A Threat to the Security of Private Property Rights: Kelo v. City of New London and a Recommendation to the Supreme Court of Rhode Island

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*Kelo v. City of New London* and a Recommendation to the Supreme Court of Rhode Island

I. INTRODUCTION

In *Kelo v. City of New London*, the United States Supreme Court held that the taking of private property for economic development purposes qualifies as a “public use” under the Takings Clause of the Fifth Amendment to the United States Constitution.¹ This decision has spawned widespread debate.² On one side are the property rights’ activists who are fighting to make it more difficult for state and local governments to use eminent domain to take private homes for the purpose of transferring property into the hands of another private person or entity.³ On the other side are government officials, planners, urban renewal experts, and development firms who believe that eminent domain is a necessary tool in the struggle to encourage prosperity in the face of severe economic decline.⁴

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². See *Power Lunch* (CNBC Business News television broadcast Oct. 12, 2005) (Bill Griffeth commenting that the Kelo decision has created controversy across the country); Castle Coalition, http://castlecoalition.org/legislation/index.html (last visited Apr. 17, 2006), [hereinafter Castle Coalition] (commenting that since *Kelo*, eminent domain has become a hot topic nationwide and legislatures everywhere are examining eminent domain laws to insure what happened in *Kelo* will not happen again).


⁴. *Id.*
Opponents of the *Kelo* decision argue that its acceptance of the use of eminent domain for economic development - to increase tax revenues and create jobs - broadly expanded existing federal Takings Clause jurisprudence. The government need only identify a more profitable use for property in order to justify the exercise of eminent domain. Because office buildings will almost always produce more jobs and tax revenue than any private residence or small private business, any home or business can be taken under the guise of economic development. Private property owners are left extremely vulnerable to eminent domain misuse.

In the wake of the *Kelo* decision, the question remains: if the government, state or federal, can take private property under a vague assertion of economic development, are private property owners left with any protection under the Takings Clause? Legislatures at the federal and state levels have begun to revisit eminent domain laws to ensure that their citizens are afforded more protection from governmental takings than that afforded by the *Kelo* decision.

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7. *Id.* at *6-7.
8. Recently, the House of Representatives passed a bill declining to extend economic development funds for two years to any state or local government which employs eminent domain for private commercial development. Private Property Protection Act, H.R. 3135, 109th Cong. (2006), available at http://www.castlecoalition.org/media/legislation/1103_05props.html. In addition, the bill expressly forbids the federal government from exercising its eminent domain power for private development. *Id.*
9. For example, Bradley Jones, Massachusetts State Representative, proposed that “the taking of private property by right of eminent domain for the sole purpose of economic development, where one private individual benefits at the expense of another, is contrary to well-established public policy. Except... to prevent the development of or to eliminate dilapidated or blighted open areas.” In New York, State Senator John DeFrancisco proposed a constitutional amendment that would only allow private property to be taken solely for the “possession, occupation, or enjoyment of land by the public at large or by public agencies.” Illinois State Representative Eileen Lyons introduced legislation that requires eminent domain power to be used exclusively for a “qualified public use.” Use of the eminent domain power “for private ownership or control, including for economic development” would be expressly prohibited. Castle Coalition, http://maps.castlecoalition.org/legislation/html (last visited Apr. 17, 2006) (Under Illinois, Massachusetts, and New York headings).
Members of the Rhode Island legislature are among those urging greater protection of individual property rights.\textsuperscript{11} State Representative Victor Moffitt introduced Rhode Island House Bill 6636, "urg[ing] the United States Congress to take immediate action to amend the Constitution in order to more fully protect and guarantee private property rights and to nullify the \textit{Kelo} decision."\textsuperscript{12} This bill was adopted by the House.\textsuperscript{13} In addition, State Senator James Sheehan expressed his approval of a decision to "amend the Constitution in lieu of the recent Supreme Court decision on eminent domain."\textsuperscript{14}

Further, Governor Donald Carcieri, in outlining his plans for 2006, has stated that he has "never been a fan" of "taking someone's property" and intends to consider legislation that would restrict the use of the eminent domain power.\textsuperscript{15} In 2001, the Rhode Island Economic Development Corporation (RI EDC) exercised its eminent domain power to condemn forty acres of private property in Smithfield, Rhode Island so that the Fidelity Corporation could expand its existing facility.\textsuperscript{16} Governor Carcieri, who does not believe in the practice of "tak[ing] people's property and then say[ing], 'I know what I'm going to do is better than what you are going to do with it,'" has asked the RI EDC to revisit the issue.\textsuperscript{17} It is expected to vote to terminate the practice
of using eminent domain to take private property from A and give it to private entity B.\textsuperscript{18} In response to the Supreme Court's decision in \textit{Kelo}, Carcieri has said, "just because the Supreme Court says its ok, does not mean the state should be doing it."\textsuperscript{19} However, while these proposals indicate an attempt to better protect the private property owners of Rhode Island, without firm legislation in place, the decision ultimately lies with the Supreme Court of Rhode Island.

This Comment examines the takings provision in the Rhode Island Constitution and urges the Supreme Court of Rhode Island, should such an opportunity arise, to decline extending eminent domain power to include the taking of private property for economic development. Part II of this Comment provides an overview of the \textit{Kelo v. City of New London} decision and details the facts and holding of the case. Part III employs Philip Bobbitt's six approaches to constitutional construction\textsuperscript{20} to examine the Rhode Island Constitution's takings clause, article I, section 16. Next, Part III proceeds to explore the history and doctrine of Rhode Island's takings clause and the occasions in which the Supreme Court of Rhode Island has typically departed from United States Supreme Court rulings. Finally, Part III discusses the various policy arguments and ethical implications of the \textit{Kelo} decision.

Part IV sums up the arguments advanced in Part III and urges the Supreme Court of Rhode Island to depart from the United States Supreme Court decision in \textit{Kelo v. City of New London} and interpret the Rhode Island Constitution in a manner that provides the citizens of Rhode Island a greater level of protection with regard to their fundamental private property rights.

\section{II. BACKGROUND: \textit{KELO V. CITY OF NEW LONDON}}

\subsection{A. Factual Background of Kelo}

The New London Development Corporation (NLDC), a private

\textsuperscript{18} Id.

\textsuperscript{19} Id.

nonprofit economic development corporation, was created in 1978 to help the City of New London, Connecticut (the City) put together an economic development plan.\textsuperscript{21} Over the years, the City had fallen into economic decline.\textsuperscript{22} In January, 2000 the City turned its attention to the Fort Trumbull neighborhood, a peninsula of land along the Thames River.\textsuperscript{23} The unemployment rate there was almost two times that of the rest of the state and its population had reached a near-record low.\textsuperscript{24} These conditions caused officials to pursue the Fort Trumbull area in an effort to turn the city around.\textsuperscript{25}

The troubled Fort Trumbull area is also home to many people, including Wilhelmina Dery\textsuperscript{26} and Susette Kelo.\textsuperscript{27} Together, the Derys, Mrs. Kelo, and six other homeowners own fifteen properties in the Fort Trumbull neighborhood.\textsuperscript{28} Several of the homeowners have lived in their homes and raised their families there for many decades.\textsuperscript{29} Others have put an extensive amount of time and money into developing their properties.\textsuperscript{30} All are genuinely attached to their homes.\textsuperscript{31}

In February of 1998, Pfizer, Inc. declared its intention to build a global research facility on the New London Mills site located directly adjacent to the Fort Trumbull neighborhood.\textsuperscript{32} The City officially conveyed the New London Mills site to Pfizer in June 1998 to complement the Pfizer facility with the development plan prepared by the NLDC for the Fort Trumbull neighborhood.\textsuperscript{33} In

\begin{itemize}
\item \textsuperscript{21} Kelo v. City of New London, 843 A.2d 500, 508 (Conn. 2004).
\item \textsuperscript{22} Kelo v. City of New London, 125 S. Ct. 2655, 2658 (2005).
\item \textsuperscript{23} Kelo, 843 A.2d at 508; Petition for Writ of Certiorari, supra note 6, at *1-*2.
\item \textsuperscript{24} Kelo, 125 S.Ct. at 2658.
\item \textsuperscript{25} Id. at 2658-59.
\item \textsuperscript{26} Petition for Writ of Certiorari, supra note 6, at *1-*2. In 1918, Mrs. Dery was born in the house that she currently shares with her husband of fifty years and the rest of her family. Id.
\item \textsuperscript{27} Ms. Kelo is another Fort Trumball neighborhood homeowner, who has lived in the area since 1997 and has made extensive improvements to the property. Kelo, 125 S. Ct. at 2660. She values the location of her home for the view and close proximity to the water. Id.
\item \textsuperscript{28} Id.
\item \textsuperscript{29} Kelo, 843 A.2d at 511.
\item \textsuperscript{30} Id.
\item \textsuperscript{31} Id.
\item \textsuperscript{32} Id. at 508.
\item \textsuperscript{33} Id. at 508-09.
\end{itemize}
addition to capitalizing on the arrival of the new Pfizer facility, the NLDC hoped to create jobs, generate tax revenue, and help "build momentum" for the city's revitalization movement.34

