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WAKE OF THE FLOOD: EXAMINING THE DISSIPATION OF PROPERTY RIGHTS THROUGH A MODEL OF POST-KATRINA NEW ORLEANS

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WAKE OF THE FLOOD: EXAMINING THE DISSIPATION OF PROPERTY RIGHTS THROUGH A MODEL OF POST-KATRINA NEW ORLEANS

Nicholas P. Devereux*

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The rebuilding process in the Gulf Coast is now in full swing, bringing hope to many for a return to normalcy in the not-so-distant future. The opportunities for abuse of the rank-and-file New Orleanian, however, are ubiquitous. The enormous disaster that Hurricane Katrina provoked occurred at a time when the gap between rich and poor in this country was at its most pronounced in years. More specific to New Orleans, public and private decisions over the past fifty years have resulted in a more segregated city than ever in its history, pushing the poorer minorities to less desirable (and formerly uninhabitable) flood-prone areas.

These citizens deserve a voice in their own futures, and they deserve the protections that our laws can provide. By writing this article, I do not presume to give them that voice. I only offer some legal arguments to whoever takes on the burden of speaking.

1. Introduction

Eminent domain in the United States has evolved from an uncontroversial tool necessary for the country’s economic development to a broad, and arguably limitless, means of transferring property from one private party to another, often as part of revitalization and gentrification schemes. Given the current scope of allowable eminent domain takings, one can imagine plausible situations where involuntary transfers in the name of economic progress could be fundamentally unfair and offend the most basic notions of property rights. Property rights are (at least textually) given equal importance in the Fifth Amendment to the interests of life and liberty, which are considered fundamental.¹ Thus, one can argue that current Takings Clause case law has overstepped its bounds, giving rise to situations where government action that is nominally constitutional under the Takings Clause could be viewed as unconstitutional under substantive due process standards.

¹ U.S. CONST. amend. V. ("No person . . . shall be deprived of life, liberty, or property without due process of the law . . . "). See Truax v. Corrigan, 257 U.S. 312, 327–30 (1921) (recognizing certain "fundamental" property rights); Laura S. Underkuffler, On Property: An Essay, 100 YALE L. J. 127, 133–42 (1990) (noting that American Founders had a broader and more comprehensive understanding of property than the modern approach).
In this essay, I hope to touch on some of the problems with Takings Clause jurisprudence as it currently stands. My note will focus predominantly on the "public use" limitation of the Takings Clause, as well as on the use of the Takings Clause in the context of urban renewal schemes. In hopes of better describing some of the troubling implications of the law today, I plan to apply it to a plausible real world, though hypothetical, situation with which most people are somewhat familiar. An examination of the recovery in New Orleans following Hurricane Katrina reveals both the flaws of current Takings Clause analysis and the many due process, and even equal protection, violations that can go unchecked.

The task of returning property rights to protected status will prove not to be an easy one. For example, urging the Court to adopt an incorporated approach to eminent domain challenges (wherein judicial scrutiny of a Takings Clause challenge would incorporate elements of due process and/or equal protection analysis) would appear to be in vain. The Court has rejected appeals to read equal protection analysis into a challenge on other constitutional grounds. Additionally, current judicial doctrine would seemingly offer little protection for individuals bringing either due process or equal protection challenges to an eminent domain action. It has become exceedingly difficult to show the requisite discriminatory intent to succeed in equal protection challenges. The Court has also effectively relegated property rights to a rung lower than those "fundamental" rights that are deserving of substantive due process protection.

Indeed, although individuals' property rights could conceptually fall under the umbrella of the Takings, Due Process and Equal Protection

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2  U.S. CONST. amend. V.
3  See Whren v. United States, 517 U.S. 806, 812-13 (1996) (finding that an examination of subjective intention is proper in equal protection analysis but not in Fourth Amendment, and that incorporating this equal protection factor into a Fourth Amendment analysis is improper).
4  See Berman v. Parker, 348 U.S. 26, 31-33 (1954) (rejecting petitioner's claim that the eminent domain action at issue was a violation of his Fifth Amendment due process rights). See also Graham v. Connor, 490 U.S. 386, 395 (1989) (refusing to analyze a claim of use of excessive force by police officers under the generalized substantive due process approach and instead using the Fourth Amendment's "reasonableness" standard).
5  See Arlington Heights v. Metro. House. Dev. Corp., 429 U.S. 252 (1977) (describing several factors used in judicial analysis of equal protection claims, and establishing a high burden of proof to show discriminatory intent). Part III of this article covers equal protection implications in more detail and, though New Orleans minorities could make a strong argument for equal protection violations, the Court requires substantial proof to infer a finding of discriminatory intent. Only in very rare cases do victims proffer sufficient proof to convince the Court to make this finding.
6  See Ronald J. Krotoszynski, Jr., Fundamental Property Rights, 85 GEO. L. J. 555, 555-59 (1997) [hereinafter Krotoszynski] (describing the Supreme Court's disinclination towards extending "fundamental" status to property rights under modern day substantive due process jurisprudence).
Clauses, individuals can in practice be left with no protection. In recent years, the Supreme Court has moved towards providing less protection for property rights under the Takings Clause, while simultaneously refusing to expand the protection of other constitutional clauses to maintain the balance. Certain property rights essentially have been left unprotected. In the following pages, I highlight the inadequacies of the law as it now stands and I argue that currently unprotected, yet fundamental, property rights be relocated under the protection of substantive due process.

Part I of this article provides a brief history of the concept and development of eminent domain law in the United States. It also describes and critiques the most important recent U.S. Supreme Court cases that have shaped eminent domain jurisprudence as it stands today. Part II offers a brief recapitulation of the events surrounding Hurricane Katrina and the resulting flood in New Orleans. Also in Part II, I offer a hypothetical eminent domain action in New Orleans, and demonstrate the inadequacy of current Takings Clause interpretation by running through a plausible judicial analysis concerning the validity of the use of eminent domain. Part III discusses the Equal Protection Clause, and its implications for the issues that the modern Takings Clause interpretation poses. By looking to a history of racially discriminatory practices in New Orleans, one can make a plausible argument that an eminent domain action under certain circumstances would result in equal protection violations. To support this contention, I will apply the accepted test of disproportionate impact and discriminatory intent as set forth in recent case law. Part IV follows with Substantive Due Process violations implicated by the hypothetical situation first sketched in Part II. In Part IV, I will also discuss the Court's current confusion in locating certain constitutional rights and offer some proposals for reconciling the constitutional themes discussed in order to ensure at least a modicum of protection for important property interests, such as homesteads. Part V concludes.

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7 See, e.g., Kelo v. City of New London, 545 U.S. 469, 490 (2005) (holding that the City's proposed condemnations were for a "public use" within the meaning of the Fifth Amendment to the Federal Constitution); Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302 (2002) (holding that the moratoria ordered by the agency were not per se takings of property requiring compensation under the Takings Clause).

8 See Washington v. Davis, 426 U.S. 229 (1976) (holding that a successful equal protection challenge must demonstrate that a law has had a disproportionate impact on a protected group, and that legislators had discriminatory intent when passing that law); Arlington Heights, 429 U.S. at 252 (describing several factors used in judicial analysis of equal protection claims to determine if evidentiary sources are powerful enough to make an inference of discriminatory intent absent explicit proof thereof).
II. Eminent Domain Jurisprudence

The concept of eminent domain, and more specifically the Takings Clause of the U.S. Constitution, has undergone significant evolution in recent history. This section briefly documents the foundations of eminent domain, including the original understanding of the Takings Clause at the time of its inclusion in the U.S. Constitution. Historically, eminent domain was left to state action and state court review, but the modern trend is for the U.S. Supreme Court to take a more active role in this area of the law. Following the description of eminent domain's early history, this section will analyze the U.S. Supreme Court's most important recent cases with a focus on urban renewal and the Court's treatment of "public use." The section concludes with discussion of the most recent in this line of cases, Kelo v. City of New London,\(^9\) and where that holding leaves the judicial understanding of eminent domain in the United States today.

III. Early History of Eminent Domain

The exact origins of the power of eminent domain are unclear. However, scholars claim its use can be traced back at least as far as the Romans.\(^10\) After the decline of the Roman Empire, the practice of eminent domain disappeared largely due to the fact that, under existing feudal systems, ultimate ownership of all property fell to the sovereign and, hence, no private property could be taken.\(^11\) Eminent domain took definite shape as Europe emerged from feudal society and began to recognize individual ownership, with political philosophers in Holland taking the lead.\(^12\)

Of more relevance to the U.S. context, English precedents point to two distinct powers. First, the Crown had the power to make use

\(^9\) Kelo, 545 U.S. at 469. The plaintiffs, owners of condemned property, filed suit alleging that the city's exercise of eminent domain power on ground takings were not for public use. Id. at 475. The Supreme Court of Connecticut held that all of the City's proposed takings were valid. Id. at 476. The court determined that the takings were authorized by chapter 132, the State's municipal development statute, and that the intended use of the land was sufficiently definite and had been given "reasonable attention" during the planning process. Id. at 476–77. The Supreme Court affirmed, declining to "second-guess the City's determinations as to what lands it needs to acquire in order to effectuate the [urban planning and development] project." Id. at 488–89.


\(^11\) Nichols, supra note 10, at 5.

\(^12\) Id. at 5, 31 (noting analytical contributions concerning eminent domain by Dutch political philosophers Hugo Grotius and Cornelius van Bynkershoek).
temporarily, but not take ownership, of land to advance certain interests such as navigation, foreign affairs and national defense. The justification for the Crown’s power rested partially in the doctrine of necessity (the act was necessary for the preservation of the kingdom), and partially in the idea that the Crown was thought to have superior title. Second, Parliament had the right to expropriate private property completely provided that it paid just compensation to the injured party. This second power is closer to our own concept of eminent domain, and the English justified its use as a part of the consent that all people give to lawmakers when they live in a system of representative government.

Early American colonists embraced eminent domain as a power akin to the English Parliament’s right to expropriate property. To justify the power, colonists generally made two requirements: that the expropriation be an act of a legislature (not on behalf of the Crown), and that compensation be paid. The reliance on English foundations continued during the struggle for independence, as the drafters of early state constitutions often used language reflecting the consent theory of representative government and the compensation requirement, which stems from Lockean concepts of property rights.

Virginia and Pennsylvania were the first states to include the term “public use” in their state constitutions, both in 1776. The eminent domain provisions in these documents were followed by other states, often verbatim, as they drew up constitutions as well. The Takings Clause of the U.S Constitution finds its place in the Fifth Amendment, authored by James Madison. Interestingly, there is little record of debate on the passage of the

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13 Berger, supra note 10, at 204.
15 Berger, supra note 10, at 204.
16 Harrington, supra note 14, at 1264.
17 Id. at 1270.
19 Berger, supra note 10, at 204.
20 Harrington, supra note 14, at 1275–76. Other states adopting eminent domain provisions similar to Virginia and Pennsylvania were Delaware (1776), Vermont (1776 & 1786), Massachusetts (1780) and New Hampshire (1784). Id.
Fifth Amendment. Determining the framers' true intent concerning the Takings Clause is therefore an exercise in conjecture. Case law and scholarly work, however, give us a rich history of the development of eminent domain jurisprudence after the Takings Clause was enacted. There have historically been two alternative definitions of "public use": (1) general advantage or benefit to the public, known as the broad view; and (2) actual use by the public, known as the narrow view. In the early years of the United States, few situations consistently gave rise to the use of eminent domain. In a vast and sparsely populated land, rights of way for roads and flowage easements for mills were seen as much more important to the overall development of the country than the protection of individual property rights in these instances. Thus, even if the sole benefit of a road across a private individual's land was to provide another private individual with access to a public road, the validity of using eminent domain to obtain the land for that road was rarely questioned. Given the necessity of eminent domain in developing a new country and the founders' lack of fear of abuse, the early trend favored a broad view of public use in eminent domain usage.

The mid-nineteenth century brought increased industrialization and a proliferation of the use of eminent domain, often to the benefit of privately-owned railroad companies. Fearing legislative overreaching and abuse of the expropriation power, many state courts adopted the narrow view of public use, requiring actual use by the public of land condemned through eminent

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22 Both houses of Congress adopted the amendment without debating the expropriation clause. CONG. REC. (Aug. 21, 1789), reprinted in 9 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS: DIARY OF WILLIAM MACLAY AND OTHER NOTES ON SENATE DEBATES 1309–10 (Kenneth R. Bowling and Helen E. Veit eds., 1998); 1 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS OF THE UNITED STATES OF AMERICA, MAR. 4, 1789–MAR. 3, 1791: SENATE LEGISLATIVE JOURNAL 154 (Linda Grant De Pauw ed., 1972). See also Harrington, supra note 14, at 1284–86 (noting that the House did not alter in the least the portion of the amendment dealing with expropriation and that neither the House nor the Senate made any substantial change in substance to the amendment). Harrington also argues that most members of Congress, in record of debate that does exist, were more concerned with due process concerns and generally found the Takings Clause as written was sufficient to protect against eminent domain abuses. Id. at 1299.


