PUBLIC OUTCRY: *KELO V. CITY OF NEW LONDON*—A PROPOSED SOLUTION

BY

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This Article begins by considering the extensive—and largely negative—public reaction that resulted from the 2005 United States Supreme Court decision in Kelo v. City of New London, *a case concerning eminent domain law when private property is taken for public use in an economic redevelopment plan. After reciting the underlying facts of the case and discussing both the majority opinion and dissenting opinions, the Article reviews further public, media, and legislative reactions to the decision. Next, the authors consider the Supreme Court's previously announced standards for applying judicial review to state actions under the Equal Protection Clause. The Article concludes with a proposal in favor of using the intermediate standard of review for future eminent domain cases predicated on economic redevelopment plans.*

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Trust, but verify.[1]

I. INTRODUCTION

On June 23, 2005, the United States Supreme Court delivered an opinion concerning eminent domain in the usually mundane and tranquil area of real property law.[2] The public reaction to this decision was anything but mundane and tranquil.[3] Instead, the reaction was more like an explosion of outrage. Why was the public reaction to the *Kelo v. City of New London* decision so extreme, was it legally justifiable, and could the Supreme Court have fashioned its opinion in such a manner that the public outcry would have been avoided or at least muted? These are the primary questions the following discussion addresses and, hopefully, resolves. However, to begin, this Article briefly presents and explains the facts of the case and the holding of the Supreme Court.

II. THE FACTS

In the latter decades of the twentieth century, the city of New London, Connecticut experienced so much "economic decline" that one of that state's agencies designated it as a "distressed municipality" in 1990.[4] A few years later, in 1996, federal authorities closed the Naval Undersea Warfare Center, which had been located in the Fort Trumbull area of town, a move costing New London over 1500 jobs.[5] By 1998, New London had an unemployment rate nearly twice as high as the rest of Connecticut and the city's population had ebbed to a level last seen in 1920.[6]

Understandably, state and local authorities began seeking ways to stimulate the local economy, especially in the old Fort Trumbull area, and in due course, utilized the New London Development Corporation (NLDC) to do so.[7] In 1998, state officials approved issuance of bonds to begin funding NLDC projects and the

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[1] President Ronald Reagan, Farewell Address to the Nation (Jan. 11, 1989), http://www.reagan.utexas.edu/archives/speeches/1989/011189i.htm (last visited Apr. 19, 2009) [hereinafter Reagan Farewell Address] (describing his vision for the United States relationship with the Soviet Union, as, "It's still trust but verify."); *see also 1987: Superpowers To Reverse Arms Race*, BBC NEWS, Dec. 8, 1987, http://news.bbc.co.uk/onthisday/hi/dates/stories/december/8/newsid_3283000/3283817.stm (last visited Apr. 18, 2009) (meeting with Prime Minister Gorbachev to discuss a nuclear arms treaty, Reagan "quoted one of his favorite Russian proverbs to Mr. Gorbachev—'Dovyerai no provyerai'—meaning 'You should trust but you should verify.'" Mr. Gorbachev replied with a smile: 'You say that every time we meet!'"); *Excerpts From the Reagan Interview With 4 Correspondents*, N.Y. TIMES, Dec. 4, 1987, http://query.nytimes.com/gst/fullpage.html?res=9B0DE6DF1439F937A35751C1A961948260&sec=&spon=&partner=permalink&exprod=permalink (last visited Apr. 19, 2009) (responding to a question about whether he had made too many compromises with Gorbachev, Reagan stated, "I think I could sum up my position on this with the recitation of a brief Russian proverb 'Doveryai no Proveryai.' It means trust but verify.").

[2] Kelo v. City of New London, 545 U.S. 469 (2005).

[3] *See infra* notes 44–59 and accompanying text.

[4] 545 U.S. at 473.

[5] *Id.*

[6] *Id.*

[7] *Id.*

Pfizer Company announced a plan to spend $300 million building a facility adjacent to the Fort Trumbull site.[8]

Consequently, the NLDC continued planning, held neighborhood meetings, and received intermediate approvals from city and state authorities.[9] The development plan subsequently produced contained seven parcels in the Fort Trumbull area dedicated to the following proposed uses: a waterfront conference hotel, restaurants, shopping, marinas, a river walk, new residences, a United States Coast Guard museum, research and development office space, parking, office and retail space, and "water dependant commercial uses."[10]

In January 2000, the city approved the development plan, made the NLDC "its development agent in charge of implementation," and gave the NLDC the power to both purchase land and use the power of eminent domain to acquire property "in the City's name" if necessary.[11] Thereafter, the NLDC purchased most of the land in the development area by negotiation, but resorted to eminent domain after unsuccessful negotiations with nine property owners who were then subject to a condemnation suit filed in November 2000.[12] Taken together, the nine owners held fifteen separate properties in the development area (some for residential use and others for investment), but there was "no allegation that any of these properties [was] blighted or otherwise in poor condition; rather, they were condemned only because they happen[ed] to be located in the development area."[13] In fact, one owner was born in the house where she had lived for nearly ninety years, and her husband had resided there with her over the course of their sixty-year marriage.[14] The next month, in December 2000, the property owners in question asked the New London Supreme Court to prohibit the NLDC from taking their land arguing that this action "would violate the 'public use' restriction of the Fifth Amendment," and received an order from the trial court prohibiting some of the takings, but permitting others.[15]

Predictably, both sides appealed to the Supreme Court of Connecticut. In a divided opinion, the court held that "all of the City's proposed takings were valid," noting that under a Connecticut statute, "taking of land, even developed land, as part of an economic development project is a 'public use' and in the 'public interest'" and finally holding "that such economic development qualified as a valid public use under both the Federal and State Constitutions."[16]

An appeal to the U.S. Supreme Court followed, and, in what may well prove to be a very important passage, the U.S. Supreme Court elected to comment on the viewpoint of the minority in the Connecticut Supreme Court by stating,

> The three dissenting justices would have imposed a "heightened" standard of judicial review for takings justified by economic development. Although they agreed

8 *Id.*
9 *Id.*
10 *Id.* at 474.
11 *Id.* at 475 (citing CONN. GEN. STAT. §§ 8-188, -193 (2005)).
12 *Id.*
13 *Id.*
14 *Id.* at 475–76.
15 *Id.*
16 *Id.*

