

THERE'S NO PLACE LIKE HOME!

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It is salutary to remember that in a world of scarce resources there is very little to preserve us from the amoral predation practised in the rest of the animal kingdom. Without something resembling rules of property and contract, the daily competition for the goods of life would readily descend into an orgy of seizure and violence. An essential precondition of civilised co-existence is that we must always proffer some better justification for asserting personal control over a desired resource than simply the argument that “you’ve got it; and I want it.” Indeed, in a desperate attempt to provide some sort of principled system for the orderly allocation of valued assets, the common law has often resorted to extremely crude rules of thumb. Hence, for example, rules of first occupancy - rules no different from those practised in any children’s playground. We still fall back, for want of any better solution, upon Bracton’s primitive formula of seven centuries ago that ‘everyone who is in possession, though he has no right, has a greater right [than] one who is out of possession and has no right.’¹ By means of such fragile distinctions as that captured in the “first in time” rule, we seek to ward off the threat of proprietary anomie. But nothing should ever blind us to the fact that the dividing line between order and spoliation is alarmingly thin.

It is true, of course, that the search for the holy grail of property has revealed remarkably few characteristics as lying irreducibly or indelibly at the core of proprietary entitlement. Yet deeply embedded in the phenomenology of property is supposed to be the notion that proprietary rights ‘cannot be removed except “for cause”.’² The essence of “property” involves some kind of claim that a valued asset is “proper” to one. The “propertiness” of property depends, at least in part, on a legally protected immunity from summary cancellation or involuntary removal of the rights concerned.³ And just as the law of theft proscribes the unconsented transfer of goods from one private actor to another, so too it is a ‘polar’ proposition that no sovereign power may ‘take the property of A for the sole purpose of transferring it to another private party B.’⁴ Were things otherwise, regimes of property would simply dissolve into the primeval chaos of the commons, in which all resources are constantly up for grabs and in which the process of trading with assets is neither meaningful nor necessary. The property game would disintegrate into some sort of mad lottery - the juristic equivalent of a game of musical chairs - in which claims to desired resources are liable to be swept aside by random, unilateral and unappealable fiat.

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¹ *Bracton on the Laws and Customs of England* (trans S E Thorne, 1977), Vol III, 134. See, more recently, *Mabo v Queensland (No 2)* (1992) 175 CLR 1 at 210 per Toohey J (‘as between mere possessors prior possession is a better right’).

² *Logan v Zimmermann Brush Co* 455 US 422 at 430, 71 L Ed 2d 265 at 274 (1982) per Justice Blackmun.

³ The prohibition against the arbitrary deprivation of property is ‘an essential idea which is both basic and virtually uniform in civilised legal systems’ (*Newcrest Mining (WA) Ltd v Commonwealth of Australia* (1997) 190 CLR 513 at 659 per Kirby J). See also *Wilson v Anderson* (2002) 213 CLR 401 at [140] per Kirby J; *Hawaii Housing Authority v Midkiff* 467 US 229 at 245, 81 L Ed 2d 186 at 200 (1984) per Justice O’Connor; *James v United Kingdom* Series A No 98 at [40] (1986).

⁴ *Kelo v City of New London, Connecticut* 162 L Ed 2d 439 (2005) at 450 per Justice Stevens.

This ‘perfectly clear’ proposition has a long history in American (as in other) law. See e.g. *Calder v Bull* 3 US (Dall) 386 (1798) at 388, where Justice Chase wrote that ‘a law that takes property from A and gives it to B’ is ‘contrary to the great first principles of the social compact ... [and] cannot be considered a rightful exercise of legislative authority.’

Like all good missionaries arriving in the South Seas I come armed with a Biblical text. I refer to the passage in the *First Book of Kings* which narrates the attempt by Ahab to acquire for himself a vineyard owned by Naboth the Jezreelite.⁵ Ahab, announcing that he wished to turn the vineyard to another, more highly preferred, use as a garden of herbs, tried to bargain with Naboth. He offered Naboth a 'better vineyard' in substitution for his own or even, 'if it seem good to thee,' he said, 'I will give thee the worth of it in money.' Naboth declined all offers, adamantly refusing to part with what he called the 'inheritance' of his fathers. We are told that Ahab returned home 'heavy and displeased', lay down on his bed and would eat no bread. But, as is well known, Ahab's wife, Jezebel, in one of the earliest recorded acts of deliberate market bypass, engineered the trial of Naboth on trumped up charges of blasphemy and, in consequence, Naboth was stoned to death. On hearing of his death, the evil Jezebel said to Ahab, 'Arise, take possession of the vineyard of Naboth the Jezreelite, which he refused to give thee for money', and Ahab swiftly did so. The Biblical account goes on to describe how later Ahab was savagely rebuked by Elijah the prophet. 'In the place where the dogs licked the blood of Naboth,' said Elijah, 'shall dogs lick thy blood too.' And so, indeed, it was to pass. Ahab came, in due course, to a suitably sticky end. In the midst of battle, we are told, an enemy archer drew a bow at a venture and, in some freak fashion, the arrow found a gap in Ahab's protective armour, inflicting a fatal wound. The dogs were not far away.

Today there is probably no *general* wish that Ahab's precise fate should befall those who orchestrate similar operations of market bypass aimed at the expropriation of private citizens. It is nevertheless one of the more ancient and majestic themes of global jurisprudence that private necessity can never demand that the lands of one individual be taken preemptorily and given to another individual exclusively for his or her personal benefit or profit. True it is that, by way of exception to the general inviolability of proprietary entitlements, we allow certain heavily controlled measures of taking in the name of the state and for communal purposes. However, such exercises of eminent domain require clear justification on grounds of public interest and must be accompanied by the payment of fair compensation - limitations which are emphatically confirmed, in some form or other, in most constitutional charters.⁶ Historically, of course, these twin caveats find their most famous expression in the guarantee of the Fifth Amendment of the United States *Constitution* that '[n]o person shall be ... deprived of ... property, without due process of law; nor shall private property be taken for public use, without just compensation.' A more muted expression of the same idea appears in section 51(xxxi) of the Australian *Constitution*, which authorises the 'acquisition of property on just terms from any State or person for any purpose in respect of which the Parliament has power to make laws.'⁷

By contrast, the assertion of a private form of eminent domain - the 'one-to-one transfer of property' for private rather than public benefit⁸ - remains anathema in most legal traditions.

⁵ *I Kings* Ch 21.

⁶ For example, the *European Convention on Human Rights* (ECHR) provides that '[n]o one shall be deprived of his possessions except in the public interest' (ECHR, Protocol No 1, Art 1), but even in cases of compelling public interest 'the taking of property without payment of an amount reasonably related to its value will normally constitute a disproportionate interference which cannot be justified' (*J A Pye (Oxford) Ltd v United Kingdom* [2005] ECHR 921 <http://www.bailii.org> at [47]). See also *Belfast Corpn v O D Cars Ltd* [1960] AC 490 at 517-518 per Viscount Simonds, 523 per Lord Radcliffe.