24 See Philip Nichols, Jr., The Meaning of Public Use in the Law of Eminent Domain, 20 B. U. L. Rev. 615, 617 (1940) (noting that in the early years of this country, there were only a few situations were eminent domain was used).

25 Id.

26 See id. at 616 (stating that the framers likely did not intend the Constitution to protect against the government's use of eminent domain).
domain. One of the most notable opinions promoting the narrow view of public use was Senator Tracy's concurrence in *Bloodgood v. Mohawk & Hudson Railroad Co.* In his opinion, Tracy questioned whether a broad view of "public use" put any meaningful limit whatsoever on the government's power to expropriate. Proponents of the narrow view argued that "an incidental, amorphous benefit accruing to the public after taking land and transferring it to a private party was insufficient to satisfy the 'public use' limitation on eminent domain." Indeed, Tracy's narrow view of the public use requirement was not fully embraced by courts nationwide, yet it persisted as a worthy counter to the broad view and held considerable sway in state courts into the early twentieth century.

The presence of two competing understandings of "public use" in state courts meant that no coherent, established judicial analysis asserted itself. Instead, the outcome of any given eminent domain challenge was unpredictable, and judicial doctrine was in disarray. The United States Supreme Court provided little guidance to state courts and did not offer meaningful review of any state cases until 1896. In *Missouri Pacific Railway v. Nebraska*, the Supreme Court held for the first time that a state exercise of eminent domain was a violation of the Due Process Clause of the Fourteenth Amendment. The Court, however, has rarely reversed a state supreme court's finding of a "public use" and has taken an increasingly deferential stance towards state courts and legislatures in determining the validity of an eminent domain taking.

Although the narrow view of public use had significant influence in the early twentieth century, a gradual shift began that once again favored the broader, "public advantage" view of the public use limit on eminent domain. In the pre-industrialized period, eminent domain actions generally focused on condemning lands for the purpose of building dams and mills, rights of

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27 See Berger, supra note 10, at 208 (describing state court case law concerning the public use limitation in the nineteenth and early twentieth centuries).
28 18 Wend. 9, 56–62 (N.Y. 1837) (Tracy, J., concurring).
29 Id. at 60.
30 Lopez, supra note 18, at 261 (2006) (describing the understanding of "public use" held by theorists such as Senator Tracy and Thomas M. Cooley).
31 Berger, supra note 10, at 209.
32 See id. (noting that the two views of "public use" resulted in a lack of predictability).
33 Legal scholar Lawrence Berger goes so far as to argue that "by the beginning of the twentieth century, doctrine was in a shambles and predictability of result at a minimum." Id.
34 Id. at 213 (citing Missouri Pacific Ry. v. Nebraska, 164 U.S. 403 (1896)).
35 In fact, Lawrence Berger states in his 1976 article: "As far as can be found, this is the only time that the Court ever reversed a state supreme court's decision that a taking was for a public use." Berger, supra note 10, at 213.
36 See id. at 206–07 (discussing the Mill Acts; citing, inter alia, Hazen v. Essex Co., 66 Mass. (12 Cush.) 475, 478 (1853)).
way across private land for the construction of roads, and later for development of the railroad network and irrigation systems in the arid West. As once-new cities decayed and languishing urban ghettos became a concern, local governments began to use the eminent domain power to "revitalize" urban centers. These actions were accompanied by a revival of the broad view of "public use," but with a twist.

In *N.Y. City Housing Auth. v. Muller*, the New York state courts initiated a crucial "public use" shift by looking to the condition of property at issue and the public safety benefit achieved simply by the taking itself. In this way, as noted in later cases, the exercise of eminent domain alone was sufficient to satisfy the "public use" limitation. In other words, the simple fact that the government was putting an end to a detrimental or dangerous use of the private property was enough of a benefit to the general public that the taking could be found to satisfy the "public use" limitation of the Takings Clause.

The U.S. Supreme Court has also ruled on several important urban redevelopment and land use cases in recent years. A discussion of three of the most important cases follows, with particular focus on the Court's legal reasoning and treatment of the public use limitation contained in the Takings Clause.

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37 See id. at 207–08 (discussing the "Landlocked Owner" cases).
38 See id. at 208 (noting the proliferation of the use of eminent domain to benefit privately-owned railroad companies).
39 See id. at 210–11 (citing Nash v. Clark, 75 P. 371 (1904)).
40 See id. at 214–17 (discussing the use of eminent domain to clear blighted property).
42 See, e.g., *Berman*, 348 U.S. at 33 (finding that Congress' determination that the use of eminent domain to eliminate substandard housing standards is a valid public use).
43 See id. at 103–04 (finding that Congress had authority to prevent future slums from being born, and removing dangerous breeding grounds was the way to accomplish that goal).
IV. Berman v. Parker

The U.S. Supreme Court took its greatest step in broadening the understanding of "public use" in 1954. Berman v. Parker concerned a challenge to a District of Columbia redevelopment plan by a business owner in a neighborhood in Southwest Washington, D.C. The redevelopment plan came about with Congress' passage of the District of Columbia Redevelopment Act in 1945. In an attempt to improve upon substandard housing conditions in the District that it considered "injurious to the public health, safety, morals, and welfare," Congress directed the National Capital Planning Commission to develop a land use plan to revive certain blighted areas. The Planning Commission's first venture involved Project Area B in Southwest Washington, where it was reported that 64.3% of dwellings were beyond repair and 18.4% needed major repairs. Projected Area B contained 5,012 people, 97.5% of whom were black.

After the Planning Commission adopted the plan, the District of Columbia Land Redevelopment Agency was then charged with assembling the real property in the area and pursuing a course of redevelopment. Although the Agency was authorized to transfer the land to public agencies, the Act stated that preference should be given to private development corporations in land transfers. In bringing suit, the petitioner claimed that his department store was not slum housing and could not be considered injurious to the public health. Hence, taking his private property would amount to violations of both the Due Process and Takings Clauses of the 5th Amendment of the U.S. Constitution.

Writing for a unanimous Court, Justice Douglas delivered a brief and deferential opinion. The Court rooted Congress' legislative powers over D.C. in the police power; the limits of which it found would be fruitless to define. It follows that determinations concerning the public interest are

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45 See generally Berman, 348 U.S. at 26.
46 Id.
47 Id. at 28.
48 Id. at 28–29.
49 Id. at 30.
50 Id. Although thousands of blacks were uprooted during this urban development project, neither side made mention of race in any of the briefs submitted. Pritchett, supra note 41, at 44. This fact is particularly remarkable given that the foundational case Brown v. Bd. of Education was decided just four months before Berman was argued. Id.
51 Berman, 348 U.S. at 31 (finding that the Agency had begun to redevelop at time of suit).
52 Id. at 30 (citing DC Redevelopment Act, § 7(g)).
53 Id. at 31.
54 Id. at 28.
55 Id. at 31–32.
completely within this police power, and the judiciary has a very limited role in reviewing whether or not the power is being exercised for a public purpose. The Court's narrow review found Congress' public purpose of promoting public health and safety, and the standards contained in the Redevelopment Act, to be adequate and reasonable. It therefore found that, once the public purpose was determined to be valid, the method and means of achieving Congress' goal were left to its own discretion. In fully asserting its position of abject deference, the Supreme Court went beyond the lower court's ruling by clearly stating that not only the dilapidated buildings, but also the land on which they stood, could be taken in full title. The Berman Court also upheld the practice of turning land over to private enterprise after exercising eminent domain, once again deferring to the legislative branch on the validity of such decisions.

The Berman decision served as the Court's unambiguous approval of a broad understanding of "public use" on the Federal level. Deference to the legislative branch on determining a public purpose now allowed redevelopment agencies across the country unchecked freedom in areas designated for revitalization. The Court sweepingly and unceremoniously interpreted the "public use" clause, explicit in the Fifth Amendment, to allow the taking of property that was immediately put back into the private sector for redevelopment. Although lower and state courts had been pushing towards a broader "public use" standard during the urban revitalization period in the 1940's, the Supreme Court decisively ushered in a new era.

V. Hawaii Housing Authority v. Midkiff

The Supreme Court waited nearly thirty years to revisit the issue of eminent domain and the bounds of the "public use" clause. The result in Hawaii Housing Authority v. Midkiff was a strong reinforcement of the Berman ruling. In Midkiff, landowners brought suit to challenge the Hawaii legislature's attempt to undo a long-standing land oligopoly, a

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56 Id. at 32.
57 Id. at 35.
58 Id. at 33.
59 Id. at 36.
60 Id. at 33–34.
62 See Pritchett, supra note 41, at 25–26 (detailing state court activity that indicated a shift towards a broader view of public use).
63 See Midkiff, 467 U.S. at 229, 240–42 (1984) (finding that the Hawaii Act was constitutional based upon the Berman findings).
remnant of the Polynesian settlers' feudal land tenure system. While 49% of Hawaii’s land was owned by the State and Federal governments, a mere 72 private individuals held title to another 47% of the usable land in Hawaii. The Land Reform Act of 1967 created a condemnation scheme under the Hawaii Housing Authority whereby houses owned by tenants on lots rented from the landowners were condemned. The lots were then acquired by the State and subsequently transferred to the tenants. The Act set forth various requirements, including a tenant’s showing his ability to pay for the lot, a process to determine just compensation, and public hearings to assure the property transfer would "effectuate the public purposes" of the Act.

The Midkiff Court rested its analysis firmly on the foundations of Berman. Citing often to Berman, the Court held that the "public use" requirement was coterminous with the scope of a sovereign’s police powers. Giving broad deference to the legislature’s determinations, the Court conceded its reviewing role was "extremely narrow" and framed its analysis on whether the exercise of eminent domain was rationally related to a conceivable public purpose. The Act’s stated purpose was to regulate an oligopoly and its associated evils, which included artificial deterrents that led to a malfunctioning land market, inflated land prices, and injury to public tranquility and welfare. With little discussion, the Court found this exercise of Hawaii’s police powers to be a proper public purpose.

The Court moved on to consider whether the means of achieving that public purpose were rationally related to its stated purpose. It found that redistribution of land title to correct deficiencies in the market due to an oligopoly was a rational exercise of eminent domain. This brief discussion

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64 Id. at 232.
65 Id.
66 Id. at 233–34.
67 Id.
68 Id.
69 Id. at 240–42.
70 Id. at 240.
71 Midkiff, 467 U.S. at 232, 242.
72 Id. at 242.
73 Id. at 242–43.
concluded the Court's deferential analysis, and the remainder of the opinion focused on deficiencies in the opinion of the Court of Appeals.\textsuperscript{74}

\textit{Midkiff} therefore signaled a powerful reinforcement of \textit{Berman}, while plunging judicial scrutiny of the exercise of eminent domain to a new low. While \textit{Midkiff} explicitly stated that the practice of taking private property from A and transferring it to B for B's sole use and benefit would be forbidden by the Constitution, the Court nevertheless held in that case that a State may transfer property from A to B when B is not a "particular class of identifiable individuals."\textsuperscript{75} The Court found that this taking, essentially a transfer from private individual to private individual, was in and of itself a public benefit.\textsuperscript{76} The benefit of redistribution in this case, though there was no actual public use, was sufficient to meet the Court's definition of public purpose.\textsuperscript{77} If \textit{Midkiff} is read broadly, we see the "public use" clause lose meaning almost to the point of eliminating it as a limitation on the exercise of eminent domain.\textsuperscript{78}

On the other hand, a narrower reading of \textit{Midkiff} might suggest that the case should be limited to its facts. Under this understanding, that eminent domain effectively transferred property from one private entity to another should be of little importance in the analysis. Of greater importance, and the point on which the Court seized, was the public benefit of correcting an ineffective market based on inflated land prices.\textsuperscript{79} The benefit of land redistribution in this case, though there was no actual use by the public, was sufficient to meet the Court's definition of public purpose.\textsuperscript{80}

If one accepts the narrow reading of \textit{Midkiff} as a unique situation not found in other parts of the United States, the result is nonetheless

\textsuperscript{74} The Court found that the Court of Appeals read the "public use" jurisprudence too narrowly in requiring that the government possess and use the property at some point prior to transferring it to another private individual. \textit{Id.} at 243. The Court held that the taking and the transfer themselves were a valid public purpose and, therefore, the absence of government possession did not hinder a finding of valid public use: "[G]overnment does not itself have to use property to legitimate the taking; it is only the taking's purpose, and not its mechanics, that must pass scrutiny under the Public Use Clause." \textit{Id.} at 244. In addition, the Court found that the Court of Appeals had erred in applying more rigorous judicial scrutiny to determinations of a state legislature than it would have applied to determinations of the U.S. Congress. \textit{Id.}

\textsuperscript{75} \textit{Id.} at 244. \textit{But see} Calder \textit{v. Bull}, 3 U.S. 386, 388 (1798) ("[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 . . . .") (emphasis deleted).

