V. LA AFECTACIÓN PÚBLICA DEL USO PRIVADO

A. LA REGLAMENTACIÓN DEL SUELO

EL *POLICE POWER* DEL ESTADO

VILLAGE OF EUCLID et al. v. AMBLER REALTY COMPANY. Supreme Court of the United States 272 U.S. 365; 47 S. Ct. 114; 71 L. Ed. 303, November 22, 1926, Decided

OPINION BY: SUTHERLAND

[*379] The Village of Euclid is an Ohio municipal corporation. It adjoins and practically is a suburb of the City of Cleveland. Its estimated population is between 5,000 and 10,000, and its area from twelve to fourteen square miles, the greater part of which is farm lands or unimproved acreage. It lies, roughly, in the form of a parallelogram measuring approximately three and one-half miles each way. East and west it is traversed by three principal highways: Euclid Avenue, through the southerly border, St. Clair Avenue, through the central portion, and Lake Shore Boulevard, through the northerly border in close proximity to the shore of Lake Erie. The Nickel Plate railroad lies from 1,500 to 1,800 feet north of Euclid Avenue, and the Lake Shore railroad 1,600 feet farther to the north. The three highways and the two railroads are substantially parallel.

Appellee is the owner of a tract of land containing 68 acres, situated in the westerly end of the village, abutting on Euclid Avenue to the south and the Nickel Plate railroad to the north. Adjoining this tract, both on the east and on the west, there have been laid out restricted residential plats upon which residences have been erected.

On November 13, 1922, an ordinance was adopted by the Village Council, establishing a comprehensive zoning plan for regulating and restricting the location of trades, [*380] industries, apartment houses, two-family houses, single

family houses, etc., the lot area to be built upon, the size and height of buildings, etc.

The entire area of the village is divided by the ordinance into six classes of use districts, denominated U-1 to U-6, inclusive; three classes of height districts, denominated H-1 to H-3, inclusive; and four classes of area districts, denominated A-1 to A-4, inclusive. The use districts are classified in respect of the buildings which may be erected within their respective limits, as follows: U-1 is restricted to single family dwellings, public parks, water towers and reservoirs, suburban and interurban electric railway passenger stations and rights of way, and farming, non-commercial greenhouse nurseries and truck gardening; U-2 is extended to include two-family dwellings; U-3 is further extended to include apartment houses, hotels, churches, schools, public libraries, museums, private clubs, community center buildings, hospitals, sanitariums, public playgrounds and recreation buildings, and a city hall and courthouse; U-4 is further extended to include banks, offices, studios, telephone exchanges, fire and police stations, restaurants, theatres and moving picture shows, retail stores and shops, sales offices, sample rooms, wholesale stores for hardware, drugs and groceries, stations for gasoline and oil (not exceeding 1,000 gallons storage) and for ice delivery, skating rinks and dance halls, electric substations, job and newspaper printing, public garages for motor vehicles, stables and wagon sheds (not exceeding five horses, wagons or motor trucks) and distributing stations for central store and commercial enterprises; U-5 is further extended to include billboards and advertising signs (if permitted), warehouses, ice and ice cream manufacturing and cold storage plants, bottling works, milk bottling and central distribution stations, laundries, carpet cleaning, dry cleaning and dyeing establishments, [*381] blacksmith, horseshoeing, wagon and motor vehicle repair shops, freight stations, street car barns, stables and wagon sheds (for more than five horses, wagons or motor trucks), and wholesale produce markets and salesrooms; U-6 is

further extended to include plants for sewage disposal and for producing gas, garbage and refuse incineration, scrap iron, junk, scrap paper and rag storage, aviation fields, cemeteries, crematories, penal and correctional institutions, insane and feeble minded institutions, storage of oil and gasoline (not to exceed 25,000 gallons), and manufacturing and industrial operations of any kind other than, and any public utility not included in, a class U-1, U-2, U-3, U-4 or U-5 use. There is a seventh class of uses which is prohibited altogether.

Class U-1 is the only district in which buildings are restricted to those enumerated. In the other classes the uses are cumulative; that is to say, uses in class U-2 include those enumerated in the preceding class, U-1; class U-3 includes uses enumerated in the preceding classes, U-2 and U-1; and so on. In addition to the enumerated uses, the ordinance provides for accessory uses, that is, for uses customarily incident to the principal use, such as private garages. Many regulations are provided in respect of such accessory uses.

The height districts are classified as follows: In class H-1, buildings are limited to a height of two and one-half stories or thirty-five feet; in class H-2, to four stories or fifty feet; in class H-3, to eighty feet. To all of these, certain exceptions are made, as in the case of church spires, water tanks, etc.

The classification of area districts is: In A-1 districts, dwellings or apartment houses to accommodate more than one family must have at least 5,000 square feet for interior lots and at least 4,000 square feet for corner lots; in A-2 districts, the area must be at least 2,500 square feet for interior lots, and 2,000 square feet for corner lots; in A-3 [*382] districts, the limits are 1,250 and 1,000 square feet, respectively; in A-4 districts, the limits are 900 and 700 square feet, respectively. The ordinance contains, in great variety and detail, provisions in respect of width of lots, front, side and rear yards, and other matters, including

restrictions and regulations as to the use of bill boards, sign boards and advertising signs.

A single family dwelling consists of a basement and not less than three rooms and a bathroom. A two-family dwelling consists of a basement and not less than four living rooms and a bathroom for each family; and is further described as a detached dwelling for the occupation of two families, one having its principal living rooms on the first floor and the other on the second floor.

Appellee's tract of land comes under U-2, U-3 and U-6. The first strip of 620 feet immediately north of Euclid Avenue falls in class U-2, the next 130 feet to the north, in U-3, and the remainder in U-6. The uses of the first 620 feet, therefore, do not include apartment houses, hotels, churches, schools, or other public and semi-public buildings, or other uses enumerated in respect of U-3 to U-6, inclusive. The uses of the next 130 feet include all of these, but exclude industries, theatres, banks, shops, and the various other uses set forth in respect of U-4 to U-6, inclusive.

[*383] Annexed to the ordinance, and made a part of it, is a zone map, showing the location and limits of the various use, height and area districts, from which it appears that the three classes overlap one another; that is to say, for example, both U-5 and U-6 use districts are in A-4 area districts, but the former is in H-2 and the latter in H-3 height districts. The plan is a complicated one and can be better understood by an inspection of the map, though it does not seem necessary to reproduce it for present purposes.

The lands lying between the two railroads for the entire length of the village area and extending some distance on either side to the north and south, having an average width of about 1,600 feet, are left open, with slight exceptions, for industrial and all other uses. This includes the larger part of appellee's tract. Approximately one-sixth of the area of the entire village is included in U-5 and U-6 use districts. That part of the village lying south of Euclid Avenue is

principally in U-1 districts. The lands lying north of Euclid Avenue and bordering on the long strip just described are included in U-1, U-2, U-3 and U-4 districts, principally in U-2.

The enforcement of the ordinance is entrusted to the inspector of buildings, under rules and regulations of the board of zoning appeals. Meetings of the board are public, and minutes of its proceedings are kept. It is authorized to adopt rules and regulations to carry into effect provisions of the ordinance. Decisions of the inspector of buildings may be appealed to the board by any person claiming to be adversely affected by any such decision. The board is given power in specific cases of practical difficulty or unnecessary hardship to interpret the ordinance in harmony with its general purpose and intent, so that the public health, safety and general welfare may be secure and substantial justice done. Penalties are prescribed for violations, and it is provided that the various [*384] provisions are to be regarded as independent and the holding of any provision to be unconstitutional, void or ineffective shall not affect any of the others.

The ordinance is assailed on the grounds that it is in derogation of § 1 of the Fourteenth Amendment to the Federal Constitution in that it deprives appellee of liberty and property without due process of law and denies it the equal protection of the law, and that it offends against certain provisions of the Constitution of the State of Ohio. The prayer of the bill is for an injunction restraining the enforcement of the ordinance and all attempts to impose or maintain as to appellee's property any of the restrictions, limitations or conditions. The court below held the ordinance to be unconstitutional and void, and enjoined its enforcement. 297 Fed. 307.

Before proceeding to a consideration of the case, it is necessary to determine the scope of the inquiry. The bill alleges that the tract of land in question is vacant and has been held for years for the purpose of selling and developing it for industrial uses, for which it is especially

adapted, being immediately in the path of progressive industrial development; that for such uses it has a market value of about $ 10,000 per acre, but if the use be limited to residential purposes the market value is not in excess of $ 2,500 per acre; that the first 200 feet of the parcel back from Euclid Avenue, if unrestricted in respect of use, has a value of $ 150 per front foot, but if limited to residential uses, and ordinary mercantile business be excluded therefrom, its value is not in excess of $ 50 per front foot.

It is specifically averred that the ordinance attempts to restrict and control the lawful uses of appellee's land so as to confiscate and destroy a great part of its value; that it is being enforced in accordance with its terms; that prospective buyers of land for industrial, commercial and residential uses in the metropolitan district of Cleveland [*385] are deterred from buying any part of this land because of the existence of the ordinance and the necessity thereby entailed of conducting burdensome and expensive litigation in order to vindicate the right to use the land for lawful and legitimate purposes; that the ordinance constitutes a cloud upon the land, reduces and destroys its value, and has the effect of diverting the normal industrial, commercial and residential development thereof to other and less favorable locations.

The record goes no farther than to show, as the lower court found, that the normal, and reasonably to be expected, use and development of that part of appellee's land adjoining Euclid Avenue is for general trade and commercial purposes, particularly retail stores and like establishments, and that the normal, and reasonably to be expected, use and development of the residue of the land is for industrial and trade purposes. Whatever injury is inflicted by the mere existence and threatened enforcement of the ordinance is due to restrictions in respect of these and similar uses; to which perhaps should be added — if not included in the foregoing — restrictions in respect of apartment houses. Specifically, there is nothing in the record to 0] suggest that any damage results from the presence in the ordinance of

those restrictions relating to churches, schools, libraries and other public and semi-public buildings. It is neither alleged nor proved that there is, or may be, a demand for any part of appellee's land for any of the last named uses; and we cannot assume the existence of facts which would justify an injunction upon this record in respect of this class of restrictions. For present purposes the provisions of the ordinance in respect of these uses may, therefore, be put aside as unnecessary to be considered. It is also unnecessary to consider the effect of the restrictions in respect of U-1 districts, since none of appellee's land falls within that class.

[*386] We proceed, then, to a consideration of those provisions of the ordinance to which the case as it is made relates, first disposing of a preliminary matter.

A motion was made in the court below to dismiss the bill on the ground that, because complainant [appellee] had made no effort to obtain a building permit or apply to the zoning board of appeals for relief as it might have done under the terms of the ordinance, the suit was premature. The motion was properly overruled. The effect of the allegations of the bill is that the ordinance of its own force operates greatly to reduce the value of appellee's lands and destroy their marketability for industrial, commercial and residential uses; and the attack is directed, not against any specific provision or provisions, but against the ordinance as an entirety. Assuming the premises, the existence and maintenance of the ordinance, in effect, constitutes a present invasion of appellee's property rights and a threat to continue it. Under these circumstances, the equitable jurisdiction is clear. See Terrace v. Thompson, 263 U.S. 197, 215; Pierce v. Society of Sisters, 268 U.S. 510, 535.

It is not necessary to set forth the provisions of the Ohio Constitution which are thought to be infringed. The question is the same under both Constitutions, namely, as stated by appellee: Is the ordinance invalid in that it violates the constitutional protection "to the right of property in the appellee by attempted regulations under the

guise of the police power, which are unreasonable and confiscatory?"

Building zone laws are of modern origin. They began in this country about twenty-five years ago. Until recent years, urban life was comparatively simple; but with the great increase and concentration of population, problems have developed, and constantly are developing, which require, and will continue to require, additional restrictions in respect of the use and occupation of private lands in [*387] urban communities. Regulations, the wisdom, necessity and validity of which, as applied to existing conditions, are so apparent that they are now uniformly sustained, a century ago, or even half a century ago, probably would have been rejected as arbitrary and oppressive. Such regulations are sustained, under the complex conditions of our day, for reasons analogous to those which justify traffic regulations, which, before the advent of automobiles and rapid transit street railways, would have been condemned as fatally arbitrary and unreasonable. And in this there is no inconsistency, for while the meaning of constitutional guaranties never varies, the scope of their application must expand or contract to meet the new and different conditions which are constantly coming within the field of their operation. In a changing world, it is impossible that it should be otherwise. But although a degree of elasticity is thus imparted, not to the meaning, but to the application of constitutional principles, statutes and ordinances, which, after giving due weight to the new conditions, are found clearly not to conform to the Constitution, of course, must fall.

The ordinance now under review, and all similar laws and regulations, must find their justification in some aspect of the police power, asserted for the public welfare. The line which in this field separates the legitimate from the illegitimate assumption of power is not capable of precise delimitation. It varies with circumstances and conditions. A regulatory zoning ordinance, which would be clearly valid as applied to the great cities, might be clearly invalid as

applied to rural communities. In solving doubts, the maxim sic utere tuo ut alienum non laedas, which lies at the foundation of so much of the common law of nuisances, ordinarily will furnish a fairly helpful clew. And the law of nuisances, likewise, may be consulted, not for the purpose of controlling, but for the helpful aid of its analogies in the process of ascertaining [*388] the scope of, the power. Thus the question whether the power exists to forbid the erection of a building of a particular kind or for a particular use, like the question whether a particular thing is a nuisance, is to be determined, not by an abstract consideration of the building or of the thing considered apart, but by considering it in connection with the circumstances and the locality. Sturgis v. Bridgeman, L. R. 11 Ch. 852, 865. A nuisance may be merely a right thing in the wrong place, — like a pig in the parlor instead of the barnyard. If the validity of the legislative classification for zoning purposes be fairly debatable, the legislative judgment must be allowed to control. Radice v. New York, 264 U.S. 292, 294.

There is no serious difference of opinion in respect of the validity of laws and regulations fixing the height of buildings within reasonable limits, the character of materials and methods of construction, and the adjoining area which must be left open, in order to minimize the danger of fire or collapse, the evils of over-crowding, and the like, and excluding from residential sections offensive trades, industries and structures likely to create nuisances. See Welch v. Swasey, 214 U.S. 91; Hadacheck v. Los Angeles, 239 U.S. 394; Reinman v. Little Rock, 237 U.S. 171; Cusack Co. v. City of Chicago, 242 U.S. 526, 529-530.

Here, however, the exclusion is in general terms of all industrial establishments, and it may thereby happen that not only offensive or dangerous industries will be excluded, but those which are neither offensive nor dangerous will share the same fate. But this is no more than happens in respect of many practice-forbidding laws which this Court

has upheld although drawn in general terms so as to include individual cases that may turn out to be innocuous in themselves. Hebe Co. v. Shaw, 248 U.S. 297, 303; Pierce Oil Corp. v. City of Hope, 248 U.S. 498, 500. The inclusion of a reasonable margin to insure effective enforcement, will not put upon a law, otherwise [*389] valid, the stamp of invalidity. Such laws may also find their justification in the fact that, in some fields, the bad fades into the good by such insensible degrees that the two are not capable of being readily distinguished and separated in terms of legislation. In the light of these considerations, we are not prepared to say that the end in view was not sufficient to justify the general rule of the ordinance, although some industries of an innocent character might fall within the proscribed class. It can not be said that the ordinance in this respect "passes the bounds of reason and assumes the character of a merely arbitrary fiat." Purity Extract Co. v. Lynch, 226 U.S. 192, 204. Moreover, the restrictive provisions of the ordinance in this particular may be sustained upon the principles applicable to the broader exclusion from residential districts of all business and trade structures, presently to be discussed.

It is said that the Village of Euclid is a mere suburb of the City of Cleveland; that the industrial development of that city has now reached and in some degree extended into the village and, in the obvious course of things, will soon absorb the entire area for industrial enterprises; that the effect of the ordinance is to divert this natural development elsewhere with the consequent loss of increased values to the owners of the lands within the village borders. But the village, though physically a suburb of Cleveland, is politically a separate municipality, with powers of its own and authority to govern itself as it sees fit within the limits of the organic law of its creation and the State and Federal Constitutions. Its governing authorities, presumably representing a majority of its inhabitants and voicing their will, have determined, not that industrial development shall cease at its boundaries, but that the course of such

development shall proceed within definitely fixed lines. If it be a proper exercise of the police power to relegate industrial establishments to localities [*390] separated from residential sections, it is not easy to find a sufficient reason for denying the power because the effect of its exercise is to divert an industrial flow from the course which it would follow to the injury of the residential public if left alone, to another course where such injury will be obviated. It is not meant by this, however, to exclude the possibility of cases where the general public interest would so far outweigh the interest of the municipality that the municipality would not be allowed to stand in the way.

We find no difficulty in sustaining restrictions of the kind thus far reviewed. The serious question in the case arises over the provisions of the ordinance excluding from residential districts, apartment houses, business houses, retail stores and shops, and other like establishments. This question involves the validity of what is really the crux of the more recent zoning legislation, namely, the creation and maintenance of residential districts, from which business and trade of every sort, including hotels and apartment houses, are excluded. Upon that question, this Court has not thus far spoken. The decisions of the state courts are numerous and conflicting; but those which broadly sustain the power greatly outnumber those which deny altogether or narrowly limit it; and it is very apparent that there is a constantly increasing tendency in the direction of the broader view. We shall not attempt to review these decisions at length, but content ourselves with citing a few as illustrative of all.

As sustaining the broader view, see Opinion of the Justices, 234 Mass. 597, 607; Inspector of Buildings of Lowell v. Stoklosa, 250 Mass. 52; Spector v. Building Inspector of Milton, 250 Mass. 63; Brett v. Building Commissioner of Brookline, 250 Mass. 73; State v. City of New Orleans, 154 La. 271, 282; Lincoln Trust Co. v. Williams Bldg. Corp., 229 N. Y. 313; City of Aurora v. Burns, 319 Ill. 84, 93; Deynzer v. City of Evanston, 319 Ill. 226; [*391] State ex

rel. Beery v. Houghton, 164 Minn. 146; State ex rel. Carter v. Harper, 182 Wis. 148, 157-161; Ware v. City of Wichita, 113 Kan. 153; Miller v. Board of Public Works, 195 Cal. 477, 486-495; City of Providence v. Stephens, 133 Atl. 614.

For the contrary view, see Goldman v. Crowther, 147 Md. 282; Ignaciunas v. Risley, 98 N. J. L. 712; Spann v. City of Dallas, 111 Tex. 350.

As evidence of the decided trend toward the broader view, it is significant that in some instances the state courts in later decisions have reversed their former decisions holding the other way. For example, compare State ex rel. Beery v. Houghton, supra, sustaining the power, with State ex rel. Lachtman v. Houghton, 134 Minn. 226; State ex rel. Roerig v. City of Minneapolis, 136 Minn. 479; and Vorlander v. Hokenson, 145 Minn. 484, denying it, all of which are disapproved in the Houghton case (p. 151) last decided.

The decisions enumerated in the first group cited above agree that the exclusion of buildings devoted to business, trade, etc., from residential districts, bears a rational relation to the health and safety of the community. Some of the grounds for this conclusion are — promotion of the health and security from injury of children and others by separating dwelling houses from territory devoted to trade and industry; suppression and prevention of disorder; facilitating the extinguishment of fires, and the enforcement of street traffic regulations and other general welfare ordinances; aiding the health and safety of the community by excluding from residential areas the confusion and danger of fire, contagion and disorder which in greater or less degree attach to the location of stores, shops and factories. Another ground is that the construction and repair of streets may be rendered easier and less expensive by confining the greater part of the heavy traffic to the streets where business is carried on.

[*392] The Supreme Court of Illinois, in City of Aurora v. Burns, supra, pp. 93-95, in sustaining a comprehensive building zone ordinance dividing the city into eight

districts, including exclusive residential districts for one and two-family dwellings, churches, educational institutions and schools, said:

"The constantly increasing density of our urban populations, the multiplying forms of industry and the growing complexity of our civilization make it necessary for the State, either directly or through some public agency by its sanction, to limit individual activities to a greater extent than formerly. With the growth and development of the State the police power necessarily develops, within reasonable bounds, to meet the changing conditions. . . .

". . . The harmless may sometimes be brought within the regulation or prohibition in order to abate or destroy the harmful. The segregation of industries commercial pursuits and dwellings to particular districts in a city, when exercised reasonably, may bear a rational relation to the health, morals, safety and general welfare of the community. The establishment of such districts or zones may, among other things, prevent congestion of population, secure quiet residence districts, expedite local transportation, and facilitate the suppression of disorder, the extinguishment of fires and the enforcement of traffic and sanitary regulations. The danger of fire and the risk of contagion are often lessened by the exclusion of stores and factories from areas devoted to residences, and, in consequence, the safety and health of the community may be promoted. . . .

". . . The exclusion of places of business from residential districts is not a declaration that such places are nuisances or that they are to be suppressed as such, but it is a part of the general plan by which the city's territory is allotted to different uses in order to prevent, or at least to reduce, the congestion, disorder and dangers [*393] which often inhere in unregulated municipal development."

The Supreme Court of Louisiana, in State v. City of New Orleans, supra, pp. 282-283, said:

"In the first place, the exclusion of business establishments from residence districts might enable the municipal

government to give better police protection. Patrolmen's beats are larger, and therefore fewer, in residence neighborhoods than in business neighborhoods. A place of business in a residence neighborhood furnishes an excuse for any criminal to go into the neighborhood, where, otherwise, a stranger would be under the ban of suspicion. Besides, open shops invite loiterers and idlers to congregate; and the places of such congregations need police protection. In the second place, the zoning of a city into residence districts and commercial districts is a matter of economy in street paving. Heavy trucks, hauling freight to and from places of business in residence districts, require the city to maintain the same costly pavement in such districts that is required for business districts; whereas, in the residence districts, where business establishments are excluded, a cheaper pavement serves the purpose. . . .

"Aside from considerations of economic administration, in the matter of police and fire protection, street paving, etc., any business establishment is likely to be a genuine nuisance in a neighborhood of residences. Places of business are noisy; they are apt to be disturbing at night; some of them are malodorous; some are unsightly; some are apt to breed rats, mice, roaches, flies, ants, etc. . . .

"If the municipal council deemed any of the reasons which have been suggested, or any other substantial reason, a sufficient reason for adopting the ordinance in question, it is not the province of the courts to take issue with the council. We have nothing to do with the question of the wisdom or good policy of municipal ordinances. If they are not satisfying to a majority of the citizens, their recourse is to the ballot — not the courts."

[*394] The matter of zoning has received much attention at the hands of commissions and experts, and the results of their investigations have been set forth in comprehensive reports. These reports, which bear every evidence of painstaking consideration, concur in the view that the segregation of residential, business, and industrial buildings will make it easier to provide fire apparatus suitable for the

character and intensity of the development in each section; that it will increase the safety and security of home life; greatly tend to prevent street accidents, especially to children, by reducing the traffic and resulting confusion in residential sections; decrease noise and other conditions which produce or intensify nervous disorders; preserve a more favorable environment in which to rear children, etc. With particular reference to apartment houses, it is pointed out that the development of detached house sections is greatly retarded by the coming of apartment houses, which has sometimes resulted in destroying the entire section for private house purposes; that in such sections very often the apartment house is a mere parasite, constructed in order to take advantage of the open spaces and attractive surroundings created by the residential character of the district. Moreover, the coming of one apartment house is followed by others, interfering by their height and bulk with the free circulation of air and monopolizing the rays of the sun which otherwise would fall upon the smaller homes, and bringing, as their necessary accompaniments, the disturbing noises incident to increased traffic and business, and the occupation, by means of moving and parked automobiles, of larger portions of the streets, thus detracting from their safety and depriving children of the privilege of quiet and open spaces for play, enjoyed by those in more favored localities, — until, finally, the residential character of the neighborhood and its desirability as a place of detached residences are utterly destroyed. Under these circumstances, [*395] apartment houses, which in a different environment would be not only entirely unobjectionable but highly desirable, come very near to being nuisances.

If these reasons, thus summarized, do not demonstrate the wisdom or sound policy in all respects of those restrictions which we have indicated as pertinent to the inquiry, at least, the reasons are sufficiently cogent to preclude us from saying, as it must be said before the ordinance can be declared unconstitutional, that such provisions are clearly

arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare. Cusack Co. v. City of Chicago, supra, pp. 530-531; Jacobson v. Massachusetts, 197 U.S. 11, 30-31.

It is true that when, if ever, the provisions set forth in the ordinance in tedious and minute detail, come to be concretely applied to particular premises, including those of the appellee, or to particular conditions, or to be considered in connection with specific complaints, some of them, or even many of them, may be found to be clearly arbitrary and unreasonable. But where the equitable remedy of injunction is sought, as it is here, not upon the ground of a present infringement or denial of a specific right, or of a particular injury in process of actual execution, but upon the broad ground that the mere existence and threatened enforcement of the ordinance, by materially and adversely affecting values and curtailing the opportunities of the market, constitute a present and irreparable injury, the court will not scrutinize its provisions, sentence by sentence, to ascertain by a process of piecemeal dissection whether there may be, here and there, provisions of a minor character, or relating to matters of administration, or not shown to contribute to the injury complained of, which, if attacked separately, might not withstand the test of constitutionality. In respect of such provisions, of which specific complaint is not [*396] made, it cannot be said that the land owner has suffered or is threatened with an injury which entitles him to challenge their constitutionality. Turpin v. Lemon, 187 U.S. 51, 60. In Railroad Commission Cases, 116 U.S. 307, 335-337, this Court dealt with an analogous situation. There an act of the Mississippi legislature, regulating freight and passenger rates on intrastate railroads and creating a supervisory commission, was attacked as unconstitutional. The suit was brought to enjoin the commission from enforcing against the plaintiff railroad company any of its provisions. In an opinion delivered by Chief Justice Waite, this Court held that the chief purpose of the statute was to fix a maximum of

charges and to regulate in some matters of a police nature the use of railroads in the state. After sustaining the constitutionality of the statute "in its general scope" this Court said: "Whether in some of its details the statute may be defective or invalid we do not deem it necessary to inquire, for this suit is brought to prevent the commissioners from giving it any effect whatever as against this company." Quoting with approval from the opinion of the Supreme Court of Mississippi it was further said: "Many questions may arise under it not necessary to be disposed of now, and we leave them for consideration when presented." And finally: "When the commission has acted and proceedings are had to enforce what it has done, questions may arise as to the validity of some of the various provisions which will be worthy of consideration, but we are unable to say that, as a whole, the statute is invalid."