⁷ Section 51(xxxi) has come to be read as a 'constitutional guarantee ... against acquisition without just terms' (*Commonwealth of Australia v State of Tasmania* (1983) 158 CLR 1 at 282 per Deane J).

⁸ See *Kelo v City of New London, Connecticut* 162 L Ed 2d 439 (2005) at 456 per Justice Stevens, 467 per

This is so even though the taking is coupled with an offer of full monetary compensation. It seems wrong that the coercive power of the state should be used to force an unconsented transfer from A to B where the operation of the open market has failed to generate the required bargain by means of normal arm's length dealing.⁹ Thus for instance, in *Prentice v Brisbane City Council*, the Supreme Court of Queensland refused to allow a city council compulsorily to acquire land from a private owner merely for the purpose of facilitating a developmental plan submitted to the council by a private property developer.¹⁰ Mansfield CJ saw no reason why a private individual should 'compulsorily, and against his will, be deprived of his property' in order to assist the carrying out of the developer's project. As Justice Callinan has noted more recently in the High Court,¹¹ the Queensland court adopted this stern view 'notwithstanding that in a broad sense the interests of the city and its inhabitants were being served by the project.' But the approach evident in the *Prentice* case - that "private-to-private" eminent domain is an offensive concept - is reflected in other areas of property law. For example, where courts are statutorily empowered to modify or extinguish a servitude on the ground of obsolescence, there is a widely acknowledged danger that this form of interference with property may 'enable a person to expropriate the private rights of another purely for his own profit.'¹² Accordingly Australian courts - in common with courts in other jurisdictions - have emphasised that such statutory powers were not designed 'with a view to benefiting one private individual at the expense of another private individual.'¹³ Much more is required to justify the removal of a servitude than the bare assertion that its extinguishment would make a neighbour's land 'more enjoyable or more convenient for his own private purposes.'¹⁴ A similar distaste for privately motivated or self-interested requisition of another's assets is evident in the contemporary response to that ultimate, and deeply historic, form of private eminent domain - the acquisition of title through adverse possession. Nowadays the trend across the common law world - not least in the Australian jurisdictions¹⁵ - is to abolish or suppress the adverse possession rule, particularly where the unsubtle operation of the limitation principle contrasts starkly with the clear-cut identification of ownership provided by a Torrens system.¹⁶

Thus there seems, at first sight, to be a fair consensus that the practice of private eminent domain is unacceptable in modern civilised legal communities. Yet the purpose of this paper is to suggest that such a supposition is, indeed, very far from the truth. The relevant issues have recently been highlighted in some extremely controversial litigation in the United States; and it is also clear that the same debate soon threatens to break out in Antipodean jurisdictions.

The buzz-word is *Kelo*. Few American citizens, even if only marginally responsive to the

Justice O'Connor.

⁹ 'A purely private taking could not withstand the scrutiny of the public use requirement; it would serve no legitimate purpose of government and would thus be void' (*Hawaii Housing Authority v Midkiff* 467 US 229 at 245, 81 L Ed 2d 186 at 200 (1984)).

¹⁰ [1966] Qd R 394 at 406.

¹¹ *Griffiths v Minister for Lands, Planning and Environment* [2005] HCA Trans 223 <http://www.austlii.edu.au>.

¹² *Durian (Holdings) Pty Ltd v Cavacourt Pty Ltd* (2000) 10 BPR 18099 at [5] per Mason P.

¹³ *Re Henderson* [1940] Ch 835 at 846 per Farwell J. See also *Re Truman, Hanbury, Buxton & Co Ltd's Application* [1956] 1 QB 261 at 270-271 per Romer LJ; *Durack v De Winton* (1998) 9 BPR 16403 at 16443.

¹⁴ *Re Henderson* [1940] Ch 835 at 846, as quoted in *Durian (Holdings) Pty Ltd v Cavacourt Pty Ltd* (2000) 10 BPR 18099 at [5].

¹⁵ See e.g. *Real Property Act 1925* (ACT) s 69; *Land Title Act 2000* (NT) s 198; *Real Property Act 1900* (NSW) Part 6A.

¹⁶ See *Land Registration Act 2002* (England) ss 96-97, Sch 6.

world around them, can have remained unaware that on 23 June 2005 the Supreme Court of their nation handed down its ruling in *Kelo v City of New London, Connecticut*.¹⁷ Few informed citizens will have failed to be caught up in the furious public disputation which has followed the *Kelo* judgment.

The City of New London, Connecticut, is an historic whaling port bordering Long Island Sound. Like many similar locations, the City retains a certain charm but there is also a faded or run-down air about the place. In 2000 the City delegated to the New London Development Corporation - a private non-profit organisation - a power of eminent domain which authorised the compulsory purchase of land required for the revitalisation of the waterfront area. Susette Kelo owned a pleasant house overlooking the waterfront. However, her home came to be coveted as a suitable location for the construction of residential and commercial facilities aimed at complementing a new Pfizer Company research facility which had been recently built on adjacent land at a cost of \$300 million. Kelo's land, like that of her immediate neighbours, was therefore earmarked to be compulsorily transferred to the New London Development Corporation and then leased for 99 years to a private developer at a rent of \$1 per year. The area was to be bulldozed by this developer and converted into a waterfront hotel and conference centre, retail outlets, high quality office space, parking facilities and, most significantly, a number of newly constructed luxury condominiums of the kind that Pfizer Company executives were likely to want to own or occupy. The rental and other profits to be drawn from the redevelopment of the waterfront were plainly destined to accrue exclusively to the private developer.

Susette Kelo was one of a small number of owners who refused to be bought out, at any price, for the purpose of the planned development. Her neighbourhood was in no sense an area of urban blight or appropriate for slum clearance. She loved the view which her home afforded and its proximity to the waterfront. She declared herself wholly uninterested in money. In an attempt to save her home, she sued the City of New London and the New London Development Corporation. As Justice Antonin Scalia observed during oral argument before the Supreme Court, New London's proposal was to take property 'from someone who doesn't want to sell' and '[n]o amount of money is going to satisfy her.'¹⁸ Or as Susette Kelo was reported elsewhere as having remarked: 'How come someone else can live here, and we can't?'

