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EMINENT DOMAIN WOLVES IN SHEEP’S CLOTHING: PRIVATE BENEFIT MASQUERADING AS CLASSIC PUBLIC USE

Carol Zeiner, St. Thomas University

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ABSTRACT

A gaping hole remains unaddressed in the midst of the debate on eminent domain. It is barely mentioned in the reform movement that was energized by *Kelo v. City of New London.*

It is understandable that the reform movement focused on private to private transfers because that was the potential form of abuse that was at issue in *Kelo.* However, this approach left open the possibility that those intent on reaping private benefit from eminent domain could do so by structuring transactions using public ownership. This strategic maneuver has the potential of circumventing even some of the strongest reform legislation. While this structure may not enable every *Kelo*-type taking, it works often enough that it must be recognized and addressed.

It is an area ripe for abuse, but is more difficult to detect than the private to private transfer in *Kelo* because it is less obvious. It should be of as much concern because it causes the same harm. Like the infamous result in *Kelo,* the major beneficiary of the taking is a private party. Often the private party initiates the activity that results in the taking. This article

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*Associate Professor of Law, St. Thomas University School of Law, Miami Gardens, Florida; former College Attorney for Miami-Dade Community College (now Miami-Dade College, “MDC”) a large multi-campus public college. Professor Zeiner has over 20 years experience as an attorney in sophisticated commercial real estate projects, both on behalf of developers and government. Her experience includes development of formerly undeveloped and agricultural land, and redevelopment in inner cities, both with and without eminent domain. Professor Zeiner thanks Kathleen Brown, Faculty Research Librarian, for her assistance which has been both skillful and personable, and Professor Elizabeth Pendo for her comments. Professor Zeiner thanks faculty colleagues, _____ for their comments. Professor Zeiner also thanks her Research Assistants, Patrick Delaney, Kristen Kawass and Adam Russo for their important assistance. Professor Zeiner is grateful to St. Thomas University School of Law for a summer research stipend that enabled this project.

reveals the extent and seriousness of this additional form of abuse and seeks to encourage its inclusion within the eminent domain reform movement so that effective means of addressing it can be developed.

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INTRODUCTION

“Government of the People, by the People and for the People . . . .” Well, maybe not for quite all the people, but rather for the powerful and politically influential. This is the concern at the heart of the dissents in the controversial eminent domain case, Kelo v. City of New London.3

Kelo held that the Public Use Clause of the federal Constitution is not violated when government uses the power of eminent domain to condemn privately owned, non-blighted land to take it from one private party for transfer to another private party who will make more intensive

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2 President Abraham Lincoln, Gettysburg Address (Nov. 19, 1863) (transcript available by the Smithsonian National Museum of American History, http://americanhistory.si.edu)
3 See generally Kelo, 545 U.S. 469 (2005). Justice O’Connor’s dissent states:
   Any property may now be taken for the benefit of another private party, but the fallout from this decision will not be random. The beneficiaries are likely to be those citizen’s with disproportionate influence and power in the political process, including large corporations and development firms. As for the victims, the government now has license to transfer property from those with fewer resources to those with more. The Founders cannot have intended this perverse result. Id. at 505.
   Justice Thomas states, inter alia, “[E]xtending the concept of public purpose to encompass any economically beneficial goal guarantees that these losses will fall disproportionately on poor communities. These communities . . . are also the least politically powerful.” Justice Thomas dissent, Id. at 521.
   On a note not sounded by the Justices, perhaps the mindset that generates takings that primarily benefit private parties is another manifestation of the self interest and greed by the powerful that has contributed to the current crisis in American financial markets.
private use of the land as part of a comprehensive plan for economic development.\(^4\)

The concern of the Court’s dissenters is that a private party that has captured the political process can rely on government’s coercive power of eminent domain to obtain for it land that it could not purchase in a voluntary transaction.\(^5\) The private party can then use that land for its private enrichment, provided the public also gets benefit such as increased tax revenue and the potential of jobs.\(^6\) The public reaction to \textit{Kelo} was outrage.\(^7\) Reform legislation was adopted at the state level, some statutory, some in the form of constitutional amendments. The outrage was so widespread that as of December, 2008, 43 states had enacted some sort of legislative response to \textit{Kelo}.\(^8\)

The post \textit{Kelo} controversy continues. Disagreement on the proper interpretation of “public use” underlies the debate. Those who support the outcome in \textit{Kelo} contend that private to private takings are necessary for economic development and particularly for redevelopment of deteriorated neighborhoods.\(^9\) They argue that abuse of eminent domain

\(^4\) See 545 U.S. 469, 484 (2005).
\(^5\) See 545 U.S. 469, 505 (2005) (O’Connor, J., dissenting). That concern had already been borne out in cases decided under state constitutions, \textit{e.g.}, \textit{Sw. IL Dev. Auth. v. Nat’l City Envtl, L.L.C.} 199 Ill. 2d 225, 241 (Ill. 2002) (the Illinois Supreme Court found, \textit{inter alia}, that government had acted as the broker of last resort).
\(^9\) This raises another important and controversial topic: the issue of eminent domain to remove blight. It seems to be mentioned favorably by Justice O’Connor as she distinguished \textit{Berman v. Parker}, 348 U.S. 26, 30 (1954) in her dissent in \textit{Kelo}, yet she points out that the abuse of eminent domain that she fears as a result of \textit{Kelo} will disproportionately and unfairly impact the poor. \textit{See}, \textit{Kelo} 545 U.S. 469, 520 (2005).

David Dana expresses concern that because certain \textit{Kelo}–reform legislation narrows the definition of blight to poor, deteriorated neighborhoods, it has the effect of reassuring upper and middle class households, but devalues the interests and needs of
is rare\textsuperscript{10} and that economic development of U.S. cities and redevelopment of areas that no longer function at an optimal level will be hampered, if not made impossible,\textsuperscript{11} by “hold outs”\textsuperscript{12} because of \textit{Kelo} reform legislation.\textsuperscript{13}

Reformers opposed to the outcome in \textit{Kelo} point out that transactions structured like \textit{Kelo} can be abused by the politically powerful to manipulate one of the most coercive powers of government, eminent domain, for their personal enrichment at the great expense of ordinary citizens.\textsuperscript{14} They emphasize, as did the dissenters in \textit{Kelo}, that it is now possible to for government to use eminent domain to deprive law abiding landowners of their well-located, and often prime, non-blighted property so it can be transferred to another private party with better political poor households. David Dana, \textit{The Law and Expressive Meaning of Condemning the Poor after \textit{Kelo}}, 101 NW. U. L. REV. 365 passim (2007), “[C]ondemnations in truly blighted neighborhoods have probably caused far more injustice and misery than . . . economic development takings in non-blighted areas or condemnations driven by dubious expansions of the definition of blight.” Ilya Somin, \textit{Overcoming Poletown: County of Wayne v. Hathcock, Economic Development Takings, and the Future of Public Use}, 2004 MICH. ST. L. REV. 1005, 1036 (2004). Eminent domain also disadvantages minorities. “Of all families displaced by urban renewal from 1949 through 1963, 63 percent of those whose race was known were nonwhite . . . .” \textsc{Bernard J. Frieden & Lynne B. Sagalyn, DOWNTOWN, INC.: HOW AMERICA REBUILDS CITIES} 28 (MIT PRESS) (1989).

\textsuperscript{10} See Dreher & Echevarria, supra, note 7, at 2 (2006).
\textsuperscript{11} Id. at 15, 18 – 19, 22 – 23, 26. Mihaly, supra, note 7, at 47.
\textsuperscript{12} The term “hold out” is used as a pejorative by some commentators who agree with the use of eminent domain for economic development and urban revitalization purposes. See Castle Coalition, \textit{Dreher & Echeverria: Disinformation & Errors on Eminent Domain}, INST. FOR JUST., Jan. 2007, at 6.

A “hold out” is simply someone who does not want to sell his or her land despite the threat of eminent domain. As a result of the refusal to sell at the price offered, or refusal to sell at all, condemnation proceedings are filed to take the land in question. Hold outs can be motivated by a wide variety of reasons. Some, like Mrs. Dery in \textit{Kelo}, merely want to live out their days in the home in which they were born. To others, their land is an important part of their identity and critical indicia of their freedom, dignity, and “having made it” as a full participant in society. To others, it is an opportunity to make a good, but not extortionate, profit from a legitimate investment in land; they are not unlike the developers who seek to maximize their profit from the use of the land once it has been taken. To some, the prospect of a taking is used as an opportunity to engage in monopolistic behavior to obtain extortionate gain. This latter is the characteristic reviled by developers; it is not an appropriate characterization of hold-outs in general.

\textsuperscript{13} See Dreher & Echeverria, supra, note 7; Marc B. Mihaly, supra, note 7.
connections for that second party’s private enrichment in the name the public benefit to be derived from economic development.\textsuperscript{15} They stress that almost any taking for more intensive use can be validated on grounds of economic development.\textsuperscript{16} They point to the inadequacy of monetary “just compensation” to the condemnee,\textsuperscript{17} and the many abuses of such takings that have been documented.\textsuperscript{18} They explain that the political influence of the powerful is such that the political process can be captured and manipulated for their benefit at the expense of those with less political power and influence, particularly, the elderly, minorities and non-profit organizations.\textsuperscript{19}

Most of the debate both prior to and following the Court’s decision in \textit{Kelo}, as well as reform efforts, have focused on curbing the potential for abuse when eminent domain is used to effectuate private to private transfers.\textsuperscript{20} Some important progress has been achieved; there is yet more to be accomplished.\textsuperscript{21}

This focus on private to private transfers has left a gaping hole unaddressed in the eminent domain reform movement. The unaddressed issue is whether abuse of the same nature as that feared in \textit{Kelo} can arise in takings in which title to the land taken is placed in government rather

\begin{footnotesize}
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\item[\textsuperscript{15}] See generally Somin, \textit{id.} at 184 – 194.
\item[\textsuperscript{16}] See generally 545 U.S. 469, 494 (2005) (O’Connor, J., dissenting).
\item[\textsuperscript{17}] This is a point that has been made totally aside from \textit{Kelo}; it is made by many on both sides of the \textit{Kelo} controversy.
\item[\textsuperscript{19}] See Berliner, \textit{supra}, note 14.
\item[\textsuperscript{20}] See 50–States Report Card, \textit{supra} note 8, at 2 – 4. The debate has also involved the definition of blight, and whether it is unfair to the poor to limit the definition of blight to deteriorated properties. Dana, \textit{supra} note 9; 50-States Report Card, \textit{supra} note 8, at 3.
\item[\textsuperscript{21}] 50-states Report Card, \textit{supra} note 8, at 2; see Jeff Benedict, \textit{All Too Easy to Condemn}, \textit{HARTFORD COURANT}, Jan. 25, 2009 at C1.
\end{itemize}
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than a private party. The answer is yes. In addition, transactions primarily for private benefit structured in this manner can be used to sidestep the prohibitions of some of even the most acclaimed reform legislation designed to prevent transactions like Kelo. The objective of this article is to focus the attention of scholars, activists, legislators, practitioners specializing in eminent domain, the media and the public on this problem, and to encourage that remedies for this type of abuse be included in the eminent domain reform movement.