The relief sought here is of the same character, namely, an injunction against the enforcement of any of the restrictions, limitations or conditions of the ordinance. And the gravamen of the complaint is that a portion of the land of the appellee cannot be sold for certain enumerated [*397] uses because of the general and broad restraints of the ordinance. What would be the effect of a restraint imposed by one or more of the innumerable provisions of the ordinance, considered apart, upon the value or marketability of the lands is neither disclosed by the bill nor by the evidence, and we are afforded no basis, apart from mere speculation, upon which to rest a conclusion that it or they would have any appreciable effect upon those matters. Under these circumstances, therefore, it is enough for us to determine, as we do, that the ordinance in its general scope and dominant features, so far as its provisions are here involved, is a valid exercise of authority, leaving other provisions to be dealt with as cases arise directly involving them.

And this is in accordance with the traditional policy of this Court. In the realm of constitutional law, especially, this Court has perceived the embarrassment which is likely to

result from an attempt to formulate rules or decide questions beyond the necessities of the immediate issue. It has preferred to follow the method of a gradual approach to the general by a systematically guarded application and extension of constitutional principles to particular cases as they arise, rather than by out of hand attempts to establish general rules to which future cases must be fitted. This process applies with peculiar force to the solution of questions arising under the due process clause of the Constitution as applied to the exercise of the flexible powers of police, with which we are here concerned.
Decree reversed.

VILLAGE OF BELLE TERRE et al. v. BORAAS et al. Supreme Court of the United States 416 U.S. 1; 94 S. Ct. 1536; 39 L. Ed. 2d 797, April 1, 1974, Decided
OPINION BY: DOUGLAS
[*2] MR. JUSTICE DOUGLAS delivered the opinion of the Court.
Belle Terre is a village on Long Island's north shore of about 220 homes inhabited by 700 people. Its total land area is less than one square mile. It has restricted land use to one-family dwellings excluding lodging houses, boarding houses, fraternity houses, or multiple-dwelling houses. The word "family" as used in the ordinance means, "one or more persons related by blood, adoption, or marriage, living and cooking together as a single housekeeping unit, exclusive of household servants. A number of persons but not exceeding two (2) living and cooking together as a single housekeeping unit though not related by blood, adoption, or marriage shall be deemed to constitute a family."
[***LEdHR1A] [1A]Appellees the Dickmans are owners of a house in the village and leased it in December 1971 for a term of 18 months to Michael Truman. Later Bruce Boraas became a colessee. Then Anne Parish moved into the house along with three others. These six are students at nearby State University at Stony Brook and none is [*3]

related to the other by blood, adoption, or marriage. When the village served the Dickmans with an "Order to Remedy Violations" of the ordinance, the owners plus three tenants thereupon brought this action under 42 U. S. C. § 1983 for an injunction and a judgment declaring the ordinance unconstitutional. The District Court held the ordinance constitutional, 367 F.Supp. 136, and the Court of Appeals reversed, one judge dissenting, 476 F.2d 806. The case is here by appeal, 28 U. S. C. § 1254 (2); and we noted probable jurisdiction, 414 U.S. 907.

This case brings to this Court a different phase of local zoning regulations from those we have previously reviewed. Euclid v. Ambler Realty Co., 272 U.S. 365, involved a zoning ordinance classifying land use in a given area into six categories. Appellee's tracts fell under three classifications: U-2, which included two-family dwellings; U-3, which included apartments, hotels, churches, schools, private clubs, hospitals, city hall and the like; and U-6, which included sewage disposal plants, incinerators, scrap storage, cemeteries, oil and gas storage and so on. Heights of buildings were prescribed for each zone; also, the size of land areas required for each kind of use was specified. The land in litigation was vacant and being held for industrial development; and evidence was introduced showing that under the restricted-use [*4] ordinance the land would be greatly reduced in value. The claim was that the landowner was being deprived of liberty and property without due process within the meaning of the Fourteenth Amendment.

The Court sustained the zoning ordinance under the police power of the State, saying that the line "which in this field separates the legitimate from the illegitimate assumption of power is not capable of precise delimitation. It varies with circumstances and conditions." Id., at 387. And the Court added: "A nuisance may be merely a right thing in the wrong place, — like a pig in the parlor instead of the barnyard. If the validity of the legislative classification for zoning purposes be fairly debatable, the legislative judgment must be allowed to control." Id., at 388. The

Court listed as considerations bearing on the constitutionality of zoning ordinances the danger of fire or collapse of buildings, the evils of overcrowding people, and the possibility that "offensive trades, industries, and structures" might "create nuisance" to residential sections. Ibid. But even those historic police power problems need not loom large or actually be existent in a given case. For the exclusion of "all industrial establishments" does not mean that "only offensive or dangerous industries will be excluded." Ibid. That fact does not invalidate the ordinance; the Court held:

"The inclusion of a reasonable margin to insure effective enforcement, will not put upon a law, otherwise valid, the stamp of invalidity. Such laws may also find their justification in the fact that, in some fields, the bad fades into the good by such insensible degrees that the two are not capable of being readily distinguished and separated in terms of legislation." Id., at 388-389.

[*5] The main thrust of the case in the mind of the Court was in the exclusion of industries and apartments, and as respects that it commented on the desire to keep residential areas free of "disturbing noises"; "increased traffic"; the hazard of "moving and parked automobiles"; the "depriving children of the privilege of quiet and open spaces for play, enjoyed by those in more favored localities." Id., at 394. The ordinance was sanctioned because the validity of the legislative classification was "fairly debatable" and therefore could not be said to be wholly arbitrary. Id., at 388.

Our decision in Berman v. Parker, 348 U.S. 26, sustained a land-use project in the District of Columbia against a landowner's claim that the taking violated the Due Process Clause and the Just Compensation Clause of the Fifth Amendment. The essence of the argument against the law was, while taking property for ridding an area of slums was permissible, taking it "merely to develop a better balanced, more attractive community" was not, id., at 31. We refused

to limit the concept of public welfare that may be enhanced by zoning regulations.3 We said:

"Miserable and disreputable housing conditions may do more than spread disease and crime and immorality. [*6] They may also suffocate the spirit by reducing the people who live there to the status of cattle. They may indeed make living an almost insufferable burden. They may also be an ugly sore, a blight on the community which robs it of charm, which makes it a place from which men turn. The misery of housing may despoil a community as an open sewer may ruin a river.

"We do not sit to determine whether a particular housing project is or is not desirable. The concept of the public welfare is broad and inclusive. . . . The values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled." Id., at 32-33.

If the ordinance segregated one area only for one race, it would immediately be suspect under the reasoning of Buchanan v. Warley, 245 U.S. 60, where the Court invalidated a city ordinance barring a black from acquiring real property in a white residential area by reason of an 1866 Act of Congress, 14 Stat. 27, now 42 U. S. C. § 1982, and an 1870 Act, § 17, 16 Stat. 144, now 42 U. S. C. § 1981, both enforcing the Fourteenth Amendment. 245 U.S., at 78-82. See Jones v. Mayer Co., 392 U.S. 409.

In Seattle Trust Co. v. Roberge, 278 U.S. 116, Seattle had a zoning ordinance that permitted a "'philanthropic home for children or for old people'" in a particular district "'when the written consent shall have been obtained of the owners of two-thirds of the property within four hundred (400) feet of the proposed building.'" Id., at 118. The Court held that provision of the ordinance unconstitutional, saying that the existing owners could "withhold consent for selfish reasons or arbitrarily and [*7] may subject the trustee [owner] to their will or caprice." Id., at 122. Unlike the billboard cases

(e. g., Cusack Co. v. City of Chicago, 242 U.S. 526), the Court concluded that the Seattle ordinance was invalid since the proposed home for the aged poor was not shown by its maintenance and construction "to work any injury, inconvenience or annoyance to the community, the district or any person." 278 U.S., at 122.

The present ordinance is challenged on several grounds: that it interferes with a person's right to travel; that it interferes with the right to migrate to and settle within a State; that it bars people who are uncongenial to the present residents; that it expresses the social preferences of the residents for groups that will be congenial to them; that social homogeneity is not a legitimate interest of government; that the restriction of those whom the neighbors do not like trenches on the newcomers' rights of privacy; that it is of no rightful concern to villagers whether the residents are married or unmarried; that the ordinance is antithetical to the Nation's experience, ideology, and self-perception as an open, egalitarian, and integrated society. 4 [***LEdHR2] [2] [***LEdHR3] [3]We find none of these reasons in the record before us. It is not aimed at transients. Cf. Shapiro v. Thompson, 394 U.S. 618. It involves no procedural disparity inflicted on some but not on others such as was presented by Griffin v. Illinois, 351 U.S. 12. It involves no "fundamental" right guaranteed by the Constitution, such as voting, Harper v. Virginia Board, 383 U.S. 663; the right of association, NAACP v. Alabama, 357 U.S. 449; the right of access to the courts, NAACP v. Button, 371 U.S. 415; or any rights of privacy, cf. Griswold v. Connecticut, [*8] 381 U.S. 479; Eisenstadt v. Baird, 405 U.S. 438, 453-454. We deal with economic and social legislation where legislatures have historically drawn lines which we respect against the charge of violation of the Equal Protection Clause if the law be "'reasonable, not arbitrary'" (quoting Royster Guano Co. v. Virginia, 253 U.S. 412, 415) and bears "a rational relationship to a [permissible] state objective." Reed v. Reed, 404 U.S. 71, 76.

[***LEdHR4] [4]It is said, however, that if two unmarried people can constitute a "family," there is no reason why three or four may not. But every line drawn by a legislature leaves some out that might well have been included. That exercise of discretion, however, is a legislative, not a judicial, function.

Mr. Justice Holmes made the point a half century ago.

"When a legal distinction is determined, as no one doubts that it may be, between night and day, childhood and maturity, or any other extremes, a point has to be fixed or a line has to be drawn, or gradually picked out by successive decisions, to mark where the change takes place. Looked at by itself without regard to the necessity behind it the line or point seems arbitrary. It might as well or nearly as well be a little more to one side or the other. But when it is seen that a line or point there must be, and that there is no mathematical or logical way of fixing it precisely, the decision of the legislature must be accepted unless we can say that it is very wide of any reasonable mark." Louisville Gas Co. v. Coleman, 277 U.S. 32, 41 (dissenting opinion).

It is said that the Belle Terre ordinance reeks with an animosity to unmarried couples who live together. There is no evidence to support it; and the provision of the ordinance bringing within the definition of a "family" two unmarried people belies the charge.

[*9] The ordinance places no ban on other forms of association, for a "family" may, so far as the ordinance is concerned, entertain whomever it likes.

The regimes of boarding houses, fraternity houses, and the like present urban problems. More people occupy a given space; more cars rather continuously pass by; more cars are parked; noise travels with crowds.

[***LEdHR5] [5] A quiet place where yards are wide, people few, and motor vehicles restricted are legitimate guidelines in a land-use project addressed to family needs. This goal is a permissible one within Berman v. Parker, supra. The police power is not confined to elimination of filth, stench, and unhealthy places. It is ample to lay out

zones where family values, youth values, and the blessings of quiet seclusion and clean air make the area a sanctuary for people.

[***LEdHR6] [6]The suggestion that the case may be moot need not detain us. A zoning ordinance usually has an impact on the value of the property which it regulates. But in spite of the fact that the precise impact of the ordinance sustained in Euclid on a given piece of property was not known, 272 U.S., at 397, the Court, considering the matter a controversy in the realm of city planning, sustained the ordinance. Here we are a step closer to the impact of the ordinance on the value of the lessor's property. He has not only lost six tenants and acquired only two in their place; it is obvious that the scale of rental values rides on what we decide today. When Berman reached us it was not certain whether an entire tract would be taken or only the buildings on it and a scenic easement. 348 U.S., at 36. But that did not make the case any the less a controversy in the constitutional sense. When Mr. Justice Holmes said for the Court in Block v. Hirsh, 256 U.S. 135, 155, "property rights may be cut down, and to that extent taken, without [*10] pay," he stated the issue here. As is true in most zoning cases, the precise impact on value may, at the threshold of litigation over validity, not yet be known.

Reversed.

DISSENT BY: BRENNAN

The constitutional challenge to the village ordinance is premised solely on alleged infringement of associational and other constitutional rights of tenants. But the named tenant appellees have quit the house, thus raising a serious question whether there now exists a cognizable "case or controversy" that satisfies that indispensable requisite of Art. III of the Constitution. Existence of a case or controversy must, of course, appear at every stage of review, see, e. g., Roe v. Wade, 410 U.S. 113, 125 (1973); Steffel v. Thompson, 415 U.S. 452, 459 n. 10 (1974). In my view it does not appear at this stage of this case.

Plainly there is no case or controversy as to the named tenant appellees since, having moved out, they no longer have an interest, associational, economic or otherwise, to be vindicated by invalidation of the ordinance. Whether there is a cognizable case or controversy must therefore turn on whether the lessor appellees may attack the ordinance on the basis of the constitutional rights of their tenants.

The general "weighty" rule of practice is "that a litigant may only assert his own constitutional rights or immunities," United States v. Raines, 362 U.S. 17, 22 (1960). A pertinent exception, however, ordinarily limits a litigant to the assertion of the alleged denial of another's constitutional rights to situations in which there is: (1) evidence that as a direct consequence of the denial of constitutional rights of the others, the litigant faces substantial economic injury, Pierce v. Society of [*11] Sisters, 268 U.S. 510, 535-536 (1925); Barrows v. Jackson, 346 U.S. 249, 255-256 (1953), or criminal prosecution, Griswold v. Connecticut, 381 U.S. 479, 481 (1965); Eisenstadt v. Baird, 405 U.S. 438 (1972), and (2) a showing that the litigant's and the others' interests intertwine and unless the litigant may assert the constitutional rights of the others, those rights cannot effectively be vindicated. Griswold v. Connecticut, supra; Eisenstadt v. Baird, supra; see also NAACP v. Alabama, 357 U.S. 449 (1958).

In my view, lessor appellees do not, on the present record, satisfy either requirement of the exception. Their own brief negates any claim that they face economic loss. The brief states that "there is nothing in the record to support the contention that in a middle class, suburban residential community like Belle Terre, traditional families are willing to pay more or less than students with limited means like the Appellees." Brief for Appellees 54-55. And whether they face criminal prosecution for violations of the ordinance is at least unclear. The criminal summons served on them on July 19, 1972, was withdrawn because not preceded, as required by the village's procedure, by an

order requiring discontinuance of violations within 48 hours. An order to discontinue violation was served thereafter on July 31, but was not followed by service of a criminal summons when the violation was not discontinued within 48 hours.

In these circumstances, I agree with the Court that no criminal action was "pending" when this suit was brought and that therefore the District Court correctly declined to apply the principles of Younger v. Harris, 401 U.S. 37 (1971).

The Court argues that, because a zoning ordinance "has an impact on the value of the property which it regulates," there is a cognizable case or controversy. But [*12] even if lessor appellees for that reason have a personal stake, and we were to concede that landlord and tenant interests intertwine in respect of the ordinance, I cannot see, on the present record, how it can be concluded that "it would be difficult if not impossible," Barrows v. Jackson, supra, at 257, for present or prospective unrelated tenant groups of more than two to assert their own rights before the courts, since the departed tenant appellees had no difficulty in doing so. Thus, the second requirement of the exception would not presently appear to be satisfied. Accordingly it is irrelevant that the house was let, as we are now informed, to other unrelated tenants on a month-to-month basis after the tenant appellees moved out. None of the new tenants has sought to intervene in this suit. Indeed, for all that appears, they too may have moved out and the house may be vacant.

I dissent and would vacate the judgment of the Court of Appeals and remand to the District Court for further proceedings. If the District Court determines that a cognizable case or controversy no longer exists, the complaint should be dismissed. Golden v. Zwickler, 394 U.S. 103 (1969).

Mr. JUSTICE MARSHALL, dissenting.

This case draws into question the constitutionality of a zoning ordinance of the incorporated village of Belle Terre,

New York, which prohibits groups of more than two unrelated persons, as distinguished from groups consisting of any number of persons related by blood, adoption, or marriage, from occupying a residence within the confines of the township. Lessor-appellees, the two owners of a Belle Terre residence, and three unrelated student tenants challenged the ordinance on the ground that it establishes a classification between households of [*13] related and unrelated individuals, which deprives them of equal protection of the laws. In my view, the disputed classification burdens the students' fundamental rights of association and privacy guaranteed by the First and Fourteenth Amendments. Because the application of strict equal protection scrutiny is therefore required, I am at odds with my Brethren's conclusion that the ordinance may be sustained on a showing that it bears a rational relationship to the accomplishment of legitimate governmental objectives.

I am in full agreement with the majority that zoning is a complex and important function of the State. It may indeed be the most essential function performed by local government, for it is one of the primary means by which we protect that sometimes difficult to define concept of quality of life. I therefore continue to adhere to the principle of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926), that deference should be given to governmental judgments concerning proper land-use allocation. That deference is a principle which has served this Court well and which is necessary for the continued development of effective zoning and land-use control mechanisms. Had the owners alone brought this suit alleging that the restrictive ordinance deprived them of their property or was an irrational legislative classification, I would agree that the ordinance would have to be sustained. Our role is not and should not be to sit as a zoning board of appeals.

I would also agree with the majority that local zoning authorities may properly act in furtherance of the objectives asserted to be served by the ordinance at issue here:

restricting uncontrolled growth, solving traffic problems, keeping rental costs at a reasonable level, and making the community attractive to families. The police power which provides the justification for zoning is not narrowly [*14] confined. See Berman v. Parker, 348 U.S. 26 (1954). And, it is appropriate that we afford zoning authorities considerable latitude in choosing the means by which to implement such purposes. But deference does not mean abdication. This Court has an obligation to ensure that zoning ordinances, even when adopted in furtherance of such legitimate aims, do not infringe upon fundamental constitutional rights.

When separate but equal was still accepted constitutional dogma, this Court struck down a racially restrictive zoning ordinance. Buchanan v. Warley, 245 U.S. 60 (1917). I am sure the Court would not be hesitant to invalidate that ordinance today. The lower federal courts have considered procedural aspects of zoning, and acted to insure that land-use controls are not used as means of confining minorities and the poor to the ghettos of our central cities. These are limited but necessary intrusions on the discretion of zoning authorities. By the same token, I think it clear that the First Amendment provides some limitation on zoning laws. It is inconceivable to me that we would allow the exercise of the zoning power to burden First Amendment freedoms, as by ordinances that restrict occupancy to individuals adhering to particular religious, political, or scientific beliefs. Zoning officials properly concern [*15] themselves with the uses of land — with, for example, the number and kind of dwellings to be constructed in a certain neighborhood or the number of persons who can reside in those dwellings. But zoning authorities cannot validly consider who those persons are, what they believe, or how they choose to live, whether they are Negro or white, Catholic or Jew, Republican or Democrat, married or unmarried.

My disagreement with the Court today is based upon my view that the ordinance in this case unnecessarily burdens appellees' First Amendment freedom of association and

their constitutionally guaranteed right to privacy. Our decisions establish that the First and Fourteenth Amendments protect the freedom to choose one's associates. NAACP v. Button, 371 U.S. 415, 430 (1963). Constitutional protection is extended, not only to modes of association that are political in the usual sense, but also to those that pertain to the social and economic benefit of the members. Id., at 430-431; Brotherhood of Railroad Trainmen v. Virginia Bar, 377 U.S. 1 (1964). See United Transportation Union v. State Bar of Michigan, 401 U.S. 576 (1971); Mine Workers v. Illinois State Bar Assn., 389 U.S. 217 (1967). The selection of one's living companions involves similar choices as to the emotional, social, or economic benefits to be derived from alternative living arrangements.

The freedom of association is often inextricably entwined with the constitutionally guaranteed right of privacy. The right to "establish a home" is an essential part of the liberty guaranteed by the Fourteenth Amendment. Meyer v. Nebraska, 262 U.S. 390, 399 (1923); Griswold v. Connecticut, 381 U.S. 479, 495 (1965) (Goldberg, J., concurring). And the Constitution secures to an individual a freedom "to satisfy his intellectual and emotional needs in the privacy of his own home." Stanley [*16] v. Georgia, 394 U.S. 557, 565 (1969); see Paris Adult Theatre I v. Slaton, 413 U.S. 49, 66-67 (1973). Constitutionally protected privacy is, in Mr. Justice Brandeis' words, "as against the Government, the right to be let alone . . . the right most valued by civilized man." Olmstead v. United States, 277 U.S. 438, 478 (1928) (dissenting opinion). The choice of household companions — of whether a person's "intellectual and emotional needs" are best met by living with family, friends, professional associates, or others — involves deeply personal considerations as to the kind and quality of intimate relationships within the home. That decision surely falls within the ambit of the right to privacy protected by the Constitution. See Roe v. Wade, 410 U.S. 113, 153 (1973); Eisenstadt v. Baird, 405 U.S. 438, 453

(1972); Stanley v. Georgia, supra, at 564-565; Griswold v. Connecticut, supra, at 483, 486; Olmstead v. United States, supra, at 478 (Brandeis, J., dissenting); Moreno v. Department of Agriculture, 345 F.Supp. 310, 315 (DC 1972), aff'd, 413 U.S. 528 (1973).

The instant ordinance discriminates on the basis of just such a personal lifestyle choice as to household companions. It permits any number of persons related by blood or marriage, be it two or twenty, to live in a single household, but it limits to two the number of unrelated persons bound by profession, love, friendship, religious or political affiliation, or mere economics who can occupy a single home. Belle Terre imposes upon those who deviate from the community norm in their choice of living companions significantly greater restrictions than are applied to residential groups who are related by blood or marriage, and compose the established order within the community. The village has, in [*17] effect, acted to fence out those individuals whose choice of lifestyle differs from that of its current residents.

This is not a case where the Court is being asked to nullify a township's sincere efforts to maintain its residential character by preventing the operation of rooming houses, fraternity houses, or other commercial or high-density residental uses. Unquestionably, a town is free to restrict such uses. Moreover, as a general proposition, I see no constitutional infirmity in a town's limiting the density of use in residential areas by zoning regulations which do not discriminate on the basis of constitutionally suspect criteria. This ordinance, however, limits the density of occupancy of only those homes occupied by unrelated persons. It thus reaches beyond control of the use of land or the density of population, and undertakes to regulate the way people choose to associate with each other within the privacy of their own homes.

It is no answer to say, as does the majority, that associational interests are not infringed because Belle Terre residents may entertain whomever they choose. Only last

Term MR. JUSTICE DOUGLAS indicated in concurrence that he saw the right of association protected by the First Amendment as involving far more than the right to entertain visitors. He found that right infringed by a restriction on food stamp assistance, penalizing [*18] households of "unrelated persons." As MR. JUSTICE DOUGLAS there said, freedom of association encompasses the "right to invite the stranger into one's home" not only for "entertainment" but to join the household as well. Department of Agriculture v. Moreno, 413 U.S. 528, 538-545 (1973) (concurring opinion). I am still persuaded that the choice of those who will form one's household implicates constitutionally protected rights.

Because I believe that this zoning ordinance creates a classification which impinges upon fundamental personal rights, it can withstand constitutional scrutiny only upon a clear showing that the burden imposed is necessary to protect a compelling and substantial governmental interest, Shapiro v. Thompson, 394 U.S. 618, 634 (1969). And, once it be determined that a burden has been placed upon a constitutional right, the onus of demonstrating that no less intrusive means will adequately protect the compelling state interest and that the challenged statute is sufficiently narrowly drawn, is upon the party seeking to justify the burden. 0] See Memorial Hospital v. Maricopa County, 415 U.S. 250 (1974); Speiser v. Randall, 357 U.S. 513, 525-526 (1958).

A variety of justifications have been proffered in support of the village's ordinance. It is claimed that the ordinance controls population density, prevents noise, traffic and parking problems, and preserves the rent structure of the community and its attractiveness to families. As I noted earlier, these are all legitimate and substantial interests of government. But I think it clear that the means chosen to accomplish these purposes are both overinclusive and underinclusive, and that the asserted goals could be as effectively achieved by means of an ordinance that did not discriminate on the basis of constitutionally protected

choices of lifestyle. The ordinance imposes no restriction whatsoever on the number [*19] of persons who may live in a house, as long as they are related by marital or sanguinary bonds — presumably no matter how distant their relationship. Nor does the ordinance restrict the number of income earners who may contribute to rent in such a household, or the number of automobiles that may be maintained by its occupants. In that sense the ordinance is underinclusive. On the other hand, the statute restricts the number of unrelated persons who may live in a home to no more than two. It would therefore prevent three unrelated people from occupying a dwelling even if among them they had but one income and no vehicles. While an extended family of a dozen or more might live in a small bungalow, three elderly and retired persons could not occupy the large manor house next door. Thus the statute is also grossly overinclusive to accomplish its intended purposes.

There are some 220 residences in Belle Terre occupied by about 700 persons. The density is therefore just above three per household. The village is justifiably concerned with density of population and the related problems of noise, traffic, and the like. It could deal with those problems by limiting each household to a specified number of adults, two or three perhaps, without limitation on the number of dependent children. The burden of such an ordinance would fall equally upon all segments of the community. It would surely be better tailored to the goals asserted by the village than the ordinance before us today, for it would more realistically [*20] restrict population density and growth and their attendant environmental costs. Various other statutory mechanisms also suggest themselves as solutions to Belle Terre's problems — rent control, limits on the number of vehicles per household, and so forth, but, of course, such schemes are matters of legislative judgment and not for this Court. Appellants also refer to the necessity of maintaining the family character of the village. There is not a shred of evidence in the record indicating that if Belle Terre permitted a limited number of unrelated persons to

live together, the residential, familial character of the community would be fundamentally affected.

By limiting unrelated households to two persons while placing no limitation on households of related individuals, the village has embarked upon its commendable course in a constitutionally faulty vessel. Cf. Marshall v. United States, 414 U.S. 417, 430 (1974) (dissenting opinion). I would find the challenged ordinance unconstitutional. But I would not ask the village to abandon its goal of providing quiet streets, little traffic, and a pleasant and reasonably priced environment in which families might raise their children. Rather, I would commend the village to continue to pursue those purposes but by means of more carefully drawn and even-handed legislation.

