Kelo at the Crossroads of Constitutional and Administrative Law

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For twenty years, the Supreme Court's broad account of the public-use requirement of the Fifth Amendment under Kelo v. City of New London *has been the target of constant criticism for its excessive deference to government acquisitions of land. The Court's recent* Loper Bright *decision marks the rejection of a similar deferential approach in administrative law. There is no good reason for these differential levels of scrutiny to survive in the move from administrative to constitutional law, especially when the same objective—the protection of property rights—is at play in both contexts. The very fears of government abuse that drove the rejection of deference in* Chevron v. NRDC *also apply with equal force to* Kelo*, whose account of public use is vulnerable to the same abuse. The best institutional design in both contexts is to ensure that both private and public actions maximize, to the extent humanly possible, human welfare, which means that both errors in judgment—too much deference and too little—have to be included in the mix. That objective cannot be achieved by ignoring government abuses of excessive condemnations like those in* Kelo*, to concentrate solely on abuses by private parties in land use and development, especially when the risk of government abuse is at least as great or greater than that of private abuse. Thus, it is, as it were, not conceivable that a sound account of the phrase "public use" could follow the current practice and validate any government action that offers "any conceivable" justification to reject private challenges. As a first approximation, these two kinds of error carry equal weight, and thus call for adoption of a standard of intermediate scrutiny in public-use cases, which is in line with the rejection of* Chevron *deference.*

Accordingly, that balance is best struck by allowing the state to take private property by and for the use of the public, and also to enact laws and regulations to control serious holdout problems generated by unique physical conditions. But the flabby rational-basis test should not bless any government scheme that orders a simple transfer between private parties, as in Hawaiian Housing Authority v. Midkiff*,* Kelo*, and more recent cases like* Brinckmann v. Town of Southold*, and* Bowers Development LLC v. Oneida County Industrial

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Development Agency. *Yet the Supreme Court took a discreet pass in* Bowers *by denying certiorari. In so doing, it confirmed its relative indifference to the issue, given its recent preference of worrying more about structural issues than substantive ones, so that over time the movement back to discretion is likely in practice to get stronger in both areas.*

I. The Tricky, but Necessary, Move from Administrative to Constitutional Law

Today the theories underlying constitutional and administrative law are on an apparent collision course. One manifestation of that problem arises in asking how best to interpret the public-use language in the Takings Clause of the Fifth Amendment to the Constitution: "nor shall private property be taken for public use without just compensation."[1] On that issue, *Kelo v. City of New London*[2] gained much notoriety for its full-throated endorsement that legislatures and administrators should receive from courts vast deference in applying that language. Nothing in the text explains why that should be so, especially on the mundane facts of *Kelo*—the condemnation of an ordinary, but famous, pink house overlooking the Long Island Sound for a flawed redevelopment project that never took place. The decision allowing condemnation to go forward provoked a deep, hostile public reaction, which led to much state action on both the judicial and legislative levels.[3] But twenty years since that decision, the Supreme Court has not made a dent in *Kelo*'s constitutional structure.

For a long time, it could be argued that the deference found in *Kelo* largely mirrored a similar attitude toward textualism in administrative law, which is largely governed today by the Administrative Procedure Act of 1946.[4] That Act sets out a framework for judicial review of administrative action. Until recently, the two lines of case law were in rough harmony on most matters of

1. U.S. CONST. Amend. V.

2. 545 U.S. 469, 477-83 (2005).

3. *See, e.g.*, Ilya Somin, *The Limits of Backlash: Assessing the Political Response to* Kelo, 93 MINN. L. REV. 2100 (2010); Andrew P. Morriss, *Symbol or Substance? An Empirical Assessment of State Responses to Kelo*, 17 SUP. CT. ECON. REV. 237 (2009).

4. Pub. L. No. 79-404, 60 Stat. 237 (1946) (codified as amended at 5 U.S.C. §§ 551-559, 701-706).

interpretation, for *Chevron v. NRDC*[5] applied a two-stage test that ran as follows: unless, at stage one, the language of the statute is unambiguous (itself an ambiguous word) on the precise point at issue, then at stage two, courts should defer to the interpretation that an agency gives to disputed language.[6] Yet that rough symmetry was shattered when a divided Supreme Court in *Loper Bright Enterprises v. Raimondo*[7] explicitly overruled the venerable two-step doctrine. The fly in the ointment is deciding when to switch the analysis from part one to part two, over which there was enormous disagreement in both theory and practice.[8]

Putting aside small points of uncertainty, *Loper Bright* represents a sea change on one of the most contentious issues of administrative and constitutional law with its stress on the best overall interpretation, in which agency discretion plays a more restricted role. No longer do courts let agencies articulate a synoptic view of the legal and social landscape needed to make sense of the many moving parts that go into any complex regulatory system.

The Court's six-member majority in *Loper Bright* was aware of these many complications. But it was equally troubled by the downside of government discretion. The greater the leeway afforded to government officials and agencies to regulate, the greater the strain on the private parties whom they regulate. It is not as though the uncertainty is eliminated when it is shifted from one branch to another. For the expansion of state power in *Loper Bright* produces greater strain on regulated parties who now have to contend not only with an abuse of discretion at any given time, but with shifts, commonly called flip-flops, when the dictates of the one administration are displaced by its successor. Just that happened in dramatic terms with the transition from the Biden to the Trump administration, which has upended what were once settled expectations about the role of Diversity, Equity, Inclusion, and Accessibility (DEIA) in the provision of government jobs and grants. This initiative was dominant in the Biden administration[9] but strictly verboten in the Trump administration.[10] In this

5. 467 U.S. 837, 842-44 (1984).

6. *Id*. at 844 ("We have long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer, and the principle of deference to administrative interpretations." (citations omitted)).

7. 603 U.S. 369 (2024).

8. RICHARD A. EPSTEIN, THE DUBIOUS MORALITY OF MODERN ADMINISTRATIVE LAW 889-99 (2020); *see also* BENJAMIN M. BARCSEWSI, CONG. RSCH. SERV., R44954, CHEVRON DEFERENCE: A PRIMER (2023) (explaining *Chevron* deference).

9. The Biden administration's position was made clear by an Executive Order issued on his first day in office. *See* Advancing Racial Equity and Support for Underserved Communities Through the Federal Government, Exec. Order No. 13985, 86 Fed. Reg. 7009 (Jan. 20, 2021) ("It is therefore the policy of [the Biden] Administration that the Federal Government should pursue a comprehensive approach to advancing equity for all, including people of color and others who have been historically underserved, marginalized, and adversely affected by persistent poverty and inequality. Affirmatively advancing equity, civil rights, racial justice, and equal opportunity is the responsibility of the whole of our Government.").

10. The Trump position was equally made clear on his first day in office. *See* Ending Radical And Wasteful Government DEI Programs and Preferencing, Exec. Order No. 14151, 90 Fed. Reg. 8339 (Jan. 20, 2025), https://www.whitehouse.gov/presidential-actions/2025/01/ending-radical-and-wasteful-

regard, executive orders are now of a piece with administrative regulations. In both cases, the principled objection to discretion is not an argument in favor of one administration over the other. It is instead an objection to the uncompensated uncertainty inherent in the current system of sudden reversals.[11]

A system that prides itself on discretion is reluctant to acknowledge that regulators too are prone to error that cannot be checked by other institutions. High levels of discretion often are expressed not in the form of rules but in the form of multi-factored standards that generate high uncertainty that can invite heavy penalties. Just think of the huge fines ($30,000 per day) that the EPA officials sought to impose on Michael and Chantell Sackett, who had the temerity to seek a permit to build a simple house about six-hundred feet away from Priest Lake, Idaho. The charge was that their actions threatened to discharge pollution into the waters of the United States.[12] The EPA's ruling did not rest on any estimates of the risk of pollution; nor did the EPA, for all its supposed expertise, even once attempt to prove that any discharges from the Sacketts' land actually polluted, or could have polluted, Priest Lake. The EPA's unfettered level of discretion rejected the private-law view that requires imminent peril to property in order to issue an injunction. In its place, it adopted a rule allowing the EPA to block any project at its inception for virtually any risk, no matter how remote. In the private context, both forms of error matter. Thus, where a private party seeks injunctive relief, it is well understood that the availability of damages as a backstop, especially when awarded on a strict-liability basis, reduces the error from not issuing an early injunction. The situation can then be further improved by coupling it with a promptly tailored injunction once the harm manifests itself. This rule-bound system reduces the play in the joints, thereby decreasing both litigation and compliance costs. But under modern administrative law, the power of the state is exerted in endless hearings, so that every conceivable complication has to be fully addressed at the outset in order to obtain government approval. Vast amounts of energy are spent chasing remote contingencies down ratholes before there is sufficient information to decide which, if any, of these possibilities are likely to occur, and with what severity. The situation is made even worse because of the common flip-flops on, say, the relationship between energy production and global warming.

