

2007

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Recommended Citation

Roark, Marc L. (2007) "The Constitution as Idea: Describing--Defining--Deciding in Kelo," *California Western Law Review*: Vol. 43 : No. 2 , Article 4.

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ESSAYS

THE CONSTITUTION AS IDEA: DESCRIBING—DEFINING— DECIDING IN *KELO*

MARC L. ROARK*

I. INTRODUCTION

Ideas are expressed by words. Words by their nature define things and events through an agreed-upon convention of meaning. We do not argue with each other whether “and” is a conjunction that joins or distinguishes—the rules that govern such determinations were established a long time before we began using the medium of conversation and composition that we use. What we argue over then, more often than not, is the way structure creates new definitions for words—how prose defines the words around it in a way that creates new meaning.

The problem with words, their definitions, and manufactured meanings within structures is their finitude. James Boyd White described the frustration of casting humanity in limited vocabulary:

[T]he lawyer must face the reality of her client’s experience, and the fact that it can never adequately be cast into the language the lawyer is given to speak: the suffering, the uncertainty, the frustration, the sense of the story from the client’s point of view, can never be adequately represented in language, without loss or distortion. Nonetheless, the lawyer’s job is to find a way to talk about this experience in the language of the law; this means that she is always

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thinking about that language itself, what it can do, what it can be made to do, and what its limits are.¹

In other works, he has described this process as a rhythm between hope, disappointment, and acceptance² and as an analogue to translation³ as a means of understanding the limits of language. Ideas are naturally limited by the elements used to construct and express them.

Despite its finite nature, language does create powerful and moving images. Words are intended to create meanings that etch concrete images into the reader's subconscious. Words are a metaphysical tapestry, creating in space that does not exist images that do not exist, but which are strong and malleable, boundless and bounded for the reader to grasp onto. Much of the way we perceive words depends on the context of our surroundings. I will give an innocuous example. If I say the phrase "St. Elmo's Fire," several images could come to mind. One may be the image of the 1985 movie by the same name, its cast of characters, or one particular character with whom that the reader identifies.⁴ One might hear in the recesses of the mind the *St. Elmo's Fire* love song with its powerful piano riffs or the song *Man in Motion* by John Parr, which references the same place.⁵ One may picture the sig-

1. James Boyd White, *What We Know*, 10 CARDOZO STUD. L. & LITERATURE 151, 151-52 (1998).

2. James Boyd White, *The Rhythms of Hope and Disappointment in the Language of Judging*, 70 ST. JOHN'S L. REV. 45, 46 (1996).

Legal language seems to have [a rhythm that moves from hope to disappointment to acceptance] on a sharpened and clarified form. . . . That is: as the utterance of a sentence holds out a possibility towards which we orient ourselves—of intelligibility, of community, of truth—the law's task is to do exactly that on a larger scale: to set forth ideal possibilities towards which we can strive, without which our energies would have no direction.

Id. at 46-47.

3. James B. White, *Translation as Mode of Thought*, 77 CORNELL L. REV. 1388, 1393 (1992) ("If it is recognized that translation always involves significant gains and losses in meaning, there can be no universal language in which universal truths are uttered.").

4. ST. ELMO'S FIRE (Sony Pictures 1985).

5. DAVID FOSTER, LOVE THEME FROM ST. ELMO'S FIRE, *on* ST. ELMO'S FIRE (Atlantic Records 1987); JOHN PARR, MAN IN MOTION, *on* ST. ELMO'S FIRE, *supra*.

I can see a new horizon underneath the blazin' sky
I'll be where the eagle's flying higher and higher
Gonna be your man in motion, all I need is a pair of wheels

nificant person he or she first saw the motion picture with or, if the reader attended Georgetown University or lived in the Georgetown area of Washington, D.C., he may picture Tombs, the bar that the mythical St. Elmo's bar mimicked.⁶ If one were scientific, he might instead think of the "corona" effect given to objects when lightning strikes, leaving a purple glow about the edges of the object.⁷ If one were a sailor, he may think of the person St. Elmo and the effect of St. Elmo's fire; St. Elmo is the patron saint, and the "fire" is a sign of his protection.⁸ And other images unknown to me probably appear for others. The common link between all of these images is an experiential contact with the phrase "St. Elmo's Fire" that makes the words have a particular meaning to that person.

One obvious conclusion from the example given above is that words tend to implicate people, places, and events within the imagination. Obviously, the images are not real; they are instead our perceptions of the images that we retain within our minds. Constitutional words tend to work under the same limitations, except that they imagine people and places within specific institutions.⁹ "We the People of

Take me where my future's lyin', St. Elmo's Fire

Id.

6. Meg Charlton, *Tumble to the Tombs and Join the Tradition*, HOYA (Georgetown Univ.), Oct. 28, 2005, at B12, available at <http://www.thehoya.com/guide/102805/guide2.cfm>.

7. MERRIAM WEBSTER'S COLLEGIATE DICTIONARY 259 (10th ed. 1996).

8. Also known as a corpusant, the term refers to "a flaming phenomenon sometimes seen in stormy weather at prominent points on a . . . ship." *Id.* at 259, 1031; see also HERMAN MELVILLE, *MOBY DICK* 498 (1851), available at http://www.princeton.edu/~batke/moby/moby_119.html.

"Look aloft!" cried Starbuck. "The corpusants! the corpusants!"

All the yard-arms were tipped with a pallid fire; and touched at each tri-pointed lightning-rod-end with three tapering white flames, each of the three tall masts was silently burning in that sulphurous air, like three gigantic wax tapers before an altar.

Id.

