

Mine and Thine Distinct: What *Kelo* Says About Our Path

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Susette Kelo's pink Victorian house in the quaint Connecticut town of New London seemed a strange place to find the Hobbesian "war of all against all." She purchased the house in 1997, and renovated it "from the concrete in the basement to the shingles on the roof," into a pleasant, two-bedroom, one-bathroom, waterfront home.¹ Still, when city officials notified her that the city wanted to bulldoze it and replace it with a convention center to accompany the nearby Pfizer pharmaceutical plant, Mrs. Kelo began a case that would touch on some of the most important issues in the political philosophy of the American Constitution. In the end, the United States Supreme Court held, five to four, that the city could take her home and transfer it to a private developer for private profit,² despite the fact that the Fifth Amendment only allows government to take property "for public use."³ The general economic effects of private development, wrote Justice Stevens, satisfied the "public use" requirement, because "public use" only means that political leaders believed the condemnation might benefit the public in some way: "The disposition of this case therefore turns on the question whether the City's development plan serves a 'public purpose.'"⁴ Since "[p]romoting economic development is a traditional and long accepted function of government," the city's redevelopment plan was constitutional,

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¹ Kirstin Downey, *Revitalization Projects Hinge on Eminent-Domain Lawsuit*, WASHINGTON POST, May 21, 2005, at E01; see also Dana Berliner, *Eminent Domain Without Limits? IJ Asks U.S. Supreme Court to Decide*, INSTITUTE FOR JUSTICE, Aug. 2004, http://www.ij.org/publications/liberty/2004/13_4_04_d.html; Patti Waldmeir, *Case for The Public Good Collides with Private Rights*, FINANCIAL TIMES (U.K.), Feb. 14, 2005, at 20.

² *Kelo v. City of New London*, 125 S. Ct. 2655, 2668 (2005).

³ U.S. CONST. amend. V.

⁴ *Kelo*, 125 S. Ct. at 2663.

and Susette Kelo and her neighbors could be forced to give up their property to another private party for private development.⁵

Kelo v. New London is the result of a crisis in American political philosophy—but not a new one. Consider the contrast between the views of private property expressed by two Supreme Court decisions separated by a century and a half. In 1829, the Supreme Court said:

We know of no case, in which a legislative act to transfer the property of A. to B. without his consent, has ever been held a constitutional exercise of legislative power in any state in the union. On the contrary, it has been constantly resisted as inconsistent with just principles, by every judicial tribunal in which it has been attempted to be enforced.⁶

But in 1978, Justice William Brennan held that the Fifth Amendment does not require compensation when a person's property rights are taken for "some public program adjusting the benefits and burdens of economic life to promote the common good."⁷ Because "[g]overnment hardly could go on" if government were required to pay for all the property it takes from citizens, "in a wide variety of contexts . . . government may execute laws or programs that adversely affect recognized economic values"⁸ without repaying the owners.

The journey from Justice Story to Justice Brennan, and from there to Justice Stevens' decision in *Kelo*, was not an inevitable one. As Justice Clarence Thomas pointed out in his dissent in *Kelo*, "[s]omething has gone seriously awry with this Court's interpretation of the Constitution."⁹ In what follows, I hope to explain how we have reached this point, and why I think there is reason for optimism in spite of the *Kelo* decision.

In Part I, I examine the evolution of concepts of sovereignty in Anglo-American law and political philosophy. Eminent domain is an attribute of sovereignty, and attitudes toward the scope and source of sovereignty are therefore essential to understanding the purpose and limits of eminent domain. In Part II, I describe the rise of two distinct visions of American sovereignty in the age leading up to the Progressive Revolution that occurred at the opening of the twentieth century. I follow in Part III with a discussion of how the Progressives came to embrace the vision of sovereignty advanced by William Blackstone and Thomas Hobbes, to the exclusion of the Lockean understanding of sovereignty that had served as the foundation of the Constitution.

⁵ *Id.* at 2665.

⁶ *Wilkinson v. Leland*, 27 U.S. (2 Pet.) 627, 658 (1829).

⁷ *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 124–25 (1978).

⁸ *Id.* at 124 (quoting *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922)).

⁹ *Kelo*, 125 S. Ct. at 2685 (Thomas, J., dissenting).

Part IV follows the consequent expansion of eminent domain through the New Deal period, and Part V concludes with some optimistic thoughts about the future of eminent domain in the wake of the *Kelo* decision.

I. EMINENT DOMAIN AS AN ATTRIBUTE OF SOVEREIGNTY

Eminent domain is the government's power to force a person to sell his property to the government. Long described as one of the most extreme forms of government coercion, the term itself dates back to the seventeenth century, when Hugo Grotius and other civil law writers explained that it was an essential aspect of the king's sovereign authority.¹⁰ Legal scholar Samuel von Pufendorf explained that it was simply a part of the sovereign's right to conscript the resources of the realm for defensive purposes.¹¹ This authority was considered an essential component of sovereignty—that is, of the right to govern. Of course, debates in political philosophy have always centered around the nature and limits of this right.

During the period leading up to the twentieth century, Anglo-American political and legal theory developed two competing visions of sovereignty. One view, traceable to the works of Thomas Hobbes and William Blackstone, held that political authority was essentially absolute, not limited by any pre-political standards of right and wrong.¹² The other view, traceable to the work of John Locke, and including such thinkers as James Madison, held that government authority was based on the *rightful*, and therefore limited, consent of the governed, and thus the state could never legitimately exceed the boundaries of individual rights.¹³ The clash between these two theories set the stage for the Progressive Revolution and, ultimately, the controversy over eminent domain that would be enunciated in the *Kelo* decision

¹⁰ HUGO GROTIUS, *THE RIGHTS OF WAR AND PEACE* 388 (A.C. Campbell trans., Adamant Media Corp. 2005) (1625).

¹¹ SAMUEL VON PUFENDORF, *ON THE DUTY OF MAN AND CITIZEN ACCORDING TO NATURAL LAW* 166–67 (James Tully ed., Michael Silverthorne trans., Cambridge Univ. Press 1991) (1673) (“[I]n a national emergency sovereigns may seize and apply to public use the property of any subject which the crisis particularly requires, even if the property seized far exceeds [the subject's taxes]. For this reason, however, as much of the excess as possible should be refunded to him from the public treasury or by a levy on the rest of the citizens.”) The Tennessee Constitution, among others, reflects the connection between the power of eminent domain and the power of military conscription: “[N]o man's particular services shall be demanded, or property taken, or applied to public use, without the consent of his representatives, or without just compensation being made therefor.” TENN. CONST. art. I, § 21.

¹² WILLIAM BLACKSTONE, *1 COMMENTARIES* *156–57; THOMAS HOBBS, *LEVIATHAN* 134–141 (Michael Oakeshott ed., Macmillan Publ'g Co. 1962) (1651).

¹³ JOHN LOCKE, *TWO TREATISES OF GOVERNMENT* 375 (Peter Laslett ed., Cambridge Univ. Press 1963) (1690).

and its dissents.

A. Hobbes on Sovereignty

In his famous book *Leviathan*, written in 1651, the philosopher Thomas Hobbes sought to explain the nature and source of political authority by imagining what the world would look like without government—something he called the state of nature. In such a world, Hobbes argued, people would be engaged in a constant war for limited resources. In the absence of an overseeing government authority, there would be “no propriety, no dominion, no *mine* and *thine* distinct; but only that [would] be every man’s, that he can get: and for so long, as he can keep it.”¹⁴ The strong would prey upon the weak, and would, in turn, be preyed upon by still stronger individuals. But, perhaps surprisingly, Hobbes concluded that such a state of affairs would not be *unjust*. Without government to police the activities of the people, there would be no rules of justice by which such plunder and pillage could be described as *wrong*, because without politics, “nothing can be unjust. . . . Where there is no common power, there is no law: where no law, no injustice.”¹⁵ Before government comes along, might literally makes right.

Life in such a world would be so miserable, of course—“solitary, poor, nasty, brutish, and short”¹⁶—that the people create government to protect themselves. But because the people are not subject to pre-political interpersonal rules of conduct, they are not limited in the sorts of governments they may establish. When creating government, the people give the sovereign all of their freedoms; but in the desperate scramble for survival in the state of nature, “every man has a right to everything; even to one another’s body.”¹⁷ This power they grant to the government, meaning that the sovereign has, essentially, the same “right to everything.” For Hobbes, political society is “radically conventional”¹⁸: because the sovereign’s acts are the very *definition* of justice, it is meaningless to argue that the sovereign may act unjustly.¹⁹

¹⁴ HOBBS, *supra* note 12, at 101.

¹⁵ *Id.*

¹⁶ *Id.* at 100.

¹⁷ *Id.* at 103.

¹⁸ Lawrence Berns, *Thomas Hobbes*, in HISTORY OF POLITICAL PHILOSOPHY 396, 400 (Leo Strauss & Joseph Cropsey eds., Univ. of Chicago Press 1987) (1963).

¹⁹ See *id.* at 407 (“The sovereign is not bound to obey the civil laws, for they are only his commands and he can release himself from them at his pleasure.”)

B. Locke on Sovereignty

John Locke's influential *Two Treatises of Civil Government* built upon—and simultaneously rejected important parts of—Hobbes' theory. Locke agreed that, in the absence of government, the people would be exposed to plunder and injury by the strong, and that government was essentially an institution for preventing such plunder. But Locke differed from Hobbes on an important point. For Locke, “[t]he *State of Nature* has a Law of Nature to govern it,” and “Reason . . . is that law.”²⁰ This law “teaches . . . that being all equal and independent, no one ought to harm another in his Life, Health, Liberty, or Possessions.”²¹ This law was binding on people even in the absence of political authority. And since the law prohibits people from stealing from each other, or harming one another, it also prohibits the people from delegating to the government the power to commit such acts, “[f]or no Body can transfer to another more power than he has in himself; and no Body has an absolute Arbitrary Power over . . . any other, to . . . take away the Life or Property of another.”²² Instead, people create government to protect them from the wrongful acts of others. Unfortunately, just as criminals will steal and plunder in the state of nature, so clever wrongdoers will find ways to gain control over the government and use its coercive powers to continue committing wrongful acts. When government joins in such acts, it has exceeded its legitimate bounds and is engaged in tyranny. Locke's insight—that government must obey the same moral rules that apply to the individuals who comprise it—means that government's authority is limited by the pre-political rights of individuals.

C. Blackstone on Sovereignty

In his *Commentaries on the Laws of England*, William Blackstone explicitly rejected the theory of limited political authority advanced by “Mr Locke, and other theoretical writers.”²³ Instead, he defined sovereignty as “uncontrolable authority in making, confirming, enlarging, restraining, abrogating, repealing, reviving, and expounding of laws, concerning matters of all possible denominations, ecclesiastical, or temporal, civil, military, maritime, or criminal”;²⁴ it is “absolute despotic power”;²⁵ “a

²⁰ LOCKE, *supra* note 13, at 289.

²¹ *Id.*

²² *Id.* at 375. See also ROBERT NOZICK, ANARCHY, STATE AND UTOPIA 6 (1974) (“Moral philosophy sets the background for, and boundaries of, political philosophy. What persons may and may not do to one another limits what they may do through the apparatus of a state, or do to establish such an apparatus.”)

²³ 1 BLACKSTONE, *supra* note 12, at *157.

²⁴ *Id.* at *156.

supreme, irresistible, absolute, uncontrolled authority”²⁶ which “can, in short, do every thing that is not naturally impossible.”²⁷

Blackstone may not have endorsed Hobbes’ theory in so many words, but his description of sovereignty has much in common with Hobbes’. Although he grudgingly respected Locke’s contention that there are pre-political rules of right and wrong, he nevertheless rejected the notion that sovereignty is *limited* by any such rules.²⁸ “So long . . . as the English constitution lasts,” Blackstone concluded, “we may venture to affirm, that the power of parliament is absolute and without control.”²⁹

D. The American Founders on Sovereignty

In this respect at least, the American founding represented a rejection of Blackstone’s views.³⁰ Relying on Locke, the Founders argued that the natural moral law forbade the creation of any government that committed theft, or any similar violation of natural rights.³¹ In Jefferson’s words, “the people in mass. . . are inherently independent of all *but moral* law.”³² Even the Declaration of Independence itself holds that the united colonies may only “do . . . things which independent states may *of right* do”³³—not absolutely anything, but only those political acts that fell within the boundaries of natural moral law. The American founding recognized no such thing as absolute sovereignty in the Blackstonian sense. As Madison wrote:

[T]he sovereignty of the society as vested in & exercisable by the majority, may do anything that could be *rightfully* done by the unanimous concurrence of the members; the reserved rights of individuals . . . in becoming parties to the original compact being beyond the legitimate reach of sovereignty, whenever vested or however viewed.³⁴

²⁵ *Id.*

²⁶ *Id.* at *49.

²⁷ *Id.* at *156.

²⁸ See Herbert J. Storing, *William Blackstone*, in *HISTORY OF POLITICAL PHILOSOPHY* 622, 626 (Leo Strauss & Joseph Cropsey eds., Univ. of Chicago Press 1987) (1963) (describing the broad power inherent in Parliament and its theoretical, but impracticable, limitations).

²⁹ 1 BLACKSTONE, *supra* note 12, at *157.

³⁰ Thomas Jefferson and James Wilson both explicitly rejected Blackstone’s work because of its emphasis on “the existence of despotic government.” Julian S. Waterman, *Thomas Jefferson and Blackstone’s Commentaries*, 27 *ILL. L. REV.* 629, 649–52 (1933).

³¹ See HARRY V. JAFFA, *A NEW BIRTH OF FREEDOM* 50–51 (2000). Obviously, the terrible exception to this was slavery. It was an exception, however, which the framers recognized. THOMAS G. WEST, *VINDICATING THE FOUNDERS* 1–19, 39 (1997).

³² THOMAS JEFFERSON, Letter to Judge Spencer Roane (Sept. 6, 1819), in *WRITINGS* 1425, 1426 (Merrill D. Peterson ed., 1984) (1819) (emphasis added).

³³ THE DECLARATION OF INDEPENDENCE para. 32 (U.S. 1776) (emphasis added).

³⁴ 9 JAMES MADISON, *Sovereignty* (1835), reprinted in *THE WRITINGS OF JAMES MADISON* 568, 570–71 (Gaillard Hunt ed., 1910).