\textsuperscript{76} \textit{Midkiff}, 467 U.S. at 244.

\textsuperscript{77} \textit{Id.}


\textsuperscript{79} \textit{Midkiff}, 467 U.S. at 243.

\textsuperscript{80} \textit{Id.} at 245.
problematic in certain ways. The Court noted the market correction reasoning of the Hawaii legislature as a legitimate public purpose, yet it failed to limit its holding in the case. Instead, *Midkiff* set a dangerous precedent that approved the transfer of property from one private entity to another by way of the Takings Clause. While neglecting to tackle its future implications, the *Midkiff* ruling further lowered the limitations placed on the exercise of eminent domain by relaxing the public use standard enunciated in the Fifth Amendment of the Constitution.

**VI. Kelo v. City of New London**

While state courts continued to struggle with finding a cohesive and predictable "public use" analysis, the Supreme Court finally breached its silence on the subject in 2005 with *Kelo v. City of New London*. The city of New London, Connecticut had seen better days in the past as a whaling community and manufacturing center, but it fell on hard times as those industries faltered. Steady economic decline in the city finally led a state agency in 1990 to declare New London a "distressed municipality." To address the problem, New London revived the New London Development Corporation (NLDC), a private nonprofit entity earlier created to facilitate economic development. The Fort Trumbull area of the city was particularly affected by the hard times, but it received a windfall in 1998 when pharmaceutical giant Pfizer, Inc. announced plans to build a new research facility adjacent to the neighborhood. Seizing the opportunity, the NLDC worked quickly to design a development plan for Fort Trumbull that would create an attractive mixed use waterfront area, including office space,

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81 *Id.*
82 *Id.* at 243–44.
83 Of particular note is the Poletown/Hathcock saga, played out in the Michigan Supreme Court. In *Poletown Neighborhood Council v. City of Detroit*, 304 N.W.2d 455 (Mich. 1981), the Michigan court adopted a broad view of the "public use" requirement and upheld an eminent domain action acquiring a large swath of an historic Polish neighborhood for an immediate transfer to General Motors Corp. There, the court held that the new GM plant would provide jobs and an overall economic boost to the city, a "clear and significant" public benefit. *Id.* at 459. After twenty years of controversy, the Michigan Supreme Court overruled *Poletown* in *County of Wayne v. Hathcock*, 684 N.W.2d 765 (Mich. 2004). *Hathcock* presented very similar facts to those in *Poletown*: an eminent domain action was used to acquire land for the construction of a business and technology park. *Id.* at 769. The Michigan court, however, drastically changed course from its *Poletown* precedent and found that the park would serve a primary benefit to a private entity. *Id.* at 786. The action, therefore, did not satisfy the "public use" requirement of Michigan's constitution. *Id.* at 786–87.
84 *Kelo*, 545 U.S. at 469.
85 *Id.* at 473.
86 *Id.*
87 *Id.*
restaurants, shopping, a renovated marina and pedestrian riverwalk as well as other recreational opportunities. The properties at issue in this case, though not blighted or otherwise in poor condition, were condemned by the city to allow the revitalization to go according to plan. Among the petitioners faced with losing their homes was Wilhelmina Dery, who had been born in her Fort Trumbull house in 1918 and had lived there her entire life. Mrs. Dery's husband moved into the house when they married in 1946, and their son lived next door in a house that was given to him as a wedding present. In all, nine petitioners commenced the action, alleging that the taking would violate the "public use" restriction of the Fifth Amendment.

In a five-to-four decision, the U.S. Supreme Court majority found in favor of the City of New London. Justice Stevens, writing for the majority, began the opinion by discussing two hypothetical situations, which represent the bounds of takings clause jurisprudence. First, he noted a government clearly may not, "take the property of A for the sole purpose of transferring it to another private party B, even though A is paid just compensation." However, a government is completely justified in transferring property from one private party to another as long as "use by the public" (such as a railroad) is the purpose of the taking. Although these two propositions are clear, Stevens found that the situation at issue fell somewhere in the muddy, more difficult middle.

Justice Stevens continued the opinion by noting historical handling of Takings Clause challenges, particularly that courts in the mid-19th century interpreted the "public use" clause narrowly to mean "use by the public." He quickly disposed of this test though, claiming that it was difficult to

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88 Id. at 474.
89 Id. at 475.
90 Id.
91 Id. at 494–95 (O'Connor, J., dissenting). To add insult to injury, eleven of the fifteen condemned properties were within "Parcel 4-A," which had been designated as parking and support for the nearby marina. Id. at 474. Essentially, the homes at issue would be torn down and replaced not by a sleek, modern marina facility or high traffic shopping mall, but by a parking lot. The New London Superior Court originally granted a permanent restraining order disallowing the taking of these properties, but the U.S. Supreme Court eventually overturned the order. Id. at 475–76.
92 Id. at 475.
93 Id. at 490.
94 Id. at 477.
95 Id.
96 Id.
97 Id. at 478–79.
98 Id. at 479 n.7 (citing Dayton Gold & Silver Mining Co. v. Seawell, 11 Nev. 394, 410 (1876)).
administer and, "impractical given the diverse and always evolving needs of society." Instead, Stevens found that the central question was whether the taking by New London achieved a "public purpose." In his analysis, Stevens noted the broad deference given to the legislative branch in both Berman and Midkiff, and found that, "[f]or more than a century, our public use jurisprudence has wisely eschewed rigid formulas and intrusive scrutiny in favor of affording legislatures broad latitude in determining what public needs justify the use of the takings power." Finding that the city used a carefully formulated and comprehensive plan, thorough deliberation in its proceedings, and was striving to provide appreciable economic benefits to the community, Stevens indicated that deferential review of the legislature's actions was proper. Under this approach, the Court held that the plan unquestionably served a public purpose and therefore met the "public use" requirement of the Fifth Amendment.

The Court, in making its finding, addressed arguments made by the petitioners. First, petitioners argued that economic development by itself did not constitute a public purpose. The Court noted that promoting economic development has traditionally been an accepted function of government. Again citing to Berman and Midkiff, Stevens held that "there is no basis for exempting economic development from our traditionally broad understanding of public purpose." Second, petitioners argued that using eminent domain for economic development would destroy any distinction between public and private takings. In response, the Court cited Berman, noting that property transfer from private parties to private developers could indeed serve a public purpose and, in fact, that public purpose may be better accomplished by private parties rather than by the government itself. The development plan in this case was not adopted "to benefit a particular class of identifiable individuals." Therefore, deference to the legislature again led the court to find that the taking had a public purpose. By relying on over a century of case law, the Kelo Court expanded the definition of public use to

99 Id. at 479.
100 Id. at 480.
101 Id. at 483.
102 Id. at 489.
103 Id. at 490.
104 Id. at 484.
105 Id.
106 Id. at 485.
107 Id.
108 Id. at 485–86 (citing Berman, 348 U.S. at 33).
109 Id. at 478 (citing Midkiff, 467 U.S. at 245).
include takings that provide any sort of indirect economic benefit to the public.

To reach the necessary five votes, the majority relied on the cautious support of Justice Kennedy, who also wrote a concurring opinion. As the important fifth vote, his caveats arguably hold significance in the overall determination of the case. In his concurrence, Kennedy focused on the issue of clear benefit to particular private parties. He argued for a stronger standard of review than that announced in Berman and Midkiff in cases where there was a risk of "undetected, impermissible favoritism." In his view, the present case offered no signs of impermissible favoritism. In coming to this conclusion, he found it particularly noteworthy that the identities of most of the private beneficiaries of the City's plan were unknown at the time that it was formulated. Thus, while ultimately agreeing with the majority, Kennedy warned of the possibility of abuses by private interests of eminent domain powers that could be accomplished under the current interpretation of public use.

Justice O'Connor, joined by Chief Justice Rehnquist and Justices Scalia and Thomas, vigorously dissented, arguing that the majority opinion effectively reduced the public use requirement included in the Fifth Amendment to a phrase devoid of meaning. O'Connor argued that the majority's analysis "wash[ed] out the distinction between private and public use of property — and thereby effectively delete[d] the words 'or public use' from the Takings Clause of the Fifth Amendment." O'Connor argued instead that the "public use" clause imposes a limitation on the Takings Clause, which necessarily embodies the concepts of fairness and justice. While agreeing with the majority that the public purpose standard was acceptable as laid out in Berman and Midkiff, O'Connor found the situation in Kelo to be distinguishable. In those cases, the taking itself served a public purpose in that it eliminated the previous harmful use of the property: "Because each taking directly achieved a public benefit, it did not matter that

110 Id. at 490–93 (Kennedy, J., concurring).
111 Id. at 491 (Kennedy, J., concurring).
112 Id. at 493 (Kennedy, J., concurring).
113 Id.
114 Id.
115 Id. at 494 (O'Connor, J., dissenting).
116 Id.
117 Id.
119 Id. at 498 (O'Connor, J., dissenting).
the property was turned over to private use.\textsuperscript{120} In \textit{Kelo}, however, the condemned property was well-maintained and did not pose any sort of social harm.\textsuperscript{121}

O'Connor also argued that the police power and public use are not necessarily one and the same; a public use must be found independently.\textsuperscript{122} In \textit{Berman} and \textit{Midkiff}, use of the police power was legitimate because the takings themselves were for a public purpose, as discussed above.\textsuperscript{123} But according to Justice O'Connor, in \textit{Kelo}, while the government's actions may have fallen within its police power, that alone did not mean that the actions were for a public purpose.\textsuperscript{124} Because the taking provided private benefit to the transferee and only incidental, or "indirect," public benefit, it can not be held that the public use requirement was met.\textsuperscript{125}

The \textit{Kelo} verdict was understandably met with vast criticism and public outcry.\textsuperscript{126} The \textit{Kelo} opinion was carefully crafted to read as though it was a logical outcome that followed easily from a long line of recent case law, not as the culmination of a snowballing course of misinterpretation. The broad legislative deference granted in \textit{Kelo} was just as apparent in \textit{Berman} and \textit{Midkiff}.\textsuperscript{127} The Court found in those cases that a transfer from one private party to another in eminent domain takings fell within the scope of a state's police power and the "public use" clause of the Fifth Amendment.\textsuperscript{128} Thus, in allowing broad deference to a legislature to determine that a public purpose is met and to effect transfer to a private

\begin{footnotesize}
\begin{enumerate}
\item[120] \textit{Id.} at 500 (O'Connor, J., dissenting) (emphasis in original).
\item[121] \textit{Id.}
\item[122] \textit{Id.} at 501–02 (O'Connor, J., dissenting).
\item[123] \textit{Id.} at 501 (O'Connor, J., dissenting).
\item[124] \textit{Id.} at 501–02 (O'Connor, J., dissenting).
\item[125] \textit{Id.} (O'Connor, J., dissenting). Justice Thomas wrote a separate dissent that focused on the original intent behind the Takings Clause of the Fifth Amendment. \textit{Id.} at 505–06 (Thomas, J., dissenting). Referring to numerous sources from the 18th and 19th centuries, he argued that the "public use" clause was intended to serve as a limitation on the practice of eminent domain and current interpretation ignores this limit. \textit{Id.} at 506 (Thomas, J., dissenting). Going further, Justice Thomas argued that recent case law, including \textit{Berman} and \textit{Midkiff}, erred by equating eminent domain with the public power and by giving such broad deference to legislative determinations. \textit{Id.} at 519 (Thomas, J., dissenting).
\item[126] \textit{See} Kenneth R. Harney, \textit{Court Ruling Leaves Poor at Greatest Risk}, WASH. POST, July 2, 2005, at F1, available at http://www.washingtonpost.com/wpdyn/content/article/2005/07/01/ AR2005070100990.html (asserting that property rights are now at greater risk and encouraging citizens to fight the ruling at the local and state levels); \textit{see also} Hands Off Our Homes, THE ECONOMIST, Aug. 18, 2005 (discussing possible far-reaching implications of \textit{Kelo}).
\item[127] \textit{See Midkiff}, 467 U.S. at 236 (deciding the legislation was unambiguous so the district court did not abuse its discretion by not abstaining from the exercise of its jurisdiction); \textit{see also} \textit{Berman}, 348 U.S. at 31 (establishing the legislature, not the judiciary, declares what the public needs).
\item[128] \textit{See Berman}, 348 U.S. at 32 (establishing that Congress has the power of eminent domain takings because they have the duties of a state's policing power in the District of Columbia); \textit{see also} \textit{Midkiff}, 467 U.S. at 240 (ruling the "public use" requirement is coterminous with the scope of a sovereign's police power).
\end{enumerate}
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party, the Court here did nothing new. However, the *Kelo* ruling is novel and troubling in its expansion of what constitutes a public purpose.