9. Consider Ronald Rotunda's description of the struggle over words within American political discourse:

Though all widespread symbols are important, certain symbols, at various times, carry particular significance. In fact, much of United States political history can be interpreted as a rivalry for the possession of certain words. In the early days of our republic, the Hamiltonians—those in favor of a strong national government—called themselves Federalists, though at that

the United States” directs our minds not only to a specific group that ordained our government, but also to the places it ordained and the actual signing of the documents in 1787.¹⁰ Imagining constitutional things brings about the same hazards that occur when mere words produce images: they can be deceptive—luring our emotions, shared mythical perceptions, and aspirations into the realm where words are redefined towards catatonic trances or ecstatic delusions of what those words *should* mean.¹¹ Said slightly differently, we can become euphorically fixated on a particular meaning while other meanings tend to fade silently into the background noise of our own interpretations. Those meanings we affix, therefore, become as sacred and as passionate as our perceptions of the document itself. You rarely hear someone blandly say that his Amended Rights of Freedom of Speech ratified in 1791 have been violated; instead, it is an excited declaration: “My First Amendment constitutional rights were trampled upon!” Interpretations of the Constitution that do not vindicate our own rights are rarely relevant.

That is why the public response to *Kelo v. City of New London*¹² is so interesting. Decided in June 2005, the Court found that New Lon-

time “federation” meant what “confederation” means today. The “true-federalists” found themselves at a tactical disadvantage: they were in the position of arguing against federalism because they had accepted the label Anti-Federalist.

RONALD D. ROTUNDA, *THE POLITICS OF LANGUAGE* 9 (1986).

10. U.S. CONST. pmb.; *see also* White, *supra* note 2, at 47.

11. Consider James Boyd White’s description of the phrase “We the People” within the Constitution:

[I]n what sense was it in fact “the People” who spoke there? Of course the document was ratified in each of the states, at conventions assembled for that purpose; in this sense, it was indeed the act of the People. But who was permitted to vote for representatives at those conventions? Certainly not slaves; in most states certainly not African Americans and Indians; certainly not women; in most states nobody who failed to meet certain property qualifications.

Does this mean that the statement “We the People” is false and hypocritical? In one sense the answer is yes. But would it really have been better if the Constitution said, “We, the voting population of propertied white males, do hereby ordain and establish the Constitution of the United States?”

White, *supra* note 2, at 47.

12. *Kelo v. City of New London*, 545 U.S. 469 (2005).

don's economic development plan, which authorized the use of eminent domain to take land from one private owner and give it to another, was constitutional.¹³ Notably, the first-named plaintiff, Susette Kelo, contended that, because the home she was living in and the neighborhood she occupied were not public nuisances, the public use doctrine did not apply, and therefore the act was unconstitutional.¹⁴ The overwhelming feeling regarding *Kelo* is that the Supreme Court's decision is an assault on property rights in general, not just Ms. Kelo's.¹⁵ In large measure, this idea is due to the constitutional imagining in both the majority and the dissenting opinions of the case.

This Essay explicates the tension between imagining and defining constitutional standards and places within the *Kelo* decision. On one level, this could be done by analyzing the response to the *Kelo* decision: how academics described the case, its fallout, and implications. For example, Richard Epstein commented that:

Kelo galvanized the public at large because [it] unified the progressives with the classical liberals as few issues can. The progressives who believe in community were hard-pressed to see how New London and its development corporation were anything other than the usual conspiracy of the rich and the powerful against the common man. The classical liberals were only strengthened in their belief that this sorry episode showed the dangers of faction and rent-

13. See *id.* at 488-89.

14. *Id.* at 475.

15. See Richard Epstein, *The Public Use, Public Trust & Public Benefit: Could both Cooley & Kelo Be Wrong?*, 9 GREEN BAG 2D 125, 125 (2006) (calling the public outcry following *Kelo* a welcome and unintended consequence). Letters written to the editors of newspapers around the country demonstrate this feeling and outcry. See, e.g., Robert "Skip" Mills, Letter to the Editor, *A Slap in the Face*, MACON TELEGRAPH (Ga.), June 29, 2005, at A9 ("With its ruling on *Kelo v. City of New London*, the Supreme Court has created a new device by which the greed of private business can walk right through the front door of a man's home and castle and plant survey markers for its own use."); Michael J. Rollins, Letter to the Editor, *Populism Run Rancid*, PROVIDENCE J. BULL. (R.I.), June 29, 2005, at B5 ("Perhaps this ruling might serve as a warning to others who believe that their particular cause is important enough to justify making an exception to the U.S. Bill of Rights."); see also WALL STREET J. ABSTRACTS, June 28, 2005, at 15 ("Six letters comment on the decision by the Supreme Court in *Kelo v. City of New London* to allow municipal governments to seize private property, all finding it 'terrible' or 'absurd.'").

seeking that only a strong system of property rights can effectively resist.¹⁶

The images created by Epstein's secondhand commentary certainly tell us something about *Kelo*.¹⁷ It *galvanized* the public. It *unified* progressives and classical liberals. Moreover, his definitions of political orientation create spaces for determining how one reacts to *Kelo*. He signals that there are two responsive groups—progressives and classical liberals—that orient the readers towards the interpretive affiliation with which they may approach this constitutional problem.¹⁸ Other phrases such as “conspiracy of the rich and powerful against the common man” and “strong system of property rights” tell us something about the orientation by which those groups generally respond to constitutional problems.¹⁹ But importantly, the words tell us little about *Kelo* itself: they are perceptions of what *Kelo* did and whom it affected, not of *Kelo* itself. Such commentaries only tell us about the reactions to the rhetoric.

16. Richard A. Epstein, *Kelo: An American Original*, 8 GREEN BAG 2D 355, 357 (2005).

17. Similar problems could be analyzed in how active speech—an act meant to communicate—reflects the same tension. For example, the ways that one citizen's protest has been characterized within the media raises certain vernacular intrigues. The WorldNetDaily Internet news source described the application that an individual, Logan Darrow Clements, made to the town of Weare, New Hampshire, regarding the property of Justice Souter (a member of the *Kelo* majority):

Although this property is owned by an individual, David H. Souter, a recent Supreme Court decision, *Kelo v. City of New London*, clears the way for this land to be taken by the government of Weare through eminent domain and given to my LLC for the purposes of building a hotel. The justification for such an eminent domain action is that our hotel will better serve the public interest as it will bring in economic development and higher tax revenue to Weare.