The concept of individual rights therefore served to chain political powers within the same moral law that applied to individuals.³⁵

In a brilliant essay entitled “Property,” James Madison made the Founders’ position on property rights clear. Beginning with a quotation from Blackstone, Madison wrote that the word property “in its particular application means ‘that dominion which one man claims and exercises over the external things of the world, in exclusion of every other individual.’”³⁶ But “[i]n its larger and juster meaning, it embraces every thing to which a man may attach a value and have a right; and *which leaves to every one else the like advantage.*”³⁷ For Madison, Blackstone’s definition of property was not “just” enough because it did not recognize that the legitimate sovereignty of a government was limited by each person’s right to the control of his own life. A “juster” definition of property, therefore, would include a person’s rights over “his opinions,” and “the safety and liberty of his person.” 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.*”³⁸ Madison’s differences with Blackstone rested on fundamentals; while Blackstone wrote eloquently about the English government’s protections for property rights,³⁹ his view of the foundation of government’s authority—that the government could violate the natural rights of individuals—rendered property fundamentally insecure. Indeed, the property that people had in their religious opinions, among other things, had been notoriously insecure under the English monarch. Americans had thrown off that monarchy because it had often perverted the entire concept of government into just

³⁵ THOMAS JEFFERSON, Letter to James Madison (Sept. 6, 1789), in WRITINGS, *supra* note 32, at 959, 960 (“What is true of every member of the society individually, is true of them all collectively, since the rights of the whole can be no more than the sum of the rights of individuals.”) For the foundations of the Lockean understanding of property rights, see Eric R. Claeys, *Public-Use Limitations And Natural Property Rights*, 2004 MICH. ST. L. REV. 877 (2004); Adam Mossoff, *What Is Property? Putting The Pieces Back Together*, 45 ARIZ. L. REV. 371 (2003); Adam Mossoff, *Locke’s Labor Lost*, 9 U. CHI. L. SCH. ROUNDTABLE 155 (2002). The founders, to put it simply, did not believe, as many moderns do, that property rights are created by the state, or that the state can legitimately alter its property rights rules in a way that deprives people of their property.

³⁶ JAMES MADISON, *Property* (1792), reprinted in WRITINGS 515, 515 (Jack N. Rakove ed., 1999). It seems Madison was quoting from memory; the actual text states property is “that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe.”

² BLACKSTONE, *supra* note 12, at *2.

³⁷ *Id.*

³⁸ *Id.*

³⁹ See 1 BLACKSTONE, *supra* note 12, at *135–36.

another unjust scheme for allowing the strong to despoil the weak. Thus, Madison ultimately rejects Blackstone's view of sovereignty as inconsistent with Blackstone's own definition of property rights.

In an edition of Blackstone's *Commentaries* published in 1803, Virginian lawyer St. George Tucker added an appendix and several passages directly challenging Blackstone's characterization of sovereignty, along Madisonian lines. The Blackstonian view of sovereignty must be altered, Tucker wrote, in accordance with "the new lights which the American revolution has spread over the science of politics."⁴⁰

[T]he American revolution has formed a new epoch in the history of civil institutions, by reducing to practice, what, before, had been supposed to exist only in the visionary speculations of theoretical writers. . . . [The Constitutions of a] number of the states in the union, and . . . that instrument, by which the union of the confederated states has since been completed, . . . the powers of the several branches of government are defined, and the excess of them, as well in the *legislature*, as in the *other* branches, finds limits, which cannot be transgressed without offending against that greater power from whom all authority, among us, is derived; to wit, the PEOPLE.⁴¹

Tucker distinguished between the sovereignty of the people and the powers of the legislature; the "essential difference between the British government and the American constitutions," he wrote, quoting Madison, is that while "parliament is unlimited in its [sic] power, or, in their own language, is omnipotent," American legislatures are

altogether different. The people, not the government, possess the absolute sovereignty. The legislature, no less than the executive, is under limitations of power. . . . [T]he great and essential rights of the people, are secured against legislative, as well as against executive ambition. They are secured, not by laws paramount to prerogative; but by constitutions paramount to laws.⁴²

Despite this rejection of Blackstone's theory of an inherent "despotic power," many American lawyers came to admire Blackstone, particularly because of his excellent writing style. Thomas Jefferson fretted about this in one of his final letters: "You will recollect that before the revolution, Coke Littleton was the universal elementary book of law students . . ." He wrote to Madi-

⁴⁰ 1 ST. GEORGE TUCKER, BLACKSTONE'S COMMENTARIES: WITH NOTES OF REFERENCE, TO THE CONSTITUTION AND LAWS, OF THE FEDERAL GOVERNMENT OF THE UNITED STATES; AND OF THE COMMONWEALTH OF VIRGINIA app. A at 3 (1803).

⁴¹ *Id.* at 4.

⁴² 2 TUCKER, *supra* note 40, app. G at 19–20. Tucker is quoting from Madison's *Report on the Alien and Sedition Acts*, also known as his Report on the Virginia Resolutions (Jan. 7, 1800), reprinted in WRITINGS, *supra* note 36, at 608, 645.

son:

You remember also that our lawyers were then all whigs. But when his black-letter text, and uncouth but cunning learning got out of fashion, and the honied Mansfieldism of Blackstone became the student's hornbook, from that moment, that profession (the nursery of our Congress) began to slide into toryism, and nearly all the young brood of lawyers now are of that hue.⁴³

As Blackstone's popularity grew, the concept of unlimited sovereignty became increasingly common in legal circles, to the dismay of several of the founders.⁴⁴

II. TAKING FROM A AND GIVING TO B

Two distinct legal "parties," if one might call them that, emerged during the nineteenth century. One, following Locke's theories of natural law, held that government's powers were limited by its nature, even if a state's constitution did not explicitly limit legislative authority. This view rested on what Randy Barnett has recently called the "presumption of liberty,"⁴⁵ which held that the government could only do those things specifically allowed to it; in Madison's words, "[i]n Europe, charters of liberty have been granted by power. America has set the example . . . of charters of power granted by liberty."⁴⁶ The other view, following Blackstone, held that sovereignty was unlimited, except for whatever express limits could be found in the state's constitution. Under this "presumption of power," the legislature could do whatever was not forbidden.

This profound debate found its first eloquent expression in the dispute between Justices Samuel Chase and James Iredell in *Calder v. Bull*,⁴⁷ a 1798 Supreme Court case arising from a dispute over a will. The probate court had ruled the will invalid, so that Caleb Bull could recover; the Connecticut legislature then passed a new law granting a new hearing, to which the litigants had not previously been entitled, and the court reversed itself. Calder challenged this law, on the ground that it was an *ex post facto* law, and the Supreme Court rejected the challenge, holding

⁴³ THOMAS JEFFERSON, Letter to James Madison (Feb. 17, 1826), in WRITINGS, *supra* note 32, at 1512, 1513–14.

⁴⁴ See Waterman, *supra* note 30, at 649–52. In particular, Blackstone's view that absolute sovereignty was primary and the rights of the people secondary was popular among defenders of slavery. WILLIAM W. FREEHLING, PRELUDE TO CIVIL WAR: THE NULLIFICATION CONTROVERSY IN SOUTH CAROLINA 160–62, 171 (1966).

⁴⁵ RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY (2004).

⁴⁶ JAMES MADISON, *Charters* (Jan. 19, 1792), reprinted in WRITINGS, *supra* note 36, at 502, 502.

⁴⁷ 3 U.S. (3 Dall.) 386 (1798).

that the *ex post facto* clause only applied to criminal laws. In the course of the decision, Justice Chase rejected the notion of “the omnipotence of a State Legislature, or that it is absolute and without control.”⁴⁸ Embracing the Lockean position, Chase insisted that there were unwritten, but valid limitations on the sovereignty of the state:

The people of the United States erected their Constitutions, or forms of government, to establish justice, to promote the general welfare, to secure the blessings of liberty; and to protect their persons and property from violence. The purposes for which men enter into society will determine the nature and terms of the social compact; and as they are the foundation of the legislative power, they will decide what are the proper objects of it: The nature, and ends of legislative power will limit the exercise of it. . . . There are certain vital principles in our free Republican governments, which will determine and over-rule an apparent and flagrant abuse of legislative power; as to authorize manifest injustice by positive law; or to take away that security for personal liberty, or private property, for the protection whereof the government was established. An ACT of the Legislature (for I cannot call it a law) contrary to the great first principles of the social compact; cannot be considered a rightful exercise of legislative authority. . . . A few instances will suffice to explain what I mean. A law that punished a citizen for an innocent action . . . a law that makes a man a Judge in his own cause; or a law that takes property from A. and gives it to B: It is against all reason and justice, for a people to entrust a Legislature with SUCH powers; and, therefore, it cannot be presumed that they have done it. . . . To maintain that our Federal, or State, Legislature possesses such powers, if they had not been expressly restrained; would, in my opinion, be a political heresy, altogether inadmissible in our free republican governments.⁴⁹

Chase was following the Lockean tradition that government must never be taken over by a faction that exploits the state’s coercive powers for their own private benefit; doing so would violate the natural rights of the victims, and transform government from a protective association into a mechanism for legalized robbery.

Justice Iredell strongly disagreed. Iredell rejected the arguments of “some speculative jurists” who contended “that a legislative act against natural justice must, in itself, be void.”⁵⁰ Embracing the Blackstonian presumption of power, he wrote that if a government “were established, by a Constitution, which imposed no limits on the legislative power, the consequence would inevitably be, that whatever the legislative power chose to enact,

⁴⁸ *Id.* at 387–91.

⁴⁹ *Id.* at 388–89 (emphasis omitted) (emphasis added).

⁵⁰ *Id.* at 398 (Iredell, J., concurring).

would be lawfully enacted, and the judicial power could never interpose to pronounce it void.”⁵¹ Citing Blackstone’s *Commentaries*, Iredell argued that a court would have no authority to intervene even if the legislature created a law that allowed a person to be the judge in his own case—the very definition of injustice—unless there were specific constitutional language prohibiting it.⁵² If a state were to “pass a law, within the general scope of their constitutional power, the Court cannot pronounce it to be void, merely because it is, in their judgment, contrary to the principles of natural justice.”⁵³

The fact that the majority in *Kelo* quoted from Justice Iredell’s decision,⁵⁴ while the dissents both quoted from Justice Chase’s,⁵⁵ demonstrates the degree to which this debate has served as one of the most fundamental—if not *the most fundamental*—controversy in the history of American constitutional law.⁵⁶

For those who followed Chase’s Lockean interpretation, government action taking property from *A* and giving it to *B* was the *quintessential* abuse of government.⁵⁷ Government existed to protect the natural rights of each person equally, and particularly the right of property. Without government, property owners would be at risk from bullies who might try to take their property; government was supposed to prevent this. But if a group of unusually clever thieves managed to gain control of government’s coercive power, they might use it to commit theft anyway. This is what Madison meant when he wrote, “[i]n a society under the forms of which the stronger faction can readily unite and oppress the weaker, anarchy may as truly be said to reign as in a state of nature, where the weaker individual is not secured against the violence of the stronger”⁵⁸ Thus Chase, like Madison, was drawing a distinction between *law* and acts of *mere force*. *Law* meant government—acting with the consent of the governed—using coercion in the service of the public good; while *mere force* meant government coercion in the service of the private benefit of the governing authority. To the latter, the people could not justly consent at all.

⁵¹ *Id.*

⁵² *Id.* at 398–99.

⁵³ *Id.* at 399.

⁵⁴ See *Kelo v. City of New London*, 125 S. Ct. 2655, 2667 n.19 (2005).

⁵⁵ See *id.* at 2671 (O’Connor, J., dissenting); *id.* at 2680 (Thomas, J., dissenting).

⁵⁶ See generally Timothy Sandefur, *Freedom and the Burden of Proof*, 10 INDEP. REV. 139 (2005).

⁵⁷ See, e.g., *Vanhorne’s Lessee v. Dorrance*, 2 U.S. (2 Dall.) 304, at 311, 28 F. Cas. 1012 (C.C.D. Pa. 1795); *Wilkinson v. Leland*, 27 U.S. (2 Pet.) 627, 658 (1829).

⁵⁸ The FEDERALIST NO. 51, at 324 (James Madison) (Clinton Rossiter ed., 1961).

Those who followed Blackstone, on the other hand, though they often recognized that such abuses were regrettable, denied that they were inherently *illegitimate*, or that the judiciary had any authority to do anything about them. And some positively defended the practice of government redistribution of wealth.

Two nineteenth-century cases, decided within a few years of each other, reveal the importance of this dichotomy, and its effect on private property rights.⁵⁹ In *Sharpless v. Mayor of Philadelphia*,⁶⁰ the Pennsylvania Supreme Court ruled that the city could spend tax dollars to buy bonds in a privately-run railroad. This scheme was challenged on the grounds that it essentially took from *A*—the non-consenting taxpayers—and gave to *B*—the private owners of the for-profit railroad. Taking the Blackstonian position, the *Sharpless* court explained that there were no theoretical limits on the power of the legislature: “In the beginning,” wrote Chief Justice Jeremiah Black,⁶¹

the people held in their own hands all the power of an absolute government. The transcendent [sic] powers of Parliament devolved on them by the revolution. Antecedent to the adoption of the federal constitution, the power of the states was supreme and unlimited. If the people of Pennsylvania had given all the authority which they themselves possessed, to a single person, they would have created a despotism as absolute in its control over life, liberty, and property, as that of the Russian autocrat.⁶²

The people had chosen, for prudential reasons, to put certain limits in the state constitution, but where those limits did not explicitly apply, the people’s elected representatives were still free to employ this “despotism” as they chose. The state constitution should be construed “liberal[ly] in favor of the government,” so that “the state may do whatever is not prohibited.”⁶³ Thus, while the legislature could not violate the federal Constitution, or the express provisions of the state Constitution, it was “entitled to the full and uncontrolled possession” of a “vast field of power, granted to the legislature by the general words of the constitution, and not reserved, prohibited, or given away to others.” The legislature’s use of this general, undefined power “can be limited

⁵⁹ In addition to the two cases discussed, see *Wynehamer v. People*, 13 N.Y. 378, 390–92 (1856), which addresses, but does not decide, this conflict.

⁶⁰ 21 Pa. 147 (1853).

⁶¹ Black went on to serve as Attorney General and Secretary of State for President Buchanan, a position where he served as an unembarrassed defender of slavery. Black later drafted President Johnson’s message vetoing the Reconstruction Act. Susan Colman, *Black, Jeremiah Sullivan*, in 1 GREAT AMERICAN LAWYERS: AN ENCYCLOPEDIA 58, 58–62 (John R. Vile ed., 2001).

⁶² *Sharpless*, 21 Pa. at 160 (citations omitted).

⁶³ *Id.*

only by their own discretion.”⁶⁴ After quoting Justice Iredell’s opinion in *Calder*, and asserting that “[t]o aid, encourage, and stimulate commerce . . . is a duty of the sovereign, as plain and as universally recognised as any other,”⁶⁵ Black upheld the government’s authority to support a private, for-profit enterprise by taxation. Moreover, the court indicated that private corporations doing a “public duty” could be vested with the power of eminent domain.⁶⁶

By contrast, only four years later, the California Supreme Court embraced the Lockean view in *Billings v. Hall*.⁶⁷ That case struck down the “Settler’s Act,” a law which required any absentee landholder who wished to evict a squatter to pay the squatter the value of any improvements on the land. If the owner refused to pay, he would forfeit his land to the squatter. “It has been erroneously supposed, by many,” wrote Justice Hugh C. Murray,⁶⁸

that the Legislature of a State might do any act, except what was expressly prohibited by the Constitution. . . . Some [i.e., followers of Blackstone] contend that the very existence of government depends upon the supreme power being lodged in some branch of the government, from which there is no appeal, and, if laws are passed which are immoral, or violate the principles of natural justice, the subject is bound to obey them. Others [i.e., followers of Locke] contend that there are boundaries set to the exercise of the supreme sovereign power of the State, that it is limited in its exercise by the great and fundamental principles of the social compact, which is founded in consent, express or implied; that it shall be called into existence for the great ends which that compact was designed to secure, and, hence, it cannot be converted into such an unlimited power, as to defeat the end which mankind had in view, when they entered into the social compact.⁶⁹

After quoting Locke’s explanation of the natural limits on sovereignty, Murray concluded—somewhat optimistically—that “[w]hatever doubt may have formerly existed on this subject, the question has been settled, by an overwhelming weight of authority, in this country, that the spirit of free institutions is at war with such a principle” as legislative supremacy.⁷⁰ Since the Constitution gave government no “power to take the property of A

⁶⁴ *Id.* at 161.