> that the plan was intended to serve a valid public use, they would have found all the takings unconstitutional because the City had failed to adduce "clear and convincing evidence" that the economic benefits of the plan would in fact come to pass.[17]

Then, to clearly focus on the issue before the Court, the majority opinion stated, "[w]e granted certiorari to determine whether a city's decision to take property for the purpose of economic development satisfies the 'public use' requirement of the Fifth Amendment."[18]

III. THE MAJORITY OPINION

The majority opinion of the Supreme Court was written by Justice Stevens and joined by Justice Kennedy, who also wrote a concurring opinion.[19] Four members of the Court dissented, including Justice O'Connor (who authored a dissenting opinion), Chief Justice Rehnquist, and Justices Scalia and Thomas.[20] The Court's majority began by reciting well settled, black letter law that the government is not allowed to take land from one private owner "for the sole purpose of transferring it to another private party . . . even though [the first owner] is paid just compensation."[21] Next, in what is likely the most important key to the majority's thinking, the Court wrote:

> Nor would the City be allowed to take property under the mere pretext of a public purpose, when its actual purpose was to bestow a private benefit. The takings before us, however, would be executed pursuant to a "carefully considered" development plan. The trial judge and all the members of the Supreme Court of Connecticut agreed that there was no evidence of an illegitimate purpose in this case.[22]

This comment by the Court is critical because it offers insight into the level of review, or scrutiny, the Court actually gave to the local government's use of eminent domain. While the Court stated that the issue was whether the local government's action satisfied the "public use" requirement of the Constitution, the more interesting, *sub rosa* question is *how* the Court decided this issue. This includes the standard of review through which the Court analyzed the city's action, whether or not the Court expressly identified the level of review exercised.

Once the Supreme Court expressed the view that the city was not engaged in some sort of a sham, it more clearly explained the rationale it used for evaluating the city's actions, even though the Court did not actually label the review process itself, by stating:

> Those who govern the City were not confronted with the need to remove blight in the Fort Trumbull area, but their determination that the area was sufficiently distressed to justify a program of economic rejuvenation is entitled to our deference. The City has

17 *Id.* at 477.
18 *Id.*
19 *Id.* at 472, 490.
20 *Id.* at 470.
21 *Id.* at 477.
22 *Id.* at 478 (citation omitted).

> carefully formulated an economic development plan that it believes will provide appreciable benefits to the community, including—but by no means limited to—new jobs and increased tax revenue. As with other exercises in urban planning and development, the City is endeavoring to coordinate a variety of commercial, residential, and recreational uses of land, with the hope that they will form a whole greater than the sum of its parts. To effectuate this plan, the City has invoked a state statute that specifically authorizes the use of eminent domain to promote economic development. *Given the comprehensive character of the plan, the thorough deliberation that preceded its adoption, and the limited scope of our review*, it is appropriate for us, as it was in *Berman*, to resolve the challenges of the individual owners, not on a piecemeal basis, but rather in light of the entire plan. Because that plan unquestionably serves a public purpose, the takings challenged here satisfy the public use requirement of the Fifth Amendment.[23]

Next, the majority opinion specifically rejected the suggestion that the Court adopt a "bright-line rule," which would hold that "economic development does not qualify as a public use," and discussed several of the Court's precedents in which it approved the use of eminent domain to transfer property from one private owner to another.[24] These cases included facilitating "agriculture and mining" interests, changing "a blighted area into a 'well-balanced' community through redevelopment," "breaking up a land oligopoly," and "eliminating a 'significant barrier to entry in the pesticide market.'"[25] Once the majority was satisfied that ample precedent existed for the proposition that, under certain circumstances, the "public use" requirement could still be met even when a city transferred property from one private party to another pursuant to condemnation, the opinion returned to further illuminate the analytical process underlying the majority's policy choice.

To do this, two arguments made by the property owners were set up, and then knocked down. First, the Court wrote:

> It is further argued that without a bright-line rule nothing would stop a city from transferring citizen *A*'s property to citizen *B* for the sole reason that citizen *B* will put the property to a more productive use and thus pay more taxes. *Such a one-to-one transfer of property, executed outside the confines of an integrated development plan, is not presented in this case.* While such an unusual exercise of government power would certainly raise a suspicion that a private purpose was afoot, the hypothetical cases posited by petitioners can be confronted if and when they arise. They do not warrant the crafting of an artificial restriction on the concept of public use.[26]

Next, the Court stated:

> Alternatively, petitioners maintain that for takings of this kind we should require a "reasonable certainty" that the expected public benefits will actually accrue. Such a rule, however, would represent an even greater departure from our precedent. "When the legislature's purpose is legitimate and *its means are not irrational, our cases make clear that empirical debates over the wisdom of takings—no less than debates over the*

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23 *Id.* at 483–84 (footnote omitted) (emphasis added).

24 *Id.* at 484–85.

25 *Id.*

26 *Id.* at 486–87 (footnotes omitted) (emphasis added).

> *wisdom of other kinds of socioeconomic legislation—are not to be carried out in the federal courts.*" . . . *The disadvantages of a heightened form of review are especially pronounced in this type of case.* Orderly implementation of a comprehensive redevelopment plan obviously requires that the legal rights of all interested parties be established before new construction can be commenced. A constitutional rule that required postponement of the judicial approval of every condemnation until the likelihood of success of the plan had been assured would unquestionably impose a significant impediment to the successful consummation of many such plans.[27]

Notice that the Court declined to undertake a "heightened form of review" in this part of the majority opinion, but clearly what they meant was that they did not want to require "judicial approval" of the "likelihood of success of the plan." This is quite sensible, since courts would understandably be reluctant to shoulder responsibility for the successful outcome, financial or otherwise, of local government redevelopment plans. It is also clear, however, that this comment does not mean that the Court was unwilling to engage in a more detailed review of the *process* by which the local government derived its development plan, which the Court certainly did, at least implicitly, when it previously decided that New London's plan was not a sham.

The majority then concluded its opinion by reminding the states that they were free to place further restrictions on the use of eminent domain within their respective jurisdictions, if they so choose, and by revisiting the original issue the majority said it would focus on, by stating:

> This Court's authority, however, extends only to determining whether the City's proposed condemnations are for a "public use" within the meaning of the Fifth Amendment to the Federal Constitution. Because over a century of our case law interpreting that provision dictates an affirmative answer to that question, we may not grant petitioners the relief that they seek.[28]

What the majority opinion did not say, however, was what specific standards and process the Court should use when reviewing a local government's decision-making matrix for producing and implementing an economic redevelopment plan. As previously indicated,[29] the majority did give some insight regarding how it accomplished this task, but it stopped short of addressing this part of its decision-making technique directly. The following pages will address this precise point in greater detail, and we will argue that the Supreme Court could substantially improve the jurisprudence of eminent domain law by clearly enunciating the requirements a local government must meet to design, adopt, and implement an economic redevelopment plan that meets constitutional standards for taking private property using eminent domain.