The development plan for Fort Trumbull encompasses about ninety acres and is divided into seven parcels, each to accommodate different projects.35 Two of the parcels involved affect the homeowners in this case.36 Parcel 3 is located near the new Pfizer building and is slated for private research and development office space and parking, and Parcel 4A is slated for park support to provide parking or retail services for the nearby park.37

While the NLDC would own the land in the development site, private developers would occupy the area through lease agreements with the NLDC.38 At the time of trial, the NLDC was involved in negotiations with one such private developer, Corcoran Jennison, for a ninety-nine-year-lease for parcels 1, 2, and 3 at a nominal $1.00 per year.39 Corcoran Jennison would then develop the parcels and choose tenants for spaces.40

The City and the NLDC want to use eminent domain to take the family homes of these individuals to make way for private business development,41 and the United States Supreme Court has ruled that this is a justified use of the City's eminent domain power.42 There is no indication that any of these homes are blighted or in poor condition, but because they happen to be located in the development area, the City has been given the authority to take their homes.43

B. Procedural History

In 2005, Susette Kelo and other affected landowners in the Fort Trumbull neighborhood brought suit in the Superior Court of Connecticut, seeking a permanent restraining order to halt the

34. Id. at 509.
35. Petition for Writ of Certiorari, supra note 6, at *2.
36. Id.
37. Kelo, 843 A.2d at 509.
38. Petition for Writ of Certiorari, supra note 6, at *3.
39. Id.
40. Id.
41. Id. at *2.
43. Id.
implementation of the NLDC plan, and the resultant taking of their homes. The court granted the permanent restraining order banning the taking of the properties for park or marina support, but denied relief to the landowners with property in the area designated for office space. On appeal to the Supreme Court of Connecticut, the majority held that all of the takings were a valid exercise of the city's eminent domain power. The dissent, signed by three judges, would have enforced a heightened level of judicial review for economic development takings and would have declared the takings unconstitutional "because the City had failed to adduce clear and convincing evidence that the economic benefits of the plan would in fact come to pass." The United States Supreme Court granted certiorari to determine, "whether a city's decision to take property for the purpose of economic development satisfies the 'public use' requirement of the Fifth Amendment."

C. The Decision

Writing for the majority, Justice Stevens, relying on Berman v. Parker, stressed the Court's "longstanding policy of deference to legislative judgments in this field," so long as the "legislature's purpose is legitimate and its means are not irrational." Thus, the Court, while recognizing that the City was not faced with the need to remove blight, nevertheless concluded that the City's determination that the Fort Trumbull area was "sufficiently depressed" to validate a plan for economic development was well

44. Id. at 2661.
45. Id.
46. Id.
47. Id.
48. Id. at 2663 (citing Berman v. Parker, 348 U.S. 26 (1954)). In Berman, the Court upheld a redevelopment plan targeting a blighted area of Washington D.C., in which most of the housing was beyond repair. Id. While some of the land would be used for streets, schools, and other public facilities, a portion would be leased or sold to private parties for the purpose of redevelopment. Id. Berman's deferential approach was reaffirmed in Hawaii Hous. Auth. v. Midkiff, where the Court concluded that the State's purpose of eliminating the "social and economic evils of a land oligopoly" qualified as a valid public use. 467 U.S. 229, 241-42 (1984). The fact that the State immediately transferred the properties to private individuals upon condemnation did not diminish the public character of the taking. Id. at 244.
within the broad understanding of public purpose and thus not violative of the Fifth Amendment to the Federal Constitution.\textsuperscript{50} The Court examined the comprehensive nature of the development plan, and the detailed consideration that preceded its adoption under a limited scope of review and concluded it was proper, as it was in \textit{Berman}, to decide the homeowners' challenges based on the entire development plan, and not on an individual basis.\textsuperscript{51}

In addition, the Court noted that "promoting economic development [has been] a traditional and long accepted function of the government" and that there was "no principled way of distinguishing economic development from the other public purposes that [the Court has] recognized."\textsuperscript{52} The Court reasoned that it would be out of step with precedent already laid down by the Court to find that the City's interest in the economic benefits to be realized from the redevelopment of the Fort Trumbull area constituted less of a public character than any of the previous interests expressed as sufficient in the Court's prior decisions. The fact that individual private parties might benefit from the City's pursuit of a public purpose was irrelevant because, as the Court had previously stated in \textit{Berman}, "[t]he public end may be as well or better served through an agency of private enterprise than through a department of government - or so the Congress might conclude. We cannot say that public ownership is the sole method of promoting the public purposes of community redevelopment projects."\textsuperscript{53} Because, under \textit{Berman} and \textit{Midkiff}, the NDLC's redevelopment plan undeniably served a public purpose, the Court held that the taking of the homes in the Fort Trumbull area satisfied the public use requirement of the Fifth Amendment.\textsuperscript{54}

Justice Kennedy joined the majority opinion but wrote a concurring opinion to stress that, while a rational-basis standard was appropriate, "transfers intended to confer benefits on

\textsuperscript{50} \textit{Id.} at 2665.

\textsuperscript{51} \textit{Id.}


\textsuperscript{53} \textit{Id.} at 2666.

\textsuperscript{54} \textit{Id.} at 2665.
particular, favored private entities... with only incidental or pretextual public benefits, [were still] forbidden by the Public Use Clause."\textsuperscript{55} In such instances, a court should "review the record to see if it has merit, though with the presumption that the government’s actions were reasonable and intended to serve a public purpose."\textsuperscript{56} Because the trial court conducted a thorough review of the findings, and determined that the primary motivation behind the City’s redevelopment of the Fort Trumbull area was not to benefit Pfizer or any other private party, but to take advantage of Pfizer’s presence, the City’s actions survived "the meaningful rational basis review."\textsuperscript{57} However, Justice Kennedy noted that a situation may arise "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{58}

Justice O’Connor, who was joined by Chief Justice Rehnquist, Justice Scalia, and Justice Thomas, dissented, concluding that economic development takings are not constitutional.\textsuperscript{59} Justice O’Connor criticized the majority opinion for essentially erasing the line between private and public use of property and "thereby effectively... delet[ing] the words ‘for public use’ from the Takings Clause of the Fifth Amendment."\textsuperscript{60} Justice O’Connor pointed out that the Fifth Amendment expressly sets forth two distinct limitations on the use of eminent domain: public use and just compensation.\textsuperscript{61} "This requirement promotes fairness as well as security."\textsuperscript{62} According to Justice O’Connor, if these constraints are to retain any meaning, it is necessary for the judiciary to keep a check on how the public use requirement is interpreted.\textsuperscript{63} Thus, prior decisions regarding what constitutes public use have "reserved ‘a role for the courts to play in reviewing a legislature’s

\textsuperscript{55} Id. at 2669 (Kennedy, J., concurring).
\textsuperscript{56} Id.
\textsuperscript{57} Id. at 2669-70.
\textsuperscript{58} Id at 2670.
\textsuperscript{59} Id. at 2671, 2673.
\textsuperscript{60} Id. at 2671 (O'Connor, J., dissenting).
\textsuperscript{61} Id. at 2672.
\textsuperscript{63} Id.
Justice O'Connor went on to distinguish *Berman* and *Midkiff* from the situation at issue in the Fort Trumbull area. In both *Berman* and *Midkiff*, the existing property was the source of the harm and the only way to remedy such harm was to condemn the property and eliminate the existing property. The elimination of the identified harm constituted the necessary public purpose, and because in each case the taking directly promoted a public benefit, it was irrelevant that the property was subsequently turned over for private use. The City did not assert that the Fort Trumbull homes were the source of any social harm. In fact, the Derys and the Kelos were merely putting their well-maintained properties to ordinary private uses.