The Supreme Court majority in *Loper Bright* was cognizant of these difficulties in applying the extant rule that did nothing to resolve textual

government-dei-programs-and-preferencing [https://perma.cc/BEZ7-BLJD] ("Section 1. Purpose and Policy. The Biden Administration forced illegal and immoral discrimination programs, going by the name "diversity, equity, and inclusion" (DEI), into virtually all aspects of the Federal Government, in areas ranging from airline safety to the military.").

11. For more in flip-flops, see Daniel Hemel, *Flips and Splits in Administrative Law*, 74 DUKE L.J. 1703, 1713-17 (2025), noting how reversals under *Chevron* can create major flips in administrative rules.

12. Sackett v. Env't Prot. Agency, 598 U.S. 651, 657, 662-63 (2023). The same case had been before the Court a decade ago, Sackett v. Env't Prot. Agency, 566 U.S. 120 (2012). For my criticism, see Richard A. Epstein, *In Sackett Case, a Shallow Dive into "Wetlands"*, HOOVER INST. (Oct. 11, 2022), https://www.hoover.org/research/sackett-case-shallow-dive-wetlands [https://perma.cc/7UT9-ZDBF].

ambiguity. The Magnuson-Stevens Act[13] was passed to impose government restrictions against overfishing that might otherwise lead to the tragedy of the commons, without specifying exactly how that challenge should be met. The statute stated explicitly that the regulated vessels had to make room for "one or more observers [to] be carried on board . . . for the purpose of collecting data necessary for the conservation and management of the fishery."[14] But when federally appropriated funds ran short for this program, a local management council unilaterally ordered the boatowners to pay for the government crews that monitored their activities, at a stiff financial price, running to perhaps $710 per day—roughly equal to twenty percent of profits for a typical boat. The textual grant covers those measures "necessary and appropriate for the conservation and management of the fishery."[15]

The then-*Chevron* universe produced three different views in the lower courts. First, the statutory grant of power was said to be sufficiently clear that these expenditures were indeed authorized; second, that the provision was clear the opposite way, namely that the expenditures were not authorized; third, an intermediate position that *Chevron* left it to the government to choose whether to extend those taxing powers to inferior officers. At this juncture, Chief Justice Roberts's majority opinion was strong on one key issue but oddly reticent on the second. It thus properly trashes *Chevron* for cavalierly ignoring the clear command of Section 706 of the Administrative Procedure Act, which states: "To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action."[16]

Section 706 puts the final interpretation on questions of law in the hands of the courts not because of any unique insight but because its logic embraces the same division of authority that has been used worldwide to reflect the comparative advantage that trial courts have on disputes over matters of fact relative to the similar advantage that appellate courts have on matters of law.[17] Administrative tribunals uniformly follow that same principle. Chief Justice Roberts quoted, like just about everyone else, Chief Justice John Marshall's apodictic observation that "[i]t is emphatically the province and duty of the judicial department to say what the law is."[18] It is worth noting that this passage does not draw any distinction between the rendering of statutes, regulations or of the Constitution; it only says that the judicial duty, as well as the right, i.e. province, are lodged in the courts. That same message is also found in Federalist No. 78, where Hamilton famously says:

13. *See* Pub. L. No. 94-265, 90 Stat. 331 (1976) (codified at 16 U.S.C. §§ 1801-1882).
14. 16 U.S.C. § 1853(b)(8) (2024).
15. *Id*. § 1853(a)(1)(A).
16. 5 U.S.C. § 706 (2024).
17. I have developed these points at greater length in EPSTEIN, *supra* note 8, at 3-5, 85-99.
18. Marbury v. Madison, 5 U.S. 137, 177 (1803).

> [T]he courts were designed to be an intermediate body between the people and the legislature, in order, among other things, to keep the latter within the limits assigned to their authority. The interpretation of the laws is the proper and peculiar province of the courts. A constitution is, in fact, and must be regarded by the judges, as a fundamental law. It therefore belongs to them to ascertain its meaning as well as the meaning of any particular act proceeding from the legislative body.[19]

Section 706 thus treats any agency as if it were a court of first instance, so that questions of law on appeal are interpreted (often under the same statute) in the same way regardless of the route by which they reach an Article III court—private litigation or administrative action. Chief Justice Roberts insisted that the judicial expertise on statutory interpretation makes it unwise to prioritize uniformity through a single agency decree. He was confident of getting better interpretive results through the courts, such that, if the conflicts do arise between the circuit courts, the Supreme Court can resolve them.

Roberts's promising beginning peters out after his ultimate but timid decision to vacate and remand, without so much as a hint as to what outcome those "traditional tools of statutory interpretation" require.[20] He should have given that question his best shot since he already had the benefit of the three lower-court decisions. That remand implicitly undercuts the claim that the Supreme Court itself knows how its broad strictures apply. Here is one resolution unique to this case that was preferable to his strategic silence. The agency actions butt up against the undisputed power of Congress to make appropriations under Article I, Section 7, Clause 1, which states that "[a]ll Bills for raising Revenue shall originate in the House of Representatives; but the Senate may propose or concur with Amendments as on other bills."[21] This provision is too easily circumvented if non-legislative bodies can use other, non-legislative methods to make these appropriations or, worse, allow subordinate agencies to impose whatever tax, however denominated, on private individuals. The proper division of authority between the branches should not let delegated authority undercut the exclusive authority of Congress. Reaching that conclusion, or at least explaining why it is incorrect, could show how the traditional interpretive methods work.

Sadly, however, just days before *Loper Bright*, the Court in *Consumer Financial Protection Bureau v. Community Financial Services Association of America*[22] read the closely related Appropriations Clause—"No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by law"[23]—to let the Consumer Financial Protection Bureau (CFPB) receive its funding not through an annual congressional appropriation but straight from the coffers of the Federal Reserve Board. The funds would come out of the latter's

19. THE FEDERALIST NO. 78, at 525 (Alexander Hamilton) (Jacob E. Cooke ed., 1961); *see also* Loper Bright Enters. v. Raimondo, 603 U.S. 369, 403 (2024) (citing Hamilton).

20. *Loper Bright*, 603 U.S. at 373.

21. U.S. CONST. art. I, § 7, cl. 1.

22. 601 U.S. 416, 421 (2024) [hereinafter *CFPB*].

23. U.S. CONST. art. I, § 9, cl. 7.

surplus, in an amount that the CFPB Director, not Congress, deems "reasonably necessary,"[24] up to some statutory cap for its operations. Chief Justice Roberts signed onto one of the worst opinions from Justice Clarence Thomas, to bless this practice, which offers textbook instructions for lodging the taxing power in an inferior administrative agency. Moving this appropriations process outside the standard traditional structure creates a dangerous precedent, in which these multiple expenditures are no longer subject to uniform congressional budgetary control. The decision is also a textual travesty, for Congress does not make any annual appropriation by allowing multiple-year expenditures by an independent, unaccountable agency. At this point, there is an odd contrast. *Loper Bright* points to an external set of interpretive standards that seven members of the Supreme Court (Alito and Gorsuch dissenting) disregarded in *CFPB*. It shows, sadly, that the Supreme Court as a collective body cannot settle on any fixed set of interpretive principles for the long haul.

It is precisely this uncertainty that has fueled much of the academic discourse, heightening legitimate doubts about the various arguments that the Chief Justice raises along the way. In my view, the most obvious objection to these various theories is that they failed to fill the hole left by the Roberts opinion because they typically say nothing about the concrete arguments on interpretation of the relevant strength of the alternative views of the statutory scheme. Too often academics reason at too high levels of abstraction, at which point it becomes difficult to pin down the correct solution to any midlevel issue of textual interpretation. Daniel Hemel, for instance, parts company from *Loper Bright* because he claims that "flips" should not be taken in isolation, but must be paired with the "splits" problem, which arises when splits between the circuits lead to excessive Supreme Court intervention.[25] Hemel claims that it is more likely that courts will divide over the question of what is the correct answer than over the question of what is a reasonable interpretation of the identical provision. But why should that be so? No matter what the legal regime, difficult cases will always fall at some indeterminate line. *Loper Bright* itself produced three separate conclusions—clear one way, not sure, and clear the other way. Three different courts acting independently could have also reached these three different conclusions.

Hence there is parallel ambiguity—especially since *Chevron* waffles on how best to do its two-part test—to decide whether the statute is clear enough. To resolve that problem, the Court in *Chevron* notes in Footnote 9 that

> [t]he judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional

24. 12 U.S.C. § 5497(a)(1) (2024) ("In General: Each year (or quarter of such year), beginning on the designated transfer date, and each quarter thereafter, the Board of Governors shall transfer to the Bureau from the combined earnings of the Federal Reserve System, the amount determined by the Director to be reasonably necessary to carry out the authorities of the Bureau under Federal consumer financial law, taking into account such other sums made available to the Bureau from the preceding year (or quarter of such year).").

