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The Public Use Clause and Heightened Rational Basis Review Commentary Essays

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Essay

The Public Use Clause and Heightened Rational Basis Review

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In their lead essay for this volume, Wesley Horton and Levesque persuasively demonstrate that the United States Supreme Court's decision in Kelo v. City of New London *was neither novel nor wrong. They then suggest that* Kelo's *detractors drop their continued crusade to overturn that decision and shift their focus from challenging the use of eminent domain for private economic development plans to challenging eminent domain abuse in general. To that end, Horton and Leveque offer the provocative proposal that the Court adopt a ten-factor heightened rational basis test to apply to all condemnations. Using this test, they argue, courts can invalidate ill-advised exercises of eminent domain while upholding condemnations that truly serve a public purpose.*

I agree with Horton and Levesque's defense of Kelo. *That decision clearly follows from the Court's prior precedent and correctly implements the Public Use Clause. In this Essay, however, I challenge the wisdom of Horton and Levesque's proposal to subject all condemnations to heightened rational basis review under their ten-factor test. This proposal, I argue, finds no support in existing doctrine and invites widespread judicial intrusion into the legislative domain in a manner that is neither authorized nor well-advised.*

ESSAY CONTENTS

The Public Use Clause and Heightened Rational Basis Review

LYNN E. BLAIS*

I. INTRODUCTION

Wesley Horton and Brendon Levesque's essay provides an interesting reflection on their litigation and oral argument strategy in *Kelo v. City of New London*[1] ten years after it was decided, as well as an apt analysis of the opinion and a provocative prescription for moving *Kelo* forward.[2] In *Kelo*, the United States Supreme Court rejected property owners' Public Use Clause challenge to the city's condemnation of their homes as part of a comprehensive economic redevelopment plan, holding that the Public Use Clause permits only minimal judicial oversight of legislative decisions to exercise the power of eminent domain.[3] In particular, the Court reaffirmed its long-standing holdings that public use is a broad concept encompassing all uses that serve a public purpose, and that courts should "afford[] legislatures broad latitude in determining what public needs justify the use of the takings power."[4] In the first part of their essay, Horton and Levesque convincingly demonstrate that the decision in *Kelo* is not an aberration but rather a straightforward application of settled takings principles.[5] In the second part of the paper, Horton and Levesque suggest that *Kelo* opponents abandon their attempts to carve out bright line rules to constrain the exercise of eminent domain and instead build on Justice Kennedy's concurrence in *Kelo* to develop a multi-factored test for determining when a proposed exercise of eminent domain would serve a public purpose and when it would not.[6]

Horton and Levesque's first point—that *Kelo* is consistent with the Court's prior precedent and was correctly decided—is well taken. Horton and Levesque persuasively show that the *Kelo* decision is a logical

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[1] 545 U.S. 469 (2005).

[2] Wesley W. Horton & Brendon P. Levesque, Kelo *Is Not* Dred Scott, 48 CONN. L. REV. 1405 (2016).

[3] *Kelo*, 545 U.S. at 487–88.

[4] *Id.* at 483.

[5] Horton & Levesque, *supra* note 2, at 1408.

[6] *Id.* at 1426.

outgrowth of the Court's most well-known Public Use Clause decisions, *Berman v. Parker*[7] and *Hawaii Housing Authority v. Midkiff*,[8] as well as cases that preceded those.[9] Moreover, Horton and Levesque artfully explore four instrumental concepts—precedent, federalism, compensation, and democracy—that confirm the wisdom of the Court's determination in *Kelo* that the Public Use Clause of the Fifth Amendment is not an absolute bar to the exercise of eminent domain for economic development.[10]

Horton and Levesque's next point—that Public Use Clause challenges should be resolved by applying a ten-factor balancing test to proposed condemnations—is less persuasive. Horton and Levesque assert that Justice Kennedy's concurrence in *Kelo* provides a road map for "look[ing] more carefully at *all* condemnations . . . to see whether they qualify as a public use."[11] According to the authors, the bright-line rules proposed by *Kelo* opponents and rejected by the *Kelo* majority are both over-broad and under-inclusive.[12] For example, a rule prohibiting only condemnations that transfer private property to a private developer for economic development would "automatically delineate[] a public road or a bridge to nowhere as a public use, and automatically delineate[] private economic development as not."[13] In contrast, Horton and Levesque claim that a new "rational-basis-with-a-bite"[14] test built on Justice Kennedy's concurrence "may possibly kill a publicly owned and operated boondoggle (such as, perhaps, a sports stadium) [but] [i]t may also save a privately owned development plan that a judge finds has a reasonable chance to succeed in reviving a dying city."[15] To determine whether a proposed use of eminent domain passes constitutional muster under the Public Use Clause, Horton and Levesque propose the following ten-factor test:

> (1) Will a public body own or operate the property? (2) How specific is the stated use? (3) Is it reasonably possible the stated use will actually succeed? (4) Is the stated use clearly a pretext? (5) Does the public gain outweigh any private gain? (6) Is there clearly improper favoritism? (7) Is there clearly

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[7] 348 U.S. 26 (1954).

[8] 467 U.S. 229 (1984).

[9] *See* Horton & Levesque, *supra* note 2, at 1414–16 ("There is quite a large body of law on how far governments can go in regulating the use of private property before it becomes an inverse condemnation.").