In *Berman*, the Court was faced with a situation where the neighborhood at issue suffered from extreme poverty, conditions of blight and numerous public health and safety hazards.\(^{129}\) The taking was necessary to ameliorate the poor conditions and a direct public benefit accrued with the taking.\(^{130}\) In *Midkiff*, a direct public benefit was achieved by the transfer itself since the existing harm, the land oligopoly, would then cease.\(^ {131}\) As discussed above, the *Kelo* taking achieved no public purpose in and of itself. It was necessary to defer to the legislature’s judgment that some public benefit would occur at some point in the future, after direct private benefit (to the developers) had already been achieved. That this benefit be purely economic in scope would be sufficient to withstand the Court’s scrutiny.

*Kelo* therefore moves beyond earlier precedent and expands "public use" to include any future indirect economic benefit to the community.\(^ {132}\) Application is but one of the numerous problems that arise. By expanding the "public use" concept to encompass such a boundless and vague body of activity, the Court gives lower courts no effective test or method by which to judge future challenges to eminent domain exercise. By continuing down this slippery slope of "public use" expansion, the Court offers us very little indication of any limit, short of echoing the standard refrain that takings for purely private benefit are invalid.

The *Kelo* verdict also further deteriorates property rights to a position of marked inferiority to the other "fundamental" rights of life and liberty noted in the Fifth Amendment.\(^ {133}\) While property rights had previously been under constant threat of a government taking for public use, *Kelo* increases the threat by allowing gang attacks by local governments and private developers seeking increased tax revenue, revitalized downtown areas and higher profits.

\(^{129}\) *See Berman*, 348 U.S. at 27 (explaining that the Act being challenged was meant to protect the public from substandard housing and blighted areas).

\(^{130}\) *Id.* at 29.

\(^{131}\) *Midkiff*, 467 U.S. at 245.

\(^{132}\) *See Kelo*, 545 U.S. at 477–84 (rejecting the narrow test for "public use" and accepting economic development in the future as a legitimate "public use" purpose in legislation for eminent domain takings).

\(^{133}\) "No person . . . shall be deprived of life, liberty, or property without due process of the law . . . ." U.S. Const. amend. V. In her dissent, Justice O’Connor notes that securing the right to property is one of the "great objects of government," which acknowledges the lowered position of property rights in the post-Lochner era while still giving them significant strength. *Kelo*, 545 U.S. at 496 (O’Connor, J., dissenting) (quoting MAX FARRAND, RECORDS OF THE FEDERAL CONVENTION OF 1787, 302 (1934)).
Finally, *Kelo* exacerbates the problems of the poor and racial minorities by tipping the balance of power further towards rich private developers. In the urban renewal craze, the spoils will disproportionately fall to wealthy development interests, the loss to the poor minorities. Although there are additional critiques of the *Kelo* decision,\(^{134}\) it is sufficient here to note that very few Federal limitations on the eminent domain power now exist.

**VII. Examining the Implications by Focusing on Post-Katrina New Orleans**

Before continuing the discussion of where the recent eminent domain jurisprudence leaves us, it may be helpful to first lay out a situation which will demonstrate some of the most troubling implications of the recent line of cases. This section focuses on rebuilding efforts in New Orleans as it recovers from the disastrous flooding caused by Hurricane Katrina. With many abandoned or vacant properties still languishing in neighborhoods all over the city, urban redevelopment is an issue of extreme importance. As part of the redevelopment process, local and state officials must attempt to balance two opposing voices: one arguing for the protection of property rights so that those who desire to rebuild their own homes may do so as personal resources allow, and the other claiming that certain rights of the few must be sacrificed in favor of immediate progress so that New Orleans as a whole can successfully rebuild.

In response to *Kelo*, Louisiana voters passed a constitutional amendment ("Amendment No. 5") that forbids use of eminent domain when the condemned property would be immediately transferred to private hands.\(^{135}\) This restriction on local and state expropriation powers should serve to assuage some of the fears residents have of losing their homes in redevelopment schemes. Indeed, some proponents of the measure may argue that eminent domain can no longer be abused in Louisiana. However, Amendment No. 5 is by no means complete protection. First, it has no power to limit federal expropriation powers. Thus, federal agencies such as the Department of Housing and Urban Development (HUD) and the Housing

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\(^{135}\) Act of Sept. 30, 2006, No. 851, § 1, 2006 La. Sess. Law [hereinafter Amendment No. 5] available at http://www.legis.state.la.us/bilddata/streamdocument.asp?id=407125. In addition to disallowing eminent domain actions that would directly transfer property to private entities, Amendment No. 5 explicitly states that economic development, enhancement of tax revenue and incidental benefit to the public shall not be considered a public purpose. *Id.*
Authority of New Orleans (HANO, under federal control since 2002) have free rein to use eminent domain under the expansive *Kelo* standard.\(^{136}\) Second, laws are not drafted without loopholes, and Amendment No. 5 contains provisions which could be manipulated by local governments if they felt compelled to do so.\(^{137}\) Therefore, the following discussion of the implications of *Kelo* in post-Katrina New Orleans is indeed relevant.\(^{138}\) One can see that New Orleans remains an area of concern for abuse of eminent domain powers despite efforts to protect private property owners attempting to rebuild.

This section begins with a brief description of the events surrounding Hurricane Katrina, the subsequent flooding in New Orleans, and current rebuilding efforts. Following that recap, the section continues with a plausible analysis of a Takings Clause challenge to an eminent domain action with application of the judicial framework set forth in *Kelo*. Through that analysis, one can see problems both with the "public use" concept and the "just compensation" concept of the Takings Clause.

### A. Present Situation, in brief

In late August, 2005, Hurricane Katrina formed around the Bahamas and grew to be a raging category 5 storm, the sixth-strongest Atlantic hurricane ever recorded and the third-strongest hurricane to make landfall on U.S. soil.\(^{139}\) By the time the storm barreled into the Gulf Coast near the

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\(^{136}\) HANO particularly has been active in post-Katrina New Orleans. The agency has condemned (and planned demolition of) much of New Orleans' public housing. Gwen Filosa, *Demolition in Developments' Destiny, HANO Says*, NEW ORLEANS TIMES-PICAYUNE, Oct. 18, 2006 at Nat'l 1. In replacing what was high-density, low-income public housing, it is not inconceivable that HANO would attempt to build new public housing in other neighborhoods, possibly gaining the property through the use of eminent domain.

\(^{137}\) Amendment No. 5 allows for the expropriation and removal of property that poses a threat to public health or safety. Act of Sept. 30, 2006, No. 851, § 1, 2006 La. Sess. Law. The New Orleans Redevelopment Agency (NORA) has publicly stated that it hopes the "public safety" provision will allow for leeway in allowing it to use expropriation powers. Frank Donze, *Low-Profile Agency Gains Blight-Bust Powers*, NEW ORLEANS TIMES-PICAYUNE, Oct. 11, 2006 at Nat'l 1. Thus, non-blighted homes could be expropriated under the theory that a neighborhood as a whole poses a public safety threat. A second loophole can be seen in the "continuous public ownership" provision of Amendment No. 5. Act of Sept. 30, 2006, No. 851, § 1, 2006 La. Sess. Law. A local government entity could expropriate homes for a period of "continuous public ownership" of only one or two years, then transfer the property to private developers.

\(^{138}\) See *Kelo*, 545 U.S. at 484 (ruling economic development is a legitimate "public use" purpose for eminent domain takings).

Louisiana-Mississippi border, it had diminished in strength to a category 3 storm with approximately 125 mile per hour winds.\textsuperscript{140} Coastal Mississippi saw perhaps the worst of the hurricane damage, with sustained 120 mile per hour winds, 8-10 inches of rain and twenty-eight foot storm surges that penetrated inland up to six miles in many areas.\textsuperscript{141} The state registered 238 people dead, many more missing and billions of dollars in damages.\textsuperscript{142}

In Louisiana, especially, the greater New Orleans area, the damage was slower. It seeped in with the flood waters, working slowly and painfully, but left far greater destruction. New Orleans itself endured a hurricane of only category 1 or 2 strength, but storm surges caused widespread flooding and, consequently, much more damage. The Mississippi River Gulf Outlet breached in several different places, flooding much of New Orleans East, Saint Bernard Parish and the East Bank of Plaquemines Parish.\textsuperscript{143} Within the city proper, storm surges caused levees to fail along the Industrial Canal, the London Avenue Canal and the 17th Street Canal.\textsuperscript{144} These breaches caused the majority of the city to flood. Despite Mayor Nagin calling for the City’s first ever mandatory evacuation on the morning of the 28th, the effort was disorganized and an exercise in self-help.\textsuperscript{145} Those with sufficient resources and desire left, the rest stayed.

After the floodwaters receded, a massive clean-up and rebuilding effort lay, and still lies, ahead. Eighty percent of New Orleans had been under water and it took until September 20 for authorities to fully pump the city dry. Moreover, just three days later, the storm surge from Hurricane Rita caused a new breach in the hastily-repaired Industrial Canal levee that led to a second bout of significant flooding.\textsuperscript{146} Swaths of neighborhoods near where the levees had breached, particularly in Lakeview and the Lower Ninth Ward, were almost obliterated. Some homes were literally decimated by the blasts of water; others were plucked from their foundations and deposited blocks away in the middle of streets and on top of cars, boats or

\textsuperscript{140} NOAA, supra note 139, at 4.
\textsuperscript{141} Id. at 4, 8.
\textsuperscript{142} Id. at 3.
\textsuperscript{144} NOAA, supra note 139, at 4.
\textsuperscript{145} See BRINKLEY, supra note 143, at 187–98.
\textsuperscript{146} NOAA, supra note 139, at 4.
other houses.\textsuperscript{147} Those who were a bit luckier faced the task of gutting homes beset with mold, rot and other decomposition resulting from the time underwater followed by weeks, even months, of inaction and neglect. For the wealthier displaced citizens, this chore meant a huge and emotional expenditure of time, money and patience. For the many poor citizens, who constituted the vast majority of the flooded areas,\textsuperscript{148} the task was like trying to climb Mount Everest. After being displaced for months in other areas of the country and trying to get jobs and make ends meet there, securing enough savings from which to live and rebuild or gut a house obviously represents a near-impossible hurdle.

While some of these poorer residents had homeowner’s insurance, many did not have the resources to also invest in flood insurance. After the storm, insurance companies often refused to honor claims made on homeowner’s insurance, asserting that they would only cover wind damage and not flood damage.\textsuperscript{149} Even when payouts were made, they were often a fraction of what homes were worth or what repairs would cost.\textsuperscript{150} The city, meanwhile, bravely pressed on in its own rebuilding efforts by restoring water and electricity in most areas, and attempting to resurrect a city that many thought should be abandoned and left to the mercy of nature. In this effort, it was imperative that the local government restore order and remove public health and safety hazards to its best ability. City Ordinance No. 22356 requires that houses be gutted and dangerous mold spores be removed by certain dates, depending on what zone of the city houses occupy.\textsuperscript{151} In addition, the city has a valid interest in improving abandoned areas of the city which facilitate illicit behavior, drug transactions and violence. To this end, the use of eminent domain can be a valuable tool in securing vast swaths of land for the government as part of its comprehensive rebuilding plan. Yet, do homeowners who have gutted their homes, removed public health and

\textsuperscript{147} Gwen Filosa, \textit{The Lower Ninth Ward Lies in Ruins}, \textit{NEW ORLEANS TIMES-PICAYUNE}, Aug. 25, 2006, at Nat’l 1 (describing the lack of progress during the first year in rebuilding areas of New Orleans that were hardest hit).

\textsuperscript{148} Of the flooded area in New Orleans, 80% of the residents were non-white and the average annual household income in these areas was just $38,300. \textit{THE BROOKINGS INSTITUTION, NEW ORLEANS AFTER THE STORM: LESSONS FROM THE PAST, A PLAN FOR THE FUTURE 16} (2005), available at http://www.brookings.edu/metro/pubs/20051012_NewOrleans.htm.

\textsuperscript{149} See Jeffrey Meitrodt and Rebecca Mowbray, \textit{After Katrina, Pundits Criticized New Orleans, Claiming Too Many Residents Had No Flood Insurance}, \textit{NEW ORLEANS TIMES-PICAYUNE}, Mar. 19, 2006, at Nat’l 1 (describing insurers’ stance on refusal to pay money for claims made under homeowners’ insurance policies).

