Clause is made applicable to the States by the Fourteenth Amendment. See *Chicago, B. & Q.R. Co. v. Chicago*, 166 U.S. 226 (1897).”³¹ It is somewhat embarrassing to acknowledge that the *Chicago* case did not even cite the Fifth Amendment. In fact, neither that case nor any later Supreme Court case with which I am familiar explained how or why the Takings Clause might have been made applicable to the states.

27. Patrick McGeehan, *Pfizer to Leave City That Won Land-Use Suit*, N.Y. TIMES, Nov. 13, 2009, at A1.

28. *Kelo*, 545 U.S. at 472 (majority opinion); *id.* at 490 (Kennedy, J., concurring); *id.* at 494, 496 (O'Connor, J., dissenting); *id.* at 506–07 (Thomas, J., dissenting).

29. U.S. CONST. amend. V.

30. U.S. CONST. amend. XIV, § 1.

31. *Kelo*, 545 U.S. at 472 n.1 (majority opinion).

What the Court actually held in that 1897 case was that the Due Process Clause of the Fourteenth Amendment contains substantive as well as procedural requirements,³² and that an element of every permissible taking of private property is the obligation to pay compensation to the former owner.³³ Similarly, the Fifth Amendment was not cited in Justice Holmes's 1906 opinion for the Court, which upheld the taking of property needed for a private mining company to operate a two-mile aerial bucket line that delivered ore to a railway station.³⁴ Nor was the Fifth Amendment cited in the Court's 1905 opinion upholding a state statute that authorized the private owner of arid land to widen an irrigation ditch on his neighbor's property so that the owner alone could obtain water.³⁵ Those cases, like the *Kelo* case that followed them, were Fourteenth Amendment substantive due process cases. As the second Justice Harlan later explained in his concurring opinion in the *Griswold* case, while the due process inquiry "may be aided by resort to one or more of the provisions of the Bill of Rights, it is not dependent on them or any of their radiations. The Due Process Clause of the Fourteenth Amendment stands . . . on its own bottom."³⁶

Thus, neither the text of the Fifth Amendment Takings Clause, nor the common law rule that it codified, placed any limit on the states' power to take private property, other than the obligation to pay just compensation to

32. *Chicago B. & Q.R. Co. v. Chicago*, 166 U.S. 226, 234–35 (1897) ("But a state may not, by any of its agencies, disregard the prohibitions of the fourteenth amendment. Its judicial authorities may keep within the letter of the statute prescribing forms of procedure in the courts, and give the parties interested the fullest opportunity to be heard, and yet it might be that its final action would be inconsistent with that amendment. In determining what is due process of law, regard must be had to substance, not to form. This court, referring to the fourteenth amendment, has said: 'Can a state make anything due process of law which, by its own legislation, it chooses to declare such? To affirm this is to hold that the prohibition to the states is of no avail, or has no application, where the invasion of private rights is effected under the forms of state legislation.' *Davidson v. New Orleans*, 96 U.S. 97, 102 [(1877)].").

33. Given prior Supreme Court jurisprudence, that obligation applied to takings "for the public benefit" as well as those for "public uses." *Chicago*, 166 U.S. at 239. In an earlier opinion quoted in the *Chicago* case, Justice Jackson as a circuit judge had written:

"Whatever may have been the power of the states on this subject prior to the adoption of the fourteenth amendment to the constitution, it seems clear that, since that amendment went into effect, such limitations and restraints have been placed upon their power in dealing with individual rights that the states cannot now lawfully appropriate private property *for the public benefit or to public uses* without compensation to the owner . . ."

Id. at 238–39 (emphasis added) (quoting *Scott v. Toledo*, 36 F. 385, 395–96 (N.D. Ohio 1888)).

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

35. *Clark v. Nash*, 198 U.S. 361, 369–70 (1905) ("[I]n this particular case, and upon the facts stated in the findings of the court, . . . we are of opinion that the use is a public one, although the taking of the right of way is for the purpose simply of thereby obtaining the water for an individual . . .").

36. *Griswold v. Connecticut*, 381 U.S. 479, 500 (1965) (Harlan, J., concurring); *see also Wolf v. Colorado*, 338 U.S. 25, 26 (1949) ("The notion that the 'due process of law' guaranteed by the Fourteenth Amendment is shorthand for the first eight amendments of the Constitution . . . has been rejected by this Court again and again . . .").

the former owner. An entirely different common law rule, however, did significantly limit the scope of the taking power. That is the rule that both Justice O'Connor and I identified at the beginning of our respective discussions of the law in our *Kelo* opinions. As I wrote, "[I]t 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."³⁷ And Justice O'Connor used, as the opening salvo in her opinion, the famous quotation from Justice Chase's opinion in *Calder v. Bull*, which states, "[A] law that takes property from A and gives it to B: It is against all reason and justice . . ."³⁸ While the Justices in *Kelo* agreed that this common law rule is an element of the due process that the Fourteenth Amendment mandates, the precise dimensions of that rule are not defined in the Constitution's text. The rule is an aspect of substantive due process that had been explicated through a process of common law case-by-case adjudication.