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27 *Id.* at 487–88 (quoting Haw. Hous. Auth. v. Midkiff, 467 U.S. 229, 242–43 (1984)) (emphasis added).

28 *Id.* at 489–90.

29 *Id.* at 489 n.21.

IV. DISSENTING OPINIONS

Justice O'Connor wrote the primary dissenting opinion in *Kelo*, joined by Chief Justice Rehnquist, Justice Scalia, and Justice Thomas.[30] Justice Thomas also added his own separate dissenting opinion.[31] In the primary dissent, wasting no time, Justice O'Connor succinctly stated her viewpoint from the outset, arguing:

> Today the Court abandons this long-held, basic limitation on government power. Under the banner of economic development, all private property is now vulnerable to being taken and transferred to another private owner, so long as it might be upgraded—*i.e.*, given to an owner who will use it in a way that the legislature deems more beneficial to the public—in the process. *To reason, as the Court does, that the incidental public benefits resulting from the subsequent ordinary use of private property render economic development takings "for public use" is to wash out any distinction between private and public use of property—and thereby effectively to delete the words "for public use" from the Takings Clause of the Fifth Amendment.* Accordingly I respectfully dissent.[32]

From there, the dissent restated the facts based on the record in the case and recited several authorities for the general proposition that private property rights are afforded significant protection in the Constitution and in the historic understanding of American law as well.[33] Next, Justice O'Connor "identified three categories of takings that comply with the public use requirement," describing them as follows: 1) takings of private property for public ownership, such as a road, 2) takings of private property for other private owners who "make the property available for the public's use," such as a common carrier like a railroad, and 3) takings of private property for other private owners "even if the property is destined for a subsequent private use" where there are "certain circumstances and to meet certain exigencies."[34]

It is in this third area that the most difficult exercises of judicial line drawing arise. Rhetorically, Justice O'Connor asked: "are economic development takings constitutional?"[35] And candidly, she answered, "I would hold that they are not."[36] To support this contention she necessarily then confronted the Court's precedents allowing the use of eminent domain to cure urban blight and to redistribute private land ownership in Washington, D.C. and Hawaii.[37] In order to sustain her viewpoint, it was incumbent on her to distinguish the case at hand from the prior court decisions involving blight and land redistribution. In attempting to make this point she argued that

> [t]he Court's holdings in *Berman* and *Midkiff* were true to the principle underlying the Public Use Clause. In both those cases, the extraordinary, precondemnation use of the targeted property inflicted affirmative harm on society—in *Berman* through blight

30 *Id.* at 494 (O'Connor, J., dissenting).
31 *Id.* at 505 (Thomas, J., dissenting).
32 *Id.* at 494 (O'Connor, J., dissenting) (emphasis added).
33 *Id.* at 494–96.
34 *Id.* at 497–98.
35 *Id.* at 498.
36 *Id.*
37 *Id.* at 498–501.

> resulting from extreme poverty and in *Midkiff* through oligopoly resulting from extreme wealth. And in both cases, the relevant legislative body had found that eliminating the existing property use was necessary to remedy the harm. Thus a public purpose was realized when the harmful use was eliminated. Because each taking *directly* achieved a public benefit, it did not matter that the property was turned over to private use. Here, in contrast, New London does not claim that Susette Kelo's and Wilhelmina Dery's well-maintained homes are the source of any social harm. Indeed, it could not so claim without adopting the absurd argument that any single-family home that might be razed to make way for an apartment building, or any church that might be replaced with a retail store, or any small business that might be more lucrative if it were instead part of a national franchise, is inherently harmful to society and thus within the government's power to condemn.[38]

In making this argument, however, Justice O'Connor seems to ignore one of the key points made in the majority opinion about the blight case. There, the majority commented on the dilemma of the owner of a nonblighted store unfortunately located in the blighted area slated for condemnation.[39] The majority wrote:

> The owner of a department store located in the area challenged the condemnation, pointing out that his store was not itself blighted and arguing that the creation of a "better balanced, more attractive community" was not a valid public use. Writing for a unanimous Court, Justice Douglas refused to evaluate this claim in isolation, deferring instead to the legislative and agency judgment that the area "must be planned as a whole" for the plan to be successful. The Court explained that "community redevelopment programs need not, by force of the Constitution, be on a piecemeal basis—lot by lot, building by building." The public use underlying the taking was unequivocally affirmed.[40]

Undoubtedly, most observers of this case and, as we will show later, the American public at large are sympathetic to the plight of some of the homeowners in the Fort Trumbull area of New London. Nevertheless, the Supreme Court's precedents demonstrate that the focus of the Court's attention is not on individual property owners within an area slated for blight removal or economic redevelopment; instead, its attention is on the whole area under condemnation. This is why jurisprudence in this area can be improved by greater judicial analysis of *how* a local government goes about formulating a blight removal or economic redevelopment plan.

Justice O'Connor approaches this point by criticizing the "two limitations" she suggests the majority placed on local governments by its decision. She argues that the majority

> suggests two limitations on what can be taken after today's decision. First, it maintains a role for courts in ferreting out takings whose sole purpose is to bestow a benefit on the private transferee—without detailing how courts are to conduct that complicated inquiry. For his part, JUSTICE KENNEDY suggests that courts may divine illicit purpose by a careful review of the record and the process by which a legislature arrived at the

38 *Id.* at 500–01 (citation omitted).

39 *See id.* at 481.

40 *Id.* (citations omitted).