Ron Storm, *This Land Was Your Land: Supreme Court Justice Faces Boot from Home?: Developer Wants Lost Liberty Hotel Built Upon Property of David Souter*, WORLDNETDAILY, June 28, 2005, http://worldnetdaily.com/news/article.asp?ARTICLE_ID=45029. The article went on to describe Clements' plans for resort amenities including a “Just Desserts Café,” a museum dedicated to preserving liberty, and “a free copy of Ayn Rand's novel ‘Atlas Shrugged’” instead of Gideon's Bible for each guest. *Id.*

18. Epstein, *supra* note 16.

19. *Id.*

In contrast, this Essay takes a very limited approach. It asks how the images invoked in *Kelo* trigger constitutional ideas. Specifically, it asks how notions of place and space in the Constitution are described within the *Kelo* opinion. That is, how do members of the Court define particular images, and what do those images mean for understanding constitutional doctrines of “economic development takings” and “public use” versus “private use”? A key method used in this analysis is to define two terms of art, place and space, and then to distinguish between the ways members of the Court define place and space within the opinion. This Essay suggests that the significant moves reflected in *Kelo* are the abstraction of particularized locations (place) and of particularized abstract locations (space). The value of this exercise is to reflect upon what can be imagined by reading and writing constitutional words. Do they, in fact, paint pictures of concrete places such as “homes,” “roads,” and “public buildings”? Or are they more spatial, defining ideas instead of things?

The Essay concludes with no satisfactory answer. Indeed, any conclusion I may offer regarding economic development takings will likely be moot given congressional moves to limit *Kelo*.²⁰ Additionally, because I subscribe to constitutional methodology that values the date of the opinion as the most telling aspect of the case,²¹ this Essay does not attempt to make an argument styled as “the trends of the Court” or to develop a post-modern theory of constitutional law. What it does offer is a pedagogical exercise that calls our attention to the way the Supreme Court uses images in one particular constitutional case.

20. The proposed Private Property Rights Protection Act states, “In the wake of the Supreme Court’s decision in *Kelo v. City of New London*, abuse of eminent domain is a threat to the property rights of all private owners, including rural land owners.” H.R. 4128, 109th Cong. §7(a)(4) (2005). It proposes to restrict state and local eligibility for federal development funds if that state or local government misuses the eminent domain power. *Id.* § 2(b).

21. See L.H. LARUE, CONSTITUTIONAL LAW AS FICTION: NARRATIVE IN THE RHETORIC OF AUTHORITY (1995) (describing how constitutional matters are not bound simply by the cases that espouse their holdings, but by a tradition of constitutional law); see also H. JEFFERSON POWELL, A COMMUNITY BUILT ON WORDS 3 (2002).

II. DEFINING PLACE AND SPACE

I start with my basic definitions of space and place and then give an example. Space is an area occupied by persons or things, ideas, or institutions. Place is the particularized location within space. Suppose I wanted to describe a specific building. The first step is to create the basic structure: the building. Next, adjectives, such as color and size, would be added to give further expression: the large, brown building. I could also add surroundings to my description to further describe the scenery: the large, brown building with a flush green lawn, spacious parking lot, and bustling courtyard. An agreed upon marker of location is another aspect that helps define my description: on Science Drive, the large, brown building with a flush green lawn, spacious parking lot, and bustling courtyard. Finally, I might add something about the building's purpose, activity, or meaning: the Duke University law school was housed on Science Drive in a large brown building with a flush green lawn, a spacious parking lot, and bustling courtyard where students anxiously awaited their civil procedure class. Importantly, the picture I provided became dramatically more understandable when I added the purpose and activity being conducted within the building. Until my description perfected an absolute image, the description was merely a space capable of existing anywhere that conformed to my generally described criteria. As the realm of possibilities narrowed and the object became clear, it obtained a "place."

The space that can be derived from my description, though, is more complicated. Two different formulations of space can be described from the examples above—one physical and one metaphysical. First and most apparent is the physical space that the brown building occupies in reality—the physical domain that, regardless of what sits upon it, is a linear, measurable, and calculable area.²² In such descriptions, the distinction between space and place is easily associable as the space becomes a place where it is particularized or named as a location. Places necessarily occupy spaces.

There is a second way that space is implicated in the description of the brown building above—a metaphysical description of space.

22. See Igor Stramignoni, *Francesco's Devilish Venus: Notations on the Matter of Legal Space*, 41 CAL. W. L. REV. 147, 170 (2004).

Certainly, the metes and bounds of the law school can be used to define the physical space, and certainly naming that boundary raises the area to the notion of place. But the physical space is not the only way to describe Duke Law; it can also be defined by the unseen, unbounded characteristics that move freely within physical space. Specifically, Duke Law maintains a space defined by persons, ideas, and importantly words—institutional space.²³ Thus, the images that comprise Duke Law, its faculty, students, alumni, clinics, institutes, and ideas, take up metaphysical space within various defining communities.²⁴ As those communities are named, the place maintained within the institutional space becomes institutional place, definable like physical boundaries are defined. The area the place occupies can be identified then by specific criteria and specific measurements that establish the institutional characteristics of the space. For example, as ideas become normative, they obtain institutional space. One expression of this way of talking about normative space from the theological field is the author of the Gospel of Matthew's identification of the kingdom of heaven as both a physical place and a normative con-

23.

[S]pace is each time the place resulting from a given institutional context (broadly understood)—namely, a particular socio-political or linear-historical environment—rather than, as noted earlier, a mute physical object that can be found “out-there” or even the particular subjectivity that each time would go to express it. In a way, there is now a mere shift of focus—from the institution of space (space as a thing or else space as the thing of a subject) to space as an institution, individual or collective, historical or socio-political—yet such a shift is, in its different and progressively more and more abstract versions of it, rather momentous.

Id.