[10] *Id.* at 1414, 1418.

[11] *Id.* at 1426.

[12] *Id.*

[13] *Id.*

[14] *Id.* Although Horton and Levesque use the phrase "rational-basis-with-a-bite," other scholars more commonly refer to it as "rational basis with bite." I prefer the more descriptive "heightened rational basis review," and will use that phrase throughout this piece.

[15] *Id.*

> improper targeting of a disfavored group? (8) Is the particular property in question on the periphery of the project? (9) Is there a comprehensive plan that any private developer must follow? (10) Were any private beneficiaries known at the time of the vote to condemn?[16]

In this response, I address the prescriptive portion of Horton and Levesque's essay. Although I applaud their efforts to move property rights proponents away from their crusade for bright-line rules, I do not endorse their proposal to apply heightened rational basis review to Public Use Clause challenges as the best path forward. I take issue with Horton and Levesque's proposal for several reasons. First, Justice Kennedy's concurrence in *Kelo* neither suggests nor supports such an intensive multi-factored inquiry into the merits of every eminent domain plan challenged under the public use clause. Second, the case on which Horton and Levesque seek to base their expanded heightened rational basis test—*City of Cleburne v. Cleburne Living Center, Inc.*[17]—also does not support the broad application of that level of scrutiny to every condemnation. Third, the Supreme Court has already rejected the use of heightened rational basis review for other Takings Clause challenges, and its reasoning in those cases applies with equal force to the Public Use Clause context. Finally, even if Justice Kennedy's concurrence and *Cleburne Living Center* could be read to support the heightened scrutiny proposed by Horton and Levesque, and even if the Court had not already rejected the use of heightened rational basis review for Takings Clause challenges, the Supreme Court and lower courts should decline to embrace it now. The Fifth Amendment should not be interpreted to deputize federal courts to engage in the sort of pervasive, undisciplined review of the merits of democratically adopted eminent domain plans that the ten-factor test would entail. Federal courts are neither authorized nor well suited to engage in such an intensive merits-driven inquiry. Ultimately, Horton and Levesque's proposed Public Use Clause test would enlist federal courts in oversight of democratic decision-making that they are neither justified in undertaking nor competent to perform.

II. JUSTICE KENNEDY'S CONCURRENCE IN *KELO*

Horton and Levesque recommend that opponents of the *Kelo* decision stop advocating for a bright-line rule that they claim does not line up well with the merits of eminent domain decisions and instead advance a heightened rational basis review standard that will ask courts to distinguish good eminent domain decisions from bad ones, upholding the good and

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[16] *Id.* at 1426–27.

[17] 473 U.S. 432 (1985).

invalidating the bad.[18] Horton and Levesque identify the seeds of their proposed heightened rational basis review in Justice Kennedy's concurrence in *Kelo*.[19]

However, Justice Kennedy's concurrence in *Kelo* neither suggests nor supports the multi-factored test proposed by Horton and Levesque. Horton and Levesque concede that "Justice Kennedy's test . . . is not well developed in his concurring opinion."[20] That, of course, is because the heightened rational basis review endorsed by Horton and Levesque is not Justice Kennedy's test at all. Justice Kennedy's concurrence in *Kelo* was concerned with the possibility of pretext, not with the substantive merit of every eminent domain decision, and he proposed more searching scrutiny of a local government's decision to use eminent domain only if there was credible evidence that the proffered "public use" was a pretext for a project that was "intended to favor a particular private party, with only incidental or pretextual public benefits."[21]

That Justice Kennedy was not proposing that all exercises of eminent domain be subject to a blanket heightened rational basis test is clear from his concurrence. He begins by reiterating the deferential rational basis test adopted by the majority, and then explains that he writes separately only to clarify that the deferential standard of review "does not . . . 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."[22] According to Justice Kennedy, only if "confronted with a plausible accusation of impermissible favoritism to private parties" should a court "review the record to see if [the accusation] has merit."[23] Even then, Justice Kennedy emphasizes that the court should review the record "with the presumption that the government's actions were reasonable and intended to serve a public purpose."[24]

Perhaps Horton and Levesque's proposal is meant to build on Justice Kennedy's concession that there may be "a more narrowly drawn category of takings" for which a more stringent standard of review might be appropriate.[25] If so, it not only goes much farther than Justice Kennedy's concurrence contemplated, it distorts the focus of Justice Kennedy's concern. Justice Kennedy never suggested that a more stringent standard of review should apply to all eminent domain decisions. Rather, he posited the possible appropriateness of a more stringent standard only in the

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[18] Horton & Levesque, *supra* note 2, at 1425–26.
[19] *Id.* at 1426.
[20] *Id.*
[21] Kelo v. City of New London, 545 U.S 469, 491 (2005) (Kennedy, J., concurring).
[22] *Id.* at 490.
[23] *Id.* at 491.
[24] *Id.*
[25] *Id.* at 493.

context of eminent domain involving private transfers, and even then only to those "categories of cases in which the [private] 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."[26] Thus, Justice Kennedy's suggestion that a more stringent standard of review might be appropriate in some cases cannot support Horton and Levesque's proposal that the Court adopt heightened rational basis review for every exercise of eminent domain. As is widely understood, Justice Kennedy's concurrence was addressed to the particular problem of pretext,[27] not the broader concerns of overreaching and bad judgments in the exercse of eminent domain that underlie the continuing opposition to *Kelo*.