Justice O'Connor argued that the majority decision "significantly expands the meaning of public use," resulting in an interpretation that does "not realistically exclude any takings, and thus [does] not exert any constraint on the eminent domain power." Justice O'Connor further explained that allowing economic development takings threatens the security of all property ownership and that those likely to feel the harsh effects of the Court's decision would be those individuals with the fewest resources. Justice O'Connor believed that, because "the Founders cannot have intended this perverse result . . . the takings in both Parcel 3 and Parcel 4A [were] unconstitutional." Justice Thomas wrote a separate dissent criticizing the long line of cases in which the Court has "strayed from the [Public Use] Clause's original meaning." According to Justice Thomas, "the Takings Clause authorizes the taking of property only if the public has a right to employ it, not if the public realizes any conceivable benefit from the taking."

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64. *Id.* at 2674 (quoting *Berman*, 348 U.S. at 32).
65. *Id.* at 2674-75.
66. *Id.* at 2674.
67. *Id.*
68. *Id.* at 2675.
69. *Id.*
70. *Id.*
71. *Id.* at 2677.
72. *Id.*
73. *Id.* at 2678 (Thomas, J., dissenting).
74. *Id.* at 2680 (emphasis added).
Pursuant to a plan for economic development, the Derys, Susette Kelo and the other homeowners have been thrust from their private homes so that their land can be given to another private owner who, according to the legislature, will put the land to a more beneficial use. The line between private and public use has been erased and "all private property is now vulnerable to being taken and transferred to another private owner, so long as it might be upgraded." Given that the Supreme Court expressly emphasized that its decision did not prevent the States from imposing stricter requirements on their exercise of the eminent domain power, when the occasion arises, the Supreme Court of Rhode Island should seize the opportunity.

II. CONSTITUTIONAL CONSTRUCTION: INTERPRETATION OF RHODE ISLAND'S TAKINGS CLAUSE

Philip Bobbitt is "one of the nation's leading constitutional theorists." In his book, Constitutional Fate: A Typology of Constitutional Arguments, Philip Bobbitt explores and identifies six types of constitutional arguments found in judicial opinions, hearings, and briefs. The six argument types are: textual argument, historical argument, structural argument, doctrinal argument, prudential argument, and ethical argument. Bobbitt asserts that what is generally considered the

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75. Id. at 2671-72 (O'Connor, J. dissenting).
76. Id. at 2671.
77. Id. at 2668 (majority opinion).
79. BOBBITT, supra note 20, at 6-7.
80. This argument considers the present meaning of the words within a particular provision. Id. at 7.
81. This argument attempts to uncover the original understanding of a constitutional provision as understood by the writers and those who adopted the constitution. Id.
82. This argument focuses on the structures of government and the relationships created in the Constitution and draws inferences from this set up. Id.
83. This argument concentrates on precedent or judicial or academic commentary on precedent to reach conclusions regarding constitutional construction. Id.
84. This argument considers the consequences of adopting a particular decision or interpretation. Id. at 7, 61.
85. This argument examines the implication of the government playing a
style of a particular judge is actually his or her preference for one of the above types of argument. These arguments are not exhaustive and can frequently work together.

A. Text

Phillip Bobbitt's textual approach to constitutional construction begins with an examination of the present plain meaning of the text. In ascertaining the true meaning of a constitutional provision, one must look to the actual words within the text. The takings clause of the Rhode Island Constitution, identical to that of the Takings Clause of the United States Constitution, is found in Article I, the Declaration of Rights, under section 16, and reads as follows, "[p]rivate property shall not be taken for public uses, without just compensation." While constitutions are intended to endure for ages and adapt to the changing needs of society, one cannot altogether discount the word choice of the framers. Every word is intended to have meaning, and it is essential that every word be given full force and effect. The Supreme Court of Rhode Island has consistently used this technique when interpreting other provisions in the Rhode Island Constitution.

This technique can be applied to the phrase "public use." Black's Law Dictionary defines "public" as being "open or available for all to use, share, or enjoy." It is the opposite of "private."

central role within the American political culture. Id. at 94.

86. Id. at 8.
87. Id.
88. Id. at 7.
89. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 147 (1803) ("It cannot be presumed that any clause in the constitution is intended to be without effect").
90. U.S. Const. amend. V.
91. R.I. CONST. art. I, § 16.
93. Marbury, 5 U.S. (1 Cranch) at 147.
95. BLACK'S LAW DICTIONARY 1264 (8th ed. 2004); see also WEBSTER'S NEW INTERNATIONAL DICTIONARY 2005 (2d ed. 1945) (defining public as open to common or general use, participation, enjoyment, etc; open to the free and unrestricted use of the public; as a public park or road).
The term "use" is defined as "the application or employment of something else."\(^{97}\) In addition, Black's Law Dictionary defines the phrase "public use" as referring to "the public's beneficial right to use property or facilities subject to condemnation."\(^{98}\) While the United States Supreme Court has departed from the Black's Law definition,\(^{99}\) the Supreme Court of Rhode Island has embraced it, stating that public use "implies a possession, occupation, and enjoyment of the land by the public at large or by public agencies."\(^{100}\) Public use takings typically involve the taking of private property for highways, railways, public walkways, parks, and public buildings.\(^{101}\)

The "public use" requirement has been extended as the law has developed. It is widely accepted that the phrase "public use" should be expanded to include takings of private property for a "public purpose."\(^{102}\) However, this extension does not drastically extend the phrase beyond its original meaning. "Public purpose" is defined as "an action by or at the direction of a government for the benefit of the community as a whole."\(^{103}\) A public purpose taking still must afford benefits to the general public as opposed to individual or private interests. The term "purpose" means "the end or aim to be kept in view in any plan, measure, exertion, or operation."\(^{104}\) When added to the term "public," as defined above, the meaning of the phrase is not much different than "public use." In either situation, the use or purpose for which private property

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97. Id. at 1577 (definition of "use"); see also Webster's New International Dictionary at 2806 (defining use under subheading eleven as the enjoyment of property which consists in its employment, occupation, exercise or practice and under subheading twelve to mean behalf; advantage; benefit).
98. Id. at 1578 (sub definition of "use" the phrase "public use").
99. See Hawaii Hous. Auth. v. Midkiff, 467 U.S. 229, 244 (1984) (stating that "it is not essential that the entire community, nor even any considerable portion, ... directly enjoy or participate in any improvement in order for it to constitute a public use").
101. Id. at 592.
103. See Black's Law Dictionary at 1267.
is to be taken must be essential to the effectuation of a wholly public benefit, and not the private interests of another.\textsuperscript{105}

The taking of private property in "slum blighted areas" has also become an accepted "public use."\textsuperscript{106} The term "blight" refers to a condition of severe dilapidation that impairs growth, withers hopes and ambitions, or impedes progress and prosperity.\textsuperscript{107} The Rhode Island legislature has identified three types of blight and substandard areas and defined them as follows:

"Slum blighted area" means any area in which there is a predominance of buildings or improvements, either used or intended to be used for living, commercial, industrial, or other purposes, or any combination of these uses, which by reason of: (i) dilapidation, deterioration, age, or obsolescence; (ii) inadequate provision for ventilation, light, sanitation, open spaces, and recreation facilities; (iii) high density of population and overcrowding; (iv) defective design or unsanitary or unsafe character or condition of physical construction; (v) defective or inadequate street and lot layout; and (vi) mixed character or shifting of uses to which they are put, or any combination of these factors and characteristics, are conducive to ill health, transmission of disease, infant mortality, juvenile delinquency, and crime; injuriously affect the entire area and constitute a menace to the public health, safety, morals, and welfare of the inhabitants of