> decision to take—without specifying what courts should look for in a case with different facts, how they will know if they have found it, and what to do if they do not. Whatever the details of JUSTICE KENNEDY'S as-yet-undisclosed test, it is difficult to envision anyone but the "stupid staff[er]" failing it. . . .
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> A second proposed limitation is implicit in the Court's opinion. The logic of today's decision is that eminent domain may only be used to upgrade—not downgrade—property. At best this makes the Public Use Clause redundant with the Due Process Clause, which already prohibits irrational government action. The Court rightfully admits, however, that the judiciary cannot get bogged down in predictive judgments about whether the public will actually be better off after a property transfer. In any event, this constraint has no realistic import. For who 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.[41]

In making these points, we are inclined to agree with Justice O'Connor that the first limitation on local government power she ascribes to the majority was not artfully crafted. The majority did not clearly say how the local government's activities in formulating an economic redevelopment plan should be reviewed. However, instead of foregoing this entire effort, as Justice O'Connor advocates, we contend that this is where the majority's decision can be improved. A better, more articulate judicial standard for reviewing a local government's adoption of an economic redevelopment plan can be, and should be, adopted. In doing so, the issue is not "[h]ow much the government does or does not desire to benefit a private party,"[42] as Justice O'Connor suggests. Instead, the issue should be: Did the local government make a bona fide effort to benefit the public in adopting its economic redevelopment plan?

Finally, Justice O'Connor concludes her dissent with the following powerful argument:

> Any property may now be taken for the benefit of another private party, but the fallout from this decision will not be random. The beneficiaries are likely to be those citizens with disproportionate influence and power in the political process, including large corporations and development firms. As for the victims, the government now has license to transfer property from those with fewer resources to those with more. The Founders cannot have intended this perverse result. "[T]hat alone is a *just* government," wrote James Madison, "which *impartially* secures to every man, whatever is his *own*."[43]

To this we would reply, not necessarily. If an economic redevelopment plan is proposed, debated, and adopted with the public interest uppermost as the motive of the local government, then the more powerful and less powerful alike may benefit

41 *Id.* at 502–03 (O'Connor, J., dissenting) (alteration in original) (citations omitted).

42 *Id.* at 502.

43 *Id.* at 505 (alteration in original) (citation omitted).

from its adoption. However, before discussing how the "less powerful" could be protected in cases like *Kelo*, we first turn to a review of the explosive public reaction ignited by the *Kelo* decision.

V. THE PUBLIC AND MEDIA REACTION TO *KELO*

Within hours after the United States Supreme Court issued its slip opinion, the media were reporting the *Kelo* decision. CNNMoney.com recounted, "A public outcry immediately arose."[44] Against the backdrop of a pending presidential appointment to the Court, then House Majority Leader Tom DeLay held a press conference in which he said the high court had made "a horrible decision," and he hoped it would cause a backlash.[45] He continued,

> The only silver lining to this decision is the possibility that this time the court has finally gone too far and that the American people are ready to reassert their constitutional authority. . . . Someone could knock on your door and tell you that the city council has voted to give your house to someone else because they have nicer plans for the property.[46]

Scott Bullock, the attorney for the Institute for Justice who argued the case for the property owners, opined, "[i]t's a wake-up call that eminent domain abuse is a real problem[,] . . . one that the Supreme Court is not going to stop."[47]

A press release from the Institute for Justice, a public interest law firm, revealed that up to ninety-nine percent of online instant poll voters opposed the use of eminent domain for private economic development.[48] The *Wall Street Journal* reported that a Quinnipiac University poll revealed that those surveyed overwhelmingly opposed the taking of private property for private economic development by a margin of 11 to 1.[49] When asked whether states should limit the use of eminent domain through passing new laws, eighty-nine percent of those surveyed supported such measures.[50] The head of the poll, Douglas Schwartz, noted

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44 Les Christie, *Taking Your Home Away: The Supreme Court has Ruled that New London Could Take Homes Away. What's Next?*, CNNMONEY.COM, Aug. 3, 2005, http://money.cnn.com/2005/07/25/real_estate/investment_prop/eminent_domain_v_deveopment/index.htm (last visited Apr. 19, 2009).

45 *Congress Works to Blunt Court Decision: DeLay Calls Supreme Court Ruling on Seizing Private Property 'Horrible,'* MSNBC.COM, June 30, 2005, http://www.msnbc.msn.com/id/8422790/ (last visited Apr. 18, 2009).

46 *Id.*

47 Christie, *supra* note 44.

48 Press Release, Institute For Justice, Grassroots Groundswell Grows Against Eminent Domain Abuse (June 29, 2005), http://ij.org/index.php?option=com_content&task=view&id=941&Itemid=165 (last visited Apr. 19, 2008) [hereinafter Institute for Justice Press Release] ("MSNBC.com readers opposed government takings for private development 98 percent to 2 percent; CNN.com readers 99 percent to 1 percent.").

49 Michael Corkery & Ryan Chittum, *Eminent-Domain Uproar Imperils Project*, WALL ST. J., Aug. 3, 2005, at B6; *see also* Press Release, Quinnipiac University Polling Institute, Connecticut Voters Say 11 – 1 Stop Eminent Domain, Quinnipiac University Poll Finds; Saving Groton Sub Base Is High Priority (July 28, 2005), http://www.quinnipiac.edu/x1296.xml?ReleaseID=821 (last visited Apr. 19, 2009) [hereinafter Quinnipiac University Press Release].

50 Quinnipiac University Press Release, *supra* note 49.

it was the most lopsided poll he had ever conducted.[51] An angry public reached out to their representatives and the media as well. According to the Institute for Justice, more than 1000 enraged constituents contacted a single New Jersey state legislator regarding eminent domain abuse.[52] And across the country citizens filled the pages of their local newspapers with letters to the editor and opinion pieces expressing dismay at the Court's ruling.[53]

Critics of *Kelo* were quick to seize upon reported local government actions, which they saw as abusive uses of eminent domain powers. For example, the Institute for Justice contended that the City of Freeport, Texas attempted to condemn waterfront shrimp processing companies in order to develop a marina mere hours after the Supreme Court rendered its judgment.[54] Just two days later, the City of Boston also began the process for seizing waterfront properties.[55] Officials from Newark, New Jersey told the press that but for the *Kelo* decision they would have abandoned plans for a downtown condo and retail project.[56]

Even before the U.S. Supreme Court issued its opinion, the deluge of amicus curiae briefs from a diversity of interests in support of Susette Kelo and the other petitioners filed with the Court portended the eventual public furor.[57] Briefs in support of petitioners came from diverse organizations such as the American Association of Retired Persons, the National Association for the Advancement of Colored People, the Southern Christian Leadership Conference, and the American Farm Bureau, as well as a host of property rights advocacy organizations.[58] After the Court heard the case, the Institute for Justice reported that membership in its "Castle Coalition—a nationwide network of citizen activists determined to stop the abuse of eminent domain in their states and communities"—nearly tripled.[59]

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[51] Corkery & Chittum, *supra* note 49.