A timely example of how institutional space differs from physical space is the displacement of New Orleans law schools in the wake of Hurricane Katrina. Loyola University New Orleans College of Law continued operating in Houston outside of the physical boundaries of the city of New Orleans. See Maria Isabel Medina, *Confronting the Rights Deficit at Home: Is The Nation Prepared in the Aftermath of Katrina? Confronting the Myth of Efficiency*, 43 CAL. W. L. REV. 9, 10 n.2 (2006). The institutional space was not compromised by the displacement of the law school, only the physical space.

24. Such relevant communities might be lawyers, the local community where the law school is located, the university community, or the American Association of Law Schools.

cept.²⁵ The common way of stating this is that the kingdom of heaven is both a present reality (in the body of Jesus and the community of believers) and as a hope yet to come (an aspirational norm that bounds current institutions).²⁶ The conclusion to this is that ideas can be particularized or can be spatial, leaving the imagination to complete its formation.

Constitutional ideas start with a boundary already created. The words that are used to describe constitutional things begin from a context-rich history of debate and discourse. But within those boundaries, this place is still not necessarily defined. There is quite a lot of room to define new things in the large open spaces of the Constitution.

III. THE SPACES AND PLACES OF *KELO*

One obvious tension in the *Kelo* opinions is whether specifically named properties (places) have specific meaning within the takings provisions. It is notable that within the majority opinion, the property is described as very generic—either “private property,” “parcels,” or

25. Compare the following statements from the Gospel of Matthew. “Repent for the kingdom of heaven is near.” *Matthew* 3:2. “Blessed are the poor in spirit, for theirs is the kingdom of heaven.” *Matthew* 5:3. “Anyone who breaks one of the least of these commandments and teaches others to do the same will be called least in the kingdom of heaven.” *Matthew* 5:19. “[Y]ou will certainly not enter the kingdom of heaven.” *Matthew* 5:20. “[T]he kingdom of heaven has been forcefully advancing . . .” *Matthew* 11:12. “The kingdom of heaven is like a mustard seed . . .” *Matthew* 13:31. “The kingdom of heaven is like yeast that a woman took and mixed into a large amount of flour until it worked all through the dough.” *Matthew* 13:31. “The kingdom of heaven is like a treasure hidden in a field.” *Matthew* 13:44. “[T]he kingdom of heaven is like a merchant looking for fine pearls.” *Matthew* 13:45. “[T]he kingdom of heaven is like a net that was let down into the lake . . .” *Matthew* 13:47. “I will give you the keys to the kingdom of heaven . . .” *Matthew* 16:19. “[O]thers have renounced marriage because of the kingdom of heaven.” *Matthew* 19:12 (all New International Version).

26. Compare STANLEY HAUERWAS, *THE PEACEABLE KINGDOM* 82 (1983) (“To begin to understand Jesus’ announcements of the kingdom we must first rid ourselves of the notion that the world we experience will exist indefinitely. We must learn to see the world as Israel had learned to understand it—that is, eschatologically[:] . . . to see it in terms of a story, with a beginning, a continuing drama, and an end.”), with RICHARD B. HAYS, *THE MORAL VISION OF THE NEW TESTAMENT* 322 (1996) (“In sum, the kingdom of God as figured forth in Matthew 5 . . . offers a vision of radical intercultural community of discipleship characterized by a ‘higher righteousness.’”).

“houses.”²⁷ In contrast, Justice O’Connor’s dissent is filled with compelling imagery designed to animate the properties and houses towards specific properties: instead of property, she talks about “homes.”²⁸ Are these language variations meaningful for understanding the takings jurisprudence or are they images that neither help nor confuse the constitutional analysis?

In the same way that the descriptive tendencies of the majority and the dissents are in tension, the reflections of institutional space (ideas of constitutional takings and their structures) are also at odds between the majority and the dissents. I choose three concepts of institutional space that are extractable from *Kelo* to describe how descriptions of physical and institutional space define the takings problem: (1) the genre of the takings at issue, (2) the definitions of public use and private use, and (3) the formulation of specific places as spaces.

A. *The Economic Development Genre*

The early portions of the *Kelo* opinion tell us that this taking fits into the category of “economic development.”²⁹ By defining the genre of the taking as economic development, the Court defines the space within the Fifth Amendment from which it will be working. Perhaps just as important, it eliminates other space that is not relevant to the discussion, such as regulatory takings. Therein, the institutional space is narrowed to a specific subset—we move from Constitution to Fifth Amendment Takings to Economic Development Takings.

So, economic development space is defined by the community of authorities surrounding it. First and foremost are the Fifth Amendment’s due process and takings clauses: “No person shall be . . . de-

27. *Kelo v. City of New London*, 545 U.S. 469, 472 (2005) (using “assembling the land needed for this project, the city’s development agent has purchased property,” “to acquire the remainder of the property,” and “the proposed disposition of the property”); *id.* at 474 (“parcel 1 is designated”); *id.* at 475 (“Susette Kelo has lived in the Fort Trumbull area since 1997. She has made extensive improvements to her house . . .”).

28. *E.g.*, *id.* at 495 (O’Connor, J., dissenting).

29. The beginning line of the opinion sets the stage: “In 2000, the city of New London approved a development . . .” *Id.* at 472 (majority opinion). Later in the opinion, the Court defines the issue: “We granted certiorari to determine whether a city’s decision to take property for the purpose of economic development satisfies the ‘public use’ requirement of the Fifth Amendment.” *Id.* at 477.

prived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.”³⁰ Next, the community of cases that have been lumped together as constituting “economic development” help define the boundaries of the genre. Specifically, the Court identifies three cases that describe the boundaries of economic development.³¹ By identifying *Kelo* as economic development, the Court thus finds the space in which the case is to be conceptualized within the overall scheme of the Fifth Amendment.

Second, the name “economic development” carves out a space for what the Court perceives as happening in the case. The images that the words themselves proffer are defining postures of improvement. Thus, the descriptions employed by the majority to define the area to be condemned bring to mind images of a well-worn, past-its-prime town. It uses the terms “economically distressed city” and “distressed municipality” to create a dark overtone over the city of New London.³² In contrast, the pictures of hope and improvement that economic development creates instigate images of a “small urban village” with a riverwalk, shops, and restaurants.³³ The new images cast a positive disposition over the future of the declining town.