In the American context the critical element in the debate comprises the constitutional reference to public use. Was Susette Kelo's home being taken "for public use"? She of course denied that it was, but the City of New London prevailed in Connecticut's Supreme Court¹⁹ and the matter then found its way to the Supreme Court of the United States. The City argued that the "public use" requirement was satisfied by the sheer fact that its development plan would rejuvenate the area, create thousands of new jobs and, most importantly, generate enormously more tax revenue for public coffers. Put bluntly, the more affluent users of the revitalised area would be able to pay higher taxes. On this analysis "public use" can be construed as meaning simply *public benefit* - an expansion or improvement of the tax base. Indeed, in the Supreme Court in Washington counsel for the City of New London openly agreed with the proposition that, on payment of due compensation, property may legitimately be taken from people who are paying less taxes

¹⁷ 545 US 469, 162 L Ed 2d 439, 125 S Ct 2655 (2005).

¹⁸ Transcript of Oral Argument (22 February 2005) 51.

¹⁹ *Kelo v City of New London* 843 A2d 500 (Conn 2004).

and allocated to people who are likely to pay significantly more.²⁰ On this basis, as counsel for Susette Kelo rejoined, ‘any city can take property anywhere within its borders for any private use that might make more money than what is there now.’²¹ In other words, nowhere is safe - any property which might be made more economically productive is ‘up for grabs.’²² In the *Kelo* hearing Justice Scalia aptly vocalised the sentiments of Ms Kelo:

She says I’ll move if it’s being taken for a public use, but by God, you are just giving it to some other private individual because that individual is going to pay more taxes.

As another American judge observed two centuries ago, such a ‘monster in legislation’ would differ not at all from ‘the mandate of an Asiatic prince’, for on this basis ‘we have nothing that we can call our own, or are sure of for a moment; we are all tenants at will, and hold our property at the mere pleasure of the Legislature.’²³

Kelo brought together many of the features of the enduring American paradox. It concerned the limits of coercive state power in the land of the free. It exposed an unresolved tension between the sanctity of private property and the power of the mighty dollar. It highlighted a confrontation between little people and big business, between individual claims of personal privacy and the collective American dream of wealth and prosperity. It marked a point at which the democratic ideal slides arguably into majoritarian tyranny. The threat to private property implicit in *Kelo* also contrasted vividly with the Supreme Court’s concern a decade or so ago to defend landowners against uncompensated regulatory interference with land use.²⁴

Above all, the *Kelo* case made for some very strange bedfellows. Social welfare activists who would once have applauded the New Deal and (later) the era of Charles Reich’s “new property” found themselves aligned alongside the most die-hard of libertarian property rights advocates. The welfarist values which might have endorsed eminent domain for broad purposes of socio-economic betterment now stood firm against the utilisation of eminent domain for private or corporate profit. And ultra-conservatives who could normally have been expected to back big business to the hilt suddenly remembered that their credo is ultimately the defence of private ownership. Moreover, if coercive taking can be justified wherever it maximises tax revenue, the land most likely to be taken is that of the poor, the black, the elderly and the disenfranchised, whose use of the land resource is, inevitably, relatively unprofitable. One of the supreme ironies of the *Kelo* case was that the amicus briefs filed in support of Susette Kelo included powerful submissions not only from extreme right-wing think tanks such as the Cato and Goldwater Institutes, but also from bodies such as the National Association for the Advancement of Colored People, which condemned *Kelo*-type takings as placing ‘the burden of economic development most heavily on those who are least able to bear it.’²⁵

²⁰ Transcript of Oral Argument (22 February 2005) 29-31.

²¹ Transcript of Oral Argument (22 February 2005) 3.

²² Transcript of Oral Argument (22 February 2005) 13.

²³ *Vanhorne’s Lessee v Dorrance*, 2 US (2 Dall) 304 at 316, 1 L Ed 391 at 396 (1795) per Patterson J (‘Wretched situation, precarious tenure!’).

²⁴ See e.g. *Lucas v South Carolina Coastal Council* 505 US 1003, 120 L Ed 2d 798 (1992).

²⁵ Brief of *Amici Curiae* National Association for the Advancement of Colored People, AARP, Hispanic Alliance of Atlantic County Inc, Citizens in Action, Cramer Hill Resident Association Inc, and The Southern Christian Leadership Conference, 4.

But how had American law reached the point where *Kelo*-type taking was even conceivable? In 1795 in *Vanhorne's Lessee v Dorrance*²⁶ Justice Patterson had propounded that the 'despotic' power of expropriation was exercisable only where it was necessary 'for the good of the community' or where 'state necessity requires.' Indeed, provided that there was 'complete indemnification to the individual', private property 'must yield to urgent calls of public utility or general danger.'²⁷ But, declared Justice Patterson, it is 'difficult to form a case, in which the necessity of the state can be of such a nature, as to authorise or excuse the seizing of landed property belonging to one citizen and giving it to another citizen.' Such property, once vested in a citizen-owner, is 'encircle[d]' by the *Constitution* and rendered 'an holy thing.' To suggest otherwise was to engage in 'an exercise of power and not of right.' He added ruefully that even the English parliament, 'with all their boasted omnipotence, never committed such an outrage on private property.'²⁸

Of course, the 19th century introduced a new era of takings in the expanding United States in response to the need to provide the infrastructure for networks of transport, power, communications, water supplies and sanitation. But the exercise of eminent domain which underpinned such public facilities as railways, telegraph installations and sewers was readily reconcilable with the constitutional requirement of "public use". More important staging posts along the journey were to emerge during the 20th century. The story is one of semantic mutation, the concept of "public use" being steadily conflated with notions of *public usefulness* and *public benefit*.²⁹ The original "public use" requirement evolved into a test of *public purpose*, the legislature's declaration of this purpose being, in the view of the Supreme Court, 'well-nigh conclusive.'³⁰

It came, moreover, to be accepted - perhaps most notably in *Hawaii Housing Authority v Midkiff*³¹ - that the exercise of eminent domain did not fail the test of "public use" merely because the land of one private owner ended up in the hands of another private owner, provided that the latter's use of the land conduced to greater public benefit.³² In an age of private finance initiatives there is no requirement that public ends should be sought exclusively, principally or even at all through the agency of a public (as distinct from private) enterprise.³³ Thus in *Berman v Parker*³⁴ the Supreme Court had already upheld the use of eminent domain as a means of slum clearance and urban regeneration, even though, as Justice Kennedy pointed out at the *Kelo* hearing, 'everybody knows that private developers were the beneficiaries in *Berman*.'³⁵ The amplitude of this more broadly perceived power of eminent domain was graphically illustrated in *Poletown Neighborhood Council v City of Detroit*,³⁶ where in 1981 a narrow majority in the Supreme Court of Michigan authorised the expropriation of the elderly Polish-American population of a Detroit suburb in order to clear a site for a new assembly plant for General Motors

²⁶ 2 US (2 Dall) 304 at 310-311, 1 L Ed 391 at 394 (1795).

²⁷ 2 US (2 Dall) 304 at 316, 1 L Ed 391 at 396 (1795).

²⁸ 2 US (2 Dall) 304 at 310-311, 1 L Ed 391 at 394 (1795).