III. *CLEBURNE LIVING CENTER* AND THE PURPOSE OF HEIGHTENED RATIONAL BASIS REVIEW

Horton and Levesque bolster their suggestion that Justice Kennedy's concurrence was "implicitly promoting the rational-basis-with-a-bite test" by pointing to the opinion's citation to *Cleburne Living Center*.[28] This claim distorts the central point of Justice Kennedy's concurrence, in part because it is clear that he was invoking *Cleburne Living Center* for a different reason, and in greater part because *Cleburne Living Center* itself did not adopt the generalized heightened rational basis review that Horton and Levesque advocate.

In his concurrence in *Kelo*, Justice Kennedy cited *Cleburne Living Center* for the unexceptional proposition that "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."[29] This reference provides the equal protection corollary of his Public Use Clause point—that "[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."[30] Neither the Equal Protection Clause nor the Public Use Clause formulation referred to by Justice Kennedy invokes judicial review of the general merits of all government decisions. Rather,

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[26] *Id.*

[27] I have explored the difficulties entailed in attempting to ferret out pretext in the exercise of eminent domain in an earlier article. *See* Lynn E. Blais, *The Problem with Pretext*, 38 FORDHAM URB. L.J. 963, 974 (2011) (discussing how the concept of pretext is inadequate to inform the public use requirement of the eminent domain analysis).

[28] Horton & Levesque, *supra* note 2, at 1418.

[29] *Kelo*, 545 U.S. at 491 (Kennedy, J., concurring).

[30] *Id.*

under both formulations heightened rational basis review is reserved for the special circumstance where a particular class is singled out for harm in a suspicious way, or where a particular party is singled out for a suspicious benefit. Moreover, even in those limited circumstances, the court's role is circumscribed. A court is authorized to look more closely only upon a "clear showing" of special harm or special benefit, and in its close analysis to look only for evidence of pretextual or incidental public purpose or benefit.[31] Horton and Levesque's proposal to expand this limited heightened rational basis review to a sweeping assessment of the merits of every condemnation decision would upend the traditional role of courts and local governments and interject courts too deeply into traditional governmental decision making.

Horton and Levesque's argument that *Cleburne Living Center* adopted a generalized heightened rational basis test that should be imported into the Public Use Clause inquiry appears to be based on a misapprehension of *Cleburne Living Center*.[32] In that case, the Court invalidated a city zoning ordinance that required a special use permit for the construction of "[h]ospitals for the insane or feeble-minded" as it applied to Cleburne Living Center's proposal to operate a group home for individuals with intellectual disabilities.[33] In so doing, the Court rejected the Fifth Circuit's holding that individuals with intellectual disabilities are a "quasi-suspect" class and that the ordinance should therefore be subject to heightened scrutiny.[34] Instead, the Court claimed to apply rational basis review but nonetheless struck down the ordinance as applied to the proposed group home.[35] After carefully evaluating all of the proffered justifications for treating group homes for the intellectually disabled differently from, for example, apartment houses, nursing homes, and fraternity or sorority houses, the Court invalidated the ordinance because "the record does not reveal any rational basis for believing that the [group home] would pose any special threat to the city's legitimate interests"[36] and therefore "requiring the permit in this case appears to us to rest on an irrational prejudice against the mentally retarded."[37]

To be fair, Horton and Levesque are not the only commentators to interpret *Cleburne Living Center* as adopting a generalized heightened rational basis test. After all, the Court expressly rejected the Fifth Circuit's invocation of strict scrutiny yet carefully examined and rejected all of the

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[31] *Id.*

[32] Horton & Levesque, *supra* note 2, at 1418.

[33] City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 432, 436, 450 (1985).

[34] *Id.* at 442–45.

[35] *Id.*

[36] *Id.* at 448.

[37] *Id.* at 450.

reasons offered by the city in support of its zoning ordinance. In fact, Justice Marshall's dissent in *Cleburne Living Center* takes the majority to task for obfuscating its analysis by disclaiming the applicability of heightened review while actually engaging in it.[38] Soon after the opinion was handed down, scholars began to characterize the Court's analysis as "rational basis with bite."[39]

But the general heightened rational basis review interpretation of *Cleburne Living Center* has not endured, neither among scholars nor in the Court.[40] Indeed, Justice Marshall's dissent was the first analysis of the *Cleburne Living Center* opinion to provide a more nuanced description of the majority's analysis. As the dissent made clear, the majority was disingenuous in claiming that it was not engaged in heightened scrutiny, and this obfuscation left lower courts with "no principled foundation for determining when more searching inquiry is to be invoked."[41] So Justice Marshall sought to fill that void by suggesting that "the level of scrutiny employed in an equal protection case should vary with 'the constitutional and societal importance of the interest adversely affected and the recognized invidiousness of the basis upon which the particular classification is drawn.'"[42] In this case, he argued, the establishment of a home is of particular social importance, and the intellectually disabled "have been subject to a 'lengthy and tragic history' of segregation and discrimination that can only be called grotesque."[43] Accordingly, he concluded that given "the importance of the interest at stake and the history of discrimination the retarded have suffered, the Equal Protection Clause requires us to do more than review the distinctions drawn by Cleburne's

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[38] *See id.* at 458 (Marshall, J., dissenting) ("[T]the Court's heightened-scrutiny discussion is even more puzzling given that Cleburne's ordinance is invalidated only after being subjected to precisely the sort of probing inquiry associated with heightened scrutiny.").