This theme of contrasting distress with improvement is also seen in the community of cases with which *Kelo* sits. In both *Berman v. Parker* and *Midkiff v. Hawaii Housing Authority*, the relevant imagery is the contrast between a bad situation and improvement. The Court

30. U.S. CONST. amend. V.

31. See *Kelo*, 545 U.S. at 480-82 (identifying *Berman v. Parker*, 348 U.S. 26 (1954) (deciding that a community development plan to erase slums from the Washington, D.C., area was a proper taking), *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229 (1984) (deciding that the taking of land was necessary to overcome a history of land oligopoly in the state of Hawaii), and *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984) (deciding that pest control companies could pay just compensation for trade secrets in the pesticide industry to remove entry barriers from the market place)).

32. *Id.* at 472. “In 2000, the city of New London approved a development plan that . . . was ‘projected to create in excess of 1,000 jobs, to increase tax and other revenues, and to *revitalize an economically distressed city*’” *Id.* (emphasis added). “Decades of economic decline led a state agency in 1990 to designate the city a ‘distressed municipality.’” *Id.* at 473. “In 1998, the City’s unemployment rate was nearly double that of the State” *Id.*

33. *Id.* at 474.

describes the takings in *Berman* as “targeting a *blighted* area of Washington, D.C.”³⁴ The key words were the desire for a “better balanced, more attractive community.”³⁵ In *Midkiff*, the problem was a “social and economic evil” in the form of a “land oligopoly.”³⁶ In response, the *Midkiff* Court says that legislatively induced balance within the real estate market is an appropriate remedy for the evil of land oligopoly.³⁷ The vocabulary used by the *Berman* Court, the *Midkiff* Court, and the *Kelo* majority incite passionate images. “Blight,” “evil,” and “distressed” are intended to stir responses. Equally important are the responses that define the action being undertaken: “balance,” “opportunity,” and “revitalization.”

The dialogue between the majority and the dissents regarding this aspect of the case highlights a tension in defining institutional space. On the one hand, the O’Connor-led dissent wants to show that the standard of betterment weakens the jurisprudence because any prop-

34. *Id.* at 480 (emphasis added). Notably, the rhetoric of “slums” was used by the *Berman* Court to describe the problems that warranted a public purpose. *Berman*, 348 U.S. at 34 (describing slums that arose from “the overcrowding of dwellings, the lack of parks, the lack of adequate streets and alleys, the absence of recreational areas, the lack of light and air, the presence of outmoded street patterns”). Moreover, the presence of slums produced other social evils:

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

Id. at 32-33.

35. *Kelo*, 545 U.S. at 481.

36. *Id.* at 482. *Midkiff*’s imagery is not the warning that slums or economic decline may have for a community, but the evils associated with kings and crowns. The Court’s association of land ownership patterns in Hawaii and the American struggle for independence is particularly captivating. *See Midkiff*, 467 U.S. at 242-43 (“The people of Hawaii have attempted, much as the settlers of the original 13 colonies did, to reduce the perceived social and economic evils of a land oligopoly traceable to their monarchs.”). Like the American colonists who tore off the bonds of tyranny that similar feudal systems represented, the Hawaiians were attempting to do the same.

37. *Midkiff*, 467 U.S. at 243 (“Redistribution of fees simple to correct deficiencies in the market determined by the state legislature to be attributable to land oligopoly is a rational exercise of the eminent domain power.”).

erty can be taken based on its potential to be made better.³⁸ Akin to this claim, O'Connor wants to show that particular properties can be distinguished from generic spaces:

New London does not claim that Susette Kelo's and Wilhelmina Dery's well-maintained homes are the source of any social harm. Indeed, it could not so claim without adopting the absurd argument that any single-family home that might be razed to make way for an apartment building, or any church that might be replaced with a retail store, or any small business that might be more lucrative if it were instead part of a national franchise, is inherently harmful to society and thus within the government's power to condemn.³⁹

Specifically, these types of properties are homes that are cared for, like Ms. Kelo's home. They have an aesthetic quality that makes them different from the property in the *Berman* case (a department store)⁴⁰ and the property in the *Midkiff* case (tracts of land).⁴¹

This is precisely where the majority is able to quibble with O'Connor's viewpoint. In a footnote, the majority states: "Nor do our cases support Justice O'Connor's novel theory that the government may only take property and transfer it to private parties when the initial taking eliminates some 'harmful property use.' There was nothing harmful about the non-blighted department store at issue in *Berman*"⁴² In this small bite, the Court shows us how place defines or does not define the constitutional question. Like Mr. Berman's department store, Ms. Kelo's property is well kept; unlike Mr. Berman's store, her property is a home.⁴³ Does this make a difference? "No," says the majority, because takings have nothing to do with how well a property is maintained or to what use the property is put.⁴⁴ The Court says: "In each case, the public purpose we upheld depended on a pri-

38. *Kelo*, 545 U.S. at 501 (O'Connor, J., dissenting) ("But nearly any lawful use of real private property can be said to generate some incidental benefit to the public.").

39. *Id.* at 500-01.

40. *Berman v. Parker*, 348 U.S. 26, 32 (1954).

41. *Midkiff*, 467 U.S. at 232.

42. *Kelo*, 545 U.S. at 486 n.16 (majority opinion).

43. *Id.* at 500 (O'Connor, J., dissenting).

44. *See id.* at 486-87 (majority opinion).

vate party's *future* use of the concededly nonharmful property that was taken. By focusing on a property's future use, as opposed to its past use [or current condition], our cases are faithful to the text of the Takings Clause."⁴⁵ Thus, the majority has oriented the reader with one defining sentence, describing the boundaries that economic development takings occupy as institutional space: (1) they are purpose oriented (2) as described by other economic development cases and (3) bound within the Takings Clause of the Fifth Amendment.