[52] Institute for Justice Press Release, *supra* note 48.

[53] *Id*; *see also*, *e.g.*, Alfred J. Bettencourt Jr., *State has No Right To Take This Land*, PROVIDENCE J. BULL., Dec. 21, 2005, at B05, *available at* 2005 WLNR 21051998; Kenneth R. Harney, *Who's at Risk on Eminent Domain? Everyday People*, CHI. TRIB., July 3, 2005, at 2, *available at* 2005 WLNR 23508342; Steven Malanga, *Eminently Dumb Eminent Domain*, L.A. TIMES, July 20, 2005, at 13, *available at* 2005 WLNR 23362965; William Robinson, *A Travesty of Justice*, PHILA. DAILY NEWS, Nov. 14, 2005, at 16, *available at* 2005 WLNR 18362825.

[54] Christie, *supra*, note 44.

[55] *Id.*

[56] *Id.*

[57] *See*, *e.g.*, Supreme Court Docket, Kelo v. City of New London, http://supreme.lp.findlaw.com/supreme_court/docket/2004/february.html (last visited Apr. 18, 2009).

[58] *See*, *e.g.*, Brief for NAACP et al. as Amici Curiae Supporting Petitioners, Kelo v. City of New London, 545 U.S. 469 (2005) (No. 04-108), *available at* http://supreme.lp.findlaw.com/supreme_court/briefs/04-108/04-108.mer.ami.naacp.pdf; Brief for American Farm Bureau Federation et al. as Amici Curiae Supporting Petitioners, Kelo v. City of New London, 545 U.S. 469 (2005) (No. 04-108), *available at* http://supreme.lp.findlaw.com/supreme_court/briefs/04-108/04-108.mer.ami.afbf.pdf; Brief for Property Rights Foundation of America, Inc. as Amicus Curiae Supporting Petitioners, Kelo v. City of New London, 545 U.S. 469 (2005) (No. 04-108), *available at* http://supreme.lp.findlaw.com/supreme_court/briefs/04-108/04-108.mer.ami.prfa.pdf.

[59] Institute for Justice Press Release, *supra* note 48.

VI. POST-*KELO* STATE EMINENT DOMAIN LEGISLATION

The day after the Court's opinion, both the United States House of Representatives and the Senate took action. By a vote of 365 Yeas to 33 Nays, the House passed a resolution entitled "Expressing the Grave Disapproval of the House of Representatives regarding the Majority Opinion of the Supreme Court in the case of *Kelo v. City of New London*."[60] The engrossed resolution provided:

> Whereas the dissenting opinion in Kelo et al. v. City of New London et al. holds that the "standard this Court has adopted for the Public Use Clause is therefore deeply perverse" and the beneficiaries of this decision are "likely to be those citizens with disproportionate influence and power in the political process, including large corporations and development firms" and "government now has license to transfer property from those with fewer resources to those with more."[61]

The National Conference of State Legislatures (NCSL), however, immediately expressed its opposition to federal legislation, which it considered to be purely a state and local matter. In a letter to Congressmen Sensenbrenner and Conyers, the Chair and the Ranking Member of the House Judiciary Committee, respectively, the NCSL stated:

> The power of eminent domain has always been, and should remain, a state power. The *Kelo v. New London* Supreme Court decision did not expand state authority to condemn private property for economic development. It merely reaffirmed existing law on the subject. There is substantial Supreme Court case law dating as early as 1954 which upholds the power of state and local governments to take and retransfer property, upon payment of just compensation, in order to promote economic development.[62]

In *Kelo*'s wake, this assertion of state authority promptly materialized into legislative activity addressing eminent domain powers. According to the Institute for Justice, at least twenty-five state legislatures introduced or promised to introduce bills aimed at clarifying and restricting the power of eminent domain.[63] The Wednesday, August 3rd edition of the *Wall Street Journal* summarized contemporary state legislative reactions to the *Kelo* decision as follows: "In the six weeks since the Supreme Court's ruling in the Kelo v. New London case, bills have been introduced in Congress and in more than half of the state legislatures that would restrict, to varying degrees, the use of eminent domain for private development."[64]

On October 25, 2005, the NCSL reported its data on eminent domain legislative actions in a letter to the U.S. House of Representatives Judiciary Committee as follows:

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60 151 CONG. REC. H5592–93 (daily ed. June 30, 2005).

61 H.R. Res. 340, 109th Cong., 151 CONG. REC. H5577-02, H5592-05 (2005) (enacted).

62 Letter from Representative Janice L. Pauls, Chair, NCSL Comm. on Law & Criminal Justice (Oct. 25, 2005) (on file with author).

63 *Id.* (noting thirteen legislatures had already proposed legislation); Corkery & Chittum, *supra* note 49 (indicating over half the states introduced legislation).

64 Corkery & Chittum, *supra* note 49.

> [T]welve states—Alabama, California, Delaware, Illinois, Michigan, Minnesota, New Jersey, New York, Ohio, Oregon, Pennsylvania, and Texas—have already introduced bills, and three of these states—Alabama, Delaware, and Texas—have already enacted legislation in special session to address the power of eminent domain in their state. We expect to see many more states address the issue of eminent domain in their next legislative session.[65]

Indeed, in light of these swift and immediate state legislative reactions to the overwhelming public outcry against the *Kelo* decision, a solid argument can be made that the Court should consider a rigorous review of its current eminent domain jurisprudence.