⁶⁵ *Id.* at 170.

⁶⁶ *Id.*

⁶⁷ 7 Cal. 1 (1857); see also Timothy Sandefur, *A Natural Rights Perspective on Eminent Domain in California: A Rationale for Meaningful Judicial Scrutiny of “Public Use,”* 32 SW. U. L. REV. 569 (2003) (discussing the history of California’s public use clause at length) [hereinafter Sandefur, *Natural Rights Perspective*].

⁶⁸ *Billings*, 7 Cal. at 10. Chief Justice Murray is today remembered for his shocking racist opinion in *People v. Hall*, 4 Cal. 399 (1854).

⁶⁹ *Billings*, 7 Cal. at 10.

⁷⁰ *Id.* at 13.

and give it to B,”⁷¹ the legislature could not transfer land from a landowner to a squatter in this way. “It is a law as immutable as those of nature, that States and nations, like individuals, are bound to obey the principles of natural justice in all their dealings with their subjects and others”⁷²

This debate continued to the beginning of the twentieth century. Less than twenty years after *Billings*, the California Supreme Court reversed itself in a passionate opinion called *Stockton & Visalia Railroad v. Common Council of Stockton*.⁷³ Like *Sharpless*, the *Stockton & Visalia Railroad* case challenged government’s authority to invest taxpayer money in a private railroad. Progressive Chief Justice William T. Wallace relied on *Sharpless* when he declared that the legislature “is politically omnipotent, except in those particulars in which its power has been limited, qualified, or absolutely withdrawn by the provisions of the Federal or the State Constitution.”⁷⁴ But no such absolute limitation existed in the Constitution with regard to spending tax money to support a private business. True, the Constitution prohibited the taking of property except for public use, but “[n]o constitutional definition of the words ‘public use’ is . . . given in that instrument,”⁷⁵ and the Constitution left its definition to the legislature, not the courts. “The resolve of a legislative body, by which . . . private property taken, is, therefore, necessarily a legislative determination, that a public use is to be promoted . . . and such a determination is the determination of a merely political question by the political department of the Government.”⁷⁶

Only three years later, however, the United States Supreme Court would hold that for government to finance a private, for-profit railroad through tax dollars was unconstitutional. In *Loan Association v. Topeka*,⁷⁷ the Court held that taxation was supposed to serve the public welfare, not the private welfare. If government’s coercive power were to be used for private benefit, it would be force, not law, and would violate the Fourteenth Amendment’s requirement of “due process of law.” There are certain private rights “in every free government beyond the control of the State,” explained Justice Samuel Miller.⁷⁸

The theory of our governments, State and National, is opposed to

⁷¹ *Id.* at 13–14.

⁷² *Id.* at 15.

⁷³ 41 Cal. 147 (1871).

⁷⁴ *Id.* at 161.

⁷⁵ *Id.* at 168.

⁷⁶ *Id.*

⁷⁷ 87 U.S. (20 Wall.) 655 (1874).

⁷⁸ *Id.* at 662.

the deposit of unlimited power anywhere. . . .

There are limitations on such power which grow out of the essential nature of all free governments. Implied reservations of individual rights, without which the social compact could not exist, and which are respected by all governments entitled to the name. No court, for instance, would hesitate to declare void a statute which enacted that A. and B. who were husband and wife to each other should be so no longer, but that A. should thereafter be the husband of C., and B. the wife of D. Or which should enact that the homestead now owned by A. should no longer be his, but should henceforth be the property of B.⁷⁹

Since government was designed to protect these rights against arbitrary or wrongful deprivation, any government act which violated such rights was not a *law*, but an act of *mere force*:

To lay with one hand the power of the government on the property of the citizen, and with the other to bestow it upon favored individuals to aid private enterprises and build up private fortunes, is none the less a robbery because it is done under the forms of law and is called taxation. This is not legislation. It is a decree under legislative forms.⁸⁰

Since the tax was a use of government's coercive power for the benefit of private parties, rather than the general public, it was not a *law*, and thus deprived citizens of their property without due process of *law*.

C. Cracks in the Foundation: Railroads and The Mill Acts

The earliest controversies over the public use requirement in eminent domain law arose over the two great power sources of the eighteenth and nineteenth centuries: water power and steam power. In a series of laws passed early in American history, government permitted riparian landowners to dam up streams on their property—thus flooding the land of neighboring landowners—to run sawmills or gristmills. These “Mill Acts” were challenged as violations of the rule against taking the property of *A* and giving to *B*,⁸¹ and several courts struck down the laws for this reason.

Others upheld the Mill Acts on the theory that the private operator of the mill was not actually reaping any monopoly advantage. This was because Mill Acts often required the operator to serve the public equally, and regulated the rates that the operator could charge. In *Ryerson v. Brown*,⁸² for example, the

⁷⁹ *Id.* at 663.

⁸⁰ *Id.* at 664.

⁸¹ See Sandefur, *Natural Rights Perspective*, *supra* note 67, at 599–601.

⁸² 35 Mich. 333, 338 (1877).

Michigan Supreme Court held that it was “essential” to the constitutionality of these Acts “that the statute should require the use to be public in fact; in other words, that it should contain provisions entitling the public to accommodations.” Mills were thus public utilities, even though operated by private companies, and could legitimately exercise the eminent domain power.

This rule was especially important because it was during this period that the whole idea of a private, for-profit corporation was being devised. In previous generations, the term “corporation” had referred to a quasi-governmental entity: a body of citizens performing some public function with a charter from the crown.⁸³ Even economic trade was conducted in this manner, because in the mercantilist system, the government granted permission and set the terms on which traders could conduct their profession. A “corporation” in the early part of American history usually meant a government-backed company with exclusive rights to carry on a particular business or function. For this reason, the generation of the American Founders tended to use the terms “corporation” and “monopoly” synonymously.⁸⁴

This began to change during the nineteenth century. To terminate the privileged character of corporations, states chose not to abolish them, but to equalize the terms on which corporate charters were granted.⁸⁵ Corporations began to lose their special status because private entrepreneurs could now easily form private, for-profit corporations with no connection to the government, except for a charter granted as a ministerial function to any applicant meeting the requirements.

The privatization of the corporation during the nineteenth century was a gradual, vitally important development in American law. It had severe repercussions in the law of eminent domain because of railroads. While tollroads and turnpikes had often been built by public corporations—and such corporations had routinely been permitted to use the eminent domain power—railroads were less like public corporations and more like wholly private business enterprises. Early cases allowed railroads to use eminent domain by simple analogy to turnpike or tollroad construction. But that analogy became weaker as railroads became increasingly private. In *Swan v. Williams*,⁸⁶ the Michigan

⁸³ See ROBERT HESSEN, IN DEFENSE OF THE CORPORATION ch. 1, ch. 3 (1979).

⁸⁴ See William Letwin, *Congress and the Sherman Antitrust Law: 1887–1890*, 23 U. CHI. L. REV. 221, 226–29 (1956).

⁸⁵ HESSEN, *supra* note 83, at 29–33. See also GORDON S. WOOD, THE RADICALISM OF THE AMERICAN REVOLUTION 321 (1991); PAUL KENS, JUSTICE STEPHEN FIELD: SHAPING LIBERTY FROM THE GOLD RUSH TO THE GILDED AGE 50 (1997).

⁸⁶ 2 Mich. 427 (1852).

Supreme Court tried to solve the confusion by dividing corporations into three major classes:

1st. Political or municipal corporations, such as counties, towns, cities and villages, which, from their nature, are subject to the unlimited control of the Legislature; 2d. Those associations which are created for *public benefit*, and to which the government delegates a portion of its sovereign power, to be exercised for public utility, such as turnpike, bridge, canal, and railroad companies; and 3d strictly *private* corporations, where the *private interest* of the corporators is the primary object of the associations, such as banking, insurance, manufacturing and trading companies

The object of *strictly private* corporations is to aggregate the capital, the talents, and the skill of individuals, to foster industry and encourage the arts. Private advantage is the ultimate, as well as the immediate object of their creation, and such as results to the public is incidental, growing out of the general benefits acquired by the application of combined capital, skill, and talent to the pursuits of commerce and of trade, and the necessities and conveniences of the community.⁸⁷

While public corporations or associations for public benefit might exercise the eminent domain power, the *Swan* court explained, it could “not for a moment be contended” that “private property can be taken by the government from one and bestowed upon another for private use.”⁸⁸ Railroads fell within the second category of corporations, and could exercise the eminent domain power for the same reasons that the Mill Acts had been sustained: because the law secures to the public the right to use the railroad as a common carrier, and because it regulated the rates that the railroad could charge.⁸⁹

The theory that railroads were public entities because of their common carrier status was questionable from the outset. Railroad travel was certainly not *free*, and the owners of railroad companies often became immensely wealthy, in part at the expense of landowners who lost their property. Still, the theory made some sense at a time when business enterprises were rarely subject to regulation.⁹⁰ The theory also made economic

⁸⁷ *Id.* at 434.

⁸⁸ *Id.* at 435.

⁸⁹ *See id.* at 437–40.

⁹⁰ In fact, when, in the 1876 case of *Munn v. Illinois*, 94 U.S. 113 (1876), the Supreme Court upheld a state’s authority to regulate the prices charged by private businesses, Justice Stephen Field dissented on the grounds that price regulations were only allowed when “some right or privilege is conferred by the government or municipality upon the owner, which he can use in connection with his property,” such as the power of eminent domain. *Id.* at 146 (Field, J., dissenting). *See also* Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 88 (1872) (Field, J., dissenting) (noting that when government grants private parties “franchises of a public character,” which include delegating “the exercise of the sovereign right of eminent domain,” it may “determine . . . the conditions upon which

sense. As Richard Epstein pointed out, condemnations create a surplus benefit to the condemner by transferring property at a rate below the market price.⁹¹ When the condemner is allowed to appropriate that surplus entirely to himself, principles of equality are violated, and economic efficiency (secured by stable property rights and rewards for productive behavior) is replaced with a severe rent-seeking problem. Regulating the rates charged by a utility that employs eminent domain ensures that it will not simply appropriate that surplus to itself, but will return it equally to the public at large.

Despite these advantages, the railroad and Mill Act cases set a dangerous precedent: privately run corporations, run for private profit, could be vested with the power of eminent domain because they conferred general public advantages on the community. In one of the earliest railroad cases, *Bloodgood v. Mohawk & Hudson Railroad*,⁹² one judge sounded the warning: "It has never been allowed to be a rightful attribute of sovereignty in any government professing to be founded upon fixed laws, however despotic the form of the government might be, to take the property of one individual or subject, and bestow it upon another."⁹³ For government to assume such a power was to abandon the principles of the founding:

[N]o approved writer on public law will be found to go as far as [Thomas] Hobbes in vindicating the unqualified right of the sovereign to assume at will the property of the subject. Every other writer is disposed to recognize a distinction between right and power as applied to sovereign and subject, and to acknowledge that a rightful government must be founded on some other principle than that of mere force.⁹⁴

That principle was the equal protection of each person's right to property, but condemnations for for-profit railroad corporations endangered this principle. As for the theory that the public derived some general advantage from the construction of the railroad, this was not enough: "If an incidental benefit, resulting

[the eminent domain power] shall be enjoyed," including business regulations).

⁹¹ RICHARD A. EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* 163–64 (1985).

If the sum of all wealth in the state of nature is 100 and that in society is 150, then there is a potential surplus of 50, which must be distributed. . . . When the state acquires private property for public use, the public use requirement should ensure the "fair" allocation of surplus by preventing any group from appropriating more than a pro rata share. Takings for private use are therefore forbidden because the takers get to keep the full surplus, even if just compensation is paid.

Id.

⁹² 18 Wend. 9 (N.Y. 1837).

⁹³ *Id.* at 56.

⁹⁴ *Id.* at 57.

to the public from the mode in which individuals in pursuit of their own interest use their property, will constitute a public use of it . . . , it will be found very difficult to set limits to the power of appropriating private property.”⁹⁵

Nevertheless, the common carrier rationale prevailed and grew with the passing years. Eventually, it was even applied to electric power lines and telephone wires, and the legal fictions required to keep up this rationale became increasingly difficult to defend by the early twentieth century.⁹⁶ It was at this time that the massive philosophical shift, known as the Progressive Movement, took the next important step in eroding the public use limitation.

III. PROGRESSIVISM AND THE REGULATORY WELFARE STATE

A. The Progressives’ Abandonment of Locke

Lockean political philosophy, as represented by *Loan Ass’n v. Topeka*, prevailed in the courts during what is today called the “*Lochner* era,” but it came to a gradual end with the rise of Progressivism, a political movement seeking a broad range of social and economic reforms through government regulation. Although Progressivism defies easy definition, its central theme was the abandonment of classical liberal concepts of individual rights and natural liberty, and their replacement with notions of collective decision-making.⁹⁷

The Progressives shared four main ideas that would reshape the legal profession’s understanding of sovereignty along Blackstonian and Hobbesian lines, and ultimately expand the reach of eminent domain far beyond the Founders’ beliefs. The first was the idea that rights are really just permissions granted by the government. The second was that the Constitution is a “living document,” which changes to suit the exigencies of the moment. The third, closely allied with the second, was the idea that courts should avoid interfering when legislatures enact laws restricting individual rights. The fourth was the idea that government exists, not to secure individual rights—which, again, had come to be seen as permissions created by government—but to shape society into the form that the collective found pleasing.

The Progressive attitude toward individual rights was well described by one of its epigones, Justice Louis Brandeis, when he wrote, “in the interest of the public and in order to preserve the

⁹⁵ *Id.* at 65.

⁹⁶ See Philip Nichols, Jr., *The Meaning of Public Use in the Law of Eminent Domain*, 20 B.U. L. REV. 615, 621–23 (1940).