\textsuperscript{150} \textit{Id.}

safety dangers from their property, and shown the intent to reestablish themselves have a choice in the matter?

B. Applying Kelo

The line of eminent domain cases discussed earlier has established the principle of giving broad deference to local government in its determinations of whether the use of eminent domain is proper and justified. In *Kelo*, the Court stressed the scope and comprehensiveness of the development plan in holding that only narrow judicial review was proper. The local government in New Orleans would undoubtedly receive the same deference if a comprehensive redevelopment plan were subject to court review.

The high level of national media attention in the aftermath of Katrina has meant that nearly every decision in the rebuilding process is closely scrutinized. City officials have gone to great lengths to ensure that proposals allow for community input and criticism from local citizens.

To address the enormous task of formulating a rebuilding strategy, Mayor Nagin formed the Bring New Orleans Back Commission, appointing prominent members of New Orleans society to serve as members. The Commission brought in outside experts, gathered volumes of information and made comprehensive, deliberated, and specific recommendations to the Mayor in the form of lengthy reports. In addition to that effort, the City Council paid $2.9 million to hire professional planners, who were tasked with delivering a broader and more detailed city-wide planning effort after the Commission’s report was widely criticized. Based on these assessments by urban planning experts, the government of New Orleans could decide to take various houses, or blocks of houses, and in turn transfer them to developers with plans to build new condominiums. With this amount of deliberation, planning, and public exposure, it is reasonable to

152 See *Berman*, 348 U.S. at 32 (stating that the role of judicial review of legislative determination of valid purpose is narrow); *Midkiff*, 467 U.S. at 240–41 (noting that the Court will not substitute their judgment for that of the legislature); *Kelo*, 545 U.S. at 482 (noting that the Court will afford the legislature "broad latitude" in deciding public purpose).

153 *Kelo*, 545 U.S. at 482.

154 Mayor Nagin has held numerous town meetings that allow for local citizens to voice concerns and frustrations with the government’s actions. See James Varney, *Town Meeting Style Curbed, Mayor’s Sessions to Get Some Structure*, NEW ORLEANS TIMES-PICAYUNE, Dec. 17, 2005, at Metro 1.

155 See Frank Donze, *Rebuild, but at Your Own Risk, Nagin Says; Recommendations from BNOB Come with Warnings and Worries*, NEW ORLEANS TIMES-PICAYUNE, Mar. 20, 2006, at Nat’l 1 (noting the release of the Commission’s final report on recovery strategy and Mayor Nagin’s reactions).

assume a court would find an eminent domain decision not to be irrational, and therefore deserving of broad deference.

C. Public Use

Once a Court decides to give a legislative decision broad deference, the constitutional analysis turns on whether the taking and subsequent redevelopment serves a "public purpose." Since the *Kelo* decision, this standard could be met by a redevelopment plan that includes any indirect economic benefit to the community. Many neighborhoods in New Orleans could be at risk of being lost through use of eminent domain. As an example, the Lower Ninth Ward in eastern New Orleans sustained perhaps the most Katrina damage due to a breach in the Industrial Canal. While many houses sustained irreparable damage (as described above), the neighborhood is taking the slow steps necessary to rebuild. Many houses have been demolished, leaving empty lots, but others have been gutted and residents are beginning their lives anew in the neighborhood. While some properties have been abandoned since the storm, making them public health and safety risks, many others have been rebuilt to the point where they could not be considered blighted. These non-blighted houses, after so much work was done to rebuild them after the storm, could be lost through eminent domain.

A plan to replace this historic residential neighborhood with new condominiums would undoubtedly meet the public purpose standard expressed in *Kelo*. High-end condominiums would provide badly needed housing for New Orleans, increase the city’s property tax revenues, and, if a successful venture, give the developers increased profits which would ‘trickle down’ to other levels of society, an indirect economic benefit. As was the case with New London in *Kelo*, the city of New Orleans is in need of

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157 *Kelo*, 545 U.S at 480.

158 Id. at 483–84. If one subscribes to Kennedy’s view as noted in his concurrence, a court would also review the plan to assure against any impermissible favoritism towards particular private parties. Id. at 493.

159 See Gwen Filosa, *The Lower 9th Ward Lies in Ruins*, NEW ORLEANS TIMES-PICAYUNE, Aug. 25, 2006 at Nat’l 1 (describing disastrous conditions nearly one year after Hurricane Katrina and efforts by some residents to rebuild).

160 Id.

"economic rejuvenation," and a newly constructed condominium could reasonably factor into that equation. Because the new condos could serve a "public purpose," a plan to expropriate the Lower Ninth Ward neighborhood, in whole or in part, would be deemed a constitutionally valid taking.

D. Just Compensation

An additional troubling issue involved in a situation such as the one described above involves the second prong of the Takings Clause: just compensation. The Court has generally held that using the fair market value at the time of the taking is the correct method of determining just compensation. In a neighborhood as devastated as the Lower Ninth Ward, the value of the homes which have been rebuilt would still be nowhere near their pre-Katrina values. The lack of a vibrant community feel post-Katrina, the neighborhood's below-sea level elevation, and the reasonable fear of a future levee breach are all factors contributing to significantly depressed real estate values. In those cases where the houses suffered irreparable damage or were completely destroyed, the fair market value of the remaining property is next to nothing. Even in cases where the houses were not so severely damaged and costly repairs were made, the fair market value of

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162 See Kelo, 545 U.S. at 483–84 (holding that the City's program of economic rejuvenation unquestionably served a public purpose).

163 See, e.g., Kirby Forest Indus. v. United States, 467 U.S. 1, 10 (1984) ("Just compensation, 'we have held, means in most cases the fair market value of the property on the date it is appropriated.'"); United States v. Va. Elec. & Power Co., 365 U.S. 624, 633 (1961) (citing United States v. Miller, 317 U.S. 369, 374 (1943)) ("The guiding principle of just compensation is reimbursement to the owner for the property interest taken . . . . In many cases this principle can readily be served by the ascertainment of fair market value—'what a willing buyer would pay in cash to a willing seller.'"). But see United States v. Commodities Trading Corp., 339 U.S. 121, 123 (1950) ("[W]hen market value has been too difficult to find, or when its application would result in manifest injustice to owner or public, courts have fashioned and applied other standards . . . . [T]he dominant consideration always remains the same: What compensation is 'just' both to an owner whose property is taken and to the public that must pay the bill?") (footnote omitted).

164 See Gordon Russell, Uptown Assessments to Rocket Higher: Property Owners Get Near 40% Increase, NEW ORLEANS TIMES-PICAYUNE, Oct. 28, 2006 at Metro 1 (noting that property values in areas above sea level have increased while values of homes below sea level have decreased).

165 In fact, one could envision a situation where a property actually had a net negative value. As part of its redevelopment plan, the city could itself perform the task of repairing a house to the point of no longer constituting a health or safety hazard, or contract for a private company to perform this service. Coupling a low fair market value for the lot and an expensive bill for bringing the property into compliance with City Ordinance No. 22356, it is conceivable that the net value would actually be a negative number. Thus, an eminent domain action could actually result in a homeowner losing title to his property and owing additional money to the city.
such property, in the shadow of an unreliable levee, would also be much lower as a result of the storm. 166

Yet, it would be no surprise if the Court were to uphold an eminent domain action that awarded only the minimum fair market value of property in rebuilding neighborhoods in New Orleans. The Court has hinted that using fair market value to determine just compensation is not a controlling standard, and other methods may be used if fair market value is not easily determined, or its application would result in "manifest injustice." 167 The fact that the Army Corps of Engineers has accepted responsibility for the failure of the levees indicates that a government entity was at least partially to blame for the situation in which thousands of New Orleanians currently find themselves. 168 By mistakenly trusting the government, many citizens are currently homeless or left with only the shells of what used to be their homes. This fact suggests that just compensation at current fair market value would, in fact, be a manifest injustice. The Court’s trend towards extreme deference to legislative decisions made at the local, state and federal levels of government implies, however, that the current Court would uphold an eminent domain action upon finding a valid public purpose, even if just compensation were limited to fair market value.

One can see that the protection offered by the Court in eminent domain actions has dwindled over the last fifty years. In fact, some now view the Takings Clause simply as a conditional "if-then" process. 169 If the government effects a transfer, then it must give just compensation. Viewing the clause this way voids any meaningful limiting principles contained within the "public purpose" phrase. As shown above, the Court has moved progressively towards this interpretation, expanding the definition of public

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166 As noted before, many homeowners did not have home insurance. Others who did have insurance were often given severely reduced payments on their claims due to insurance companies' determinations that homeowners insurance covered only hurricane damage, not flood damage. See Jeffrey Meitrodt & Rebecca Mowbray, After Katrina, Pundits Criticized New Orleans, Claiming Too Many Residents Had No Flood Insurance. In Fact, Few Communities were Better Covered, NEW ORLEANS TIMES-PICAYUNE, Mar. 19, 2006 at Nat'l I (stating that some insurers were paying nothing on homeowners' claims).


168 See John Schwartz, Army Builders Accept Blame Over Flooding, N.Y. TIMES, June 2, 2006, at A1 (describing admissions in a 6,000 page report released by the Army Corps of Engineers that the New Orleans levee system contained a chain of design and construction flaws).

169 Justice Kennedy has equated the Takings Clause of the Fifth Amendment to a conditional limitation. E. Enters. v. Apfel, 524 U.S. 498, 545 (1998) (Kennedy, J., concurring) ("The Clause operates as a conditional limitation, permitting the government to do what it wants so long as it pays the charge."). See also First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 482 U.S. 304, 314 (1987) (stating that the Takings Clause "does not prohibit the taking of private property, but instead places a condition on the exercise of that power").
use almost to a point where the words contain no meaning and impose no limit on government action. One need not look far to imagine a situation that illustrates the grave and unfair implications of such an expansive interpretation of the Takings Clause. Thousands of property owners in and around New Orleans could face the very real and troubling consequences of the current interpretation in the years to come. Therefore, if the Takings Clause no longer protects property owners against desperate, irrational and unfair government expropriation, we must locate protections elsewhere in the Constitution.

VIII. Equal Protection Analysis

Though many white New Orleans residents were affected by the flooding, the vast majority of flood-prone neighborhoods were inhabited by blacks. To be sure, historically white neighborhoods, such as Lakeview, sustained costly damage. However, these neighborhoods were home to families who generally had higher incomes than their flooded counterparts in majority-black areas of the city. With more financial resources available to them, many Lakeview residents were able to rebuild more quickly. In contrast, majority-black neighborhoods have suffered more from months of neglect due to insufficient resources to begin the rebuilding process. Given a slower rebuilding process in these areas, combined with a weaker political voice, it follows that these majority black neighborhoods would be more susceptible to an eminent domain action. In situations such as this,

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170 THE BROOKINGS INSTITUTION, NEW ORLEANS AFTER THE STORM: LESSONS FROM THE PAST, A PLAN FOR THE FUTURE 7 (2005), available at http://www.brookings.edu/metro/pubs/20051012_NeOrleans.htm. Specifically, the Lakeview neighborhood, only 6.3% non-white, had an average annual household income of $63,178, according to the 2000 census. In contrast, the average annual household income for blacks in the city was only $21,000. Id. For flooded areas in Orleans Parish that were a majority non-white, the average annual household income was $38,300. Id. at 16.

171 To be clear, many residents of the poorer neighborhoods in New Orleans have benefited from the generosity of volunteers working with organizations such as Common Ground and ACORN to assist in gutting houses and removing safety and health hazards. Though a clear sign of progress, these efforts are nowhere near comprehensive and thousands of residents are left to rely solely on whatever resources they may have. According to ACORN's website, the organization has assisted in gutting over 1,600 homes, yet thousands of homes remain on this one organization's waiting list alone.

the expropriation attempt may be challenged through the use of the Equal Protection Clause.

This section begins with the Equal Protection Clause, its constitutional roots, and the current judicial framework of analysis for claims made under the clause. The section continues with an exploration into the unfortunate and deep history of racial discrimination in New Orleans. This history, as well as some recent occurrences, fit well into the Arlington Heights factor analysis of inferring discriminatory intent by looking at the totality of the facts. Although Arlington Heights places a very high evidentiary burden on those bringing and equal protection claim, the analysis contained in this section sets forth a plausible argument that the use of eminent domain in some instances could have equal protection implications.

A. Current Law on Equal Protection

The Fourteenth Amendment states: "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws." Congress and the states originally adopted the Constitutional Amendment to prohibit states from continuing to discriminate against recently freed blacks following the Civil War. Although this provision does not explicitly apply to the federal government, the Court has construed the Fifth Amendment Due Process Clause as containing an equal protection component. Equal protection typically applies to discrimination against an identifiable class of individuals; however, the Court has held that equal protection challenges may also be brought by an individual, a "class of one."