I respectfully dissent.

LA ZONIFICACIÓN

Gordon L. COMMONS, Helen T. Commons and Leo Weingarten, t/a Better Modern Homes Co., Plaintiffs-Appellants, v. WESTWOOD ZONING BOARD, Defendants-Respondents. Supreme Court of New Jersey 81 N.J. 597; 410 A.2d 1138, January 18, 1980, Decided

OPINION BY: SCHREIBER

[*602] 41] We are again called upon to examine the proceedings before and findings of a board of adjustment which denied a zoning variance for construction of a single-family residence on an undersized lot. See N.J.S.A. 40:55-39(c). Plaintiffs, Gordon L. Commons, Helen T. Commons and Leo Weingarten, filed a complaint to review the denial of the variance by the Borough of Westwood Zoning Board of Adjustment. The Superior Court, Law Division, and the Appellate Division affirmed the board's action. We granted plaintiffs' petition for certification. 79 N.J. 482 (1979).

The facts developed at the hearings before the Board of Adjustment were substantially undisputed. The property in question is a vacant lot, designated as Lot 20 in Block 208 on the tax map of the Borough of Westwood. Located in an

established residential area consisting of one and two-family dwellings, this lot is the only undeveloped property in the neighborhood. Plaintiffs Gordon and Helen Commons are the present owners. They and their predecessors in title have owned this plot since 1927. Plaintiff Weingarten, a builder, contracted to purchase the property on the condition that he could construct a one-family residence on the lot.

A variance from the borough's zoning ordinance was necessary for two reasons. The land was located in a District B residential zone requiring a minimum frontage of 75 feet and a minimum area of 7500 square feet. The lot, however, has a frontage on Brickell Avenue of only 30 feet and a total area of 5190 square feet.

When adopted in 1933, the borough's zoning ordinance contained no minimum frontage or area provisions. However, a 1947 amendment required that one-family houses be located on lots with a frontage of at least 75 feet and an area of no less than 7500 square feet. At the time the amendment was adopted there were approximately 32 homes in the immediate area. Only seven satisfied the minimum frontage requirement. The nonconforming lots had frontages varying from 40 to 74 feet. [*603] This situation has remained virtually unchanged, only two homes having been constructed thereafter, one in 1948 with a frontage of 70 feet and one in 1970 with a frontage of 113 feet.

Weingarten proposed to construct a single-family, one and one-half story "raised ranch" with four bedrooms, a living room, dining room, kitchen, two baths and a one-car garage. Weingarten had no architectural design of the proposed house, but submitted a plan for a larger home which he claimed could be scaled down. The proposed home would have an approximate width of 19 feet, 18 inches and a depth of 48 feet. It would be centered on the 30-foot lot so as to provide five-foot side yards, the minimum required by the zoning ordinance. The proposed setback would also conform with the zoning plan.

Weingarten further explained that the proposed residence would be roughly 18 feet from the house belonging to Robert Dineen located on adjacent land to the north, and 48 feet from the two-family residence owned by David Butler on the property to the south. The Dineen property has a 50-foot frontage, and the Butler frontage measures 74.5 feet.

The proposed home would be offered for sale for about $ 55,000. That price compared favorably with the market values of other nearby homes which a local realtor, Thomas Reno, estimated at between $ 45,000 and $ 60,000. Reno testified that the proposed home would not impair the borough's zoning plan because the house would be new, its value would compare favorably with other homes, its setback from the street would be at least as great as others, and the distances between the adjoining houses on each side would be substantial.

In 1974, plaintiff Gordon Commons had offered to sell the lot to Dineen for $ 7,500. 42] Negotiations terminated, however, after Dineen countered with a $ 1,600 proposal, the assessed value of the property. When Weingarten contracted to purchase the land, he sought, albeit unsuccessfully, to purchase from Butler a 10-foot strip, adjacent to the south side of the lot.

[*604] Many neighbors opposed the application for a variance. Butler testified that a house on a 30-foot lot would be aesthetically displeasing, would differ in appearance by having a garage in front rather then alongside the dwelling, and would impair property values in the neighborhood. Another property owner, whose home was across the street, expressed her concern about privacy, reasoning that the occupants of a four-bedroom residence on a small lot would cause a spillover effect in terms of noise and trespassing.

The board of adjustment denied the variance, finding "that the applicant failed to demonstrate any evidence to establish hardship" and "that the granting of the variance would substantially impair the intent and purpose of the Zone Plan and Zoning Ordinance of the Borough of

Westwood." The trial court, after reviewing the testimony, affirmed because it felt that to permit the variance "would be detrimental to the entire area wherein the property in question is situated." The Appellate Division, holding that the board of adjustment had not acted arbitrarily, affirmed in a brief per curiam opinion.

The variance application was filed and heard when N.J.S.A. 40:55-39(c) was effective. That statute has been replaced with N.J.S.A. 40:55D-70(c) of the Municipal Land Use Law, N.J.S.A. 40:55D-1 et seq. Since these provisions are substantially the same and we are remanding this matter to the board of adjustment, we shall consider the issues in the light of the current statute.

I.

N.J.S.A. 40:55D-70(c) provides that a board of adjustment shall have power to grant a variance where by reason of the narrowness of the land or other extraordinary and exceptional situation of the property, the strict application of a zoning ordinance would result in exceptional and undue hardship upon [*605] the developer of the property. In addition, the statute's negative criteria must be satisfied, that is that the variance can be granted "without substantial detriment to the public good and will not substantially impair the intent and purpose of the zone plan and zoning ordinance." As in Chirichello v. Monmouth Beach Zoning Bd. of Adjustment, 78 N.J. 544 (1978), where the proposed residence conformed to the use requirement of the zoning ordinance but had insufficient frontage and area, we are called upon to consider and analyze the "undue hardship" concept and the negative criteria.

"Undue hardship" involves the underlying notion that no effective use can be made of the property in the event the variance is denied. Use of the property may of course be subject to reasonable restraint. As Justice Pashman observed in Taxpayers Association of Weymouth Tp., Inc. v. Weymouth Tp., 80 N.J. 6, 20 (1976), cert. den. 430 U.S. 977, 97 S.Ct. 1672, 52 L.Ed.2d 373 (1977), "[z]oning is inherently an exercise of the State's police power" and the

property owner's use of the land is subject to regulation "which will promote the public health, safety, morals and general welfare . . .." N.J.S.A. 40:55D-2(a). Put another way an "owner is not entitled to have his property zoned for its most profitable use." Bow & Arrow Manor 43] v. West Orange, 63 N.J. 335, 350 (1973). See Shell Oil Co. v. Shrewsbury Zoning Bd. of Adjustment, 64 N.J. 334 (1974). However, when the regulation renders the property unusable for [*606] any purpose, the analysis calls for further inquiries which may lead to a conclusion that the property owner would suffer an undue hardship.

It is appropriate to consider first the origin of the existing situation. If the property owner or his predecessors in title created the nonconforming condition, then the hardship may be deemed to be self-imposed. To measure this type of impact it is necessary to know when the zoning ordinance limitations were adopted and the status of the property with respect to those limitations at that time. Thus, if the lot had contained a 75-foot frontage and despite the existence of that requirement, the owner sold a 40-foot strip of the land, he or his successors in title would have little cause to complain. Likewise no undue hardship is suffered by an owner of a lot with a 35-foot frontage who acquired an adjoining 40-foot strip so that the lot complied with the ordinance and then sold a part of the land. These examples serve to illustrate the nature of a self-inflicted hardship which would not satisfy the statutory criteria.

Related to a determination of undue hardship are the efforts which the property owner has made to bring the property into compliance with the ordinance's specifications. Attempts to acquire additional land would be significant if it is feasible to purchase property from the adjoining property owners. Endeavors to sell the property to the adjoining landowners, the negotiations between and among the parties, and the reasonableness of the prices demanded and offered are also relevant considerations. See Gougeon v. Stone Harbor Bd. of Adjustment, 52 N.J. 212, 224 (1968), where it was held that if an owner of land refused

to sell at a "fair and reasonable" price he would not be considered to be suffering an "undue hardship." If on the other hand the owner is willing to sell at a "fair and reasonable" price and the adjoining property owners refuse to make a reasonable offer, then "undue hardship" would exist.

When an undue hardship is found to exist, the board of adjustment must be satisfied that the negative criteria are [*607] satisfied before granting a variance. Thus the grant of the variance must not substantially impinge upon the public good and the intent and purpose of the zone plan and ordinance. As we observed in Chirichello, "the variance may be granted only if the spirit of the ordinance and the general welfare are observed." 78 N.J. at 552. In this respect attention must be directed to the manner in and extent to which the variance will impact upon the character of the area. We have frequently observed that the applicant carries the burden of establishing the negative criteria by a fair preponderance of the evidence, but that "[t]he less of an impact, the more likely the restriction is not that vital to valid public interests." Chirichello v. Monmouth Zoning Bd. of Adjustment, 78 N.J. at 561. See Fobe Associates v. Demarest, 74 N.J. 519, 547 (1977).

There lurks in the background of cases of this type the possibility that denial of a variance will zone the property into inutility so that "an exercise of eminent domain [will be] . . called for and compensation must be paid." Harrington Glen, Inc. v. Leonia Bd. of Adjustment, 52 N.J. 22, 33 (1968). When that occurs all the taxpayers in the municipality share the economic burden of achieving the intent and purpose of the zoning scheme. Compared to this result is the denial of a variance conditioned upon the sale of the property at a fair market value to the adjoining property owners. They will perhaps receive the more direct benefit of the land remaining undeveloped and it may therefore be fairer for them to bear the cost. In this respect we made the following pertinent comments in Chirichello:

44] It would certainly be consonant with the interest of all parties to deny a variance conditioned on the purchase of the land by adjoining property owners at a fair price. The immediate benefit to the adjoining property owners of maintenance of the zoning scheme and aesthetic enjoyment of surrounding vacant land adjacent to their homes is self-evident. The owner of the odd lot would suffer no monetary damage having received the fair value of the land. Of course, if the owner refused to sell, then he would have no cause for complaint. Or if the adjoining owners would not agree to purchase, then [*608] perhaps the variance should be granted, less weight being given to their position particularly when the land in question will have been rendered useless. In either event the use of a conditional variance, the condition bearing an overall reasonable relationship to the purposes of the zoning ordinance, may lead to a satisfactory solution. See Harrington Glen, Inc. v. Leonia Bd. of Adj., supra; Houdaille Const. Materials, Inc. v. Tewksbury Tp. Bd. of Adj., 92 N.J. Super. 293 (App.Div.1966); Cohen v. Fair Lawn, 85 N.J. Super. 234, 237-238 (App.Div.1964).

Hearings before the board of adjustment serve as the focal point for resolution of conflicting interests between public restraints on the use of private property and the owner's right to utilize his land as he wishes. A third interest which frequently makes its appearance is represented by other property owners in the immediate vicinity whose major objective is the more limited self-interest of taking whatever position they believe will enhance the value of their property or coincide with their personal preferences. The board of adjustment must settle these disputes by engaging in a "discretionary weighing," a function inherent in the variance process. [78 N.J. at 555-556]

We have referred to the fair market value and the fair and reasonable price of the property with respect to considerations of offers to purchase and sell the property as well as the possibility of conditioning the variance. We believe that the preferred method to determine value is on

the assumption that a variance had been granted so that a home could be constructed on the lot. See Gougeon v. Stone Harbor Bd. of Adjustment, 52 N.J. at 224, and Chirichello v. Monmouth Beach Zoning Bd. of Adjustment, 78 N.J. at 562 (Pashman, J., concurring). It is possible that other methods of valuation may be feasible. However, the parties have not briefed or argued the issue and accordingly we do not foreclose such possibilities.

II.

Here, the board of adjustment concluded that "the applicant failed to demonstrate any evidence to establish hardship on the part of the applicant." (emphasis supplied) The record does not support that conclusion. Until the 1947 amendment to the zoning ordinance the plaintiffs or their predecessors [*609] in title could have constructed a one-family house on the lot. Ownership commenced in 1927 when the Borough of Westwood had no zoning ordinance. Furthermore, an attempt, albeit unsuccessful, had been made to acquire an additional ten-foot strip from Mr. Butler, owner of the property bordering to the south. A 40-foot frontage would have at least brought the property into conformity with one home in the neighborhood and within close proximity of the size of the lots of two other houses. In addition there had been discussions concerning the possible sale of the property to a neighbor, there being a substantial divergence in the offering and asking prices. Lastly, one could reasonably conclude that, if a variance were not granted, the land would be zoned into inutility. In view of all the above, it cannot be said that there was not any evidence to establish hardship.

Passing to the negative criteria, the board of adjustment made only the conclusive statement that the variance would substantially impair the intent and purpose of the zone plan and ordinance. The manner 45] in which the variance would cause that effect is not explained. The board found that the lot was the only 30-foot parcel in the block, that the applicant builder had never constructed a house on a 30-foot lot, and that the proposed house would be 19 feet in

width. How these facts relate to the zone plan is not made clear. The proposed use, side yards and setback meet the requirements of the ordinance. The proposed sales price of the home would be within the range of the value of the houses in the neighborhood. The total acreage of the land, exceeding 5,000 square feet, is comparable to 17 other properties in the neighborhood.

Perhaps the proposed house would be smaller in size than others. But in and of itself that would not justify a denial of a variance. Size of the house does not violate any of the traditional zoning purposes of light, air and open space which are reflected in the ordinance. We have recognized that minimum lot size "may be closely related to the goals of public health and safety" but that minimum floor area requirements [*610] "are not per se related to public health, safety or morals." Home Builders League of South Jersey, Inc. v. Berlin Tp., 81 N.J. 127, 139, 142 (1979).

It is possible that the board of adjustment was concerned with the appearance of the house and its relationship to the neighborhood from an aesthetic and economic viewpoint. These are proper zoning purposes, for the appearance of a house may be related to the character of the district. N.J.S.A. 40:55D-62(a). In Home Builders League of South Jersey, Inc. 81 N.J. at 145, we recognized that conserving the value of the surrounding properties and aesthetic considerations are appropriate desiderata of zoning. Thus, if the size and layout of the proposed house would have adversely affected the character of the neighborhood, both with respect to a "desirable visual environment," N.J.S.A. 40:55D-2(i), and the value of the neighborhood properties, a board may justly conclude that a variance should not be granted.

The board's resolution does not address these problems. They are brought into sharp focus when an articulation of findings and reasoning must be made. We have frequently advised boards of adjustment to make findings predicated upon factual support in the record and directed to the issues

involved. We refer again to Justice Francis's statements in Harrington Glen, Inc., 52 N.J. at 28:

Denial of a variance on a summary finding couched in the conclusionary language of the statute is not adequate. There must be a statement of the specific findings of fact on which the Board reached the conclusion that the statutory criteria for a variance were not satisfied. Unless such findings are recited, a reviewing court cannot determine fairly whether the Board acted properly and within the limits of its authority in refusing a variance.

In this connection boards should be mindful that they may receive assistance from other municipal employees. The board would not have been amiss here in calling the municipal building inspector to testify to construction requirements. The board or its counsel may also have addressed [*611] inquiries with respect to the size and appearance of the other homes, and the aesthetic and economic impact upon those homeowners. We do not mean to imply that the burden of proof is not upon the applicant. It is, but in performing its function as a governmental body, the board may take some action which may be of assistance to it. The difficulty in this case also rests with the applicants. They did not submit a plan of the proposed house, demonstrate compliance with the municipality's building code, and adequately describe the appearance and type of the structure. It is essential in a case of this type that the proponent submit a detailed plan of the proposed house. Under all these circumstances we believe fairness calls for a remand to the board of adjustment so that the record may be supplemented, the matter reconsidered, and adequate findings made.

46] Reversed and remanded to the Borough of Westwood Zoning Board of Adjustment.

B. LA EXPROPIACIÓN

EL *POLICE POWER* DEL ESTADO

HADACHECK v. SEBASTIAN, CHIEF OF POLICE OF THE CITY OF LOS ANGELES. Supreme Court of the United States 239 U.S. 394; 36 S. Ct. 143, December 20, 1915

OPINION BY: MCKENNA

[*404] Habeas corpus prosecuted in the Supreme Court of the State of California for the discharge of plaintiff in error from the custody of defendant in error, Chief of Police of the City of Los Angeles.

Plaintiff in error, to whom we shall refer as petitioner, was convicted of a misdemeanor for the violation of an ordinance of the City of Los Angeles which makes it unlawful for any person to establish or operate a brick yard or brick kiln, or any establishment, factory or place for the manufacture or burning of brick within described limits in the city. Sentence was pronounced against him [*405] and he was committed to the custody of defendant in error as Chief of Police of the City of Los Angeles.

Being so in custody he filed a petition in the Supreme Court of the State for a writ of habeas corpus. The writ was issued. Subsequently defendant in error made a return thereto supported by affidavits, to which petitioner made sworn reply. The court rendered judgment discharging the writ and remanding petitioner to custody. The Chief Justice of the court then granted this writ of error.

The petition sets forth the reason for resorting to habeas corpus and that petitioner is the owner of a tract of land within the limits described in the ordinance upon which tract of land there is a very valuable bed of clay, of great value for the manufacture of brick of a fine quality, worth to him not less than $ 100,000 per acre or about $ 800,000 for the entire tract for brick-making purposes, and not exceeding $ 60,000 for residential purposes or for any purpose other than the manufacture of brick. That he has made excavations of considerable depth and covering a

very large area of the property and that on account thereof the land cannot be utilized for residential purposes or any purpose other than that for which it is now used. That he purchased the land because of such bed of clay and for the purpose of manufacturing brick; that it was at the time of purchase outside of the limits of the city and distant from dwellings and other habitations and that he did not expect or believe, nor did other owners of property in the vicinity expect or believe, that the territory would be annexed to the city. That he has erected expensive machinery for the manufacture of bricks of fine quality which have been and are being used for building purposes in and about the city.

That if the ordinance be declared valid he will be compelled to entirely abandon his business and will be deprived of the use of his property.

[*406] That the manufacture of brick must necessarily be carried on where suitable clay is found and the clay cannot be transported to some other location, and, besides, the clay upon his property is particularly fine and clay of as good quality cannot be found in any other place within the city where the same can be utilized for the manufacture of brick. That within the prohibited district there is one other brick yard besides that of plaintiff in error.

That there is no reason for the prohibition of the business; that its maintenance cannot be and is not in the nature of a nuisance as defined in § 3479 of the Civil Code of the State, and cannot be dangerous or detrimental to health or the morals or safety or peace or welfare or convenience of the people of the district or city.

That the business is so conducted as not to be in any way or degree a nuisance; no noises arise therefrom, and no noxious odors, and that by the use of certain means (which are described) provided and the situation of the brick yard an extremely small amount of smoke is emitted from any kiln and what is emitted is so dissipated that it is not a nuisance nor in any manner detrimental to health or comfort. That during the seven years which the brick yard

has been conducted no complaint has been made of it, and no attempt has ever been made to regulate it.

That the city embraces 107.62 square miles in area and 75% of it is devoted to residential purposes; that the district described in the ordinance includes only about three square miles, is sparsely settled and contains large tracts of unsubdivided and unoccupied land; and that the boundaries of the district were determined for the sole and specific purpose of prohibiting and suppressing the business of petitioner and that of the other brick yard.

That there are and were at the time of the adoption of the ordinance in other districts of the city thickly built up with residences brick yards maintained more detrimental to the inhabitants of the city. That a petition was filed, [*407] signed by several hundred persons, representing such brick yards to be a nuisance and no ordinance or regulation was passed in regard to such petition and the brick yards are operated without hindrance or molestation. That other brick yards are permitted to be maintained without prohibition or regulation.

That no ordinance or regulation of any kind has been passed at any time regulating or attempting to regulate brick yards or inquiry made whether they could be maintained without being a nuisance or detrimental to health.

That the ordinance does not state a public offense and is in violation of the constitution of the State and the Fourteenth Amendment to the Constitution of the United States.

That the business of petitioner is a lawful one, none of the materials used in it are combustible, the machinery is of the most approved pattern and its conduct will not create a nuisance.

There is an allegation that the ordinance if enforced fosters and will foster a monopoly and protects and will protect other persons engaged in the manufacture of brick in the city, and discriminates and will discriminate against petitioner in favor of such other persons who are his

competitors, and will prevent him from entering into competition with them.

The petition, after almost every paragraph, charges a deprivation of property, the taking of property without compensation, and that the ordinance is in consequence invalid.

We have given this outline of the petition as it presents petitioner's contentions, with the circumstances (which we deem most material) that give color and emphasis to them.

But there are substantial traverses made by the return to the writ, among others, a denial of the charge that the ordinance was arbitrarily directed against the business of [*408] petitioner, and it is alleged that there is another district in which brick yards are prohibited.

There was a denial of the allegations that the brick yard was conducted or could be conducted sanitarily or was not offensive to health. And there were affidavits supporting the denials. In these it was alleged that the fumes, gases, smoke, soot, steam and dust arising from petitioner's brick-making plant have from time to time caused sickness and serious discomfort to those living in the vicinity.

There was no specific denial of the value of the property or that it contained deposits of clay or that the latter could not be removed and manufactured into brick elsewhere. There was, however, a general denial that the enforcement of the ordinance would "entirely deprive petitioner of his property and the use thereof."

How the Supreme Court dealt with the allegations, denials and affidavits we can gather from its opinion. The court said, through Mr. Justice Sloss, 165 California, p. 416: "The district to which the prohibition was applied contains about three square miles. The petitioner is the owner of a tract of land, containing eight acres, more or less, within the district described in the ordinance. He acquired his land in 1902, before the territory to which the ordinance was directed had been annexed to the city of Los Angeles. His land contains valuable deposits of clay suitable for the manufacture of brick, and he has, during the entire period

of his ownership, used the land for brickmaking, and has erected thereon kilns, machinery and buildings necessary for such manufacture. The land, as he alleges, is far more valuable for brickmaking than for any other purpose."

The court considered the business one which could be regulated and that regulation was not precluded by the fact "that the value of investments made in the business prior to any legislative action will be greatly diminished," and that no complaint could be based upon the fact that [*409] petitioner had been carrying on the trade in that locality for a long period.

And, considering the allegations of the petition, the denials of the return and the evidence of the affidavits, the court said that the latter tended to show that the district created had become primarily a residential section and that the occupants of the neighboring dwellings are seriously incommoded by the operations of petitioner; and that such evidence, "when taken in connection with the presumptions in favor of the propriety of the legislative determination, overcame the contention that the prohibition of the ordinance was a mere arbitrary invasion of private right, not supported by any tenable belief that the continuance of the business was so detrimental to the interests of others as to require suppression."

The court, on the evidence, rejected the contention that the ordinance was not in good faith enacted as a police measure and that it was intended to discriminate against petitioner or that it was actuated by any motive of injuring him as an individual.

The charge of discrimination between localities was not sustained. The court expressed the view that the determination of prohibition was for the legislature and that the court, without regard to the fact shown in the return that there was another district in which brick-making was prohibited, could not sustain the claim that the ordinance was not enacted in good faith but was designed to discriminate against petitioner and the other brick yard within the district. "The facts before us," the court finally

said, "would certainly not justify the conclusion that the ordinance here in question was designed, in either its adoption or its enforcement, to be anything but what it purported to be, viz., a legitimate regulation, operating alike upon all who came within its terms."

We think the conclusion of the court is justified by the evidence and makes it unnecessary to review the many [*410] cases cited by petitioner in which it is decided that the police power of a state cannot be arbitrarily exercised. The principle is familiar, but in any given case it must plainly appear to apply. It is to be remembered that we are dealing with one of the most essential powers of government, one that is the least limitable. It may, indeed, seem harsh in its exercise, usually is on some individual, but the imperative necessity for its existence precludes any limitation upon it when not exerted arbitrarily. A vested interest cannot be asserted against it because of conditions once obtaining. Chicago & Alton R.R. v. Tranbarger, 238 U.S. 67, 78. To so hold would preclude development and fix a city forever in its primitive conditions. There must be progress, and if in its march private interests are in the way they must yield to the good of the community. The logical result of petitioner's contention would seem to be that a city could not be formed or enlarged against the resistance of an occupant of the ground and that if it grows at all it can only grow as the environment of the occupations that are usually banished to the purlieus.

The police power and to what extent it may be exerted we have recently illustrated in Reinman v. Little Rock, 237 U.S. 171. The circumstances of the case were very much like those of the case at bar and give reply to the contentions of petitioner, especially that which asserts that a necessary and lawful occupation that is not a nuisance per se cannot be made so by legislative declaration. There was a like investment in property, encouraged by the then conditions; a like reduction of value and deprivation of property was asserted against the validity of the ordinance there considered; a like assertion of an arbitrary exercise of

the power of prohibition. Against all of these contentions, and causing the rejection of them all, was adduced the police power. There was a prohibition of a business, lawful in itself, there as here. It was a livery stable there; a brick yard here. They differ in [*411] particulars, but they are alike in that which cause and justify prohibition in defined localities — that is, the effect upon the health and comfort of the community.

The ordinance passed upon prohibited the conduct of the business within a certain defined area in Little Rock, Arkansas. This court said of it: granting that the business was not a nuisance per se, it was clearly within the police power of the State to regulate it, "and to that end to declare that in particular circumstances and in particular localities a livery stable shall be deemed a nuisance in fact and in law." And the only limitation upon the power was stated to be that the power could not be exerted arbitrarily or with unjust discrimination. There was a citation of cases. We think the present case is within the ruling thus declared.

There is a distinction between Reinman v. Little Rock and the case at bar. There a particular business was prohibited which was not affixed to or dependent upon its locality; it could be conducted elsewhere. Here, it is contended, the latter condition does not exist, and it is alleged that the manufacture of brick must necessarily be carried on where suitable clay is found and that the clay on petitioner's property cannot be transported to some other locality. This is not urged as a physical impossibility but only, counsel say, that such transportation and the transportation of the bricks to places where they could be used in construction work would be prohibitive "from a financial standpoint." But upon the evidence the Supreme Court considered the case, as we understand its opinion, from the standpoint of the offensive effects of the operation of a brick yard and not from the deprivation of the deposits of clay, and distinguished Ex parte Kelso, 147 California, 609, wherein the court declared invalid an ordinance absolutely prohibiting the maintenance or operation of a rock or stone

quarry within a certain portion of the city and county of San Francisco. [*412] The court there said that the effect of the ordinance was "to absolutely deprive the owners of real property within such limits of a valuable right incident to their ownership, — viz., the right to extract therefrom such rock and stone as they might find it to their advantage to dispose of." The court expressed the view that the removal could be regulated but that "an absolute prohibition of such removal under the circumstances," could not be upheld.