²⁹ See *Kelo v City of New London* 843 A2d 500 (Conn 2004) at 522-527.

³⁰ *Berman v Parker* 348 US 26 at 32, 99 L Ed 27 at 37 (1954) per Justice Douglas.

³¹ *Hawaii Housing Authority v Midkiff* 467 US 229 at 243-244, 81 L Ed 2d 186 at 199 (1984).

³² The same conclusion was reached by the European Court of Human Rights in *James v United Kingdom*, Series A No 98 (1986) at [40]-[41].

³³ *Berman v Parker* 348 US 26 at 33-34, 99 L Ed 27 at 38 (1954) per Justice Douglas.

³⁴ 348 US 26, 99 L Ed 27 (1954).

³⁵ Transcript of Oral Argument (22 February 2005) 12.

³⁶ 304 NW2d 455 (Mich 1981).

Corporation. As was pointed out in Justice Ryan's dissenting judgment - incidentally one of the more noble dissents of legal history - the 'reverberating clang of [*Poletown's*] economic, sociological, political and jurisprudential impact' was indeed 'likely to be heard and felt for generations'.³⁷

Poletown prepared the way for an era of aggressive exercise of eminent domain in many jurisdictions in the United States. Many government takings became, functionally, exercises of a *private* power of compulsory acquisition. In an age of unrestrained capitalist enterprise the private pursuit of profit - the maximisation of privately or corporately owned wealth - constituted per se a "public use". Private benefit became indistinguishable from public benefit and, along the way, the *Constitution's* requirement of "public use" was widely considered to have been rendered a 'dead letter'.³⁸ Matters even reached the point where some agencies of local government started to advertise that, in return for a fee, they would supply the exercise of their eminent domain powers in order to help private developers secure the compulsory acquisition of privately held land which the developers could not purchase through voluntary bargain.³⁹ In effect, the state began to act as a 'default broker of land'⁴⁰ for private clients whose concern was private profit, the process being supposedly legitimised by the presence of some rationally conceivable public benefit which followed as a marginal incident or spin-off of the transaction.

During the years leading up to *Kelo*, this practice of "private-to-private" eminent domain flourished in many parts of the United States, unabated by the irony that, following the transfer, the new private owner might even invite the former owner to repurchase his own land.⁴¹ "Private-to-private" eminent domain could also be harnessed by a powerful commercial party in order to squeeze out business competition, a strategy which was particularly effective if coupled with a threat to relocate an anchor business (and its accompanying jobs and revenue potential) to another urban centre.⁴² For many, the "fiscalization" of land use⁴³ - i.e. turning land to its highest value as a generator of profit - became the supreme "public use" in an increasingly materialistic America. Quite insidiously, the constitutional concession that some takings are required for the common good became a licence for a new form of efficient taking directed towards the manufacture of money.

It was against this backdrop that the *Kelo* case provided a timely opportunity for re-examination of the proper purposes of eminent domain - a problem which affects not only the United States, but also every jurisdiction which permits coercive takings of title. To what extent (if at all) may eminent domain be used in order to facilitate economic

³⁷ 304 NW2d 455 (Mich 1981) at 464.

³⁸ See Thomas W Merrill, 'The Economics of Public Use' (1986-87) 72 *Cornell Law Review* 61; Gregory S Alexander, 'Ten Years of Taking' (1996) 46 *Journal of Legal Education* 586 at 587.

³⁹ See e.g. *Southwestern Illinois Development Authority v National City Environmental, LLC* 768 NE2d 1 (Ill 2002) at 8-11.

⁴⁰ *Southwestern Illinois Development Authority v National City Environmental LLC*, 768 NE2d (Ill 2002) at 10 per Garman J. It is significant that Australasian courts have long been highly suspicious of any compulsory purchase in which the acquiring authority behaves effectively as the agent of the private developer rather than as 'the agent of the inhabitants in general' (*Bartrum v Manurewa Borough* [1962] NZLR 21 at 26-27 per Hardie Boys J). See likewise *Prentice v Brisbane City Council* [1966] Qd R 394 at 410 per Mansfield CJ.

⁴¹ *Berman v Parker* 348 US 26 at 34, 99 L Ed 27 at 38 (1954) per Justice Douglas; *Midkiff v Tom* 702 F2d 788 (1983) at 797.

⁴² See e.g. *99 Cents Only Stores v Lancaster Redevelopment Agency* 237 F Supp 2d 1123 (CD Cal 2001).

⁴³ See Mark Brnovich, 'Condemning Condemnation: Alternatives to Eminent Domain' (Goldwater Institute Policy Report No 195, 14 June 2004).

developments promoted by private entrepreneurs?

On this question American law found itself in increasing turmoil. In 2004 the Supreme Court of Michigan overturned its earlier decision in *Poletown*. In *Wayne County v Hathcock*⁴⁴ the Michigan court thought that '*Poletown*'s "economic benefit" rationale would validate practically any exercise of the power of eminent domain on behalf of a private entity', thereby rendering 'impotent' the constitutional limitations on that power. The trickle-down effects of private economic development could not, in the court's view, justify coercive acquisitions of title.⁴⁵ As the Supreme Court of Illinois had observed two years earlier in *Southwestern Illinois Development Authority v National City Environmental, LLC*,

If property ownership is to remain what our forefathers intended it to be, if it is to remain a part of the liberty we cherish, the economic by-products of a private capitalist's ability to develop land cannot justify a surrender of ownership to eminent domain.⁴⁶

In very similar vein, a New Jersey court had, in 1998, rejected Donald Trump's attempt to dispossess an elderly homeowner in order to use her land as a limousine parking lot adjacent to a Trump Plaza Hotel-Casino in Atlantic City. Here, the court stated, 'the primary interest served ... is a private rather than a public one.'⁴⁷

We are once again on the cusp of that most difficult divide in modern law - the boundary between the public and the private. Takings of title can be calibrated across circumstances ranging from expropriations which are underpinned by intensely private motivations of personal gain (always improper⁴⁸) to those which are inspired by wholly laudable social or infrastructural objectives directed toward the common good.⁴⁹ Doubtless many takings of title fall at some intermediate point across the intervening spectrum, thus prompting critical questions as to the primary or 'controlling'⁵⁰ purpose of the taking. Inevitably we and the courts are drawn into a ranking of social concerns, a new index of collective values, a fresh assessment of the social worth of expropriatory objectives.

Kelo was always bound to be an odd and a difficult decision.⁵¹ For a start, two out of nine

⁴⁴ 684 NW2d 765 (Mich 2004) at 786-787.

⁴⁵ See also *Cottonwood Christian Center v Cypress Redevelopment Agency* 218 F Supp 2d 1203 (CD Cal 2002) at 1229, where an attempt by Costco to take over a church site for use as a supermarket was regarded as a 'naked transfer of property from one private party to another' in violation of the Fifth Amendment of the United States Constitution.