This topic has received little scholarly attention.²² It has not been scrutinized as a source of abuse in the nature of Kelo. Yet, the technique of placing title in government, rather than a private transferee, has been hinted at by some who support the outcome in Kelo.²³ They suggest that in states that have enacted strong Kelo reform measures, government will be “forced” to own and operate economic redevelopment projects in order to enable “progress” that could be thwarted by Kelo-reform enactments.²⁴ For this reason alone, it is critical that the topic be examined to determine whether it presents risks of abuse similar to Kelo, and whether remedies should be incorporated into the eminent domain reform movement. In fact, the abusive structures that are possible extend far beyond that which was suggested above. Among them are structures in which large, Kelo-type private benefit is enabled through takings structured as “classic” public use.²⁵ Such situations can go largely unnoticed, except to its condemnee victims to whom it feels like Kelo, and to the private beneficiary to whom it feels like profit. To all but the closest observers, this form looks like a traditional, valid taking for a “classic” public use. In reality, it is private benefit merely masquerading as public use. It is a wolf in sheep’s clothing that ought to be addressed as part of the larger eminent domain reform movement.

As in Kelo, the interpretation of “public use” is critical. Additional reform is needed; the time to do so is now, with the present debate and proposals for reform expanded to provide more comprehensive solutions.

²² Professor Somin examines economic development takings in general and thus touches upon many of the concerns. He touches only lightly on instances in which government keeps title to land that was taken by eminent domain See Somin, supra note 14, at 264 (2007).
²³ See Dreher & Echeverria, supra. note 7, at 15, 22; see, Mihaly, supra., note 8, at 51.
²⁴ See Dreher & Echeverria, supra. note 7, at 15, 22.
Part I provides a brief background of eminent domain, *Kelo*, and the ensuing debate and reform movement. Part II sets forth three illustrations, each progressively more complicated in terms of the public use issue, but each clearly benefiting a private party and structured using public ownership. Following each Illustration is an analysis based strictly on the federal standards as they exist post-*Kelo*. It purposely eliminates the panoply of variations that arise as a result of the laws of the states and tries to anticipate the likely reactions of each side of the *Kelo* debate if they were to contemplate the issue presented by the illustrations. The analyses reveal that the particular variety of takings that are the topic of this article causes problems identical to *Kelo*. Part II also examines the impact of the *Kelo*-inspired reform legislation of four states, two considered weak reforms and two considered among the strongest of the reforms. Analysis of the illustrations shows that the highly regarded reforms successfully curb the abuse of a *Kelo*-type taking structured in the standard way, Illustration 1, but become progressively less effective when “classic” public uses are introduced. None are effective in controlling the situation in Illustration 3, even though the harms are identical to those in *Kelo*. The illustrations also demonstrate the few bases for challenge and the limited likelihood of success for a landowner who undertakes a public use challenge without effective state reform measures. Part III continues the analysis by examining the implications for takings that are the topic of this article from two recent cases. Those cases come to diametrically opposed results when takings involve a “classic” public use. The first, *County of Hawaii v. Coupe*,26 involves a “classic” public use of the land that was taken by eminent domain, and is thus very much like Illustration 3. Yet, its dissent is troubling, particularly in its use of *Goldstein v. Pataki*. The second case, *Goldstein v. Pataki*27 actually involves a private to private transfer and takes place in New York, a state that has no *Kelo*-inspired reform legislation. Nonetheless, its treatment of public use challenges when “classic” public uses are included in a redevelopment, is chillingly instructive of the possibilities for abuse and avoidance of strong *Kelo*-inspired reform legislation when the land taken is titled in government. When the interpretations of the dissent in *Coupe* are added, the lesson is clear. The eminent domain reform movement needs to be expanded to include takings of the type that are the subject of this article.

27 See *Goldstein v. Pataki*, 516 F.3d 50 (2d. Cir. 2008).
The Takings Clause of the Fifth Amendment to United States Constitution, “Nor shall private property be taken for public use without just compensation,”28 “applie[s] to the States through the Due Process Clause of the 14th Amendment.29 The constitutions of most States also contain Takings Clauses.30

“Physical takings are typically accomplished through condemnation proceedings, or through negotiated purchases under the stated or implicit threat of condemnation.”31 The Takings Clause itself neither empowers nor bars government from taking private property within its jurisdiction; it acts as a limitation on that power.32 The clause operates whenever the government “takes” “private property.”33 “Government can do so only when such taking is for “public use” and, only if the government pays “just compensation” to the owner of that property.”34 “A body of law and considerable scholarship has arisen around each of these requirements.”35 By the end of the twentieth century, the public use clause was thought by many to have become virtually meaningless as a limitation within the Takings Clause.36

28 U.S. Const. amend. V.
30 See Dana & Merrill, supra note 29, at 2; e.g., Fla. Const. art. X, § 6 (Florida); N.J. Const. art. I, § 20 (New Jersey); Tex. Const. art. I, § 17 (Texas); Ohio Const. art. I, § 19 (Ohio); Haw. Const. art. I, § 20 (Hawaii).

A sale in lieu of or under threat of condemnation is treated as a voluntary sale in many statistical reviews; however, to a property owner who feels like there is no alternative, the transfer is not emotionally voluntary. See, e.g., Berliner, supra note 14 at 15.

A physical taking can also be the result of a permanent invasion of an owner’s property by the government or a third party acting with government authorization.
33 Zeiner, supra note 31, at 508.
34 U.S. Const. amend. V; DANA & MERRILL, supra note 29, at 5.
35 Zeiner, supra note 31, at 508.
36 David L. Callies, Public Use: What Should Replace the Rational Basis Test? in EMINENT
Reaction to the seeming erosion of the Public Use Clause and concern about abuse of eminent domain for private benefit did not begin with Kelo. Activists had been warning of the problem for several years. Some courts had begun to scrutinize takings more closely. Based on the research of Professor Somin, nine states had judicial bans on takings for economic development prior to Kelo. The most publicized of these was the Supreme Court of Michigan’s 2004 decision in County of Wayne v. Hathcock which overturned its prior decision, Poletown Neighborhood Council v. City of Detroit. Thus, when the Supreme Court agreed to hear Kelo, its first major Public Use Clause case since its 1984 decision in Hawaii Housing Authority v. Midkiff, scholars, commentators, specialists within the practicing bar, and government officials awaited the outcome with keen interest.


Id.; According to Dreher and Echeverria, the Institute for Justice had been challenging takings for economic development since approximately the mid-1990’s. Dreher & Echeverria, supra note 7, at 6.


Poletown Neighborhood Council v. City of Detroit, 304 NW2d 455 (Mich. 1981), overruled by Hathcock, Id.


E.g., Ely, supra note 36; Steven J. Eagle, A Resurgent “Public Use” Clause is Consistent with Fairness, in EMINENT DOMAIN USE AND ABUSE: KELO IN CONTEXT 81 (Dwight H. Merriam
The meaning of “public use” was at issue in *Kelo*. The Supreme Court confirmed that for federal Constitutional purposes “public use” means “public purpose” and includes the public benefits of increased tax revenue and new jobs that are anticipated from economic development takings\(^{45}\). Accordingly, government can take non-blighted, as well as blighted, land and homes from one private party for transfer to another private party as part of a comprehensive plan for economic redevelopment by that second private party.\(^{46}\) The majority in *Kelo* found that *Berman v. Parker*,\(^{47}\) *Midkiff*,\(^{48}\) and *Fallbrook Irrigation District v. Bradley*,\(^{49}\) provided controlling precedent. The Justices joining in the majority opinion\(^{50}\) found that “[t]he City ha[d] carefully formulated an economic development plan that it believe[d] [would] provide appreciable benefits to the community, including - but by no means limited to – new jobs and increased tax revenue.”\(^{51}\) The majority noted that “[t]he trial judge and … Supreme Count of Connecticut agreed that there was no evidence of an illegitimate purpose.”\(^{52}\) The Court went on to state “the City’s development plan was not adopted to benefit a particular class of identifiable individuals,”\(^{53}\) then concluded, “[g]iven the comprehensive character of the plan, the thorough deliberation that preceded its adoption, and the limited scope of our review . . . . the takings . . . satisfy the . . . Fifth Amendment.”\(^{54}\)

Once the Supreme Court decided *Kelo*, the federal grounds for challenges to takings that seemed to predominantly and directly benefit a private party were limited to two. First, challenges on public use grounds – *i.e.*, there is no public use – still existed, but the limitations on the scope of such challenges had been more clearly enunciated. It was reconfirmed that takings that benefited a private party failed under the public use standard only if the taking was for the *sole* benefit of the private party.

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\(^{45}\) *Kelo*, 545 U.S. at 483.

\(^{46}\) *Kelo*, 545 U.S. at 484.


\(^{49}\) 164 U.S. 112, (1896).

\(^{50}\) Justice Stevens wrote the opinion for the majority in which he was joined by Justices Kennedy, Souter, Ginsburg and Breyer.

\(^{51}\) *Kelo*, 545 U.S. at 483

\(^{52}\) *Kelo*, Id. at 478.

\(^{53}\) *Kelo*, Id. at 478 (internal quotation marks deleted.)

\(^{54}\) Id. at 484.
without any public purpose at all;\textsuperscript{55} and, it was confirmed that economic development takings -- \textit{i.e.}, takings to promote economic growth such as anticipated new jobs, increased tax revenue, and the like -- of non-blighted land unquestionably constituted a public purpose.\textsuperscript{56} In reaching this conclusion, the Court attached significant importance to the existence of a "comprehensive plan" and the process that preceded adoption of that plan.\textsuperscript{57} Second, challenges on public use grounds were available if the public purpose stated by government was a pretext and the actual purpose of the taking was to bestow a private benefit.\textsuperscript{58} The Court did little to elaborate on the pretext challenge because it had been determined already that no pretext existed in this case.

The concurrence of Justice Kennedy\textsuperscript{59} also addressed the possibility of a pretext challenge, saying, "A court . . . should strike down a taking that by a clear showing is intended to favor a particular private party, with only incidental or pretextual public benefit."\textsuperscript{60} He went on to say, "A court confronted with a plausible accusation of impermissible favoritism to private parties should treat the objection as a serious one and review the record to see if it has merit, though with [a presumption in favor of government]."\textsuperscript{61} Justice Kennedy also asserted that "[t]here might be private transfers in which the risk of undetected impermissible favoritism of private parties is so acute that a presumption (rebuttable or otherwise) of invalidity is warranted under the Public Use Clause."\textsuperscript{62} Like, the majority, he did not elaborate because it had been determined that the takings were not pretextual in this case.\textsuperscript{63}

To observers who agreed with the outcome, the 5-4 majority opinion broke little new ground from a technical standpoint.\textsuperscript{64} However, it confirmed the worst fears of many observers\textsuperscript{65} and generated

\textsuperscript{55} \textit{Kelo}, 545 U.S. 469, at 477.
\textsuperscript{56} \textit{Id.} at 484.
\textsuperscript{57} \textit{Id.}
\textsuperscript{58} \textit{Id.} at 478.
\textsuperscript{59} Justice Kennedy argued for a heightened standard of review, "meaningful rational-basis review", which he found had been met in this case. \textit{Id.}, at 492 (2005) (Kennedy, J., concurring).
\textsuperscript{60} \textit{Id.} at 491 (2005) (Kennedy, J., concurring).
\textsuperscript{61} \textit{Id.} at 492 (2005) (Kennedy, J., concurring).
\textsuperscript{62} \textit{Id.} at 493 (2005) (Kennedy, J., concurring).
\textsuperscript{63} \textit{Kelo}, 545 U.S. 469, 491 - 492 (2005) (Kennedy, J., concurring).
\textsuperscript{64} Dreher & Echeverria \textit{supra} note 7; Mihaly \textit{supra} note 7; Thomas Merrill \textit{Six Myths About Kelo, PROBATE & PROPERTY} 19 (Jan/Feb/2006).
\textsuperscript{65} \textit{E.g.}, Berliner, \textit{supra} note 14, at 1.
impassioned dissents by Justice O’Connor and Justice Thomas. It also sparked emboldened action by governmental entities. The decision

See quotations from Justices O’Connor and Thomas note 3 supra; Justice O’Connor also wrote, inter alia,

"[The majority] holds that the sovereign my take private property currently put to ordinary private use, and give it over for new, ordinary private use, so long as the new use is predicted to generate some secondary benefit to the public – such as increased tax revenue, more jobs, maybe even esthetic pleasure. But nearly any lawful use of real property can be said to generate some incidental benefit to the public. Thus, if predicted (or even guaranteed) positive side effects are enough to render transfer from one private party to another constitutional, then the words ‘for public use’ do not realistically exclude any takings, and thus do not exert any constraint on the eminent domain power.”