⁹⁷ See ERIC FONER, *THE STORY OF AMERICAN FREEDOM* 140 (1998).

liberty and the property of the great majority of the citizens of a State, rights of property and the liberty of the individual must be remoulded, from time to time, to meet the changing needs of society.”⁹⁸ Government’s primary role was now viewed as the shaping of society rather than the protection of human beings; it was to provide people with the necessities of comfortable living,⁹⁹ and to employ its coercive powers not merely to protect but to create individual personalities.¹⁰⁰ Government, no longer seen as a potential threat to freedom, autonomy, and dignity, was seen as the *creator* of these values, and in creating them, the government was justified in manipulating individual choice. For the Progressives, in fact, legal restrictions on liberty, or redistributions of property, were not really limits on freedom, but expansions of the newly defined concept of freedom. When it came to property rights, this concept of freedom sought to replace the time-honored notion of the owner’s right to do what he or she pleased with his or her own property, with the owner’s entitlement to participate in collective decision-making with regard to all other property in the area. As Eric Claeys puts it, “[e]ach local owner loses substantial freedom to control the use of his own parcel of land, but gains the opportunity to vote on how his neighbors ought to use *their* properties.”¹⁰¹ Thus, Progressive attitudes toward property rights included frequent violations of the rights of individuals, but because society took precedence over the individual, rights would have to yield to the “public good.”

Where previous generations saw private property as a natural right which government was obliged to protect, the Progressives believed the right to property was merely a creation of positive law. As Louis Menand puts it, the Progressives saw freedoms as “socially engineered spaces where parties engaged in specified pursuits enjoy protection from parties who would otherwise naturally seek to interfere [R]ights are created not for the good of individuals, but for the good of society. Individual

⁹⁸ *Truax v. Corrigan*, 257 U.S. 312, 376 (1921) (Brandeis, J., dissenting).

⁹⁹ See John Dewey, *The Future of Liberalism*, 32 J. PHIL. 225 (1935).

[F]ull freedom of the human spirit and of individuality can be achieved only as there is effective opportunity to share in the cultural resources of civilization. . . . Any liberalism that does not make full cultural freedom supreme and that does not see the relation between it and genuine industrial freedom as a way of life is a degenerate and delusive liberalism.

Id.

¹⁰⁰ Thomas G. West, *Progressivism and the Transformation of American Government*, in *THE PROGRESSIVE REVOLUTION IN POLITICS AND POLITICAL SCIENCE: TRANSFORMING THE AMERICAN REGIME* 13, 16 (John Marini & Ken Masugi eds., 2005).

¹⁰¹ Eric R. Claeys, *Zoning and Progressive Political Theory*, in *THE PROGRESSIVE REVOLUTION IN POLITICS AND POLITICAL SCIENCE*, *supra* note 100, at 287, 292.

freedoms are manufactured to achieve group ends.”¹⁰² Rather than reflecting any natural, moral entitlement, property was simply the invention of the state, and the state could alter the rules at will.¹⁰³ The Progressives employed this newfound authority in the pursuit of a slew of social projects.¹⁰⁴

It would be difficult to exaggerate the degree to which Progressivism was alienated from the basis of American constitutionalism. The Progressives believed that the Lockean principles of the founding had been based on theories of knowledge that had now been disproved by, among other things, the science of evolution. Lockeanism had held that humans are endowed with a particular, special nature, a characteristic quality that distinguishes man from all the rest of nature. This unique spark was also the source of inalienable, individual rights. But under the influence of philosophers such as Hegel,¹⁰⁵ the Progressives “put an end to the idea that . . . there exists some order, invisible to us, whose logic we transgress at our peril.”¹⁰⁶ Hegel’s followers came to argue that the distinctions between humans and the rest of nature were artifices created by History and social consensus. Moral orders, economic orders, and even, in extreme cases, physical orders,¹⁰⁷ were held to be matters of mere convention by thinkers who contended that the human will could master what were once conceived of as objective truths. Harnessing this willpower on a collective scale was the main purpose of Progressive politics.¹⁰⁸

In fact, such collective will was not only the source of political legitimacy, but the very source of individual identity.¹⁰⁹ The

¹⁰² LOUIS MENAND, *THE METAPHYSICAL CLUB* 409 (2001).

¹⁰³ See, e.g., CHARLES EDWARD MERRIAM, *A HISTORY OF AMERICAN POLITICAL THEORIES* 311 (Russell & Russell 1968) (1903) (“The present tendency . . . in American political theory is to disregard the once dominant ideas of natural rights and the social contract . . . [R]ights are considered to have their source not in nature, but in law.”).

¹⁰⁴ See generally MICHAEL MCGERR, *A FIERCE DISCONTENT: THE RISE AND FALL OF THE PROGRESSIVE MOVEMENT IN AMERICA, 1870–1920* (2003); RICHARD HOFSTADTER, *THE AGE OF REFORM* (1955). See also KEVIN STARR, *INVENTING THE DREAM: CALIFORNIA THROUGH THE PROGRESSIVE ERA 199–282* (1985).

¹⁰⁵ See generally Mathias Reimann, *Nineteenth Century German Legal Science*, 31 B.C. L. REV. 837 (1990); Stephen A. Siegel, *Historicism in Late Nineteenth-Century Constitutional Thought*, 1990 WIS. L. REV. 1431 (1990).

¹⁰⁶ MENAND, *supra* note 102, at 439.

¹⁰⁷ See generally ZHORES MEDVEDEV, *THE RISE AND FALL OF T.D. LYSENKO* (1969) (detailing the life of Soviet biologist Lysenko, who contended that biological characteristics were matters of convention, rather than nature).

¹⁰⁸ See JOHN A. MARINI, *THE POLITICS OF BUDGET CONTROL* 187 (1992).

¹⁰⁹ See *id.* See also Dewey, *supra* note 99, at 227.

[Progressive] liberalism knows that an individual is nothing fixed, given ready-made. It is something achieved, and achieved not in isolation, but the aid and support of conditions, cultural and physical, including in “cultural” economic, legal, and political institutions as well as science and art. Liberalism knows that social conditions may restrict, distort, and almost prevent the development of individuality. It therefore takes an active interest in the working of

good state did not take the nature of individuals as a given, nor did it recognize any rights originating in human nature, let alone any pre-political standards of justice. Those who relied on such concepts were, in Oliver Wendell Holmes' phrase, "churning the void in hope of making cheese."¹¹⁰ Rather, morality, human nature, and individual rights were generated and shaped only by the conscious, focused will of the collective society. This vision placed a disturbing emphasis on the power of political leaders, as Woodrow Wilson's description of "leaders of men" makes clear: "Men are as clay in the hands of the consummate leader."¹¹¹

The second Progressive idea was the notion of a "living constitution."¹¹² In this conception, the Constitution's restrictions on government power had to be "redefined" and "remolded" to meet the modern need for government regulation. One contemporary admirer of Justice Oliver Wendell Holmes described his jurisprudence this way:

Holmes came to the bench in 1882, when the transition from individualism to collectivism in England was in progress. . . . [He] was too learned in the history of the law to be blind to the fact that the socialistic trend in American political thought would finally demand extensive paternal legislation in no uncertain terms; and that when this demand became strong enough serious consequences might follow the failure of the courts to acquiesce

. . . [T]he necessity for the establishment of a benevolent attitude towards social reform was apparent [yet] the Constitution was

social institutions that have a bearing, positive or negative, upon the growth of individuals who shall be rugged in fact and not merely in abstract theory. It is as much interested in positive construction of favorable institutions, legal, political, and economic, as it is in the work of removing abuses and overt oppressions.

Id.

¹¹⁰ OLIVER WENDELL HOLMES, JR., Letter to Alice Stopford Greene (Aug. 20, 1909), in *THE ESSENTIAL HOLMES* 115, 116 (Richard A. Posner ed., 1992). Another interesting indication of Holmes' fundamentally Hobbesian understanding of sovereignty comes in his comment on sovereign immunity: suing the government, he said, "seems to me like shaking one's fist at the sky, when the sky furnishes the energy that enables one to raise the fist." HOLMES, JR., Letter to Harold Laski (Jan. 29, 1926), in *THE ESSENTIAL HOLMES*, *supra*, at 234, 235. Cf. Berns, *supra* note 18, at 407, noting that, for Hobbes,

[o]pposing the sovereign's will in any particular case would be opposing the ground of all property and, hence, self-defeating. When citizens are allowed to sue the supreme authority, the question cannot be whether the sovereign or his ministers had a right to do what was done, but rather what it was that the sovereign in fact willed in this matter.

¹¹¹ 6 WOODROW WILSON, *Leaders of Men* (1890), reprinted in *The PAPERS OF WOODROW WILSON* 646, 650 (Arthur S. Link ed., 1969).

¹¹² This term first appeared in Arthur W. Machen Jr., *The Elasticity of the Constitution*, 14 *HARV. L. REV.* 200, 205 (1901), but was popularized in HOWARD LEE MCBAIN, *THE LIVING CONSTITUTION* (1927). See also R. G. Tugwell, *That Living Constitution*, *THE NEW REPUBLIC*, June 20, 1928, at 120; G. EDWARD WHITE, *THE CONSTITUTION AND THE NEW DEAL* 356 n.25 (2000).

regarded as almost immutable. . . . [N]o further [Amendment] might be looked for short of a popular upheaval.

Next to amendment of the Constitution, the most feasible means of giving validity to new principles was to change the interpretation of the provisions under which the inevitable social legislation would be held invalid. "Liberty of contract" and the broad powers of review assumed by the courts under the 5th and 14th Amendments were the elements which barred the way to reform,—and it is against these interpretations that Justice Holmes' most significant attacks have been directed.¹¹³

It was not that Holmes was a socialist—in fact, he was not¹¹⁴—but that Holmes and his allies adopted a view of the judiciary that drastically curtailed its role in limiting legislative power. This was the third Progressive idea—the concept of judicial restraint. "If my fellow citizens want to go to Hell," Holmes is reputed to have said, "I will help them. It's my job."¹¹⁵ Holmes abandoned older principles of natural, inherent limits on legislative authority, which he saw as mere superstitions.¹¹⁶ He went even further in favor of the legislature than Blackstone had. As a true follower of Hobbes,¹¹⁷ Holmes believed that rights do not derive from the nature of human beings, but are simply permissions granted by society and revocable at will; the judiciary exceeds its proper bounds if it intervened at such a moment. Holmes' ultra-democratic principles were so extreme that he wrote in his most famous opinion that "the word liberty in the Fourteenth Amendment is perverted when it is held to prevent the natural outcome of a dominant opinion,"¹¹⁸ even though it is difficult to imagine what else the word could possibly mean. Most fundamentally, where previous generations had held that a political society was based on a general assent to certain common principles,¹¹⁹ Holmes argued that the Constitution was not based on any principles of political philosophy *at all*. Holmes wrote, "a constitution is not intended to embody a particular economic the-

¹¹³ DORSEY RICHARDSON, CONSTITUTIONAL DOCTRINES OF JUSTICE OLIVER WENDELL HOLMES 41 (1924), in 42 JOHNS HOPKINS UNIVERSITY STUDIES IN HISTORICAL AND POLITICAL SCIENCE 319, 359 (1924).

¹¹⁴ See MENAND, *supra* note 102, at 65.

¹¹⁵ Walter Berns, *The Supreme Court as Republican Schoolmaster: Constitutional Interpretation and the "Genius of the People,"* in THE SUPREME COURT AND AMERICAN CONSTITUTIONALISM 3, 11 (Bradford P. Wilson & Ken Masugi eds., 1998) (quoting Letter from Oliver Wendell Holmes Jr. to Harold Laski (Mar. 4, 1920), in 1 HOLMES-LASKI LETTERS, at 194 (Mark de Wolfe Howe ed., 1963)).

¹¹⁶ See, e.g., Oliver Wendell Holmes, *Natural Law*, 32 HARV. L. REV. 40 (1918).

¹¹⁷ See, e.g., Ben W. Palmer, *Hobbes, Holmes and Hitler*, 31 A.B.A. J. 569 (1945).

¹¹⁸ *Lochner v. New York*, 198 U.S. 45, 76 (1905) (Holmes, J., dissenting).

¹¹⁹ See, e.g., VA. CONST. § 15 (1776) ("[N]o free government, or the blessings of liberty, can be preserved to any people, but by a firm adherence to justice, moderation, temperance, frugality, and virtue, and by frequent recurrence to fundamental principles.").

ory It is made for people of *fundamentally* differing views.”¹²⁰ This was a departure from the entire history of Western political philosophy, and particularly the Declaration of Independence, which held that political society is only possible among people of fundamentally *shared* views.¹²¹

Perhaps paradoxically, the concept of judicial restraint was deeply allied to the idea of a “living constitution.” Courts could take a passive, seemingly non-partisan role in cases involving legislative entrenchments on previously protected rights, thus pursuing an air of objectivity while in fact advancing Progressive ideals, or at least allowing the advancement of Progressive activism in legislatures. By abandoning the fundamentally shared views of American constitutionalism—which had once helped anchor American legislatures to philosophical principles—Holmes and his followers allowed the ship of state to drift toward the goals to which Progressives were steering, all while professing personal detachment from the project.

One of those who preferred to steer was Louis Brandeis. In 1936, in a flattering portrait of Brandeis entitled *Brandeis and the Modern State*, Professor Alpheus Thomas Mason praised the justice for having recognized that “[p]roperty has a social function to perform; it is a means, not an end in itself,” and that when property interferes with “that fundamental freedom of life for which property *is only a means*. . . . it should be controlled [by the government].”¹²² Like Blackstone, Brandeis’ focus was primarily on mechanisms of social organization, not on the individual liberty that America’s Founders believed such mechanisms ought to serve. Thus the state’s power to regulate the economy “is not conditioned upon the existence of economic need but flows from the broader right of Americans to preserve and to establish such institutions, social and economic, as seem to them desirable.”¹²³ Notions of government preserving individual liberty were simply outdated: Mason praised Brandeis’ “conviction that eighteenth century individualistic philosophy of rights and property is no longer a creed adequate for modern life,”¹²⁴ even while he voiced some slight concern that Brandeis’ “principles exhibit an element of collectivism so strong as somewhat to embarrass those who

¹²⁰ *Lochner*, 198 U.S. at 75–76 (Holmes, J., dissenting) (emphasis added).

¹²¹ See THE DECLARATION OF INDEPENDENCE, 1 Stat. 1 (1776) (“[G]overnments are instituted among men, deriving their just powers from the consent of the governed . . . as to them shall seem most likely to affect their safety and happiness.”).

¹²² ALPHEUS THOMAS MASON, *BRANDEIS AND THE MODERN STATE* 211–12 (Sherman F. Mittell ed., 1936) (1933) (internal quotation marks omitted) (quoting Ernest Poole, *Brandeis*, 71 THE AMERICAN MAGAZINE, Feb. 1911, at 481, 493).

¹²³ *Id.* at 211.

¹²⁴ *Id.* at 232–33.

endorse his libertarian doctrines.”¹²⁵ Mason noted that Brandeis’ “zeal for social justice and his belief in the genuine worth of the individual sometimes cause him to favor even drastic regulation of those very liberties which many consider it the primary purpose of the Bill of Rights to protect.”¹²⁶ Holmes, Mason argued, professed no opinion as to the desirability of economic redistribution, but “[i]f Mr. Justice Brandeis sustains social legislation, it is because he believes it desirable and expedient as well as constitutional.”¹²⁷ Whatever their differences, Holmes and Brandeis shared a fundamental premise with Hobbes and with Blackstone: that there were no pre-political limits on what government might do in the “interests of society.”