⁴⁶ 768 NE2d 1 (Ill 2002) at 10 per Garman J.

⁴⁷ *Casino Reinvestment Development Authority v Banin* 727 A2d 102 (NJ Super L 1998) at 111. Compare, however, *City of Las Vegas Downtown Redevelopment Agency v Pappas* 76 P3d 1 (Nev 2003) at 10-12, cert denied 124 S Ct 1603 (2004), where the United States Supreme Court refused to review the case of a 72 year old homeowner whose house was compulsorily acquired in order to provide a parking lot to service off-Strip casinos in Las Vegas. See also *Bugryn v Bristol* 774 A2d 1042 (2001) (elderly owners expropriated for purposes of an industrial park).

⁴⁸ *Poletown Neighborhood Council v City of Detroit* 304 NW2d 455 (Mich 1981) at 458, 472; *Hawaii Housing Authority v Midkiff* 467 US 229 at 245, 81 L Ed 2d 186 at 200 (1984).

⁴⁹ See e.g. *Rindge Co v County of Los Angeles* 262 US 700 at 706, 67 L Ed 1186 at 1192 (1923) ('That a taking of property for a highway is a taking for public use has been universally recognized, from time immemorial').

⁵⁰ See *In re Slum Clearance in City of Detroit* 50 NW2d 340 (1951) at 343; *Poletown Neighborhood Council v City of Detroit* 304 NW2d 455 (Mich 1981) at 477.

⁵¹ At the end of the oral hearing before the Supreme Court, counsel for the City of New London tried to wind up

Supreme Court justices failed to attend the oral hearing in February 2005 - Chief Justice Rehnquist because of severe illness and Justice Stevens because his plane to Washington was cancelled.⁵² In June 2005, in a highly controversial five-to-four ruling, the Court confirmed that takings aimed at promoting economic development do indeed satisfy the “public use” requirement imposed by the United States *Constitution*. The assertion of eminent domain by the New London Development Corporation was accordingly upheld as valid. And for Susette Kelo, therefore, there was, in fact, “no place like home”.

As we speak, Ms Kelo and her stubborn neighbours are awaiting the arrival of the bulldozers which will come and knock down the waterfront houses in which some have lived for over 80 years. And, just to add insult to injury, the City of New London has announced that it plans to charge the recalcitrant residents tens of thousands of dollars of back rent on the basis that they have enjoyed occupation of city property during the five years which have elapsed since the original notices of condemnation.

In *Kelo* the majority opinion, in which Justices Breyer, Ginsburg, Kennedy and Souter joined, was given by Justice Stevens. Predictably this opinion laid a heavy stress on the precedential weight of the Court’s earlier decisions in *Berman* and *Midkiff*. The majority went on to assert, somewhat blandly, that the program of economic rejuvenation proposed in New London ‘unquestionably serve[d] a public purpose’ and therefore justified the use of eminent domain.⁵³ Although conceding that the City of New London ‘would no doubt be forbidden from taking petitioners’ land for the purpose of conferring a private benefit on a particular private party’,⁵⁴ Justice Stevens went on to point out that ‘the government’s pursuit of a public purpose will often benefit private parties.’⁵⁵ Whilst not wishing to ‘minimise the hardship that condemnations may entail’, the majority opinion argued that the present case involved not a ‘one-to-one transfer of property’, but rather a series of takings as part of an ‘integrated development plan’ formulated at the local level and to which the Court should pay substantial deference.⁵⁶ Justice Kennedy also filed a separate, and significantly more thoughtful, opinion in which he expressed a deep concern that there may be ‘private transfers in which the risk of undetected impermissible favoritism of private parties is so acute that a presumption ... of invalidity is warranted under the Public Use Clause.’⁵⁷ He too was moved by the consideration that the *Kelo* taking occurred ‘in the context of a comprehensive development plan meant to address a serious city-wide depression’ and that the projected economic benefits of the scheme could not be ‘characterised as *de minimis*.’ The majority’s Benthamite endorsement of the New London condemnations was, however, countered by strong dissents from a vociferous minority comprising Justice Sandra Day O’Connor, Chief Justice Rehnquist and Justices Scalia and Thomas.

his argument in four crucial words, but was unable to articulate these four words because his red light had come on. Counsel subsequently revealed out of court - although not terribly helpfully - that his culminating message for the Supreme Court justices would have been ‘federalism, boundaries, discretion and precedent.’ In other words, that it was not for the courts to decide where boundaries ought to be and that the courts should defer to legislative discretion. See the account published on the internet at http://biz.yahoo.com/law/050223/eed972ffcf8f3c0f32cc6d6074dff364_1.html.

⁵² Both reserved their right to decide on the briefs and transcripts.

⁵³ *Kelo v City of New London, Connecticut* 162 L Ed 2d 439 (2005) at 454 (‘Promoting economic development is a traditional and long accepted function of government’).

⁵⁴ 162 L Ed 2d 439 (2005) at 450.

⁵⁵ 162 L Ed 2d 439 (2005) at 455.

⁵⁶ 162 L Ed 2d 439 (2005) at 456-457.

⁵⁷ 162 L Ed 2d 439 (2005) at 460.

The *Kelo* decision is, I think, an extremely testing case for all property lawyers and here I confess to a personal difficulty. I reckon that I have a reasonably respectable record as a socially minded property scholar. I believe that ‘the purchase of a “bundle of rights” necessarily includes the acquisition of a bundle of limitations.’⁵⁸ I hold a pretty community-oriented view of takings, largely on the footing that social obligation is an intrinsic component of private entitlement and because, in the long run, the community-oriented perspective is conducive to a sort of civic equity⁵⁹ - an ‘average reciprocity of advantage’ for all concerned.⁶⁰ But I have to say that *Kelo*-type taking - quite apart from the limitless scope which it creates for cronyism and corruption in local government - leaves me deeply troubled on at least three related scores. Overarching my concerns is the way in which *Kelo* has caused me to dig deeper in attempting to answer the fundamental question whether there remains any content *at all* in the concept of property. Indeed, no less a body than the High Court of Australia is already on record as mooted that ‘the ultimate fact about property is that it does not really exist: it is mere illusion.’⁶¹

First, the taking in *Kelo* involves something resembling a bill of attainder directed at the *home*, a category of place which has long been regarded as deserving of special protection in the law.⁶² American case law has consistently deferred to ‘the sanctity of a man’s home and the privacies of life’,⁶³ a theme echoed almost verbatim in Article 8 of the *European Convention on Human Rights*.⁶⁴ We can still hear the fierce words of the dissent in *Poletown*,⁶⁵ where Justice Ryan denounced the ‘sweeping away [of] a tightly-knit residential enclave of first- and second- generation Americans, for many of whom their home was their single most valuable and cherished asset and their stable ethnic neighborhood the unchanging symbol of the security and quality of their lives.’ The ‘demoralization costs’ of such dislocation are incalculable.⁶⁶

Second, *Kelo*-type expropriation results, courtesy of the state, in the transfer of a privately held asset to another private actor who holds on *exclusionary* terms. Unlike (say) the position in relation to the public highway built on compulsorily acquired land, the persons expropriated in *Kelo* have no guarantee of fair and equal access to the supposedly beneficial land uses made possible by the expropriation.⁶⁷ In *Kelo*, for example, it was

⁵⁸ *Gazza v New York State Department of Environmental Conservation* 679 NE2d 1035 (NY 1997) at 1039.