In the present case there is no prohibition of the removal of the brick clay; only a prohibition within the designated locality of its manufacture into bricks. And to this feature of the ordinance our opinion is addressed. Whether other questions would arise if the ordinance were broader, and opinion on such questions, we reserve.

Petitioner invokes the equal protection clause of the Constitution and charges that it is violated in that the ordinance (1) "prohibits him from manufacturing brick upon his property while his competitors are permitted, without regulation of any kind, to manufacture brick upon property situated in all respects similarly to that of plaintiff in error"; and (2) that it "prohibits the conduct of his business while it permits the maintenance within the same district of any other kind of business, no matter how objectionable the same may be, either in its nature or in the manner in which it is conducted."

If we should grant that the first specification shows a violation of classification, that is, a distinction between businesses which was not within the legislative power, petitioner's contention encounters the objection that it depends upon an inquiry of fact which the record does not enable us to determine. It is alleged in the return to the petition that brickmaking is prohibited in one other district and an ordinance is referred to regulating business in other districts. To this plaintiff in error replied that the ordinance attempts to prohibit the operation of certain [*413] businesses having mechanical power and does not prohibit the maintenance of any business or the operation of any

machine that is operated by animal power. In other words, petitioner makes his contention depend upon disputable considerations of classification and upon a comparison of conditions of which there is no means of judicial determination and upon which nevertheless we are expected to reverse legislative action exercised upon matters of which the city has control.

To a certain extent the latter comment may be applied to other contentions, and, besides, there is no allegation or proof of other objectionable businesses being permitted within the district, and a speculation of their establishment or conduct at some future time is too remote.

In his petition and argument something is made of the ordinance as fostering a monopoly and suppressing his competition with other brickmakers. The charge and argument are too illusive. It is part of the charge that the ordinance was directed against him. The charge, we have seen, was rejected by the Supreme Court, and we find nothing to justify it.

It may be that brick yards in other localities within the city where the same conditions exist are not regulated or prohibited, but it does not follow that they will not be. That petitioner's business was first in time to be prohibited does not make its prohibition unlawful. And it may be, as said by the Supreme Court of the State, that the conditions justify a distinction. However, the inquiries thus suggested are outside of our province.

There are other and subsidiary contentions which, we think, do not require discussion. They are disposed of by what we have said. It may be that something else than prohibition would have satisfied the conditions. Of this, however, we have no means of determining, and besides we cannot declare invalid the exertion of a power which the city undoubtedly has because of a charge that it does [*414] not exactly accommodate the conditions or that some other exercise would have been better or less harsh. We must accord good faith to the city in the absence of a clear

showing to the contrary and an honest exercise of judgment upon the circumstances which induced its action.

We do not notice the contention that the ordinance is not within the city's charter powers nor that it is in violation of the state constitution, such contentions raising only local questions which must be deemed to have been decided adversely to petitioner by the Supreme Court of the State.

Judgment affirmed.

STATE OF CONNECTICUT v. William HELLER.

Supreme Court of Connecticut 123 Conn. 492; 196 A. 337, December 21, 1937, Decided

OPINION BY: BROWN

[*493] The information charged that the defendant on or about July 11th, 1936, at Easton, bathed in a stream tributary to a reservoir from which the inhabitants of Bridgeport are supplied with water, in violation of § 2542 of the General Statutes. That statute so far as relevant provides: "Any person who shall bathe in any reservoir from which the inhabitants [*494] of any town, city or borough are supplied with water, or in any lake, pond or stream tributary to such reservoir," shall be subject to fine, imprisonment, or both. The defendant's demurrer to the information was overruled. He thereupon elected to be tried by the court and it found him guilty.

These facts are undisputed: On July 11th, 1936, the defendant owned in fee simple a tract of land in Easton comprising about thirty-eight acres, on which was a dwelling-house occupied by him and his family. Ball Wall Brook flows across this land forming a small pond thereon, and runs on into the Aspetuck Reservoir about forty-two hundred feet away, from which by connecting pipe water flows into the Hemlock Reservoir. These reservoirs are part of the Bridgeport Hydraulic Company's system, from which Bridgeport and other municipalities are supplied with water. Ball Wall Brook is and ever since before the defendant's purchase of his property has been a stream tributary to both of these reservoirs. The distance from the

place where it enters the Aspetuck Reservoir to the pipes leading from the reservoir to the municipality is over three and one-half miles. The combined area of the reservoirs when full is about five hundred acres. On July 11th, 1936, the accused bathed in Ball Wall Brook at a place within the boundaries of the thirty-eight acre tract owned by him, and was arrested and charged with a violation of § 2542 of the General Statutes.

The fundamental question determinative of the appeal is whether § 2542 as applied to the defendant in forbidding his bathing pursuant to his property right in a brook flowing through his own land, is a valid exercise of the State's police power, or is unconstitutional as depriving him of property rights without compensation. It is unquestioned that the defendant [*495] as riparian owner had a right which included ordinary and reasonable bathing privileges in this brook by himself, his family, and inmates and guests of his household. Harvey Realty Co. v. Wallingford, 111 Conn. 352, 359, 150 Atl. 60. It is further undisputed that § 2542 can only be sustained as an exercise of the State's police power. Furthermore, it is not disputed that the object of the statute in question is to protect the health of citizens using water distributed through these reservoirs, and that thus its purpose affords a proper basis for the exercise of the police power inherent in the Legislature. State v. Racskowski, 86 Conn. 677, 680, 86 Atl. 606; 1 Farnham, Waters & Water Rights, p. 618, § 137a. The issue for determination, therefore, is reduced to the sole question of whether or not this exercise of the police power for the purpose indicated, is so unreasonable as to violate the provisions of Section 11 of Article First of the Constitution of the State of Connecticut or Section 1 of Article XIV of the Amendments to the Constitution of the United States.

The foundation of the police power of a State is the overruling necessity of the public welfare. Thus it has been referred to as that inherent and plenary power which enables the State "to make and enforce rules and regulations concerning and to prevent and prohibit all

things hurtful to the comfort and welfare of society. It has been aptly termed 'The Law of Overruling Necessity,' and compared with the right of self-protection of the individual, it is involved in the very right and idea of government itself, and based on the two maxims that, 'The Public Welfare is the Highest Law,' and that 'One must so use his own right as not to injure that of another.'" 1 Bruce, State and Federal Control of Personal and Property Rights, 8. Accordingly all property of every person is owned subject [*496] to this power resting in the State. It is an incident of title. Application of St. Bernard Cemetery Asso., 58 Conn. 91, 96, 19 Atl. 514. "The power to legislate for the safety, health or welfare of its people, is inherent in the State by virtue of its sovereignty. All property is held subject to this power. Meriden v. West Meriden Cemetery Asso., 83 Conn. 204, 207, 76 Atl. 515. And all property, too, is held upon the implied promise of its owner or user that it shall not be used against the public welfare." Connecticut Co. v. Stamford, 95 Conn. 26, 29, 110 Atl. 554.

It is pursuant to these principles that the State may regulate one's use of his property. "In short, it [the police power] may regulate any business or the use of any property in the interest of the public health, safety or welfare, provided this be done reasonably. To that extent the public interest is supreme and the private interest must yield. Eminent domain takes property because it is useful to the public. The police power regulates the use of property or impairs the rights in property, because the free exercise of these rights is detrimental to public interest. Freund, Police Power, § 511." Windsor v. Whitney, 95 Conn. 357, 367, 111 Atl. 354; State v. Kievman , 116 Conn. 458, 463, 165 Atl. 601. "The use of property may be regulated as the public welfare demands. . . . Beyond this, private property cannot be interfered with under the police power, but resort must be had to the power of eminent domain and compensation made." 1 Lewis, Eminent Domain (3d Ed.) p. 492, § 249. "The protection of the public safety, health or morals, by the exercise of the police power, is not within

the inhibitions of the Constitution. And since all property is held subject to such regulation, there is no obligation upon the State to indemnify the owner of property for the damage done him by the legitimate exercise [*497] of the police power. Property so damaged is not taken: its use is regulated in order to promote the public welfare." Connecticut Co. v. Stamford, supra, 30; State v. Wheeler, 44 N. J. L. 88, 93.

But there are definite limits upon the application of the foregoing principles. "The power of regulation by government is not unlimited; it cannot, as we have stated, be imposed unless it bears rational relation to the subjects which fall fairly within the police power and unless the means used are not within constitutional inhibitions. The means used will fall within these inhibitions whenever they are destructive, confiscatory, or so unreasonable as to be arbitrary. Euclid v. Ambler Realty Co., 272 U.S. 365, 47 Sup. Ct. 114." State v. Hillman, 110 Conn. 92, 105, 147 Atl. 294. "A large discretion is necessarily vested in the Legislature to determine not only what the interests of public health, security and morals require, but what measures are necessary for the protection of such interests. Young v. Lemieux, 79 Conn. 434, 440, 65 Atl. 436, 600." Cotter v. Stoeckel, 97 Conn. 239, 244, 116 Atl. 248. Furthermore, "'incidental damage to property resulting from governmental activities, or laws passed in the promotion of the public welfare, is not considered a taking of the property for which compensation must be made.'" State v. Hillman, supra, 104.

The foregoing principles are established by abundant authority. The difficulty arises in their application, to determine where the proper exercise of the police power ends and that of the other governmental power of eminent domain begins, that is, how far the State can properly go to deprive an owner of valuable rights under the former without compensation, as distinguished from necessary resort to the latter with compensation. The right of the State in the exercise of its police power to limit the use of

property even [*498] when prejudicial to the pecuniary interests of the owner, has been made increasingly clear by our more recent decisions. Windsor v. Whitney, supra; State v. Hillman, supra; Young v. West Hartford, 111 Conn. 27, 149 Atl. 205; Rice v. Zoning Board of Appeals of Milford, 122 Conn. 435, 190 Atl. 257. Whether a statute enacted pursuant to the police power is a means reasonable in quality and extent, and in time, place and circumstance, presents a question to be determined by the court. Windsor v. Whitney, supra, 369. It is the court's duty in such case, in the exercise of great care and caution, to make every presumption and intendment in favor of the validity of the statute, and to sustain it unless its invalidity is beyond a reasonable doubt. Beach v. Bradstreet, 85 Conn. 344, 350, 82 Atl. 1032; State v. Lay, 86 Conn. 141, 145, 84 Atl. 522; State v. Muolo, 119 Conn. 323, 325, 176 Atl. 401. It is in the light of the principles above stated, that we must determine whether the provisions of § 2542 are so unreasonable as to constitute an unconstitutional invasion of the defendant's rights.

The defendant claims the statute is invalid in that its unlimited scope constitutes an unreasonable exercise of the police power, it being contended that it goes far beyond what is necessary to accomplish the legislative purpose and so does not bear a reasonable relation thereto. Thus it is contended that since by its terms the statute prohibits bathing in "any tributary" of a reservoir, it could apply to one bathing in a brook which finally flows into a reservoir a hundred miles away but that any resulting pollution would be cleared before the polluted water reached such reservoir, and that therefore it prohibits something unnecessary for the public's protection. The physical impossibility of such a case, due to the boundaries and topography of the State, affords one [*499] answer to this argument; the lack of a finding that the pollution would be cleared under such circumstances affords another. While the established scientific fact that water can serve as a carrier of disease germs to one drinking it, is one within

judicial notice (State v. Morse, 84 Vt. 387, 80 Atl. 189, 194), what the conditions essential to the destruction of such germs in water of a flowing stream may be, is not. But aside from this, the tendency of such pollution to produce public injury, even though no actual injury occurs, affords ground sufficient to sustain the Legislature's act. State v. Wheeler, supra, 92; Dunham v. New Britain, 55 Conn. 378, 384, 11 Atl. 354. Upon the record before us we cannot hold that bathing in a tributary of a reservoir might not have such a tendency to endanger the health of users of the water that the Legislature might not reasonably prohibit it. It is our conclusion that the statute by its terms is not of such broad scope that it fails to bear a rational relation to the protection of the public health, thus constituting an unreasonable exercise of the police power.

The defendant further claims the statute is invalid because it deprives him of a property right without compensation. One contention is that the Bridgeport Hydraulic Company by the operation of this penal statute is obtaining rights in his property without paying for them. The State chartered the company to engage in business as a public utility to supply water for profit to the municipalities served. If the sole result from the enforcement of § 2542 was to benefit this company, there would be force to the defendant's contention, for the valid exercise of the police power must find justification in the general public welfare rather than in the protection or enhancement of private interests. State v. Kievman, supra, 469. The significant fact here is, however, that [*500] by the State's grant of a charter to the company to supply water for the people in this locality, the State's duty to protect the health and welfare of these people was neither abandoned nor discharged. Therefore the fact that the State's enactment of such a statute in carrying out its duty, incidentally benefits the company by helping to safeguard the purity of its water supply, which it as a public agent under its charter dispenses to meet the needs of the people of the locality, is of no consequence. The duty of the

State is in extent state-wide, and § 2542 is of application coincident therewith.

The further and basic contention is, that since this statute entirely deprives the defendant of his valuable property right of bathing in this stream, it goes beyond regulation within the police power, and constitutes a taking, warranted only under eminent domain proceedings with proper compensation. The principles above recited make clear that this conclusion does not necessarily follow. Of the legion of decisions illustrative of this, we refer to but two cases very closely analogous to the present, Commonwealth v. Tewksbury, 52 Mass. 55, 57, and People v. Bridges, 142 Ill. 30, 31 N. E. 115, 16 L. R. A. 684, 687. In the former, a statute for the protection of Boston Harbor, forbidding any person to take stones, gravel, or sand from the shore, was sustained as against one taking where he owned the fee, as was the statute in the latter forbidding any person to fish with a seine in a stream or lake, even as against an owner fishing upon his own land. Thus a law which in fact in certain respects deprives the owner of a use of his property involving its physical consumption, if to protect a common right of all citizens, is valid within the police power. State v. Wheeler, supra. A fortiori regulation depriving the defendant merely of his property [*501] right to bathe as here, may also be valid as within it. What we said in State v. Hillman, supra, 105, is a sufficient answer to this contention of the defendant: "Regulations may result to some extent, practically in the taking of property, or the restricting of its uses, and yet not be deemed confiscatory or unreasonable."

There is no distinction in principle between the legal restriction in the present case which without compensation deprives the owner of his right to bathe in the stream crossing his property, and that in State v. Hillman, supra, prohibiting the use of property for business purposes; or that in Windsor v. Whitney, supra, depriving him of the right to build on the entire area of his lot; or that in Ingham v. Brooks, 95 Conn. 317, 328, 111 Atl. 209, denying an

owner the right to move a building from one place to another, which was held within the police power although the ordinance in question was void by reason of the arbitrary and unfettered discretion in the town officials thereunder; or that in Application of St. Bernard Cemetery Asso., supra, denying an owner the right to use its property for cemetery purposes unless the court determined such use would not be detrimental to public health; or those in a number of cases that have come before us involving various zoning ordinances. The restriction imposed by § 2542 was not a taking contravening any constitutional provision, but rather a regulation within the State's police power.

Two decisions, where the precise question here presented on substantially the same factual situation was determined, have reached diametrically opposite conclusions. In the earlier case of People v. Hulbert, 131 Mich. 156, 173, 91 N. W. 211, decided in 1902, where the defendant, a riparian owner on a pond or lake from which a city took its water supply, was convicted of bathing therein, under a statute which made [*502] it a criminal offense to pollute such waters, the court held in a very brief statement citing no authorities that as such owner the defendant had a right to a reasonable use of the waters of the lake including the right to bathe and swim therein, and that he could not be deprived of this right by the police power of the State. The later case of State v. Morse, supra, decided in 1911, on a similar state of facts, criticised the earlier case and arrived at the opposite conclusion. In the case of Battle Creek v. Goguac Resort Asso., Ltd., 181 Mich. 241, 148 N. W. 441, 443, decided in 1914, in an opinion concurred in by three of the judges of the equally divided court, some question is intimated as to the soundness of the court's decision in the Hulbert case.

In the Morse case the court pointed out that since the defendant's right to bathe conflicted with the public's rights concerning its health, safety, and welfare, the former must yield and the latter prevail, and that the enforcement and

protection of these paramount rights is the proper function of the police power. It went on to conclude that within the principles definitive of the police power and those applicable to the interpretation of enactments pursuant thereto, which we have already mentioned, the action of the state board of health in question was a valid exercise of the police power. We reach a similar conclusion in the case before us. What the court says in the Morse case (p. 393) well states the effect of the statute here: "Such use in such circumstances may be prohibited in a valid exercise of the police power. The owner's rights are not then 'taken' in a constitutional sense; or, if this statement savors too much of refinement of reasoning, as some suggest, the 'taking' is not such as the Constitution prohibits. The beneficial use of the property is curtailed in some measure but all the other [*503] incidents of ownership are left unimpaired. The fact that this is a property right does not determine the question." The regulation imposed by § 2542 is neither destructive, confiscatory nor arbitrary, but is on the contrary upon all the facts in the case, reasonable in time, place, and circumstance, and therefore a reasonable exercise of the police power. Cf.: State v. Griffin, 69 N. H. 1, 22, 39 Atl. 260; Miles City v. State Board of Health, 39 Mont. 405, 411, 102 Pac. 696; Durham v. Cotton Mills, 141 N. C. 615, 634, 54 S. E. 453.

The defendant makes one further claim, that other statutes, including §§ 2539, 2540 and 2541, show so clearly that the legislative policy of the State is to provide for compensation in all cases where a person is to be deprived of any property rights in protecting public water supplies, that § 2542 must in any event, for that reason, be interpreted as not applicable to one like the defendant, bathing in a reservoir tributary within the limits of his own land. Section 2539 provides for injunctive relief against the pollution of a reservoir, and authorizes the abatement of nuisances upon a watershed causing such pollution. It further gives the owner a right to compensation "for all unnecessary or unreasonable damage done" to his property

by those abating a nuisance thereunder. Section 2540 provides for the assessment of damages in favor of one damaged or deprived of "any substantial right" by any order of the court under § 2539. Section 2541 provides for the taking of property for the establishment or protection of a public water supply, and the awarding of damages therefor "in any case in which the law shall require compensation." Under these statutes by the court's decree, not only may an owner's rights to use his property be curtailed, but his very title to either a part or all of it may be entirely [*504] divested. The Legislature, therefore, in these sections, with good reason, made provision for compensation to meet such a contingency, but by its enactment of penal § 2542, under which at most one's right to bathe in a stream on his land could be cut off, did not. This, as well as the language above quoted from §§ 2539, 2540 and 2541, refutes the defendant's claim that they evidence a legislative policy to provide compensation in all cases where private property rights are restricted for the benefit of a public water supply. These indicate rather that the Legislature contemplated there would be cases where the exercise of the police power would interfere with one's use of his property without entitling him to compensation. There is no error.

LA CAUSA DE UTILIDAD PÚBLICA

 Susette KELO, et al., Petitioners v. CITY OF NEW LONDON, CONNECTICUT, et al. Supreme Court of the United States 545 U.S. 469; 125 S. Ct. 2655, June 23, 2005, Decided

OPINION BY: STEVENS

[*472] In 2000, the city of New London approved a development plan that, in the words of the Supreme Court of Connecticut, was "projected to create in excess of 1,000 jobs, to increase tax and other revenues, and to revitalize an economically distressed city, including its downtown and waterfront areas." 268 Conn. 1, 5, 843 A.2d 500, 507 (2004). In assembling the land needed for this project, the

city's development agent has purchased property from willing sellers and proposes to use the power of eminent domain to acquire the remainder of the property from unwilling owners in exchange for just compensation. The question presented is whether the city's proposed disposition of this property qualifies as a "public use" within the meaning of the Takings Clause of the Fifth Amendment to the Constitution.

[*473] I

The city of New London (hereinafter City) sits at the junction of the Thames River and the Long Island Sound in southeastern Connecticut. Decades of economic decline led a state agency in 1990 to designate the City a "distressed municipality." In 1996, the Federal Government closed the Naval Undersea Warfare Center, which had been located in the Fort Trumbull area of the City and had employed over 1,500 people. In 1998, the City's unemployment rate was nearly double that of the State, and its population of just under 24,000 residents was at its lowest since 1920.

These conditions prompted state and local officials to target New London, and particularly its Fort Trumbull area, for economic revitalization. To this end, respondent New London Development Corporation (NLDC), a private nonprofit entity established some years earlier to assist the City in planning economic development, was reactivated. In January 1998, the State authorized a $5.35 million bond issue to support the NLDC's planning activities and a $10 million bond issue toward the creation of a Fort Trumbull State Park. In February, the pharmaceutical company Pfizer Inc. announced that it would build a $300 million research facility on a site immediately adjacent to Fort Trumbull; local planners hoped that Pfizer would draw new business to the area, thereby serving as a catalyst to the area's rejuvenation. After receiving initial approval from the city council, the NLDC continued its planning activities and held a series of neighborhood meetings to educate the public about the process. In May, the city council authorized the NLDC to formally submit its plans to the

relevant state agencies for review. Upon obtaining state-level approval, the NLDC [*474] finalized an integrated development plan focused on 90 acres of the Fort Trumbull area.

The Fort Trumbull area is situated on a peninsula that juts into the Thames River. The area comprises approximately 115 privately owned properties, as well as the 32 acres of land formerly occupied by the naval facility (Trumbull State Park now occupies 18 of those 32 acres). The development plan encompasses seven parcels. Parcel 1 is designated for a waterfront conference hotel at the center of a "small urban village" that will include restaurants and shopping. This parcel will also have marinas for both recreational and commercial uses. A pedestrian "riverwalk" will originate here and continue down the coast, connecting the waterfront areas of the development. Parcel 2 will be the site of approximately 80 new residences organized into an urban neighborhood and linked by public walkway to the remainder of the development, including the state park. This parcel also includes space reserved for a new U. S. Coast Guard Museum. Parcel 3, which is located immediately north of the Pfizer facility, will contain at least 90,000 square feet of research and development office space. Parcel 4A is a 2.4-acre site that will be used either to support the adjacent state park, by providing parking or retail services for visitors, or to support the nearby marina. Parcel 4B will include a renovated marina, as well as the final stretch of the riverwalk. Parcels 5, 6, and 7 will provide land for office and retail space, parking, and water-dependent commercial uses. App. 109-113.

The NLDC intended the development plan to capitalize on the arrival of the Pfizer facility and the new commerce it was expected to attract. In addition to creating jobs, generating tax revenue, and helping to "build momentum for the revitalization of downtown New London," id., at 92, the plan was also designed to make the City more attractive and to create [*475] leisure and recreational opportunities on the waterfront and in the park.

The city council approved the plan in January 2000, and designated the NLDC as its development agent in charge of implementation. See Conn. Gen. Stat. § 8-188 (2005). The city council also authorized the NLDC to purchase property or to acquire property by exercising eminent domain in the City's name. § 8-193. The NLDC successfully negotiated the purchase of most of the real estate in the 90-acre area, but its negotiations with petitioners failed. As a consequence, in November 2000, the NLDC initiated the condemnation proceedings that gave rise to this case.

II

Petitioner Susette Kelo has lived in the Fort Trumbull area since 1997. She has made extensive improvements to her house, which she prizes for its water view. Petitioner Wilhelmina Dery was born in her Fort Trumbull house in 1918 and has lived there her entire life. Her husband Charles (also a petitioner) has lived in the house since they married some 60 years ago. In all, the nine petitioners own 15 properties in Fort Trumbull—4 in parcel 3 of the development plan and 11 in parcel 4A. Ten of the parcels are occupied by the owner or a family member; the other five are held as investment properties. There is no allegation that any of these properties is blighted or otherwise in poor condition; rather, they were condemned only because they happen to be located in the development area.

In December 2000, petitioners brought this action in the New London Superior Court. They claimed, among other things, that the taking of their properties would violate the "public use" restriction in the Fifth Amendment. After a 7-day bench trial, the Superior Court granted a permanent restraining order prohibiting the taking of the properties located [*476] in parcel 4A (park or marina support). It, however, denied petitioners relief as to the properties located in parcel 3 (office space). App. to Pet. for Cert. 343-350.

After the Superior Court ruled, both sides took appeals to the Supreme Court of Connecticut. That court held, over a

dissent, that all of the City's proposed takings were valid. It began by upholding the lower court's determination that the takings were authorized by chapter 132, the State's municipal development statute. See Conn. Gen. Stat. § 8-186 et seq (2005). That statute expresses a legislative determination that the taking of land, even developed land, as part of an economic development project is a "public use" and in the "public interest." 268 Conn., at 18-28, 843 A. 2d, at 515-521. Next, relying on cases such as Hawaii Housing Authority v. Midkiff, 467 U.S. 229, 81 L. Ed. 2d 186, 104 S. Ct. 2321 (1984), and Berman v. Parker, 348 U.S. 26, 99 L. Ed. 27, 75 S. Ct. 98 (1954), the court held that such economic development qualified as a valid public use under both the Federal and State Constitutions. 268 Conn., at 40, 843 A. 2d, at 527.

Finally, adhering to its precedents, the court went on to determine, first, whether the takings of the particular properties at issue were "reasonably necessary" to achieving the City's intended public use, id., at 82-84, 843 A. 2d, at 552-553, and, second, whether the takings were for "reasonably foreseeable needs," id., at 93-94, 843 A. 2d, at 558-559. The court upheld the trial court's factual findings as to parcel 3, but reversed the trial court as to parcel 4A, agreeing with the City that the intended use of this land was sufficiently [*477] definite and had been given "reasonable attention" during the planning process. Id., at 120-121, 843 A. 2d, at 574.

The three dissenting justices would have imposed a "heightened" standard of judicial review for takings justified by economic development. Although they agreed that the plan was intended to serve a valid public use, they would have found all the takings unconstitutional because the City had failed to adduce "clear and convincing evidence" that the economic benefits of the plan would in fact come to pass. Id., at 144, 146, 843 A. 2d, at 587, 588 (Zarella, J., joined by Sullivan, C. J., and Katz, J., concurring in part and dissenting in part).

We 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. 542 U.S. 965, 159 L. Ed. 2d 857, 125 S. Ct. 27 (2004).