\begin{itemize}
\item \textsuperscript{105} See Palazzolo v. Rhode Island, 533 U.S. 606, 615 (2001); In re Rhode Island Suburban Ry., 48 A. at 593.
\item \textsuperscript{106} See R.I. CONST. art. I, § 16 (stating "improvement of blighted and substandard areas shall be a public use and purpose for which the power of eminent domain may be exercised."); Opinion to the Governor, 69 A.2d 531, 532 (R.I. 1949) (redevelopment of blighted areas constitute public uses and purposes). See also Chicago Land Clearance Comm'n v. White, 104 N.E.2d 236 (Ill. 1952) Nashville Hous. Auth. v. City of Nashville, 237 S.W.2d 946 (Tenn. 1951); In re Slum Clearance in City of Detroit, 50 N.W.2d 340 (Mich. 1951); Opinion of the Justices, 48 So. 2d 757 (Ala. 1950); Schenck v. Pittsburgh, 70 A.2d 612 (Pa. 1950); Redfern v. Bd. of Comm'rs of Jersey City, 59 A.2d 641 (N.J. 1948); Hous. Auth. v. Higgenbotham, 143 S.W.2d 79 (Tex. 1940); Allydonn Realty Corp. v. Holyoke Housing Authority, 23 N.E.2d 665 (Mass. 1939); Hous. Auth. v. Dockweiler, 94 P.2d 794 (Cal. 1939).
\item \textsuperscript{107} WEBSTER'S NEW INTERNATIONAL DICTIONARY 287 (2d ed. 1945) (defining blight as that which frustrates one's plans or withers one's hopes; that which impairs or destroys).
\end{itemize}
"Deteriorated blighted area" means any area in which there exist buildings or improvements, either used or intended to be used for living, commercial, industrial, or other purposes, or any combination of these uses, which by reason of: (i) Dilapidation, deterioration, age, or obsolescence; (ii) Inadequate provision for ventilation, light, sanitation, open spaces, and recreation facilities; (iii) High density of population and overcrowding; (iv) Defective design or unsanitary or unsafe character or conditions of physical construction; (v) Defective or inadequate street and lot layout; and (vi) Mixed character, shifting, or deterioration of uses to which they are put, or any combination of these factors and characteristics, are conducive to the further deterioration and decline of the area to the point where it may become a slum blighted area as defined in subdivision (18), and are detrimental to the public health, safety, morals, and welfare of the inhabitants of the community and of the state generally.

"Arrested blighted area" means any area which, by reason of the existence of physical conditions including, but not by way of limitation, the existence of unsuitable soil conditions, the existence of dumping or other insanitary or unsafe conditions, the existence of ledge or rock, the necessity of unduly expensive excavation, fill or grading, or the necessity of undertaking unduly expensive measures for the drainage of the area or for the prevention of flooding or for making the area appropriate for sound development, or by reason of obsolete, inappropriate, or otherwise faulty platting or subdivision, deterioration of site improvements, inadequacy of utilities, diversity of ownership of plots, or tax delinquencies, or by reason of

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any combination of any of the foregoing conditions, is unduly costly to develop soundly through the ordinary operations of private enterprise and impairs the sound growth of the community.\textsuperscript{110}

In other words, in order for a particular area to classify as a "blighted area" subject to a taking by eminent domain, it must have reached a point of no return due to either extreme deterioration, constituting "a serious and growing menace... injurious and inimical to the public health, safety, and welfare of the people of the state,"\textsuperscript{111} or costly, unsafe or unsanitary conditions that impair the healthy development of the community.\textsuperscript{112} Thus, by condemning the property and redeveloping the area, the public interest is served and the public use requirement is satisfied. While even this extension of the "public use" requirement arguably exceeds the boundaries of valid eminent domain takings,\textsuperscript{113} unlike the "economic development" extension in \textit{Kelo}, the "blighted area" extension still imposes hefty limitations on the taking of private property.

In contrast, the only requirement for the taking of private property under the "economic development" extension is that the city find that a particular area is "sufficiently depressed."\textsuperscript{114} This gives legislatures unprecedented discretion in their exercise of eminent domain power and permits the taking of private property merely because the legislature finds a more profitable use for the property. This analysis effectively deletes the "public use" requirement from the Takings Clause. Because no word or phrase in a constitution is without meaning, this interpretation of "public use" cannot stand.

It is Rhode Island's specific, detail-oriented, statutory definitions of blight which warrant a narrower interpretation of its takings clause than that employed by the United States Supreme Court. The Supreme Court of Rhode Island should decline to follow the United States Supreme Court decision in \textit{Kelo}

\textsuperscript{110} \textit{Id.} (Section 2) (emphasis added).
\textsuperscript{111} \textit{R.I. GEN. LAWS} § 45-31-3 (2005) (LexisNexis) (legislative findings as to which slum blighted areas will qualify for eminent domain condemnation).
\textsuperscript{112} \textit{R.I. GEN. LAWS} § 45-31-8 (2005) (LexisNexis) (Section 2).
\textsuperscript{113} \textit{Accord In re Advisory Opinion to Governor}, 69 A.2d 531, 544 (Judge Flynn stating that redevelopment should not be considered as a public use).
because it would erase the "public use" requirement from the takings clause of the state constitution and because it fails to satisfy Rhode Island's strict taking requirements.

B. Structure

According to Bobbitt, the structural approach to constitutional interpretation examines the inferences taken from the structures established by the constitution.\(^{115}\) The structure of article I, section 16 of the Rhode Island Constitution supports the position that the Supreme Court of Rhode Island should not extend the "public use" requirement to include takings on the basis of "economic development." The clause, "[p]rivate property shall not be taken for public uses, without just compensation" sets forth two express limitations on the power of eminent domain.\(^{116}\) One such limitation is the requirement of "just compensation" and the other is that private property can only be taken for public uses.\(^{117}\) While the structure of Rhode Island's taking clause is identical to that of the United States Takings Clause,\(^{118}\) the Rhode Island Supreme Court is not restrained from interpreting the clause in a manner inconsistent with United States Supreme Court.

These limitations provide private property owners with protection and security.\(^{119}\) "[T]hey ensure stable property ownership by providing safeguards against excessive, unpredictable, or unfair use of the government's eminent domain power."\(^{120}\) The public use requirement describes the scope of the eminent domain power: the government can deprive a person of his property only for the public's use, but not for the use of another private individual.\(^{121}\) It is the duty of the court to determine whether a particular use is a public use.\(^{122}\)

By substituting "economic development" for "public use," the requirement of just compensation remains intact, but the public

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117. City of Newport, 189 A. at 846.
118. See U.S. Const. amend. V.
120. Id.
121. Id.
use limitation on the exercise of eminent domain is severely reduced. Private property owners would no longer enjoy the level of security and protection expressly afforded them by the framers. While private property owners would still enjoy the protection of "just compensation," they would be denied the assurance of stable property ownership. The balance of power would shift into the hands of the government, leaving the use of eminent domain power virtually absolute and unchecked.

In addition, the takings clause is found in article I of the Rhode Island Constitution which is titled, the "Declaration of Certain Constitutional Rights and Principles." Other rights expressed in Article I include: due process and equal protection, freedom of religion, the right to privacy and freedom from illegal searches and seizures, rights of those accused in criminal proceedings, the right against self-incrimination, and the right to trial by jury. These guarantees were founded upon the principle that freedom and liberty were valued above all other interests. The placement of the takings clause amongst these other fundamental rights illustrates that the security and protection of private property was a sacred right that should only be burdened in the rarest of circumstances.

While the placement of the takings clause in the Rhode Island Constitution is similar to that in the United States Constitution, Rhode Island's later amendments indicate a divergence from the meaning of its federal counterpart. These subsequent amendments support the view that private property rights are fundamental guarantees, subject to the exercise of eminent domain in limited situations. Adoption by the Rhode Island Supreme Court of the United States Supreme Court's decision in *Kelo* would alter the structure of article I, section 16 of the Rhode

123. *Accord Power Lunch*, supra note 2 (Bill Griffeth expressing concern that public uses, one of the safeguards of the eminent domain power, went by the wayside with the *Kelo* decision).
126. R.I. CONST. art. I, § 3.
Island Constitution, upset express limitations placed on the eminent domain power by the framers, and disrupt the provisions of subsequent amendments. Therefore, the Supreme Court of Rhode Island should decline to extend the exercise of eminent domain power to the taking of private property for economic development.

C. History and Doctrine

A thorough post-Kelo recommendation to the Supreme Court of Rhode Island must include an examination of Rhode Island takings clause jurisprudence. This analysis falls within Bobbitt's doctrinal approach, which focuses on exploring the case law on a particular subject. In addition, it is important under Bobbitt's historical approach to describe the historical background of eminent domain jurisprudence in Rhode Island, paying particular attention to those occasions in which the Supreme Court of Rhode Island has departed from the United States Supreme Court interpretation of similar federal constitutional provisions.