Kelo, 545 U.S. 469, 501 (2005) (O’Connor, J. dissenting) And her statement that became a rallying cry for the reform movement: “The specter of condemnation hangs over all property. Nothing is to prevent the State from replacing any Motel 6 with a Ritz-Carlton, any home with a shopping center, or any farm with a factory.” Id. at 503 (O’Connor, J. dissenting). Near the end of her dissent, she concluded, “The Founders cannot have intended this perverse result.” Id., at 505 (O’Connor, J. dissenting).

Justice Thomas’ dissent voiced Originalist concerns and reflected his belief that property is a “fundamental right.” Id. at 510 (Thomas, J. dissenting) (internal citations omitted). He also expressed, “In my view it is imperative that the Court maintain absolute fidelity to the [Public Use] Clause’s express limit on the power of the government over the individual, no less than with every other liberty expressly enumerated in the Fifth amendment or the Bill of Rights more generally.” Id. at 507 (Thomas, J. dissenting). And,

"[I]t is backwards to adopt a searching standard of constitutional review for nontraditional property interests, . . . while deferring to the legislature’s determination as to what constitutes a public use when it exercises the power of eminent domain, and thereby invades individuals’ traditional rights in real property. The Court has elsewhere recognized the . . . sanctity of the home. . . when the issue is only whether the government may search a home, [y]et . . . tells us that we are not to ‘second guess’ the City’s considered judgments when the issue is, instead whether government may take the infinitely more intrusive step of tearing down petitioners’ homes.”

Id. at 518 (Thomas, J. dissenting) (internal citations omitted).

Professors Eagle and Somin each noted that, despite the negative reaction of the public to Kelo, the case in some respects represented a more tempered approach than Midkiff and Berman. Steven Eagle, Kelo v. City of New London: A Tale of Pragmatism Betrayed, in EMINENT DOMAIN USE AND ABUSE: KEO IN CONTEXT 195 (Dwight H. Merriam and Mary Massaron Ross, Eds.); Somin, supra note 14, at 224 – 225.

Berliner, supra note 14, at 2. “Within hours of the Kelo decision, Freeport, Texas brought an eminent domain action against three family-owned seafood businesses in order to transfer the land to a larger private marina. Id., at 3.
outraged the general public. It was the impetus for a wave of reform legislation of various types across the country.

Reform was implemented at the state level in response to that public outrage in part because *Kelo* stated, “[w]e emphasize that nothing in our opinion precludes any State from placing further restrictions on its exercise of the takings power. Indeed, many States already impose ‘public use’ requirements that are stricter than the federal baseline. Some of these requirements have been established as a matter of state constitutional law….”

As of summer 2007, 42 states had adopted new laws to address what they saw as the abuse of eminent domain for private use as exemplified by *Kelo*. Rhode Island joined that group the next year. The state reforms vary in type and approach as well as in comprehensiveness and efficacy. Professor Steven Eagle together with Lauren Perotti created a taxonomy that explains the different types of *Kelo*-reform measures adopted by the states as well as a state by state description of the measures. The Institute for Justice produced a paper

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68 "To call it a backlash would hardly do it justice. Calling it an unprecedented uprising to nullify a decision by the highest court in the land would be more accurate." (Eagle *supra* note 66, at 196, *citing* Kenneth R. Harney, *Eminent Domain Ruling Has Strong Repercussions*, WASH. POST, July 23, 2005, at F1.).

69 The public uproar over *Kelo* and the wave of legislative action to undo the decision indicate that the public is fearful that governmental officials and powerful interests would conspire to deprive citizens of their homes and businesses. As information about the increasing use of eminent domain for private economic development spread, these fears have grown. (Eagle and Perotti at 802, *citing* Somin, *supra* note 14, at 183–84 (2007).

70 In this respect, *Kelo* may have been just the “ammunition” that property rights groups needed to produce public outcry and generate remedial legislative action.


72 Most are statutory while some take the form of constitutional amendments. It is more difficult for the latter to be “undone” by future legislators. *See* 50-State Report Card, *supra* note 8.

73 *See* 50-State Report Card, *supra* note 8, at 2 (reforms vary from the nominal to the comprehensive).

74 Eagle & Perotti, *supra* note 71. Their explanatory classification included changes that dealt with Limiting the Scope of Public Use, with subparts, inclusionary definitions of public use, exclusionary definitions, hybrid provisions, exemptions from the exclusionary approach (typically addressing blight); Adjustments to Just Compensation, with subparts,
that grades each state’s efforts for their efficacy in preventing private to private transfers for private gain and their treatment of takings to eliminate blight. The Institute for Justice paper concludes that most of the reform legislation to date is inadequate. Similarly, Professor Somin predicts that much of the supposed reform legislation is likely to have little or no effect in constraining abusive takings for economic development and simply may have been intended to mollify public outrage.

In the ardent effort to curb the obvious abuse of eminent domain arising from private to private takings, we failed to recognize that the same abusive results can be generated by certain takings in which title to the land taken is placed in government. The eminent domain reform movement ought to be expanded to address this additional form of abuse. However, before we can examine solutions effectively, there must be recognition that a problem exists. The balance of this article is devoted to that goal.

II PRIVATE BENEFIT MASQUERADING AS PUBLIC USE: ILLUSTRATIONS, ARGUMENTS AND ANALYSES.

adjustments that typically increase the fair market value standard or compensate additional costs such as attorney’s fees, rights of first refusal or options to reacquire (at varying prices), limitations on subsequent transfers for private use, and replacement of dwellings with comparable housing; and, Procedural Reforms, with subparts dealing with the burden of proof, the degree of specificity or time limits in redevelopment plans, notice and the making of offers, and approval of takings by the vote of elected bodies.

75 Assuming some public benefit to meet the minimum criteria of Kelo.
76 See 50-State Report Card, supra note 8. States measures were graded from A to F based on the following criteria. Public use is defined as meaning that government or the public at large must own, occupy, and have a definite right to use the property; private to private transfers for economic development are specifically excluded as a public use; these measures take the form of constitutional provisions rather than legislation that can be easily changed by legislatures; blight takings are eliminated or blight is redefined narrowly so that it refers only to individual properties that directly threaten public health and safety; the burden is on government to prove a legitimate public use, rather than giving deference to legislative determinations of public use. Id. at 4.

The underlying question evaluated by the graders was, “How hard is it now for the government to take a person’s home or business and give it to someone else for private gain?” Id. at 4. States that made it impossible or extremely difficult received high marks. States that enacted no reform legislation were given a grade of “F.” Id. at 4.

77 Id. at 4. Contra, Dana supra note 9.
78 50-State Report Card, supra note 8, passim.
79 Somin, supra note 14, at 190.
80 and takings based on blight
Three illustrations are presented in Part III. Illustration 1 is a generic economic development illustration. It is included to demonstrate that the public ownership structure that is the topic of this article is actually part of the *Kelo* problem. Moreover, since it is part of the same problem, it presents the same harms and issues of abuse as *Kelo*. Illustrations 2 and 3 are based loosely upon real situations\(^81\) that have caused real anguish to real people.\(^82\) In both Illustrations 2 and 3, the land targeted for taking is to be titled in government and used for a "classic" public use. In my opinion, in both Illustrations 2 and 3, the political process has been captured by special interests; government has been enticed to succumb to the special interests either willingly, or without even realizing it, because, as the old adage goes, "government has rarely seen a development that it didn't like."

Eminent domain is a creature of both state and federal law. While federal Constitutional law provides the minimum protection for property owners, the laws of the states, derived from state constitutions, statutory enactments and judicial decisions, vary considerably.\(^83\) For ease of discussion, analysis of these three illustrations is based on post-*Kelo* federal constitutional standards. The discussion includes the majority opinion and the dissents in *Kelo*, principally the dissent of Justice O'Connor. These illustrations show how limited are the bases for landowners' legal challenges to takings based on public use objections, the heavy burden and the little likelihood of success that confront

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\(^81\) I have simplified the facts in order to avoid extraneous issues. I have not investigated the actual facts. To the extent that facts of the actual situations are used, I have proceeded on the basis of what I was told. Nothing in this article constitutes legal advice for any of the three Illustrations, or for any particular set of facts. Persons should consult with their own counsel. The Illustrations and fact patterns used in this article are utilized strictly to illuminate scholarly discussion.

\(^82\) None of the communities that are the setting of these Illustrations is poor. Nevertheless, the threat of takings disproportionately involves lower income neighborhoods. This was not only true of urban renewal in the 1950s and 1960s, it remains true today. Dick M. Carpenter & John Ross, *Victimizing the Vulnerable the Demographics of Eminent Domain Abuse*, Institute for Justice (2007). I have questioned whether the public was galvanized into action in response to *Kelo* because *Kelo* made middle and upper class landowners aware that they, too were vulnerable and subject to the same situation that had plagued the poor and minorities for decades. Zeiner, note 31.

It noteworthy that I did not learn of the situations that inspired Illustrations 2 and 3 through my interest in scholarship on eminent domain. I learned of these situations simply through conversations with friends about current events that were of concern to them in the communities in which they reside. If I encountered two of these situations in a brief span of time without even searching for them, how many more instances exist?

\(^83\) See, supra note 71.
landowners, regardless of the extent of benefit derived by the private party. In addition, there is analysis of the impact of four states’ *Kelo*-inspired reform legislation, two highly regarded, and two characterized as ineffective in curbing abusive private to private transfers. The illustrations show that even the best of these reform measures are not particularly effective in remedying the abuse that is the subject of this article. Additional discussion of the illustrations also appears in Part IV in connection with recent case law.

Illustration 1

As part of a comprehensive plan to renew an older, attractive but comparatively low-grossing shopping area, government intends to take land and improvements from private owners for use by a different private user, a big-box discount store new to the locale, through exercise of the power of eminent domain. The circumstances minimally meet the public use definition under *Kelo*. Among the condemnees is a discount store that owns its own site, the largest in the target area, and enjoys strong sales revenue in its location; the rest of the stores in the shopping area are enjoying moderate to good success, but the center has many small stores that together do not yield the volume of sales predicted for the big-box store. Previously, the big box store had attempted unsuccessfully to purchase its smaller competitor’s site. By virtue of the taking, the new user big-box discount store is able to displace a smaller competitor and gain a larger footprint than it would have enjoyed if it had purchased only the competitor’s site. Government asserts that the public use element of the Takings Clause is to be fulfilled in this instance through public purpose. Based on its comprehensive plan for the project, it is anticipated that the new user will be making more productive use of the land based on its larger size and higher gross sales.