Significantly, the use of eminent domain expanded greatly during the Progressive era. Since government was no longer seen as a device for protecting equal rights, projects which once would have been considered beyond the state’s authority were now seen as perfectly legitimate. The government’s role was not to police the boundaries of rights, “restrain[ing] men from injuring one another,” as the Founders had believed;¹²⁸ it was to take an active role in forming a better society in general. Thus, the Progressives adopted a wide variety of government programs for manipulating society, including zoning,¹²⁹ mandatory government schooling,¹³⁰ racial segregation,¹³¹ government control over the money supply,¹³² eugenics programs,¹³³ and even the Pledge of Allegiance.¹³⁴ And it was during this period that the term “blight” first came to be applied to neighborhoods, to describe areas that failed to perform economically to standards that the government preferred.¹³⁵ As the reach of sovereignty expanded, so, too, did the power of eminent domain. In *Rindge Co. v. County of Los Angeles*,¹³⁶ the Supreme Court upheld the condemnation of land for public recreation, because “[p]ublic uses are not

¹²⁵ *Id.* at 206.

¹²⁶ *Id.* at 222.

¹²⁷ *Id.* at 224.

¹²⁸ THOMAS JEFFERSON, *First Inaugural Address*, in WRITINGS, *supra* note 32, at 492, 494.

¹²⁹ See Claeys, *supra* note 101, at 292.

¹³⁰ See MCGERR, *supra* note 104, at 109–11.

¹³¹ See *id.* at 182–218.

¹³² See *id.* at 163–64.

¹³³ See *id.* at 214.

¹³⁴ See RICHARD A. EPSTEIN, *HOW PROGRESSIVES REWROTE THE CONSTITUTION* 108 (2006).

¹³⁵ See generally Wendell E. Pritchett, *The “Public Menace” of Blight: Urban Renewal and the Private Uses of Eminent Domain*, 21 YALE L. & POLY REV. 1 (2003); Eric R. Claeys, *Euclid Lives? The Uneasy Legacy of Progressivism in Zoning*, 73 FORDHAM L. REV. 731, 751–53 (2004). The first use of the term “blight” to describe a dilapidated neighborhood was in *Pritz v. Messer*, 149 N.E. 30, 35 (Ohio 1925).

¹³⁶ 262 U.S. 700 (1923).

limited, in the modern view, to matters of mere business necessity and ordinary convenience, but may extend to matters of public health, recreation and enjoyment.”¹³⁷ The California Supreme Court went even further: “anything calculated to promote the education, the recreation, or the pleasure of the public is to be included within the legitimate domain of public purposes” permitting the exercise of eminent domain.¹³⁸

B. The New Deal Canonizes Progressivism

The confluence of “the Holmesian negative canon of limited court action and the aggressive New Deal version of judicial positivism” was to finalize the break with the Lockean tradition in a series of cases in the 1930s.¹³⁹ In 1934, writer and Yale University Professor Francis W. Coker concluded that the debate over government regulation of property had pretty much been settled in favor of extensive government regulation. “In some decisions, indeed, the American courts have enunciated a broad and positive collectivist doctrine” affirming such regulation.¹⁴⁰ The notion that preserving individual rights is a goal to be served by government was outmoded: there “is no important economic group that now holds in practice to any anti-interventionist conception of the proper sphere of state activity in the economic field.”¹⁴¹ Coker admired the Roosevelt Administration’s “rapid advances in collectivism”¹⁴² which, “if they work passably well in the emergency [of the Great Depression], they will in many particulars become [sic] permanent parts of governmental policy.”¹⁴³ Such a result was perfectly consistent with the trend of Progressive political philosophy, because

[a]s the means of production and distribution change, the forms of social interdependence also change, creating new problems of comfort, convenience, decency, and order. The specific interferences with individual economic freedom have recently assumed somewhat new forms, and there may appear to have been a general movement from individualism to collectivism. But private property is itself a highly collectivistic institution, dependent for its existence upon very substantial restraints, rigorously applied by the organized force of the community, upon individual freedom. At any given period of time, therefore, the law intervenes, not only to protect individual owners in what are then regarded as proper uses of private property, but also to

¹³⁷ *Id.* at 707.

¹³⁸ *Egan v. City of San Francisco*, 133 P. 294, 296 (Cal. 1913).

¹³⁹ ARTHUR A. EKIRCH JR., *IDEOLOGIES AND UTOPIAS: THE IMPACT OF THE NEW DEAL ON AMERICAN THOUGHT* 205 (1969).

¹⁴⁰ FRANCIS W. COKER, *RECENT POLITICAL THOUGHT* 554 (1934).

¹⁴¹ *Id.* at 556.

¹⁴² *Id.* at 558.

¹⁴³ *Id.* at 559.

safeguard individuals and the community as a whole against oppressive and incompetent uses of property.¹⁴⁴

Two years later, James Madison's biographer and Progressive ideologue, Irving Brant, published a shrill, partisan book called *Storm Over the Constitution*, denouncing the "nine men in black robes" who stood in the way of nationwide economic reorganization.¹⁴⁵ "In the combat between economic democracy and the industrial oligarchy," he wrote,

the Supreme Court has at all times been the last and most formidable entrenchment of privileged wealth. . . . The fundamental necessity is to find power through which federal and state governments, but particularly the federal government, may cope with the economic and social problems of the twentieth century. Federal power must be found in the Constitution; the state governments need only relief from misapplied constitutional restraints.¹⁴⁶

Brant argued that the Constitution must be interpreted to allow Congress to experiment with new forms of "economic democracy." "Commerce among the states must be saved from demoralization," he wrote.¹⁴⁷ "Let that be the touchstone of constitutional interpretation and it will allow the federal government to go exactly so far, in controlling activities *affecting* interstate commerce, as may be necessary to make the commercial life of the nation serve the general welfare."¹⁴⁸

In 1934, the Supreme Court formally adopted the Progressive doctrine that laws restricting economic liberty and private property rights would be presumed constitutional except in extremely rare circumstances.¹⁴⁹ "The court has repeatedly sustained curtailment of enjoyment of private property, in the public interest," wrote Justice Roberts in *Nebbia v. New York*.¹⁵⁰ "The owner's rights may be subordinated to the needs of other private owners whose pursuits are vital to the paramount interests of the community."¹⁵¹ Although not an eminent domain case, *Nebbia* is a legal landmark because it finally made the Progressive principle of deference toward legislative control over economic freedom and property rights into constitutional law, which it remains to-

¹⁴⁴ *Id.*

¹⁴⁵ IRVING BRANT, *STORM OVER THE CONSTITUTION* 234–48 (1936).

¹⁴⁶ *Id.* at 242.

¹⁴⁷ *Id.* at 145.

¹⁴⁸ *Id.* Brant suggested three options: amending the Constitution, restricting the power of judicial review, or "[c]onversion of the liberal Supreme Court minority into a consistent majority." *Id.* at 242. To this third option he added a less than ingenuous footnote: "But not by enlarging the Court even though Lincoln did it." *Id.* at 242 n.*. In 1937, of course, Franklin Roosevelt would propose just such a court-packing scheme.

¹⁴⁹ See WHITE, *supra* note 112, at ch. 8 (2000).

¹⁵⁰ 291 U.S. 502, 525 (1934).

¹⁵¹ *Id.*

day. The Court declared that states are “free to adopt whatever economic policy may reasonably be deemed to promote public welfare, and to enforce that policy by legislation adapted to its purpose. The courts are without authority either to declare such policy, or, when it is declared by the legislature, to override it.”¹⁵²

Four justices dissented in *Nebbia*, and in the next three years, the Court sometimes patrolled the constitutional limits by striking down some of the more extreme New Deal programs.¹⁵³ But after the 1937 Supreme Court term, such dissent became more subdued and infrequent. In its place was erected a dogma that political philosophy is simply no concern of judges,¹⁵⁴ and that every conceivable (and even absurd) presumption is to be indulged in favor of the validity of the legislature’s actions.¹⁵⁵ While the Court sometimes recited formulas suggesting it had some degree of understanding of the role of government—such as “rationally related to a legitimate government interest”—it had abandoned the tools that allowed it to understand what that role is. By 1987, over two hundred years after the founding of the United States, the Supreme Court would confess the humiliating fact that “[o]ur cases have not elaborated on the standards for determining what constitutes a ‘legitimate state interest.’”¹⁵⁶ The Court had simply forgotten what government exists to do.¹⁵⁷ When faced with that question, it would usually substitute “tradition” for constitutional principles,¹⁵⁸ or employ some other technique to avoid addressing whether government may rightfully pursue the goal in question. As a consequence, the Court tended—with notable exceptions¹⁵⁹—to sustain any government

¹⁵² *Id.* at 537.

¹⁵³ *See, e.g.*, *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935); *United States v. Butler*, 297 U.S. 1 (1936).

¹⁵⁴ *See, e.g.*, ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 6 (1990).

¹⁵⁵ *See, e.g.*, *FCC v. Beach Commc’ns, Inc.*, 508 U.S. 307, 315–16 (1993) (stating that under the rational basis test, “those attacking the rationality of the legislative classification have the burden to negative every conceivable basis which might support it. . . . [W]e never require a legislature to articulate its reasons for enacting a statute, [so] it is entirely irrelevant for constitutional purposes whether the conceived reason for the challenged [law] actually motivated the legislature. . . . [T]he absence of legislative facts explaining the [law] . . . has no significance . . . [and] legislative judgment [is] virtually unreviewable”) (citations omitted) (internal quotation marks omitted).

¹⁵⁶ *Nollan v. Cal. Coastal Comm’n*, 483 U.S. 825, 834 (1987).

¹⁵⁷ *Cf.* 6 JAMES MADISON, Letter to Henry Lee (Jan. 1, 1792), in *THE WRITINGS OF JAMES MADISON* 80, 81 n.1 (Gaillard Hunt ed., 1906) (“If not only the *means* [of government’s actions], but the *objects* are unlimited, the parchment had better be thrown into the fire at once . . .”).

¹⁵⁸ *See, e.g.*, *Chavez v. Martinez*, 538 U.S. 760, 775 (2003) (“Only fundamental rights and liberties which are ‘deeply rooted in this Nation’s history and tradition’ and ‘implicit in the concept of ordered liberty’ qualify for [due process] protection.”) (quoting *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997)).

¹⁵⁹ *See, e.g.*, *Lawrence v. Texas*, 123 S. Ct. 2472 (2003) (holding that a Texas statute,

interest as “legitimate” when it achieved significant public support.¹⁶⁰ And as a consequence, the Court had given its blessing, as a practical matter, to the abandonment of Lockean limits on government sovereignty. At the end of the 1930s, the Blackstonian vision—that the legislature could do whatever was not naturally impossible—was almost entirely realized in American jurisprudence. The “[r]evival of absolutism,” said Roscoe Pound in 1940, “is a manifest fact. . . . The books of the day are full of theories which when carried out lead to organization of society in an omniscient state in which the individual man is submerged.”¹⁶¹

There was one class of cases, however, where the Court continued to exercise some degree of judicial review. In *United States v. Carolene Products Co.*,¹⁶² the Court indicated that its “presumption of constitutionality” would not apply “when legislation appears on its face to be within a specific prohibition of the Constitution.” In other words, the Blackstonian notion of an inherently sovereign government, free to act however it pleased except where *specifically* forbidden, was enshrined for good, and as time went on, it would become increasingly clear that even some of the “specific prohibitions” in the Constitution would receive less judicial solicitude.

IV. “PUBLIC USE” SINCE THE NEW DEAL

A. The Court Abandons “Public Use”

The 1930s’ abandonment of judicial protection for economic freedom was applied in the law of eminent domain only a decade later, when the Court held in *United States ex rel. Tennessee Valley Authority v. Welch* that “it is the function of Congress to decide what type of taking is for a public use Any departure from this judicial restraint would result in courts deciding on what is and is not a governmental function . . . which has proved impracticable in other fields.”¹⁶³ *Welch*, like the cases that were to follow, reflected the Progressives’ innovations in constitutional law in that it was argued under the Public Use Clause rather than the Due Process Clause. Earlier cases had established that

criminalizing private sexual conduct between two people of the same sex, violated the Constitution).

¹⁶⁰ See EPSTEIN, *supra* note 91, at 109 (“The legitimate state interest in vogue today is a bare conclusion, tantamount to asserting that the action is legitimate because it is lawful. . . . [It] functions, at best, as a convenient label for serious inquiry, without defining the set of permissible ends of government action.”).

¹⁶¹ ROSCOE POUND, *CONTEMPORARY JURISTIC THEORY* 1 (Fred B. Rothman Publications 1999) (1940).

¹⁶² 304 U.S. 144, 152 n.4 (1938).

¹⁶³ 327 U.S. 546, 551–52 (1946).

the prohibition on taking from *A* and giving to *B* was located in the substantive protections of the Due Process Clause—because enactments which redistributed wealth on the basis of political popularity were not *laws*, but were mere enactments.¹⁶⁴ But with the New Deal abandonment of this principle, reflected in the *Welch* Court's reference to "judicial restraint . . . in other fields," such cases were litigated under the Public Use Clause instead.¹⁶⁵

The results, however, were no more successful than they would have been had they been brought under the older theory. Having explicitly abandoned the role of "deciding on what is and is not a governmental function," the Court finally rejected the notion that government may not take property from *A* and give it to *B*. *Berman v. Parker*¹⁶⁶ involved a challenge to a Washington, D.C., slum-clearance program. Judging certain neighborhoods dangerous to the public welfare, Congress declared that cleaning up the city could not be accomplished "by the ordinary operations of private enterprise alone,"¹⁶⁷ and ordered the condemnation of "blighted areas" of the city.¹⁶⁸ Moreover, Congress declared that "the leasing or sale" of the property taken in this way "for redevelopment pursuant to a project area redevelopment plan . . . is hereby declared to be a public use."¹⁶⁹

Along with the substandard property, officials condemned viable property, including a department store owned by Max Morris. Morris sued, arguing that the condemnation violated the

¹⁶⁴ See, e.g., *Loan Ass'n v. Topeka*, 87 U.S. (20 Wall.) 655, 664 (1874) ("This is not legislation. It is a decree under legislative forms.")

¹⁶⁵ This is the answer to the seeming paradox that the Fifth Amendment refers explicitly only to compensating owners for takings that are "for public use"—which might be interpreting as allowing takings for private use to go uncompensated. This absurd result comes from forgetting the prohibition on private takings located in the Due Process Clause. The proper reading of the Fifth Amendment therefore declares that no person shall be deprived of property without due process of law (including that no person shall be deprived of property simply to transfer it to more politically successful parties), and that when property is taken for public use, it shall be compensated. Justice Kennedy is therefore correct in his observation that

the Takings Clause . . . has not been understood to be a substantive or absolute limit on the government's power to act. The Clause operates as a conditional limitation, permitting the government to do what it wants so long as it pays the charge. The Clause presupposes what the government intends to do is otherwise constitutional.

Eastern Enterprises v. Apfel, 524 U.S. 498, 545 (1998) (Kennedy, J., concurring in judgment). To get to the compensation requirement, the government must first satisfy the Due Process limitation forbidding private takings.

¹⁶⁶ 348 U.S. 26 (1954).