1. Eminent Domain Jurisprudence in Rhode Island

The Supreme Court of Rhode Island has consistently imposed narrow limits on the Rhode Island Constitution's takings clause. Even with the expansion of the definition of public use, the court has sought to confine the use of eminent domain power so as to prevent its abuse.

The Supreme Court of Rhode Island originally insisted on a strict interpretation of the "public use" requirement. For

132. BOBBITT, supra note 20, at 7.
133. Id.
135. See O'Neill v. City of East Providence, 480 A.2d 1375, 1381 (R.I. 1984) (finding that taking of plaintiffs land did not fit within the definition of public use because it did not comply with the necessary criteria); Ajootian v. Providence Redevelopment Agency, 91 A.2d 21, 22 (R.I. 1952) (found the taking of a particular area to fit within the slum blighted area definition of public use only after detailed legislative findings).
example, in *In re Rhode Island Suburban Railway Company*,\(^{137}\) the court held that the taking of a private lot by the Rhode Island Suburban Railway did not qualify as a public use because the main reason for the selection of the particular lot was to satisfy a purely private interest.\(^ {138}\) The court stated that "the right to take is not for the convenience or advantage of the public, but for public uses."\(^ {139}\)

The court went on to explain that, while many types of business may incidentally benefit the public, they do not justify a taking.\(^ {140}\) Private property cannot be taken for anything other than use by the public.\(^ {141}\) Public use "implies a possession, occupation, and enjoyment of the land by the public at large."\(^ {142}\) The court warned that if such a taking were to constitute a valid use of eminent domain, then companies could condemn land to construct any building that might be required to further company interests.\(^ {143}\) Thus, even in its early decisions, in accordance with other jurisdictions,\(^ {144}\) the court feared possible abuses of the public use requirement and sought to limit the type of takings that were included under the provision.

As eminent domain jurisprudence developed, the trend became to broadly construe the meaning of public use to include the condemnation of blighted areas.\(^ {145}\) While the Rhode Island

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137. *Id.*
138. *Id.* at 593 (the only reason for choosing the lot was because it was located along the Providence River and the company could conveniently get coal by tide-water).
139. *Id.* at 592.
140. *Id.*
141. *Id.*
142. *Id.* at 593.
143. *Id.*
144. See Port of Umatilla v. Richmond, 321 P.2d 338, 347 (Or. 1958) ("the public's use and occupation must be direct"); City of Richmond v. Carneal, 106 S.E. 403, 407 (Va. 1921) (there should always be a "direct" public use of the property taken); In re Opinion of the Justices, 91 N.E. 405, 407 (Mass. 1910) (the taking of private property to insure the proper development of industrial facilities primarily benefited individuals and only an incidental benefit to the public and thus was not considered a constitutional public use); Healy Lumber Co. v. Morris, 74 P. 681, 685 (Wash. 1903) (the use must be either a use by the public or a quasi public agency, and cannot be a merely incidental benefit to the public).
145. See, e.g., O'Neill v. City of East Providence, 480 A.2d 1375, 1377 (R.I. 1984) (considering the constitutionality of acquiring private property to effectuate urban renewal); Romeo v. Cranston Redevelopment Agency, 254
Supreme Court has recognized that, in the wake of constantly changing conditions of society, the concept of public use needs to be more flexible,146 it has continued to impose strict, narrow limits on the exercise of the eminent domain power.147

Following the lead of its sister states,148 the Supreme Court of Rhode Island expanded its definition of "public use" to include the taking of private property in "blighted areas."149 However, in its advisory opinion on the constitutionality of the Community Redevelopment Act, which proposed the taking of private property in blighted areas, the court explicitly noted that its validation of the act was based on the highly specific definition of a "blighted area" and the fact that the conditions must "predominate and injuriously affect the entire area."150 The court clearly distinguished between an invalid statute that permitted the taking of private property for uses that were partly private and partly public but combined so as to make the two uses inseparable, and the Community Redevelopment Act, which is a valid public use because it seeks to eliminate disease, delinquency, overcrowding, deterioration and crime in the interest of public health and safety.151

Further, the court firmly stated that its advisory opinion did

A.2d 426, 428-29 (R.I. 1969) (considering whether private property proposed for condemnation complies with the definition of an arrested blighted area); Ajootian v. Providence Redevelopment Agency, 91 A.2d 21, 22 (R.I. 1952) (considering whether the condemnation of private property fit within the definition of a slum blighted area); Opinion to the Governor, 69 A.2d 531, 531 (R.I. 1949) (considering the constitutionality of the Community Redevelopment Act).

146. See In re Advisory Opinion to the Governor 324 A.2d 641, 645-46 (R.I. 1974); Romeo, 254 A.2d at 431.
147. See O'Neill, 480 A.2d at 1381; Romeo, 254 A.2d at 431.
148. See, e.g., Chicago Land Clearance Comm'n v. White, 104 N.E.2d 236 (Ill. 1952); Nashville Hous. Auth. v. City of Nashville, 237 S.W.2d 946 (Tenn. 1951); In re Slum Clearance in City of Detroit, 50 N.W.2d 340 (Mich. 1951); Opinion of the Justices, 48 So.2d. 757 (Ala. 1950); Schenck v. Pittsburgh, 70 A.2d 612 (Pa. 1950); Redfern v. Board of Comm'rs of Jersey City, 59 A.2d 641 (N.J. 1948); Hous. Auth. v. Higgenbotham, 143 S.W.2d 79 (Tex. 1940); Allydonn Realty Corp. v. Holyoke Hous. Auth., 23 N.E. 619 (Mass. 1939); Hous. Auth. v. Dockweiler, 94 P.2d 794 (Cal. 1939); Dornan v. Philadelphia Hous. Auth., 200 A. 834, (Pa. 1938) (slum prevention statute was constitutional because its fundamental purpose was for a public use).
149. Romeo, 105 R.I. at 664; Ajootian, 91 A.2d at 26.
151. Id. at 534.
not condone the use of eminent domain under the act for a primarily esthetic purpose or as a means of creating an economic advantage for the municipality.\textsuperscript{152} The act should be narrowly construed to apply only to those redevelopment projects that are necessary to protect public health, morals, and safety by removing blight.\textsuperscript{153}

In addition, the court specifically rejected the idea that the act would permit municipalities to take private property under the guise of so-called "blighted conditions" to develop the area for a potentially more beneficial or profitable use.\textsuperscript{154} In other words, only when the area in question constitutes a "menace to public health, safety, or welfare" can the municipality then engage in condemnation proceedings.\textsuperscript{155}

In subsequent cases challenging both the Community Redevelopment Act and Amendment XXXIII of the Rhode Island Constitution, which adopted the Act into the state constitution,\textsuperscript{156} the court has strictly adhered to its narrow construction of what constitutes a "blighted area" and has only permitted the use of eminent domain in areas that fit within the rigorous definitions outlined in the Act and Amendment XXXIII.\textsuperscript{157}

For example, in \textit{Ajootian v. Providence Redevelopment Agency}, the Supreme Court of Rhode Island had its first opportunity to review the city's application of the Slum Clearance and Redevelopment Act, which had repealed the fundamentally

\begin{footnotes}
152. \textit{Romeo}, 105 R.I. at 657; \textit{In re Advisory Opinion to the Governor}, 69 A.2d at 536.
153. \textit{In re Advisory Opinion to the Governor}, 69 A.2d at 536.
154. \textit{Id.} at 536-37.
155. \textit{Id.} at 539.
156. Note, the adoption of the Community Redevelopment Act into the Rhode Island Constitution created a significant difference between the state constitution and the United States Constitution.
157. \textit{See O'Neill v. City of East Providence}, 480 A.2d 1375, 1382 (R.I. 1984) (finding that the taking of land for the city's proposed revitalization project did not constitute a proper public use because the city failed to meet the necessary requirements for a public use as defined in Amendment XXXIII); \textit{Romeo}, 105 R.I. at 655 (finding that the area in question fit within the definition of an arrested blighted area after reviewing detailed legislative findings); \textit{Ajootian v. Providence Redevelopment Agency}, 91 A.2d 21, 22 (R.I. 1952) (finding that the designated project area qualified as a slum blighted area because it fit within the narrow definition); \textit{See generally} R.I. \textsc{const.} art. I, § 16; R.I. \textsc{gen. laws} § 45-31-3 (2005) (LexisNexis).
\end{footnotes}
similar Community Redevelopment Act.\textsuperscript{158} Through the use of its eminent domain power under the Act, the city had proceeded to acquire lands within an area that it had determined to be a "slum blighted area."\textsuperscript{159} Plaintiff Ajootian owned one plot with a two-family residential dwelling and two other lots within the designated area.\textsuperscript{160} He sought an injunction against the city to prevent it from taking these properties.\textsuperscript{161}