VII. EMINENT DOMAIN: ORIGIN AND LEGAL DEVELOPMENT

The U.S. Constitution is the basic, organic law of the national government in the American federal system. Although the term "eminent domain" is not expressly used in the Constitution, the subject of eminent domain is specifically addressed in the Fifth Amendment, which states, in part: "No person shall . . . be deprived of life, liberty, or *property, without due process of law; nor shall private property be taken for public use, without just compensation.*"[66]

The Fifth Amendment was, of course, added to the Constitution as part of the Bill of Rights in 1791, shortly after the states successfully ratified the Constitution itself. In addition, as the majority opinion in *Kelo* advised, this portion of the Fifth Amendment was "made applicable to the states by the Fourteenth Amendment."[67] Obviously, the ideas upon which the language of the Constitution and the Bill of Rights rest embody legal concepts that were both familiar and important to the Framers, including the "public use" requirement of the Fifth Amendment. For example, a *Syracuse Law Review* article published in 2000 on the subject of eminent domain discussed the Framers' understanding of the concept as follows:

> The public use requirement of the Fifth Amendment has never been precisely defined. The Framers of the Constitution, influenced strongly by the Lockean concepts of natural law and individual property rights, embraced the notion that "government is instituted no less for the protection of property, than of the persons of individuals." By enumerating the new government's powers, the Framers, ipso facto, precluded the government from acting in a private capacity. Although the sovereign retained the power to take property, any action outside the parameters of the Constitution would constitute an invalid exercise of government power.[68]

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65 Pauls, *supra* note 62. A comprehensive list of the NCSL's materials on eminent domain can be found on its website. Nat'l Conference of State Legislatures, Eminent Domain, http://www.ncsl.org/programs/natres/EMINDOMAIN.htm (last visited Apr. 19, 2009). Another source of federal and state legislation can be found at the Castle Coalition campaign website. Castle Coal., Legislative Center, http://www.castlecoalition.org/legislation/index.html (last visited Apr. 19, 2009).

66 U.S. CONST. amend. V (emphasis added).

67 *Kelo*, 545 U.S. 469, 472 n.1 (2005).

68 Stephen Jones, *Trumping Eminent Domain Law: An Argument for Strict Scrutiny Analysis Under the Public Use Requirement of the Fifth Amendment*, 50 SYRACUSE L. REV. 285, 289 (2000) (quoting The Federalist No. 54, 370 (James Madison) (Benjamin Fletcher Wright ed., 1961) (citations omitted).

As might be expected, Justice Thomas made similar arguments to those just cited in his dissent to the *Kelo* majority opinion. He argued:

> The Constitution's text, in short, suggests that the Takings Clause authorizes the taking of property only if the public has a right to employ it, not if the public realizes any conceivable benefit from the taking.
>
> The Constitution's common-law background reinforces this understanding. The common law provided an express method of eliminating uses of land that adversely impacted the public welfare: nuisance law. Blackstone and Kent, for instance, both carefully distinguished the law of nuisance from the power of eminent domain. Blackstone rejected the idea that private property could be taken solely for purposes of any public benefit. "So great . . . is the regard of the law for private property," he explained, "that it will not authorize the least violation of it; no, not even for the general good of the whole community." He continued: "If a new road . . . were to be made through the grounds of a private person, it might perhaps be extensively beneficial to the public; but the law permits no man, or set of men, to do this without the consent of the owner of the land." Only "by giving [the landowner] full indemnification" could the government take property, and even then "[t]he public [was] now considered as an individual, treating with an individual for an exchange." When the public took property, in other words, it took it as an individual buying property from another typically would: for one's own use. The Public Use Clause, in short, embodied the Framers' understanding that property is a natural, fundamental right, prohibiting the government from "tak[ing] *property* from A and giv[ing] it to B."[69]

It is also worth noting that even though the Constitution uses the term "public use," the jurisprudence of the Supreme Court has, over time, developed and evolved into the concept of "public purpose" in substitution for the older term "public use" in a case like *Kelo*. The majority in *Kelo* explained the evolution of this terminology and its judicial interpretation as follows:

> On the other hand, this is not a case in which the City is planning to open the condemned land—at least not in its entirety—to use by the general public. Nor will the private lessees of the land in any sense be required to operate like common carriers, making their services available to all comers. But although such a projected use would be sufficient to satisfy the public use requirement, this "Court long ago rejected any literal requirement that condemned property be put into use for the general public." Indeed, while many state courts in the mid-19th century endorsed "use by the public" as the proper definition of public use, that narrow view steadily eroded over time. Not only was the "use by the public" test difficult to administer (*e.g.*, what proportion of the public need have access to the property? at what price?), but it proved to be impractical given the diverse and always evolving needs of society. Accordingly, when this Court began applying the Fifth Amendment to the States at the close of the 19th century, it embraced the broader and more natural interpretation of public use as "public purpose." Thus, in a case upholding a mining company's use of an aerial bucket line to transport ore over property it did not own, Justice Holmes' opinion for

[69] *Kelo*, 545 U.S. at 510–11 (Thomas, J., dissenting) (citations omitted) (alterations in original).

> the Court stressed "the inadequacy of use by the general public as a universal test." We have repeatedly and consistently rejected that narrow test ever since.[70]

Consequently, it seems fair to say that the idea of protecting private property owners from arbitrary seizures by the sovereign, at least without payment of compensation, was percolating in and about the common law prior to the advent of the Constitution. After the adoption of the Fifth Amendment, and its application to the states pursuant to the Fourteenth Amendment, the concept of eminent domain protection became solidly implanted in American law. Still, it has to be recognized that changes in society—for example, the industrial revolution—presented cases with new factual situations for judicial determination regarding the boundaries and scope of eminent domain. Courts in general, and the U.S. Supreme Court in particular, began to broaden what would count as a "public use," or later even as "public purpose." It is clear that what American courts have approved as an allowable "public use" or "public purpose" has grown broader and broader over time. This definition was stretched, and stretched again, so that when *Kelo* was announced, a substantial public outcry arose complaining that the scope of the term had been stretched past its breaking point. Nevertheless, the public outcry might have been avoided, or at least greatly dampened, had the Court modified its jurisprudential approach in reaching the *Kelo* decision. The Court might have chosen to apply one of its stricter and more well-known tests for determining the constitutionality of the proceedings before it. It is to these "tests" or "standards" that we now turn our attention.

VIII. THE U.S. SUPREME COURT'S STANDARDS FOR JUDICIAL REVIEW FOR STATE ACTION UNDER EQUAL PROTECTION

Throughout its history, the U.S. Supreme Court has analyzed and interpreted the Equal Protection Clause of the Fourteenth Amendment to protect and safeguard individual rights and liberties. The Fourteenth Amendment provides in pertinent part: "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws."[71] To assist the Court in its analysis and interpretation of state actions in Equal Protection Clause cases, the Court has utilized three general types of means-ends tests of judicial review: "rational basis review," "intermediate scrutiny," and "strict scrutiny." The following is a brief description of these three standards of review, considering their origins as well as their application to the Equal Protection Clause.