B. *Defining Public and Private Use*

The next institutional space with which *Kelo* overlaps is the question of how we constitutionally define public and private use. The majority notes that public use can be defined by specific "place"; certainly takings that are for the construction of public buildings or for common carriers satisfy a public use.⁴⁶ Equally clear is that the taking "for the purpose of conferring a [purely] private benefit on a particular private party" is forbidden.⁴⁷ The Court has again defined the boundaries by which the space we are operating in is determined. The Court then narrows those boundaries. First, it notes that the development plan by the city is not one intended to benefit a particular class of individuals.⁴⁸ But then the Court notes the land to be condemned is not to be opened up to the public at large.⁴⁹ Thus, the Court defines the problem by setting that problem within an area of interpretation that rests between two polar opposites, which if either were true, would determine the result of the case. Then, looking to the community of decisions surrounding this question, the Court determines that this particular taking suffices as a public use and therefore is appropriate.⁵⁰

And it is this way of defining the public use/private use dichotomy with which the dissenters are most concerned:

45. *Id.* at 486 n.16.

46. *Id.* at 477, 480.

47. *Id.* at 477 (citing *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 245 (1984); *Missouri Pacific R. Co. v. Nebraska*, 164 U.S. 403 (1896)). The Court further expounds this limitation noting that the city could not take property under the pretext of a public use if the actual purpose was to bestow a private benefit. *Id.*

48. *Id.* at 478.

49. *Id.*

50. *Id.* at 483-90.

To reason, as the Court does, that the incidental public benefits resulting from the subsequent ordinary use of private property render economic development takings “for public use” is to wash out any distinction between private and public use of property—and thereby effectively to delete the words “for public use” from the takings clause of the Fifth Amendment.⁵¹

After differentiating *Kelo* from *Berman* and *Midkiff*, O’Connor writes:

Yet for all the emphasis on deference, *Berman* and *Midkiff* hewed to a bedrock principle without which our public use jurisprudence would collapse: “A purely private taking could not withstand the scrutiny of the public use requirement; it would serve no legitimate purpose of government and would thus be void.” To protect that principle, those decisions reserved “a role for courts to play in reviewing a legislature’s judgment of what constitutes a public use . . . [though] the Court in *Berman* made clear that it is ‘an extremely narrow’ one.”⁵²

Importantly, O’Connor’s dissent suggests that a primary role of the Court is to define constitutional terms:

We give considerable deference to legislatures’ determinations about what governmental activities will advantage the public. But were the political branches the sole arbiters of the public-private distinction, the Public Use Clause would amount to little more than hortatory fluff. An external, judicial check on how the public use requirement is interpreted, however limited, is necessary if this constraint on government power is to retain any meaning.⁵³

51. *Id.* at 494 (O’Connor, J., dissenting).

52. *Id.* at 500 (alteration in original) (citations omitted).

53. *Id.* at 497. O’Connor expressed regret over the language she used in *Midkiff*:

There is a sense in which this troubling result follows from errant language in *Berman* and *Midkiff*. In discussing whether takings within a blighted neighborhood were for a public use, *Berman* began by observing “We deal, in other words with what traditionally has been known as the police power.” From there it declared that “[o]nce the object is within the authority of Congress, the right to realize it through the exercise of eminent domain is clear.” Following up, we said in *Midkiff* that “[t]he ‘public use’ requirement is coterminous with the scope of a sovereign’s police

One might notice that the disagreement between the majority and the dissent is not based on what is or is not public use. Rather, the institutional space this discussion occupies is whether the Court is in the best position to define public use beyond its prior statements.

It may be worth noting that the Court engages in defining exercises all the time. For example, the Court defined the meaning of “privacy” from the Constitution; some would say out of thin air.⁵⁴ One explanation for the Court’s hesitancy to define “public use” in tangible terms is the danger of defining terms and things in inconsistent ways. “Public use” is much more pliable and susceptible as an abstract concept than as a concretely defined term. I can feel a road, see it, and therefore gain experiential knowledge that it is in front of me. The “public use” that the Court defines exists outside of such empirical datums—it is to a certain degree elusive, which makes it more adaptable.

I am carefully choosing my words. I do not want to write that the Court is activist (whatever that means) or even that *Kelo* was incorrectly decided (which may or may not be true). What I do want to communicate is the way the Court used abstraction to reach the meaning of the Fifth Amendment’s takings clause that it wanted to reach, particularly its refusal to isolate a specific place within the institutional space that is public use.

powers.” This language was unnecessary to the specific holding of those decisions. *Berman* and *Midkiff* simply did not put such language to the constitutional test, because the takings in those cases were within the police power but also for “public use” for the reasons I have described. The case before us now demonstrates why, when deciding if a taking’s purpose is constitutional, the police power and “public use” cannot always be equated.

Id. at 501-02. Notably, the Court does not even mention the words “police power” within its opinion. It is obvious to O’Connor that the police power is somehow implicated by the majority’s decision. Is there meaning behind the majority’s failure to define this case as falling within the police power? Is it merely a case that omitted its *ratione decendi*? Or is the police power lurking behind other definitions, still present, imagined, but not stated? It seems Justice O’Connor thinks so.

54. See, e.g., ROBERT BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 166 (1990) (describing the use of the Privileges and Immunities Clause as a source of the right of privacy as an “ink blot” on the Constitution); John Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 *YALE L.J.* 920, 935-43 (1973) (criticizing the Court’s undefined application of the constitutional right to privacy in *Roe v. Wade*).

C. *Physical Places as Institutional Spaces*

To this point, I have only described how place and space contrast each other to create a definitional dichotomy defining economic development and public use. One final example is the recasting of physical place, by the dissenters, as institutional space. The foremost example is Justice Thomas's description of the home: "The Court has elsewhere recognized 'the overriding respect for the sanctity of the home that has been embedded in our traditions since the origins of the Republic,' when the issue is only whether the government may search a home."⁵⁵ He continues contrasting the meaning of the *Kelo* opinion with the Court's previous stance: "Though citizens are safe from the government in their homes, the homes themselves are not."⁵⁶ Thomas's "home" becomes definitional towards the liberties individuals can expect and must be read to consistently protect those liberties. Thomas's argument, said slightly more argumentatively, might go something like this: How can the "home" safeguard citizens within the meaning of the Fourth Amendment if it can be seized under the Fifth Amendment? Thus for Thomas, the institutional space of the "home" as read through the Fourth Amendment must continue through the Fifth (and arguably the Sixth, Seventh, Eighth, etc.).