The Court has developed the following test in assessing the merit of an equal protection claim based on race. In making a prima facie case, a plaintiff must show that: (1) the law has had a disproportionate impact on an

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173 U.S. CONST. amend. XIV.
174 San Mateo v. S. Pac. R.R. Co. (Railroad Tax Cases), 13 F. 722, 740 (C.C.D. Cal. 1882) (noting that the original purpose of the Fourteenth Amendment was to "protect the newly-made citizens of the African race in their freedom").
175 See, e.g., Washington, 426 U.S. at 239 ("[T]he Due Process Clause of the Fifth Amendment contains an equal protection component prohibiting the United States from invidiously discriminating between individuals or groups.").
identifiable group and, (2) lawmakers had discriminatory intent or purpose when passing the law. In other words, for the Court to apply heightened scrutiny when reviewing an equal protection challenge, the elements of disproportionate impact and discriminatory intent must both be present. Proving that a legislature or government body has intentionally discriminated can be a difficult task. Although facial discrimination has occurred in the past, the Court held in Washington v. Davis that "an invidious discriminatory purpose may often be inferred from the totality of the relevant facts . . . ." The "totality of the relevant facts" language is purposefully vague and essentially requires the Court to analyze a plaintiff’s assertions in their proper context and on a case-by-case basis. In Arlington Heights v. Metropolitan Housing Development Corp., the Court notes the following factors as evidentiary sources in determining intent: historical background of the situation and the law, specific sequence of events leading up to the challenged decision, departures from the normal procedural sequence, substantive departures in the decision-making process, and legislative history.

The Arlington Heights factors, though not all-inclusive, provide a framework through which a plaintiff can present evidence of discriminatory intent when making an equal protection claim. To be clear, the plaintiff carries a heavy evidentiary burden. However, the Court has upheld challenges to facially neutral laws when the context of their enactment indicates a discriminatory purpose and the law produces a discriminatory

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177 See Washington, 426 U.S. at 240 (holding that it is a basic equal protection principle that the invidious quality of a law challenged as racially discriminatory must be traced to a racially discriminatory purpose).
178 See Strauder v. West Virginia, 100 U.S. 303 (1879) (holding a West Virginia law limiting juries to adult white males to be an equal protection violation).
180 Arlington Heights, 429 U.S. at 252. Metropolitan Housing Development Corp. had contracted to purchase a tract of land in order to build racially integrated low and moderate income housing filed a suit alleging that local authorities’ refusal to change the tract from a single-family to a multi-family classification was a violation of the Constitution. The Court reasoned that discriminatory intent doesn’t have to be express or obvious on the face of the law, it can also be inferred from the relevant facts. The Court held however that racial discrimination need not be the sole basis for the law, but must be a motivating factor. In this case, the discriminatory intent was not sufficiently evidenced by racially disproportionate impact, historical background, specific prior events, departures from usual procedures, or contemporaneous statements of the decision makers involved. Id.
181 Id. at 267.
182 In Arlington Heights itself, the Court ultimately did not find that petitioners met their burden of showing discriminatory intent and the Village of Arlington Heights’ refusal to re-zone property to allow construction of low-income housing was upheld. Id. at 269.
In Rogers v. Lodge, for instance, the Court struck down an at-large county election system, holding that the system was being maintained for racially discriminatory purposes. The Court determined this by considering the proven disparate impact and the totality of the plaintiffs’ circumstantial evidence of intent, including a history of depressed socioeconomic status of blacks, exclusion from the political process, discriminatory use of public monies, and a failure of the political process to address the needs of the black community.

Once a plaintiff succeeds in presenting a prima facie claim under the Equal Protection Clause, the burden shifts to the state to rebut the claim. Essentially, the state must only show that, by a preponderance of the evidence, the same action would have been taken absent any intentionally discriminatory motive. If the state successfully rebuts the evidence against it, the Court’s analysis will proceed under mere rationality review; i.e., if the policy bears a rational relationship to any conceivable legitimate state interest, it is constitutional. If the state cannot meet its burden, the Court applies strict scrutiny to the government action, which if not always "fatal in fact" is more often than not so.

B. Equal Protection in New Orleans

We will continue with the hypothetical, but not implausible, situation of an eminent domain action for the condemnation of unblighted houses in the severely damaged Lower Ninth Ward neighborhood. To construct an equal protection argument, we must begin by showing that the taking would

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183 See Hunter v. Underwood, 471 U.S. 222 (1985) (striking down a provision in Alabama’s Constitution because its original enactment was motivated by discriminatory intent and the provision had had a racially discriminatory impact since its adoption).

184 Rogers v. Lodge, 458 U.S. 613 (1982) Rogers involved a challenge to an at-large election scheme for a large rural county in Georgia. Id. at 614. The Court found that the at-large system was being maintained for the invidious purpose of diluting the voting strength of the black population. Id. at 622. The Court based its reasoning on the fact that blacks were a substantial majority of the population in the county, yet a distinct minority of the registered voters. Id. at 623–24. In support of its holding, the Court noted that no black individual ever had been elected to the county commission. Id. In addition, blacks had been excluded from participating in the political process, in party affairs, and in primary elections. Id. at 625. The Court therefore held that an at-large election system was unconstitutional because there was sufficient proof of a discriminatory purpose behind the election system. Id. at 627.

185 See id. (affirming District Court’s findings that the at-large system was “maintained for invidious purposes”).

186 Id. at 624–26.

187 Adarand Constructors v. Pena, 515 U.S. 200, 237 (1995) (noting that many perceive an application of strict scrutiny to mean a law is automatically struck down, but that this is not always the case).
have a disparate impact on a protected class of people. Before the storm, the Lower Ninth Ward was an almost exclusively African American neighborhood, having a 99.5% non-white population. Indeed, more generally, the flooded areas of the city as a whole were 80% non-white.

Wealth distribution is also a concern, due to the fact that eminent domain actions often target low-income, minority urban neighborhoods. In New Orleans, the economic disparity between races closely parallels the economic differences between those living within a flood zone and those living outside of one. For example, in Orleans Parish the average income of inhabitants of flooded areas was only $38,263, compared to $55,300 for those living in areas not flooded. In addition, 84% of the city's poor population was black and almost all extreme-poverty neighborhoods in the city were predominately black. Of the forty-nine extreme poverty tracts existing in the city before the flood, thirty-eight of those tracts were flooded. Virtually all of the residents in those tracts were black.

Thus, while flooding in New Orleans was widespread, it disproportionately affected African Americans. Because the flooded areas were also predominantly low-income, residents need more time to rebuild, and will more likely become targets for the use of eminent domain. As the above statistics show, nearly any eminent domain action in a flooded area of New Orleans would disproportionately affect blacks, a group that triggers heightened scrutiny under equal protection analysis.

Having shown that a taking in such a neighborhood as the Lower Ninth Ward would have disparate impact on blacks, we move on to the difficult task of presenting evidence of discriminatory intent on the part of the government. As noted above, one of the factors considered in Arlington Heights is the historical background of the situation surrounding the eminent domain action. In the case of New Orleans, there is a lengthy history of


189 Id. at 17. It should be noted that this statistic accounts for only those citizens within the boundaries of the city proper. Other statistics may instead refer to the New Orleans metropolitan area. According to the U.S. Census Bureau, this area includes a total of eight parishes: Jefferson, Plaquemines, St. Bernard, St. Charles, St. John the Baptist, St. Tammany, St. James and Orleans (of which the City of New Orleans is a part). U.S. Census Bureau, Census 2000. Also note that the Brookings Institution's definition of the metro area does not include St. James parish. Id. at 3.

190 See Pritchett, supra note 41 (noting that political and institutional elites use urban renewal programs, and eminent domain actions through which they are carried out, to "reduce minority populations and entrench racial segregation").


192 Id. at 6.

193 Id. at 17. The Brookings Report defines "extreme poverty tracts" to be areas where at least 40% of the population lives below the poverty line.
discrimination, with segregation become increasingly pronounced in recent
years.

Jean-Baptiste Le Moyne de Bienville founded New Orleans in 1718
as a part of the French empire in America.\textsuperscript{194} He chose the site because of its
position as a natural levee (an elevated piece of ground due to deposit of
river silt) near the mouth of the Mississippi. Its surroundings were desolate,
uninhabitable swamplands and nature therefore confined the city to a small
footprint.\textsuperscript{195} New Orleans occupied an extremely strategic position on the
Mississippi, governing trade into the interior of the new country while also
serving as a window both to Europe and Latin America. Despite its
fortuitous placement and status as a trade center, the city’s population did not
press its natural boundaries until the early twentieth century. The city began
to expand with A. Baldwin Wood’s invention in the 1920s of a heavy duty
pump capable of draining the swampland surrounding New Orleans.\textsuperscript{196}
Expansion occurred slowly at first, but finally exploded after the Second
World War.\textsuperscript{197} This expansion occurred mainly towards the Northwest
of New Orleans proper, upriver of the French Quarter and into Jefferson Parish.
The incoming residents were almost exclusively white.\textsuperscript{198}

Antebellum New Orleans was a slave society. Despite its inherent
differences from the rest of the South, it was, in fact, a Southern city.\textsuperscript{199} As
such, black families lived close to the white families for whom they worked.
Affluent whites lived along the larger boulevards, while the poor (but not
exclusively black) lived along the alleys and smaller streets between the
boulevards.\textsuperscript{200} Thus, while New Orleans had one of the highest proportions
of African American populations of any major U.S. city, it was also one of
the least segregated geographically.\textsuperscript{201} Yet as the population grew and the
economy changed, blacks were forced to live where they could. Initially,
this meant sparse and discontinuous settlement in the backswamps further

\textsuperscript{194} LEWIS, \textit{supra} note 172, at 37–38.

\textsuperscript{195} \textit{Id. at} 37. The natural levee that formed amid the swampland was in a bend of the Mississippi,
with high ground occupying a swath of land in a crescent shape, thus the nickname “Crescent City.”

\textsuperscript{196} \textit{Id. at} 65–66. In an ironic twist, it was the wood pump which Dutch engineers studied to help
drain some of the lowest lying areas of the Netherlands. After Katrina, many people pointed to the
Netherlands successful scheme as a model on which to base the design of a successful levee system in
New Orleans.

\textsuperscript{197} \textit{Id. at} 78–79.

\textsuperscript{198} \textit{Id. at} 66–67, 78–79.

\textsuperscript{199} Given New Orleans’ unique history as a French settlement and its isolation from British
colonial expansion, it maintained a defiant air of individuality. \textit{See} LEWIS, \textit{supra} note 172, at 15–16
(describing the unique aspects of New Orleans in comparison with the rest of the Southern United States).

\textsuperscript{200} \textit{Id. at} 50–51.

\textsuperscript{201} \textit{Id. at} 52.
from the natural levees, lands actually below sea level. As population grew, these settlements merged into one large "superghetto," what is now the shallow bowl of central city and mid-city.\textsuperscript{202}

Black occupation of these backswamp areas was not voluntary; other options simply did not exist. With real estate in the higher, older neighborhoods beyond the means of poor families, they were forced to look elsewhere. The Wood pump opened land upriver of the city, but mortgage companies maintained openly discriminatory lending practices which resulted in blacks essentially getting shut out of any opportunity to move upriver into the recently drained land in Jefferson Parish.\textsuperscript{203} In addition, the Federal Housing Agency (FHA), which insured long-term mortgages, advocated zoning and deed restrictions to bar racial minorities, and refused to provide financing in communities where minorities lived.\textsuperscript{204} Because of these FHA policies, developers and real estate agents simply refused to sell to African Americans.\textsuperscript{205} Although these practices have since been discontinued, they serve as evidence of the Federal government's intent to exclude blacks from these suburban New Orleans neighborhoods during the pivotal years of their initial development.

Federal public housing and infrastructure projects have also further inhibited black housing choices. In the 1930s and '40s, Orleans Parish and the federal Works Progress Administration combined to complete a huge and ambitious development known as Lakefront on Lake Pontchartrain, north of the old city.\textsuperscript{206} The development, acquired at enormous expense to the public, was originally planned to be made available for sale to both rich and poor.\textsuperscript{207} However, amid public outcry that there were consistent and blatant violations of the law during the auctioning process, the land ended up as one of the wealthiest, and whitest, areas of the metropolitan area.\textsuperscript{208}

The construction of new highways often occurs in areas where political opposition is weakest.\textsuperscript{209} Until very recently, blacks have not had proportionate representation in local government.\textsuperscript{210} As an example, the

\textsuperscript{202} Id. at 52.