⁵⁹ See Gray, ‘Land Law and Human Rights’ in Louise Tee (ed), *Land Law: Issues, Debates, Policy* (2002) 233-245; Gray and Gray, ‘The Rhetoric of Realty’ in J Getzler (ed), *Rationalizing Property, Equity and Trusts: Essays in Honour of Edward Burn* (2003) 277-278.

⁶⁰ See *Pennsylvania Coal Co v Mahon* 260 US 393 at 415, 67 L Ed 322 at 326 (1922) per Justice Holmes.

⁶¹ *Yanner v Eaton* (1999) 201 CLR 351 at [17] per Gleeson CJ, Gaudron, Kirby and Hayne JJ. See Gray, ‘Property in Thin Air’ (1991) 50 *Cambridge Law Journal* 252.

⁶² See *Hester v United States* 265 US 57, 68 L Ed 898 at 900 (1923), where Justice Holmes declared the distinction between the home and ‘open fields’ to be ‘as old as the common law.’

⁶³ *Boyd v United States* 116 US 616 at 630, 29 L Ed 746 at 751 (1886) per Justice Bradley. See likewise *Payton v New York* 445 US 573 (1980) at 601.

⁶⁴ ‘(1) Everyone has the right to respect for his private and family life, his home and his correspondence. (2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.’

⁶⁵ *Poletown Neighborhood Council v City of Detroit* 304 NW2d 455 (Mich 1981) at 470.

⁶⁶ See Frank I Michelman, ‘Property, Utility and Fairness: Comments on the Ethical Foundations of “Just Compensation” Law’ (1966-67) 80 *Harvard Law Review* 1165 at 1214.

⁶⁷ As Justice O’Connor noted in *Kelo* (162 L Ed 2d 439 (2005) at 462), the petitioners’ objection was one of principle, i.e. that, while the government ‘might take their homes to build a road or a railroad or to eliminate a

quite clear that the private developer had reserved the right to select, at its sole discretion, the tenants, occupiers and users of the redeveloped site.⁶⁸ There was to be no public accountability, no public control, as the price of access to the public power of eminent domain. No “common carrier” regulations were going to apply here.⁶⁹ The state would have ‘no voice in the manner in which the public may avail itself’ of the confiscated land resource.⁷⁰ It was for this reason that Justice Clarence Thomas, in his dissent in *Kelo*, advocated a return to the ‘original meaning’ of the Public Use Clause, i.e. ‘that a government may take property only if it actually uses, or gives the public a legal right to use, the property.’⁷¹

Third, and perhaps most important, the fundamentally objectionable feature of *Kelo*-type takings is - to adopt Justice Breyer’s words at the oral hearing - that somebody is being expropriated ‘just so some other people can get a lot more money.’⁷² As even Justice Kennedy pointed out, it is strange that ‘100 per cent of the premium for the new development goes to ... the developer and to the taxpayer and not to the property owner.’⁷³ The expropriated person (and the land he or she owns) is treated simply as a means to a desired fiscal end. The exercise becomes entirely predatory in nature. The result is a form of spoliation not unlike the pillaging of the goods of those who lose on the field of battle. *Kelo*-type evictions are quite deliberately intended to generate money - very substantial amounts of money - for somebody else. As the *Poletown* dissent lamented, the overwhelming consideration governing the forced expropriation in that case was General Motors’ ‘enlightened self-interest as a private, profit-making enterprise.’⁷⁴

There is, however, a deep immorality in exploiting the private assets of others as a vehicle to a capital accumulation in which those others have absolutely no equity share - an immorality which is merely intensified by the fact that the enabling transaction is a forced confiscation of a cherished domestic residence.⁷⁵ No private corporation should be allowed to harness eminent domain for the predominating purpose of corporate profit. The exercise of the sovereign power of taking should always be accomplished - should always be defensible - in the collective name of the citizenry. To adapt a phrase of Michael Ignatieff, the notion of moral community requires that the assertion of public power, no less than the

property use that harms the public, it cannot take their property for the private use of other owners simply because the new owners may make more productive use of the property.’

⁶⁸ *Kelo v City of New London* 843 A2d 500 (Conn 2004) at 551.

⁶⁹ As Justice Thomas pointed out in *Kelo* (162 L Ed 2d 439 (2005) at 472), the commercial enterprises which benefited from exercises of eminent domain in the 19th century tended to be ‘common carriers - quasipublic entities’ which provided ‘quintessentially public goods’ such as roads, ferries, canals, railroads and public parks. During that earlier era takings were truly directed towards “‘public uses” in the fullest sense of the word, because the public could legally use and benefit from them equally.’

⁷⁰ *Board of Health of Portage Twp v Van Hoesen* 49 NW 894 (1891) at 896.

⁷¹ 162 L Ed 2d 439 (2005) at 478.

⁷² Transcript of Oral Argument (22 February 2005) 50.

⁷³ Transcript of Oral Argument (22 February 2005) 44.

⁷⁴ *Poletown Neighborhood Council v City of Detroit* 304 NW2d 455 (Mich 1981) at 466. ‘[W]hat General Motors wanted, General Motors got’ as the price of keeping its motor assembly plants in a city deeply affected by chronic unemployment. General Motors orchestrated the entire process of expropriation in *Poletown*. It selected the site for condemnation, fixed the cost, established deadlines for clearance of the area and even demanded 12 years of tax concessions. The condemnation was completed with inordinate speed and efficiency. ‘Behind the frenzy of official activity’, said Justice Ryan, was ‘the unmistakable, guiding and sustaining, indeed controlling, hand of the General Motors Corporation’ (304 NW2d 455 (Mich 1981) at 468-470). The *Poletown* residents were bought out for a total of \$200 million, of which General Motors paid \$8 million.