[39] *See, e.g.*, Gayle Lynn Pettinga, Note, *Rational Basis With Bite: Intermediate Scrutiny by Any Other Name*, 62 IND. L.J. 779, 779–80 (1987) (noting that "[m]any commentators have suggested that these opinions represent an effort by the Court to put more 'teeth' in the rational basis test"). The concept of rational basis with bite was first introduced into the scholarly lexicon by Gerald Gunther. *See* Gerald Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 21 (1972) (arguing that the Court should put "consistent new bite into the old equal protection" by declining to "supply justifying rationales by exercising its imagination").

[40] *See, e.g.*, Robert C. Farrell, *Successful Rational Basis Claims in the Supreme Court from the 1971 Term Through* Romer v. Evans, 32 IND. L. REV. 357, 373–82 (1999) (arguing that Gerald Gunther's theory that the Court developed a new "rational basis with bite" standard had not stood the test of time); Susannah W. Pollvogt, *Unconstitutional Animus*, 81 FORDHAM L. REV. 887, 899 (2012) ("But as subsequent commentators noted, the 'rational basis with bite' standard did not have much in the way of legs.").

[41] *Cleburne*, 473 U.S. at 460 (Marshall, J., dissenting).

[42] *Id.*

[43] *Id.* at 461 (quoting University of California Regents v. Bakke, 438 U.S. 265, 303 (1978) (opinion of Powell, J.)).

zoning ordinance as if they appeared in a taxing statute or in economic or commercial legislation."[44] The majority, he asserted, had applied heightened rational basis review as a result of an essential trigger (the importance of the issue at stake) to determine whether an impermissible purpose (discrimination against a disadvantaged group) was the true purpose of the legislation.

This "trigger-purpose" formulation of the Court's use of heightened rational basis review has emerged as the enduring interpretation among scholars and within the Court. For example, in 2015 Raphael Holoszyc-Pimentel analyzed every Supreme Court decision invalidating an ordinance under rational basis review and concluded that this heightened rational basis review is most often applied to laws that classify on the basis of an immutable characteristic or that burden a significant right.[45] Similarly, Susannah Pollvogt has argued convincingly that the Court's "real concern in many of these [rational basis with bite] cases was with ends and not means—that insufficient tailoring was merely symptomatic of an improper purpose: animus."[46] Thus, in its heightened rational basis review cases, the Court's scrutiny is triggered by a legislative classification that raises a realistic concern that the object of the legislative action is impermissible, not that the action is somehow not closely enough tailored to a permissible legislative goal.

The Supreme Court has expressly affirmed the "trigger-purpose" theory of heightened rational basis review, explaining that it employs more searching rational basis scrutiny when a challenged law is based on classifications that are "so seldom relevant to the achievement of any legitimate state interest that the laws grounded in such considerations are deemed to reflect prejudice and antipathy."[47] As Justice O'Connor noted in

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[44] *Id.* at 464.

[45] Raphael Holoszyc-Pimentel, *Reconciling Rational-Basis Review: When Does Rational Basis Bite?*, 90 N.Y.U. L. REV. 2070, 2072, 2105 (2015).

[46] *See* Pollvogt, *supra* note 40, at 899–900 (recasting the "rational basis with bite" cases as instances of heightened scrutiny aimed at ferreting out unconstitutional animus); s*ee also* Ashutosh Bhagwat, *Purpose Scrutiny in Constitutional Analysis*, 85 CALIF. L. REV. 297, 327 (1997) (citations omitted) ("Recently, however, the Court's constitutional jurisprudence—especially in the areas of equal protection and free speech—has revealed a renewed attention to the legitimacy of governmental purposes, including some consideration of how legitimacy is to be determined by the judiciary. In the equal protection context, starting with the 1973 *Moreno* decision, and continuing with *Cleburne* in 1985 and *Romer v. Evans* this past Term, the Court has struck down non-suspect legislative classifications on the grounds that the legislative purpose of 'harm[ing] a politically unpopular group' is incompatible with the Equal Protection Clause."); Farrell, *supra* note 40, at 411–15 (concluding that at least five of the ten "rational basis with bite" cases in the Court between 1971 and 1999 are more properly classified as impermissible purpose cases); Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747, 763 (2011) ("Rational basis with bite depends on the idea that governmental 'animus' alone is never enough to sustain legislation.").

[47] Kimel v. Florida Bd. of Regents, 528 U.S. 62, 83 (2000) (citing *Cleburne*, 473 U.S. at 440).