\textsuperscript{203} Martha Mahoney, Law and Racial Geography: Public Housing and the Economy in New Orleans, 42 STAN. L. REV. 1251, 1274–75 (1990) (arguing that discriminatory lending practices were part of a systematic, government-organized policy of discrimination towards blacks).

\textsuperscript{204} Kenneth T. Jackson, CRABGRASS FRONTIER: THE SUBURBANIZATION OF THE UNITED STATES 207–08 (1985).

\textsuperscript{205} LEWIS, supra note 172, at 67.

\textsuperscript{206} Id. at 68–69.

\textsuperscript{207} Id. at 69. Indeed, Mayor Maestri went so far as to describe it the "poor man's project." Id.

\textsuperscript{208} Id.

\textsuperscript{209} Id. at 98.

\textsuperscript{210} See LEWIS, supra note 172, at 95 (noting that in 1970 blacks held only 3.6% of "Level I Leadership" positions while constituting 45% of the overall population of New Orleans).
Federal Highway Administration was forced to abandon its proposed "Riverfront Expressway," near the French Quarter due to intense political opposition from the affluent white. Yet, the department found it easy to run Interstate 10 right down North Claiborne Avenue, "converting the main street of New Orleans' biggest African American neighborhood from a broad, landscaped boulevard into a dingy, concrete cavern."

All of the above examples provide evidence of a history of discrimination against African Americans in a variety of facets related to housing. From the FHA's openly discriminatory practices in the early days of expansion into Jefferson Parish to the placement of highways such that the atmosphere of a nice black neighborhood is ruined, discrimination has been widespread. This evidence of historical discrimination should weigh heavily in favor of the plaintiff trying to prove discriminatory intent in a government action.

A second body of evidence considered by the Arlington Heights Court was the sequence of events leading to the challenged action and any departures from the normal procedural sequence. In the case of an eminent domain action for homes in the Lower Ninth Ward, there is ample evidence of the local government attempting to bypass the normal due process procedural protections. On December 28, 2005, residents and homeowners in the Lower Ninth Ward filed with the Civil District Court for the Parish of Orleans a Petition for Temporary Restraining Order and Preliminary and Permanent Injunctive and Declaratory Relief. Petitioners' Brief alleged that the Mayor of the City of New Orleans and his staff had developed a plan to demolish 2,500 homes in the city, totally in ex parte proceedings without consent of the owners, and absent any legal proceedings beforehand. Defendants in the action (the Mayor and City of New Orleans) did not deny the nature of the plan, and a consent judgment was

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211 Id. at 90.
212 Id. at 98. The placement of I-10 along N. Claiborne severely detracted from the value and the attractiveness of the historically black Tremé neighborhood. According to 2000 U.S. Census data, the Tremé/Lafitte area of New Orleans had become 95.1% black with an average household income of $19,479 and 56.9% of residents living in poverty. THE BROOKINGS INSTITUTION, NEW ORLEANS AFTER THE STORM: LESSONS FROM THE PAST, A PLAN FOR THE FUTURE 7 (2005).
213 See discussion, supra, pages 23–24.
216 Id. The fact that Mayor Nagin is also African-American does not immunize his actions from Equal Protection Clause scrutiny. See Castaneda v. Partida, 430 U.S. 482, 499 (1977) (rejecting the
reached whereby both parties agreed that no demolitions would occur until a scheduled hearing.\footnote{Consent Judgment, No. 2005-13471, Civil Dist. Ct. for Parish of Orleans (Dec. 28, 2005) (on file with author).}

This example alone is ample evidence of procedural abnormality. However, it gets worse. The day before the court hearing when the court-sanctioned agreement was to expire, the City prepared to begin demolition of homes in the Lower Ninth Ward, in clear violation of the agreement.\footnote{See Gwen Filosa, Gordon Russell, Bruce Eggler, Lower Ninth Ward Activists Chase Away Bulldozer Crew, NEW ORLEANS TIMES-PICAYUNE, Jan. 6, 2006 (describing the efforts of homeowners necessary to physically stop the demolitions from occurring before the hearing).} Had homeowners not been alerted of the scheduled demolitions, and had they not taken physical steps to stop the bulldozers, the demolitions would have continued without the homeowners’ consent and without any legal proceeding.\footnote{Id.} Thus, ample proof of departure from normal procedural sequence can be added to the body of evidence inferring discriminatory intent.

Though the Court in Arlington Heights lists some factors that, if proved, could lead to a proper inference of discriminatory intent, it explicitly states that the list is not exhaustive.\footnote{Arlington Heights, 429 U.S. at 268 ("The foregoing summary identifies, without purporting to be exhaustive, subjects of proper inquiry in determining whether racially discriminatory intent existed.").} Another factor that may be relevant in this case is what plans the government has for subsequent use of the property at issue. A taking that condemns the property owned by a protected class only to then transfer that property to another group could contain indications of discriminatory intent. In fact, the majority in Kelo relied heavily on the plans for subsequent use in order to find that the taking, specifically due to the economic boon the subsequent use would bring, was constitutional.\footnote{Kelo, 545 U.S. at 474–75, 483–84 (describing the economic benefits the city’s redevelopment plan would bring and holding that the plan serves a public purpose). Notably, Justice O’Connor’s dissent seemingly rejects this emphasis on subsequent use. She distinguishes Kelo from Berman and Midkiff on the grounds that, in those cases, the taking itself accomplished the public purpose whereas in Kelo, the Court was required to look beyond the taking itself to the subsequent use in order to justify the taking as serving a public purpose. Id. at 499–501 (O’Connor, J., dissenting).} If subsequent use of the property is a proper issue for the Court to consider, we may examine the subsequent use here to find indications of any discriminatory intent.

Recent action by the Housing Authority of New Orleans (HANO) shows a trend of demolishing low-income, majority black housing to make...
room for "mixed-income" urban developments. Though not discriminatory on its face, these actions have a disproportionate impact on low income African American families. The demolition of the St. Thomas public housing project provides an indication of the results of recent attempts at "mixed income" housing. Originally constructed in the 1930's as public housing for whites (at the time, the federal government funded segregated housing), the St. Thomas projects became almost 100% black due to the "white flight" in the 1950s and '60s. It was a model for public housing: solid construction with a pleasant neighborhood atmosphere. With its removal, the city destroyed over 1,500 units of low-income housing and replaced them with only 200 comparable units, the rest being high-end condos. Though St. Thomas had been near full capacity at the time of demolition, only 100 units of the housing that replaced it were occupied by displaced St. Thomas residents. The disproportionate racial effects here are clear. Destroying 1,500 units of low-income housing, occupied almost exclusively by African Americans, and replacing those units with only 200 comparable ones creates a dearth of housing for low-income residents.

The trend of destroying low-income housing has continued after the storm. At a time when residents were in dire need of affordable housing to allow them to return and rebuild, HANO and HUD decided to raze 3,500 additional public housing units in the city. Officials decided to proceed with the demolition plan despite the fact that many of the units needed only minor renovations and amid public outcry and lawsuits claiming that the plan was racially discriminatory. Like the St. Thomas redevelopment, the new developments at issue would be constructed in partnership with private investors and would represent more "mixed-income" housing containing far fewer low-income units than before.

As the figures noted above make clear, decreasing low-income housing in New Orleans will affect many more blacks than whites. In

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222 See, e.g., LEWIS, supra note 172, at 134–35 (describing the city's demolition of the St. Thomas public housing project in the late 1990's in order to construct a "mixed-income" development with drastically fewer low-income housing units).
223 Id. at 134–35.
224 Id.
225 Sara Gran, Nobody Home, Agencies in Charge of Housing New Orleans' Poor Prefer Not to, NEW ORLEANS TIMES-PICAYUNE, Oct. 30, 2006 at B5.
226 Id.
228 Id.
229 Id.
addition, the replacement high-end condos presumably are occupied by those in the higher income bracket, which is disproportionately made up of whites. Therefore when looking at subsequent use, an eminent domain action to condemn housing in the Lower Ninth Ward would have a disproportionate effect on African Americans. It would demolish housing historically owned by blacks to make room for "mixed income" housing, which New Orleans has shown to mean high-end condos with an insufficient number of low-income units included.

Noting the recent trends in urban development in New Orleans and any plans for subsequent use in our hypothetical eminent domain action, evidence of plans of a "mixed income" development could contribute to a circumstantial showing of discriminatory intent against African Americans. When presented with the option of re-opening affordable housing that would benefit thousands of poor African Americans, local and federal officials chose instead to pursue a strategy that would instead benefit private investors, higher-income residents and government coffers in the form of increased property tax revenue. Given the racial make-up of the city, those benefiting from the redevelopment plans will be mainly higher-income, majority white residents while those suffering will be almost exclusively African American. From these facts, one can argue (and indeed, attorneys have) that HANO-HUD's conscious decisions to shut out poor African Americans from inhabitable housing in order to make way for more profitable real estate ventures rises to intentional discrimination.²³⁰

Taken together, the factors of evidence of racially discriminatory intent could combine to make a colorable claim of equal protection. Following the Arlington Heights analysis, an eminent domain action in the Lower Ninth Ward would certainly have a disparate impact on blacks. An inference of racially discriminatory intent is reasonable when considering the evidence noted above of blatant and systematic racially discriminatory housing practices by the FHA and local officials, a departure from the normal procedural sequence in this case, and the disproportionate harm suffered by blacks due to subsequent use as "mixed income" housing. Therefore, one can see that the situation could arise where an eminent domain action, valid under the current standard, could in fact be in violation of the Equal Protection Clause of the Fourteenth Amendment.

²³⁰ Gwen Filosa, *Demolition is Developments' Destiny, HANO says*, NEW ORLEANS TIMES-PICAYUNE, Oct. 18, 2006 at 1 (noting that plaintiffs in a civil rights lawsuit against HANO-HUD depict the demolition plan as racist).
IX. Substantive Due Process

Whether or not one would succeed in an Equal Protection claim, the situation from purely a Takings Clause analysis seems troubling. The Fifth Amendment states: "No person . . . shall be deprived of life, liberty, or property, without due process of the law . . . ." In contrast to procedural due process, which is directly implicated by the text of the Fifth and Fourteenth Amendments, the federal courts consistently have read into the phrase a guarantee against any government action that may be substantively unfair or unreasonable. The following section details substantive due process implications of an eminent domain action under our running hypothetical. First, this section explores a substantive due process analysis under current judicial standards. The second part explores the presence of substantive due process notions within Takings Clause analysis, and proposes a realignment of property rights in eminent domain actions.

A. Current Law on Substantive Due Process Peer

Concerning New Orleans, poor homeowners should have as much of a right to rebuild as their financially superior counterparts, and they should not suffer additional injury simply because they do not have the resources to rebuild as quickly. A government facilitated taking which would give the property to another private entity to redevelop, all under the guise of promoting economic revival in the city, would offend traditional notions of fairness. In addition, the issue of what constitutes just compensation implicates fairness considerations. A government giving only fair market value, which would be next to nothing for a severely damaged home located in the shadow of a faulty levee system, would arguably be fundamentally unfair. A government expropriating an individual’s property while also billing him for clean up work would unquestionably be unfair. This conclusion is ever easier to reach when one considers that the federal government itself has accepted at least partial blame for the levee breaches that prompted the massive property damage.232

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231 U.S. CONST. amend. V.
232 See John Schwartz, Army Builders Accept Blame Over Flooding, N.Y. TIMES, June 2, 2006 at A1 (describing admissions in a 6,000 page report released by the Army Corps of Engineers that the New Orleans levee system contained a chain of design and construction flaws).
Under substantive due process analysis, the Court applies strict scrutiny in cases where fundamental rights are infringed. A law or government action will be upheld under strict scrutiny only if the law serves a compelling government interest and no reasonable alternative means of accomplishing that interest exists. Thus, if strict scrutiny were applied to an eminent domain action in the Lower Ninth Ward, there would be a strong presumption against the validity of the action. While the city may be able to show that reviving the economy in New Orleans is a compelling government interest in order to assure the city’s survival, it would be extremely difficult to show that no reasonable alternatives to the exercise of eminent domain existed. Other parts of the city would present adequate sites, where involuntarily taking the homes of people hoping to rebuild would not be an issue. Additionally, market negotiation between private developers and private homeowners is always an option and would avoid unnecessary, and in this case unfair, government involvement. Thus, if property were considered a fundamental right, it is likely that the eminent domain action in our hypothetical situation would result in a violation of substantive due process.

We no longer live in an era where property rights are considered fundamental, however. During the Lochner Era of the early 20th century, the Court found that substantive due process protected against laws that regulated economic relationships. For example, in *Coppage v. Kansas*, the Court held that the right to contract was included in personal property rights,

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233 See United States v. Carolene Products, 304 U.S. 144, 152–53 n.4 (1938) (suggesting a strict scrutiny standard by stating that legislation aimed at discrete and insular minorities deserve a higher standard of judicial review and should be exceptions to the presumption of constitutionality because minorities lack the normal protections of the political process).