25. *See* Hemel, *supra* note 11, at 1717-19.

> intent . . . . If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect.[26]

So, in the end, by different routes, both *Chevron* and *Loper Bright* rely on the same undefined tool kit with perhaps this difference—the use of the term "precise" is meant to narrow the number of cases decided at stage one. But still, that issue has to be traversed in every case under either rule, so that in the abstract it is hard to predict that there will be less harmony under *Loper Bright* than under *Chevron*; judges always have to ask themselves whether to follow precedents they do not like, or to distinguish on grounds that look arbitrary, or to disapprove of them outright. Under *Chevron* conflicts can arise either at stage one or stage two. So this debate over the relative frequency of conflicts all comes out in the wash, but the flip-flop problem remains vivid in all cases, and it cannot be eradicated or controlled by Supreme Court decisions that impose uniformity on the area. These flip-flops are always very costly to implement because they always require countless government agencies and private parties to make major adjustments on the fly as in the DEIA cases, which remain in massive transition as this Article is being written.

Indeed, these debates over statutory interpretation have a surreal quality to me, as someone who was brought up in the Roman law tradition. Lots of documents have to be interpreted: constitutions, statutes, regulations, contracts with drafting issues. In many cases, interpretation has nothing to do with the separation of powers, one of the leitmotifs in the administrative-law literature, recently reviewed by Professor Abbe Gluck.[27] Adopting a starting point that celebrates separation of powers at a high level of abstraction may demote but does not negate an ordinary-language approach that then filters into these discussions of the somewhat fictive dialogue between Congress and the courts over time, no less, when both are silent. But such institutional gambits are not a theory of meaning because they cannot answer the question of what should be done with two identical texts, one of which comes out of a legislative committee and the other from a group of laypeople, some with sophistication in the law and others not. Finding meaning for both groups means reading the language closely, and understanding the background presumptions that are commonly read into ordinary language. Consider the famous illustration by Wittgenstein:

> Someone says to me, "Shew the children a game." I teach them gambling with dice, and the other says, "I didn't mean that sort of game." Must the exclusion of the game with dice have come before his mind when he gave me the order?[28]

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26. Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842-43 n.9 (1984) (citations omitted).

27. For references to this rule, see Abbe R. Gluck, *Overruling* Chevron *Without a Coherent Theory of Statutory Interpretation and the Court-Congress Relationship*, 62 HARV. J. ON LEGIS. 20, 24-28 (2024).

28. LUDWIG WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS 33 (G.E.M. Anscombe trans., Basil Blackwell 2d ed. 1958) (1953).

Thus the correct answer here is that the respondent was right to object but not because he had this or any of a dozen caveats in mind. Rather, it is because once the issue is squarely confronted, it triggers a general response that is in both theory and practice tied to dialogue over background principles inherent in any system of legal rules, whether articulated by code adjudication or not. So, the statement that one should not kill does not rule out killing, for example, in self-defense or in defense of a third party, or in wartime. The general rule thus becomes a presumption subject to exceptions furthering the minimization of force, which is advanced by allowing the self-defense and kindred examples. Once introduced, these generic exceptions are themselves thereafter qualified to deal with excessive or disproportionate force. None of these adaptations depends in the slightest on legislative history, and many date back to Roman law.[29] Their use is not just for today but tomorrow and yesterday, here and everywhere, for otherwise a given text can have as many meanings as the days in the calendar. The Chief Justice hints at something similar when he observes "[p]resumptions have their place in statutory interpretation, but only to the extent that they approximate reality."[30] But he offers no theory here either.

Alas, this natural-law view is not in fashion. Thus in her recent article on the issue, Gluck, for example, claims that we should interpret statutes as they are understood *today*,[31] and not at the time of the Framing. One reason why this might be so, Gluck reminds us, is that statutes that have become obsolete may languish uncorrected unless a court moves to update the response. She writes:

> The opinion [in *Loper Bright*] seems to assume that Congress can update statutes as often as needed to keep up with changing technologies and facts, so broad delegations to agencies are unnecessary. But we all know that such constant updating by Congress is neither possible nor usually wise, given the pace and complexity of many regulatory schemes.[32]

But this objection need assume no such thing about the activity level in any or all Congresses. Judicial revision is not error-free either; indeed it often contains purposive alterations of the status quo introduced for no better reason than the new administration wishes to make its mark on the law. Indeed, agencies, like courts, can add new gimmicks to interpretation that expand the application of a statute far beyond what legislative compromise allows, and do so in ways that make matters worse. That was so, in my view, with judicial decisions like *Griggs v. Duke Power Co.*[33] on disparate impact in race cases; the

29. Richard A. Epstein, *A Common Lawyer Looks at Constitutional Interpretation*, 72 B.U. L. REV. 699, 705-706, 713-714 (1992).

30. Loper Bright Enters. v. Raimondo, 603 U.S. 369, 399, 403 (2024).

31. Gluck, *supra* note 27, at 37 ("This ordinary-meaning approach is not only inconsistent with the traditional 'faithful-agent-of-the-legislature' approach to statutory cases to which the *Loper Bright* theory harkens back; it is also often inconsistent with the originalism *Loper Bright* endorses. Ordinary people read statutes *today*, not as they were understood in 1964.").

32. *Id*. at 22.

33. 401 U.S. 424, 433-436 (1971).

1979 Policy Interpretation of Title IX in the Carter administration;[34] the broad definition of navigable waters to cover uplands, marshes, and nonnavigable waters, which started with a collusive settlement between the government and the National Resource Defense Council[35] that was converted into broad regulation then sustained under *Chevron* deference;[36] and the level of administrative deference to the Department of Labor in *Auer v. Robbins*,[37] a unanimous decision written by Justice Scalia, which denied that police sergeants and lieutenants were outside the exemption from overtime pay under the Fair Labor Standards Act of 1938,[38] as "bona fide executive, administrative, or professional" employees. All too often, so-called updating is tantamount to redrafting a new statute. At one point, navigable waters and territorial waters were thought to be the same.

In light of these and similar cases, the Chief Justice needed to give an inventory of the earlier cases he was prepared to defend, and so too must defenders of the older *Chevron* system. Getting out of this problem by saying that we have to follow, as Gluck suggests, the meaning that the terms have *today* cannot be right, since all our tomorrows become todays, and all our todays become yesterdays. It is just this form of temporal relativism that contributes to what the Chief Justice called the "unworkability" of *Chevron*, which will surely carry over to the new regime precisely because *Chevron*'s supposed crutches or guides are of no use in dealing with all sorts of statutes where a court has to interpret without the benefit (or burden) of some administrative intermediary. Getting rid of deference is a fine first step, but it does not supply us with principled rules of statutory interpretation; nor does it rule out the need for some administrative deference when a statute states, for example, that a claim under it must be filed within a reasonable time—two different answers can be consistent with the mandate even if they are inconsistent with each other. So here the job is to police discretion, not reject it. Hence, first the agency and then the courts have to look to parallels and comparisons to decide whether the right answer should

34. OFF. FOR CIV. RTS., U.S DEP'T OF EDUC., OCR-00005, A POLICY INTERPRETATION: TITLE IX AND INTERCOLLEGIATE ATHLETICS (1979), https://www.ed.gov/about/offices/list/ocr/docs/t9interp.html [https://perma.cc/L3PN-BL4J]. For my criticism, see Richard A. Epstein, *Foreword: "Just Do It!" Title IX as a Threat to University Autonomy*, 101 MICH. L. REV. 1365, 1365-70 (2003).

35. Nat. Res. Def. Council, Inc. v. Callaway, 392 F. Supp. 685 (D.D.C. 1975).

36. United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 131 (1985) (treating *Chevron* as decisive). After initially construing the Act to cover only waters navigable in fact, in 1975, the Corps issued interim final regulations redefining "the waters of the United States" to include not only actually navigable waters but also tributaries of such waters, interstate waters and their tributaries, and nonnavigable intrastate waters whose use or misuse could affect interstate commerce. *See* 40 Fed. Reg. 31320 (July 25, 1975). More importantly for present purposes, the Corps construed the Act to cover all "freshwater wetlands" that were adjacent to other covered waters. A "freshwater wetland" was defined as an area that is "periodically inundated" and is "normally characterized by the prevalence of vegetation that requires saturated soil conditions for growth and reproduction." *Riverside Bayview Homes*, 474 U.S. at 123-24.

37. The Court deferred to the Department's view that police sergeants and lieutenants were exempt from receiving overtime pay under the Fair Labor Standards Act of 1978 because they qualified as "bona fide executive, administrative, or professional" employees. 519 U.S. 452, 460-63 (1997).