Courts apply the rational basis standard of judicial review by asking whether the governmental action at issue is rationally a means to an end that may be legitimately pursued by the government. This easiest of the three standards to pass has its origins in the 1819 case *McCulloch v. Maryland*.[72] Chief Justice John Marshall, writing for a unanimous Court, held that Congress has the authority to promulgate legislation as long as the result is legitimate under the Constitution and

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[70] *Id.* at 478–80 (quoting *Midkiff*, 467 U.S. 229, 244, and Strickley v. Highland Boy Gold Mining Co., 200 U.S. 527, 531 (1906)) (citations omitted).

[71] U.S. CONST. amend. XIV, § 1.

[72] 17 U.S. (4 Wheat.) 316 (1819).

adopted for that objective.[73] As a general rule, the government only has to make one argument to pass the test. For example, in *McCulloch*, Congress argued that the creation of a bank was within its constitutional authority because the creation of a bank was a reasonable means for regulating commerce under the Commerce Clause.[74] Accordingly, the Court held it constitutional for the government to create a bank.[75]

In 1938, the Court originated the concept of a "more searching" level of scrutiny that would apply to economic legislation in *United States v. Carolene Products Co.*[76] In that case, the defendant was charged with violating a federal law that prohibited the shipping in interstate commerce of a product made from skimmed milk compounded with any nonmilk fat.[77] The defendant argued that the federal law was unconstitutional because it regulated an activity outside the purview of the Commerce Clause and violated its substantive due process.[78] The Court held that when reviewing economic legislation there is a "presumption of constitutionality," and, in doing so, changed its Commerce Clause jurisprudence from the previous term.[79]

In footnote four of the Court's opinion, Justice Harlan Stone described an exception to the Court's new standard of presumptive constitutionality and wrote: "[P]rejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry."[80]

Subsequently, the Court applied its more searching judicial inquiry and its highest standard of judicial review, "strict scrutiny," when a fundamental constitutional right was infringed. Examples include such things as rights guaranteed in the Bill of Rights or rights under the Equal Protection Clause when a government action involves the use of a suspect classification such as race or national origin. In the 1943 and 1944 Japanese-American internment cases,[81] the Court noted its consistent repudiation of classifications based on national origin and the Fourteenth Amendment's demand that racial classification in criminal cases be subjected to the "most rigid scrutiny."[82] In 1967, Chief Justice Earl Warren, writing for the Court in *Loving v. Virginia*,[83] declared that a Virginia statute banning marriages between persons of different races violated the Equal Protection Clause.[84] Chief Justice Warren wrote:

73 *Id.* at 421.
74 *Id.* at 389.
75 *Id.* at 425.
76 304 U.S. 144, 153 n.4 (1938).
77 *Id.* at 146.
78 *Id.* at 146–47.
79 *Id.* at 148.
80 *Id.* at 153 n.4.
81 Hirabayashi v. United States, 320 U.S. 81 (1943); Korematsu v. United States, 323 U.S. 214 (1944).
82 *Korematsu*, 323 U.S. at 216; *Hirabayashi*, 320 U.S. at 100.
83 388 U.S. 1 (1967).
84 *Id.* at 2.

> Over the years, this Court has consistently repudiated "[d]istinctions between citizens solely because of their ancestry" as being "odious to a free people whose institutions are founded upon the doctrine of equality." At the very least, the Equal Protection Clause demands that racial classifications, especially suspect in criminal statutes, be subjected to the "most rigid scrutiny," and, if they are ever to be upheld, they must be shown to be necessary to the accomplishment of some permissible state objective, independent of the racial discrimination which it was the object of the Fourteenth Amendment to eliminate.[85]

To pass "strict scrutiny" judicial review, the government must have a "compelling" government interest and the government action must be the least restrictive means for achieving that interest.[86]

In 1976, a majority of the Court for the first time sanctioned its middle standard of judicial review, "intermediate scrutiny," in *Craig v. Boren*.[87] In *Craig*, the Court addressed an Oklahoma statute that prohibited the sale of "nonintoxicating" 3.2% beer to males under the age of twenty-one and to females under the age of eighteen.[88] The question before the Court was whether such a gender-based differential constituted a denial to males eighteen to twenty years of age of the equal protection of the law in violation of the Fourteenth Amendment. Justice Brennan articulated the Court's "intermediate scrutiny" standard of judicial review as follows:

> Analysis may appropriately begin with the reminder that *Reed* emphasized that statutory classifications that distinguish between males and females are "subject to scrutiny under the Equal Protection Clause." To withstand constitutional challenge, previous cases establish that classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives.[89]

The following table developed by Professor Thomas O'Connor[90] is helpful in understanding the differences between the three standards of judicial review:

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85 *Id.* at 11 (quoting *Hirabayashi*, 320 U.S. at 100, and *Korematsu*, 323 U.S. at 216) (citations omitted).

86 *See, e.g.*, United States v. Playboy Entm't Group, 529 U.S. 803, 813 (2000).

87 429 U.S. 190 (1976); *see id.* at 218 (Rehnquist, J., dissenting) (arguing against the "Court's application here of an elevated or 'intermediate' level scrutiny"); Deborah L. Markowitz, *In Pursuit of Equality: One Woman's Work to Change the Law*, 11 WOMEN'S RTS. L. REP. 73, 93 (1989) (explaining that "[a] majority of the Supreme Court finally enunciated an intermediate standard of review" in *Craig*).

88 *Craig*, 429 U.S. at 191–92.

89 *Id.* at 197 (quoting Reed v. Reed, 404 U.S. 71, 75 (1971)) (citation omitted).

90 Thomas R. O'Connor, Equal Protection of Law and other Concepts Related to Equality, Justice and Fairness (2005) (unpublished lecture notes, on file with Environmental Law).

Type of test:	Applicability:	Judicial Analysis:
Rational Basis	Interference with economic interests or discrimination on the basis of non-suspect classifications	Presumption of constitutionality. Government action must have a rational relationship to a legitimate government purpose.
Intermediate	Interference with commercial speech or discrimination on basis of suspect classifications like gender or illegitimate birth	Government action must directly advance substantial interests and clear governmental objectives and be no more extensive than necessary
Strict	Interference with fundamental rights or discrimination on basis of suspect classifications like race or national origin	Presumption of unconstitutionality. Government action must further a compelling government interest in the least intrusive manner.