The court, reiterating the findings expressed in its Advisory Opinion regarding the Community Redevelopment Act, upheld the constitutionality of the Act and found that the taking of private property in order to dispose of blight in the interest of public safety, health, and welfare fit within the public use requirement of the takings clause.\textsuperscript{162} In doing so, the court pointed out that the city had fulfilled all the necessary steps required by the Act before engaging in condemnation proceedings, including that the designated project area complied with the "slum blighted area" definition outlined in the Act.\textsuperscript{163} The following findings were set forth:

46 per cent of the land is used for industrial or commercial purposes; that the streets are narrow and congested; that of the 125 dwelling units, which are contained in 49 structures and occupied by about 400 people, 110 have been surveyed; that 84 per cent of these were built before 1900; that 71 per cent have no central heating; that 63 per cent have no inside hot water; that 62 per cent have no private bath; that 97 per cent are inadequate because of hazardous and unsanitary conditions; that 85 per cent have serious deterioration; and that all dwellings are predominately of wood construction, built close together and constitute fire hazards. . . . [B]ecause of such conditions, the incidence of juvenile delinquency, aid to dependent children,

\begin{footnotes}
\item 158. 91 A.2d 21, 26 (1952) ("...both acts generally expressed the same legislative intent. The changes in the latter relate mostly to matters of detail and definition.")
\item 159. Id. at 22.
\item 160. Id.
\item 161. Id.
\item 162. Id. at 26.
\item 163. Id. at 24.
\end{footnotes}
tuberculosis and other diseases are disproportionately high.\textsuperscript{164}

While the above facts and findings were not at issue, had the city not taken the necessary steps and made the proper findings to specifically show how the project area fit within the explicit definition of a "slum blighted area," the court implied that the city may not have been entitled to exercise its eminent domain power to acquire Ajootian's property.\textsuperscript{165}

Thus, even under a more expansive "public use" requirement, the Supreme Court of Rhode Island continued to curtail the abuse of eminent domain power by requiring a positive showing that a particular area meet the definition of a "slum blighted area." Such a showing is not required by the Federal Constitution and therefore justifies the Rhode Island Supreme Court to depart from the United States Supreme Court's more lenient public use requirements.

Subsequently, the citizens of Rhode Island approved an amendment, known as article XXXIII, to the Rhode Island Constitution.\textsuperscript{166} This amendment somewhat broadened the state's eminent domain power by permitting not only the removal of slums but also the removal of blight in general which frequently leads to slums.\textsuperscript{167} However, unlike the United States Constitution, the provisions of the amendment still require specific showings that the existence of the alleged blighted area "constitutes a serious and growing menace which is injurious and inimical to the public health, safety, morals and welfare of the people. . . ."\textsuperscript{168}

The Supreme Court of Rhode Island addressed the constitutionality of Article XXXIII in \textit{Romeo v. Cranston Redevelopment Agency},\textsuperscript{169} specifically the inclusion of "arrested

\textsuperscript{164} \textit{Id.} at 22-23.
\textsuperscript{165} See \textit{id.} at 24; see also O'Neill v. City of East Providence, 480 A.2d 1375, 1382 (R.I. 1984) (where the city was not authorized to use the eminent domain power because it failed to meet the necessary requirements.)
\textsuperscript{167} \textit{Id.} at 658; see generally R.I. CONST. art. I, § 16; R.I. GEN. LAWS § 45-31-3 (2005) (LexisNexis).
\textsuperscript{168} \textit{Romeo,} 105 R.I. at 656; see R.I. GEN. LAWS § 45-31-3 (2005) (LexisNexis).
\textsuperscript{169} \textit{Romeo,} 105 R.I. at 651.
blighted areas\textsuperscript{170} within the definition of blighted and substandard area.\textsuperscript{171} The project in question involved a section of land that the city desired to acquire in order to build a highway and install various utilities.\textsuperscript{172} The purpose of the project was to "assist in the orderly development of this particular area of Cranston."\textsuperscript{173} The plaintiff owned a home in the area and jointly retained eleven plots of vacant land in the project area.\textsuperscript{174}

The court found that the redevelopment agency properly adhered to the standards set forth under the definition of an "arrested blighted area."\textsuperscript{175} The project area displayed the following conditions: outmoded platting, inadequacy of utilities, diversity of ownership of lots, title to multiple lots held by reason of their sale for unpaid taxes, and the disposal of garbage and perishables in the area.\textsuperscript{176} The court went on to state that, while the textual definition of an "arrested blighted area" did not contain an express reference to public health, safety, and welfare, provisions of § 45-31-3 presented eight specific findings regarding the hazards which arise from blighted and substandard areas.\textsuperscript{177} Chief among these findings is that the area presents a "serious growing menace which is injurious and inimical to the public health, safety, morals, and welfare of the people. . . ."\textsuperscript{178}

In endorsing the redevelopment agency's findings and its use of the eminent domain power, the court was careful to explain that what classified as a valid public use was still a judicial question.\textsuperscript{179} Recognizing that this expansion of the public use requirement gave redevelopment agencies an "extreme grant of power," the court reserved the authority to hear claims alleging an abuse of this power.\textsuperscript{180} In other words, the Supreme Court of Rhode Island,

\textsuperscript{170} See supra note 9, and accompanying text.
\textsuperscript{171} Romeo, 105 R.I. at 654.
\textsuperscript{172} Id. at 653. Utilities included water, sewer, drainage, gas, electric, telephone, street lighting and appurtenances.
\textsuperscript{173} Id. In my view, because the city would be building a public highway on the land, this type of taking is the type envisioned by the framers and thus, validly within the original definition of "public use."
\textsuperscript{174} Id. at 654.
\textsuperscript{175} Id. at 655.
\textsuperscript{176} Id. at 655 n.1.
\textsuperscript{177} Id. at 656; see generally R.I. GEN. LAWS § 45-31-3 (2005) (LexisNexis).
\textsuperscript{178} Romeo, 105 R.I. at 656.
\textsuperscript{179} Id. at 665.
\textsuperscript{180} Id.
while broadening the original, rigid definition of public use in order to conform with the changes of modern society, has continued to maintain a policy of strict adherence to the limits placed on the eminent domain power, a policy which the United States Supreme Court has not pursued.

While the Supreme Court of Rhode Island has yet to be presented with a *Kelo*-like situation, it has recently referenced the *Kelo* decision. In *Rhode Island Development Corp. v. The Parking Co.*, the court first reaffirmed "the well-established rule that what constitutes a public use is a judicial question."¹⁸¹ Then, in mentioning *Kelo*, the court stressed the fact that the Supreme Court had focused on the City of New London's extensive, deliberate, and methodical approach in preparing the economic development plan and "the condemning authority's responsibility of good faith and due diligence before it may start its condemnation engine."¹⁸² However, while the court appears to apply *Kelo* in a positive light, it also emphasizes the need for the "principle purpose and objective in a given enactment [to be] public in nature [and] designed to protect the public health, safety, and welfare."¹⁸³ The court went on to conclude that condemnation proceedings motivated by a desire for increased revenue did not satisfy the public use requirement.¹⁸⁴ This implies that the Supreme Court of Rhode Island would be against the adoption of a bright line rule, as enunciated in *Kelo*, that taking private property for economic development will always constitute a valid public use, and opt for an approach that continues to limit the use of the eminent domain power.

Thus, even under an expanded definition of public use, the Supreme Court of Rhode Island has continued to curb potential exploitation of the eminent domain power by imposing limits on its application. The court should continue its current practice of narrow construction of the public use requirement and reject the broad, all-encompassing "economic development" interpretation of

¹⁸¹. R.I. Econ. Dev. Corp. v. Parking Co., 892 A.2d 87, 103 (R.I. 2006). The court found that, because the condemnation of a parking facility was motivated by a desire to increase revenue, the taking was not a legitimate public use). *Id.* at 101.
¹⁸². *Id.* at 104.
¹⁸³. *Id.*
¹⁸⁴. *Id.*
public use.