III

[***LEdHR3A] [3A] [***LEdHR4A] [4A] Two polar propositions are perfectly clear. On the one hand, it has long been accepted that the sovereign may not take the property of A for the sole purpose of transferring it to another private party B, even though A is paid just compensation. On the other hand, 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. Neither of these propositions, however, determines the disposition of this case.

[***LEdHR3B] [3B] [***LEdHR5] [5] As for the first proposition, the City would no doubt be forbidden from taking petitioners' land for the purpose of conferring a private benefit on a particular private party. See Midkiff, 467 U.S., at 245, 81 L. Ed. 2d 186, 104 S. Ct. 2321 ("A purely private taking could not withstand the scrutiny of the public use requirement; it would serve no legitimate purpose of government and would thus be void"); Missouri Pacific R. Co. v. Nebraska, [*478] 164 U.S. 403, 41 L. Ed. 489, 17 S. Ct. 130 (1896). Nor would the City be allowed to take property under the mere pretext of a public purpose, when its actual purpose was to bestow a private benefit. The takings before us, however, would be executed pursuant to a "carefully considered" development plan. 268 Conn., at 54, 843 A. 2d, at 536. The trial judge and all the members of the Supreme Court of Connecticut agreed that there was no evidence of an illegitimate purpose in this case. Therefore, as was true of the statute challenged in Midkiff, 467 U.S., at 245, 81 L. Ed. 2d 186, 104 S. Ct.

2321, the City's development plan was not adopted "to benefit a particular class of identifiable individuals."

[***LEdHR4B] [4B] On the other hand, this is not a case in which the City is planning to open the condemned land—at least not in its entirety—to use by the general public. Nor will the private lessees of the land in any sense be required to operate like common carriers, making their services available to all comers. [*479] But although such a projected use would be sufficient to satisfy the public use requirement, this "Court long ago rejected any literal requirement that condemned property be put into use for the general public." Id., at 244, 81 L. Ed. 2d 186, 104 S. Ct. 2321. Indeed, while many state courts in the mid-19th century endorsed "use by the public" as the proper definition of public use, that narrow view steadily eroded over time. Not only was the "use by the public" test difficult to administer (e.g., what proportion of the public need have access to the property? at what price?), but it proved to be impractical given the diverse and always evolving needs of society. Accordingly, [*480] when this Court began applying the Fifth Amendment to the States at the close of the 19th century, it embraced the broader and more natural interpretation of public use as "public purpose." See, e.g., Fallbrook Irrigation Dist. v. Bradley, 164 U.S. 112, 158-164, 41 L. Ed. 369, 17 S. Ct. 56 (1896). Thus, in a case upholding a mining company's use of an aerial bucket line to transport ore over property it did not own, Justice Holmes' opinion for the Court stressed "the inadequacy of use by the general public as a universal test." Strickley v. Highland Boy Gold Mining Co., 200 U.S. 527, 531, 50 L. Ed. 581, 26 S. Ct. 301 (1906). We have repeatedly and consistently rejected that narrow test ever since.

The disposition of this case therefore turns on the question whether the City's development plan serves a "public purpose." Without exception, our cases have defined that concept broadly, reflecting our longstanding policy of deference to legislative judgments in this field.

In Berman v. Parker, 348 U.S. 26, 99 L. Ed. 27, 75 S. Ct. 98 (1954), this Court upheld a redevelopment plan targeting a blighted area of Washington, D. C., in which most of the housing for the area's 5,000 inhabitants was beyond repair. Under the plan, the area would be condemned and part of it utilized for the construction of streets, schools, and other public facilities. The remainder of the land would be leased or sold to private parties for the purpose of redevelopment, including the construction of low-cost housing.

[*481] The owner of a department store located in the area challenged the condemnation, pointing out that his store was not itself blighted and arguing that the creation of a "better balanced, more attractive community" was not a valid public use. Id., at 31, 99 L. Ed. 27, 75 S. Ct. 98. Writing for a unanimous Court, Justice Douglas refused to evaluate this claim in isolation, deferring instead to the legislative and agency judgment that the area "must be planned as a whole" for the plan to be successful. Id., at 34, 99 L. Ed. 27, 75 S. Ct. 98. The Court explained that "community redevelopment programs need not, by force of the Constitution, be on a piecemeal basis—lot by lot, building by building." Id., at 35, 99 L. Ed. 27, 75 S. Ct. 98. The public use underlying the taking was unequivocally affirmed:

"We do not sit to determine whether a particular housing project is or is not desirable. The concept of the public welfare is broad and inclusive. . . . The values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled. In the present case, the Congress and its authorized agencies have made determinations that take into account a wide variety of values. It is not for us to reappraise them. If those who govern the District of Columbia decide that the Nation's Capital should be beautiful as well as sanitary, there is nothing in the Fifth

Amendment that stands in the way." Id., at 33, 99 L. Ed. 27, 75 S. Ct. 98.

In Hawaii Housing Authority v. Midkiff, 467 U.S. 229, 81 L. Ed. 2d 186, 104 S. Ct. 2321 (1984), the Court considered a Hawaii statute whereby fee title was taken from lessors and transferred to lessees (for just compensation) in order to reduce the concentration of land ownership. We unanimously upheld the statute and rejected the Ninth Circuit's view that it was "a naked attempt on the part of the state of Hawaii to take the property of A [*482] and transfer it to B solely for B's private use and benefit." Id., at 235, 81 L. Ed. 2d 186, 104 S. Ct. 2321 (internal quotation marks omitted). Reaffirming Berman's deferential approach to legislative judgments in this field, we 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., at 241-242, 81 L. Ed. 2d 186, 104 S. Ct. 2321. Our opinion also rejected the contention that the mere fact that the State immediately transferred the properties to private individuals upon condemnation somehow diminished the public character of the taking. "[I]t is only the taking's purpose, and not its mechanics," we explained, that matters in determining public use. Id., at 244, 81 L. Ed. 2d 186, 104 S. Ct. 2321.

In that same Term we decided another public use case that arose in a purely economic context. In Ruckelshaus v. Monsanto Co., 467 U.S. 986, 81 L. Ed. 2d 815, 104 S. Ct. 2862 (1984), the Court dealt with provisions of the Federal Insecticide, Fungicide, and Rodenticide Act under which the Environmental Protection Agency could consider the data (including trade secrets) submitted by a prior pesticide applicant in evaluating a subsequent application, so long as the second applicant paid just compensation for the data. We acknowledged that the "most direct beneficiaries" of these provisions were the subsequent applicants, id., at 1014, 81 L. Ed. 2d 815, 104 S. Ct. 2862, but we nevertheless upheld the statute under Berman and Midkiff. We found sufficient Congress' belief that sparing applicants

the cost of time-consuming research eliminated a significant barrier to entry in the pesticide market and thereby enhanced competition. 467 U.S., at 1015, 81 L. Ed. 2d 815, 104 S. Ct. 2862.

Viewed as a whole, our jurisprudence has recognized that the needs of society have varied between different parts of the Nation, just as they have evolved over time in response to changed circumstances. Our earliest cases in particular embodied a strong theme of federalism, emphasizing the "great respect" that we owe to state legislatures and state courts in discerning local public needs. See Hairston v. Danville & Western R. Co., 208 U.S. 598, 606-607, 52 L. Ed. 637, 28 S. Ct. 331 (1908) [*483] (noting that these needs were likely to vary depending on a State's "resources, the capacity of the soil, the relative importance of industries to the general public welfare, and the long-established methods and habits of the people"). For more than a century, our public use jurisprudence has wisely eschewed rigid formulas and intrusive scrutiny in favor of affording legislatures broad latitude in determining what public needs justify the use of the takings power.

IV

[***LEdHR1B] [1B] [***LEdHR6] [6] Those who govern the City were not confronted with the need to remove blight in the Fort Trumbull area, but their determination that the area was sufficiently distressed to justify a program of economic rejuvenation is entitled to our deference. The City has carefully formulated an economic development plan that it believes will provide appreciable benefits to the community, including—but by no means limited to—new jobs and increased tax revenue. As with other exercises in urban planning and development, the City is endeavoring to coordinate a variety of commercial, residential, and recreational uses of land, with the hope that they will form a whole greater than the sum of its parts. To effectuate [*484] this plan, the City has invoked a state statute that specifically authorizes the use of eminent domain to promote economic development. Given the comprehensive

character of the plan, the thorough deliberation that preceded its adoption, and the limited scope of our review, it is appropriate for us, as it was in Berman, to resolve the challenges of the individual owners, not on a piecemeal basis, but rather in light of the entire plan. Because that plan unquestionably serves a public purpose, the takings challenged here satisfy the public use requirement of the Fifth Amendment.

[***LEdHR7] [7] To avoid this result, petitioners urge us to adopt a new bright-line rule that economic development does not qualify as a public use. Putting aside the unpersuasive suggestion that the City's plan will provide only purely economic benefits, neither precedent nor logic supports petitioners' proposal. Promoting economic development is a traditional and long-accepted function of government. There is, moreover, no principled way of distinguishing economic development from the other public purposes that we have recognized. In our cases upholding takings that facilitated agriculture and mining, for example, we emphasized the importance of those industries to the welfare of the States in question, see, e.g., Strickley, 200 U.S. 527, 50 L. Ed. 581, 26 S. Ct. 301; in Berman, we endorsed the purpose of transforming a blighted area into a "well-balanced" community through redevelopment, 348 U.S., at 33, 99 L. Ed. 27, 75 S. Ct. 98; in Midkiff, [*485] we upheld the interest in breaking up a land oligopoly that "created artificial deterrents to the normal functioning of the State's residential land market," 467 U.S., at 242, 81 L. Ed. 2d 186, 104 S. Ct. 2321; and in Monsanto, we accepted Congress' purpose of eliminating a "significant barrier to entry in the pesticide market," 467 U.S., at 1014-1015, 81 L. Ed. 2d 815, 104 S. Ct. 2862. It would be incongruous to hold that the City's interest in the economic benefits to be derived from the development of the Fort Trumbull area has less of a public character than any of those other interests. Clearly, there is no basis for exempting economic development from our traditionally broad understanding of public purpose.

Petitioners contend that using eminent domain for economic development impermissibly blurs the boundary between public and private takings. Again, our cases foreclose this objection. Quite simply, the government's pursuit of a public purpose will often benefit individual private parties. For example, in Midkiff, the forced transfer of property conferred a direct and significant benefit on those lessees who were previously unable to purchase their homes. In Monsanto, we recognized that the "most direct beneficiaries" of the data-sharing provisions were the subsequent pesticide applicants, but benefiting them in this way was necessary to promoting competition in the pesticide market. 467 U.S., at 1014, 81 L. Ed. 2d 815, 104 S. Ct. 2862. The owner of the department store in [*486] Berman objected to "taking from one businessman for the benefit of another businessman," 348 U.S., at 33, 99 L. Ed. 27, 75 S. Ct. 98, referring to the fact that under the redevelopment plan land would be leased or sold to private developers for redevelopment. Our rejection of that contention has particular relevance to the instant case: "The 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." Id., at 34, 99 L. Ed. 27, 75 S. Ct. 98.

It is further argued that without a bright-line rule nothing would stop a city from transferring citizen A's property to [*487] citizen B for the sole reason that citizen B will put the property to a more productive use and thus pay more taxes. Such a one-to-one transfer of property, executed outside the confines of an integrated development plan, is not presented in this case. While such an unusual exercise of government power would certainly raise a suspicion that a private purpose was afoot, the hypothetical cases posited by petitioners can be confronted if and when they arise.

They do not warrant the crafting of an artificial restriction on the concept of public use.

[***LEdHR8] [8] Alternatively, petitioners maintain that for takings of this kind we should require a "reasonable certainty" that the expected public benefits will actually accrue. Such a rule, however, would represent an even greater departure from [*488] our precedent. "When the legislature's purpose is legitimate and its means are not irrational, our cases make clear that empirical debates over the wisdom of takings—no less than debates over the wisdom of other kinds of socioeconomic legislation—are not to be carried out in the federal courts." Midkiff, 467 U.S., at 242, 81 L. Ed. 2d 186, 104 S. Ct. 2321. Indeed, earlier this Term we explained why similar practical concerns (among others) undermined the use of the "substantially advances" formula in our regulatory takings doctrine. See Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, ___, 161 L. Ed. 2d 876, 125 S. Ct. 2074 (2005) (noting that this formula "would empower—and might often require—courts to substitute their predictive judgments for those of elected legislatures and expert agencies"). The disadvantages of a heightened form of review are especially pronounced in this type of case. Orderly implementation of a comprehensive redevelopment plan obviously requires that the legal rights of all interested parties be established before new construction can be commenced. A constitutional rule that required postponement of the judicial approval of every condemnation until the likelihood of success of the plan had been assured would unquestionably impose a significant impediment to the successful consummation of many such plans.

[***LEdHR9A] [9A] Just as we decline to second-guess the City's considered judgments about the efficacy of its development plan, we also decline to second-guess the City's determinations as to what [*489] lands it needs to acquire in order to effectuate the project. "It is not for the courts to oversee the choice of the boundary line nor to sit in review on the size of a particular project area. Once the

question of the public purpose has been decided, the amount and character of land to be taken for the project and the need for a particular tract to complete the integrated plan rests in the discretion of the legislative branch." Berman, 348 U.S., at 35-36, 99 L. Ed. 27, 75 S. Ct. 98.

[***LEdHR9B] [9B] [***LEdHR10] [10] In affirming the City's authority to take petitioners' properties, we do not minimize the hardship that condemnations may entail, notwithstanding the payment of just compensation. We 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, while others are expressed in state eminent domain statutes that carefully limit the grounds upon which takings may be exercised. As the submissions of the parties and their amici make clear, the necessity and wisdom of using eminent domain to promote economic development are certainly matters of legitimate public debate. This Court's authority, [*490] however, extends only to determining whether the City's proposed condemnations are for a "public use" within the meaning of the Fifth Amendment to the Federal Constitution. Because over a century of our case law interpreting that provision dictates an affirmative answer to that question, we may not grant petitioners the relief that they seek.

The judgment of the Supreme Court of Connecticut is affirmed. It is so ordered.

CONCUR BY: KENNEDY

I join the opinion for the Court and add these further observations.

This Court has declared that a taking should be upheld as consistent with the Public Use Clause, U.S. Const., Amdt. 5, as long as it is "rationally related to a conceivable public purpose." Hawaii Housing Authority v. Midkiff, 467 U.S. 229, 241, 81 L. Ed. 2d 186, 104 S. Ct. 2321 (1984); see

also Berman v. Parker, 348 U.S. 26, 99 L. Ed. 27, 75 S. Ct. 98 (1954). This deferential standard of review echoes the rational-basis test used to review economic regulation under the Due Process and Equal Protection Clauses, see, e.g., FCC v. Beach Communications, Inc., 508 U.S. 307, 313-314, 124 L. Ed. 2d 211, 113 S. Ct. 2096 (1993); Williamson v. Lee Optical of Okla., Inc., 348 U.S. 483, 99 L. Ed. 563, 75 S. Ct. 461 (1955). The determination that a rational-basis standard of review is appropriate does not, however, alter the fact that transfers intended to confer benefits on particular, favored private entities, and with only incidental or pretextual public benefits, are forbidden by the Public Use Clause.

[*491] A court applying rational-basis review under the Public Use Clause should strike down a taking that, by a clear showing, is intended to favor a particular private party, with only incidental or pretextual public benefits, just as a court applying rational-basis review under the Equal Protection Clause must strike down a government classification that is clearly intended to injure a particular class of private parties, with only incidental or pretextual public justifications. See Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432, 446-447, 450, 87 L. Ed. 2d 313, 105 S. Ct. 3249 (1985); Department of Agriculture v. Moreno, 413 U.S. 528, 533-536, 37 L. Ed. 2d 782, 93 S. Ct. 2821 (1973). As the trial court in this case was correct to observe: "Where the purpose [of a taking] is economic development and that development is to be carried out by private parties or private parties will be benefited, the court must decide if the stated public purpose—economic advantage to a city sorely in need of it—is only incidental to the benefits that will be confined on private parties of a development plan." App. to Pet. for Cert. 263. See also ante, at 477-478, 162 L. Ed. 2d, at 450.

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 the presumption that the

government's actions were reasonable and intended to serve a public purpose. Here, the trial court conducted a careful and extensive inquiry into "whether, in fact, the development plan is of primary benefit to . . . the developer [i.e., Corcoran Jennison], and private businesses which may eventually locate in the plan area [e.g., Pfizer], and in that regard, only of incidental benefit to the city." App. to Pet. for Cert. 261. The trial court considered testimony from government officials and corporate officers, id., at 266-271; documentary evidence of communications between these parties, ibid.; respondents' awareness of New London's depressed economic condition and evidence corroborating the validity of this concern, id., at 272-273, 278-279; the substantial commitment of public [*492] funds by the State to the development project before most of the private beneficiaries were known, id., at 276; evidence that respondents reviewed a variety of development plans and chose a private developer from a group of applicants rather than picking out a particular transferee beforehand, id., at 273, 278; and the fact that the other private beneficiaries of the project are still unknown because the office space proposed to be built has not yet been rented, id., at 278.

The trial court concluded, based on these findings, that benefiting Pfizer was not "the primary motivation or effect of this development plan"; instead, "the primary motivation for [respondents] was to take advantage of Pfizer's presence." Id., at 276. Likewise, the trial court concluded that "[t]here is nothing in the record to indicate that . . . [respondents] were motivated by a desire to aid [other] particular private entities." Id., at 278. See also ante, at 478 , 162 L. Ed. 2d, at 450-451. Even the dissenting justices on the Connecticut Supreme Court agreed that respondents' development plan was intended to revitalize the local economy, not to serve the interests of Pfizer, Corcoran Jennison, or any other private party. 268 Conn. 1, 159, 843 A.2d 500, 595 (2004) (Zarella, J., concurring in part and dissenting in part). This case, then, survives the meaningful

rational basis review that in my view is required under the Public Use Clause.

Petitioners and their amici argue that any taking justified by the promotion of economic development must be treated by the courts as per se invalid, or at least presumptively invalid. Petitioners overstate the need for such a rule, however, by making the incorrect assumption that review under Berman and Midkiff imposes no meaningful judicial limits on the government's power to condemn any property it likes. A broad per se rule or a strong presumption of invalidity, furthermore, would prohibit a large number of government takings that have the purpose and expected effect of conferring substantial benefits on the public at large and so do not offend the Public Use Clause.

[*493] My agreement with the Court that a presumption of invalidity is not warranted for economic development takings in general, or for the particular takings at issue in this case, does not foreclose the possibility that a more stringent standard of review than that announced in Berman and Midkiff might be appropriate for a more narrowly drawn category of takings. There may 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. Cf. Eastern Enterprises v. Apfel, 524 U.S. 498, 549-550, 141 L. Ed. 2d 451, 118 S. Ct. 2131 (1998) (Kennedy, J., concurring in judgment and dissenting in part) (heightened scrutiny for retroactive legislation under the Due Process Clause). This demanding level of scrutiny, however, is not required simply because the purpose of the taking is economic development.

This is not the occasion for conjecture as to what sort of cases might justify a more demanding standard, but it is appropriate to underscore aspects of the instant case that convince me no departure from Berman and Midkiff is appropriate here. This taking occurred in the context of a comprehensive development plan meant to address a serious city wide depression, and the projected economic

benefits of the project cannot be characterized as de minimis. The identities of most of the private beneficiaries were unknown at the time the city formulated its plans. The city complied with elaborate procedural requirements that facilitate review of the record and inquiry into the city's purposes. In sum, while there may be 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, no such circumstances are present in this case.

For the foregoing reasons, I join in the Court's opinion.

DISSENT BY: O'CONNOR; THOMAS

[*494] Over two centuries ago, just after the Bill of Rights was ratified, Justice Chase wrote:

"An Act of the Legislature (for I cannot call it a law) contrary to the great first principles of the social compact, cannot be considered a rightful exercise of legislative authority . . . . A few instances will suffice to explain what I mean. . . . [A] law that takes property from A. and gives it to B: It is against all reason and justice, for a people to entrust a Legislature with such powers; and, therefore, it cannot be presumed that they have done it." Calder v. Bull, 3 U.S. 386, 3 Dallas 386, 1 L. Ed. 648 (1798) (emphasis deleted).

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

public use" from the Takings Clause of the Fifth Amendment. Accordingly I respectfully dissent.

I

Petitioners are nine resident or investment owners of 15 homes in the Fort Trumbull neighborhood of New London, Connecticut. Petitioner Wilhelmina Dery, for example, lives in a house on Walbach Street that has been in her family for over 100 years. She was born in the house in 1918; her husband, petitioner Charles Dery, moved into the house when they married in 1946. Their son lives next door with [*495] his family in the house he received as a wedding gift, and joins his parents in this suit. Two petitioners keep rental properties in the neighborhood.

In February 1998, Pfizer Inc., the pharmaceuticals manufacturer, announced that it would build a global research facility near the Fort Trumbull neighborhood. Two months later, New London's city council gave initial approval for the New London Development Corporation (NLDC) to prepare the development plan at issue here. The NLDC is a private, nonprofit corporation whose mission is to assist the city council in economic development planning. It is not elected by popular vote, and its directors and employees are privately appointed. Consistent with its mandate, the NLDC generated an ambitious plan for redeveloping 90 acres of Fort Trumbull in order to "complement the facility that Pfizer was planning to build, create jobs, increase tax and other revenues, encourage public access to and use of the city's waterfront, and eventually 'build momentum' for the revitalization of the rest of the city." App. to Pet. for Cert. 5.

Petitioners own properties in two of the plan's seven parcels—Parcel 3 and Parcel 4A. Under the plan, Parcel 3 is slated for the construction of research and office space as a market develops for such space. It will also retain the existing Italian Dramatic Club (a private cultural organization) though the homes of three plaintiffs in that parcel are to be demolished. Parcel 4A is slated, mysteriously, for "'park support.'" Id., at 345-346. At oral

argument, counsel for respondents conceded the vagueness of this proposed use, and offered that the parcel might eventually be used for parking. Tr. of Oral Arg. 36.

To save their homes, petitioners sued New London and the NLDC, to whom New London has delegated eminent domain power. Petitioners maintain that the Fifth Amendment prohibits the NLDC from condemning their properties for the sake of an economic development plan. Petitioners are not holdouts; they do not seek increased compensation, and [*496] none is opposed to new development in the area. Theirs is an objection in principle: They claim that the NLDC's proposed use for their confiscated property is not a "public" one for purposes of the Fifth Amendment. While the government may take their homes to build a road or a railroad or to eliminate a property use that harms the public, say petitioners, it cannot take their property for the private use of other owners simply because the new owners may make more productive use of the property.

II

The Fifth Amendment to the Constitution, made applicable to the States by the Fourteenth Amendment, provides that "private property [shall not] be taken for public use, without just compensation." When interpreting the Constitution, we begin with the unremarkable presumption that every word in the document has independent meaning, "that no word was unnecessarily used, or needlessly added." Wright v. United States, 302 U.S. 583, 588, 82 L. Ed. 439, 58 S. Ct. 395, 86 Ct. Cl. 764 (1938). In keeping with that presumption, we have read the Fifth Amendment's language to impose two distinct conditions on the exercise of eminent domain: "the Taking must be for a 'public use' and 'just compensation' must be paid to the owner." Brown v. Legal Foundation of Wash., 538 U.S. 216, 231-232, 155 L. Ed. 2d 376, 123 S. Ct. 1406 (2003).

These two limitations serve to protect "the security of Property," which Alexander Hamilton described to the Philadelphia Convention as one of the "great obj[ects] of

Gov[ernment]." 1 Records of the Federal Convention of 1787, p 302 (M. Farrand ed. 1911). Together they ensure stable property ownership by providing safeguards against excessive, unpredictable, or unfair use of the government's eminent domain power—particularly against those owners who, for whatever reasons, may be unable to protect themselves in the political process against the majority's will.

[*497] While the Takings Clause presupposes that government can take private property without the owner's consent, the just compensation requirement spreads the cost of condemnations and thus "prevents the public from loading upon one individual more than his just share of the burdens of government." Monongahela Nav. Co. v. United States, 148 U.S. 312, 325, 37 L. Ed. 463, 13 S. Ct. 622 (1893); see also Armstrong v. United States, 364 U.S. 40, 49, 4 L. Ed. 2d 1554, 80 S. Ct. 1563 (1960). The public use requirement, in turn, imposes a more basic limitation, circumscribing the very scope of the eminent domain power: Government may compel an individual to forfeit her property for the public's use, but not for the benefit of another private person. This requirement promotes fairness as well as security. Cf. Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency, 535 U.S. 302, 336, 152 L. Ed. 2d 517, 122 S. Ct. 1465 (2002) ("The concepts of 'fairness and justice' . . . underlie the Takings Clause").

Where is the line between "public" and "private" property use? We give considerable deference to legislatures' determinations about what governmental activities will advantage the public. But were the political branches the sole arbiters of the public-private distinction, the Public Use Clause would amount to little more than hortatory fluff. An external, judicial check on how the public use requirement is interpreted, however limited, is necessary if this constraint on government power is to retain any meaning. See Cincinnati v. Vester, 281 U.S. 439, 446, 74

L. Ed. 950, 50 S. Ct. 360 (1930) ("It is well established that . . . the question [of] what is a public use is a judicial one"). Our cases have generally identified three categories of takings that comply with the public use requirement, though it is in the nature of things that the boundaries between these categories are not always firm. Two are relatively straightforward and uncontroversial. First, the sovereign may transfer private property to public ownership—such as for a road, a hospital, or a military base. See, e.g., Old Dominion [*498] Land Co. v. United States, 269 U.S. 55, 70 L. Ed. 162, 46 S. Ct. 39 (1925); Rindge Co. v. County of Los Angeles, 262 U.S. 700, 67 L. Ed. 1186, 43 S. Ct. 689 (1923). Second, the sovereign may transfer private property to private parties, often common carriers, who make the property available for the public's use—such as with a railroad, a public utility, or a stadium. See, e.g., National Railroad Passenger Corporation v. Boston & Maine Corp., 503 U.S. 407, 118 L. Ed. 2d 52, 112 S. Ct. 1394 (1992); Mt. Vernon-Woodberry Cotton Duck Co. v. Alabama Interstate Power Co., 240 U.S. 30, 60 L. Ed. 507, 36 S. Ct. 234 (1916). But "public ownership" and "use-by-the-public" are sometimes too constricting and impractical ways to define the scope of the Public Use Clause. Thus we have allowed that, in certain circumstances and to meet certain exigencies, takings that serve a public purpose also satisfy the Constitution even if the property is destined for subsequent private use. See, e.g., Berman v. Parker, 348 U.S. 26, 99 L. Ed. 27, 75 S. Ct. 98 (1954); Hawaii Housing Authority v. Midkiff, 467 U.S. 229, 81 L. Ed. 2d 186, 104 S. Ct. 2321 (1984).