Lawrence v. Texas,[48] "[w]hen a law exhibits such a desire to harm a politically unpopular group, [the Court has] applied a more searching form of rational basis review to strike down such laws under the Equal Protection Clause."[49]

It is to this animus-based heightened rational basis review that Justice Kennedy alluded in *Kelo*. His concurrence was not a call to subject all eminent domain decisions to "rational basis with a bite" review, as Horton and Levesque suggest.[50] Rather, his concurrence reiterated the Court's long-held view that certain legislative goals are not constitutionally permissible, regardless of the closeness of fit between the means and the ends.[51] In the context of the Public Use Clause the constitutionally impermissible legislative goal is purely private benefit—Justice Kennedy wrote separately in *Kelo* to emphasize that the exercise of eminent domain must be struck down if the condemnation was in fact undertaken solely to confer a private benefit and the public benefit that was offered to justify it was merely pretextual or incidental.[52]

IV. HEIGHTENED RATIONAL BASIS REVIEW AND THE PUBLIC USE CLAUSE

Perhaps the most damning critique of Horton and Levesque's proposal to adopt a heightened rational basis test for all eminent domain decisions is that it would require overturning years of Supreme Court precedent. For more than 100 years, the Supreme Court has consistently rejected the use of a generalized heightened rational basis review in the Public Use Clause context, including in *Kelo* itself.[53] The Court in *Kelo* made clear that heightened rational basis review had no place in Public Use Clause

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[48] 539 U.S. 558 (2003).

[49] *Id.* at 580 (O'Connor, J., concurring).

[50] Horton & Levesque, *supra* note 2, at 1418.

[51] Kelo v. City of New London, 545 U.S. 469, 490 (2005) (Kennedy, J., concurring).

[52] *Id.* at 490–491.

[53] Of course, the Court has imported heightened scrutiny into takings cases in the context of exactions, requiring that a condition on a land use permit have an essential nexus to the reason for which the permit could have been denied and rough proportionality with the projected impact of the permitted use. *See* Dolan v. City of Tigard, 512 U.S. 374, 389–90 (1994) (adopting a "reasonable relationship" test whereby the proposed land use requirement must have a reasonable relationship or nexus to the use to which the property is being made); Nollan v. California Coastal Comm'n, 483 U.S. 825, 836–37 (1987) (determining that a condition on land use designed to further a given purpose cannot be sustained within a state's police powers if the essential nexus between the prohibition and the stated purpose is eliminated). In doing so, the Court made clear that the essential nexus/rough proportionality inquiry was not heightened rational basis review, and, in fact, expressly declined to call its new heightened scrutiny by a term that might be confused with rational basis review. *See Dolan*, 512 U.S. at 391 ("We think the 'reasonable relationship' test adopted by a majority of the state courts is closer to the federal constitutional norm than either of those previously discussed. But we do not adopt it as such, partly because the term 'reasonable relationship' seems confusingly similar to the term 'rational basis' which describes the minimal level of scrutiny under the Equal Protection Clause of the Fourteenth Amendment.").

challenges when it said, "[f]or more than a century, our public use jurisprudence has wisely eschewed . . . intrusive scrutiny in favor of affording legislatures broad latitude in determining what public needs justify the use of the takings power."[54] Justice Kennedy both joined that decision and reiterated the point in his concurrence, stating "[t]his Court has declared that a taking should be upheld as consistent with the Public Use Clause . . . as long as it is 'rationally related to a conceivable public purpose.'"[55] This emphatic embrace of deferential rational basis review is consistent with the Court's prior Public Use Clause cases.[56]

Moreover, in a case decided the same term as *Kelo*, the Court finally eliminated the specter of heightened rational basis review in regulatory takings cases, for many of the same reasons it has consistently rejected that level of scrutiny in Public Use Clause cases.[57] In *Lingle v. Chevron U.S.A. Inc.*,[58] the Court rejected Chevron's regulatory takings challenge to a Hawaii statute limiting the amount of rent that an oil company could charge a lessee service station.[59] Chevron based its challenge on the Court's oft-repeated statement that "government regulation of private property 'effects a taking if [such regulation] does not substantially advance legitimate state interests . . . .'"[60] Although the Court had never decided a regulatory takings case using this "substantially advance[d] legitimate state[-]interests" standard, the phrase had been repeated so often in its decisions that it had "been read [by lower courts] to announce a stand-alone regulatory takings test."[61] The *Lingle* Court put an end to that misadventure, holding that "this formula prescribes an inquiry in the nature of a due process, not a takings, test, and . . . it has no proper place in our takings jurisprudence."[62] In particular, the *Lingle* Court explained that its regulatory takings jurisprudence was intended to identify those regulations

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[54] *Kelo*, 545 U.S. at 483. In light of this statement, Horton and Levesques' claim that the majority did not embrace very deferential rational basis review in *Kelo* is inexplicable. *See* Horton & Levesque, *supra* note 2, at 1427 ("the 'anything goes' rational basis test was not repeated").

[55] *Kelo*, 545 U.S. at 490 (Kennedy, J., concurring) (citations omitted).

[56] *See, e.g.*, Hawaii Hous. Auth. v. Midkiff, 467 U.S. 229, 241 (1984) ("[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 v. Parker, 348 U.S. 26, 32 (1954) ("We deal, in other words, with what traditionally has been known as the police power . . . . The role of the judiciary in determining whether that power is being exercised for a public purpose is an extremely narrow one.").

[57] *See* Lee Anne Fennell, *Picturing Takings*, 88 NOTRE DAME L. REV. 57, 77 n.60 (2012) (explaining that the Court rejected "the possibility of *any* elevated means-ends analysis in the regulatory takings context").

[58] 544 U.S. 528 (2005).

[59] *Id.* at 532.