84 This is part of the design of eminent domain, since the power is one of the inherent sovereign rights of the federal government. The problems arise when the political system is captured by special interests and the Takings Clause is manipulated for private enrichment as described by Justice O’Connor and others.

85 A study that minimally constitutes a “comprehensive plan,” which plan predicts that increased tax revenue and employment will result from the project. There have been opportunities for members of the public to present their views, and all the general prerequisites required by *Kelo* have been met. The big-box store has agreed to move to the community if it can have the site that is the subject of the taking.


87 The majority in *Kelo* explained that over the years the Constitutional terminology, “public use” had come to be interpreted as “public purpose.” *Kelo*, 545 U.S. at 480 (2005).
More jobs have been predicted. Government anticipates that the big-box store’s ad valorem tax assessment will increase the tax rolls over the previous uses of the land. The big-box store has obtained a prime location that it could not obtain through purchase. Moreover, because it has eliminated the competition, the big-box store anticipates greater profit than if shoppers had a nearby alternative.

In this instance, rather than transferring fee simple title to the new user, government intends to keep fee simple title in its own name and enter into a long-term lease with the ultimate user big-box store. Because Illustration 1 meets Kelo’s standard of public purpose, the use constitutes a valid public use under the federal Constitution. However, by far, the greatest and most direct beneficiary is the big-box store.

Assume that fee simple title to the land is to be placed in government and a long term lease executed by government and the big-box store because in reaction to Kelo, the jurisdiction in question has adopted eminent domain reform legislation aimed at curbing the abuses generated by private to private transfers.

Arguments and Analysis

Supporters of the outcome in Kelo likely would find the structure of Illustration 1 unsurprising and completely acceptable. Sites for commercial development are often controlled via long term ground leases rather than fee simple ownership. Moreover, supporters of the outcome in Kelo could point out that while the rancorous debate surrounding Kelo focused on private to private transfers, presumably of fee simple title, footnote 4 of Kelo revealed that the city was negotiating a 99-year ground lease with the developer.

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88 Professor Somin has noted the tendency of over enthusiastic prediction and the absence of accountability. Somin, supra note 14 at 194-197.

89 While this structure is acceptable for commercial development such as the big box store that is taking over this shopping center, a leasehold might be a less desirable structure for residential development. Condominiums and cooperative apartments are more valuable on the market if based on fee simple title rather than a leasehold; however, there are residential structures constructed on leased land.

90 FLORIDA COMPLEX REAL PROPERTY TRANSACTIONS §2.4 (4th ed. The FL Bar, distrib. by LexisNexis) (2005). A long term ground lease gives the developer control of the land for at least as long as the useful life of the improvements, often longer. The amount of the ground rent tends to be similar to mortgage payments but ground rent is deductible in full for federal income tax purposes while there is no tax deduction for the portion of a mortgage payment that represents repayment of principle.

Continuing on, proponents of *Kelo* probably would have no objection to the underlying transaction in Illustration 1. Likely they would assert that by redeveloping an existing commercial site, urban sprawl is limited. Environmental impacts that typically accompany development of previously undeveloped lands on the outskirts of a city are avoided. Vehicle emissions and fuel consumption may be reduced by travel to this infill redevelopment site as compared to expansion of the city into outlying vacant sites. The desires of the condemning authority for economic development in the community have been fulfilled. The big box store has acquired the site that it wanted but could not purchase in the open market. The minimums of *Kelo* have been met.

Those who support the outcome in *Kelo* likely would point to Illustration 1 as a prime example of the types of structures that government would be required to adopt in order to proceed with economic development takings following the passage of *Kelo*-reform legislation in some states. These supporters have said that government will be “forced” to own and operate economic development projects in order to enable progress. They go on to point out that government is ill-equipped to operate these ventures and that such activities are not within the operational expertise of government.

Opponents of this transaction and to the result in *Kelo* might be incensed because likely they were led to believe that the reform legislation would curb private to private economic development transactions like this *Kelo* look alike.

Depending on the wording of the particular reform law, the structure of the transaction may or may not be effective to avoid the restrictions of *Kelo*-reform legislation. The legislation of Maryland, Alaska, Florida and North Dakota will be examined for illustrative purposes.

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92 Christopher W. Smart, *Legislative and Judicial Reactions to Kelo; Eminent Domain’s Continuing Role in Redevelopment*, 22 Probate & Property 60, 63 (Mar./Apr.2008).
93 *Id.*
94 *Id.* Of course this claim depends on the length of the trip of the store’s customer base. It is possible that those who live or work in the suburbs would use just as much gasoline traveling to the subject property as would city dwellers/workers traveling to a site on the outskirts of the city.
95 Dreher & Echevarria, *supra* note 7, at 22; Smart, *supra* note 98, at 63.
96 like owning and operating shopping centers and luxury housing developments (unlike government-assisted low income housing projects) Dreher & Echevarria, *Id.*
Looking solely at the text of reform legislation, this structure would seem to be valid in Maryland where the legislation merely increases caps on some compensation agreements and requires condemnors to proceed within four years of the condemnation authorization. Again, based solely on its Kelo-inspired legislation, the leasehold structure would appear to be effective in Alaska, despite that state’s apparent effort to ban private to private transfers for economic development. The relevant portion of Alaska’s reform legislation prohibits use of eminent domain “to acquire private property from a private person for the purpose of transferring title to the property to another private person for economic development purposes.” In Illustration 1, title is being transferred to government; therefore the purpose of the condemnation could not possibly be to transfer title to the private big-box store. The structure utilizing retention of title in government seems to avoid the limitation in the statute.

Looking solely at Florida’s eminent domain reform legislation, the proposed leasehold structure would be ineffective to skirt the prohibitions of the Kelo-inspired reform law. The Florida constitutional amendment adopted post-Kelo reads in pertinent part, “Private property taken by eminent domain . . . may not be conveyed to a natural person or private entity . . . .” Since a leasehold constitutes an interest in real property that is conveyed from lessor to lessee, the structure in Illustration 1 would be prohibited by Florida law. Finally, and again, based solely on the text of its post-Kelo eminent domain legislation, it appears that the structure would be invalid in North Dakota. There the

97 For purposes of comparison this article looks only at the wording of states’ Kelo-reform legislation alone. States can and do have additional elements in their laws governing takings which can change the outcome of any particular case. Changing the outcome was the purpose of Kelo reform legislation.

98 50-States Report Card, supra note 8 at 24

99 See supra note 97.

100 50-States Report Card, supra note 8, at 6.

101 See supra note 97.

102 Fla. Const. Art. X, Sec 6 (c).


104 For an extensive discussion of the use of eminent domain to create leaseholds, see Zeiner, supra note 31.

105 See supra note 97.
ballot language for that state’s constitutional amendment eliminates from the definition of public use, “an increase in tax base, tax revenues, employment or general economic health,”106 In addition, the ballot language prohibits takings “for the use of, or ownership by, any private individual or entity, unless that property is necessary for conducting a common carrier or utility business.”107

Illustration 1 is virtually identical to Kelo, and is prohibited by the two versions of highly rated reform legislation used in this example; it is valid under both of the poorly rated reforms. In these latter jurisdictions, supporters of this transaction and of the outcome in Kelo would be correct in declaring that the restrictions of the Kelo-reform statute have been navigated successfully, and if the transaction is nothing more than a thinly disguised Kelo, so be it – it is legal.

In states where the leasehold structure is valid, despite the state’s post-Kelo eminent domain legislation, opponents of the transaction and the outcome in Kelo might also characterize the transaction as nothing more than a thinly disguised Kelo-type transaction. They would likely go on to object that since Kelo involved a long-term leasehold, the transaction in Illustration 1 is Kelo.

The success or failure of the opponents’ public use objections depends solely on whether the jurisdiction’s particular eminent domain laws and eminent domain reform measures, if any, provide greater protection than the federal standards. Illustration 1 is valid under federal standards. Opponents to the outcome in Kelo could stress that Illustration 1 contains all the objectionable, infamous elements of Kelo except that the property being taken happens to be business property108 rather than

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106 50-State Report Card, supra note 8, at 38.
107 50-State Report Card, supra note 8, at 38.
108 Those insisting upon reform would argue that the wrong demonstrated in Illustration 1 is not eliminated by the fact that the condemned land is not the residence of the condemnee. Condemnation of a small, closely held business is just as much of an affront to personal dignity as condemnation of one’s home. See Zeiner, supra note 31. Such businesses embody the toil, creativity and commitment of their owners. These owners identify with their businesses yet typically have fewer resources and less political influence than the large corporations for whom their land is being taken. However, the situation is equally as egregious if the condemnee and the private beneficiary are both publicly-held corporations. In Illustration 1, the transferee/lessee corporation is being awarded the prime business site of the condemnee. The value of the stock of the beneficiary and the condemnee is being enhanced or diminished, respectively, by virtue of the forced disposition, unless the just compensation fully compensates both the current and future income potential (speculative and thus not likely fully compensated; moreover, federal standards do not compensate for loss of business goodwill, moving expenses and
investment properties and owner-occupied residences. They could assert that the transferee/lessee, a politically influential entity, is misusing one of the most coercive powers of government, the power of eminent domain,\(^\text{109}\) to obtain a result that the transferee could not achieve without the intrusive power of government — acquisition of a coveted, prime business location that it could not acquire on the open market. Opponents of \textit{Kelo} could complain that the objectionable standards affirmed by the majority in \textit{Kelo} and reviled by the public are present in Illustration 1.\(^\text{110}\) They could complain to the media that while the big box store is not the "sole" beneficiary of the taking,\(^\text{111}\) and the taking was not "purely private,"\(^\text{112}\) standards prohibited in \textit{Kelo}, the big box store is clearly, and by far, the greatest beneficiary.\(^\text{113}\) They could also question the costs of litigation. See, \textit{e.g.}, United States v. Petty Motor Co., 327 U.S. 372, 377-78 (1946) \textit{cited in} Dana & Merrill \textit{supra} note 29, at 174, or for the condemnee's astute selection of its business location. Government is merely favoring one private business over another. See, \textit{Kelo}, 545 U.S. at 501 (O'Connor J. dissent). Some author stressed how important the land of small business owners is to them.

\(^\text{109}\) Which has been referred to as the diabolical power.

\(^\text{110}\) See \textit{supra} notes 65, 66 and 68. Opponents of the taking likely would assert a point made by the Michigan Supreme Court in \textit{County of Wayne v. Hathcock}, that an:

\begin{quote}
\[\text{[economic benefit] rationale would validate practically any exercise of eminent domain on behalf of a private entity. After all, if one's ownership of private property is forever subject to government's determination that another private party would put one's land to better use, then the ownership of real property is perpetually threatened by the expansion plans of any large discount retailer, "megastore" or the like.}\]
\end{quote}


A similar point was made by Justice O'Connor in her dissent in \textit{Kelo}:

\begin{quote}
\[\text{all private property is now vulnerable to being taken and transferred to another private owner, so long as it might be upgraded -- \textit{i.e.}, given to an owner who will use it in a way that the legislature deems to be more beneficial to the public -- in the process.}\]
\end{quote}

\textit{Kelo}, 545 U.S. at 494 (2005).

\(^\text{111}\) \textit{Kelo}, 545 U.S. at 477 (2005).

\(^\text{112}\) \textit{Midkiff}, 467 U.S. at 245 (1984), a case heavily relied upon by the majority in \textit{Kelo}, as referred to by Justice O'Connor in her dissent at \textit{Kelo}, 545 U.S. at 500 (2005).