⁷⁵ As the state court dissent put it, the compulsory acquisitions in *Kelo* resulted in a ‘bonanza to the developers [rather than] ... a benefit to the public’ (*Kelo v City of New London* 843 A2d 500 (Conn 2004) at 585).

delivery of public care or even the application of public correction, be carried out 'in my name'.⁷⁶

The most difficult question posed by *Kelo* is whether there is actually anything left in the holy grail of property. Can the state really demand to purchase absolutely anything it wants from any citizen-owner and then hand it over to some other person or corporation who may make better use of it? Is it simply the case that all *property* rules collapse ultimately into *liability* rules,⁷⁷ leaving privately owned assets as a mush of social and economic resource to be reallocated at will by the state?

For the minority in *Kelo*, the answer to these questions was quite clear. What was at stake was Alexander Hamilton's cherished 'security of property' or, as Justice O'Connor expressed it, the need to 'ensure stable property ownership by providing safeguards against excessive, unpredictable, or unfair use of the government's eminent domain power – particularly against those owners who, for whatever reasons, may be unable to protect themselves in the political process against the majority's will.'⁷⁸ It therefore followed, for O'Connor, that 'Government may compel the individual to forfeit her property for the *public's* use, but not for the benefit of another private person.' This requirement, she said, 'promotes fairness as well as security.' In O'Connor's view, the outcome of the majority's reading of the "public use" requirement was simply 'to wash out any distinction between private and public use of property – and thereby effectively to delete the words "for public use" from the Takings Clause of the Fifth Amendment.'⁷⁹ On this basis, she continued, 'the sovereign may take private property currently put to ordinary private use, and give it over for new, ordinary private use so long as the new use is predicted to generate some secondary benefit for the public – such as increased tax revenue, more jobs, maybe even aesthetic pleasure.' This 'perverse result' effectively meant that 'the government now has license to transfer property from those with fewer resources to those with more.'⁸⁰ Justice O'Connor concluded:

Under the banner of economic development, all private property is now vulnerable to being taken and transferred to another private owner, so long as it might be upgraded - i.e., given to an owner who will use it in a way that the legislature deems more beneficial to the public - in the process ... [W]ho among us can say that she already makes the most productive or attractive possible use of her property? The specter of condemnation hangs over all property. Nothing is to prevent the State from replacing any Motel 6 with a Ritz-Carlton, any home with a shopping mall, or any farm with a factory.⁸¹

⁷⁶ Michael Ignatieff, *The Needs of Strangers* (1984) 10.

⁷⁷ See Guido Calabresi and A Douglas Melamed, 'Property Rules, Liability Rules, and Inalienability: One View of the Cathedral' (1971-72) 85 *Harvard Law Review* 1089.

⁷⁸ 162 L Ed 2d 439 (2005) at 462.

⁷⁹ 162 L Ed 2d 439 (2005) at 461.

⁸⁰ 'Any property may now be taken for the benefit of another private party, but the fallout from this decision will not be random. The beneficiaries are likely to be those citizens with disproportionate influence and power in the political process, including large corporations and development firms' (162 L Ed 2d 439 (2005) at 468 per Justice O'Connor). The point was reinforced by Justice Clarence Thomas, who added that 'extending the concept of public purpose to encompass any economically beneficial goal guarantees that [the] losses will fall disproportionately on poor communities' and he voiced the fear that the *Kelo* decision would encourage the strong to 'victimise the weak' (162 L Ed 2d 439 (2005) at 478-479).

⁸¹ 162 L Ed 439 (2005) at 462.

One immediate outcome of the Supreme Court's ruling in *Kelo* should not pass unremarked. Four days after the ruling was handed down, a citizen named Logan Darrow Clements initiated an application to build a hotel called the Lost Liberty Hotel on the site of Justice Souter's pleasant summer residence in the City of Weare, New Hampshire. Justice Souter is widely seen as the "swing vote" who tilted the decision in *Kelo*. Clements seeks access to the City's powers of eminent domain in furtherance of his purpose, arguing that the City will derive greater tax revenue and enhanced economic prosperity if Justice Souter's home is replaced by a large tourist attraction. Amongst Clements' proposals is the plan that the hotel facilities should include a museum dedicated to recording the loss of freedom in the United States.

The New Hampshire application remains, as yet, undetermined but many other jurisdictions are now beginning to feel the force of the argument that *any* property can be taken by the state if it is thought that some other owner may be able to make higher, better or more efficient use of it. In *Ainsdale Investments Ltd v First Secretary of State*, for example, a local authority in England (Westminster City Council) exercised a statutory power of compulsory acquisition on the express ground that the condemned property - a building in Soho worth £1 million - was 'not making a proper contribution to the housing stock of the City of Westminster.'⁸² The property was, in fact, being used for purposes of prostitution - something of an irony given that the freehold owner was a company registered in the British Virgin Islands. At the public hearing preceding the making of the compulsory purchase order, the local Church of England vicar had argued, with typical open-mindedness, that prostitutes were vital to the area's traditions. But the local authority made it clear that it intended to terminate what it called 'a waste of potential housing accommodation' and the English High Court upheld the compulsory purchase as involving *no* violation of the property guarantee contained in the *European Convention on Human Rights*.⁸³ In *Ainsdale* the expropriated freeholder, naturally enough, accused the local authority of wanting to profit by the sale of the property (and of nine other similar properties) to private developers.⁸⁴ The local authority's chief housing officer later commended the decision for sending 'a strong message to property owners and landlords that the improper use of properties in Westminster is unacceptable and will not be tolerated.'⁸⁵

Well, if you think that the *Kelo* problem is not coming to Australasia, think again. The doctrine of higher or better use has arrived even here.

For several years the *Griffiths* case has been rumbling on in Australia's Northern Territory - a case which poses exactly the same central problem as arose in *Kelo*.⁸⁶ Right now one

⁸² [2004] EWHC 1010 (QB); [2004] HLR 956.

⁸³ ECHR, Protocol No 1, Art 1 ('Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law. The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties').

⁸⁴ <http://news.bbc.co.uk/1/hi/england/london/3714285.stm>.

⁸⁵ <http://www.the-blue-pages.com/NEWS/may2004/biz03467.html>. Westminster City Council claimed that the prostitutes concerned in this case had been 'dragging down Soho.'

⁸⁶ See *Minister for Lands, Planning and Environment v Griffiths and others* [2002] NT LMT 26 <http://www.austlii.edu.au>; *Griffiths & Anor v Lands and Mining Tribunal* [2003] NTSC 86 <http://www.austlii.edu.au> (Angel J); *Griffiths v Northern Territory of Australia* [2003] FCA 1177

aspect of the *Griffiths* case is the subject of an application for special leave to appeal to the High Court.