[60] *Id*. at 531 (quoting Agins v. City of Tiburon, 447 U.S. 255, 260 (1980)) (bracketed language in original).

[61] *Id*. at 540.

[62] *Id*.

that "forc[e] some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."[63] Thus, the Court explained, regulatory takings tests look to the magnitude and distribution of the burdens of land use regulation, not to their relative effectiveness.[64] As the Court further explained:

> The owner of a property subject to a regulation that effectively serves a legitimate state interest may be just as singled out and just as burdened as the owner of a property subject to an ineffective regulation. It would make little sense to say that the second owner has suffered a taking while the first has not. Likewise, an ineffective regulation may not significantly burden property rights at all, and it may distribute any burden broadly and evenly among property owners. The notion that such a regulation nevertheless "takes" private property for public use merely by virtue of its ineffectiveness or foolishness is untenable.[65]

The *Lingle* Court rejected heightened rational basis review for regulatory takings challenges not only because it is "*doctrinally* untenable,"[66] but also because "it would require courts to scrutinize the efficacy of a vast array of state and federal regulations—a task for which courts are not well suited. Moreover, it would empower—and might often require—courts to substitute their predictive judgments for those of elected legislatures and expert agencies."[67] I have argued previously that the reasoning in *Lingle* applies with equal force to the *Kelo* Court's concern for pretext in the eminent domain context,[68] and other scholars have concurred.[69] At the very least, the reasoning in *Lingle* powerfully undermines Horton and Levesque's argument that the Court should embrace a generalized heightened rational basis review in every case invoking the Public Use Clause to challenge the exercise of eminent domain.

V. HEIGHTENED RATIONAL BASIS REVIEW, THE PUBLIC USE CLAUSE, AND THE JUDICIAL ROLE

Of course, it is possible that Horton and Levesque's proposal is a good idea even if it isn't supported by Justice Kennedy's concurrence in *Kelo* or

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[63] *Id*. at 537 (quoting Armstrong v. United States, 364 U.S. 40, 49 (1960)).
[64] *Id*. at 543–44.
[65] *Id*. at 543 (emphasis omitted).
[66] *Id.* at 544.
[67] *Id*.
[68] Blais, *supra* note 27, at 982–83.
[69] Fennell, *supra* note 57, at 77 n.60.

by the Court's existing Public Use Clause cases or its heightened rational basis review jurisprudence. However, careful scrutiny of their suggestion that every exercise of eminent domain should be subject to heightened rational basis review under a detailed ten-factor test[70] reveals several ways in which it causes more mischief than it prevents. First, the application of heightened rational basis review to every governmental eminent domain will likely flood the courts with takings cases, yet Horton and Levesque offer no evidence or argument about the extent of the benefit they expect from this dramatic increase in judicial oversight of state and local government decision making. Second, the proposal sets out ten factors for courts to consider in resolving Public Use Clause challenges without providing any guidance as to how the factors should be weighed, especially if they conflict. Finally, the avowed purpose of the proposed ten-factor test—to differentiate between good eminent domain decisions and bad ones[71]—would involve courts in a substantive review of the merits of economic legislation in a manner inconsistent with the appropriate and acceptable roles of the two branches.

Horton and Levesque's proposal would permit (perhaps encourage) landowners to raise a Public Use Clause challenge to every proposed eminent domain project. Under the Court's current Public Use Clause jurisprudence, challenges to the exercise of eminent domain for the construction of publicly owned infrastructure are destined to fail and therefore unlikely to be brought.[72] Similarly, under existing Public Use Clause jurisprudence, the use of eminent domain for projects that would be "used by the public" is clearly constitutional.[73] But one of the primary purposes of the Horton and Levesque proposal is to change that. As they say, "a proposal for a public road may in fact more easily meet Kennedy's test than a private economic development plan."[74] Thus, countless condemnations for uses that are currently well-established as public uses would be vulnerable to legal challenge under Horton and Levesque's proposal, greatly increasing the case loads of state and federal courts. But

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[70] Horton & Levesque, *supra* note 2, at 1426–27.

[71] *Id.*

[72] *See* Kelo v. City of New London, 545 U.S. 469, 497–99 (2005) (O'Connor, J., dissenting) ("Our cases have generally identified three categories of takings that comply with the public use requirement . . . . First, the sovereign may transfer private property to public ownership—such as for a road, a hospital, or a military base."); Rindge Co. v. County of Los Angeles, 262 U.S. 700, 708 (1923) ("[W]e conclude that these highways will . . . afford accommodation to the traveling public, and that the taking of land for them is a taking for a public use authorized by the law[] . . . ."). *Cf.* Berman v. Parker, 348 U.S. 26, 34 (1954) ("We cannot say that public ownership is the sole method of promoting the public purposes of community redevelopment projects.").

[73] *Kelo*, 545 U.S. at 477 ("[I]t 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.").

[74] Horton & Levesque, *supra* note 2, at 1426.

Horton and Levesque do not explain how this increase in cases will better implement the Public Use Clause or safeguard constitutionally protected property rights. They allude to a "public road or bridge to nowhere" and a "publicly owned and operated boondoggle" as targets of their proposed ten-factor test, but do not elaborate. Is the nation filled with public roads to nowhere and publicly owned and operated boondoggles, built on the backs of oppressed private property owners? If so, Horton and Levesque's proposal would benefit from the inclusion of examples of actual publicly owned roads and bridges to nowhere or other public works boondoggles that their ten-factor test would have identified and invalidated before they were built. Without such examples, a reader is left wondering whether the potential payoff of such a wholesale expansion of judicial review of state and local decision-making would be worth the cost.