38. 29 U.S.C. § 213(a)(1) (2024).

be measured in days, weeks or years. But such is a parallel to the doctrine of laches, under which equitable claims have to be filed when there is no fixed statute of limitations. The task is difficult but not insuperable, even if here there is no one right answer. So, after a fashion, the Chief Justice is right in his global conclusion. Pity he did not apply that approach to the existing body of caselaw, where it could have provided modest signposts through the haze.

II. What Does *Loper Bright* Tell Us About *Kelo v. City of New London*?

A. The Setup

Kelo resides in a constitutional universe that falls outside of administrative law. Thus, the most recent analyses of that decision concentrate on important issues such as the ability to condemn property to curtail blight, however generously defined by the state,[39] or the historical meaning of the term "public use" in the run-up to *Kelo*,[40] whose twin major precedents were *Berman v. Parker*[41]and *Hawaii Housing Authority v. Midkiff*.[42] The academic discussions of interpretive difficulties in the *Kelo* line of cases all center around how much discretion should be afforded to an administrative agency in deciding whether some property may be taken for public use. Yet I am not aware of any systematic effort to ask whether *Loper Bright* casts even the tiniest shadow on *Kelo*, notwithstanding the inescapable parallels between the low standard of review in both areas.[43] The question is whether a decision to overturn *Chevron*, if pushed hard, has the power to transform the analysis of the public-use doctrine by raising the standard of scrutiny from a lax rational-basis test, where any "conceivable" justification works, to a tougher standard of strict or intermediate scrutiny. It turns out that a revolution that starts in one area should carry over to another—even though predictively that outcome is highly uncertain. Here I concentrate on public use, but the same logic could also carry over to regulatory takings under *Penn Central Transportation Co. v. City of New York*,[44] or the zoning laws

39. Sam Spiegelman, *Blight Made Right: Defects in State Condemnation Laws and a Roadmap for Reform in Alaska and Beyond*, 40 ALASKA L. REV. 341, 346-50 (2024).

40. Joseph E. Decker, *The "Ownership" of Real Property: The Consequences of* Kelo v. City of New London 5-13 (2025) (student work, Seton Hall University) (Seton Hall University eRepository), https://scholarship.shu.edu/cgi/viewcontent.cgi?article=2546&context=student_scholarship [https://perma.cc/U6QE-YN2Q].

41. 348 U.S. 26 (1954).

42. 467 U.S. 229 (1984).

43. *Cf.* Williamson v. Lee Optical, 348 U.S. 483, 485-88 (1955) (exemplifying a weak standard of review). Not coincidentally, that case was also written by Justice Douglas, just after he wrote *Berman*. *Williamson* upheld a statute that required licensed ophthalmologists to fix glasses or fit glasses to faces, thereby excluding lower price opticians from providing a service that they routinely provide everywhere else. *Id*. at 487 ("The Oklahoma law may exact a needless, wasteful requirement in many cases. But it is for the legislature, not the courts, to balance the advantages and disadvantages of the new requirement. It appears that in many cases the optician can easily supply the new frames or new lenses without reference to the old written prescription.").

44. 438 U.S. 104, 124-28 (1978).

starting with *Euclid v. Ambler Realty Co*.[45] But the political economy differs in the three cases: *Kelo* hits local citizens; *Penn Central* hits a select fraction of them; and zoning in *Euclid* tends to keep outsiders at bay.

B. Public Use and the Police Power

Start with the Takings Clause: "[N]or shall private property be taken for public use, without just compensation."[46] There is little legislative history of note on the words "public use," and references to Locke, Hume, and others all presuppose that government takings have to be made for a public use and, even then, only if just compensation is paid. But it is only with the passages on property rights in Blackstone's *Commentaries* that a more systematic theory starts to emerge:

> So great moreover is the regard of the law for private property, that it will not authorize the least violation of it; no, not even for the general good of the whole community. If a new road, for instance, 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 consent of the owner of the land. . . . In this, and similar cases the legislature alone can, and indeed frequently does, interpose, and compel the individual to acquiesce. But how does it interpose and compel? Not by absolutely stripping the subject of his property in an arbitrary manner; but by giving him a full indemnification and equivalent for the injury thereby sustained. The public is now considered as an individual, treating with an individual for an exchange. All that the legislature does is to oblige the owner to alienate his possessions for a reasonable price; and even this is an exertion of power, which the legislature indulges with caution, and which nothing but the legislature can perform.[47]

The passage starts with the implication that the consent of the owner is necessary to take property but then veers in the opposite direction by allowing the state to take the owner's property only after paying compensation that provides "him a full indemnification and equivalent for the injury thereby sustained," though only with an abundance of caution, which is an indirect way of saying that the presumption is set against using this power. Given this limited context, Blackstone had no need to address the police-power regulations that arise when state takings or regulations are intended to deal with harmful activities of the defendant. All of this is done in a regime that has no written constitutional document, but nonetheless, its logic sets the template for the Fifth Amendment. It is therefore no surprise that the text of the Fifth Amendment makes no reference to the police power as it relates to matters of health and safety, which ideally comes into play when government action—e.g., the seizure of illegal firearms—does not require compensation because it suppresses a private wrong,

45. 272 U.S. 365, 394-97 (1926).
46. U.S. CONST. amend. V, cl. 4.
47. 1 WILLIAM BLACKSTONE, COMMENTARIES *84.

most notably in the form of a private-law nuisance.[48] At this point, the implied limitations on government action necessarily come into play. It is quite striking that the Roberts opinion in *Loper Bright* never addresses this vital police-power question, which shows that the Court misses at least one of the traditional canons of interpretation that long predates (as does the police power generally) any direct reference or allusion to the New Deal. Thus, such early cases as *Brown v. Maryland*[49] make explicit recognition (for better or ill) of that power, which is then further elaborated in *Fertilizing Co. v. Hyde Park*,[50] and most controversially *Mugler v. Kansas*,[51] relating to a ban on the manufacture of alcohol within Kansas, even if destined for consumption elsewhere. All of these interpretive issues relating to the scope and limits of that power combine the techniques of textual interpretation and those of necessary implication, which can only be resolved with reference to some sensible normative theory that in the end ties the public law of nuisance to the private law of nuisance, and thus to the body of private law left unaddressed in *Loper Bright*.

C. Digging into the Public-Use Language: The Uniform Extension of Public Use to Bilateral Monopolies and Other Holdout Problems

The above discussion of implied limitations can be addressed only after first examining with care the text, which sets the context for those implications.[52] In this instance, the text of the Takings Clause reads like a strict-liability provision, for it categorically says: "[N]or shall private property be taken for public use, without just compensation."[53] The words "public use" suggest that any reasonable efforts by public officials to expand the use of that power beyond that clear meaning should be regarded as an unprincipled effort to circumvent constitutional norms, by not acting with Blackstone's appropriate caution.

In light of *Loper Bright*, dealing with that risk requires that judges be made the final interpreters of constitutional text, as they are of administrative

48. Putting aside here the two other prongs of the police power: morals and general welfare.

49. 25 U.S. 419, 444 (1827) ("The power to direct the removal of gunpowder is a branch of the police power, which unquestionably remains, and ought to remain, with the States.").

50. 97 U.S. 659, 667-68 (1878) ("That a nuisance of a flagrant character existed, as found by the court below, is not controverted. We cannot doubt that the police power of the state was applicable and adequate to give an effectual remedy. That power belonged to the states when the Federal Constitution was adopted. They did not surrender it, and they all have it now. It extends to the entire property and business within their local jurisdiction. Both are subject to it in all proper cases. It rests upon the fundamental principle that everyone shall so use his own as not to wrong and injure another. To regulate and abate nuisances is one of its ordinary functions.").

51. 123 U.S. 623, 661 (1887) ("Under our system that power is lodged with the legislative branch of the Government. It belongs to that department to exert what are known as the police powers of the State, and to determine, primarily, what measures are appropriate or needful for the protection of the public morals, the public health, or the public safety."). After this explanation, Justice Harlan notes the need for constitutional limitations, left unspecified, under the authority of *Marbury*.

52. For my systematic explication, see RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN, ch. 12 (1985). For an early influential treatment of the subject, see Thomas Merrill, *Economics of Public Use*, 72 CORN. L. REV. 61, 75, 110 (1986) (noting that the public-use requirement is needed to counter the risk of bilateral monopoly).