The Northern Territory's *Lands Acquisition Act 1978* currently confers on the relevant government minister authority to acquire land 'for any purpose whatsoever.'⁸⁷ In the *Griffiths* case a private citizen, Fogarty, applied to purchase several lots of unalienated Crown land in and around Timber Creek. More specifically his proposal was that he (or his company) be granted Crown leases under which he would develop the land as a cattle husbandry facility and for such purposes as goat breeding, hay production and market gardening. On completion of the development, it was envisaged that the Crown leases would be surrendered in exchange for freehold titles. The government of the Northern Territory warmed to this proposal, also taking the view that other adjacent areas of unalienated Crown land should be offered for sale by public auction or leased for purposes of tourism and private commercial development. The only difficulty was (and is) that all the lands concerned here are alleged to be the subject of native title rights (a claim which is currently being adjudicated by the Federal Court). Aware of this possible impediment, the relevant minister promptly published notices which announced his intention to acquire the lands together with 'all interests including native title rights and interests (if any) therein.'

The *Griffiths* case bristles with awkward issues. For instance, can the Northern Territory government ever resume land which is already Crown land? As it happens, the Northern Territory Court of Appeal has upheld the notices of intended acquisition,⁸⁸ but the question which has been placed before the High Court relates to the proper limits of the power of eminent domain. If native title rights *do* exist over the land concerned, can the owners of these rights be expropriated simply in order to confer an estate or interest on a private person for private benefit? In so far as native title rights connote some form of claim to a *spiritual home*,⁸⁹ an affirmative answer would indicate that, just as in the *Kelo* case, there really is "no place like home".

The question is given an even sharper edge by the fact that the Lands and Mining Tribunal, to which the objections of the native title claimants in Timber Creek were referred, concluded that the Aboriginal people who lived in the area would suffer no consequences from the proposed development. According to the Tribunal, there could be 'little or no public interest in the acquisitions' precisely because the impact of the planned development fell essentially on its proponent, Fogarty, and 'would benefit [him] and/or his commercial or corporate interests.'⁹⁰

In the Northern Territory Court of Appeal the majority judgment saw 'no reason why it would necessarily be beyond the purposes of the *Lands Acquisition Act* for the Territory to acquire the interests of A in order to confer a wider interest on B.'⁹¹ Nor, in the view of the majority, could the proposed acquisitions in *Griffiths* be said to be *unconnected* with 'a

<http://www.austlii.edu.au>; *Minister for Lands, Planning and Environment v Griffiths* [2004] NTCA 5 <http://www.austlii.edu.au>.

⁸⁷ *Lands Acquisition Act 1978* s 43.

⁸⁸ *Minister for Lands, Planning and Environment v Griffiths* [2004] NTCA 5 <http://www.austlii.edu.au>.

⁸⁹ See Gray, 'Equitable Property' (1994) 47(2) *Current Legal Problems* 157 at 181-188.

⁹⁰ *Minister for Lands, Planning and Environment v Griffiths and others* [2002] NT LMT 26 <http://www.austlii.edu.au> [475]-[479]. The 'acquiring of the land and the subsequent establishment of a business would operate to the profit of the developer' (at [499]).

⁹¹ *Minister for Lands, Planning and Environment v Griffiths* [2004] NTCA 5 <http://www.austlii.edu.au> [85] per Mildren J (Riley J concurring).

legitimate Territory purpose' in that it is 'very much the business of government to promote industry in or around towns by providing land for the use of industry, whether the industry be manufacturing, tourist businesses or goat farming.' However, two decades ago in *Clunies-Ross* the High Court of Australia indicated (albeit with reference to a slightly differently worded Commonwealth *Lands Acquisition Act*) that the purpose of a compulsory acquisition must be related or connected to the need for, or proposed use of, the land.⁹² Eminent domain powers, said a strong majority in the High Court, do not extend 'to the acquisition of land merely for the purpose of depriving the owner of it and thereby achieving ... in relation to land in a Territory, a purpose in relation to that Territory.'⁹³ Indeed, ministerial power would be 'surprisingly wide' if 'subject only to monetary compensation, it [c]ould encompass the subjection of the citizen to the compulsory deprivation of his land, including his home, by executive fiat to achieve or advance any ulterior purpose' in respect of which parliament has power to legislate.⁹⁴

In the *Griffiths* case the native title claimants allege, amongst other things, that the proposed acquisitions at Timber Creek are directed towards depriving them of their proprietary rights for a purpose which is unconnected with any need on the part of government for the land or any proposed future use by the government itself of the land concerned. Instead, say the claimants, the governmental purpose underlying the acquisitions is simply the disposal of the land for the private benefit of an individual and his commercial interests - a purpose which lies completely outside the ambit of the statutory power of eminent domain (no matter how widely this power may be phrased).

The *Griffiths* application currently before the High Court thus pinpoints, as a matter of general public importance, the question whether compulsory acquisition is permissible where the ultimate aim of the acquisition is to alienate the subject land, not for the purposes of the government, but for the private profit of another citizen. The application for special leave has been adjourned pending a determination that the claimed native title rights at Timber Creek actually exist.⁹⁵ A resolution of this issue is expected early in 2006 and - depending on the outcome of the Federal Court's deliberations - there is an intriguing possibility that the High Court will have a fresh opportunity to clarify whether property 'is mere illusion' and 'does not really exist.' Is the concept of property now so devoid of content that state-endorsed buy-outs of potentially valuable assets may be forced upon the poor and vulnerable by those who are rich and more powerful? Or will the High Court confirm that, even though the concept of property performs no compellingly positive function, it still finds a minimal, but meaningful, role in negating the human impulse towards purely predatory behaviour?

AFTERWORD

The foregoing is the text of a paper delivered on 11 December 2005 at the Australasian Property Law Teachers' Conference held at the University of the South Pacific Vanuatu. The Federal Court of Australia has since confirmed that native title *does* exist in respect of the lands involved in the *Griffiths* case, although the precise rights comprised in this title remain a matter of dispute (*Griffiths v Northern Territory of Australia (No 2)* [2006] FCA

⁹² *Clunies-Ross v Commonwealth of Australia* (1984) 155 CLR 193.

⁹³ (1984) 155 CLR 193 at 202.

⁹⁴ (1984) 155 CLR 193 at 200.

⁹⁵ *Griffiths v Minister for Lands, Planning and Environment* [2005] HCA Trans 223 <http://www.austlii.edu.au>.

1155 <http://www.austlii.edu.au>). Accordingly the High Court of Australia has now granted special leave to appeal in relation to the question whether the Northern Territory's power of compulsory acquisition is wholly unrestricted in terms of the purpose for which it may be exercised (*Griffiths v Minister for Land, Planning and Environment* [2007] HCA Trans 320 <http://www.austlii.edu.au>). Yet to be seen, of course, is the potential impact of Parts 4 and 5 of the Northern Territory National Emergency Response Bill 2007 (Bill 07145) placed before the Federal Parliament on 7 August 2007. This Bill provides, amongst other things, for the mandatory grant to the Commonwealth of five-year leases over certain areas of the Northern Territory.