Critics of the majority's holding in *Kelo* may legitimately argue that earlier cases should not have been applied to New London's ambitious redevelopment, or that it would be wiser instead to overrule those prior cases and to hold that any taking for the purpose of economic redevelopment is impermissible. Justice Thomas, in dissent in *Kelo*, argued exactly that.³⁹ It is abundantly clear, however, that nothing in the text, or the relevant history, of the Constitution supports such a dramatic result.

Before reviewing the scholarly commentary on *Kelo*, I think it appropriate to describe the two unanimous opinions on which the *Kelo* majority principally relied.

IV

In *Berman v. Parker*, decided in 1954, the owners of a department store located in the City of Washington, D.C., contended that the condemnation of their property pursuant to the District of Columbia Redevelopment Act of 1945 violated the Fifth Amendment.⁴⁰ Reasoning that the power of condemnation for a public purpose was as broad as the police power, the Court upheld the constitutionality of the statute, the slum clearance redevelopment plan that it authorized, and the taking of the appellants' store.⁴¹ Despite the fact that appellants' store was itself in acceptable condition, the mere fact that it was located in the area targeted for

37. *Kelo v. City of New London, Conn.*, 545 U.S. 469, 477 (2005).

38. *Id.* at 494 (O'Connor, J., dissenting) (quoting *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 388 (1798)).

39. *Id.* at 514–15 (Thomas, J., dissenting).

40. 348 U.S. 26, 31 (1954).

41. *Id.* at 31–36.

redevelopment provided a sufficient justification for the taking.⁴² The Court explained:

If owner after owner were permitted to resist these redevelopment programs on the ground that his particular property was not being used against the public interest, integrated plans for redevelopment would suffer greatly. The argument pressed on us is, indeed, a plea to substitute the landowner's standard of the public need for the standard prescribed by Congress. But as we have already stated, community redevelopment programs need not, by force of the Constitution, be on a piecemeal basis—lot by lot, building by building.

It is not for the courts to oversee the choice of the boundary line nor to sit in review on the size of a particular project area. Once the question of the public purpose has been decided, the amount and character of land to be taken for the project and the need for a particular tract to complete the integrated plan rests in the discretion of the legislative branch.⁴³

Berman, of course, involved deference to an Act of Congress, and the purpose of the plan was the elimination of a blighted area, whereas *Kelo* involved deference to state officials and state courts and a plan designed to replace a distressed area with an economically healthier community. But our unanimous decision in *Hawaii Housing Authority v. Midkiff* made abundantly clear that those differences should not affect the legal analysis.⁴⁴

In *Midkiff*, the Court upheld the constitutionality of a statute that authorized the taking of title to real property from lessors and transferring it to lessees in order to reduce the concentration of property ownership in the state of Hawaii.⁴⁵ Relying on the reasoning in *Berman*, the Court first held that the “public use” requirement is “coterminous with the scope of a sovereign's police powers.”⁴⁶ Then, assuming that the standard for reviewing federal takings applied as well to Hawaii's takings, the Court stated that “deference to the legislature's ‘public use’ determination is required ‘until it is shown to involve an impossibility.’”⁴⁷ The opinion summed up: “In short, the Court has made clear that it will not substitute its judgment for a legislature's judgment as to what constitutes a public use

42. *Id.* at 34–35.

43. *Id.* at 35–36.

44. 467 U.S. 229 (1984).

45. *Id.* at 232–33.

46. *Id.* at 240.

47. *Id.* (quoting *Old Dominion Co. v. United States*, 269 U.S. 55, 66 (1925)).