234 Numerous editorials following Katrina wondered if New Orleans was even worth repopulating. See, e.g., Klaus Jacob, Time For a Tough Question: Why Rebuild?, WASH. POST at A25 (Sept. 6, 2005), available at http://www.washingtonpost.com/wp-dyn/content/article/2005/09/05/AR2005090501034.html (“It is time to face up to some geological realities and start a carefully planned deconstruction of New Orleans.”); Jack Shafer, Don’t Refloat: The Case Against Rebuilding the Sunken City of New Orleans, Slate.com, available at http://www.slate.com/id/2125810 (“But it would be a mistake to raise the American Atlantis. It’s gone.”).

235 The Court stated precisely this idea in *Davidson v. New Orleans*, 96 U.S. 97 (1878). In dicta, the Court stated "a statute which declares in terms, and without more, that the full and exclusive title of a described piece of land, which is now in A., shall be and is hereby vested in B., would, if effectual, deprive A. of his property without due process of law, within the meaning of the constitutional provision." *Id.* at 102. Apart from being dicta, the *Davidson* decision also is problematic because it was handed down before the Court’s shift away from Lochner Era protection of economic rights as fundamental, and therefore deserving of protection under substantive due process.

236 See *Lochner v. New York*, 198 U.S. 45, 56–58 (1905) (holding that a law disallowing bakers from working more than ten hours a day or sixty hours a week violated the substantive due process right to contract).
and was therefore protected by substantive due process.\textsuperscript{237} This judicial protection was short-lived, however, as the Great Depression prompted the Court to adopt an increasingly deferential stance towards economic regulations.\textsuperscript{238}

In \textit{United States v. Carolene Products}, the Court evoked the rational basis test in upholding a law that impaired the right to contract.\textsuperscript{239} Under this test, the Court conducts a deferential review of the challenged law, upholding it as long as the Court finds the legislature had some conceivable, rational basis for enacting it.\textsuperscript{240} Although there has been a revival of substantive due process jurisprudence in protecting certain unenumerated rights to privacy and personal autonomy,\textsuperscript{241} this revival has been limited to liberty interests. Thus, after the Court's forceful repudiation of \textit{Lochner} Era substantive due process rights, it carefully began taking up certain liberty interests which do, in fact, deserve substantive due process protection. To this day, fundamental property rights have been left out.\textsuperscript{242} Given economic and property rights position in substantive due process analysis, rationality review of an eminent domain action in post-Katrina New Orleans would, in all likelihood, pass the Court's deferential review.

\textbf{B. Untangling Substantive Due Process and Takings Clause Jurisprudence}

The landscape of fundamental individual property rights currently appears bleak. Two trends in Takings Clause jurisprudence merit attention. First, the Court has expanded its use of the Takings Clause in considering legal challenges affecting property. This has occurred most notably in the

\textsuperscript{237} Coppage v. Kansas, 236 U.S. 1, 14 (1915).
\textsuperscript{238} This transition occurred in a number of ways in the late 1930s. For instance, in \textit{Nebbia v. New York}, the Court abandoned the strict scrutiny standard that it normally would have applied when it upheld a New York law setting a minimum price for the sale of milk. \textit{See generally} \textit{Nebbia v. New York}, 291 U.S. 502 (1934).
\textsuperscript{239} \textit{See generally} \textit{Carolene Products}, 304 U.S. at 144.
\textsuperscript{240} \textit{Id.} at 152--54.
\textsuperscript{241} \textit{See, e.g.,} Griswold v. Connecticut, 381 U.S. 479 (1965) (finding that a law disallowing the use of contraceptives interfered with the right to privacy in marriage, a violation of substantive due process rights); Moore v. City of East Cleveland, 431 U.S. 494 (1977) (affirming that blood relations have a fundamental right to cohabit); Lawrence v. Texas, 539 U.S. 558 (2003) (holding that substantive due process protected the right of consenting adults, including homosexuals, to engage in sexually intimate behavior within their own homes)
\textsuperscript{242} The Court has not spoken to fundamental property rights as an aspect of substantive due process jurisprudence since 1921 in \textit{Truax v. Corrigan}, 257 U.S. 312 (1921). \textit{See generally} Krotoszynski, \textit{supra} note 6 (discussing the evolution of fundamental property rights in Supreme Court jurisprudence).
arena of regulatory takings. Thus, the Court is more eager to locate property rights under the Takings Clause umbrella rather than the substantive due process umbrella. Second, property rights in eminent domain cases have consistently deteriorated as the Court has essentially read the "for public use" limitation out of the Takings Clause. Thus, while the scope of the Takings Clause has broadened, the level of its protection of individuals' rights has diminished, reducing the Takings Clause to a conditional grant of power to the government. Coupling this trend with the fact that property rights have not been considered fundamental, and therefore not deserving of substantive due process protection, property rights have essentially been left to the whimsy of legislatures.

Post-Katrina New Orleans gives us a glimpse into how this neglect could go wrong. The massive and widespread property damage following Katrina, a combination of natural disaster and federal agency negligence, has left thousands of property owners at greater risk than ever of having their property taken for urban redevelopment. Poor minorities have disproportionately suffered the brunt of the damage due to the intentional decisions of government officials. Further, local government has both a long and rich history of discriminatory practices in regards to minority housing. Although an Equal Protection claim may succeed, it is by no means a sure thing. Those homeowners who could face an eminent domain action deserve protection from what would amount to a fundamentally unfair or arbitrary action. Yet, neither the Takings nor Due Process Clauses would protect those homeowners' property rights. In other words, the U.S. Constitution, as it is currently interpreted, offers them no relief.

To address this dilemma, I propose reincorporating property rights under the substantive due process umbrella in eminent domain challenges, and restoring the fundamentality of property rights in these cases. In support of this contention, the text of the U.S. Constitution itself incorporates
property explicitly into its Due Process Clause of both the Fifth and Fourteenth Amendments. It was clearly the Framers' intent to put property interests on equal footing with life and liberty interests when due process concerns are implicated. While the Court has recently attempted to disconnect Takings Clause analysis from Due Process analysis, perhaps the two were in fact not meant to be separated. Justice Kennedy's concurrence in *Kelo*—of crucial importance because it gives the majority opinion its fifth vote—cautions that a more stringent standard of review may be warranted in eminent domain actions that contain elements of impermissible favoritism, again evoking the substantive due process concept of fundamental fairness. In light of the disturbing implications of the current reading of the Takings Clause, as evidenced by the above discussion of valid eminent domain actions in New Orleans, there are significant substantive due process elements that should not be ignored.

In addition, the Court itself has struggled with separating the concepts involved in takings and due process cases. Most notably, in *Eastern Enterprises v. Apfel*, the Court could not come to full agreement as to whether a retroactive health benefits funding scheme violated the Takings Clause or the Due Process Clause. In the plurality opinion, Justice O'Connor concludes that the funding scheme, though it does not present the case of a "classic taking," was in fact a Takings Clause violation. In invalidating the health benefits plan, the plurality makes numerous references to notions of "substantial unfairness" and the disproportionate impact of the retroactive nature of the legislation. As Professor Krotoszynski argues, these phrases, though used in the context of a Takings Clause analysis here, in fact imply an argument of fundamental fairness that is more properly located in Due Process jurisprudence.

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248 See Krotoszynski, supra note 6, at 557 (citing William Van Alstyne, *Cracks in "The New Property": Adjudicative Due Process in the Administrative State*, 62 CORNELL L. REV. 445, 453 (1977) (arguing that courts should afford property interests equal treatment with liberty interests in applying the Due Process Clause)).
249 See *Kelo*, 545 U.S. at 493 (Kennedy, J., concurring) (indicating that some private transfers may involve government acts of impermissible favoritism so arbitrary or unjust as to give rise to a presumption of invalidity under the Public Use Clause).
250 See generally *Eastern Enters.*, 524 U.S. at 498.
251 *Eastern Enters.*, 524 U.S. at 522, 538.
252 Id. at 538.
253 See Ronald J. Krotoszynski, Jr., *Expropriatory Intent: Defining the Proper Boundaries of Substantive Due Process and the Takings Clause*, 80 N. C. L. REV. 713, 724–25 (2002) (arguing that J. O'Connor entwines the Takings Clause and Due Process concepts in a problematic fashion). In fact, the Court also recently advocated greater separation between Takings Clause and Due Process analysis,
Justice Kennedy, who concurs in the judgment and dissents in part, argues that the legislation at issue in *Eastern Enterprises* violates the Due Process Clause, not the Takings Clause as the plurality holds. He asserts that the Takings Clause is a conditional grant to the government, limited only by the requirement that just compensation be made. Kennedy finds that retroactive legislation has traditionally been forbidden, except by the Due Process Clause. Thus, Kennedy's concurrence in *Eastern Enterprises* serves as a precursor to his important concurrence in *Kelo*. In both opinions, Kennedy examines claims of Takings Clause violations and ultimately concludes that a taking would be invalid if predicated on irrational or unfair government action. Though he only finds that the taking in *Eastern Enterprises* rises to the level of being a due process violation, both concurring opinions contain strong suggestions of limits on valid takings if government action is arbitrary or irrational, both key concepts in substantive due process jurisprudence.

The decision in *Eastern Enterprises* is anything but clear, but the resulting confusion indicates an important overlap of the concepts involved in Takings Clause and Due Process jurisprudence. The Court, in the recent case *Lingle v. Chevron*, attempted to provide some separation between takings and due process analysis. In that case, the Court held that the inquiry into whether a regulation "substantially advances" legitimate state interests is properly a due process inquiry and is logically distinct from a takings analysis. The *Lingle* Court, however, carefully and explicitly limits its ruling to the "substantially advances" formula and declines to take on the larger issue of overlapping judicial concepts in takings and due process inquiries that are evident in *Eastern Enterprises*. The confusion therefore remains problematic for the following reason.

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254 *Eastern Enters.*, 524 U.S. at 539–50.
255 *Id.* at 545 (Kennedy, J., concurring in the judgment and dissenting in part).
256 *Id.* at 548 (Kennedy, J., concurring in the judgment and dissenting in part).
257 See *id.* 549–50 (Kennedy, J., concurring) (concluding that the retroactive legislation at issue was neither just nor reasonable and was irrational in that it bore no legitimate relation to the interest which the government asserted); *Kelo*, 545 U.S. at 492 (Kennedy, J., concurring) (noting that a government-facilitated private taking may deserve a presumption of invalidity if there is a risk of acute, undetected impermissible favoritism).
258 *Eastern Enterprises* is further complicated by Justice Stevens' dissent, which asserts that the proper analysis is under Due Process, not the Takings Clause, but that the legislation passes the fundamental fairness test and should be upheld. 524 U.S. at 550–68 (Stevens, J., dissenting).
259 *Lingle*, 544 U.S. at 543.
260 *Id.* at 545.
The plurality in *Eastern Enterprises* suggests that a Due Process inquiry would be appropriate only if the government action is in some way arbitrary or irrational.\(^\text{261}\) Yet, now that the current Eminent Domain standard allows a government-facilitated transfer to private parties with only indirect public benefit, the door has seemingly been opened to arbitrary or irrational government action. Though eminent domain actions traditionally proceed with an underlying presumption that the government action is rational, focusing more on the payment of just compensation,\(^\text{262}\) that presumption no longer is assured. In other words, an eminent domain transfer that puts property directly in the hands of private developers, with only incidental public benefit, invites governments to promote use of eminent domain. The government often stands to gain from these actions, either from contributions by the wealthy developers, through increased tax revenue, or both. Commencing an eminent domain action on these grounds, however, would be arbitrary and fundamentally unfair. Arguably, the current reading of the Takings Clause in regards to eminent domain actions actually necessitates an inquiry into whether or not that government act was arbitrary or unfair.

X. Conclusion

Property rights' current plunge from importance must soon be stopped. In an effort to revive the Takings Clause, the Court has instead reduced property rights from their former status as fundamental alongside life and liberty to a dangerous new low. As gentrification and urban redevelopment continue in the coming years, it will be necessary to protect against further disadvantaging the poor and minority residents of low-income urban America. Because the Takings Clause cannot offer this protection, property rights must be subject to Due Process analysis in eminent domain actions.

\(^{261}\) *Eastern Enters.*, 524 U.S. at 537.

\(^{262}\) See, *e.g.*, *Lingle*, 544 U.S. at 543 (noting that "the Takings Clause presupposes that the government has acted in pursuit of a valid public purpose" as opposed to acting arbitrarily).