This case returns us for the first time in over 20 years to the hard question of when a purportedly "public purpose" taking meets the public use requirement. It presents an issue of first impression: Are economic development takings constitutional? I would hold that they are not. We are guided by two precedents about the taking of real property by eminent domain. In Berman, we upheld takings within a blighted neighborhood of Washington, D. C. The

neighborhood had so deteriorated that, for example, 64.3% of its dwellings were beyond repair. 348 U.S., at 30, 99 L. Ed. 27, 75 S. Ct. 98. It had become burdened with "overcrowding of dwellings," "lack of adequate streets and alleys," and "lack of light and air." Id., at 34, 99 L. Ed. 27, 75 S. Ct. 98. Congress had determined that the neighborhood had become "injurious to the public health, safety, morals, and welfare" and that it was necessary to "eliminat[e] all such injurious conditions by employing all means necessary and appropriate for the purpose," including eminent domain. Id., at 28, 99 L. Ed. 27, 75 S. Ct. 98. Mr. Berman's department store was not itself blighted. Having approved [*499] of Congress' decision to eliminate the harm to the public emanating from the blighted neighborhood, however, we did not second-guess its decision to treat the neighborhood as a whole rather than lot-by-lot. Id., at 34-35, 99 L. Ed. 27, 75 S. Ct. 98; see also Midkiff, 467 U.S., at 244, 81 L. Ed. 2d 186, 104 S. Ct. 2321 ("It is only the taking's purpose, and not its mechanics, that must pass scrutiny").

In Midkiff, we upheld a land condemnation scheme in Hawaii whereby title in real property was taken from lessors and transferred to lessees. At that time, the State and Federal Governments owned nearly 49% of the State's land, and another 47% was in the hands of only 72 private landowners. Concentration of land ownership was so dramatic that on the State's most urbanized island, Oahu, 22 landowners owned 72.5% of the fee simple titles. Id., at 232, 81 L. Ed. 2d 186, 104 S. Ct. 2321. The Hawaii Legislature had concluded that the oligopoly in land ownership was "skewing the State's residential fee simple market, inflating land prices, and injuring the public tranquility and welfare," and therefore enacted a condemnation scheme for redistributing title. Ibid.

In those decisions, we emphasized the importance of deferring to legislative judgments about public purpose. Because courts are ill equipped to evaluate the efficacy of proposed legislative initiatives, we rejected as unworkable

the idea of courts' "'deciding on what is and is not a governmental function and . . . invalidating legislation on the basis of their view on that question at the moment of decision, a practice which has proved impracticable in other fields.'" Id., at 240-241, 81 L. Ed. 2d 186, 104 S. Ct. 2321 (quoting United States ex rel. TVA v. Welch, 327 U.S. 546, 552, 90 L. Ed. 843, 66 S. Ct. 715 (1946)); see Berman, supra, at 32, 99 L. Ed. 27, 75 S. Ct. 98 ("[T]he legislature, not the judiciary, is the main guardian of the public needs to be served by social legislation"); see also Lingle v. Chevron U.S.A., Inc., 544 U.S. 528, 161 L. Ed. 2d 876, 125 S. Ct. 2074 (2005). Likewise, we recognized our inability to evaluate whether, in a given case, eminent domain is a necessary means by which to pursue the legislature's ends. Midkiff, supra, at 242, 81 L. Ed. 2d 186, 104 S. Ct. 2321; Berman, supra, at 33, 99 L. Ed. 27, 75 S. Ct. 98.

[*500] Yet for all the emphasis on deference, Berman and Midkiff hewed to a bedrock principle without which our public use jurisprudence would collapse: "A purely private taking could not withstand the scrutiny of the public use requirement; it would serve no legitimate purpose of government and would thus be void." Midkiff, 467 U.S., at 245, 81 L. Ed. 2d 186, 104 S. Ct. 2321; id., at 241, 81 L. Ed. 2d 186, 104 S. Ct. 2321 ("[T]he Court's cases have repeatedly stated that 'one person's property may not be taken for the benefit of another private person without a justifying public purpose, even though compensation be paid'" (quoting Thompson v. Consolidated Gas Util. Corp., 300 U.S. 55, 80, 81 L. Ed. 510, 57 S. Ct. 364 (1937))); see also Missouri Pacific R. Co. v. Nebraska, 164 U.S. 403, 417, 41 L. Ed. 489, 17 S. Ct. 130 (1896). To protect that principle, those decisions reserved "a role for courts to play in reviewing a legislature's judgment of what constitutes a public use . . . [though] the Court in Berman made clear that it is 'an extremely narrow' one." Midkiff, supra, at 240, 81 L. Ed. 2d 186, 104 S. Ct. 2321 (quoting Berman, supra, at 32, 99 L. Ed. 27, 75 S. Ct. 98).

The Court's holdings in Berman and Midkiff were true to the principle underlying the Public Use Clause. In both those cases, the extraordinary, precondemnation use of the targeted property inflicted affirmative harm on society—in Berman through blight resulting from extreme poverty and in Midkiff through oligopoly resulting from extreme wealth. And in both cases, the relevant legislative body had found that eliminating the existing property use was necessary to remedy the harm. Berman, supra, at 28-29, 99 L. Ed. 27, 75 S. Ct. 98; Midkiff, supra, at 232, 81 L. Ed. 2d 186, 104 S. Ct. 2321. Thus a public purpose was realized when the harmful use was eliminated. Because each taking directly achieved a public benefit, it did not matter that the property was turned over to private use. Here, in contrast, New London does not claim that Susette Kelo's and Wilhelmina Dery's well-maintained homes are the source of any social harm. Indeed, it could not so claim without adopting the absurd argument that any single-family home that might be razed to make way for an apartment building, or any church [*501] that might be replaced with a retail store, or any small business that might be more lucrative if it were instead part of a national franchise, is inherently harmful to society and thus within the government's power to condemn.

In moving away from our decisions sanctioning the condemnation of harmful property use, the Court today significantly expands the meaning of public use. It holds that the sovereign may 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 for the public—such as increased tax revenue, more jobs, maybe even esthetic pleasure. But nearly any lawful use of real private 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.

There is a sense in which this troubling result follows from errant language in Berman and Midkiff. In discussing whether takings within a blighted neighborhood were for a public use, Berman began by observing: "We deal, in other words, with what traditionally has been known as the police power." 348 U.S., at 32, 99 L. Ed. 27, 75 S. Ct. 98. From there it declared that "[o]nce the object is within the authority of Congress, the right to realize it through the exercise of eminent domain is clear." Id., at 33, 99 L. Ed. 27, 75 S. Ct. 98. Following up, we said in Midkiff that "[t]he 'public use' requirement is coterminous with the scope of a sovereign's police powers." 467 U.S., at 240, 81 L. Ed. 2d 186, 104 S. Ct. 2321. This language was unnecessary to the specific holdings of those decisions. Berman and Midkiff simply did not put such language to the constitutional test, because the takings in those cases were within the police power but also for "public use" for the reasons I have described. The case before us now demonstrates why, when deciding if a taking's purpose is [*502] constitutional, the police power and "public use" cannot always be equated.

The Court protests that it does not sanction the bare transfer from A to B for B's benefit. It suggests two limitations on what can be taken after today's decision. First, it maintains a role for courts in ferreting out takings whose sole purpose is to bestow a benefit on the private transferee—without detailing how courts are to conduct that complicated inquiry. Ante, at 477-478, 162 L. Ed. 2d, at 450. For his part, Justice Kennedy suggests that courts may divine illicit purpose by a careful review of the record and the process by which a legislature arrived at the decision to take—without specifying what courts should look for in a case with different facts, how they will know if they have found it, and what to do if they do not. Ante, at 491-492, 162 L. Ed. 2d, at 459-460 (concurring opinion). Whatever the details of Justice Kennedy's as-yet-undisclosed test, it is

difficult to envision anyone but the "stupid staff[er]" failing it. See Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1025-1026, n. 12, 120 L. Ed. 2d 798, 112 S. Ct. 2886 (1992). The trouble with economic development takings is that private benefit and incidental public benefit are, by definition, merged and mutually reinforcing. In this case, for example, any boon for Pfizer or the plan's developer is difficult to disaggregate from the promised public gains in taxes and jobs. See App. to Pet. for Cert. 275-277.

Even if there were a practical way to isolate the motives behind a given taking, the gesture toward a purpose test is theoretically flawed. If it is true that incidental public benefits from new private use are enough to ensure the "public purpose" in a taking, why should it matter, as far as the Fifth Amendment is concerned, what inspired the taking in the first place? How much the government does or does not desire to benefit a favored private party has no bearing on whether an economic development taking will or will not generate secondary benefit for the public. And whatever the reason for a given condemnation, the effect is the same [*503] from the constitutional perspective—private property is forcibly relinquished to new private ownership.

A second proposed limitation is implicit in the Court's opinion. The logic of today's decision is that eminent domain may only be used to upgrade—not downgrade—property. At best this makes the Public Use Clause redundant with the Due Process Clause, which already prohibits irrational government action. See Lingle, 544 U.S. 528, 161 L. Ed. 2d 876, 125 S. Ct. 2074 __. The Court rightfully admits, however, that the judiciary cannot get bogged down in predictive judgments about whether the public will actually be better off after a property transfer. In any event, this constraint has no realistic import. For who among us can say she already makes the most productive or attractive possible use of her property? The specter of condemnation hangs over all property. Nothing is to prevent the State from replacing any Motel 6 with a Ritz-

Carlton, any home with a shopping mall, or any farm with a factory. Cf. Bugryn v. Bristol, 63 Conn. App. 98, 774 A.2d 1042 (2001) (taking the homes and farm of four owners in their 70's and 80's and giving it to an "industrial park"); 99 Cents Only Stores v. Lancaster Redevelopment Agency, 237 F. Supp. 2d 1123 (CD Cal. 2001) (attempted taking of 99 Cents store to replace with a Costco); Poletown Neighborhood Council v. Detroit, 410 Mich. 616, 304 N.W.2d 455 (1981) (taking a working-class, immigrant community in Detroit and giving it to a General Motors assembly plant), overruled by County of Wayne v. Hathcock, 471 Mich. 445, 684 N.W.2d 765 (2004); Brief for Becket Fund for Religious Liberty as Amicus Curiae 4-11 (describing takings of religious institutions' properties); Institute for Justice, D. Berliner, Public Power, Private Gain: A Five-Year, State-by-State Report Examining the Abuse of Eminent Domain (2003) (collecting accounts of economic development takings).

The Court also puts special emphasis on facts peculiar to this case: The NLDC's plan is the product of a relatively careful deliberative process; it proposes to use eminent domain [*504] for a multipart, integrated plan rather than for isolated property transfer; it promises an array of incidental benefits (even esthetic ones), not just increased tax revenue; it comes on the heels of a legislative determination that New London is a depressed municipality. See, e.g., ante, at 487, 162 L. Ed. 2d, at 456 ("[A] one-to-one transfer of property, executed outside the confines of an integrated development plan, is not presented in this case"). Justice Kennedy, too, takes great comfort in these facts. Ante, at 493, 162 L. Ed. 2d, at 460 (concurring opinion). But none has legal significance to blunt the force of today's holding. If legislative prognostications about the secondary public benefits of a new use can legitimate a taking, there is nothing in the Court's rule or in Justice Kennedy's gloss on that rule to prohibit property transfers generated with less care, that are less comprehensive, that happen to result from less

elaborate process, whose only projected advantage is the incidence of higher taxes, or that hope to transform an already prosperous city into an even more prosperous one.

Finally, in a coda, the Court suggests that property owners should turn to the States, who may or may not choose to impose appropriate limits on economic development takings. Ante, at 489, 162 L. Ed. 2d, at 457-458. This is an abdication of our responsibility. States play many important functions in our system of dual sovereignty, but compensating for our refusal to enforce properly the Federal Constitution (and a provision meant to curtail state action, no less) is not among them.

It was possible after Berman and Midkiff to imagine unconstitutional transfers from A to B. Those decisions endorsed government intervention when private property use had veered to such an extreme that the public was suffering as a consequence. Today nearly all real property is susceptible to condemnation on the Court's theory. In the prescient words of a dissenter from the infamous decision in Poletown, "[n]ow that we have authorized local legislative [*505] bodies to decide that a different commercial or industrial use of property will produce greater public benefits than its present use, no homeowner's, merchant's or manufacturer's property, however productive or valuable to its owner, is immune from condemnation for the benefit of other private interests that will put it to a 'higher' use." 410 Mich., at 644-645, 304 N. W. 2d, at 464 (opinion of Fitzgerald, J.). This is why economic development takings "seriously jeopardiz[e] the security of all private property ownership." Id., at 645, 304 N. W. 2d, at 465 (Ryan, J., dissenting).

Any property may now be taken for the benefit of another private party, but the fallout from this decision will not be random. The beneficiaries are likely to be those citizens with disproportionate influence and power in the political process, including large corporations and development firms. As for the victims, the government now has license to transfer property from those with fewer resources to

those with more. The Founders cannot have intended this perverse result. "[T]hat alone is a just government," wrote James Madison, "which impartially secures to every man, whatever is his own." For the National Gazette, Property, (Mar. 27, 1792), reprinted in 14 Papers of James Madison 266 (R. Rutland et al. eds. 1983).

I would hold that the takings in both Parcel 3 and Parcel 4A are unconstitutional, reverse the judgment of the Supreme Court of Connecticut, and remand for further proceedings.

Justice Thomas, dissenting.

Long ago, William Blackstone wrote that "the law of the land . . . postpone[s] even public necessity to the sacred and inviolable rights of private property." 1 Commentaries on the Laws of England 134-135 (1765) (hereinafter Blackstone). The Framers embodied that principle in the Constitution, allowing the government to take property not for "public necessity," but instead for "public use." Amdt. 5. [*506] Defying this understanding, the Court replaces the Public Use Clause with a "'[P]ublic [P]urpose'" Clause, ante, at 479-480, 162 L. Ed. 2d, at 451-452 (or perhaps the "Diverse and Always Evolving Needs of Society" Clause, ante, at 479, 162 L. Ed. 2d, at 451 (capitalization added)), a restriction that is satisfied, the Court instructs, so long as the purpose is "legitimate" and the means "not irrational," ante, at 488, 162 L. Ed. 2d, at 456 (internal quotation marks omitted). This deferential shift in phraseology enables the Court to hold, against all common sense, that a costly urban-renewal project whose stated purpose is a vague promise of new jobs and increased tax revenue, but which is also suspiciously agreeable to the Pfizer Corporation, is for a "public use."

I cannot agree. If such "economic development" takings are for a "public use," any taking is, and the Court has erased the Public Use Clause from our Constitution, as Justice O'Connor powerfully argues in dissent. Ante, at 494, 501-505, 162 L. Ed. 2d, at 460-461, 464-468. I do not believe that this Court can eliminate liberties expressly enumerated in the Constitution and therefore join her dissenting

opinion. Regrettably, however, the Court's error runs deeper than this. Today's decision is simply the latest in a string of our cases construing the Public Use Clause to be a virtual nullity, without the slightest nod to its original meaning. In my view, the Public Use Clause, originally understood, is a meaningful limit on the government's eminent domain power. Our cases have strayed from the Clause's original meaning, and I would reconsider them.

I

The Fifth Amendment provides:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb, nor shall be compelled in any [*507] criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." (Emphasis added.)

It is the last of these liberties, the Takings Clause, that is at issue in this case. In my view, it is "imperative that the Court maintain absolute fidelity to" the 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. Shepard v. United States, 544 U.S. 13, 28, 161 L. Ed. 2d 205, 125 S. Ct. 1254 (2005) (Thomas, J., concurring in part and concurring in judgment) (internal quotation marks omitted).

Though one component of the protection provided by the Takings Clause is that the government can take private property only if it provides "just compensation" for the taking, the Takings Clause also prohibits the government from taking property except "for public use." Were it otherwise, the Takings Clause would either be meaningless or empty. If the Public Use Clause served no function other

than to state that the government may take property through its eminent domain power—for public or private uses—then it would be surplusage. See ante, at 496, 162 L. Ed. 2d, at 462 (O'Connor, J., dissenting); see also Marbury v. Madison, 5 U.S. 137, Cranch 137, 174, 2 L. Ed. 60 (1803) ("It cannot be presumed that any clause in the constitution is intended to be without effect"); Myers v. United States, 272 U.S. 52, 151, 71 L. Ed. 160, 47 S. Ct. 21 (1926). Alternatively, the Clause could distinguish those takings that require compensation from those that do not. That interpretation, however, "would permit private property to be taken or appropriated for private use without any compensation whatever." Cole v. La Grange, 113 U.S. 1, 8, 28 L. Ed. 896, 5 S. Ct. 416 (1885) (interpreting same language in the Missouri Public Use Clause). In other words, the Clause would require the government to compensate for takings done "for public use," leaving it free to take property for purely private uses without the payment of compensation. [*508] This would contradict a bedrock principle well established by the time of the founding: that all takings required the payment of compensation. 1 Blackstone 135; 2 J. Kent, Commentaries on American Law 275 (1827) (hereinafter Kent); For the National Property Gazette, (Mar. 27, 1792), in 14 Papers of James Madison 266, 267 (R. Rutland et al. eds. 1983) (arguing that no property "shall be taken directly even for public use without indemnification to the owner"). 1 The Public Use Clause, like the Just Compensation Clause, is therefore an express limit on the government's power of eminent domain.

The most natural reading of the Clause is that it allows the government to take property only if the government owns, or the public has a legal right to use, the property, as opposed to taking it for any public purpose or necessity whatsoever. At the time of the founding, dictionaries primarily defined the noun "use" as "[t]he act of employing any thing to any purpose." 2 S. Johnson, A Dictionary of the English Language 2194 (4th ed. 1773) (hereinafter

Johnson). The term "use," moreover, "is from the Latin utor, which means 'to use, make use of, avail one's self of, employ, apply, enjoy, etc." J. Lewis, Law of Eminent Domain § 165, p 224, n 4 (1888) (hereinafter Lewis). When the government takes property and gives it to a private individual, and the public has no right to use the property, it strains language to say that the public is "employing" the property, regardless of the incidental benefits that might accrue to the public from the private use. The term "public use," then, means that either the government or its citizens as a whole must actually [*509] "employ" the taken property. See id., at 223 (reviewing founding-era dictionaries).

Granted, another sense of the word "use" was broader in meaning, extending to "[c]onvenience" or "help," or "[q]ualities that make a thing proper for any purpose." 2 Johnson 2194. Nevertheless, read in context, the term "public use" possesses the narrower meaning. Elsewhere, the Constitution twice employs the word "use," both times in its narrower sense. Claeys, Public-Use Limitations and Natural Property Rights, 2004 Mich. St. L. Rev. 877, 897 (hereinafter Public Use Limitations). Article I, § 10 provides that "the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States," meaning the Treasury itself will control the taxes, not use it to any beneficial end. And Article I, § 8 grants Congress power "[t]o raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years." Here again, "use" means "employed to raise and support Armies," not anything directed to achieving any military end. The same word in the Public Use Clause should be interpreted to have the same meaning.

Tellingly, the phrase "public use" contrasts with the very different phrase "general Welfare" used elsewhere in the Constitution. See ibid. ("Congress shall have Power To . . . provide for the common Defence and general Welfare of the United States"); preamble (Constitution established "to

promote the general Welfare"). The Framers would have used some such broader term if they had meant the Public Use Clause to have a similarly sweeping scope. Other founding-era documents made the contrast between these two usages still more explicit. See Sales, Classical Republicanism and the Fifth Amendment's "Public Use" Requirement, 49 Duke L. J. 339, 367-368 (1999) (hereinafter Sales) (noting contrast between, on the one hand, the term "public use" used by 6 of the first 13 States and, on the other, [*510] the terms "public exigencies" employed in the Massachusetts Bill of Rights and the Northwest Ordinance, and the term "public necessity" used in the Vermont Constitution of 1786). The Constitution's text, in short, suggests that the Takings Clause authorizes the taking of property only if the public has a right to employ it, not if the public realizes any conceivable benefit from the taking.

The Constitution's common-law background reinforces this understanding. The common law provided an express method of eliminating uses of land that adversely impacted the public welfare: nuisance law. Blackstone and Kent, for instance, both carefully distinguished the law of nuisance from the power of eminent domain. Compare 1 Blackstone 135 (noting government's power to take private property with compensation) with 3 id., at 216 (noting action to remedy "public . . . nuisances, which affect the public, and are an annoyance to all the king's subjects"); see also 2 Kent 274-276 (distinguishing the two). Blackstone rejected the idea that private property could be taken solely for purposes of any public benefit. "So great . . . is the regard of the law for private property," he explained, "that it will not authorize the least violation of it; no, not even for the general good of the whole community." 1 Blackstone 135. He continued: "If a new road . . . were to be made through the grounds of a private person, it might perhaps be extensively beneficial to the public; but the law permits no man, or set of men, to do this without the consent of the owner of the land." Ibid. Only "by giving [the landowner]

full indemnification" could the government take property, and even then "[t]he public [was] now considered as an individual, treating with an individual for an exchange." Ibid. When the public took property, in other words, it took it as an individual buying property from another typically would: for one's own use. The Public Use Clause, in short, embodied the Framers' understanding that property is a natural, fundamental right, prohibiting the government from "tak[ing] property from A. and [*511] giv[ing] it to B." Calder v. Bull, 3 Dall. 386, 388, 1 L. Ed. 648 (1798); see also Wilkinson v. Leland, 27 U.S. 627, 2 Pet. 627, 658, 7 L. Ed. 542 (1829); Vanhorne's Lessee v. Dorrance, 2 U.S. 304, 2 Dallas 304, 1 L. Ed. 391 (CC Pa. 1795).

The public purpose interpretation of the Public Use Clause also unnecessarily duplicates a similar inquiry required by the Necessary and Proper Clause. The Takings Clause is a prohibition, not a grant of power: The Constitution does not expressly grant the Federal Government the power to take property for any public purpose whatsoever. Instead, the Government may take property only when necessary and proper to the exercise of an expressly enumerated power. See Kohl v. United States, 91 U.S. 367, 371-372, 23 L. Ed. 449 (1876) (noting Federal Government's power under the Necessary and Proper Clause to take property "needed for forts, armories, and arsenals, for navy-yards and light-houses, for custom-houses, post-offices, and court-houses, and for other public uses"). For a law to be within the Necessary and Proper Clause, as I have elsewhere explained, it must bear an "obvious, simple, and direct relation" to an exercise of Congress' enumerated powers, Sabri v. United States, 541 U.S. 600, 613, 158 L. Ed. 2d 891, 124 S. Ct. 1941 (2004) (Thomas, J., concurring in judgment), and it must not "subvert basic principles of" constitutional design, Gonzales v. Raich, ante, at 65, 162 L. Ed. 2d 1, 125 S. Ct. 2195 (Thomas, J., dissenting). In other words, a taking is permissible under the Necessary and Proper Clause only if it serves a valid public purpose. Interpreting the Public Use Clause likewise to limit the

government to take property only for sufficiently public purposes replicates this inquiry. If this is all the Clause means, it is, once again, surplusage. See supra, at 507, 162 L. Ed. 2d, at 469. The Clause is thus most naturally read to concern whether the property is used by the public or the government, not whether the purpose of the taking is legitimately public.

II

Early American eminent domain practice largely bears out this understanding of the Public Use Clause. This practice [*512] concerns state limits on eminent domain power, not the Fifth Amendment, since it was not until the late 19th century that the Federal Government began to use the power of eminent domain, and since the Takings Clause did not even arguably limit state power until after the passage of the Fourteenth Amendment. See Note, The Public Use Limitation on Eminent Domain: An Advance Requiem, 58 Yale L. J. 567, 599-600, and nn. 3-4 (1949); Barron ex rel. Tiernan v. Mayor of Baltimore, 32 U.S. 243, 7 Pet. 243, 250-251, 8 L. Ed. 672 (1833) (holding the Takings Clause inapplicable to the States of its own force). Nevertheless, several early state constitutions at the time of the founding likewise limited the power of eminent domain to "public uses." See Sales 367-369, and n 137 (emphasis deleted). Their practices therefore shed light on the original meaning of the same words contained in the Public Use Clause.

States employed the eminent domain power to provide quintessentially public goods, such as public roads, toll roads, ferries, canals, railroads, and public parks. Lewis §§ 166, 168-171, 175, at 227-228, 234-241, 243. Though use of the eminent domain power was sparse at the time of the founding, many States did have so-called Mill Acts, which authorized the owners of grist mills operated by water power to flood upstream lands with the payment of compensation to the upstream landowner. See, e.g., id., § 178, at 245-246; Head v. Amoskeag Mfg. Co., 113 U.S. 9, 16-19, 28 L. Ed. 889, 5 S. Ct. 441, and n. (1885). Those early grist mills "were regulated by law and compelled to

serve the public for a stipulated toll and in regular order," and therefore were actually used by the public. Lewis § 178, at 246, and n 3; see also Head, supra, at 18-19, 28 L. Ed. 889, 5 S. Ct. 441. They were common carriers—quasi-public entities. These were "public uses" in the fullest sense of the word, because the public could legally use and benefit from them equally. See Public Use Limitations 903 (common-carrier status traditionally afforded to "private beneficiaries of a state franchise [*513] or another form of state monopoly, or to companies that operated in conditions of natural monopoly").

To be sure, some early state legislatures tested the limits of their state-law eminent domain power. Some States enacted statutes allowing the taking of property for the purpose of building private roads. See Lewis § 167, at 230. These statutes were mixed; some required the private landowner to keep the road open to the public, and others did not. See id., § 167, at 230-234. Later in the 19th century, moreover, the Mill Acts were employed to grant rights to private manufacturing plants, in addition to grist mills that had common-carrier duties. See, e.g., M. Horwitz, The Transformation of American Law 1780-1860, pp 51-52 (1977).