53. U.S. CONST. amend. V, cl. 4.

regulations. Most notably, the Takings Clause does not contain any wiggle room that excuses state actors who have acted in good faith and with reasonable care. All those possible defenses may turn out to be relevant to meting out possible individual civil and criminal sanctions. Textually, however, these excuses are not allowed for takings of private property, which is exactly what Justice Sandra Day O'Connor sought in *Hawaii Housing Authority v. Midkiff*.[54]

As is well known, *Midkiff* involved a condemnation scheme whereby a group of tenants could petition the Hawaii Housing Authority (HHA) to assess whether the state should acquire the parcel to "effectuate the public purposes" of the Hawaii Legislature's Land Reform Act of 1967.[55] If HHA found acquisition would serve the public interest, it could acquire the lots by negotiation or condemnation. Thereafter, HHA could sell the parcels to the tenants, a sale HHA could facilitate by lending then-tenets some 90% of the purchase price.[56]

To unpracticed eyes, this looks like a taking from A, the landlord, to B, the tenant. But in *Midkiff*, Justice Sandra Day O'Connor held that this taking was indeed for a public use: "[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."[57] She offered no justification for moving from a straightforward, textualist reading to the rational-basis test: the word "conceivable" is not in the text of the Fifth Amendment and there is no structural justification for reading it in, say, to avoid some logical absurdity or dangerous social policy. At this point, therefore, it is important to see how the caselaw set the stage for *Kelo.*

This history is not one of faithful textualism because there is a large unexplored terrain between "use by the public" on the one side and "a conceivable use" on the other. Early cases navigated that ambiguity by finding that the public-use requirement is satisfied when a standard use of private property is impaired by the bilateral-monopoly holdout problem. There is the persistent and justified fear that when one party is trying to acquire land from another as an input for a commercial venture, the landowning party, by holding out, can extract a gross return on his investment from the acquirer—for example, when the owner of a parcel of land of otherwise trivial value sells the parcel for a massive return compared to that which an acquiring railroad or mining company might expect from their business activities.[58]

This backstory begins with the late-nineteenth-century cases. No one has ever doubted that the taking of private land was permissible to construct a public building or a public road. But complications arose whenever a private party wanted to build a road for his own advantage over someone else's property. As

54. 467 U.S. 229, 239-43 (1984).

55. *Id.* at 233-34.

56. *Id.*

57. *Id.* at 241.

58. For a systematic account of how a weak public-use requirement allows an appropriation of combined surplus by the party whose input (the easement) is far beyond that of the other party (the miner), see EPSTEIN, *supra* note 52, at 162-66.

far back as *Dayton Gold & Silver Mining Co. v. Seawell*,[59] the Supreme Court of Nevada drew a key distinction between takings for railroads and hotels, noting that location constraints for long and skinny[60] railroads are far greater than those for hotels because railroads need to be constructed "along the most feasible and direct route."[61] Similarly, the public-use limitation was relaxed for mining companies, because the location of mines are fixed by nature, making it easy for surrounding landowners to compromise the mining companies by holding out.[62]

A similar holdout problem arose in *Head v. Amoskeag Manufacturing Co.*,[63] where the state had to pay a premium of fifty percent over market value to the owners of undeveloped farmland to avoid undue injury after a government-authorized dam was allowed to flood the farmland to create a sufficient head of water for the defendant's grist mill. But it should not be supposed that the dam builder could do whatever he wanted. The authorization was limited by government oversight, and the dam owner was required to pay a fifty percent premium *over* the value of the farmland so that the exercise of this private right was hemmed in by administrative and financial limitations to prevent the abuse of the monopoly power given.

Similar holdout problems existed in both *Clark v. Nash*[64] and *Strickley v. Highland Boy Gold Mining Co*.[65] In *Clark*, the holdout problem arose because the landowner sought to block the creation of a ditch to transport water needed for farming from one location to another. Here was the explanation offered by Justice Rufus Peckham:

> Whether a statute of a state permitting condemnation by an individual for the purpose of obtaining water for his land or for mining should be held to be a condemnation for a public use, and therefore a valid enactment, may depend upon a number of considerations relating to the situation of the state and its possibilities for land cultivation, or the successful prosecution of its mining or other industries. Where the use is asserted to be public, and the right of the individual to condemn land for the purpose of exercising such use is founded upon or is the result of some peculiar condition of the soil or climate or other peculiarity of the state where the right of condemnation is asserted under a state statute, we are always, where it can fairly be done, strongly inclined to hold with the state courts when they uphold a state statute providing for such condemnation.[66]

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59. 11 Nev. 394, 410-12 (1876).

60. Richard A. Epstein, *Property Rights: Long and Skinny*, 14 INT'L J. COMMONS 567, 573-75 (2020). It turns out that these properties with a larger perimeter and small area are hard to defend, which matters in undeveloped countries. And they often, as with rivers, give rise to boundary disputes, and can be subject to oversight by multiple governments.

61. *Dayton*, 11 Nev. at 411.

62. *Id*. at 409.

63. 113 U.S. 9, 10-15, 24-26 (1885).

64. 198 U.S. 361, 362-67 (1905).

65. 200 U.S. 527, 529-32 (1906).

66. *Clark*, 198 U.S. at 367-70. The last case, *Mt. Vernon-Woodberry Co. v. Alabama Power Co*., does not belong on the list: "The condemnation was to manufacture, supply, and sell to the public power produced by water as a motive force . . . If that purpose is not public, we should be at a loss to say what is." 240 U.S. 30, 32 (1916).

The situation in *Strickley*, a mining case, tells the same story. Here Justice Holmes held that it was permissible to condemn an aerial right of way to allow a mining company to ferry ore down to a railroad station some two miles away.[67] Again, the holdout problem is painfully evident.

But three cases Justice O'Connor cited in *Midkiff—Block v. Hirsh*,[68] *Rindge Co. v. Los Angeles*,[69] and *Berman v. Parker*[70]—moved away from earlier doctrine's focus on holdout problem. The sea change occurs with Holmes's 1921 opinion in *Block v Hirsh.*[71] *Block* involved a modest (but unwise) rent-control scheme passed in 1919 in order to deal with the mass influx of government workers into the D.C. area just after World War I. The new setup prevented landlords from raising rents for a three-year period, and from removing sitting tenants, except to turn the property over to family use. The Court found that the influx "exigency" justified those restrictions, at least so long as the exigency persisted. Holmes took that temporal limitation seriously, and in 1924 he wrote the majority opinion in *Chastleton Corp. v. Sinclair*[72] which struck down the District's effort to extend the scheme for another three years, long after the post-War frenzy had passed. But the unwise expansion of *Block* became complete when the Supreme Court found other emergencies, as with New York's rent-stabilization laws starting in the 1960s, by pointing to the low vacancy rates in rental units brought about. These ersatz emergencies bear no relationship to floods, invasions or diseases, all of which came from external sources rather than a self-inflicted shortage induced by regulation.[73]

Less noticed, in *Block*, Justice Holmes also flubbed his claim that these transfers from landlord to tenant counted as public uses and not transfers from one private person to another. This manufactured argument only works if these private transfers generate some collateral benefit to the public at large, a class that does not include the disruption of market forces. Only the magic of deference transforms a set of negative external consequences from rent regulation into a reason to allow the ordinance to stand. After all, if the landlords could remove their current tenants at the end of term, they could then relet premises to other parties with a higher rate of occupancy. That would surely induce some increase

67. *Strickley*, 200 U.S. at 531.

68. 256 U.S. 135 (1921).

69. 262 U.S. 700 (1923).

70. 348 U.S. 26 (1954).

71. 256 U.S. at 153-62, 168-70. For my exhaustive review of these cases, see Richard A. Epstein, *Once More into the Rent Control Abyss*, *in* RETHINKING THE LAW OF PRIVATE PROPERTY 173 (Jan Laitos ed., 2025).

72. 264 U.S. 543, 546-49.

73. The mistake is ingrained in New York, as the effort to topple rent-control statutes foundered in *74 Pinehurst, LLC v. New York*, 59 F. 4th 557 (2d Cir. 2023), *cert. denied*, 144 S. Ct. 264 (2024), which upheld the strict rent controls found in the misnamed Housing Stability and Tenant Protection Act of 2019. Austin, Texas, which faced similar high rents, did not seek to cap rentals but instead expanded supply through an expedited permit process. So after 2020, rents in Austin tumbled and supply increased, while in New York rents have stayed high with only a smallish increase in supply. *See* Greg Ip, *A Misguided NYC Vote for Cheaper Housing*, WALL ST. J. (June 26, 2025, 5:30 AM), https://www.wsj.com/economy/housing/nyc-mayor-election-housing-costs-c1f88bcb [https://perma.cc/M6NX-EJSS].

in supply—for example, by renting out a coach house or an extra bedroom. Such measures would do far more to expand supply than the explicit protectionism of the D.C. ordinance. But Holmes was determined to meet the challenge. He insisted that, given the circumstances of the time, letting buildings in Washington D.C. was clothed with the public interest and thus indistinguishable from the irrigation in *Clark* or the mining in *Strickley*. On that basis, Holmes held it was reasonable to allow tenants to remain in place at the old rent until higher rents were allowed by Commission, which was allowable under standard rate regulation law in place since *Munn v. Illinois*.[74] As he explained, "The regulation is put and justified only as a temporary measure. . . . A limit in time, to tide over a passing trouble, well may justify a law that could not be upheld as a permanent change."[75]

The rate-regulation cases like *Munn* offer a misleading comparison.[76] The rent-control statute in *Block* does not distinguish between monopoly and competitive rental markets and thus allows for the regulation of the two equally, when the former contains an economic distortion that calls for regulation, and the latter does not. It would be foolish to ignore the holdout risk, and equally mistaken to broaden the public-use doctrine so that the limitation has no sensible use at all. But even if given full value, it is a mystery as to how *Block* justifies *Midkiff*, given that the Hawaiian sitting tenants were not faced with any impending emergency when the state condemnation scheme was hatched, at a time when the Bishop Estate was eager to sell its holdings in order to diversify its own portfolio.