¹⁶⁷ *Id.* at 29 (quoting District of Columbia Redevelopment Act of 1945, Pub. L. No. 79-592, 60 Stat. 790, § 2 (1946)).

¹⁶⁸ The Court itself noted that "[t]he Act does not define either 'slums' or 'blighted areas.'" *Id.* at 28 n.*.

¹⁶⁹ *Id.* at 29 (quoting District of Columbia Redevelopment Act of 1945, Pub. L. No. 79-592, 60 Stat. 790, § 2 (1946)).

Public Use Clause because it would simply hand his property over to a private developer to build a store or some other building for his own private profit. Justice William O. Douglas rejected this argument in no uncertain terms:

Subject 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 This principle admits of no exception merely because the power of eminent domain is involved. The role of the judiciary in determining whether that power is being exercised for a public purpose is an extremely narrow one.¹⁷⁰

Douglas—a Roosevelt appointee firmly in the grip of Progressive constitutionalism¹⁷¹—was applying *Nebbia*-style deference to the legislature’s authority to reshape the neighborhood. In the process, he and the rest of the Court affirmed that government could take property from one private party and give it to another if the overriding goal were important enough—and the Court would defer to the legislature’s judgment as to whether the goal was important enough.¹⁷² What is particularly noteworthy about *Berman* is its lack of caution; the decision—which was unanimous—explicitly conceded that government may transfer property directly from one owner to another: “The public end may be as well or better served through an agency of private enterprise than through a department of government We cannot say that public ownership is the sole method of promoting the public purposes of community redevelopment projects.”¹⁷³ *Berman* does not appear ever to have been criticized by a lower court.

The Court did not revisit the Public Use Clause for another thirty years. But during that time, protections for property rights continued to erode. In *Penn Central Transportation Co. v. New York City*,¹⁷⁴ the Court upheld the validity of a New York law forbidding the owners of a historic train station from constructing an office tower on the site. Although the law did not actually seize the title to the land, it prohibited the purchasers

¹⁷⁰ *Id.* at 32.

¹⁷¹ See, e.g., *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 488 (1955) (“The day is gone when this Court uses the Due Process Clause of the Fourteenth Amendment to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought.”).

¹⁷² See *Berman*, 348 U.S. at 33 (“Appellants argue that . . . the project [is] a taking from one businessman for the benefit of another businessman. But the means of executing the project are for Congress and Congress alone to determine, once the public purpose has been established.”).

¹⁷³ *Id.* at 33–34.

¹⁷⁴ *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 135–38 (1978).

from using their land as they wanted, and thus deprived them of the value of their property. Although the Court had long held that government should not be able to evade the duty of paying just compensation through the trick of simply prohibiting the use of land while allowing the owner to keep the title,¹⁷⁵ it rejected the property owners' argument that the law was a taking of their property. To decide when legal interference with property use amounts to a taking of the property, *Penn Central* proposed a confusing, multi-factor "balancing" test, under which a property owner is almost never entitled to compensation.¹⁷⁶ Explaining this vague approach, Justice Brennan wrote that a taking "may more readily be found when the interference with property can be characterized as a physical invasion by government, than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good."¹⁷⁷

Under the principles of the American founding, of course, such programs are simply not constitutional, but the Court hardly paused to address that issue, concluding that "in a wide variety of contexts . . . government may execute laws or programs that adversely affect recognized economic values."¹⁷⁸ Brennan simply asserted, without explanation, that government has a legitimate interest in redistributing wealth, even when these "adversely affect" the property rights of those who have earned this wealth. The *Penn Central* test he devised purported to distinguish such valid programs from laws that unjustly deprived persons of their property, but he provided no substantive standards for making that distinction. Instead, he substituted such wholly subjective standards as "fairness" and interference with reasonable investment-backed expectations¹⁷⁹ (the reasonableness to be determined by the judge's subjective standards). The result has been an inconsistent body of law under which the property owner almost invariably loses.¹⁸⁰ The Court would employ a similar

¹⁷⁵ See, e.g., *Pumpelly v. Green Bay Co.*, 80 U.S. (13 Wall.) 166, 177–78 (1871) ("It would be a very curious and unsatisfactory result . . . [to hold] that if the government refrains from the absolute conversion of real property to the uses of the public it can destroy its value entirely . . . without making any compensation, because, in the narrowest sense of that word, it is not *taken* for the public use.").

¹⁷⁶ See John E. Fee, *Unearthing the Denominator in Regulatory Taking Claims*, 61 U. CHI. L. REV. 1535, 1536 n.4 (1994) (explaining the balancing test created in *Penn Central Transportation Co.*, 438 U.S. at 124); David F. Coursen, *The Takings Jurisprudence of the Court of Federal Claims and the Federal Circuit*, 29 ENVTL. L. 821, 823 n.12 (1999) (noting that the Court has never compensated a property owner under the *Penn Central* test).

¹⁷⁷ *Penn Cent. Transp. Co.*, 438 U.S. at 124 (citation omitted).

¹⁷⁸ *Id.*

¹⁷⁹ *Id.* The term "reasonable" was actually added to the *Penn Central* formula in *Kaiser Aetna v. United States*, 444 U.S. 164, 175 (1979).

¹⁸⁰ See William P. Barr et al., *The Gild That Is Killing the Lily: How Confusion over Regulatory Takings Doctrine is Undermining the Core Protections of the Takings Clause*,

technique in the *Kelo* decision.

Finally, in the 1984 case of *Hawaii Housing v. Midkiff*,¹⁸¹ the Court returned to the subject of eminent domain when it upheld a Hawaii law allowing any person renting a home to request that the state condemn the house, and resell it to the renter at a substantially discounted rate. This scheme, which even more obviously took property from *A* and gave it to *B* than did the law in *Berman*, was devised to address the problem of “land oligopoly,” according to the state.¹⁸² Forty-seven percent of the state’s land was held by seventy-two private landowners, the state argued, and this caused a shortage of land for residences.¹⁸³ As a matter of economics, this is a bit silly: *seventy-two* distinct competitors in a marketplace, owning collectively less than half the land, is hardly an oligopoly, if that term even has meaning.¹⁸⁴ The state’s further contention that this “oligopoly” was responsible for the shortage of residential land is belied by its admission that federal and state government owned forty-nine percent of the land.¹⁸⁵ The government had purchased almost half of the land in the state, and then, worried that there were too few landowners left, its solution was to redistribute what little property remained in private hands.

In any event, the Court held that the law satisfied the Public

73 GEO. WASH. L. REV. 429, 484 (2005).

Inconsistency was inevitable [under *Penn Central*]. Regulations that cause massive economic harm to the owner are held not to go too far, whereas others with only a slight impact are found to constitute regulatory takings. As a result, the regulatory takings cases have fallen back to a three-factor, ad hoc test that tries to get at the idea of fairness to the owner. . . . It is inherently vague and subjective. As it turns out, the Court has usually not considered it unfair or unjust to force owners to bear fairly heavy burdens, at least if the owner is rich.

Id. (citations omitted).

¹⁸¹ 467 U.S. 229, 233–36 (1984).

¹⁸² *Id.* at 242. As the Ninth Circuit Court of Appeals noted when it struck down the Hawaii law as a violation of the Public Use Clause, “[t]he key in *Berman* is the intermediate step in which the property was transferred from the private owner to the government for a public purpose, *i.e.*, the redevelopment of the area. In the case before us there is no such intermediate step. . . . The lessee simply retains possession of residential property throughout the condemnation process until he receives fee simple title. . . . Nothing in *Berman* permits the lessee of property to take ownership of that property from the owner involuntarily through condemnation proceedings.” *Midkiff v. Tom*, 702 F.2d 788, 797 (9th Cir. 1983), *rev’d* 467 U.S. 229 (1984).

¹⁸³ *Midkiff*, 467 U.S. at 232.

¹⁸⁴ See Arthur Austin, *Antitrust Reaction to the Merger Wave: The Revolution vs. The Counterrevolution*, 66 N.C. L. REV. 931, 938–39 (1988), and GEORGE REISMAN, *CAPITALISM: A TREATISE ON ECONOMICS* 390–91 (1996), both noting that oligopoly is indefinable. See also Norman R. Prance, *Price Data Dissemination as a Per Se Violation of the Sherman Act*, 45 U. PITT. L. REV. 55, 56 (1983) (contending that oligopoly should be defined as a market with “no more than approximately six firms of equal size”).

¹⁸⁵ *Midkiff*, 467 U.S. at 232.

Use Clause despite transferring property exclusively to private users. Since “public use” and “public purpose” were synonymous, and since the legislature was responsible for declaring when a purpose was “public,” the legislature possessed unlimited authority to redistribute private property for whatever reason it considered important enough. Emphasizing that “deference to the legislature’s ‘public use’ determination is required ‘until it is shown to involve an impossibility,’”¹⁸⁶ Justice Sandra Day O’Connor gave lip service to the principle that government may not engage in purely private transfers, but concluded that “where the exercise of the eminent domain power is rationally related to a conceivable public purpose, the Court has never held a compensated taking to be proscribed by the Public Use Clause.”¹⁸⁷ As with *Berman*, *Midkiff* was unanimous.

In the meantime, the Michigan Supreme Court had issued its infamous decision in *Poletown Neighborhood Council v. Detroit*,¹⁸⁸ allowing Detroit to condemn an entire neighborhood and transfer the property to the General Motors Corporation to build an auto factory.¹⁸⁹ Astute observers realized that liberalizing the rules on eminent domain had put in place the ingredients for a ruthless competition between private interest groups, seeking to persuade Michigan authorities to condemn property for their own benefit.

B. How Deference Tore Down the “Good Fences”

Whenever government has power to redistribute benefits and burdens between constituents, interest groups will compete for control of that power in order to secure benefits for themselves or to impose burdens on their competitors. Modern economists refer to this contest as “rent seeking,” and predict that when government begins to transfer property between private parties, those parties will start spending their time and energy trying to persuade the government to give them someone else’s property.¹⁹⁰

¹⁸⁶ *Id.* at 240 (quoting *Old Dominion Co. v. United States*, 269 U.S. 55, 66 (1925)).

¹⁸⁷ *Id.* at 241.

¹⁸⁸ 304 N.W.2d 455 (Mich. 1981).

¹⁸⁹ See Timothy Sandefur, *A Gleeeful Obituary for Poletown Neighborhood Council v. Detroit*, 28 HARV. J.L. & PUB. POL’Y 651 (2005).

¹⁹⁰ See generally JAMES M. BUCHANAN & GORDON TULLOCK, *THE CALCULUS OF CONSENT* 287 (Ann Arbor Paperbacks 1965) (1962).

[T]he profitability of investment in [political organization] is a direct function of the size of the total public sector and an inverse function of the “generality” of the government budget. . . . The organized pressure group thus arises because differential advantages are expected to be secured through the political process.

Id.

The consequences of judicial abandonment of the public use requirement bear this prediction. Nationwide, during the years from 1998 to 2002, there were some 3700 reported instances of eminent domain used against private property owners for projects involving private beneficiaries.¹⁹¹ Another 6000 property owners were threatened with condemnation. Some of the examples of eminent domain abuse are truly astonishing. The City of Merriam, Kansas, condemned a lot being used by one car dealership to sell the land to the BMW dealership next door.¹⁹² The state of Mississippi condemned a twenty-three acre neighborhood to give to the Nissan company for an auto factory, even though the head of the state's Development Authority admitted to the *New York Times* that Nissan did not need the land.¹⁹³ Las Vegas, Nevada, condemned a mini-mall owned by the Pappas family to build a parking lot for the Fremont Street Experience, a pedestrian mall in the downtown area. While in many cases, topless bars and other "adult" establishments are considered examples of "blight" that must be cleaned up by the use of eminent domain, the Pappas family lost their property so that tourists could visit such attractions as the Topless Girls of Glitter Gulch!¹⁹⁴ In one especially notorious case, billionaire Donald Trump convinced the government of Atlantic City, New Jersey, to condemn the home of an elderly widow so that he could build a limousine parking lot.¹⁹⁵ When Atlanta, Georgia, was constructing an Olympic Village for the 1996 games, it condemned the homes and businesses of thousands of people—and even condemned three homeless shelters.¹⁹⁶ (When China did the same thing to attract the

¹⁹¹ See DANA BERLINER, PUBLIC POWER, PRIVATE GAIN 2 (2003).

¹⁹² Linda Cruse, *Merriam Sells Condemned Property to Baron BMW*, KANSAS CITY STAR (Mo.), Jan. 27, 1999, Shawnee & Lenexa, at 4.

¹⁹³ See Sandefur, *Natural Rights Perspective*, *supra* note 67, at 598.

¹⁹⁴ See *City of Las Vegas Downtown Redevelopment Agency v. Pappas*, 76 P.3d 1, 5–9 (Nev. 2003), *cert. denied*, 124 S. Ct. 1603 (2003); Richard Abowitz, *Gulch Doesn't Glitter and It's Not Gold*, LAS VEGAS WEEKLY, May 16, 2002, http://www.lasvegasweekly.com/2002/05_16/nightlife_skin.html; see also Brief Amici Curiae of Mary Bugryn Dudko et al. In Support of Petitioners at 18–22, *Kelo v. City of New London*, 125 S. Ct. 2655 (2005) (No. 04-108), available at http://www.cfif.org/htdocs/legal_issues/legal_activities/amicus_briefs/Kelo_Formatted_USSC_Draft.pdf.

¹⁹⁵ *Casino Reinvestment Dev. Auth. v. Banin*, 727 A.2d 102 (N.J. 1998). Though he won the government over, the Superior Court of New Jersey ruled in favor of the widow, but only because there was no guarantee that Trump would only use the land as a parking lot. See also Stephen J. Jones, Note, *Trumping Eminent Domain Law: An Argument for Strict Scrutiny Analysis under the Public Use Requirement of the Fifth Amendment*, 50 SYRACUSE L. REV. 285, 288 (2000).

¹⁹⁶ See Loretta Ross, *Atlanta Olympics: A Steamroller Flattening the Poor And the Homeless*, NEWS & RECORD (Greensboro, N.C.), July 19, 1996, at A8; Douglas Holt, *Common Ground: Advertisers Mob Atlanta's Olympic Park*, DALLAS MORNING NEWS, July 22, 1996 at 1A ("Some say [the Olympic park] has taken away a refuge for homeless people . . . Robin Monsky, an Atlanta Committee for the Olympic Games spokeswoman, denied that the park displaced any homeless shelters.").

Olympics to Beijing, it was widely condemned by international human rights groups.¹⁹⁷)

Erasing the public use limitation meant that pressure groups raced to local governments, seeking to have property condemned for their benefit—and why not? The developers would get rich; the tax revenue to the city would increase; the brand new “old town” would look so nice; the politicians would look like visionaries. The only losers would be the property owners who lacked the political influence to persuade the government to respect their property rights.

By lowering the barriers that protected property from the political contest, the courts had revived the Hobbesian state of nature, where there is “no propriety, no dominion, no *mine* and *thine* distinct; but only that to be every man’s, that he can get: and for so long, as he can keep it.”¹⁹⁸ And the results were disastrous, both from an economic and social perspective.