2. Departure From the United States Supreme Court

The Supreme Court's decision in *Kelo* represents the minimum level of protection that the States must afford their citizens under the Fifth Amendment to the federal Constitution.\(^{185}\) The States are free to interpret their state constitutions so as to provide additional rights to their citizens than the Federal Constitution provides.\(^{186}\) Given this integral tenet of federalism, the Supreme Court of Rhode Island should enforce stricter "public use" requirements than the federal minimum.

While the language of article I, section 16 of the Rhode Island Constitution and the Fifth Amendment to the Federal Constitution are similar,\(^{187}\) Rhode Island has not closed its doors to the possibility of departing from the minimum standards set by the Supreme Court.\(^{188}\) In fact, Rhode Island has strayed from Supreme Court rulings and provided its citizens with a heightened degree of protection in several areas: the Fourth Amendment auto exigency,\(^{189}\) drunk driving roadblocks under the Fourth Amendment,\(^{190}\) electronic eavesdropping,\(^{191}\) suppression of seized evidence,\(^{192}\) and the Sixth Amendment right to a jury trial.\(^{193}\)

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186. *Id.*
187. See U.S. CONST. amend. V; R.I. CONST. art. I, § 16 ("Private property shall not be taken for public uses, without just compensation").
189. State v. Benoit, 417 A.2d 895, 899 (R.I. 1980) (departing from U.S. Supreme Court holding that the automobile exception included immobilized vehicles by invalidating the warrantless search of a car four hours after it had been seized by police), overruled by State v. Werner, 615 A.2d 1010, 1014 (R.I. 1992) (overruled Benoit because the Supreme Court had subsequently corrected the inconsistencies in the auto exigency requirement).
190. *Pimental*, 561 A.2d at 1351 (departing from the United States Supreme Court language that the Fourth Amendment allowed nondiscretionary roadblocks).
192. State v. von Bulow, 475 A.2d 995, 1019 (R.I. 1984) (stating that even if the defendant's Fourth Amendment rights had not been violated, the Rhode
Rhode Island has generally departed from Supreme Court authority when a principled rationale exists for such a departure. For example, in *Pimental v. Dept. of Transp.*, the Supreme Court of Rhode Island declined to follow the language of the Supreme Court decision in *Delaware v. Prouse*, which allowed non-discretionary roadblock stops. The Supreme Court of Rhode Island opined that such roadblocks would "diminish the guarantees against unreasonable searches and seizures" embedded in the Rhode Island Constitution. The court recognized that, while the societal interest in getting drunk drivers off the roadways was compelling, it could not outweigh the fundamental guarantees of privacy explicitly outlined by the framers of the Rhode Island Constitution. The court reasoned that to ignore the traditional values set forth in the Rhode Island Constitution would surely "shock and offend" the founders of this state. Based on this reasoning, the court found that a principled rationale existed to depart from the minimum level of protection established by the Supreme Court.

Similar to the situation in *Pimental*, a principled rationale exists to depart from the Supreme Court standard set forth in *Kelo v. City of New London*. The founders believed the right to acquire, possess, and protect property was a guaranteed fundamental right similar to the right to privacy. This understanding that property was a natural, fundamental right was widely accepted and embodied in the common law. For instance, William Blackstone described private property rights
in the following way: "So great... is the regard of the law for private property, that it will not authorize the least violation of it."205 He wrote that "the law of the land... postpone[s] even the public necessity to the sacred and inviolable rights of private property."206 In addition, Rhode Island courts have recognized that ownership of property creates fundamental rights in that property.207 This "bundle of rights" includes the right to exclude others, to possession, to use and enjoy, and to dispose of the property.208 Because the taking of private property for "economic development" essentially allows the government to take private property solely on the basis of finding a more profitable use for the land, this fundamental right, valued by our founders, would be severely diminished. Surely such a violation would "shock and offend" the framers of the Rhode Island Constitution.

Thus, because a principled rationale exists for departing from the Supreme Court minimum in *Kelo v. City of New London*, the Supreme Court of Rhode Island should afford its citizens with a heightened level of protection under the takings clause of article I, section 16 of the state constitution.

D. Prudentialism

Bobbitt's prudential approach to constitutional interpretation focuses on the consequences of adopting a particular decision or interpretation.209 The sanctity of the home is a concept with deep roots, fully embedded in American tradition.210 Homes provide

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205. William Blackstone, 1 Commentaries 135.

206. Id.


209. BOBBITT, supra note 20, at 7.

210. For example, the concept is consistently found in Supreme Court Fourth Amendment cases protecting against unwarranted searches of the home. See, e.g., Welsh v. Wisconsin, 466 U.S. 740, 750 (1984) (Government has the burden of showing that exigent circumstances existed before they may invade the sanctity of the home); Payton v. New York, 445 U.S. 573, 586 n.24 (1980) (quoting Johnson v. United States, 333 U.S. 10, 13-14 (1948) ("the right of officers to thrust themselves into a home is also a grave concern, not
foundations for America's families and the encouragement of stable family homes is a fundamental aspect of good public policy. Yet, with the Supreme Court decision in *Kelo*, allowing governments to take private property without fulfilling the public use requirement,\(^ {211}\) no family is safe from the threat of losing its home. What was formerly a hurdle for governments to overcome to take an individual's home is now non-existent, resulting in the possibility of leaving once stable, happy households with no place to go.

Entire families could be uprooted from their homes and forced to alter their lives\(^ {212}\) solely because the government believes that other businesses might be a more profitable use for the land. Children may be forced to change schools or child care facilities and leave their friends behind. Parents may have to find new jobs or drive longer distances to get to their current jobs. Similar to what happened to the Derys in New London, the government would be allowed to force elderly couples from their longstanding homes.\(^ {213}\) These couples may have special needs, like requiring wheelchair accessibility, that their home was particularly designed to handle. Eminent domain poses risks to financial stability and creates severe stress for all those affected. As a public policy matter, the pursuit of higher tax revenues should not trump the encouragement of stable family units.

Some may argue that the legislature, acting on behalf of its constituents, is better situated to address policy concerns and that the courts should play at most a limited role. However, as will be discussed, certain situations call for the courts to step up and take a more active role in policy decision-making.\(^ {214}\) For example, in this situation, constitutional interpretation and fundamental rights are at issue, and because, as shown below, the interests of all socioeconomic levels of society are not always taken into account by the local legislature, the courts, in an effort to protect those individuals less politically represented, need to intervene.\(^ {215}\)

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213. *Id.* at *9*.
214. *See infra* Part E.
215. Both Kennedy in his concurrence and Thomas in his dissent support the idea that a more stringent standard of review may be appropriate for
In addition, if the government is given free rein to take private property with such ease, private property owners will have less of an incentive to keep up their land and make improvements. What motivates a person to improve his land when the threat of condemnation is constantly looming over him? Essentially, a private property owner would just be leasing from the city until the city decides it wants the land.\footnote{Kelo, 125 S. Ct. at 2670 (Kennedy, J. concurring); 125 S. Ct. at 2687 (Thomas, J. dissenting).}

Further, the \textit{Kelo} expansion of public purpose "guarantees that these losses will fall disproportionately on poor communities."\footnote{See Benjamin D. Cramer, Comment, \textit{Eminent Domain for Private Development: An Irrational Basis for the Erosion of Property Rights}, 55 CASE W. RES. L. REV. 409, 419 (2004) (summarizing the comments of an Ohio property owner).} Economic development embraces any economically advantageous end.\footnote{Id. at 2686-87.} Because poor communities have little political power and are almost certainly less likely to use their land to its maximum and paramount social use, they will inevitably feel the brunt of economic development takings.\footnote{Id. at 2686-87.}

Since the expansion of the definition of "public use" to include the taking of "slum blighted areas," this harsh disproportionate effect has already been felt among the nation's poorer communities and the Supreme Court's decision in \textit{Kelo} would only work to aggravate those effects.\footnote{Id. at 2687.} Between 1949 and 1963, 63 percent of families uprooted by urban renewal whose race was known were minorities.\footnote{Id. at 2686-87.} Of these families, while 56 percent of minorities and 38 percent of whites satisfied the public housing minimum income prerequisite, public housing was rarely available to them.\footnote{Id. (quoting Berman v. Parker, 348 U.S. 26, 28 (1954)).} During the 1950s and 1960s, public works ventures decimated largely nonwhite neighborhoods in St. Paul, Minnesota and Baltimore, Maryland.\footnote{Id. (citing \textit{Berman}, 348 U.S. at 28-29).} The lower income and elderly residents of Poletown in Detroit, Michigan were displaced from their homes in 1981 to make way for a new General Motors
In the “slum clearance” development upheld by the United States Supreme Court in *Berman v. Parker*, more than 97 percent of people uprooted by the project were black. Because of its intimate connection to the dislocation of minorities, “urban renewal came to be known as ‘Negro removal.’” The Supreme Court’s decision in *Kelo* will only worsen this situation. Now, under the guise of economic development, cities have unbridled power to take private property for any economically profitable objective, not just to remove blight.