The next case referenced in *Midkiff*, *Rindge Co. v. Los Angeles*, is completely off point, for its fact pattern involves the taking of some private land for a highway extension that was connected to the general road grid.[77] At this juncture, the Court insisted that local conditions should be taken into account in assessing how the new extension would be integrated with the grid for two roads that traversed a huge ranch in Malibu. There was an official report that supported the acquisition:

> The trial judge reviewed the evidence and, manifestly without reference to any presumption arising under his ruling as to the *prima facie* evidence furnished by the [L.A. County] resolutions, decided all the questions submitted in favor of the county, and made specific findings that the public interest and necessity required the acquisition of these public highways; that the use to which they were to be applied was authorized by law; that they would afford accommodation to the traveling public, and that they were located as required.[78]

74. 94 U.S. 113, 123-24, 134-35 (1876); *Block*, 256 U.S. at 157-58.

75. *Block*, 256 U.S. at 157 (citations omitted).

76. *Munn*, 94 U.S. at 123-31.

77. Haw. Hous. Auth. v. Midkiff, 467 U.S. 229, 241 (1984) (citing Rindge Co. v. Los Angeles, 262 U.S. 700 (1923)).

78. *Rindge*, 262 U.S. at 704 (1923).

How could Justice O'Connor rely on this case to justify the Hawaiian scheme? It would be far too restrictive to insist that only new roads that were open to everyone could meet the public-use requirement, or that scenic or recreational uses somehow don't count. *Rindge* is a useless diversion.

The last case, *Berman v Parker*, is the strongest of the precedents for *Midkiff*. Under the District of Columbia Redevelopment Act of 1945,[79] the urban-renewal program in Washington, D.C. transferred Berman's department store to the District, by claiming that the neighborhood was "blighted," a term that invites abuse, even if the targeted property did not fit that description. *Berman* was mangled conceptually, because Justice William O. Douglas conflated the public-use requirement with the police power: "We deal, in other words, with what traditionally has been known as the police power. An attempt to define its reach or trace its outer limits is fruitless, for each case must turn on its own facts."[80] In this short passage, Justice Douglas commits a double sin. He first insists there is never any discernible standard, which always leads courts to apply a rational-basis test, a standard not applicable under the police power. Second, he misses the point that the police power allows for taking private property *without any compensation*, while any taking that meets the public-use requirement always requires compensation. It follows that the state needs to show a more powerful justification in invoking the police power when it offers no compensation at all, which is why the accurate definition of a nuisance is needed to police the line between them.

Yet a no police-power claim is remotely plausible in *Midkiff*, where the sole reason for and consequence of the transfer was to change the record owner of certain properties from the landlord to the legions of sitting tenants. That was done not to initiate any program of land-use redevelopment, but for the sole purpose of allowing the tenants rather than the original owners (Hawaii's dreaded Bishop Estate) to sell the units at a profit to then-ascendent Japanese buyers (before the Japanese bubble burst). It should then be asked, why does it not make a difference to the outcome if just compensation is provided to landlords? As a first approximation, all that changes is who bears the risk of future market fluctuations, which is something that could be readjusted in setting the compensation levels lower if the unit owner is no longer the residual claimant.

Indeed, *Midkiff* squarely raises the question—why worry about public use at all if the compensation paid can be so adjusted to prevent any loss to the landlord? But that rosy view misses the key concern, because the level of compensation required under current constitutional norms *never* leaves the former land holder at least as well-off as before. Given that the compensation formulas exclude consequential damages, legal and appraisal fees, and loss of good will, they usually result in a net loss to many property owners. In practice, the situation is often worse given that many property owners, especially smaller

79. Pub. L. No. 79-592, 60 Stat. 790 (1946).
80. Berman v. Parker, 348 U.S. 26, 31 (1954).

ones, are often systematically undercompensated.[81] These problems arise in takings for unquestionable public uses, making a strong case for not using or even threatening to use that power save when faced with multiple holdout problems—a point that emerges with *Kelo.*

Midkiff is also questionable for its novel specification of public use:

> The people of Hawaii have attempted, much as the settlers of the original 13 Colonies did, to reduce the perceived social and economic evils of a land oligopoly traceable to their monarchs. The land oligopoly has, according to the Hawaii Legislature, created artificial deterrents to the normal functioning of the State's residential land market and forced thousands of individual homeowners to lease, rather than buy, the land underneath their homes. Regulating oligopoly and the evils associated with it is a classic exercise of a State's police powers.[82]

The creation of an *illegal* oligopoly justifies a breakup of the firm, *without* any compensation with a private defendant (such as the Bishop's estate), but *Midkiff* is not a case where such illegality can be established, given the general rule in *United States v. Grinnell Corp*.[83] In Hawaii, historical accident created the oligopoly. The Great Māhele of 1848 was a huge land-redistribution program initiated by King Kamehameha III. The King took a third of the total lands for his family. These lands became the Bishop's estate through marriage. The case for regulation may still exist, but the formula for compensation must include the full premium that the Bishop's estate and other lands could command if they sold their units in the marketplace. There, given the lands' durable monopoly, there would be no diminution in value because the defendants had already embarked on a program of disposal.[84] Any effort to calculate the amounts owed if that defendant's plan was upended would have to equal the amount that it could get through its own program of voluntary sales. It therefore makes no sense whatsoever to force the sales via government, whether or not it advances funds to the individual tenant to acquire the property. The middle layer is wholly unnecessary. The whole program should be scrapped, given that Justice O'Connor did not address the antitrust critique that is fatal to her oligopoly argument.

D. Back to Kelo

Kelo takes these matters one step further, building on *Block*, *Berman*, and *Midkiff*, to overcome, without acknowledgement, a long-standing implicit barrier in the public-use language: *Kelo* allows homeowners to be removed from their

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81. *See, e.g.*, Yun-chien Chang, *An Empirical Study of Compensation Paid in Eminent Domain Settlements: New York City 1990–2002*, 39 J. LEGAL STUD. 201, 203-05 (2010).

82. *Midkiff*, 467 U.S. at 241-42.

83. 384 U.S. 563, 570-71 (1966) ("The offense of monopoly under § 2 of the Sherman Act has two elements: (1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.").

84. R.H. Coase, *Durability and Monopol*y, 15 J.L. & ECON. 143, 143-45 (1972).

homes by force, not for some core government project, but for an iffy private redevelopment scheme.[85] As such, the case is the polar opposite of *Midkiff*, which allowed sitting tenants to displace their landlord, which has totally different optics. Historically, the situation in *Kelo* was set up in 1997, when the Connecticut legislature appropriated some $73 million to create infrastructure in New London. The appropriation allowed a developer, Corcoran Jennison, to design a project to complement the construction of a new nearby Pfizer plant. The overall scheme implicitly assumed that those complementary facilities would be located in New London itself. But in short order, two substitute facilities were built outside New London. One was modest and close by, the other more luxurious but further away. Neither had to deal with New London's time-consuming land-use politics.

So, the Corcoran Jennison project was never built, while Susette Kelo and friends have been permanently displaced. A simple decision to postpone condemnation until Corcoran Jennison had finalized its contract construction plans would have prevented the upcoming social and economic mess. But Justice Stevens (like the Connecticut Supreme Court) held that local officials had extensive discretion to set both the timing and the scope of the project, which led to an unnecessarily early condemnation of private homes before the project was crystallized. Justice Stevens relied on both *Clark*[86] and *Strickley.*[87] His account of these cases showed that he knew that they were holdout cases.[88] But on eight separate occasions in *Kelo*, he used the word "local," concealing that simple fact that Ms. Kelo and her group of objectors attempted no holdout, as evidenced by the "not-for-sale" sign that she posted on her property to prevent the takeover of land which, ironically, the City did not need to acquire to complete its proposed project. In my amicus curiae brief with the Cato Institute,[89] I took the position that the government claim flunked even under a broader definition of public use that included holdout cases. It was shameful, therefore, to force Kelo and friends from their homes—her former building site in due course turned into a rubbish dump. This entire mess could have been avoided by accepting the dual constraints on taking for public use that had been articulated in the earlier cases.