These early uses of the eminent domain power are often cited as evidence for the broad "public purpose" interpretation of the Public Use Clause, see, e.g., ante, at 479-480, n 8, 162 L. Ed. 2d, at 450-451 (majority opinion); Brief for Respondents 30; Brief for American Planning Assn. et al. as Amici Curiae 6-7, but in fact the constitutionality of these exercises of eminent domain power under state public use restrictions was a hotly contested question in state courts throughout the 19th and into the 20th century. Some courts construed those clauses to authorize takings for public purposes, but others adhered to the natural meaning of "public use." As noted above, [*514] the earliest Mill Acts were applied to entities with duties to remain open to the public, and their later extension is not deeply probative of whether that

subsequent practice is consistent with the original meaning of the Public Use Clause. See McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 370, 131 L. Ed. 2d 426, 115 S. Ct. 1511 (1995) (Thomas, J., concurring in judgment). At the time of the founding, "[b]usiness corporations were only beginning to upset the old corporate model, in which the raison d'etre of chartered associations was their service to the public," Horwitz, supra, at 49-50, so it was natural to those who framed the first Public Use Clauses to think of mills as inherently public entities. The disagreement among state courts, and state legislatures' attempts to circumvent public use limits on their eminent domain power, cannot obscure that the Public Use Clause is most naturally read to authorize takings for public use only if the government or the public actually uses the taken property.

III

Our current Public Use Clause jurisprudence, as the Court notes, has rejected this natural reading of the Clause. Ante, at 479-483, 162 L. Ed. 2d, at 450-452. The Court adopted its modern reading blindly, with little discussion of the Clause's history and original meaning, in two distinct lines of cases: first, in cases adopting the "public purpose" interpretation of the Clause, and second, in cases deferring to legislatures' judgments regarding what constitutes a valid public purpose. Those questionable cases converged in the boundlessly broad and deferential [*515] conception of "public use" adopted by this Court in Berman v. Parker, 348 U.S. 26, 99 L. Ed. 27, 75 S. Ct. 98 (1954), and Hawaii Housing Authority v. Midkiff, 467 U.S. 229, 81 L. Ed. 2d 186, 104 S. Ct. 2321 (1984), cases that take center stage in the Court's opinion. See ante, 480-482, 162 L. Ed. 2d, at 452-453. The weakness of those two lines of cases, and consequently Berman and Midkiff, fatally undermines the doctrinal foundations of the Court's decision. Today's questionable application of these cases is further proof that the "public purpose" standard is not susceptible of principled application. This Court's reliance by rote on this standard is ill advised and should be reconsidered.

A

As the Court notes, the "public purpose" interpretation of the Public Use Clause stems from Fallbrook Irrigation Dist. v. Bradley, 164 U.S. 112, 161-162, 41 L. Ed. 369, 17 S. Ct. 56 (1896). Ante, at 479-480, 162 L. Ed. 2d, at 452-453. The issue in Bradley was whether a condemnation for purposes of constructing an irrigation ditch was for a public use. 164 U.S., at 161, 41 L. Ed. 369, 17 S. Ct. 56. This was a public use, Justice Peckham declared for the Court, because "[t]o irrigate and thus to bring into possible cultivation these large masses of otherwise worthless lands would seem to be a public purpose and a matter of public interest, not confined to landowners, or even to any one section of the State." Ibid. That broad statement was dictum, for the law under review also provided that "[a]ll landowners in the district have the right to a proportionate share of the water." Id., at 162, 41 L. Ed. 369, 17 S. Ct. 56. Thus, the "public" did have the right to use the irrigation ditch because all similarly situated members of the public—those who owned lands irrigated by the ditch—had a right to use it. The Court cited no authority for its dictum, and did not discuss either the Public Use Clause's original meaning or the numerous authorities that had adopted the "actual use" test (though it at least acknowledged the conflict of authority in state courts, see id., at 158, 41 L. Ed. 369, 17 S. Ct. 56; supra, at 513-514, 162 L. Ed. 2d, at 473, and n 2). Instead, the Court reasoned that "[t]he use must be regarded as a public use, or else it would seem to follow that no general [*516] scheme of irrigation can be formed or carried into effect." Bradley, supra, at 160-161, 41 L. Ed. 369, 17 S. Ct. 56. This is no statement of constitutional principle: Whatever the utility of irrigation districts or the merits of the Court's view that another rule would be "impractical given the diverse and always evolving needs of society," ante, at 479, 162 L. Ed. 2d, at 451, the Constitution does not embody those policy preferences any more than it "enact[s] Mr. Herbert Spencer's Social Statics," Lochner v. New York, 198 U.S. 45, 75, 49 L. Ed.

937, 25 S. Ct. 539 (1905) (Holmes, J., dissenting); but see id., at 58-62, 49 L. Ed. 937, 25 S. Ct. 539 (Peckham, J., for the Court).

This Court's cases followed Bradley's test with little analysis. In Clark v. Nash, 198 U.S. 361, 49 L. Ed. 1085, 25 S. Ct. 676 (1905) (Peckham, J., for the Court), this Court relied on little more than a citation to Bradley in upholding another condemnation for the purpose of laying an irrigation ditch. 198 U.S., at 369-370, 49 L. Ed. 1085, 25 S. Ct. 676. As in Bradley, use of the "public purpose" test was unnecessary to the result the Court reached. The government condemned the irrigation ditch for the purpose of ensuring access to water in which "[o]ther land owners adjoining the defendant in error . . . might share," 198 U.S., at 370, 49 L. Ed. 1085, 25 S. Ct. 676, and therefore Clark also involved a condemnation for the purpose of ensuring access to a resource to which similarly situated members of the public had a legal right of access. Likewise, in Strickley v. Highland Boy Gold Mining Co., 200 U.S. 527, 50 L. Ed. 581, 26 S. Ct. 301 (1906), the Court upheld a condemnation establishing an aerial right-of-way for a bucket line operated by a mining company, relying on little more than Clark, see Strickley, supra, at 531, 50 L. Ed. 581, 26 S. Ct. 301. This case, too, could have been disposed of on the narrower ground that "the plaintiff [was] a carrier for itself and others," 200 U.S., at 531-532, 50 L. Ed. 581, 26 S. Ct. 301, and therefore that the bucket line was legally open to the public. Instead, the Court unnecessarily rested its decision on the "inadequacy of use by the general public as a universal test." Id., at 531, 50 L. Ed. 581, 26 S. Ct. 301. This Court's cases quickly incorporated the public purpose standard set forth in Clark and Strickley by barren citation. See, [*517] e.g., Rindge Co. v. County of Los Angeles, 262 U.S. 700, 707, 67 L. Ed. 1186, 43 S. Ct. 689 (1923); Block v. Hirsh, 256 U.S. 135, 155, 65 L. Ed. 865, 41 S. Ct. 458 (1921); Mt. Vernon-Woodberry Cotton Duck Co. v. Alabama Interstate Power Co., 240 U.S. 30, 32, 60 L. Ed.

507, 36 S. Ct. 234 (1916); O'Neill v. Leamer, 239 U.S. 244, 253, 60 L. Ed. 249, 36 S. Ct. 54 (1915).

B

A second line of this Court's cases also deviated from the Public Use Clause's original meaning by allowing legislatures to define the scope of valid "public uses." United States v. Gettysburg Electric R. Co., 160 U.S. 668, 40 L. Ed. 576, S. Ct. 427 (1896), involved the question whether Congress' decision to condemn certain private land for the purpose of building battlefield memorials at Gettysburg, Pennsylvania, was for a public use. Id., at 679-680, 40 L. Ed. 576, 16 S. Ct. 427. Since the Federal Government was to use the lands in question, id., at 682, 40 L. Ed. 576, 16 S. Ct. 427, there is no doubt that it was a public use under any reasonable standard. Nonetheless, the Court, speaking through Justice Peckham, declared that "when the legislature has declared the use or purpose to be a public one, its judgment will be respected by the courts, unless the use be palpably without reasonable foundation." Id., at 680, 40 L. Ed. 576, 16 S. Ct. 427. As it had with the "public purpose" dictum in Bradley, , the Court quickly incorporated this dictum into its Public Use Clause cases with little discussion. See, e.g., United States ex rel. TVA v. Welch, 327 U.S. 546, 552, 90 L. Ed. 843, 66 S. Ct. 715 (1946); Old Dominion Land Co. v. United States, 269 U.S. 55, 66, 70 L. Ed. 162, 46 S. Ct. 39 (1925).

There is no justification, however, for affording almost insurmountable deference to legislative conclusions that a use serves a "public use." To begin with, a court owes no deference to a legislature's judgment concerning the quintessentially legal question of whether the government owns, or the public has a legal right to use, the taken property. Even under the "public purpose" interpretation, moreover, it is most implausible that the Framers intended to defer to legislatures as to what satisfies the Public Use Clause, uniquely [*518] among all the express provisions of the Bill of Rights. We would not defer to a legislature's determination of the various circumstances that establish,

for example, when a search of a home would be reasonable, see, e.g., Payton v. New York, 445 U.S. 573, 589-590, 63 L. Ed. 2d 639, 100 S. Ct. 1371 (1980), or when a convicted double-murderer may be shackled during a sentencing proceeding without on-the-record findings, see Deck v. Missouri, 544 U.S. 622, 161 L. Ed. 2d 953, 125 S. Ct. 2007 (2005), or when state law creates a property interest protected by the Due Process Clause, see, e.g., Castle Rock v. Gonzales, post, at 756-758, 162 L. Ed. 2d 658, 125 S. Ct. 2796; ; Board of Regents of State Colleges v. Roth, 408 U.S. 564, 576, 33 L. Ed. 2d 548, 92 S. Ct. 2701 (1972); Goldberg v. Kelly, 397 U.S. 254, 262-263, 25 L. Ed. 2d 287, 90 S. Ct. 1011 (1970).

Still worse, it is backwards to adopt a searching standard of constitutional review for nontraditional property interests, such as welfare benefits, see, e.g., Goldberg, supra, 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 overriding respect for the sanctity of the home that has been embedded in our traditions since the origins of the Republic," Payton, supra, at 601, 63 L. Ed. 2d 639, 100 S. Ct. 1371, when the issue is only whether the government may search a home. Yet today the Court tells us that we are not to "second-guess the City's considered judgments," ante, at 488, 162 L. Ed. 2d, at 457, when the issue is, instead, whether the government may take the infinitely more intrusive step of tearing down petitioners' homes. Something has gone seriously awry with this Court's interpretation of the Constitution. Though citizens are safe from the government in their homes, the homes themselves are not. Once one accepts, as the Court at least nominally does, ante, at 477, 162 L. Ed. 2d, at 450, that the Public Use Clause is a limit on the eminent domain power of the Federal Government and the States, there is no justification for the almost complete deference it grants to legislatures as to what satisfies it.

[*519] C

These two misguided lines of precedent converged in Berman v. Parker, 348 U.S. 26, 99 L. Ed. 27, 75 S. Ct. 98 (1954), and Hawaii Housing Authority v. Midkiff, 467 U.S. 229, 81 L. Ed. 2d 186, 104 S. Ct. 2321 (1984). Relying on those lines of cases, the Court in Berman and Midkiff upheld condemnations for the purposes of slum clearance and land redistribution, respectively. "Subject to specific constitutional limitations," Berman proclaimed, "when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive. In such cases the legislature, not the judiciary, is the main guardian of the public needs to be served by social legislation." 348 U.S., at 32, 99 L. Ed. 27, 75 S. Ct. 98. That reasoning was question begging, since the question to be decided was whether the "specific constitutional limitation" of the Public Use Clause prevented the taking of the appellant's (concededly "nonblighted") department store. Id., at 31, 34, 99 L. Ed. 27, 75 S. Ct. 98. Berman also appeared to reason that any exercise by Congress of an enumerated power (in this case, its plenary power over the District of Columbia) was per se a "public use" under the Fifth Amendment. Id., at 33, 99 L. Ed. 27, 75 S. Ct. 98. But the very point of the Public Use Clause is to limit that power. See supra, at 508, 162 L. Ed. 2d, at 469-470.

More fundamentally, Berman and Midkiff erred by equating the eminent domain power with the police power of States. See Midkiff, supra, at 240, 81 L. Ed. 2d 186, 104 S. Ct. 2321 ("The 'public use' requirement is . . . coterminous with the scope of a sovereign's police powers"); Berman, supra 32, 99 L. Ed. 27, 75 S. Ct. 98. Traditional uses of that regulatory power, such as the power to abate a nuisance, required no compensation whatsoever, see Mugler v. Kansas, 123 U.S. 623, 668-669, 31 L. Ed. 205, 8 S. Ct. 273 (1887), in sharp contrast to the takings power, which has always required compensation, see supra, at ____, 162 L. Ed. 2d, at 469-470, and n 1. The question whether the State can take property using the power of

eminent domain is therefore distinct from the question whether it can regulate property pursuant to the police power. See, e.g., Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1014, 120 L. Ed. 2d 798, 112 S. Ct. 2886 (1992); Mugler, [*520] supra, at 668-669, 31 L. Ed. 205, 8 S. Ct. 273. In Berman, for example, if the slums at issue were truly "blighted," then state nuisance law, see, e.g., supra, at 510, 162 L. Ed. 2d, at 463-464; Lucas, supra, at 1029, 120 L. Ed. 2d 798, 112 S. Ct. 2886, not the power of eminent domain, would provide the appropriate remedy. To construe the Public Use Clause to overlap with the States' police power conflates these two categories.

The "public purpose" test applied by Berman and Midkiff also cannot be applied in principled manner. "When we depart from the natural import of the term 'public use,' and substitute for the simple idea of a public possession and occupation, that of public utility, public interest, common benefit, general advantage or convenience . . . we are afloat without any certain principle to guide us." Bloodgood v. Mohawk & Hudson R. Co., 18 Wend. 9, 60-61 (NY 1837) (opinion of Tracy, Sen.). Once one permits takings for public purposes in addition to public uses, no coherent principle limits what could constitute a valid public use-at least, none beyond Justice O'Connor's (entirely proper) appeal to the text of the Constitution itself. See ante, at 494, 501-505, 162 L. Ed. 2d, at 460-461, 464-468 (dissenting opinion). I share the Court's skepticism about a public use standard that requires courts to second-guess the policy wisdom of public works projects. Ante, at 486-489, 162 L. Ed. 2d, at 456-457. The "public purpose" standard this Court has adopted, however, demands the use of such judgment, for the Court concedes that the Public Use Clause would forbid a purely private taking. [*521] Ante, at 477-478, 162 L. Ed. 2d, at 450-451. It is difficult to imagine how a court could find that a taking was purely private except by determining that the taking did not, in fact, rationally advance the public interest. Cf. ante, at 502-503, 162 L. Ed. 2d, at 465-466 (O'Connor, J., dissenting)

(noting the complicated inquiry the Court's test requires). The Court is therefore wrong to criticize the "actual use" test as "difficult to administer." Ante, at 479, 162 L. Ed. 2d, at 451. It is far easier to analyze whether the government owns or the public has a legal right to use the taken property than to ask whether the taking has a "purely private purpose"—unless the Court means to eliminate public use scrutiny of takings entirely. Ante, at 477-478, 488-489, 162 L. Ed. 2d, at 450-451, 456-457. Obliterating a provision of the Constitution, of course, guarantees that it will not be misapplied.

For all these reasons, I would revisit our Public Use Clause cases and consider returning to the original meaning of the Public Use Clause: that the government may take property only if it actually uses or gives the public a legal right to use the property.

IV

The consequences of today's decision are not difficult to predict, and promise to be harmful. So-called "urban renewal" programs provide some compensation for the properties they take, but no compensation is possible for the subjective value of these lands to the individuals displaced and the indignity inflicted by uprooting them from their homes. Allowing the government to take property solely for public purposes is bad enough, but extending the concept of public purpose to encompass any economically beneficial goal guarantees that these losses will fall disproportionately on poor communities. Those communities are not only systematically less likely to put their lands to the highest and best social use, but are also the least politically powerful. If ever there were justification for intrusive judicial review of constitutional provisions that protect "discrete and insular minorities," United States v. Carolene Products Co., 304 U.S. 144, 152, n. 4, [*522] 82 L. Ed. 1234, 58 S. Ct. 778 (1938), surely that principle would apply with great force to the powerless groups and individuals the Public Use Clause protects. The deferential standard this Court has adopted for the Public

Use Clause is therefore deeply perverse. It encourages "those citizens with disproportionate influence and power in the political process, including large corporations and development firms," to victimize the weak. Ante, at 505, 162 L. Ed. 2d, at 468 (O'Connor, J., dissenting).

Those incentives have made the legacy of this Court's "public purpose" test an unhappy one. In the 1950's, no doubt emboldened in part by the expansive understanding of "public use" this Court adopted in Berman, cities "rushed to draw plans" for downtown development. B. Frieden & L. Sagalyn, Downtown, Inc. How America Rebuilds Cities 17 (1989). "Of all the families displaced by urban renewal from 1949 through 1963, 63 percent of those whose race was known were nonwhite, and of these families, 56 percent of nonwhites and 38 percent of whites had incomes low enough to qualify for public housing, which, however, was seldom available to them." Id., at 28. Public works projects in the 1950's and 1960's destroyed predominantly minority communities in St. Paul, Minnesota, and Baltimore, Maryland. Id., at 28-29. In 1981, urban planners in Detroit, Michigan, uprooted the largely "lower-income and elderly" Poletown neighborhood for the benefit of the General Motors Corporation. J. Wylie, Poletown: Community Betrayed 58 (1989). Urban renewal projects have long been associated with the displacement of blacks; "[i]n cities across the country, urban renewal came to be known as 'Negro removal.'" Pritchett, The "Public Menace" of Blight: Urban Renewal and the Private Uses of Eminent Domain, 21 Yale L. & Pol'y Rev. 1, 47 (2003). Over 97 percent of the individuals forcibly removed from their homes by the "slum-clearance" project upheld by this Court in Berman were black. 348 U.S., at 30, 99 L. Ed. 27, 75 S. Ct. 98. Regrettably, the predictable consequence of the Court's decision will be to exacerbate these effects.

The Court relies almost exclusively on this Court's prior cases to derive today's far-reaching, and dangerous, result. See ante, at 479-483, 162 L. Ed. 2d, at 451-453. But the principles this Court should employ to dispose of this case

are found in the Public Use Clause itself, not in Justice Peckham's high opinion of reclamation laws, see supra, at 515-516, 162 L. Ed. 2d, at 474. When faced with a clash of constitutional principle and a line of unreasoned cases wholly divorced from the text, history, and structure of our founding document, we should not hesitate to resolve the tension in favor of the Constitution's original meaning. For the reasons I have given, and for the reasons given in Justice O'Connor's dissent, the conflict of principle raised by this boundless use of the eminent domain power should be resolved in petitioners' favor. I would reverse the judgment of the Connecticut Supreme Court.

 ¿Qué queda del requisito elemental de una causa de utilidad pública en el derecho estadounidense?

 Daniel GOLDSTEIN, Jerry CAMPBELL, as the putative administrator of the estate of Oliver St. Clair Stewart and in his individual capacity, GELIN GROUP, LLC, CHADDERTON'S BAR AND GRILL, INC., d/b/a Freddy's Bar and Backroom, et al. Plaintiffs-Appellants v. Governor George E. PATAKI, NEW YORK STATE URBAN DEVELOPMENT CORPORATION, d/b/a Empire State Development Corporation, et al., Defendants-Appellees. United States Court of Appeals for the Second Circuit, 516 F.3d 50, February 1, 2008, Decided
OPINION BY: KATZMANN
[*52] Few powers of government have as immediate and intrusive an impact on the lives of citizens as the power of eminent domain. For affected property owners, monetary compensation may understandably seem an imperfect substitute for the hardships of dislocation and the loss of a home or business. But federal judges may not intervene in such matters simply on the basis of our sympathies. Just as eminent domain has its costs, it has its benefits, and in all but the most extreme cases, Supreme Court precedent requires us to leave questions of how to balance the two to the elected representatives of government, notwithstanding

the hardships felt by those whose property is slated for condemnation.

Against this backdrop, we must decide if a complaint has sufficiently alleged that an eminent domain action violates the Public Use Clause of the Fifth Amendment. In our view, the plaintiffs-appellants effectively acknowledge, albeit reluctantly, that the well-publicized, multi-billion dollar development project they challenge would result, inter alia, in a new stadium for the New Jersey Nets, a public open space, the creation of affordable housing units and the redevelopment of an area in downtown Brooklyn afflicted for decades with substantial blight. They contend, however, that the project's public benefits are serving as a "pretext" that masks its actual [*53] raison d'tre: enriching the private individual who proposed it and stands to profit most from its completion. Following Supreme Court precedent, we conclude that the plaintiffs have not mounted a viable Fifth Amendment challenge. The judgment of the district court is affirmed.

I.

Because this appeal follows the grant of a motion to dismiss, we must derive our version of the facts of record, including our description of the Atlantic Yards Project, from the allegations set forth in the plaintiffs' Amended Complaint, "taking [them] as true . . . and drawing all reasonable inferences in favor of the plaintiff[s]." Stuto v. Fleishman, 164 F.3d 820, 824 (2d Cir. 1999).

The Atlantic Yards Arena and Redevelopment Project (the "Atlantic Yards Project" or the "Project") is a publicly subsidized development project set to cover twenty-two acres in and around the Metropolitan Transit Authority's Vanderbilt Yards, an area in the heart of downtown Brooklyn, New York. The plan for the Project, which will be designed in part by the architect Frank Gehry, includes the construction of a sports arena that will play home to the National Basketball Association franchise currently known as the New Jersey Nets, no fewer than sixteen high-rise apartment towers, and several office towers. The Project

site is bounded generally by Dean Street, Atlantic Avenue, Fourth Avenue, and Vanderbilt Avenue.

Announced to the public in December 2003, the Project is being carried out, in part, through the assistance of the New York State Urban Development Corporation, which also operates as the Empire State Development Corporation ("ESDC"), a public-benefit corporation and political subdivision of New York State. The involvement of the ESDC is critical. Although approximately half the proposed footprint for the Project lies within the Atlantic Terminal Urban Renewal Area ("Renewal Area"), a heavily blighted area owned in part by the Metropolitan Transit Authority ("MTA"), the Project site also includes an adjacent parcel of land with less blight (referred to in the complaint as the "Takings Area") that is currently held by private parties. Under the plan for the Project, the ESDC, if necessary, will acquire the rest of the privately held land in the Takings Area through the use of eminent domain.

Consistent with the strictures of New York's Eminent Domain Procedure Law, the ESDC held a public hearing, which it publicized in advance, on August 23, 2006, at which it discussed the proposal for the Project in detail. See N.Y. Em. Dom. Proc. Law § 202. Thereafter, in September 2006, members of the public were invited to attend a community forum on the Project where they could voice their concerns.

II.

Plaintiffs-appellants are fifteen property owners whose homes and businesses in the Takings Area are slated for condemnation to make way for the Project. In October 2006, they filed this action in the Eastern District of New York, naming as defendants Appellee Bruce Ratner, the private developer carrying out the Project, several entities affiliated with him (collectively, the "Forest City Ratner Appellees" or "Ratner [*54] Group") and various officials, agencies, and subdivisions of New York State and New York City (respectively, the "State Appellees" and "City

Appellees"). The action was assigned to the Hon. Nicholas G. Garaufis.

Apparently, after being consolidated, this action represented the first challenge in federal court to the Atlantic Yards Project. The original complaint raised three federal-law claims, asserting that the use of eminent domain in furtherance of the Project would violate the "Public Use" Clause of the Fifth Amendment, and the Equal Protection and Due Process Clauses of the Fourteenth Amendment. Thereafter, the plaintiffs amended the complaint, asserting the same three federal-law causes of action against all defendants, and adding a cause of action under New York state law against defendant ESDC.

Each of the claims relies on slightly different allegations. The heart of the complaint, however, and the centerpiece of the instant appeal, is its far-reaching allegation that the Project, from its very inception, has not been driven by legitimate concern for the public benefit on the part of the relevant government officials. Appellants contend that a "substantial" motivation of the various state and local government officials who approved or acquiesced in the approval of the Project has been to benefit Bruce Ratner, the man whose company first proposed it and who serves as the Project's primary developer. Ratner is also the principal owner of the New Jersey Nets. In short, the plaintiffs argue that all of the "public uses" the defendants have advanced for the Project are pretexts for a private taking that violates the Fifth Amendment.

The defendants timely moved to dismiss all the claims on various grounds, among them that the complaint failed to state a claim upon which relief could be granted. See Fed. R. Civ. P. 12(b)(6). Magistrate Judge Robert Levy, to whom the Rule 12 motion practice was referred, issued a Report and Recommendation ("R&R") recommending that the district court abstain from deciding the issue under Burford v. Sun Oil Co., 319 U.S. 315, 63 S. Ct. 1098, 87 L. Ed. 1424 (1943). See Goldstein v. Pataki, 2007 U.S. Dist. LEXIS 44491, 2007 WL 1695573 (E.D.N.Y. Feb. 23,

2007). After objections were filed, Judge [*55] Garaufis rejected this aspect of the R&R, and, instead, dismissed the federal claims in the amended complaint with prejudice. See Goldstein v. Pataki, 488 F. Supp. 2d 254 (E.D.N.Y. 2007). In a ruling that is not challenged on appeal, the district court declined to retain supplemental jurisdiction over the state claim, dismissing it without prejudice.

With respect to the claim made under the Public Use Clause, the district court concluded, after a thorough and careful analysis, that no such claim was available. By the plaintiffs' own admission, the court noted, the Project here would serve several well-established public uses such as the redress of blight, the construction of a sporting arena, and the creation of new housing, including 2,250 new units of affordable housing. Id. at 286-87. The district court additionally held that a "pretext" argument provided a valid basis for a public-use challenge under the Supreme Court's decision in Kelo v. City of New London, 545 U.S. 469, 125 S. Ct. 2655, 162 L. Ed. 2d 439 (2005), but was not available here because "even if Plaintiffs could prove every allegation in the Amended Complaint, a reasonable juror would not be able to conclude that the public purposes offered in support of the Project [were] 'mere pretexts' within the meaning of Kelo." Id. at 288. As to the plaintiffs' equal-protection claim, the district court determined that it was not viable because, inter alia, any distinction between the plaintiffs and other persons has a rational basis. Id. at 291. As to the plaintiffs' due process claim, the district court held that such a claim was ill-fated in view of our holding in Brody v. Village of Port Chester, 434 F.3d 121 (2d Cir. 2005), in which we determined that section 207 of New York's Eminent Domain Procedure Law was sufficient to satisfy the requirements of due process. Id. This appeal followed.