‘unless the use be palpably without reasonable foundation.’”⁴⁸ Finally, as though it was anticipating the position endorsed by the dissenting justices in the Connecticut Supreme Court’s decision in *Kelo*, the *Midkiff* opinion added:

Of course, this Act, like any other, may not be successful in achieving its intended goals. But “whether *in fact* the provision will accomplish its objectives is not the question: the [constitutional requirement] is satisfied if . . . the . . . [state] Legislature *rationaly could have believed* that the [Act] would promote its objective.”⁴⁹

Given these earlier cases, the majority in the *Kelo* case concluded that the Court had a duty to give deference to the decisions of the Connecticut legislature, the state agencies interpreting the state statute, and the state courts’ evaluation of the particular development plan that gave rise to the litigation.⁵⁰ The two dissenting opinions disagreed for different reasons. Justice O’Connor would permit takings for economic development only to remedy more serious harms such as the blight in *Berman* and the oligopolistic condition of Hawaii’s real estate market in *Midkiff*.⁵¹ Justice Thomas would overrule our earlier cases and entirely prohibit use of the government’s eminent domain power for the purpose of economic development.⁵²

V

Scholarly commentary on the *Kelo* opinions is more like the opinions themselves than the hostile views expressed by the extremists who picketed Justice Souter. Like Justice Thomas, a few commentators seem to believe our earlier cases should be overruled and that takings for economic development performed by private parties are categorically prohibited by the Constitution.⁵³ I have not found scholarship that adopts Justice

48. *Id.* at 241 (quoting *United States v. Gettysburg Electric R. Co.*, 160 U.S. 668, 680 (1896)).

49. *Id.* at 242 (quoting *W. & S. Life Ins. Co. v. State Bd. of Equalization*, 451 U.S. 648, 671–72 (1981)).

50. *Kelo*, 545 U.S. at 480, 483–84, 490 (majority opinion).

51. *Id.* at 500–01 (O’Connor, J., dissenting).

52. *Id.* at 506, 519–21 (Thomas, J., dissenting).

53. See Nicholas M. Gieseler & Steven Geoffrey Gieseler, *Strict Scrutiny and Eminent Domain After Kelo*, 25 J. LAND USE & ENVTL. L. 191, 202–04 (2010) (declaring that the “deathblow” to their preferred interpretation of “public use” and preferred level of scrutiny in this context was struck in 1954 in *Berman* and describing Justice Thomas’s dissent as “[t]he most celebrated recent judicial questioning of the scrutiny system”); Ilya Somin, *Controlling the Grasping Hand: Economic Development Takings After Kelo*, 15 SUP. CT. ECON. REV. 183, 185, 187 (2007) (arguing that state and federal courts should categorically ban economic development takings “as inconsistent with the Public Use Clauses of the federal and state constitutions”; noting that while “[i]n theory” takings for economic development

O'Connor's position that economic development takings are permissible only as a response to severely blighted or harmful conditions, although several commentators have endorsed other aspects of her opinion.⁵⁴ As for scholarship resembling the *Kelo* majority decision, many scholars saw the decision as an application of settled law,⁵⁵ and they, like the majority in *Kelo*, would afford states broad discretion to determine when their eminent domain power may be used in aid of plans designed to provide future benefits, not simply to eliminate existing harms—provided of course that compensation is adequate and that the benefits flow to the public.⁵⁶

The three different positions represented by the opinions in *Kelo* remind me of another important substantive due process case in which the Justices took three different positions: *Lochner v. New York*,⁵⁷ decided in 1905 and later repudiated in the New Deal Era of the 1930s. In *Lochner*,

should be permissible in certain “rare circumstances,” they should be categorically banned because the rationale cannot easily be confined to those circumstances); Bradley P. Jacob, *Will the Real Constitutional Originalist Please Stand Up?*, 40 CREIGHTON L. REV. 595, 643–46 (2007) (crediting the analysis in Justice Thomas's *Kelo* dissent and describing it as a “thorough use[] of original-meaning textualist analysis”).

54. See, e.g., Steven J. Eagle, *Public Use in the Dirigiste Tradition: Private and Public Benefit in an Era of Agglomeration*, 38 FORDHAM URB. L.J. 1023, 1046 (2011) (stating that “Justice O'Connor was correct” that “a purpose test” of “isolat[ing] the motives behind a given taking” is “theoretically flawed”); Audrey G. McFarlane, *Rebuilding the Public-Private City: Regulatory Taking's Anti-Subordination Insights for Eminent Domain and Redevelopment*, 42 IND. L. REV. 97, 110 (2009) (similar).

55. See, e.g., Erwin Chemerinsky, *Supreme Court: The Calm Before the Storm*, CAL. B.J., Aug. 2005, at 1, 18 (“The media presented this case as a dramatic change in the law, while in reality the Court applied exactly the principle that was articulated decades ago.”); Abraham Bell & Gideon Parchomovsky, *The Uselessness of Public Use*, 106 COLUM. L. REV. 1412, 1416–19 (2006) (noting that any other interpretation of “public use” would “produce inconsistencies within the constitutional law of property rights,” and that “as even the case's harshest critics agree . . . from a legal standpoint, the ruling broke no new ground”); Clayton P. Gillette, *Kelo and the Local Political Process*, 34 HOFSTRA L. REV. 13, 16–20 (2005) (“*Kelo* . . . fits neatly within the tradition of counteracting the need for flexibility in urban planning with political process protections.”).