Thus, because the exercise of eminent domain has such negative effects on those displaced by it, as a matter of good public policy, the power of eminent domain should continue to be used only sparingly. A broad expansion of the power threatens to exacerbate an already devastatingly disproportionate condition. Therefore, the Supreme Court of Rhode Island should reject the Supreme Court’s finding that economic development is a valid public use because it gives the government too much discretion in exercising its takings power.

E. Ethics

The *Kelo* decision raises many ethical questions. Bobbitt’s ethical approach to constitutional interpretation takes a look at the implication of the government in its central role in American political culture. In the absence of any real guidelines on the use of economic development as a justification for exercising the eminent domain power, what stops the government from abusing its takings power? Does the government need to advance any rationale for its decisions to take private property for economic development? What conditions must be present to condemn an area for economic development? Can plans for economic development be based entirely on speculation?

The answers to these questions can be summed up with the following: because the Court gave complete deference to the

224. *Id.* (citing Jeanie Wylie, *Poletown: Community Betrayed* 58 (1989)).
228. BOBBITT, supra note 20, at 94.
legislature to determine which areas are ripe for economic development, the government can take private property for essentially any reason without any meaningful check on its authority. In *Kelo*, the legislature only had to find that the Fort Trumbull area was "sufficiently distressed" and put together a plan that it "believed" would benefit the community. However, the legislature did not provide any criteria for the basis of its finding that the Fort Trumbull area was "sufficiently depressed" or give any guarantee that its economic development plan would in fact create more jobs or increase tax revenue, thus benefiting the community.

The question remains: Are there any safeguards in place to prevent the abuse of eminent domain? Some may argue that the political process can adequately remedy any potential abuses. In other words, because the citizens have a voice in whom they want to run their state, legislators seeking re-election will not alienate the citizens by abusing their powers.

However, legislators are also influenced by corporations and organized interest groups who help raise money and promise votes. It is these situations that threaten abuse of eminent domain power and call for the courts to intervene. "The beneficiaries [of the *Kelo* decision] are likely to be those citizens with disproportionate influence and power in the political process, including large corporations and development firms." The *Kelo* decision encourages more influential citizens to take advantage of individuals who are less politically powerful. These ethical considerations make it more likely that the aforementioned negative prudential concerns will be realized. Especially in regard

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230. Id.
231. Id.
232. Power Lunch, supra note 2 (Bill Griffeth asking, "what stops the head of a major hotel from coming in and wanting to develop a choice piece of property that already has homes on it? "Couldn't he just say, 'you let me build, and your tax base will go up?'").
233. Cramer, supra note 216, at 419; See *Kelo*, 125 S. Ct. at 2670 (Kennedy, J. concurring) (stating that "there may be some categories of cases in which the transfers are so suspicious, or the procedures employed so prone to abuse, or the purported benefits are so trivial or implausible, that courts should presume an impermissible private purpose.").
235. Id. at 2687 (Thomas, J., dissenting).
to large influential corporations, such as General Motors or Pfizer, municipalities could essentially act as personal real estate agents. A constitutional right thus would be undermined to advance the interests of private corporate interests.\(^{235}\)

In the aftermath of the *Kelo* decision, the incidents of abuse of eminent domain power are already surfacing nationwide.\(^{236}\) For example, city officials in National City, California endorsed the use of eminent domain to take a large area of the city to allow a private developer to build an office tower, condominiums and retail space.\(^ {237}\) While not all properties in the designated area are blighted, they are still subject to eminent domain taking "because the proposed development will be more profitable."\(^ {238}\) In Toledo, Ohio, eighty-three well-maintained homes were condemned so that a Jeep plant, threatening to leave otherwise, could expand its facilities.\(^ {239}\) Elsewhere, property owners in Menomonee Falls, Wisconsin could stand to lose their land as the city formulates a tangible redevelopment plan.\(^ {240}\)

Even homeowners in upscale and middle-class neighborhoods are not safe.\(^ {241}\) Homeowners in Boulevard Heights, an upscale community in St. Louis, Missouri, were forced from their homes to make way for a shopping center.\(^ {242}\) In Long Branch, New Jersey, city officials moved to employ eminent domain to seize middle-class oceanfront homes and replace them with luxury condominiums.\(^ {243}\)

Some Rhode Island citizens are also among those who are feeling the harsh effects of the abusive post-*Kelo* eminent domain

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\(^{238}\) Id.

\(^{239}\) Castle Coalition, http://maps.castlecoalition.org/ (last visited Apr. 17, 2006) (Select Ohio on "select state" drop down menu, then select Toledo on the map).


\(^{241}\) Id. (under Long Branch, NJ and St. Louis, Mo. headings).

\(^{242}\) Id. (under St. Louis, Mo. heading).

\(^{243}\) Id. (under Long Branch, NJ heading).
power. Back in 2000, the City of Warwick sought to redevelop the Station District. Plans were stalled when the Warwick Station Redevelopment Agency failed to secure the land needed for the project. Property owners in the area were simply not willing to negotiate. However, in light of the *Kelo* decision, the city and Warwick Station Redevelopment Agency have renewed their efforts to put their plan in motion. Agency chairman Michael Grande says, "[t]he only obstacle to private development of hotels, condos, office space, and retail is the price of the dirt."

Thus, if the Supreme Court of Rhode Island adopted economic development as a valid public use, property rights would exist subject to the compulsion of the government and its desires to satisfy influential corporations. The lure of potential abuse of the eminent domain power would be great.

IV. CONCLUSION

In sum, the Supreme Court of Rhode Island should reject the United States Supreme Court decision in *Kelo v. City of New London* to extend the use of the eminent domain power to include the taking of private property for economic development.

The text and structure of article I, section 16 both imply that the "public use" requirement is a limitation on the exercise of eminent domain. Not only must the government pay just compensation, but the intended use must be for the possession, enjoyment, and occupation by the public. It cannot be for the benefit of a purely private interest. While the Supreme Court of Rhode Island has accepted the extension of the "public use" requirement to include the taking of "blighted" areas, this exception is extremely narrow and only applies to those areas that are so deteriorated and dilapidated that public health and safety are at risk or those unsafe and unsanitary "arrested blighted areas" that prevent the healthy growth of a community.

244. Castle Coalition, http://maps.castlecoalition.org/ (last visited Apr. 17, 2006) (Select Rhode Island on “select state” drop down menu, then select Warwick on the map).
245. Id.
246. Id.
247. Id.
248. Id.
249. Id.
In addition, Rhode Island’s history and doctrine support the rejection of the *Kelo* expansion of eminent domain jurisprudence. The Supreme Court of Rhode Island has continued to enforce a strict application of the eminent domain power. In its advisory opinions and subsequent decisions, the court has explicitly rejected the notion that the government could take private property solely for the purpose of putting it to a more beneficial use.

Furthermore, the Supreme Court of Rhode Island has not hesitated to depart from the United States Supreme Court in the past when it believed that a principled rationale existed to afford its citizens with more protection than the federal minimum. Because the private right to property ownership was a core, fundamental value of the founders, to allow the government to acquire private property with such ease would be wholly contrary to their beliefs and objectives.

Finally, the furtherance of good public policy and the hindering of unethical abuse of the eminent domain power are additional reasons to reject the *Kelo* holding. It is violative of public policy to uproot families and force them out of their homes. Also, because there are essentially no limitations on the economic development rationale, the government is susceptible to bribery from large influential corporations.

To maximize the rights of private property owners, the Supreme Court of Rhode Island should depart from the United States Supreme Court decision in *Kelo v. City of New London*, and provide the citizens of Rhode Island with greater protection of individual property rights than that afforded by the federal minimum.

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