85. Kelo v. City of New London, 545 U.S. 469, 472-75, 483-89 (2005).

86. Clark v. Nash, 198 U.S. 361 (1905).

87. Strickley v. Highland Boy Gold Mining Co., 200 U.S. 527 (1906).

88. *Kelo*, 545 U.S. at 484 n.11 (quoting *Strickley*, 200 U.S. at 531 ("In the opinion of the legislature and the Supreme Court of Utah the public welfare of that State demands that aerial lines between the mines upon its mountain sides and railways in the valleys below should not be made impossible by the refusal of a private owner to sell the right to cross his land. The Constitution of the United States does not require us to say that they are wrong.")).

89. Brief of the Cato Institute as Amicus Curiae in Support of Petitioners at 25-30, *Kelo*, 545 U.S. 469 (No. 04-108), https://ij.org/wp-content/uploads/2000/12/cato011.pdf [https://perma.cc/LHP3-DVP5].

III. Going Forward: Rethinking Public Use

A. Theory Again

Sadly, *Kelo* represents the kind of systematic failure that requires rethinking the public-use requirement, indeed the entire takings law, from the ground up. Here is the major premise of that reorientation. The whole purpose of takings law is to make sure that government coercion creates positive-sum games, but this never occurs when takings convert competitive real-estate markets into a monopolies, reducing output by government diktat. This same phenomenon explains why so many of the miscast reforms of Franklin Roosevelt's New Deal policies that created monopolies—in agriculture, motor vehicles, airlines, and labor, for example—were and are unconstitutional (in my long-held view).[90] These government initiatives always give rise to negative-sum games; so, we can know for certain that *someone* has been mistreated and has standing to challenge the action. It is not necessary for enjoining the activity to know which individuals, in particular, have been short-changed. In situations like that in *Kelo*, the homeowner is the obvious person to have standing to press the takings claim in court.

The argument here is that only positive-sum games pass through the Takings Clause filter. It may be objected that a positive-sum test is utterly inoperable. Indeed, there are numerous cases where it is hard to tell which course of action, if any, is required of the government: what is the optimal speed limit on an interstate highway, for example, or the optimal length for a statute of limitations? Yet, if these questions are attacked by a sensible deliberative process, the inability to come up with the one ideal answer for cases at the margin does not mean that any answer is as good as any other. If someone wanted to set the minimum driving age at either two or twenty, the immediate response would be that the first is be too low and the second too high, and so variations have to be left to the political process, which usually hits a number between fifteen and eighteen for initial learner permits. These choices should prevail in the absence of some clear demonstration that shady practices, bribes, or coercion have corrupted the process.

Yet, none of these complications apply to the set of public-use cases that have dominated the judicial calendar, cases about takings that convert competitive markets into monopoly ones and that skew the distribution of gains to one group at the expense of a less well-situated rival (as in *Kelo*). These two tests may not capture every relevant factor, but with higher scrutiny, they can root out egregious misbehavior which now routinely passes muster under today's porous public-use doctrine championed in such cases as *Block*, *Berman*, *Midkiff*, and *Kelo.*

At this point, it is critical to break down the public-use cases into two classes. It is not possible, or sensible, to challenge the construction of a public

90. EPSTEIN, *supra* note 52, at 281-82.

highway on the grounds that it does not meet some ideal cost-benefit formula. So long as the use itself is open to the public or stops a bilateral holdout problem, further scrutiny is neither possible nor desirable. But when the property taken goes ultimately to a private party for a private use, as with rent control, any gauzy argument claiming indirect public benefits, like Justice Holmes's in *Block*, should be closely scrutinized because of the manifest risk that the government will exaggerate its supposed benefits while ignoring the evident negative externalities generated by that same program. It has been said that short of bombing, rent control is the surest way to destroy a city.[91] Accordingly, it is wholly improper to posit some external benefit—e.g., stability of neighborhoods—while ignoring its countless negative externalities: underutilization of spacious rent-control units occupied by widowers and widows; reduction in city tax base; deterioration of stagnant neighborhoods; political skirmishing about what the regulated rents should be; and constant efforts to either rope more units into the program or to remove those that are already covered.

B. Bad Kelo *Extension*

Yet these strategic public condemnations also distort some competitive equilibrium in commercial-real-estate markets. *Brinkmann v. Town of Southold* featured a sharp division of opinion on the Second Circuit Court of Appeals between Judges Dennis Jacobs and Amalya Kearse, on the one side, and Judge Steven Menashi on the other.[92] Judge Jacobs vividly described the situation:

> The only question is whether the Takings Clause is violated when a property is taken for a public amenity as a pretext for defeating the owner's plans for another use.
>
> On appeal, Plaintiffs argue that the exercise of eminent domain violates the Takings Clause if that public use, though real, is pretextual. We conclude that when the taking is for a public purpose, courts do not inquire into alleged pretexts and motives. Since a park is a public amenity that serves a public purpose, we affirm.[93]

The disputed project sought to develop a hardware store as part of a chain. Its neighbors objected, claiming a negative traffic impact, a perpetual objection that cannot be dismissed out of hand. But in this instance, a traffic study proved that the hardware store was not an obstacle, and the Brinkmanns had agreed to cover the costs of any interchange adjustments the Town deemed necessary. The town then demanded an additional "Market and Municipal Impact Study,"

91. David Henderson, *Rent Control is Worse than Bombing*, ECONLIB: ECONLOG (Mar. 5, 2019), https://www.econlib.org/rent-control-is-worse-than-bombing [https://perma.cc/Z2AM-WKVZ] ("Assar Lindbeck asserted, 'In many cases rent control appears to be the most efficient technique presently known to destroy a city—except for bombing.'").

92. 96 F.4th 209, 209-11 (2d Cir. 2024).

93. *Id.* at 210-11.

coupled with more special permits.[94] When the Brinkmanns sought to comply with these unnecessary demands, the town offered to buy the land, but it was turned down. The town then condemned the site for a "passive park," after which the City sought to impose a six-month moratorium on future development within a one-mile area.[95] At this point, we have only a selective account that just mentions alleged negative externalities while ignoring the large positive externalities for shoppers, suppliers and workers, many of whom do not live (or vote) in the town and whose preferences are downplayed in local political decisions. Thus, any account of the total costs and benefits of this project gives negative voices greater salience than positive ones.

At the very least, this first-cut account requires that courts give a closer look at the level of compensation paid, which now shapes the overall evaluation of the case. But according to the majority, given *Kelo*, nothing else mattered once it was concluded that the park was for a "passive" but proper public use. Normally, that narrow focus makes sense, but not when the perverse machinations produce such vivid negative consequences. More generally, the public-use test backstops the just-compensation requirement, which, as noted earlier, generally falls short of leaving the property owner indifferent between the cash received and the value of the property lost—including, à la Blackstone, all the consequential damages that came from losing property and business opportunities to this explicit delaying strategy. At this point, both the majority and the dissent should look at these dislocations that demonstrate that paying only the fair market of the property leaves the Brinkmanns woefully short.

At this point the dissent should prevail, even if it cannot deny the public use because of the admittedly corrupt motivation. Standard takings doctrine under *Monongahela Navigation Co. v. United States* allows a private owner to enjoin a government taking when the damage award does not supply "full and perfect equivalent for the property taken" to which all citizens are entitled.[96] In *Monongahela*, the term "taken" did not include consequential damages (e.g., appraisal costs of relocation, attorney's fees, and loss of unique site value) in a case where the government's bona fides were beyond dispute. "As a result, indirect costs to the property owner caused by the taking of his land are generally not part of the just compensation to which he is constitutionally entitled."[97] It should be noted that this position is in evident tension with giving him, as Blackstone required, a full indemnification and equivalent for the injury thereby sustained.[98] This rule leads to systematic over-condemnation when real losses that would be cognizable in a private dispute are overlooked.[99] Even if that rule is not overruled, it should be subject to a principled exception that takes into account the evident skullduggery that was uniquely present in this setting: award

94. *Id.* at 211.
95. *Id.* at 211, 218-19.
96. 148 U.S. 312, 326 (1893).
97. United States v. Bodcaw Co., 440 U.S. 202, 203 (1979).
98. BLACKSTONE, *supra* note 47, at *84.
99. See EPSTEIN, *supra* note 52, at 80-86.

consequential damages when the government acts in bad faith. It is a standard rule of contract damages that the awards for an innocent breach are always lower than they are for a deliberate and unjustified one,[100] even if this taking is for a public use. If those damages were imposed, this conspicuous bit of government overreach would crumple. Whether one blocks the taking, or awards consequential damage, the result is the same: judicial action blocks the town's effort to create a negative-sum game. The corrupt motive is evidence here that establishes the overall social loss.