56. See, e.g., Bell & Parchomovsky, *supra* note 55, at 1415, 1426, 1449 (arguing that “*Kelo* was rightly decided,” extolling “the stark logic supporting the Court's position,” and explaining that “[g]ranted the government broad deference under the Public Use Clause is a necessary protection for private property owners seeking relief from harmful government decisions”); Richard A. Posner, *The Supreme Court, 2004 Term—Foreword: A Political Court*, 119 HARV. L. REV. 32, 98 (2005) (stating that “[p]aradoxically, the strong adverse public and legislative reactions to the *Kelo* decision are evidence of its pragmatic soundness,” because the decision's opponents have turned to the democratic process to persuade states to limit their own eminent domain powers, and—since property owners and advocates of property rights generally are not a marginalized minority that lacks political influence—have had significant success); Robert C. Ellickson, *Federalism and Kelo: A Question for Richard Epstein*, 44 TULSA L. REV. 751, 762 (2009) (“I conclude, on grounds of federalism, that the Supreme Court of the United States was wise in *Kelo* to refrain from imposing a restrictive set of national rules on cities' use of the power of eminent domain.”); James C. Smith, *Keeping Current—Property*, PROB. & PROP., July–Aug. 2007, at 12, 15 (“[Merrill] believes the courts cannot effectively scrutinize the purposes of particular condemnations. He views the *Kelo* decision not as an endorsement of condemnation for economic development but as a call for legislative bodies to determine the limits of the condemnation power.”).

57. 198 U.S. 45 (1905).

the majority held that the substantive component of the Fourteenth Amendment's Due Process Clause—the same provision that limits state authority to condemn private property—was violated by a New York statute regulating the hours of work for bakery employees.⁵⁸ For the *Lochner* majority, the interest in freedom of contract outweighed the interest in protecting the health of overworked employees.⁵⁹ For the first Justice Harlan, writing for three dissenters, the public health interests were sufficient to justify the statute.⁶⁰ But Justice Holmes, writing only for himself, did not address the policy debate. Construing the word “liberty” as used in the constitutional text more narrowly than any of his colleagues, Justice Holmes concluded that the dispute about an economic issue was one that generally should be determined by the people through their democratic participation in enacting state laws, not by federal judges.⁶¹

Of the three different positions advanced in *Kelo*, the majority's was unquestionably the closest to Holmes's dissent. Justice O'Connor's dissent resembled the intermediate position advanced in the Harlan dissent,⁶² but Justice Thomas's solo dissent was even more extreme than the majority's holding in *Lochner*. For Justice Thomas's dissent would categorically invalidate economic development takings if any of the property is given to a private developer, whereas the *Lochner* majority left open the question of

58. *Id.* at 52.

59. *Id.* at 57–58.

60. *Id.* at 68–70 (Harlan, J., dissenting).

61. *Id.* at 74–76 (Holmes, J., dissenting) (“I strongly believe that my agreement or disagreement has nothing to do with the right of a majority to embody their opinions in law. It is settled by various decisions of this court that state constitutions and state laws may regulate life in many ways which we as legislators might think as injudicious . . . [T]he accident of our finding certain opinions natural and familiar or novel and even shocking ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States.”).

62. *Compare Kelo*, 545 U.S. at 498, 500 (O'Connor, J., dissenting) (“[W]e have allowed that, in certain circumstances and to meet certain exigencies, takings that serve a public purpose also satisfy the Constitution even if the property is destined for subsequent private use. . . . [We have upheld takings where] the extraordinary, precondemnation use of the targeted property inflicted affirmative harm on society . . . [and] each taking *directly* achieved a public benefit 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.”), *with Lochner*, 198 U.S. at 65–74 (Harlan, J., dissenting) (“I take it to be firmly established that what is called the liberty of contract may, within certain limits, be subjected to regulations designed and calculated to promote the general welfare or to guard the public health, the public morals or the public safety. . . . It is plain that this statute was enacted in order to protect the physical well-being of those who work in bakery and confectionary establishments. [recounting empirical evidence about health harms to bakers from excessive work] I take leave to say that the New York statute, in the particulars here involved, cannot be held to be in conflict with the 14th Amendment”). *But cf.* D. Benjamin Barros, *Nothing “Errant” About It: The Berman and Midkiff Conference Notes and How the Supreme Court Got to Kelo With Its Eyes Open*, in *PRIVATE PROPERTY, COMMUNITY DEVELOPMENT, AND EMINENT DOMAIN* 57, 73 (Robin Paul Malloy ed., 2008) (“Justice O'Connor's argument [in *Kelo*] is inherently flawed because the inquiry into whether a legislative act is intended to prevent harm is an inquiry into the substance and merits of the legislative act. Indeed, it is exactly the same inquiry that many *Lochner*-era courts used to try to limit the scope of the police power under the doctrine of substantive due process.”).