Thomas has a point only if you accept his initial conclusion that words should be consistently defined every time they are used. We know that this is not always the case within the realm of constitutional interpretation. For example, the first seventy-one years of our country saw different *legal* definitions of the word "person": it could mean all people, black and white, male and female (such as in criminal law); all white people (such as in constitutional law); or all white male people (such as in the voting public).⁵⁷ One could argue back to Thomas that the Court historically has no problem with inconsistency of terms.

55. *Kelo*, 545 U.S. at 518 (Thomas, J., dissenting) (quoting *Payton v. New York*, 445 U.S. 573, 601 (1980)).

56. *Id.*

57. See Michael J. Gerhardt, *The Utility and Significance of Professor Amar's Holistic Reasoning*, 87 GEO. L.J. 2327, 2336-37 (1999) ("The Constitution does not define 'person' in so many words. Section 1 of the Fourteenth Amendment contains three references to 'person.' The first, in defining 'citizens,' speaks of 'persons born or naturalized in the United States.' The word also appears in both the Due Process Clause and the Equal Protection Clause. 'Person' is used in other places in the Con-

A second example of place becoming institutional space is O'Connor's use of labeling. One example of this labeling flows from the possibilities that O'Connor envisions occurring to any 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."⁵⁸ O'Connor uses the idea of what a "Ritz-Carlton" replacing a "Motel 6" symbolizes. This can also be seen by O'Connor's use of the word "home" to describe Susette Kelo's property.⁵⁹ She wants to use places to define the boundaries of property by the images people imagine—by "Motel 6s," "Ritz-Carltons," and "homes." Thus, for the community of economic developments, the concept of home is more important than any single manifestation of it.⁶⁰

stitution: in the listing of qualifications for Representatives and Senators, Art. I, § 2, cl. 2, and § 3, cl. 3; in the Apportionment Clause, Art. I, § 2, cl. 3; in the Migration and Importation provision, Art. I, § 9, cl. 1; in the Emolument Clause, Art. I, § 9, cl. 8; in the Electors provision, Art. II, § 1, cl. 2, and the superseded cl. 3; in the provision outlining qualifications for the office of the President, Art. II, § 1, cl. 5; in the Extradition provisions, Art. IV, § 2, cl. 2, and the superseded Fugitive Slave Clause 3; and in the Fifth, Twelfth, and Twenty-Second Amendments, as well as in §§ 2 and 3 of the Fourteenth Amendment.").

Consider the strains by early republic legal abolitionists St. George Tucker and Judge William Cushing, who believed guarantees in the Declaration of Independence that all men are created equal, and similar guarantees in the Massachusetts Constitution that every subject is entitled to liberty, demanded an end to slavery. *See* ST. GEORGE TUCKER, A DISSERTATION ON SLAVERY: WITH A PROPOSAL FOR THE GRADUAL ABOLITION OF IT IN THE STATE OF VIRGINIA 7-8 (1796) ("Whilst America hath been the land of promise to Europeans, . . . it hath been the vale of death to millions of the wretched sons of Africa. . . . Whilst we were offering up vows at the shrine of Liberty, . . . we were imposing upon our fellow men, who differ in complexion from us, a *slavery*, ten thousand times more cruel than the utmost extremity of those grievances and oppressions of which we complained. Such are the inconsistencies of human nature; . . . such that partial system of morality which confines rights and injuries, to particular complexions; such the effect of that self-love which justifies, . . . not according to principle, but to the agent."); *Commonwealth v. Jennison* (Mass. 1783) (unreported) (Cushing, J.) ("[E]very subject is entitled to liberty."), *cited in* David Thomas Konig, *The Long Road to Dred Scott: Personhood and the Rule of Law in the Trial Records of the St. Louis Slave Freedom Suits*, 75 UMKC L. REV. 53, 61 (2006).

58. *Kelo*, 545 U.S. at 502 (O'Connor, J., dissenting).

59. *See supra* text accompanying notes 28, 39.

60. One might also recall O'Connor's earlier First Amendment opinion in *Frisby v. Schultz*, 487 U.S. 474 (1988), where the rhetoric of the "home" is also de-

* * *

One point that can be made in reviewing the three examples of the use of institutional space is the tension that exists between defining things and defining concepts. Just as Thomas wants “homes” to be “homes,” Stevens, writing for the majority, would rather talk about public and private use. The Court’s hesitancy in *Kelo* to define “things” may reflect the abstract nature of our Constitution. In the example of *Kelo*, private things can be made public so long as the boundaries of the space they occupy permit them to be so defined. And yet, there is a certain discomfort we feel when the Court uses words that mean one thing as if they mean the opposite.⁶¹ To this point, my initial discussion of the nature of words creating images becomes relevant. If words can create different images for different people, we should have no problem with a court that uses a word one way in one context and another way in a different context. If institutional surroundings conjure different images to different persons, then the words are only as relevant as the person who is using or interpreting the words—in this case five justices that thought private use can sometimes mean public use.

A second, related point is that even when the Court may not be engaged in defining things, it is perpetually engaging in institutional definition, defining the ways cases should be thought about by outsiders. James Boyd White’s insightful comments reach this point: “[I]n

scribed.

One important aspect of residential privacy is protection of the unwilling listener. Although in many locations, we expect individuals simply to avoid speech they do not want to hear, the home is different. “That we are often ‘captives’ outside the sanctuary of the home and subject to objectionable speech . . . does not mean we must be captives everywhere.” Instead, a special benefit of the privacy all citizens enjoy within their own walls, which the State may legislate to protect, is an ability to avoid intrusions. Thus, we have repeatedly held that individuals are not required to welcome unwanted speech into their own homes and that the government may protect this freedom.

Id. at 484-85 (alteration in original) (citations omitted).