\(^\text{113}\) The Supreme Court has previously approved takings where the "most direct beneficiaries" were private parties, so long as there was a public benefit that was more than incidental. \textit{Ruckelshaus v. Monsanto Co.} 467 U.S. 986, (1984), cited by the majority in \textit{Kelo}, 545 U.S. at 482 (2005).
whether, the jobs lost and the local purchasing activities of the smaller stores that have been eliminated would exceed the speculative promises of the big-box store as contained in the comprehensive plan.\textsuperscript{114} They could also point out that if the displaced businesses were not to permanently close, but were to relocate to the open space on the outskirts of town, the environmental impacts, effects of urban sprawl, and the like, would be the same; the only true difference is that the big box store was able to acquire a site that was not for sale. They could refer to the famous example from Calder v. Bull\textsuperscript{115} to bemoan that the “law [has taken] property from A, and give[n] it to B.”\textsuperscript{116} Government has engaged in a “reverse Robin Hood,”\textsuperscript{117} by “transfer[ring] property from those with fewer resources to those with more.”\textsuperscript{118}

If the opponents to the outcome in \textit{Kelo} were to file a legal challenge, they would lose, unless, as mentioned above, the jurisdiction has adopted judicial interpretations or legislative standards more restrictive than \textit{Kelo}, – or the complainants in this case could convince the court to adopt judicial standards more stringent than the federal standards. Their case is virtually identical to \textit{Kelo}. The fact that fee simple title is held by government rather than by the transferee is an irrelevant subterfuge. The structure of public ownership is nothing more than private benefit masquerading as public use.\textsuperscript{119} It is a wolf in sheep’s clothing.

\textit{Illustration 2.}

As part of the original development plan for an attractive subdivision of 20 to 30 single-family homes built in the 1990’s, several acres of land, including a stream, large mature trees and other natural vegetation, was conveyed by the developer of the subdivision to the homeowners’ association for the subdivision (the “Homeowners’ Association”) to be kept permanently in its undisturbed natural state as a protected green space.\textsuperscript{120} The land forms a linear shaped natural preserve.

\textsuperscript{114} See Somin, \textit{supra} note 14.

\textsuperscript{115} Calder v. Bull, 3 Dall, 386, 388, 1 L.Ed. 648 (1798).

\textsuperscript{116} Id. An example referred to in \textit{Kelo} and subsequent scholarship.

\textsuperscript{117} \textit{Wall Street Journal}, June 24, 2005; Andrew Brigham, \textit{Tampa Tribune}, June 19, 2006, at 15

\textsuperscript{118} \textit{Kelo}, 545 U.S. at 505 (O’Connor J. dissent).

\textsuperscript{119} In this instance, the “public use” requirement is met through its federal judicial equivalent, “public purpose.”

\textsuperscript{120} In the real situation on which this Illustration is based, the green space contained
Preservation of this green space was a condition of the developer’s permit. Homeowners paid a premium for lots bordering on the natural preserve.

Now, however, the valued mature trees in the green space preserve face destruction. A developer is purchasing a nearby 20-acre parcel and the farmhouse located upon it. The developer wants to construct six additional homes on the 20-acre parcel. The Homeowners’ Association has been told by government that if they do not sell an easement for a gravity-type sewer to the neighboring developer, the County will use eminent domain to seize the easement. Construction of the sewer will necessitate cutting down the mature trees, and disturbing stream, to install a sewer pipe 12 feet underground. Interestingly, a few years ago, when some homeowners in a neighboring subdivision wished to make changes in the green space, they were informed by government that the land could not be disturbed.\footnote{In the real life situation, government recognition of the sensitivity of the wetlands was confirmed a few years ago when the President of a neighboring subdivision attempted to address water problems in some basements within his subdivision. It was believed that alteration of the green space could improve the situation. He was informed by representatives of the County Engineering Department that nothing could be disturbed in the green space area because it contained sensitive wetlands.}

Many homes in the County use septic tanks\footnote{The problems of septic tank systems are beyond the scope of this article. Speaking as one without expertise on that subject, I would hesitate to endorse use of septic tanks near fragile wetlands. Although mentioned, the use of septic tanks was not pursued by anyone in the real life situation.} or a shallow sewer system that is used in combination with a pump to provide sewer service for homes. In this instance, use of a septic system rather than a sewer system likely would eliminate a part of the increased density desired by the developer because of the amount of land needed to provide a proper drain field for each additional home. According to the Homeowners’ Association, use of a pump-assisted system would not be unusual in the area and construction of a pump-assisted sewer system could be accomplished without cutting down more than a few of the mature trees and with much less damage to the stream and the green space preserve environmentally sensitive wetlands. Apparently, the legal structure for the initial creation of the natural preserve was not legally sufficient to make it inviolate, or if mitigation was necessary, the mitigation could be provided on other lands. The issue did not arise in the real life situation. Wetlands protection and mitigation issues are beyond the scope of this article. Therefore the fact pattern has been changed to eliminate these additional legal issues and focus solely on the law of eminent domain. However, the homeowners in the subdivision whose green space was to be taken treasured their wetlands and their role in environmental protection. This contributed to their distress.
on the Homeowners' Association's property. However, homes with gravity-type sewer service are more desirable to purchasers. And, it appears that current County regulations limit use of private pump-assisted systems to new subdivisions of no more than four homes. Thus, the developer can build and profit from three more houses if a gravity-type sewer line is constructed.

The only homes that would be served by the new sewer line, whether pump-assisted or gravity-type, would be those constructed by the developer. Thus, it is to the developer's great advantage if the Homeowners' Association voluntarily or involuntarily grants an easement for a gravity-type sewer line. It is not at all to the advantage of the Homeowners' Association; it will destroy the natural preserve that forms a significant part of their community. The residents of the subdivision highly value their nature preserve for its beauty and for its contribution to the environment.

Not only has the County Council said it will use eminent domain if the Homeowners' Association does not sell an easement to the developer, the County included a line item in its budget earmarking $14,000 to be paid for the easement if eminent domain is necessary, thus undermining the Homeowners' Association's ability to negotiate for a price that will begin to compensate them for their loss or enable them to replace the mature trees or restore the green space. The County will use public funds to purchase the easement and to build the sewer line; the cost will be reimbursed by the developer. Thus, the benefit of the non-compensatory figure in the County budget will inure to the ultimate benefit of the developer. Moreover, in the event of litigation, the homeowners will have to bear the costs of litigation. Depending on the terms agreed between the County and the developer, either the developer or the taxpayers will bear the cost of the litigation on their side of the case. Even if the developer pays the cost of litigation, public employees will be distracted from their other official duties in order to work on the litigation.

The initial construction of a gravity-type sewer is said to cost more than a pump-assisted system, but is purportedly less expensive to maintain and will be more than made up in the quicker sales and possibly enhanced purchase prices of the homes. While title to the easement and

\[123\] The amount that constitutes "just compensation" is one of the matters decided in the trial of an eminent domain case. If this case goes to trial, the amount ultimately will be determined there. However, the low figure set by government in its budget has a coercive impact on the negotiations of the parties.
sewer line could be placed in the name of the developer (or the homeowners’ association the developer is likely to create to take over its responsibilities once the development is completed), or in government, title likely will be placed in government.

Arguments and Analysis

This illustration is more complicated in terms of analyzing public use than Illustration 1. Use of eminent domain to acquire an easement for construction of a sewer line is a “classic” public use. This is clearly the argument that would be made by government and urged by the developer; it is the argument that might be advanced by those who support the outcome in *Kelo* and by developers, in general. Whether publicly owned or operated by a private company as a regulated public utility, sewers are generally available for use by all homes and businesses located in the service area upon payment of the applicable connection and service fees. Often homeowners and business are not given the option of whether to connect to a public sewer, they are required to connect to and use the sewer system if service is available. Arguably, a sewer easement and sewer line owned and operated by government is in “actual use” by government. Or, in the alternative, the availability of the sewer line to the purchasers of the new homes for disposal of their sewerage upon payment of sewer charges can be argued to constitute a public right to use the property.

Even if title to the easement and sewer line were placed in the name of the developer, the situation, at first glance, seems to fall within the one of the settled circumstances mentioned by both the majority and dissenters in *Kelo*. The majority states, “it is equally clear that a State may transfer property from one private party to another if future ‘use by the public’ is the purpose of the taking: the condemnation of land for a railroad with common-carrier duties is a familiar example.” Likewise, the dissenters would approve of a transfer to a party with common-carrier type duties providing use by the public, and a sewer serving all

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124 Sewer systems are among the public services provided by, or under the auspices of, government. Nichols, The Law of Eminent Domain, Vol. 2A, § 7.06[20] (3d ed, Julius Sackman, ed.).

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

126 *Kelo*, 545 U.S. at 498 (O’Connor, J. dissenting); see *Kelo*, 545 U.S. at 510, 512, 514, 521 (Thomas, J. dissenting).
residences that could connect to it on payment of sewer service fees, could meet that standard.\textsuperscript{127}

The project may be referred to as development in general, or it could be referred to as economic development, depending on whether the term “economic development” is legally favored or stigmatized in the jurisdiction.\textsuperscript{128}

The Kelo-inspired reform legislation of Maryland, Alaska, Florida and North Dakota are examined once again with respect to Illustration 2. The Maryland and Alaska measures would be ineffective to invalidate the transaction for the same reasons as stated in Illustration 1. Unlike Illustration 1, even strong Kelo-reform legislation may not block the transaction (based solely on the language of the legislation alone),\textsuperscript{129} if title to the easement is placed in government. Florida’s constitutional language blocks private to private transfers, not takings where the land taken is transferred to government ownership.\textsuperscript{130}

The first portion of North Dakota’s constitutional amendment excludes the “public benefits

\begin{footnotesize}
\begin{enumerate}
\item[	extsuperscript{127}] “Common sewers . . . constitute a public use and eminent domain may be employed in their behalf.” Nichols, The Law of Eminent Domain, Vol. 2A, § 7.06[20] (3d ed, Julius Sackman, ed.)
\item[	extsuperscript{128}] If the jurisdiction is not among those that have either legislatively or judicially banned takings for economic development, there could be an attempt by government to characterize the taking as an economic development, in order to produce a public purpose. Increased tax revenues, construction jobs, and contributions of the prospective homeowners to the local economy could be predicted as a result of the taking. In this Illustration, if a private pump-assisted system were used, and likely if septic tanks were used, only three homes could be built; if a gravity-type sewer were available, six additional houses could be built, thus providing enhanced economic benefits. Opponents to this project and to Kelo would point out that this is a solitary development project, not part of a comprehensive plan for economic development. Of course, depending on the profitability of any particular project versus the cost of developing such a plan, a political body that had succumbed to influence might undertake to create such a plan. If the project is small such as this one, the cost of developing a plan might be another reason for government to forego the economic development characterization.