the permissibility of maximum hour legislation in other industries, even though not for bakery employees.⁶³

Like Justice Holmes, the *Kelo* majority reasoned that the “necessity and wisdom” of the government policy at hand was a “matter[] of legitimate public debate,” but that it was for legislatures, not the courts, to resolve those disputes.⁶⁴ I am not at all sure that the plan that we approved was wise policy,⁶⁵ but I remain firmly convinced that the Fourteenth Amendment did not deprive the state of the power to adopt it.

VI

I shall conclude with a brief comment on the possible connection between popularity and the doctrine of substantive due process. On more than one occasion, I have repeated this paragraph from a talk that I gave to the Chicago Bar Association in 1974 explaining why I am opposed to the popular election of judges:

[T]here is a critical difference between the work of the judge and the work of other public officials. In a democracy, issues of policy are properly decided by majority vote; it is the business of legislators and executives to be popular. But in litigation, issues of law or fact should not be determined by majority vote; it is the business of judges to be indifferent to unpopularity. [Sir Matthew Hale] described an essential attribute of judicial office in words which have retained their integrity for centuries:

11. That popular or court applause, or distaste, have no influence upon any thing I do in point of distribution of justice.

63. Compare *Kelo*, 545 U.S. at 506, 521 (Thomas, J., dissenting) (declaring that “economic development” takings are not for a “public use” and that “the government may take property only if it actually uses or gives the public a legal right to use the property”), with *Lochner*, 198 U.S. at 61 (“Statutes of the nature of that under review, limiting the hours in which grown and intelligent men may labor to earn their living, are mere meddlesome interferences with the rights of the individual, and they are not saved from condemnation by the claim that they are passed in the exercise of the police power and upon the subject of the health of the individual whose rights are interfered with, *unless there be some fair ground, reasonable in and of itself, to say that there is material danger to the public health or to the health of the employees, if the hours of labor are not curtailed.*” (emphasis added)).

64. *Kelo*, 545 U.S. at 489–90 (majority opinion); see *Lochner*, 198 U.S. at 74–76 (Holmes, J., dissenting).

65. Linda Greenhouse, *Supreme Court Memo; Justice Weighs Desire v. Duty (Duty Prevails)*, N.Y. TIMES, Aug. 25, 2005, at A1 (reporting my views that the government action in *Kelo* may have been “unwise” as a matter of policy, but that I was convinced that the law compelled a result that I would have opposed if I were a legislator).

12. That (I) not be solicitous what men will say or think, so long as I keep myself exactly according to the rules of justice.⁶⁶

As I suggested at the outset, an important explanation for the unpopularity of the *Kelo* decision was the fact that it upheld the taking of a private home, rather than a commercial property. That fact may also explain why Justices who normally profess strong opposition to substantive due process were willing to take action to expand that doctrine in order to protect Susette Kelo and Wilhelmina Dery from the loss of their residences.

This hypothesis is supported by the plurality opinion and Justice Scalia's concurring opinion in the recent *McDonald* case, which relied squarely on the doctrine of substantive due process as the basis for holding that an individual's right to keep a loaded firearm in one's home for purposes of self-defense is enforceable against the states.⁶⁷ Those opinions were both popular and consistent with the dissenters' positions in *Kelo*. They suggest that if the petitioners in *Kelo* had directly asked the Court to expand the doctrine of substantive due process to create a special rule protecting home owners from takings in aid of economic redevelopment, they might have persuaded an empathetic Justice to join the dissenters. Even though such an open call for judicial activism might well have been more persuasive than either the arguments that petitioners did make or the views expressed by the dissents, it would not have changed my vote. In my view, the *Kelo* majority opinion was rightly consistent with the Supreme Court's precedent and the Constitution's text and structure. The popularity and policy wisdom of that decision may be an issue for the political branches, as the *Kelo* majority noted,⁶⁸ but not an issue for the Supreme Court.

Thank you for your attention.

66. John Paul Stevens, *The Office of an Office*, 55 CHI. B. REC. 276, 281–82 (1974).

67. *McDonald v. City of Chicago, Ill.*, 130 S. Ct. 3020, 3050 (2010).

68. *Kelo*, 545 U.S. at 489–90 (majority opinion).