From an economic perspective, rent-seeking is economically inefficient because it encourages groups to invest their resources and energy into nonproductive activity such as lobbying, rather than into wealth-creating activity or innovation.¹⁹⁹ By distracting producers from meeting consumer needs, and drawing resources away from the productive sectors of the economy and into the wining-and-dining of legislators, rent-seeking results in a lower supply of goods and services and higher costs to the consumer. Also, rent-seeking has a ratchet effect. Since the benefits conferred by government will be localized and concentrated, while the costs are broadly dispersed, the incentives will be skewed toward increased lobbying and ever-increasing amounts of wealth redistribution.²⁰⁰ Rent-seeking behavior therefore tends to “restrict[] those political processes which can ordinarily be expected to bring about repeal of undesirable legislation,”²⁰¹ which was, at one time, considered a special concern of the judicial branch. Finally, rent-seeking behavior rewards those who are already most wealthy and powerful. A group’s wealth can

¹⁹⁷ See Press Release, Amnesty International, China: Human Rights—A Long Way to Go Before the Olympics (Aug. 5, 2005), available at [http://news.amnesty.org/index/ENGASA170232005/\\$FILE/newsrelease.pdf](http://news.amnesty.org/index/ENGASA170232005/$FILE/newsrelease.pdf); Human Rights Watch, Beijing 2008 Human Rights and the Olympics in China: Forced Evictions, <http://hrw.org/campaigns/china/beijing08/evictions.htm> (last visited Nov. 2, 2006). See also Frank Langfitt, *China Razes Alleys, Bulldozes Way of Life*, BALTIMORE SUN, Aug. 18, 2002, at 1A; Michael A. Lev, *Beijing’s Poor Pay Price for Urban Renewal*, CHICAGO TRIBUNE, January 13, 2002 at 4.

¹⁹⁸ HOBBS, *supra* note 12, at 101.

¹⁹⁹ See BUCHANAN & TULLOCK, *supra* note 190, at 111 (“[B]argaining opportunities afforded in the political process cause the individual to invest more resources in decision-making, and, in this way, cause the attainment of ‘solution’ to be much more costly.”).

²⁰⁰ See *id.* at 287–88 (noting the “spiral effect” of ever-greater lobbying efforts).

²⁰¹ *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4.

greatly affect its ability to influence legislation.²⁰² Small grass-roots organizations, or individuals, are less able to rally support behind a cause, and in the eminent domain context, winners are so enriched that they are increasingly likely to win the next time around. This problem is acute in eminent domain abuse.²⁰³

But more generally, the rash of eminent domain abuse has led to a severe weakening of social institutions.²⁰⁴ Robert Frost famously said “Good fences make good neighbors,”²⁰⁵ meaning that respect for each other’s privacy and individuality reinforces the sense of goodwill that makes for a healthy community. As Friedrich Hayek put it,

The understanding that “good fences make good neighbours,” that is, that men can use their own knowledge in the pursuit of their own ends without colliding with each other only if clear boundaries can be drawn between their respective domains of free action, is the basis on which all known civilization has grown. Property . . . is the only solution men have yet discovered to the problem of reconciling individual freedom with an absence of conflict. . . . There can be no law in the sense of universal rules of conduct which does not determine boundaries of the domains of freedom by laying down rules that enable each to ascertain where he is free to act.²⁰⁶

American culture has long cherished the spirit of neighborliness and mutual respect that depends entirely on “good fences”: that is, on mutual respect for property rights and, thereby, the individual liberties of one’s fellow citizens.²⁰⁷ But eminent do-

²⁰² See *McConnell v. Fed. Election Comm’n*, 540 U.S. 93, 115–16 (2003).

²⁰³ See Donald J. Kochan, “Public Use” and the Independent Judiciary: Condemnation in an Interest-Group Perspective, 3 TEX. REV. L. & POL. 49, 82 (1998)

Even though a particular condemnation may concentrate the cost of the taking on the affected landowner . . . that owner is not likely to invest enough to successfully oppose the condemnation. First, the existence of compensation, even when not truly substituting for market or subjective value, decreases the cost to the affected owner of the land seized and thereby decreases his incentive to invest in fighting the condemnation. Furthermore, the special interest is likely to have more political influence, because unlike the landowner, the interest group is probably a repeat player in the political process

Id.

²⁰⁴ This section is based in part on the amicus curiae brief I filed on behalf of the Bugryn and Dudko families and Mr. Curtis Blanc, in *Kelo v. City of New London*. See Brief Amici Curiae of Mary Bugryn Dudko, et al. In Support of Petitioners, *supra* note 194.

²⁰⁵ ROBERT FROST, *Mending Wall*, reprinted in ROBERT FROST: COLLECTED POEMS, PROSE, & PLAYS 39, 39 (Richard Poirier & Mark Richardson eds., Library of America 1995) (1916).

²⁰⁶ 1 F.A. HAYEK, LAW, LEGISLATION AND LIBERTY: RULES AND ORDER 107 (1973). See also RICHARD PIPES, PROPERTY AND FREEDOM 119 (1999) (“It is the sense of economic independence and that of personal worth which it generates that give rise to the idea of freedom.”).

²⁰⁷ See, e.g., Letter from Thomas Jefferson to John Adams (Oct. 28, 1813), in THE ADAMS–JEFFERSON LETTERS 387, 391 (Lester Cappon ed., 1959).

main abuse threatens this sense of domestic tranquility by putting the private property rights of some citizens at the mercy of others.

The *Poletown* case provides a stark example of this.²⁰⁸ The public debate over the project, which ultimately resulted in the condemnation and demolition of an entire neighborhood, turned what had been a peaceful, integrated community into a battleground between neighbors and officials. As Jeanie Wylie describes in her book about the case:

[P]eople whose lives were composed of their union loyalty, their tenure in the auto plants, their patriotism, and their willingness to fight in U.S. wars were rejected, ignored, and robbed by the very institutions through which they claimed their identities. . . . [T]hese same people broke free of the illusion of civility that these institutions carry as trappings. . . . [H]istorically law-abiding Poletown residents felt free to cry out and to disrupt [a General Motors stockholders] meeting. In exactly the same spirit, Poletown resisters learned to interrupt reporters' interviews, to raise placards at the mayor's inaugural dinner, and, ultimately to go to jail when the city's police force moved on the [town's] church.²⁰⁹

The residents of Poletown, like so many other victims of eminent domain abuse, came to see democratic government not as a system of mutual respect and participation toward a common good, but as a machine destroying their homes, their family heritage, and their community.

Alexis de Tocqueville argued that American democracy rested on democratic mores, and in particular on the spirit of restraint by which "no one in the United States has dared to profess the maxim that everything is allowed in the interests of society, an impious maxim apparently invented in an age of freedom in order to legitimize every future tyrant."²¹⁰ He believed that this spirit of restraint—that is, of mutual respect for each other's

Every one, by his property, or by his satisfactory situation, is interested in the support of law and order. And such men may safely and advantageously reserve to themselves a wholesome controul over their public affairs, and a degree of freedom, which in the hands of the [mob-rule] of the cities of Europe, would be instantly perverted to the demolition and destruction of every thing public and private.

Id.

²⁰⁸ *Poletown Neighborhood Council v. City of Detroit*, 304 N.W.2d 455 (Mich. 1981).

²⁰⁹ JEANIE WYLIE, *POLETOWN: COMMUNITY BETRAYED* 219–20 (1989). Wylie's book remains the standard history of the *Poletown* case, although it is in some ways (not relevant here) misleading. See generally William A. Fischel, *The Political Economy of Public Use in Poletown: How Federal Grants Encourage Excessive Use of Eminent Domain*, 2004 MICH. ST. L. REV. 929 (2004) (discussing the use of eminent domain in *Poletown* and federal grants' impact).

²¹⁰ ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 292 (J. P. Mayer ed., George Lawrence trans., Anchor Books 1969) (1840).

rights—was responsible for the fact that “while the law allows the American people to do everything,” there are things which their mores “forbid[] them to dare.”²¹¹ Eliminating the limits on eminent domain upends these *mores*, and puts the livelihood and the safety of a citizen’s home at the mercy of the political process. It has established the principle that “everything is allowed in the interests of society,” and turned the ballot box into a weapon.

This disillusionment is deeply harmful to a democratic society. As Professor Eric Claeys writes, the American Founders saw property not only as a vital protection for individual liberty, and an essential part of a prosperous economy, but also as a necessary foundation of healthy social participation.²¹²

[T]he Founders appreciated that self-government, the moral virtues, and social happiness cannot flourish unless . . . [t]he law and political opinion . . . teach and habituate citizens to see their fellow citizens not as rivals but as neighbors and potential friends. That spirit of concord and friendship cannot flourish without security and trust. Security and trust, however, cannot flourish unless people first feel secure that they can take care of their most basic needs of survival and, more generally, that none of their would-be friends will interfere with their own. . . . [A]s [James] Wilson emphasizes, without the establishment of private property, “the tranquility of society would be perpetually disturbed by fierce and ungovernable competitions for the possession and enjoyment of things, insufficient to satisfy all, and by no rules of adjustment distributed to each.” Trite as it may sound, good fences make good neighbors.²¹³

By lowering those fences, the Progressive movement—despite its frequent invocation of the value of democracy—ended up corroding those principles on which a stable and worthy democratic society must rest.

C. The Courts Reexamine Eminent Domain

In July 2004, the Michigan Supreme Court, urged on by a coalition of conservative and liberal public policy groups, overruled its twenty-year-old *Poletown* decision.²¹⁴ Allowing private property to be taken and transferred to private parties was a mistake, the court unanimously declared. “After all, if one’s ownership of private property is forever subject to the government’s determination that another private party would put one’s

²¹¹ *Id.*

²¹² See Eric R. Claeys, Property, Morality, and Society in Founding Era Legal Treatises 14–26 (Aug. 30, 2002) (unpublished manuscript, presented at the American Political Science Association Annual Meeting, on file with author).

²¹³ *Id.* at 32 (quoting 2 JAMES WILSON, *On Property*, in WORKS OF JAMES WILSON 711, 719 (Robert McCloskey ed., 1967)).

²¹⁴ *County of Wayne v. Hathcock*, 684 N.W.2d 765, 787 (Mich. 2004).

land to better use, then the ownership of real property is perpetually threatened by the expansion plans of any large discount retailer, 'megastore,' or the like."²¹⁵

The court recognized that the basic flaw in *Poletown* lay in its holding that "public use" and "public benefit" were synonymous terms. Since every business contributes to the public benefit, by creating jobs or in some other way, that holding meant that the power of eminent domain was effectively limitless. Although the court recognized that the railroad and Mill Act cases provided some precedent for allowing private parties to use the eminent domain power, those cases did not permit the widespread exploitation of eminent domain by wholly private entities for their own aggrandizement.²¹⁶

The demise of *Poletown* came only days after Susette Kelo had asked the United States Supreme Court to review the condemnation of her home in New London, Connecticut. When the Court agreed to hear the case, many defenders of property rights were hopeful that the Court would put some meaningful limit on the use of eminent domain at the federal level.

Kelo purchased a fixer-upper home on the Thames River in New London, Connecticut, in 1997. Divorced at the time, she began renovating the home. She and her partner (and later husband) Tim lived happily in the home until October of 2002, when Tim was in a car accident that left him severely handicapped. Susette, a nurse, took care of him, and took on extra jobs.²¹⁷ Meanwhile, in 1998, Pfizer pharmaceuticals decided to construct a multimillion dollar research facility nearby—a significant boost to the local economy. New London city officials hoped that the facility could serve as an anchor for further economic development. In 2000, the city asked the New London Development Corporation—a private company—to draw up the Fort Trumbull Municipal Development Plan, covering a ninety-acre economic redevelopment area. The Plan was divided into seven parcels, some of which would include a hotel and conference center, office space, fancy new housing, and a Coast Guard museum. The Plan was extremely vague on what would be done with several sub-parcels, however.²¹⁸

Among the affected property owners were Wilhelmina Dery

²¹⁵ *Id.* at 786.

²¹⁶ *Id.* at 782.

²¹⁷ *The Kelo Decision: Investigating Takings of Homes and Other Private Property: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 7 (2005) [hereinafter *Hearings*] (statement of Susette Kelo).

²¹⁸ Brief of Petitioners at 4, *Kelo v. City of New London*, 125 S.Ct. 2655 (2005) (No. 04-108).

and Susette Kelo. Wilhelmina Dery's family immigrated from Italy in the 1880s, and purchased a home in New London in 1901. Two years later they bought the house next door. Wilhelmina was born in the house in 1918, and she grew up there. During World War II, she met a young merchant marine, Charles, at a USO dance. When Charles returned from the war in the Pacific, they were married, and he moved into the house. They opened a grocery store and had four children. When their youngest son, Matthew, married, Wilhelmina's mother gave him the house next door as a wedding present. He took over the family business in 1976, and with his wife Sue and their son, enjoyed the tightly-knit Italian neighborhood. "Nobody locked their doors," he recalled. "You just walked in and yelled. You'd get fed wherever you went."²¹⁹

Susette Kelo had similarly pleasant memories of moving to Fort Trumbull.

I searched all over for a home and finally found this perfect little Victorian cottage with beautiful views of the water. I was working then as a paramedic and was overjoyed that I was able to find a beautiful little place I could afford on my salary. I spent [e]very spare moment fixing it up and creating the kind of home I had always dreamed of²²⁰

In the years that followed, she met Tim, a stone mason and fellow antique lover, and graduated from nursing school. Tim did the stone work on the house himself, and Susette braided rugs and planted a garden. In 2000, the day before Thanksgiving, the Kelos were notified that the city was going to take their home to construct a convention center as part of a massive plan for economic redevelopment. The Derys, too, and several other property owners received similar notices. Interestingly, the Italian Dramatic Club, a social organization located next door to one of the condemned houses, was also originally slated for demolition, but was told in 2000 that it could remain in the area. It may have had something to do with the fact that the Italian Dramatic Club is frequented by many prominent Connecticut politicians, including former Governor John Rowland.²²¹

The Kelos and the six other families sued, arguing that the condemnation of their property violated the "public use" requirement of both the Connecticut and United States Constitu-

²¹⁹ Barry Yeoman, *Whose House Is It Anyway?*, AARP MAGAZINE, May & June 2005, at 66, 66; see also TIMOTHY SANDEFUR, CORNERSTONE OF LIBERTY: PROPERTY RIGHTS IN 21ST-CENTURY AMERICA 98 (2006).

²²⁰ *Hearings*, *supra* note 217, at 6 (statement of Susette Kelo).