In addition, see argument discussed in Part IV below, based on Pataki, decided in the Second Circuit, that “pretext” challenges to takings under the power of eminent domain are available only for economic development projects.
\item[	extsuperscript{129}] Again, as stated above, the law of eminent domain of each state varies in numerous details. For purposes of this analysis of the effectiveness of Kelo-reform legislation, the impact of that legislation alone is considered.
\item[	extsuperscript{130}] See, supra note 102, and accompanying text. The 50-States Report Card, supra note 8, at 13, notes that the state’s legislation that preceded passage of the constitutional amendment, (HB 1567, 2006), allows “government to condemn property for traditional public uses such as roads, bridges, and government buildings.”
\end{enumerate}
\end{footnotesize}
of economic development.”131 from the definition of public use. If the project were located in a jurisdiction with this type of legislation, government would avoid the economic development characterization and focus on the classic public use element to avoid the prohibition. The North Dakota constitutional amendment also prohibits transfers “for the use of, or ownership by,”132 private parties unless necessary for conducting, \textit{inter alia}, a utility business.133 The transaction would not be impeded if title were taken in the name of government and government and its developer beneficiary were successful in their argument that the use is to be public.134 However, even if they are unsuccessful, the North Dakota measure appears to provide an additional safe haven; if sewers are considered a utility business, which is likely, the taking would be valid even if title were placed in the developer.135

Those who are opposed to this transaction and outcomes such as that in \textit{Kelo} would argue the reality behind the façade. This is merely private benefit masquerading as a classic public use.

Given the few alternatives available under federal constitutional law post-\textit{Kelo}, those challenging the taking would likely couch their arguments in the alternative: that the use of the easement does not constitute a public use at all; or, that the public use is at most a pretext for a private purpose. They would point out that although sewer systems are

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131 Const. N.D., Decl. of Rights, Art. 1 Sec 16.
132 \textit{Id}.
133 \textit{Id}.
134 I say government “would not be impeded” because the landowners’ bases for a challenge would be identical to the grounds for challenge if no reform legislation were present. The next sentence of the text would seem to say that even if the easement were considered “use of” a private party, it could be argued that in is irrelevant if title is placed in government because title could be placed in the developer and protected under the public utility exception.
135 One might attempt to argue that the exception carved out for private ownership of utilities supports a conclusion that utilities ought to be exempt from takings challenges regardless of the private benefit. This would be in line with the interpretation of the Second Circuit in \textit{Pataki}. See Part IV.

   Given the specific exception for “conducting a utility business” under the \textit{Kelo}-inspired reform in North Dakota, the legislation of South Dakota will be examined. That state is selected because Florida, North Dakota and South Dakota are the only states that were awarded a grade of “A” in the 50-States Report Card, \textit{supra} note 8, at table of contents and state grades.

   The statutory language in South Dakota prohibits takings by eminent domain “for transfer to any private person, nongovernment entity, or other public-private business entity.” Const. N.D., Decl. of Rights, Art. 1 Sec 16. This language would not invalidate the taking if the easement and sewer line are titled in government.
classic public uses for which interests in land can be taken, the only beneficiaries of this particular taking are the developer, first and foremost, and later the developer’s purchasers who derive their title from the developer and are clearly a “particular class of identifiable individuals,” as prohibited by the majority opinion in _Kelo_. Thus, public use is absent. Notably, the sewer project was initiated by a request at the behest of the developer. _But for_ the request of the owner of the development site, the easement would not be taken and the sewer system would not be constructed. There is no purpose for the taking other than the private benefit to the developer; it is not a public use.

In the alternative, opponents to the taking might argue that any public use present in this instance is merely a pretext. The actual purpose of the taking is to bestow a private benefit on the developer. They would employ the facts described above and emphasize that there is absolutely no need for a sewer line at this time other than to benefit to the developer. While sewers are a classic public use, the actual purpose is private benefit.

The absence of an integrated comprehensive plan might be cited by the challengers in support of both of their arguments -- absence of public purpose and pretext. The majority in _Kelo_ emphasized the importance of the City’s comprehensive plan and the process undertaken in its adoption, and indicated that a suspicion of private purpose might be raised in the absence of such a plan.

Government is likely to respond that statement of the majority in _Kelo_ about a transfer “executed outside the confines of an integrated development plan,” referred to private to private transfers; in this transaction, title is to be placed in government. Government might also respond that the only reason that the sewer line serves only the developer’s seven houses is that they will be at “the end of the line.” If there is future development in outlying areas that can be served by this sewer line, then general use by the public will be present. Government would likely first respond with a motion to dismiss or a motion for summary judgment.

Depending on the jurisdiction in which the fact pattern occurs, the allegations in the challenge may or may not be sufficient to survive a

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137 _Kelo_, 545 U.S. at 487 (2005).
motion to dismiss for failure to state a cause of action or a motion for summary judgment.\textsuperscript{139}

If the challenge survives and goes to trial, the burden is on the Homeowners’ Association to prove its allegations of no public use and pretext based on discovery from a government entity that has been hijacked and not likely to acknowledge an illegitimate purpose. The paperwork is likely in order, and a thoroughly captured legislative body may believe it is doing something of benefit to the community.\textsuperscript{140} Evidence of pretext may be difficult to uncover. For example, even in \textit{Kelo} that had the benefit of tremendous effort from a strong public interest group, an investigative reporter later uncovered evidence that the conclusion that “there was no evidence of an illegitimate purpose”\textsuperscript{141} was mistaken.\textsuperscript{142} Moreover, government’s determinations of public purpose are entitled to deference,\textsuperscript{143} a standard of review akin to rational basis.\textsuperscript{144} The courts’ role is “an extremely narrow one.”\textsuperscript{145} Of course, the Homeowners’ Association must bear the expense of its challenge while its opponent in what is likely to be a vigorous legal battle is funded by the taxpayers or a wealthy developer.\textsuperscript{146}

In conclusion, a taking such as this one, that was initiated at the request of a private party and primarily provides enrichment to that private party, can sidestep the supposed public protections of even strong \textit{Kelo} reform legislation. The harms that were to be prevented by the reform legislation will still occur. Clearly, this is a “loophole” that needs to be closed. The eminent domain reform movement ought to be expanded to search for remedies for this type of problem.

\textsuperscript{139} \textit{See infra} Part IV, \textit{Pataki} discussion.

\textsuperscript{140} Somin, \textit{supra} note 14.

\textsuperscript{141} \textit{Kelo}, 545 U.S. at 478 (2005).

\textsuperscript{142} Somin, \textit{supra} note 14, at 237-38.

\textsuperscript{143} \textit{Kelo}, 545 U.S. at 483, 488, the latter citing, \textit{Midkiff} 467 U.S. at 242-243 (When the legislature’s purpose is legitimate and its means not irrational . . .)

\textsuperscript{144} Again, based on the federal standards. \textit{See Kelo}, 545 U.S. at 490 (Kennedy, J., concurring).

\textsuperscript{145} \textit{Kelo}, 545 U.S. at 500, citing \textit{Midkiff}, 467 U.S. at 240, and \textit{Berman}, 348 U.S. at 32 (O’Connor, J., dissenting).

\textsuperscript{146} In some instances, a Development Agreement entered into between the governmental entity and the developer requires that the developer bear the cost of the challenge. \textit{Infra} Part IV, \textit{see Coupe}, 2008 WL 5352948.
Illustration 3 takes place in a pleasant beachfront town. It is surrounded on all sides by water and extensive public parklands. Some of the adjacent parkland is owned by the county and the rest is owned by the state. There has been substantial redevelopment through private investment in the town.\textsuperscript{147} No property in the town could be considered blighted under the farthest stretch of either the dictionary’s definition or the layman’s common understanding of that word.\textsuperscript{148}

One of the churches in the town is located on an attractive parcel of land. The church land is private property and maintained as such, although there are many opportunities for the community to enter as invitees.

The owner of a beachfront commercial building wants to raze the structure and an adjoining modest motel that it owns and replace them with an enormous, multi-tower five star hotel/luxury condominium project. The developer wants to build more units than existing regulations will allow. It stands to profit by millions if the project is constructed. Local officials seem enthusiastic about the enormous luxury project. One of the obstacles to the project is that even if the town government were to remain favorably disposed toward the project, there is insufficient park space within the town to allow such a large project. As an alternative, the developer could donate a part of its own land for a park. It could then construct a project larger than present regulations allow, but smaller and more exclusive than its original proposal, so that the park space-to-density ratio would be in balance. The developer also could make a large profit if it simply were to develop a project on the scale allowed by local regulations. Finally, the developer could purchase additional land, donate the purchased land or part of its existing land for

\textsuperscript{147} This is a point made by opponents of takings for redevelopment. They contend that especially in areas where private redevelopment is strong, there is no need for government to step in and use eminent domain in aid of the redevelopment process.

\textsuperscript{148} Nevertheless, under the definitions of blight that exist in some states, e.g., California, the town could be classified as blighted because not every parcel is devoted to the most intensive, revenue-producing use possible. The fact that the commercial property and adjacent motel, referred to in the next paragraph are closed, fenced off and deteriorating due to weather and the absence of maintenance, could result at some point in a finding that they are blighted. \textit{But see, Aaron v. Target} (blight taking not allowed when party seeking to benefit from blight classification has itself heavily contributed to the condition.).
the necessary park, and build its enormous project. Any project larger than current regulations allow would require a variance.\textsuperscript{149}

There is no undeveloped land adjacent to the developer’s site. In fact, the town is totally built out. There is no undeveloped land within the confines of the municipality except for public parks and the green space that private owners maintain for their aesthetic pleasure on their own land.\textsuperscript{150} The developer obviously has chosen to construct the enormous project because it would yield the greatest profit, even though it does not own enough land. The developer has approached the church and offered to purchase its property as the park land necessary to enable its project. The church has refused stating that it is using and has future plans for all of its property and no desire to sell it. The church intends to expand its school and wants also to offer more community-wide activities on its land.

Interestingly, local officials have become increasingly vocal about the need for additional open space and playing fields for the town’s children. Not surprisingly, local officials and the developer have promoted eminent domain of the church site as a possible solution. Although the label “economic development” has not been attached to the project, the developer has described the benefits of the project in terms that sound very much like economic development: the town could acquire a larger tax base through the hotel and number of luxury dwelling units that would be constructed on the former commercial/motel property; town businesses would enjoy increased revenue; jobs have also been mentioned. The fact that all of the town’s infrastructure will become overburdened has been downplayed.

\textit{Arguments and Analysis}

The church property is currently exempt from ad valorem taxes. Thus, taking the church land for a tax-immune public park would not reduce the tax base.\textsuperscript{151} The property of churches and other nonprofit organizations is frequently the target of eminent domain.\textsuperscript{152}

\textsuperscript{149} In some jurisdictions, it is possible that government could simply waive the park requirement and permit the development. In this instance that alternative is apparently unavailable because the town would then be in violation of state standards.

\textsuperscript{150} Or to comply with local regulations for floor area ratios, setbacks, green space within projects, etc.

\textsuperscript{151} While charities and schools are typically “exempt” from ad valorem taxes, government itself is “immune” from taxation. See, e.g. Fla. Const.

\textsuperscript{152} See Amicus Brief of Becket Fund for Religious Liberty, \textit{Kelo v. City of New London}, Civil
If the church is taken, title to the church land/future park, undoubtedly will be taken in the name of government, not the developer. Thus, it is unlikely that Kelo-reform legislation would foreclose the project for the reasons described in connection with Illustration 2.153

Illustration 3 poses a public use issue more complicated than Illustration 2 if the landowner wants to challenge the taking for its Kelo-like harms. Unlike Illustration 2, there will be actual use by and benefit to the general public of the park to be created on the condemned land. Opponents to this taking cannot argue that there is no public use.