None of these subtleties were present in a recent decision of the New York State Court of Appeals, for which the Institute for Justice filed an impassioned petition for certiorari that sought to overturn or limit *Kelo*, only to be quickly rejected by the Supreme Court.[101] In *Bowers Development, LLC v. Oneida County Industrial Development Agency*,[102] which originated in the New York courts, the petitioner had under contract the purchase of land for the construction of its own medical clinic that operated in direct competition with the codefendant, the Central Utica Building, operating next door. Central Utica sought to condemn the plaintiff's interest by asserting these public purposes for the condemnation: "1: Improving healthcare for the community; 2: Creating new and improved job opportunities; 3: Reducing unemployment; 4: Eliminate blight in the immediate area of the Project; [5]: Promote urban renewal and redevelopment and; 6: On an overall basis, result in the betterment of community prosperity within Oneida County."[103]

The basic purpose of the condemnation was for the explicit suppression of competition; this purpose necessarily reduces the level of social welfare. The Institute of Justice put the dispute this way: "Does the Public Use Clause require something more than minimal rational-basis review when the government takes land from one private owner to give it to a specifically identified private owner outside the context of a comprehensive economic redevelopment plan?"[104]

The reference to "a comprehensive economic development plan" was an effort to distinguish this case from the ill-conceived comprehensive plan that flopped in *Kelo.* But even more telling is that each of the six collateral purposes identified by the defendant applied equally to the petitioner, whose own project would have also generated positive externalities, which could be either greater or less than the gains from the competitor's. It follows therefore that only by

100. For a discussion, see Richard A. Epstein, *Beyond Foreseeability: Consequential Damages in the Law of Contract*, 18 J. LEGAL STUD. 105, 105-07, 110-12 (1989).

101. Bowers Dev., LLC v. Oneida Cnty. Indus. Dev. Agency, 145 S. Ct. 1428 (2025) (denying cert.).

102. 181 N.Y.S.3d 412, 412-13 (N.Y. App. Div. 2022). That conclusion was affirmed in the Court of Appeals on the statutory ground that the "proposed parking facility functioned simply to satisfy the need for parking created by the medical office building and provide public parking at night. The proposed use did not serve any healthcare-related function." Bowers Dev., LLC v. Oneida Cnty. Indus. Dev. Agency, 225 N.E.3d 337, 339 (N.Y. 2023). Thus, the public use was raised only in the decision of the Appellate Division.

103. Petition for a Writ of Certiorari at 3 n.3, *Bowers*, 145 S. Ct. 1428 (2025) (No. 24-670).

104. *Id.* at i.

continuing to speak of "conceivable" justifications could this land grab be sustained—which is what the New York Court of Appeals held,[105] applying this terse test as they previously had in cases such as *Goldstein v. New York State Urban Development Corp.*[106] On remand in *Bowers*, the New York Appellate Division likewise found that "what qualifies as a public purpose or public use is broadly defined as encompassing virtually any project that may confer upon the public a benefit, utility, or advantage."[107] And building a parking lot for a private office building was "rationally related to a conceivable public purpose": mitigating parking and traffic congestion.[108]

Goldstein is much closer to the line between public and private uses, and in any event is easily distinguishable. There, that broad conception was used to permit the acquisition of a mixed-use site that would house, among other organizations, a basketball arena for the Brooklyn Nets.[109] *Goldstein* had both a concurrence and a dissent, and clearly raised serious assembly problems that are not involved here. It was further coupled with a dodgy claim of blight[110] that has no bearing on this case. So if one puts aside the larger claim to overrule *Kelo*, the rational-basis test invites massive forms of abuse that should be stopped now.

The current landscape looks different. The Supreme Court's prompt rejection of this simple but compelling fact pattern gives rise to this observation. There are many cases in which takings issues are combined with administrative law and separation-of-powers issues. Unlike the Supreme Court in the 1980s, this Court is deeply concerned with the latter but largely indifferent to the former, except at the edges where takings claims are connected to some independent regulatory scheme: think of *Horne v. Department of Agriculture*,[111] where the takings law was tied in closely to the complex pricing schemes under the Agricultural Adjustment Act, or *Cedar Point Nursery v. Hassid*,[112] where the question of property rights was intimately tied in with regulations under the California Labor Relations law. But straight-up property questions are both more frequent and important but now largely irrelevant to the Supreme Court docket.

Conclusion

Given its long-term neglect in the Supreme Court, the current law of public use cries out for major repair. To succeed, the Court must reject the progressive spirit that, for several generations, has unduly expanded the scope of government while unwisely limiting the scope of private rights. The constant claim that

105. *Bowers*, 225 N.E.3d at 338-39.
106. 921 N.E.2d 164, 170-72 (N.Y. 2009).
107. Bowers Dev., LLC v. Oneida Cnty. Indus. Dev. Agency, 205 N.Y.S.3d 606, 609 (N.Y. App. Div. 2024) (citations omitted).
108. *Id*.
109. *Goldstein*, 921 N.E.2d at 166.
110. *Id.* at 189 (Smith, J., dissenting).
111. 576 U.S. 350, 354-57 (2015).
112. 594 U.S. 139, 143-47, 151-52 (2021).

government needs more discretion to plan its affairs should be rejected because it adopts a strategy of "too much, too soon." In so doing, it consciously disregards the downside of that posture, whereby early and excessive claims to acquire private property lead to degenerate long-term outcomes like that in *Kelo*. That one-sided approach places intolerable burdens on the private parties required to jump through these government-manufactured hoops.

The point is not unique to this area, because the identical trade-off is common in administrative law under the now-discarded *Chevron* doctrine, which adopted that same approach to error control, leading to the same unfortunate set of outcomes. On a broader canvas, *Loper Bright* exposed the similar risk of that broad deference to administrative regulations. The move from administrative to constitutional law changes the terminology, but it does not alter the fundamental calculus of abuse. The use in constitutional law of "a conceivable" test for public use is not just a linguistic affront to constitutional text, but it is also an open invitation for political intrigue which, as the outcome in *Bowers* demonstrates, remains alive and well in New York State. It is critical to jettison the rational-basis mindset and to adopt in its place a standard of intermediate scrutiny which recognizes both kinds of error—too much regulation versus too little regulation—and gives, roughly speaking, both kinds of error equal weight. That self-conscious search for balance means that the current justices and lawyers who plump for an exclusive use-by-the-public test fail to be alert to abuses by private parties who hold out for large payoffs in cash or kind in order to gain excessive advantage over their rivals. The cases in the late nineteenth century and early twentieth century (with the notable exception of the rent-control cases) were sensitive to these issues. So going back to the pre-Progressive Era makes better sense than an overreaction that sets the balance of power too much in favor of private individuals. The Supreme Court should now take this moment to rectify excessive deference to either government or private parties.

But will it? On this point, I am not optimistic for two reasons. First, the effort to wean administrative law from *Chevron* has been met with stout academic resistance and is likely to be undercut by lower-court judges who work within the general progressive tradition. And since the decision of Chief Justice Roberts neither articulates any hard markers nor states which of the notable cases in the *Chevron* line should be on the chopping block and which should not, it will be rather easy to find that the standard tools of interpretation have sufficient play in the joints. Thus, deference is the inevitable judicial response to a bewildering array of administrative decisions that resist any clear ordering. So expect some backsliding, more likely sooner rather than later.

As to *Kelo*, the battle over public use is in economic terms a battle over who gets what fraction of the surplus when government permits and licenses are in play. And here the argument is that *Kelo* permits all sorts of monopoly abuse by an untethered sovereign and by the private parties whom it favors, whether it be developers in the one case or tenants in another. Yet here the current Supreme Court does not place the misallocation of economic rents or the choice between competitive and monopoly institutions at the top of its agenda, as is evident to

anyone who looks over the docket—executive privilege,[113] birthright citizenship,[114] transgender rights,[115] environmental regulation,[116] independent agencies[117] and more. One starts to see that abuses can happen as in *Kelo* or *Bowers*, and the rational-basis test will impose a heavy blow to one aspect of the law of eminent domain. And once that wall is knocked over, other key rational-basis doctrines will be at risk, including the zoning laws under *Euclid*, landmark legislation under *Penn Central*, and rent-control laws under *Block* and *74 Pinehurst.* Those are all poorly reasoned cases that deserve to be overturned, but not by this court; it has other priorities to which it must attend. So, sadly, the status quo in both areas is likely to hold, and we shall all be the losers for it.

113. *See* Trump v. United States, 603 U.S. 593 (2024).
114. *See* Trump v. CASA, Inc., 145 S. Ct. 2540 (2025).
115. *See* United States v. Skrmetti, 145 S. Ct. 1816 (2025).
116. *See* City & Cnty. of San Francisco v. Env't Prot. Agency, 145 S. Ct. 704 (2025).
117. *See* Trump v. Wilcox, 145 S. Ct. 1415 (2025).