²²¹ Kathleen Edgecomb, *Decision to Save Italian Club Questioned*, THE DAY (New London), Sept. 21, 2000, at A1; SANDEFUR, *supra* note 219, at 98–99.

tions. After they lost in trial court, the Connecticut Supreme Court took up the case directly, and in a four to three decision, upheld the condemnation of the property. The majority indignantly rejected the notion that the Public Use Clause requires anything more than a general benefit to the public. The Connecticut Constitution “requires only that the ‘benefit’ of the taking be available to the general public,” the court held, and “the dramatic economic benefit that the development plan is expected to have for the public in the New London community, namely, the massive projected growths in employment and tax and other revenues” was enough to sustain the condemnation.²²² Moreover, the court endorsed the most extreme form of deference;²²³ it even found the *Poletown* decision was *too protective* of property owners, and “decline[d] to follow” it on the grounds that “the application of a ‘heightened scrutiny’ standard” to condemnations benefiting private parties “is inconsistent with our well established approach of deference to legislative determinations of public use.”²²⁴ It concluded:

[E]conomic development plans that the appropriate legislative authority rationally has determined will promote municipal economic development by creating new jobs, increasing tax and other revenues, and otherwise revitalizing distressed urban areas, constitute a valid public use for the exercise of the eminent domain power under either the state or federal constitution [sic].²²⁵

In a five to four decision, the United States Supreme Court affirmed the decision and refused to reconsider its deferential attitude toward eminent domain. Just as Justice Brennan had asserted in *Penn Central* that redistributing wealth was a legitimate state interest—while providing no support for that proposition—Justice Stevens asserted without support that “[p]romoting economic development is a traditional and long accepted function of government.”²²⁶ And, following *Berman*, the Court reasoned that anything that benefits the public (as determined by the legislature) satisfies the Public Use Clause.²²⁷ The decision confirms the virtually boundless power of state bureaucrats to redistribute private property for whatever reason they determine to be in the public interest.

The justifications Stevens provided for such boundless legis-

²²² *Kelo v. City of New London*, 843 A.2d 500, 552 (Conn. 2004).

²²³ *See id.* at 527–28 (“Both federal and state courts place an overwhelming emphasis on the legislative purpose and motive behind the taking, and give substantial deference to the legislative determination of purpose.”).

²²⁴ *Id.* at 528–29 n.39.

²²⁵ *Id.* at 531.

²²⁶ *Kelo v. City of New London*, 125 S. Ct. 2655, 2665 (2005).

²²⁷ *Id.* at 2662–63.

lative authority were tenuous. For instance, although he pointed to the Mill Act and railroad cases as proof that it would be “difficult to administer” any strict limit on the eminent domain power,²²⁸ those cases prove nothing of the sort. They generally required that any private entity exercising the power of eminent domain must be regulated by the state to ensure that they do not aggrandize to themselves the monopoly profits they gain through exploiting government power: such entities were limited in what they could charge, and were required to serve all customers without discrimination. Under such regulations, as Justice Thomas pointed out, the mills and railroads “were ‘public uses’ in the fullest sense of the word, because the public could legally use and benefit from them equally.”²²⁹ The judiciary did not find this a judicially unmanageable requirement. What’s more, some state courts struck down the Mill Acts for violating the public use requirement.²³⁰ When, a year before *Kelo*, the Michigan Supreme Court overruled its *Poletown* decision, it did not find it “difficult to administer” a more meaningful standard of public use.

More important to the outcome of *Kelo* was Stevens’ assertion that a lax benefit-to-the-public standard serves “the diverse and always evolving needs of society.”²³¹ This approach to constitutional interpretation is generally called “living constitutionalism,”²³² but *Kelo* reveals that this approach is more appropriately called “dead constitutionalism.” Seeing the Constitution as malleable, depending on the circumstances and needs of the moment, results not in a *living* Constitution, but in a Constitution with all sorts of *dead* spots in it. The violence that the Progressives and their progeny have done to the Constitution comes at a price, after all. For example, by allowing the Commerce Clause to mutate into a federal police power giving Congress authority over anything it sees fit to regulate,²³³ the Court has transformed the federal government into a government of unenumerated and practically limitless powers.²³⁴ This requires ignoring several explicit passages in the Constitution, such as the statement that

²²⁸ *Id.* at 2662.

²²⁹ *Id.* at 2681–83 (Thomas, J., dissenting).

²³⁰ *See id.* at 2682 n.2 (listing state cases striking down the Mill Acts). *See also* Sandefur, *Natural Rights Perspective*, *supra* note 67 at 599–601 (discussing cases that struck down the Mill Acts).

²³¹ *Kelo*, 125 S. Ct. at 2662.

²³² *See, e.g.,* WHITE, *supra* note 112, at 299 (defining “living constitutionalism” as the theory that the Constitution is “an adaptive document that responds to changing social and economic conditions through altered judicial interpretations of its central textual provisions”).

²³³ *See* *Gonzales v. Raich*, 125 S. Ct. 2195, 2205–06 (2005).

²³⁴ *Cf. United States v. Lopez*, 514 U.S. 549, 552 (1995) (“We start with first principles. The Constitution creates a Federal Government of enumerated powers.”).

Congress has only those “legislative Powers herein granted.”²³⁵ Note the plural of “powers,” and the phrase “herein granted.” Today’s Court simply ignores these words to make way for the regulatory welfare state. Likewise, to avoid striking down various government programs that are “traditional and long accepted,” the Court simply rendered the phrase “public use” meaningless. The Progressive Constitution is a Constitution whose clauses are manipulated, bent, stretched, or ignored outright so as to allow the welfare state to accomplish its aims. To call this “living constitutionalism” is perverse, because it is neither living, nor constitutionalism.

Compounding the perversity is the fact that the so-called “liberal” members of the Supreme Court—Justices Stevens, Souter, Ginsberg, and Breyer—all joined in a decision which opens the door to massive “corporate welfare” programs at the expense of the poor and members of minority groups. This might seem paradoxical at first, but the key is that property rights are more important for the poor and powerless than for the rich and influential. Wealthy corporations, after all, have the resources to persuade political bodies to do their will, and this is why one rarely (if ever) sees the homes of wealthy and influential people being bulldozed to build shopping centers. But people like Susette Kelo and Wilhelmina Dery can only rely on the Constitution, and the federal courts, to protect their rights. As James Ely has concluded, *Kelo* “puts the lie to [the] canard” that “judicial solicitude for economic rights [is] favoritism to the wealthy and business interests.”²³⁶

In the end, the *Kelo* decision was really not surprising. Stevens was certainly right that “[f]or more than a century, our public use jurisprudence has . . . afford[ed] legislatures broad latitude in determining what public needs justify the use of the takings power.”²³⁷ The Progressive Era decisions which created that “latitude” were based on a rejection of the founding principles of private property and limited government, and Stevens was simply following their direction.

V. REASON FOR HOPE AFTER *KELO*?

It is not that remarkable that the *Kelo* decision would follow *Berman*. What is remarkable is that four Justices dissented, in two strong opinions. These dissents represent the first time in

²³⁵ U.S. CONST. art I, § 1.

²³⁶ James W. Ely Jr., “*Poor Relation*” *Once More: The Supreme Court and the Vanishing Rights of Property Owners*, 2004–2005 CATO SUP. CT. REV. 39, 64 (2005).

²³⁷ *Kelo v. City of New London*, 125 S. Ct. 2655, 2664 (2005).

over a century that any Justice of the Supreme Court has ever held that the Public Use Clause puts any serious limitations on the power of eminent domain. Moreover, these dissenters appear to be the first federal judges ever to openly criticize *Berman*.

Justice O'Connor—the author of *Midkiff*—dissented on the ground that the majority's rule rendered the phrase “public use” meaningless, contradicting a basic rule of interpretation.²³⁸ Since the Due Process Clause requires the government to act in the public's welfare, the majority decision “makes the Public Use Clause redundant with the Due Process Clause, which already prohibits irrational government action.”²³⁹ Moreover, equating public use with public benefit would also reduce the Clause to “little more than hortatory fluff,”²⁴⁰ since the legislature will always declare that its decisions benefit the public.

O'Connor identified three types of condemnations that satisfied the Public Use Clause: (1) takings for government buildings or other actual public uses, (2) transfers to common carriers and public utilities that might be run by private parties, and, most problematically, (3) takings which “serve a public purpose . . . even if the property is destined for subsequent private use.”²⁴¹ O'Connor cited *Berman* and *Midkiff* as examples of the third type, because in those cases, “the extraordinary, precondemnation use of the targeted property inflicted affirmative harm on society”²⁴² Eliminating that harm required taking the property. Since the taking *itself*, as distinguished from the subsequent use of the property, accomplished the legislature's goals, the Public Use Clause was satisfied, and “it did not matter that the property was turned over to private use.”²⁴³

Justice O'Connor's attempt to reconcile *Berman* and her *Midkiff* opinion with her dissent in *Kelo* is deeply unsatisfying, and does not survive Justice Stevens' criticism. As Stevens pointed out, there was nothing affirmatively “harmful” about the property at issue in *Berman*, which was a non-blighted department store.²⁴⁴ Nor has the law of eminent domain ever limited condemnations to instances of “harmful property use.”²⁴⁵ On the contrary, harmful property use has always been the subject of *nuisance* law, and, in the traditional understanding of government's powers, subject to the *police power*, not the power of emi-

²³⁸ *Id.* at 2673 (O'Connor, J., dissenting).

²³⁹ *Id.* at 2676.

²⁴⁰ *Id.* at 2673.

²⁴¹ *Id.*

²⁴² *Id.* at 2674.

²⁴³ *Id.*

²⁴⁴ *Id.* at 2666 n.16 (majority opinion).

²⁴⁵ *Id.*

ment domain.²⁴⁶ But then O'Connor reaches the essential problem with *Kelo* and its ancestry:

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. . . .

....

. . . [W]ho among us can say she already makes the most productive or attractive possible use of her 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.²⁴⁷

Strong as Justice O'Connor's dissent was, it was only Justice Thomas who saw into the philosophical heart of the *Kelo* case. *Midkiff* and *Berman* were both wrongly decided to begin with, he stated, part of "a string of . . . cases construing the Public Use Clause to be a virtual nullity, without the slightest nod to its original meaning."²⁴⁸ Employing a scrupulous textual analysis, Justice Thomas pointed out that "the phrase 'public use' contrasts with the very different phrase 'general Welfare' used elsewhere in the Constitution. . . . The Framers would have used some such broader term if they had meant the Public Use Clause to have a similarly sweeping scope."²⁴⁹ Referring to sources from Blackstone to Kent to Samuel Johnson, Thomas concluded that the Public Use Clause "embodied the Framers' understanding that property is a natural, fundamental right, prohibiting the government from 'tak[ing] *property* from A. and giv[ing] it to B.'"²⁵⁰

As for deference, Thomas was uniquely sensitive to the suspicious nature of this argument. In 1994, Thomas joined with Justice Scalia in rejecting the "picking and choosing among various rights to be accorded 'substantive due process' protection."²⁵¹

²⁴⁶ Alas, another philosophical conundrum arising from the Supreme Court's Fifth Amendment cases is to confuse the police power (the government's power to defend the health, safety, and welfare of the people) with the power of eminent domain (used to provide public goods). This error began in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922), and was reiterated in Justice O'Connor's *Midkiff* decision, 467 U.S. 229, 240 (1984) ("The 'public use' requirement is thus coterminous with the scope of a sovereign's police powers."). Under the police power as properly understood, government may eradicate "harmful property use"—i.e., nuisances—without paying any compensation at all. In *Kelo*, Justice O'Connor admitted this error and characterized one of the most important lines in *Midkiff* as dictum! *Kelo*, 125 S. Ct. at 2675 (O'Connor, J., dissenting).

²⁴⁷ *Kelo*, 125 S. Ct. at 2675–76 (O'Connor, J., dissenting).

²⁴⁸ *Id.* at 2678 (Thomas, J., dissenting).

²⁴⁹ *Id.* at 2679–80 (citation omitted).

²⁵⁰ *Id.* (quoting *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 388 (1798)).

²⁵¹ *United States v. Carlton*, 512 U.S. 26, 41 (1994) (Scalia, J., concurring in judg-

The “categorical and inexplicable exclusion of so-called ‘economic rights’” from such protection despite the Fifth Amendment’s explicit reference to property “unquestionably involves policymaking rather than neutral legal analysis.”²⁵² Likewise, in *Kelo*, Thomas compared the deference that the majority applied to the condemnation of property with the lack of deference in other areas of the law:

[I]t 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. We would not defer to a legislature’s determination of the various circumstances that establish, for example, when a search of a home would be reasonable, or when a convicted double-murderer may be shackled during a sentencing proceeding without on-the-record findings, or when state law creates a property interest protected by the Due Process Clause.

Still worse, it is backwards to adopt a searching standard of constitutional review for nontraditional property interests, such as welfare benefits, while deferring to the legislature’s determination as to what constitutes a public use when it exercises the power of eminent domain, and thereby invades individuals’ traditional rights in real property.²⁵³

Finally, like O’Connor, Thomas recognized that the rent-seeking problem will cause the *Kelo* decision to lay a disproportionate burden on the poor and those with less political power. “[E]xtending 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.”²⁵⁴

The dissents give reason for hope. They present solid and persuasive arguments, which will influence future legal thinkers. More importantly, they reveal a willingness to reconsider some of the most pernicious aspects of the last seventy years of Supreme Court jurisprudence. *Berman* and *Midkiff* were unanimous and their holdings crystal clear. The same cannot be said of even of such atrocities as *Dred Scott*, *Korematsu*, *Plessy*, or *Nebbia*. Yet it is hard to imagine, fifty years after the holdings in any of those cases, four justices writing such powerful dissents challenging their basic holdings. In fact, there are very few instances of Justices so directly challenging the philosophical trend of the Court’s

ment).

²⁵² *Id.* at 41–42.

²⁵³ *Kelo*, 125 S. Ct. at 2684–85 (Thomas, J., dissenting) (citations omitted).

²⁵⁴ *Id.* at 2686–87.

decisions.

Kelo stands at one end of a long debate between two fundamentally differing views of the American Constitution. One, which I have called the Lockean view, sees government as a tool for protecting the rights of individuals against the wrongs of others, and sees the overriding goal of constitutionalism as preventing government from being perverted into a tool for violating those rights. The other view, following Blackstone and Hobbes, sees the government as primary and individuals as secondary, and believes that rights are created by the society for certain prudential reasons, and when society's "diverse and always evolving needs" require that the citizen relinquish those rights, the courts should not stand in the way. American legal history has been profoundly shaped by these two different outlooks, from Chase and Iredell's dispute in *Calder* to the decisions in *Kelo*, each of which quotes the corresponding *Calder* opinion that supports it.

It is hoped that the legal community will take the dissents in *Kelo* seriously. As Justice Thomas so aptly puts it, "[s]omething has gone seriously awry with this Court's interpretation of the Constitution."²⁵⁵ Setting it right will require a careful consideration of fundamental principles. Those principles were severely damaged by a philosophical movement that abandoned notions of individual liberty and private property. The consequences of that movement, in eminent domain as well as other areas of the law, have been disastrous. But so much of our world has been built on those errors that fixing the problem will require courage, strength, and a great deal of patience.

CONCLUSION

Kelo v. New London hardly came out of the blue. It was a logical next step, given the gradual erosion of the Founders' vision as enunciated in the Declaration of Independence and the Constitution. Those who were shocked by the outcome of that decision, and by the abuse of eminent domain across the nation, must understand the philosophical background of the fight they are waging. Only by challenging the assumptions of the modern Progressive state can they hope to prevail, and to restore respect for the fundamental right of private property.

²⁵⁵ *Id.* at 2685.