Illustration 3 presents the problem of mixed benefit that is inherent in economic development projects, even if this project has not been so labeled.154 Justice O’Connor pointed out, “The trouble with economic development takings is that private benefit and incidental public benefit are, by definition, merged and mutually reinforcing.”155 Illustration 3 demonstrates Justice O’Connor’s point in the clearest of terms. Of course, the most direct beneficiary of this taking, and the biggest winner by far, would be the developer who would profit by millions because of the additional top-dollar density that could be constructed. The biggest losers would be the church and those who avail themselves of its spiritual and cultural activities, its school, and its many church-based activities that contribute to life in the town. Those town residents who do not want the community’s density to be increased by such a significant percentage would also find themselves in the losers’ category.

In this instance government and its developer beneficiary would not have to rely on the economic development rationale to establish a public purpose to support the taking, even though this taking clearly has the characteristics of an economic development project -- i.e., a taking of private land to enable private development from which a private party will obtain private enrichment, while the public benefits by way of enhanced tax revenues, increased economic activity, jobs and the like.156

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153 See, notes 129 – 134 and accompanying text.
154 Somin, supra note 14.
155 Kelo, 545 U.S. at 502 (O’Connor, J., dissenting).
156 Clearly, supporters of Kelo and those in favor of this project would point out that the majority in Kelo stated that “the government’s pursuit of a public purpose will often benefit individual private parties,” Kelo, 545 U.S. at 485 (2005), and the Kelo majority went on to point out that the most direct beneficiaries in Midkiff and Ruckelshaus v. Monsanto Co.
Here, there is actual use by the public to support the taking. It just so happens that the land to be taken to enable the project will be devoted to a “classic” public use, a park. Ergo, there is an automatic public use complying with the requirements of the Fifth Amendment.

Since they cannot argue that the project is devoid of public use, those who would challenge this taking under federal constitutional standards are left with an argument that the taking is a pretext\textsuperscript{157} -- that government’s actual purpose is to enable the developer to construct its enormous project, which also happens to be enormously profitable. Opponents to the validity of the taking would argue that the public use is merely incidental to the true purpose of the taking. It is simply coincidental that there happens to be a classic public use for the land that is being condemned. The real reason for the taking is to enable a politically favored development. But for that development, there would be no taking.\textit{Because} of that development, there will be a taking in order to provide the additional land that the developer should have purchased on the open market to enable its project. The additional land needed could have been for any purpose. It could have been for private parking for the development itself. It is merely coincidental that the particular need of the developer in this instance is for a park and that the ultimate use of the specific land to be taken will be for a park.\textsuperscript{158} Government is simply acting as the broker of last resort for the developer;\textsuperscript{159} a broker whose “offer,” eminent domain, cannot be declined.\textsuperscript{160}

If the state is among those that has banned takings for economic development either legislatively or by judicial decision, the church might

\textsuperscript{157} Based on state law, there can be additional arguments available to the challengers, depending on the state in which the land is located.

\textsuperscript{158} It is irrelevant under the federal law of eminent domain that there are other ways that either that: 1) the project can be accomplished (see discussion in fact pattern of Illustration 3 in the text); or 2) that land adaptable for park purposes could be obtained from among other sites available on the open market. These factors are relevant under the eminent domain law of some states. \textit{E.g.} Florida.


\textsuperscript{160} I believe that part of the reason that takings that primarily benefit a private party are so galling to the public is that government makes the condemnee “an offer he can’t refuse.” \textit{The Godfather} (Paramount Pictures, 1972). While traditional, generally accepted forms of takings also involve such an “offer,” it is the direct and sizable benefit to the private party that is reminiscent of the film in \textit{Kelo}-type takings.
argue that the taking is in reality a taking for economic development. The presence of a classic public use by way of a park simply disguises the reality.

Illustration 3 is nothing more than private benefit well-disguised as public use. It is a carefully disguised wolf in sheep’s clothing and an unwary public – and court - could have the wool pulled over their eyes.

The allegations of pretext seem correct. Assuming for purposes of discussion, that the case could survive a motion to dismiss and a motion for summary judgment, there are yet many more hurdles to be overcome in order for the taking to be invalidated on grounds of pretext.

As further discussed in Part IV, courts in different jurisdictions have reached differing interpretations of the pretext challenge recognized by the Supreme Court in Kelo. A more condemnee-favorable interpretation of that challenge to these facts would seem to be as follows. The court is to give deference to legislative determinations of public purpose, as discussed with respect to Illustration 2; the standard is equivalent to a rational basis test. In this instance government’s determination would be classic public use: a public park. As confirmed in Kelo, a court is not to look into the wisdom of a taking, so long as the “purpose is legitimate and [the] means are not irrational.” Once government has established its prima facie public use/public purpose under this minimal standard -- which outcome would be almost an automatic conclusion under these facts, the church would have to prove that although a park is clearly a public use and condemnation is not an irrational means of obtaining land for a park, in this instance, the park is merely incidental to and a pretext for the Village’s real purpose, to facilitate the private party’s project. As described in connection with Illustration 2, the church has the difficult problem of discovering proof of the pretext from among the records and proceedings of a political process that has been captured by an influential and powerful private interest. Absent the involvement of the investigative skill of the media to unearth and point to the relevant evidence, the church must fight this expensive uphill battle of discovery fully at its own expense. It must fund what is likely to be costly litigation on its own. Yet the church committed no wrong that justifies it being subjected to such stress, or to expend such

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161 See, notes 143 – 145 and accompanying text.
162 Kelo, 545 U.S. at 488 (2005)
163 If the state has prohibited economic development takings, the church, could attempt to prove that this taking, in reality is a taking for economic development and is thus prohibited under the law of the state.
enormous amounts of time, energy and money. The only thing the church did was to own a prime piece of property that a powerful and politically influential developer wanted and that the church refused to sell.

IV. IMPLICATIONS FROM RECENT CASES

It has been noted, “[t]he overarching trend is that courts at all levels have [ ] paid more attention to public use challenges than they did before Kelo.” The same commentators found that “[d]iscernable trends that continued during 2007 – 2008 include[d] . . .the proliferation of litigation and refinement of the ‘pretext’ defense left open by Kelo, and the lack of uniformity of rules and results among the states.”

Two cases decided during 2008 are particularly useful in analyzing the topic that is the subject of this article. These cases come to diametrically opposite conclusions and are irreconcilable. They also serve as a starting point to predict how takings that are the topic of this article might become a more widely employed means of abuse if the eminent domain reform movement is not expanded to deal with them.

In County of Hawaii v. Coupe, the Supreme Court of Hawaii examined the issue of pretext and remanded a case involving a taking for a public road for an express determination of whether government’s asserted public purpose for the taking was pretextual. It is precisely the type of taking that is the subject of this article. In that case, a developer sought to develop a 1550 acre parcel. However, existing zoning did not allow the developer’s planned project. In exchange for granting rezoning of its land, the developer agreed to construct, at the developer’s expense, a road accessing the development from the existing road infrastructure. According to government, the road was needed to “alleviat[e] unacceptable and unsafe traffic conditions.”

164 Amy Brigham Boulris and Annette Lopez, 2007 – 2008 Update on Judicial Reactions to Kelo, 1, Course materials, ALI ABA Annual Conference on Eminent Domain and Land Valuation Litigation, Jan. 8 – 10, 2009, Miami Beach, FL

165 Id.

166 Interestingly, neither Hawaii nor New York, the states in which these cases arose, has adopted any eminent domain reform legislation in response to Kelo. 50-State Report Card, supra note 8, at 15, 36.


168 Id. at 2.

169 Id. at 2

170 Id.
for the road was to be acquired by the developer at its expense; the road was to be constructed by the developer. However, if the developer could not obtain any of the parcels at a price and on terms acceptable to the developer, the Development Agreement between the developer and government obligated government to use eminent domain upon demand of the developer to acquire that land. The Development Agreement empowered the developer to choose the route for the road, the parcels to be acquired, the prices and terms that were acceptable, and whether and when eminent domain would be utilized. The original government Resolution for the taking at issue recited that its purpose was to comply with the government’s obligations under the Development Agreement. By the time the case reached the Supreme Court of Hawaii: the original taking had been invalidated as an improper delegation of government’s taking authority; government had passed a new resolution that did not mention the Development Agreement; and government had changed the northern terminus of the road to take slightly more of the condemnee’s land.

The Supreme Court of Hawaii found that it was “not evident whether the court below engaged in a ‘pretext’ analysis as to whether [the condemnation] provided a predominantly private benefit to [the developer]...” The standard in Hawaii is the same rational-basis test as in federal precedent and, like federal standards, “where the actual purpose of a condemnation action is to bestow a benefit on a private party, there can be no rational basis for the taking.” Regardless of government’s characterization of the taking as economic development or otherwise, and regardless of whether “the government’s stated purpose is a ‘classic’ one, where the actual purpose is to ‘confer[ ] a private benefit on a particular private party[,]’ the condemnation is forbidden.”

The court rejected emphatically the dissent’s propositions that

171 Also at the expense of the developer, Id.
172 Id. at 4.
174 Some three years later and with a county council having four of nine different members, Id. at 33.
175 Id.
176 Id. at 28.
177 Id. at 29.
would have disallowed “all pretext arguments where the government’s stated public purpose is a ‘classic’ use, such as a road, and . . . confined [pretext arguments] to cases where the condemnation was for economic development.” In reaching its conclusion and rejecting the position of the dissent, the majority of the Coupe court relied upon the majority in Kelo by stating, “[p]lainly it was not the intention of this court . . . or of the Supreme Court in Kelo to foreclose the possibility of pretext arguments merely because the stated purpose is a ‘classic’ one,” and “[t]here is no indication [in Kelo that the pretext defense to takings] is limited to economic development takings such as in Kelo.”

The court also warned against judicial constructions of government pronouncements that would elevate form over substance. The court indicated that timing may be an important factor. In this instance government and the developer had entered into the Development Agreement long before any Resolution was passed for the condemnation of the land in question. But, the court went on to say, “Merely because [government] had recognized the need for a bypass [road] prior to entering into negotiations with [the developer] and [the developer] had capitalized on that need, does not preclude [the landowner’s] argument that government’s subsequent negotiations with [the developer] resulted in an agreement that provided a ‘predominantly private benefit to [the developer].’”

Nevertheless, in Hawaii as elsewhere, the landowner’s burden in order to invalidate a taking on the basis of pretext is a heavy one. The court expressly declined to adopt Justice Kennedy’s concurring opinion in Kelo and based is decision on the majority opinion in Kelo and its own cases. The level of scrutiny necessary to validate government’s taking is rational basis. “[T]he question as it presents itself to the courts is whether the legislature might reasonably have considered the use public, not whether the use is public.” If so, the declaration of government
constitutes prima facie evidence of permissible public use and there is a presumption in government’s favor. In order to prevail, the landowner “must show that ‘such use is clearly and palpably of a private character.’”

As yet, there is no outcome of Coupe on remand. It is difficult to predict whether the landowner is being given the opportunity to spend more money to attempt the unachievable, or whether there is a reasonable likelihood that the court will determine that the taking for the road, although a classic public use, is a pretext for the benefit of the developer and its future customers.

Based on Coupe, the Homeowners’ Association’s (in Illustration 2) and the church’s (in Illustration 3) arguments of pretext are not foreclosed simply because the use to be made of the property to be taken is a “classic” public use. There are further similarities. In Coupe, as in Illustrations 2 and 3, the alleged public improvement would not be built at this time, or necessarily at this location, “but for” the particular project and profit motive of the developer in each instance. It is also helpful to the landowners’ challenges in Illustrations 2 and 3, that the alleged private beneficiary first attempted to purchase the necessary interest in the land it desired then approached government for use of eminent domain. However, in all three of these situations, Coupe, Illustration 2 and Illustration 3, the landowner must prove the pretext of a government entity unlikely to acknowledge an improper purpose. The difficulties are compounded when government likely has been captured, willingly or unknowingly, by the powerful private interest and led to state, or perhaps even believe, that its actions have benefit to the public as well as to the private party.