Moreover, once these multitudes of Public Use Clause cases get to court, Horton and Levesque's proposal offers courts little guidance in how to resolve them. Horton and Levesque suggest that courts assess the proposed eminent domain projects using the following ten factors:

> (1) Will a public body own or operate the property? (2) How specific is the stated use? (3) Is it reasonably possible the stated use will actually succeed? (4) Is the stated use clearly a pretext? (5) Does the public gain outweigh any private gain? (6) Is there clearly improper favoritism? (7) Is there clearly improper targeting of a disfavored group? (8) Is the particular property in question on the periphery of the project? (9) Is there a comprehensive plan that any private developer must follow? (10) Were any private beneficiaries known at the time of the vote to condemn?[75]

They do not, however, offer any guidance into how those factors should be evaluated or weighed against one another.

In considering Horton and Levesque's ten-factor test, I found it helpful to regroup the factors based on the focus of each inquiry. It appears that factors four, six, and seven would be outcome determinative. In fact, factor four simply restates the holding in *Kelo*—both the majority opinion and Kennedy's concurrence agreed that the exercise of eminent domain for purely pretexual purposes is unconstitutional under the Public Use Clause.[76] Similarly, by including the term "improper" within factors six

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[75] *Id.* at 1426–27.

[76] *Kelo*, 545 U.S. 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."); *Id.* at 490 (Kennedy, J., concurring) ("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, with only incidental or pretextual public benefits, are forbidden by the Public Use Clause.").

and seven, these factors essentially become outcome determinative also.[77] One presumes that government action involving "clearly improper favoritism" or "clearly improper targeting of a disfavored group" is already unlawful, unless Horton and Levesque are proposing a new concept of improper specific to this area of the law.[78] If so, the content of that concept should be fleshed out.

That leaves seven factors to be considered in cases where one of the three outcome determinative inquiries is not satisfied.[79] We can further categorize these seven factors into those aimed at identifying pretext and those aimed at assessing the wisdom of the proposed condemnation. Factors one, five, and ten appear to be aimed at identifying pretext, whereas factors two, three, eight, and nine seem to be intended to evaluate the merits of the governmental decision to use eminent domain for the project in question.[80]

Nowhere in their article, however, do Horton and Leveque offer any guidance on the appropriate weight to be given to any of these factors, or on what a court should do if it determines that several of the factors suggest contradictory outcomes. Nor does the article provide sufficient theoretical justification for the ten-factor test to permit a thoughtful court to discern the appropriate weights and resolutions for itself. For example, consider a court faced with a Public Use Clause challenge to a proposed condemnation. If none of the three outcome determinative factors are satisfied, the court must evaluate the proposed eminent domain project using the remaining seven factors. Imagine that after taking extensive evidence the court concludes that: (1) the project will be owned by a public body; (3) it is reasonably possible that the stated use will actually succeed; (5) the private gain outweighs the public gain by a considerable margin but the public gain is large; (8) the particular property in question is on the periphery of the project; (9) there is a comprehensive plan for the project; and (10) there were private beneficiaries known at the time of the vote to condemn. These findings appear to cut in competing directions: the public ownership, likelihood of success, and comprehensive plan indicate that the project serves a public use, but the private gain, known private

[77] Horton & Levesque, *supra* note 2, at 1426–27.

[78] Alternatively, these two factors can be seen as similar to the triggers for heightened rational basis review discussed above. But triggers are conceptually different from factors in a multi-factor test, and Horton and Levesque's inclusion of these triggers in their proposal as mere factors obfuscates rather than clarifies current law.

[79] *Id.* (including factors one, two, three, five, eight, nine, and ten). As noted above, under current Public Use Clause jurisprudence if the project was to be owned by a public entity, this factor would also be determinative. I include it in the remaining test because I understand Horton and Levesque to be proposing to change the current law in this regard.

[80] Of course, some of the factors might be relevant to both inquiries. For example, the existence of a comprehensive plan could demonstrate the merits of a proposed project as well as decrease the likelihood that the public use component was pretextual or incidental.

beneficiaries, and peripheral nature of the property suggest that the condemnation might be serving a private interest. But Horton and Levesque offer no guidance to a court tasked with resolving a Public Use Clause challenge in such a case. Indeed, Horton and Leveque offer a similar example, drawn from the New London development plan at issue in *Kelo*, by suggesting that some aspects of the plan could have been different: "Suppose the owner was New London itself? Suppose the lease was for twenty years? Suppose New London actually operated the project?"[81] They then assert that "the answer to these questions would be relevant to a decision, but they should not be conclusive."[82] Nowhere, however, do they explain why the answers would be relevant, why they should not be conclusive, or even how they should be evaluated.