IX. "INTERMEDIATE SCRUTINY" FOR EMINENT DOMAIN IN ECONOMIC REDEVELOPMENT CASES

As discussed previously herein, the U.S. Supreme Court used the rational basis test to review the constitutionality of New London's eminent domain proceedings in *Kelo*.[91] In so doing, the Court followed its normal and typical practice in cases of this type. Even though the majority opinion carefully pointed out that the states were free to adopt stricter requirements for applying eminent domain than those that existed in New London, Connecticut, this caveat did little to minimize the adverse public reaction to *Kelo*. A good example to further illustrate the lack of public appreciation of the Court's position on this point can be seen in a portion of the proceedings before the U.S. Senate Judiciary Committee during its confirmation hearing of then-nominated Chief Justice John Roberts. Senator Brownback's question to Chief Justice Roberts was:

> [SENATOR BROWNBACK.] Judge Roberts, what is your understanding of the state of the Takings Clause jurisprudence now after *Kelo*? Isn't it now the case that it is much easier for one man's home to become another man's castle?
>
> JUDGE ROBERTS. Well, under the *Kelo* decision, which, as you explained, was interpreting the public use requirement in the Constitution, the majority — and, of course, as you mentioned, it was a closely divided case. The majority explained its reasoning by noting the difficulty in drawing the line. Everybody would agree, as you suggest, to build a road or to build a railroad, to situate a military base, if that is the only suitable place, that the power of eminent domain is appropriate in those instances. And I think people agree further that when you're talking about a hospital or something like that, that satisfies public use. And I think the reason the Court gave, really, in the majority opinion was that it's kind of hard to draw the line.

[91] *See supra* note 23 and accompanying text; *Kelo*, 545 U.S. 469, 483–84 (2005).

> The dissent, Justice O'Connor's dissent, didn't think it was that hard. She focused on the question of whether it was going to be a use open to the public as, you know, a road, a hospital, use for the public like in a military base, or private. And she would have drawn the line there and said even public benefits that derive from different private uses don't justify that aspect of it.
>
> *There was a caveat in the* Kelo *majority. They said they were only deciding this in the context of an urban redevelopment plan. They reserved the question—if it's just taking one parcel and giving it to somebody else, not part of a broader plan, that question was still open.*And as you say, there's been a lot of reaction to it. I understand some States have even legislated restricting their power.
>
> SENATOR BROWNBACK. And we are considering it here in the Congress.
>
> JUDGE ROBERTS. And I think that's a very appropriate approach to consider. In other words, the court was not saying you have to have this power, you have to exercise this power. What the Court was saying is there is this power, and then it's up to the legislature to determine whether it wants that to be available, whether it wants it to be available in limited circumstances, or whether it wants to go back to an understanding as reflected in the dissent, that this is not an appropriate public use.
>
> That leaves the ball in the court of the legislature.[92]

Despite the protestations of both Chief Justice Roberts (during the Senate confirmation hearings), and the Court itself (in the *Kelo* majority opinion), that either Congress or the state legislatures can tighten eminent domain rules, critics of *Kelo* would surely be more satisfied with an alteration of the Court's judicial philosophy in cases of this type. Such an alteration could be accomplished quite easily.

As previously explained, it is well known and widely accepted that the Supreme Court employs a three-tiered approach to reviewing the constitutionality of statutory enactments subject to the Equal Protection Clause of the Fourteenth Amendment; it can apply either "strict scrutiny," "intermediate scrutiny" or "rational basis" as the judicial yardstick. As long as the Supreme Court continues to use the rational basis test in cases like *Kelo*, it will be quite difficult for property owners to obtain relief in court since the vast majority of statutes and ordinances pass constitutional muster when the Court requires only a rational basis for the legislation in question. This approach has proved workable, arousing little public indignation so long as local governments use eminent domain for projects like roads, airports, dams, schools, or hospitals. Even governmental uses of eminent domain to clear urban areas of "blighted" property have found judicial precedent for decades and arouse relatively little public controversy. For these types of cases, the traditional rational basis test continues to seem adequate and appropriate.

On the other hand, when a government undertakes to use eminent domain in order to advance an economic redevelopment program, controversy has reigned supreme. Critics assert that the wealthy and powerful are too likely to be able to manipulate the system at the expense of the weak and poor. Accordingly, for economic redevelopment eminent domain cases, the Supreme Court, in an appropriate case, should ratchet up the judicial standard of review. Indeed, a prescient *Syracuse Law Review* article advanced a well-reasoned argument for a heightened standard of review in 2000, some five years before the *Kelo* decision.

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92 *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 285–86 (2005) (emphasis added).

The article contended that the Supreme Court should adopt a "strict scrutiny' review of eminent domain cases like *Kelo*.[93]

Perhaps the "strict scrutiny" standard of review is too high for use in eminent domain, even in economic redevelopment cases. After all, this standard of review is difficult to meet and many statutes have failed to pass judicial muster under this exacting standard. On the other hand, raising the level of review to the middle level standard, that is "intermediate scrutiny," offers the advantages of increasing the standard to afford greater protection to property owners, but not unnecessarily hamstringing the legislative branch and local governments.

Using the intermediate scrutiny standard of review would involve the courts in an examination of the motives behind economic redevelopment cases. This would give all parties more confidence that the use of eminent domain was designed, from inception of the plan, to serve the public interest, not a special interest. As previously noted, three justices on the Connecticut Supreme Court in *Kelo* advocated an approach similar to this.[94] Indeed, the U.S. Supreme Court majority in *Kelo* discussed issues normally connected with this type of a review without actually employing the standard.[95] Making a change of this nature would be a carefully measured, incremental one, and would in fact serve to officially recognize and strengthen the analysis the Supreme Court majority already implicitly used in *Kelo*. Changing to this approach would forestall critics, protect property owners, and still leave the legislative branch sufficient latitude to operate to advance the public interest in economic redevelopment eminent domain cases.

X. CONCLUSION

President Ronald Reagan used the phrase "Trust, but verify" when negotiating with the former Soviet Union regarding arms control agreements.[96] The concept behind this phrase has a useful application to selecting the appropriate standard of judicial review for economic redevelopment eminent domain cases. The Supreme Court should trust local governments to use eminent domain in these types of cases properly, but verify their actions by increasing the standard of review to the intermediate level. Using only the rational basis standard trusts local governments too much, and strict scrutiny does not trust them enough.

93 Jones, *supra* note 68, at 305–06.

94 *Kelo*, 545 U.S. at 477.

95 *Id.* at 488–89.

96 Reagan Farewell Address, *supra* note 1.