The foregoing analysis shows that it is entirely possible for private benefit to masquerade as classic public use, and when this happens, a landowner’s only basis for challenge is pretext. Proving pretext is an almost unachievable task when the very public process that must be shown to be pretextual has been captured by the private beneficiary of the taking. The eminent domain reform movement needs to be expanded to find more effective means to identify and limit this variety of eminent domain abuse that can be equally as harmful as that in Kelo.

190 Coupe, 2008 WL 5352948 (Haw. 2008).
191 Id. at 21, citing Ajimine, 39 Haw. 550.
192 See Somin, supra note 14.
In stark contrast to *Coupe*, the Second Circuit’s 2008 decision in *Goldstein v. Pataki*\(^{193}\) drastically limits the ability of landowners to challenge takings when a “classic” public use is involved. *Pataki* comes to a conclusion completely opposite to that in *Coupe*. *Pataki* totally forecloses public use challenges where the project includes “classic” public use that is more than incidental. In *Pataki*, a group of property owners challenged the taking of their land for a multibillion dollar publicly subsidized redevelopment project covering 22 acres near the heart of downtown Brooklyn, New York, known as the Atlantic Yards Project.\(^{194}\) Their claim was based on several federal constitutional grounds, including violation of the Public Use Clause.\(^{195}\) The property owners appealed the dismissal of their case for “fail[ure] to state a claim upon which relief could be granted,”\(^{196}\) among other grounds.

The Atlantic Yards Project was first proposed by Bruce Ratner, principal owner of the New Jersey Nets.\(^{197}\) Ratner affiliates also proposed the geographic boundaries of the project,\(^{198}\) and their plan for the project, which includes a new arena for the Nets, was “eventually adopted without significant modification.”\(^{199}\) Mr. Ratner was also the private developer for the project.\(^{200}\) The project is to include the new arena, multiple high rise apartment towers, several office towers,\(^{201}\) affordable housing,\(^{202}\) public open space,\(^{203}\) and mass transit improvements.\(^{204}\) Among the purposes stated by government was to redress blight.\(^{205}\)

The Second Circuit held that the landowners had “effectively conceded . . . to a complete defense to a public-use challenge: [namely that] the Project bears at least a rational relationship to several well-established categories of public uses, among them the redress of blight, the creation of affordable housing, the creation of a public open space and

\(^{193}\) *Pataki* 516 F.3d 50 (2d. Cir. 2008).

\(^{194}\) *Pataki*, 516 F.3d at 53 (2d Cir. 2008).

\(^{195}\) *Id.* at 54.

\(^{196}\) See, Fed R. Civ. P. 12(b)(6).

\(^{197}\) *Pataki*, 516 F.3d at 53 – 54 (2d Cir 2008).

\(^{198}\) *Id.* at 56.

\(^{199}\) *Id.*

\(^{200}\) *Id.* at 53.

\(^{201}\) *Pataki*, 516 F.3d at 53.

\(^{202}\) *Id.* at 55. Apparently, the affordable housing is for middle income households, not for the poor.

\(^{203}\) *Id.* at 58 – 59.

\(^{204}\) *Id.* at 59.

\(^{205}\) *Id.*
various mass transit improvements.” Having conceded to the presence of classic public use, the challenge failed. “We need not go further. The redevelopment of a blighted area, even standing alone, represents a ‘classic example of a taking for public use.’” “Once we discern a valid public use to which the project is rationally related” the inquiry is essentially completed. Thus, according to the Second Circuit, if a “classic” public use is among the uses included in the project to which the takings relate, a challenge based on public use will fail; the taking is considered conclusively to be for public use. The Second Circuit likewise disposed of the landowners’ challenge on the basis of pretextual public purpose. Pataki said that the pretext defense is limited to takings based solely on an economic development rationale. Based on the court’s reasoning in Pataki, however, it appears that the pretext defense is also unavailable when the taking is rationally related to a classic public use.

Pataki shows the willingness of the court in an influential federal circuit to refuse to even entertain a public use challenge when the project involves classic public use, and to refuse to entertain a pretext challenge when a taking is characterized as something other than an economic development taking. This is precisely the approach adopted by the dissent in the 3 to 2 decision of the Supreme Court of Hawaii in Coupe. The Coupe dissenters argued that “[i]t is well-settled that ‘whenever property is taken for [a classic public use] it is for the public use, notwithstanding that the [classic public use] may greatly benefit a private party.’” The dissent in Coupe would seem to foreclose all pretext

206 Id. at 58 – 59 (internal citations omitted).
207 Pataki, 516 F.3d at 59. (citing its own decision, Rosenthal, 771 F.2d at 46, Berman, 348 U.S. 26, and Kelo, 545 U.S. at 483 – 84.)
208 Pataki, 516 F.3d at 60. It makes no difference whether the services of a private developer are used or the property will be transferred to private parties. Id., at 59 – 60.
209 It is even irrelevant whether the land taken by eminent domain (as distinguished from land acquired by voluntary purchase) is put to that “classic” public use or is developed for private use, or even transferred to a private party. This point is derived from the fact that New York has no reform measure that prohibits private to private transfers. See 50-State Report Card, note 8, at 36. It should be noted that Pataki did not involve allegations that the public uses were so inconsequential as to be merely incidental. Sports stadiums are also considered by some to be a classic public use. Kelo, 545 U.S. at 498 (O’Connor, J. dissenting). Nichols, The Law of Eminent Domain, Vol. 2A, § 7.06[17] (3d ed, Julius Sackman, ed.).
210 Pataki, 516 F.3d at 61.
211 Id. at 62 – 64.
212 Coupe, 2008 WL 5352948 (Haw. 2008).
213 Id. at 41 (dissent, Moon, C.J.) (citing Rodgers Dev. Co. v. Town of Tilton, 147 N.H. 57,
arguments where the government’s stated public purpose is a ‘classic’
public use, such as a road, because it believed that the pretext reference in
the majority opinion in Kelo meant that pretext arguments are to
considered only to show that government’s asserted public interest was
pretextual because there really was no public purpose at all. Since
“classic” public uses do not, by definition, fall into that category, there is
no place for a pretext argument where government has asserted a
“classic” public use. In addition, the dissent in Coupe appears to believe
that pretext arguments should be confined to cases where the
condemnation is for the purpose of economic development.”

The dissent in Coupe relied on the trial court opinion in Pataki and a decision
of the Supreme Court of New Hampshire. Rogers Dev. Co. v. Town of
Tilton.

Pataki involved a taking for private to private transfer and was
silent as to whether the properties involved in the challenge would be
devoted to “classic” public use. Nevertheless, the case has serious
implications for all takings that involve classic public use, including the
particular subtype that is the topic of this article.

First, if Pataki is adopted in states that do not have Kelo reform that
bans private to private transfers, it appears that there is no limit on the
amount of private benefit that can be derived from a project that relies on
eminent domain, provided that there is some legitimate “classic” public
use within the project. If one uses the limited interpretation of pretext
challenges enunciated by the dissent in Coupe, i.e., pretext can be used
only in economic development projects and then only to show that there
is no public use at all, the limitation of pretext is thus also virtually
eliminated. As a result, unlimited private enrichment can “hide” behind
“classic” public use; the presence of “classic’ public use is an absolute
shield.

Second, if Pataki is adopted in a state that has barred use of
eminent domain for private to private transfers, a taking will still be
immune from public use and pretext challenges, meaning that the private
enrichment would be virtually unlimited, provided that the specific tracts
taken by eminent domain are used for “classic” public uses and the

214 Coupe, 2008 WL 5352948 (Haw. 2008), (dissent, Moon, C.J.)
215 Id. at 29 (majority accurately summarizing the dissent’s position)
217 New Hampshire earned a B+ in the Castle Coalition’s 50-State Report Card, supra note
8, at 33.
project is characterized as something other than economic development. If the reasoning of the dissent in *Coupe* is followed, the pretext challenge seems to be eliminated for practical purposes from economic development takings. Thus, an unassailable “safe harbor” or “subterfuge,” depending on one’s perspective, is created when the particular land taken through the exercise of eminent domain is used for a classic public use within a project, regardless of government’s actual motivation or the degree of private enrichment to be derived from the project. This technique is particularly ripe for abuse.

For example, assume the state has adopted strong *Kelo* reform legislation like that in Florida that prohibits takings for conveyance to a private person. It is not difficult to imagine how the sites of projects primarily for private gain can be adjusted so that there is public use of those parcels that must be acquired by eminent domain due to hold-outs. There are many possibilities: a park located within a high density inner city luxury redevelopment project; a community room, public open space, or a public library within a shopping mall; a public boat launch, a passive park or a putting green on a waterfront parcel in a project like that envisioned in *Kelo*. While such accommodations might require redesign of a project, or even result in inelegant design as warned by some who criticize reform generated by *Kelo*, if the project is large enough and the private profit to be derived large enough, it could be accomplished in many projects. Such a requirement might eliminate some private projects utilizing eminent domain if redesign is impossible or the expense too great as compared to the size of the private project. Thus, the public use/public purpose standard would continue to favor large scale, expensive projects over smaller projects, even though larger projects presumably harm more people than smaller projects, for this variety of abuse in states that prohibit private to private transfers.

**CONCLUSION**

Whether one looks at comparatively simple structures such as Illustrations 2 and 3, or large, complex projects like those in *Coupe* and *Pataki*, it is clear that private benefit can successfully evade both the intent and the letter of *Kelo*-inspired eminent domain reform legislation by masquerading as “classic” public use. If the interpretations in *Pataki* and

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219 Dreher & Echevarria, note 7 supra, at 19.
220 See Somin, *supra* note 14 at 211-212(discussing *Poletown*, the larger the project, the more likely that public use will be found).
the dissent in *Coupe* become widely accepted, the technique can produce almost unlimited egregious abuse.

The harms of taking private land primarily to enable a powerful, politically influential private party to obtain private enrichment through its private project are not reduced simply because the condemnee’s land is titled in government. Property owners can see through the subterfuge. If anything, the insult is greater because government has engaged in deception.

The eminent domain reform movement ought to be expanded to seek solutions for this particular form of abuse.

Finding solutions to this particular form of abuse will pose some delicate problems.\(^{221}\) The objective must be to bar transactions in which private, *Kelo*-type benefits hide behind public use, causing *Kelo*-type harms, without stifling legitimate, traditional takings where the public use is not a subterfuge to evade prohibitions on *Kelo*-like transactions. It must respect the power of eminent domain as an attribute of sovereignty,\(^{222}\) without violating the Constitutional limitations of the Fifth Amendment.\(^{223}\) The analysis and subsequent design of solutions may not be a simple task, but it is clearly worthwhile. I believe it is a goal that can be accomplished if it receives the place and attention that it deserves within the eminent domain reform movement.

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\(^{221}\) While beyond the scope of this article, development of such means will require careful consideration of complex political, legal and philosophical issues and much debate in order to balance important cultural values, individual property rights, and the social benefits of repurposing property for classic public uses.

\(^{222}\) Ga. V. City of Chattanooga, 264 U.S. 472, 480 (1924).

\(^{223}\) U.S. Const. amend. V.