Takings jurisprudence, which already has a long and troubled relationship with undertheorized multi-factored tests, will not benefit by the addition of a longer, more multi-factored test. In the regulatory takings context, land use regulations that interfere with a landowner's use of her property are evaluated under an "essentially ad-hoc, factual inquir[y]" that employs three factors: (1) the character of the government action; (2) the economic impact of the government action; and (3) the degree of interference with distinct investment-backed expectations.[83] Although this test includes only three (not ten) factors, courts and commentators have long lamented its indeterminacy and lack of coherence as a standard for deciding when land use regulations constitute compensable takings.[84] Horton and Leveque's proposed ten-factor test, lacking in general theoretical foundation and concrete practical guidance, threatens to bring even more incoherence and indeterminacy to takings jurisprudence via the Public Use Clause.

Finally, even if Horton and Levesque's proposal could be implemented to permit courts to make reasoned and consistent distinctions between good

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[81] Horton & Levesque, *supra* note 2, at 1427.

[82] *Id.*

[83] Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124 (1978).

[84] *See, e.g.*, Carol M. Rose, Mahon *Reconstructed: Why the Takings Issue is Still a Muddle*, 57 S. CAL. L. REV. 561, 561–62 (1984) (citations omitted) ("By far the most intractable constitutional property issue is whether certain governmental actions 'take' property without satisfying the constitutional requirements of due process and just compensation. A number of property theorists have addressed this vexing issue, but they have yet to agree on the proper disposition. Instead, commentators propose test after test to define 'takings,' while courts continue to reach ad hoc determinations rather than principled resolutions."); Jed Rubenfeld, *Usings*, 102 YALE L.J. 1077, 1089 (1993) (citations omitted) ("This confusion only worsened in 1978 with *Penn Central Transportation Co. v. New York City*, in which the Court . . . foreswore the pursuit of general principles to resolve takings cases and held that judges must instead engage in 'essentially ad hoc, factual inquiries.' The Court's results under this 'ad hoc' approach easily earned the continuing admiration of commentators for the 'disarray' they produced."). *But see* Mark Fenster, *The Stubborn Incoherence of Regulatory Takings*, 28 STAN. ENVTL. L.J. 525, 529–30 (2009) (arguing that the "conceptual fuzziness" and "indeterminacy and imprecision" of the *Penn Central* factors are inevitable and are an "explicitly realist solution" to difficult cases).

eminent domain projects and bad ones, its adoption would be inconsistent with the appropriate roles of legislative decision makers and courts. Courts are particularly poorly suited to assess some of the factors included in Horton and Levesque's ten-factor test. For example, courts are ill-equipped to decide whether a project is reasonably likely to succeed, and there is certainly no reason to believe that a court's determination of this issue would be more accurate than that of state and local legislative decision makers. Thus, requiring courts to attempt these assessments would likely interfere with legitimate and important state and local projects. The *Kelo* Court recognized these concerns when it expressly rejected judicial oversight of the likelihood of a project's success:

> "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 . . . ." 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.[85]

Moreover, the basic premise of Horton and Levesque's proposal—that courts should sit as super legislatures to assess the wisdom or merits of state and local economic decision-making—is inconsistent with the legitimate judicial role. The Supreme Court has long recognized that courts should not substitute their judgment about the wisdom of economic legislation and regulation for that of elected legislatures or expert agencies in challenges to those laws and policies. As the Court said in *Heller v. Doe*:[86]

> [R]ational-basis review in equal protection analysis "is not a license for courts to judge the wisdom, fairness, or logic of legislative choices" . . . . Nor does it authorize "the judiciary [to] sit as a superlegislature to judge the wisdom or

[85] Kelo v. City of New London, 545 U.S. 469, 488 (2005) (quoting Hawaii Hous. Auth. v. Midkiff, 467 U.S 229, 242–43 (1984)).

[86] 509 U.S. 312 (1993).

> desirability of legislative policy determinations made in areas that neither affect fundamental rights nor proceed along suspect lines."[87]

A look at the *Lingle* holding is also instructive:

> The [substantially advances] formula [proposed by Chevron] can be read to demand heightened means-ends review of virtually any regulation of private property. If so interpreted, it would require courts to scrutinize the efficacy of a vast array of state and federal regulations—a task for which courts are not well suited. Moreover, it would empower—and might often require—courts to substitute their predictive judgements [sic] for those of elected legislatures and expert agencies.
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> . . . [W]e have long eschewed such heightened scrutiny when addressing substantive due process challenges to government regulation. The reasons for deference to legislative judgments about the need for, and likely effectiveness of, regulatory actions are by now well established . . . .[88]

Horton and Leveque's proposal would upend this careful balance of roles and responsibilities, and subject a vast array of legislative and administrative policy decisions to judicial review under a sweeping ten-factor test that provides little guidance to the reviewing court.

VI. CONCLUSION

Ten years ago, Horton and Levesque prevailed in an important Public Use Clause case that put to rest emerging calls for heightened scrutiny, or outright banning, of a particular category of condemnation cases—those motivated by economic development plans or involving transfers of the condemned property to other private owners. In so doing, Horton and Levesque helped the Supreme Court reaffirm the long-established wisdom that public use is a broad concept encompassing anything that serves a public purpose and that it is particularly within the province of legislative decision makers to determine what projects will serve the public purpose. By advocating the adoption and widespread application of a ten-factor heightened rational basis review test for every exercise of the power of eminent domain, Horton and Levesque threatened to forsake that victory and upend the settled wisdom.

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[87] *Id.* at 319 (citations omitted).

[88] Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 544–45 (2005).