III.

The primary contentions raised on appeal are that the district court overlooked substantial and specific allegations that Ratner is the sole beneficiary of the Project and that the

public uses invoked by appellees are "pretexts" advanced by corrupt and coopted state officials. (Appellants also press their equal protection and due process claims, but give these appropriately short discussion.) The following passage from the appellants' brief captures the essence of their argument:

Defendants' decision to take Plaintiffs' properties serves only one purpose: it allows Ratner to build a Project of unprecedented size, and thus reap a profit that Defendants, tellingly, have attempted to conceal at every turn. This is not merely favoritism of a particular developer . . . . Here, the "favored" developer is driving and dictating the process, with government officials at all levels obediently falling into line. . . . The imminent seizure of Plaintiffs' properties in the Takings Area selected by Ratner has been accomplished through a wholesale abdication of governmental responsibility . . . . That abdication has allowed Ratner to co-opt the power of eminent domain; and to wield it in service of his understandable desire to expand the Project to truly mammoth proportions, thus increasing the profit to himself, his companies and his shareholders.

Although the claim is far-reaching, the specific allegations underlying it are less so. Almost without exception, the appellants' arguments can be grouped into one of five discrete categories. First, the appellants point to a series of allegations that follow logically from the acknowledged fact that Ratner was the impetus behind the Project, i.e., that he, not a state agency, first conceived of developing Atlantic [*56] Yards, that the Ratner Group proposed the geographic boundaries of the Project, and that it was his plan for the Project that the ESDC eventually adopted without significant modification. Second, the appellants emphasize certain allegations that relate not to the passage of the Project, but to some purported departures from convention in the process through which the MTA (which is not a defendant in this case) accepted a bid from the Ratner Group to develop land owned principally by the MTA. Third, certain allegations are invoked to suggest that

the public uses being proffered by appellees (and relied upon by the district court) were post hoc justifications, for example, the charge in the appellants' brief that "Defendants never claimed that the Takings Area was blighted until years after the Project was officially announced and Kelo had been decided." Fourth, while conceding that the ESDC has at all times abided by the letter of the strict requirements of state law, the appellants make various conclusory allegations in the complaint to suggest that the ESDC has nonetheless violated the spirit of these rules, to wit, that the "ESDC . . . engaged in a sham 'public' review process whose outcome was predetermined long before." Finally, the appellants make reference to several lawsuits that have been filed in state court in connection with this Project, but do not claim that any of those lawsuits addressed the issue of whether the public use of the Project was pretextual, which is the gravamen of the primary claim here.

IV.

We review the grant of a motion to dismiss under Rule 12(b)(6) de novo, "construing the complaint liberally, accepting all factual allegations in the complaint as true, and drawing all reasonable inferences in the plaintiff's favor." Chambers v. Time Warner, Inc., 282 F.3d 147, 152 (2d Cir. 2002). In setting forth the pleading standard for this cause of action, the district court looked for guidance to the Supreme Court's recent decision in Bell Atlantic Corp. v. Twombly, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007), which disavowed the oft-quoted statement from Conley v. Gibson, 355 U.S. 41, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957), that "'a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.'" 127 S. Ct. at 1968 (quoting Conley, 355 U.S. at 45-46). Twombly requires instead that the complaint's "[f]actual allegations be enough to raise a right to relief above the speculative level on the

assumption that all the allegations in the complaint are true." Id. at 1965 (internal citation omitted).

Because the disavowed language in Conley had been a part of our court's jurisprudence for decades, "'[c]onsiderable uncertainty' surrounds the breadth of the . . . decision." In re Elevator Antitrust Litig., 502 F.3d 47, 50 (2d Cir. 2007) (quoting Iqbal v. Hasty, 490 F.3d 143, 155 (2d Cir. 2007)). The appellants concede on appeal that Twombly applies to the pleading standard in their action. Even though the precedents in this area "are less than crystal clear," see Iqbal, 490 F.3d at 178 (Cabranes, J., concurring), we need not take this occasion to contemplate the outer limits of the Twombly standard. As all parties acknowledge, at a bare minimum, the operative standard requires the "plaintiff [to] provide the grounds upon which his claim rests through factual allegations sufficient 'to raise a right to relief above the speculative level.'" See ATSI Commc'ns., Inc. v. Shaar Fund, Ltd., 493 F.3d 87, 98 (2d Cir. 2007) (quoting Twombly, 127 S. Ct. at 1965). In view of what they have effectively [*57] conceded in prosecuting this lawsuit, the appellants cannot meet this standard.

V.

We have recognized that the power of eminent domain is "a fundamental and necessary attribute of sovereignty, superior to all private property rights." Rosenthal & Rosenthal, Inc. v. New York State Urban Dev. Corp., 771 F.2d 44, 45 (2d Cir. 1985) (per curiam) (citing Georgia v. City of Chattanooga, 264 U.S. 472, 480, 44 S. Ct. 369, 68 L. Ed. 796 (1924) and Albert Hanson Lumber Co. v. United States, 261 U.S. 581, 587, 43 S. Ct. 442, 67 L. Ed. 809 (1923)). But as the Fifth Amendment ensures, this power is not without limits, among them what has come to be known as the public-use requirement. Among its crucial protections, the Fifth Amendment provides, "nor shall private property be taken for public use, without just compensation." U.S. Const. amend. V. This language has long been understood to guarantee that "one person's property may not be taken for the benefit of another private

person without a justifying public purpose, even though compensation be paid." Thompson v. Consol. Gas Utils. Corp., 300 U.S. 55, 80, 57 S. Ct. 364, 81 L. Ed. 510 (1937); see also Hawaii Hous. Auth. v. Midkiff, 467 U.S. 229, 245, 104 S. Ct. 2321, 81 L. Ed. 2d 186 (1984) ("A purely private taking could not withstand the scrutiny of the public use requirement; it would serve no legitimate purpose of government and would thus be void.").

But both in doctrine and in practice, the primary mechanism for enforcing the public-use requirement has been the accountability of political officials to the electorate, not the scrutiny of the federal courts. Over the last century, reflecting the direction of Supreme Court case law, federal courts have had a much greater role in addressing what type of governmental action constitutes a taking and what level of compensation is just, leaving to legislatures to determine, in all but the most extreme cases, whether a taking fulfills the public-use requirement. See generally William Michael Treanor, The Original Understanding of the Takings Clause and the Political Process, 95 Colum. L. Rev. 782, 803-10 (1995); Vicki Been, "Exit" as a Constraint on Land Use Exactions: Rethinking the Unconstitutional Conditions Doctrine, 91 Colum. L. Rev. 473, 497 (1991). "There is, of course, a role for courts to play in reviewing a legislature's judgment of what constitutes a public use, even when the eminent domain power is equated with the police power," Midkiff, 467 U.S. at 240, but the Supreme Court has repeatedly "made clear that it is 'an extremely narrow' one." Id. (quoting Berman v. Parker, 348 U.S. 26, 32, 75 S. Ct. 98, 99 L. Ed. 27 (1954)).

Speaking for a unanimous Supreme Court in Midkiff, Justice O'Connor explained the rationale behind the very limited scope of federal judicial review in this area:

Judicial deference is required because, in our system of government, legislatures are better able to assess what public purposes should be advanced by an exercise of the taking power. State legislatures are as capable as Congress

of making such determinations within their respective spheres of authority. Thus, if a legislature, state or federal, determines there are substantial reasons for an exercise of the taking power, [*58] courts must defer to its determination that the taking will serve a public use.

467 U.S. at 244 (internal citation omitted). The Supreme Court has therefore instructed lower courts not to "substitute [their] judgment for a legislature's judgment as to what constitutes a public use 'unless the use be palpably without reasonable foundation.'" Id. at 241 (quoting United States v. Gettysburg Elec. Ry. Co., 160 U.S. 668, 680, 16 S. Ct. 427, 40 L. Ed. 576 (1896)); see also Kelo v. City of New London, 545 U.S. 469, 480, 125 S. Ct. 2655, 162 L. Ed. 2d 439 (2005) ("Without exception, our cases have defined [public use] broadly, reflecting our longstanding policy of deference to legislative judgments in this field."); Berman, 348 U.S. at 32 ("[W]hen the legislature has spoken, the public interest has been declared in terms well-nigh conclusive."). To that end, we have said that our review of a legislature's public-use determination is limited such that "'where the exercise of the eminent domain power is rationally related to a conceivable public purpose,' . . . the compensated taking of private property for urban renewal or community redevelopment is not proscribed by the Constitution." Rosenthal, 771 F.2d at 46 (quoting Midkiff, 467 U.S. at 241).

By way of brief illustration, in Berman, the Supreme Court rejected a Fifth Amendment challenge from the owner of a department store slated for condemnation as part of a larger redevelopment plan targeting blight in Washington, D.C. 348 U.S. at 31. The owner argued that because his particular store was not blighted, and his land would be transferred to a private developer, the taking violated the Public Use Clause. The Supreme Court disagreed, reasoning that "[o]nce the question of the public purpose has been decided, the amount and character of land to be taken for the project and the need for a particular tract to complete the integrated plan rests in the discretion of the

legislative branch." Id. at 35-36. In Rosenthal, applying Berman, we reached a similar result when we rejected a challenge to a plan redressing "the physical, social and economic blight that ha[d] afflicted the Times Square area of Manhattan" in spite of the fact that the private developer who had been selected to acquire the land in connection with the project was allegedly connected to then New York City Mayor Edward Koch. 771 F.2d at 45; see also Rosenthal & Rosenthal, Inc. v. N.Y. State Urban Dev. Corp., 605 F. Supp. 612, 616 (S.D.N.Y. 1985).

With echoes of Rosenthal, the instant complaint calls the "alleged 'public benefits' . . . either wildly exaggerated or simply false. At best, [they] are incidental; at worst, they are non-existent." Read carefully, however, the specific allegations in the complaint foreclose any blanket suggestion that the Project can be expected to result in no benefits to the public. See Hirsch v. Arthur Andersen & Co., 72 F.3d 1085, 1092 (2d Cir. 1995) (noting that "conclusory allegations need not be credited . . . when they are belied by more specific allegations of the complaint"). Instead, their collective import is that the costs involved, measured in terms of either government spending or the impact the Project will have on the character of the neighborhood and its current residents, will dwarf whatever benefits result.

In other words, the appellants have effectively conceded what Rosenthal found to have been a complete defense to a public-use challenge: that viewed objectively, 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 [*59] space, and various mass-transit improvements. But the plaintiffs then expend considerable effort explaining why these proffered public uses should nonetheless be rejected as "pretextual," not because they are false, but because they are not the real reason for the Project's approval.

For example, on the subject of whether the Project will redress blight, the complaint alleges that this is a "pretext with no basis in fact," explaining that "far from being 'blighted,' the Takings Area [as distinct from the Renewal Area] rests smack in the middle of some of the most valuable real estate in Brooklyn." But the complaint does not allege, nor could it, that either the Renewal Area or the Takings Area are devoid of blight. The claim made is that the "City of New York . . . never declared that the Takings Area [as opposed to the Renewal Area] was 'blighted' and . . . never designated it for redevelopment" until three years after the project was announced, an implicit acknowledgment of the fact that the Renewal Area, which makes up "[n]early half" of the Project site, was first designated as blighted in 1968, a designation that has since been reaffirmed by New York City ten times, most recently in 2004. By the same token, although alleging that none of their own properties are blighted, the plaintiffs have conceded that even within the Takings Area, many properties are blighted and that the Project, as a whole, targets an area more than half of which is significantly blighted. The blight study commissioned by ESDC in 2006 determined that the conditions of blight extended well into the Takings Area, and the complaint alleges no facts to the contrary. The study concluded that "the non-rail yard portion of the project site is characterized by unsanitary and substandard conditions including vacant and underutilized buildings, vacant lots, irregularly shaped lots, building facades that are in ill-repair (e.g., crumbling brickwork, graffiti, flaking paint), and structures suffering from serious physical deterioration."

As to the issue of affordable housing, the complaint contends that "[f]undamentally, the Project is comprised of luxury housing" because 69% of the housing units will be "market rate, luxury units" and the remaining units will, for the most part, be introduced as part of the second phase of development, which is not guaranteed. But the complaint concedes in the ensuing allegations that at least 550 below-

market units (roughly 5% of the total number of units proposed) are slated to be built in the first phase of development, and that roughly three times that number are slated for the next phase. Viewed carefully, the plaintiffs' contention is not that the Project will result in no below-market housing, but that when viewed "from the perspective of [potential] residents' income, the affordable [housing] units proposed from the Project will not remotely offset the impact of the luxury housing."

We need not go further. As Berman and Rosenthal illustrate, the redevelopment of a blighted area, even standing alone, represents a "classic example of a taking for a public use." Rosenthal, 771 F.2d at 46; see also Kelo, 545 U.S. at 483-84. Nor does it matter that New York has enlisted the services of a private developer to execute such improvements and implement its development [*60] plan. Once we discern a valid public use to which the project is rationally related, it "makes no difference that the property will be transferred to private developers, for the power of eminent domain is merely the means to the end." Rosenthal, 771 F.2d at 46.

Similarly, we are without authority to provide the appellants the relief they seek based on the fact that their individual lots are not blighted, notwithstanding the understandable frustration this must cause them. The appellants do not dispute the presence of significant blight in the Takings Area and even greater blight in the adjacent Renewal Area. "[O]nce it has been shown that the surrounding area is blighted, the state may condemn unblighted parcels as part of an overall plan to improve a blighted area." In re G. & A. Books, Inc., 770 F.2d 288, 297 (2d Cir. 1985). This is "because 'community redevelopment programs need not, by force of the Constitution, be on a piecemeal basis-lot by lot, building by building.'" Rosenthal, 771 F.2d at 46 (quoting Berman, 348 U.S. at 35). The public-use requirement will be satisfied as long as the purpose involves "developing [a blighted] area to create conditions that would prevent a reversion to blight

in the future." Kelo, 545 U.S. at 484 n.13 (emphasis omitted).

Lastly on this point, we must reject the argument that the ESDC is undeserving of such deference because it is merely a state agency deputized by the legislature. The Supreme Court has expressly extended deference in such matters to both "Congress and its authorized agencies." Berman, 348 U.S. at 33. In this context, "State legislatures are as capable as Congress of making such determinations within their respective spheres of authority." Midkiff, 467 U.S. at 244. Indeed, Midkiff suggested it would be "ironic" if "state legislation [were] subject to greater scrutiny under the incorporated 'public use' requirement than is congressional legislation under the express mandate of the Fifth Amendment." Id. at 244 n.7. Nor do we see why it is relevant to the constitutional analysis that the ESDC, which in any case is not the only participant in this story, is organized under state law as a public-benefit corporation. See N.Y. Unconsol. Law § 6254(1) (McKinney 2007) (providing that the ESDC "shall be a corporate governmental agency of the state, constituting a political subdivision and public benefit corporation").

VI.

Because it correctly rejected, on the basis of the complaint and the documents referenced therein, the argument that the Project was not rationally related to a public use, the district court concluded that the appellant's claim would have necessarily failed under the precedents established in Berman and Midkiff. But the district court's analysis did not end there because it determined that Kelo opened up a separate avenue for a takings challenge under which a plaintiff could claim a taking had been effectuated "'under the mere pretext of a public purpose, when [the] actual purpose was to bestow a private benefit.'" Goldstein, 488 F. Supp. 2d at 282 (quoting Kelo, 545 U.S. at 478).

[*61] Primarily underlying this claim is a passing reference to "pretext" in the Kelo majority opinion in a single sentence. See id. at 478 ("Nor would the City be allowed to

take property under the mere pretext of a public purpose when its actual purpose was to bestow a private benefit."). Fortunately, the Supreme Court's guidance in Kelo need not be interpreted in a vacuum. Kelo posed a novel question of law precisely because the City of New London had "not [been] confronted with the need to remove blight." Id. at 482. The Supreme Court granted certiorari on the limited question of "whether a city's decision to take property for the purpose of economic development satisfies the 'public use' requirement of the Fifth Amendment." Id. at 477. Accordingly, the issue of pretext must be understood in light of both the holding of the case, which, in permitting a taking solely on the basis of an economic development rationale, reaffirmed the "longstanding policy of deference to legislative judgments in this field," id. at 480, as well as the decision's self-identification with a tradition of public use jurisprudence that "[f]or more than a century . . . has wisely eschewed rigid formulas and intrusive scrutiny in favor of affording legislatures broad latitude in determining what public needs justify the use of the takings power." Id. at 483.

Prior to Kelo, no Supreme Court decision had endorsed the notion of a "pretext" claim, although a few lower court cases contained language suggesting that a pretextual public use may be invalid. See, e.g., 99 Cents Only Stores v. Lancaster Redevelopment Agency, 237 F. Supp. 2d 1123, 1129 (C.D. Cal. 2001) ("No judicial deference is required . . . where the ostensible public use is demonstrably pretextual"), appeal dismissed as moot, 60 F.App'x 123 (9th Cir. 2003); Aaron v. Target Corp., 269 F. Supp. 2d 1162, 1177 (E.D. Mo. 2003) (same), rev'd on other grounds, 357 F.3d 768 (8th Cir. 2004);Cottonwood Christian Ctr. v. Cypress Redev. Agency, 218 F. Supp. 2d 1203, 1229 (C.D. Cal. 2002) (same). But see Montgomery v. Carter County, Tenn., 226 F.3d 758, 765-66 (6th Cir. 2000) (observing that "[v]ery few takings will fail to satisfy that standard [and] the examples suggested in the reported cases tend to be highly implausible hypotheticals"). These

claims have come in all shapes and sizes. See Cottonwood Christian Ctr., 218 F. Supp. 2d at 1228 (challenging taking where the "evidence does not necessarily support a finding of blight"); 99 Cents Only Stores, 237 F. Supp. 2d at 1130 (challenging taking premised on the assumption that the departure of Costco would result in future blight); Aaron, 269 F. Supp. 2d at 1174-75 (entertaining claim of pretext where the requisite "findings of blight rested in part on the condition of [the beneficiary's own] personal property, [*62] and on the substandard condition of property [the beneficiary] was obligated to maintain under the various leases"). Tellingly, it appears that in each of these district court cases, the plaintiff had contested whether any public use would be served by the taking.

In contrast, the particular kind of "pretext" claim the plaintiffs in this case advance bears an especially dubious jurisprudential pedigree: The plaintiffs have effectively acknowledged the Project's rational relationship to numerous well-established public uses, but contend that it is constitutionally impermissible nonetheless because one or more of the government officials who approved it was actually-and improperly-motivated by a desire to confer a private benefit on Mr. Ratner. The allegations in support of this claim primarily involve purported excesses in the costs of the plan as measured against its benefits. The appellants seek to use these alleged failings to gain discovery into the process by which the ESDC approved this Project. Among other things, as was made clear at oral argument, they seek depositions of pertinent government officials, along with their emails, confidential communications, and other pre-decisional documents. They also dispute various plausible assumptions underlying the Project's budget.

Allowing such a claim to go forward, founded only on mere suspicion, would add an unprecedented level of intrusion into the process. See Kelo, 545 U.S. at 488 (remarking that the "disadvantages of a heightened form of review are especially pronounced in this type of case. Orderly implementation of a comprehensive redevelopment

plan obviously requires that the legal rights of all interested parties be established before new construction can be commenced."). Prior to Kelo, it was well settled that "it is only the taking's purpose, and not its mechanics that must pass scrutiny under the Public Use Clause." Midkiff, 467 U.S. at 244.

Accordingly, we must reject the notion that, in a single sentence, the Kelo majority sought sub silentio to overrule Berman, Midkiff, and over a century of precedent and to require federal courts in all cases to give close scrutiny to the mechanics of a taking rationally related to a classic public use as a means to gauge the purity of the motives of the various government officials who approved it. See Kelo, 545 U.S. at 483 (characterizing more than a century of Public Use Clause jurisprudence as having "wisely eschewed rigid formulas and intrusive scrutiny in favor of affording legislatures broad latitude in determining what public needs justify the use of the takings power"); Midkiff, 467 U.S. at 241 ("[W]here the exercise of the eminent domain power is rationally related to a conceivable public purpose, the Court has never held a compensated taking to be proscribed by the Public Use Clause."); Berman, 348 U.S. at 32 ("The role of the judiciary in determining whether [the takings] power [*63] is being exercised for a public purpose is an extremely narrow one"); United States ex rel. Tenn. Valley Auth. v. Welch, 327 U.S. 546, 552, 66 S. Ct. 715, 90 L. Ed. 843 (1946) ("Any departure from this judicial restraint would result in courts deciding on what is and is not a governmental function . . . a practice which has proved impracticable in other fields."); Old Dominion Land Co. v. United States, 269 U.S. 55, 66, 46 S. Ct. 39, 70 L. Ed. 162 (1925); ("[T]he declaration by Congress of what it had in mind . . . . is entitled to deference until it is shown to involve an impossibility."); United States v. Gettysburg Elec. Ry. Co., 160 U.S. 668, 680, 16 S. Ct. 427, 40 L. Ed. 576 (1896) ("[W]hen the legislature has declared the use or purpose to be a public one, its judgment will be respected by the courts, unless the use be palpably without reasonable

foundation."); cf. Franco v. Nat'l Capital Revitalization Corp., 930 A.2d 160, 171 (D.C. 2007) (recognizing that in this context, courts must be "especially careful not to indulge baseless, conclusory allegations that the legislature acted improperly").

We do not read Kelo's reference to "pretext" as demanding, as the appellants would apparently have it, a full judicial inquiry into the subjective motivation of every official who supported the Project, an exercise as fraught with conceptual and practical difficulties as with state-sovereignty and separation-of-power concerns. Beyond being conclusory, the claim that the "decision to take Plaintiffs' properties serves only one purpose" defies both logic and experience. "Legislative decisions to invoke the power to condemn are by their nature political accommodations of competing concerns." Brody v. Vill. of Port Chester, 434 F.3d 121, 136 (2d Cir. 2005). And as Justice Scalia observed in words, if anything, more pertinent in this case:

[W]hile it is possible to discern the objective "purpose" of a statute (i.e., the public good at which its provisions appear to be directed) . . . . discerning the subjective motivation of [a legislative body] is, to be honest, almost always an impossible task. The number of possible motivations, to begin with, is not binary, or indeed even finite. . . . To look for the sole purpose of even a single legislator is probably to look for something that does not exist.

Edwards v. Aguillard, 482 U.S. 578, 636-37, 107 S. Ct. 2573, 96 L. Ed. 2d 510 (1987) (Scalia, J., dissenting) (emphasis in original). Thus, while "a legislature may juggle many policy considerations in deciding whether to condemn private property," the task of a federal court reviewing the constitutionality of such a taking should be one of "patrolling the borders" of this decision, viewed objectively, not second-guessing every detail in search of some illicit improper motivation. See Brody, 434 F.3d at 135.

We reach this conclusion preserving the possibility that a fact pattern may one day arise in which the circumstances of the approval process so greatly undermine the basic legitimacy of the outcome reached that a closer objective scrutiny of the justification being offered is required. In this area, "hypothetical cases . . . can be confronted if and when they arise." Kelo, 545 U.S. at 487; see also id. at 487 n.19. But we hold today that where, as here, a redevelopment plan is justified in reference to several classic public uses whose objective basis is not in doubt, we must continue to adhere to the Midkiff standard, i.e., that the Atlantic Yards Project:

may not be successful in achieving its intended goals. But 'whetherin fact the [Project] will accomplish its objectives is not the question: the [constitutional requirement] is satisfied if . . . the . . . [*64] [state] rationally could have believed that the [taking] would promote its objective.'

Midkiff, 467 U.S. at 242 (quoting Western & Southern Life Ins. Co. v. State Bd. of Equalization, 451 U.S. 648, 671-672, 101 S. Ct. 2070, 68 L. Ed. 2d 514 (1981) (emphasis in Midkiff)).

The appellants urge that we reach a contrary result because, unlike in Kelo, the Atlantic Yards Project was allegedly proposed in the first instance by Ratner himself. The sequence of events was certainly one of the factors considered in Kelo. However, here, New York long ago decided by statute not to restrict the ESDC's mandate to those "projects in which it is the prime mover." E. Thirteenth St. Cmty. Ass'n v. N.Y. State Hous. Fin. Agency, 218 A.D.2d 512, 630 N.Y.S.2d 517, 518 (App. Div. 1995); see also N.Y. Unconsol. Law § 6252 (McKinney 2007) (providing the ESDC should "encourag[e] maximum participation by the private sector of the economy"). And as Kelo reaffirmed, the mere fact that a private party stands to benefit from a proposed taking does not suggest its purpose is invalid because "[q]uite simply, the government's pursuit of a public purpose will

often benefit individual private parties." Kelo, 545 U.S. at 485.

Moreover, in this case, substantial factors not present in Kelo support our result. As we have already illustrated, private economic development is neither the sole, nor the primary asserted justification for the Atlantic Yards Project. The appellants have conceded, if only reluctantly, that the Atlantic Yards Project will target a long-blighted area, result in the construction of a publicly owned (albeit generously leased) stadium, create a public open space, increase the quantity of affordable housing, and render various improvements to the mass transit system. Furthermore, they have failed to allege any specific examples of illegality in the elaborate process by which the Project was approved, any specific illustration of improper dealings between Mr. Ratner and the pertinent government officials, or any specific defect in the Project that would be so egregious as to render it, on any fair reading of precedent, "palpably without reasonable foundation." Midkiff, 467 U.S. at 241.

This case has been very well litigated on both sides. At the end of the day, we are left with the distinct impression that the [*65] lawsuit is animated by concerns about the wisdom of the Atlantic Yards Project and its effect on the community. While we can well understand why the affected property owners would take this opportunity to air their complaints, such matters of policy are the province of the elected branches, not this Court.

VII.

Finally, we must reject the due process and equal protection claims brought by the appellants for essentially the reasons stated by the district court. Accordingly, for the foregoing reasons, we hereby AFFIRM the judgment of the district court dismissing the federal claims with prejudice and the state claim without prejudice.