61. See STEVEN L. WINTER, A CLEARING IN THE FOREST: LAW, LIFE, AND MIND 105 (2001) (“The judge, no less than others, is enmeshed in and dependent upon the structures of social meaning that make communication possible. . . . [I]magination is systematic and orderly rather than chaotic or anarchic.”).

every case the court is saying not only, ‘This is the right outcome for this case,’ but also, ‘This is the right way to think and talk about this case, and others like it.’”⁶² The conclusion one might draw from this discussion is that the Court is steering constitutional law interpretation towards abstraction. Another viable conclusion is that the Court abstracts definitions when the institutional space that the object occupies (this time, economic development takings) requires abstraction. Whichever mode you choose to rest upon, the Court decides and defines by its own words what the channels of discussion will look like—it sets our imagination.

IV. INTERPRETING THE WAVE DEFINING SPACE AND PLACE IN THE CONSTITUTION

At the end of Part II, I said, “There is quite a lot of room to define new things in the large open spaces of the Constitution.” What I mean is that the boundaries of the Constitution itself are relatively open, leaving much for speculation. One of the limiting factors in constitutional growth, then, is whether we perceive the space as dominated by physical manifestations of ideas or spatial manifestations. I now want to put forward a theory of how space is defined in the Constitution, described through *Kelo* above, using economic development takings as my illustration. I will do so visually as well as verbally.

The Constitution starts with a set of ideas contained by words. The specific words that we are concerned with are the Fifth Amendment’s due process and takings clauses: “No person shall be . . . deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.”⁶³ The central question, then, for economic development takings issues is what constitutes public use. The hierarchy of ideas is shown visually in Figure 1. If the idea is a constitutional idea, then the large box represents the whole universe of constitutional ideas, the box inside of it represents Fifth Amendment takings problems, and the box inside of that represents the idea of public use.

62. James Boyd White, *What’s an Opinion For?*, 62 U. CHI. L. REV. 1363, 1366 (1995).

63. U.S. CONST. amend. V.

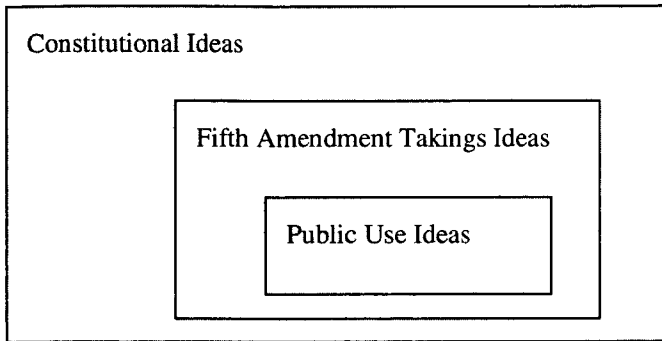


Figure 1.

We are working strictly inside the public use box. We can illustrate the division between the physical manifestations of ideas and the institutional manifestations by dividing the box into two halves. The line dividing the two is the words.

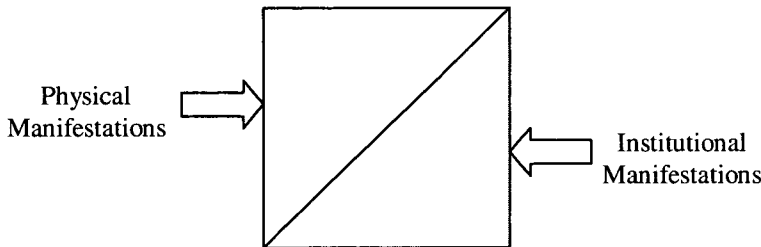


Figure 2.

Figure 2 represents the idea in equipoise, before judicial intervention into the idea of public use.

In defining the idea of public use before *Berman*, the Court talked about things. It talked about buildings, roads, and parks. Thus, the physical manifestations of the idea grew in emphasis. This is shown visually in Figure 3 by shifting the dividing line between the spaces.

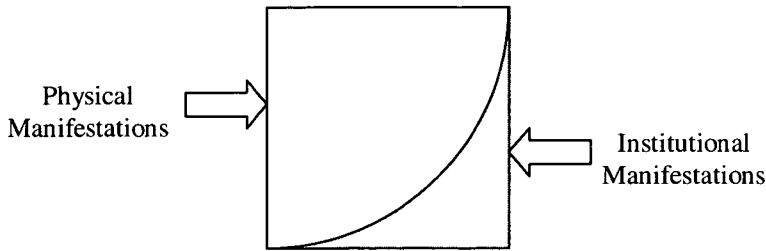


Figure 3.

Notice that physical manifestations of the idea grow while the institutional manifestations shrink. Note also that the institutional manifestation does not disappear. Rather, the physical manifestation of the idea predominates. Two observations are germane. First, because public use is intimately associated with physical manifestations, the idea is extremely nonabstract in the ordinary usage and meaning. Public use becomes defined not by words, but by things. Second, the words do not disappear. That is, the definition of public use, though primarily identified by physicality, still has room within the words to be expanded to other areas. After *Berman* and *Midkiff*, the space begins to move the opposite direction. Thus, the curve is reversed.

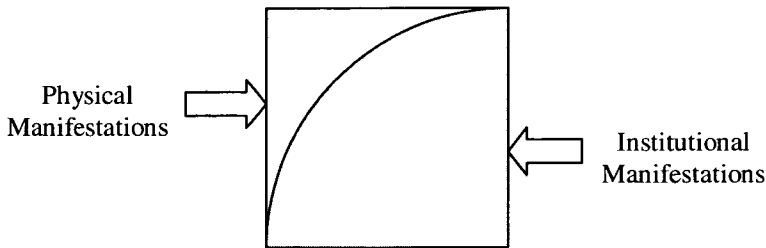


Figure 4.

Thus, as visualized in Figure 4, no longer do the physical manifestations of public use dominate, but the everyday vernacular of the words themselves become dominant. My argument is that what the dissents and the majority argue about in *Kelo* is the placement of the line separating physical and vernacular manifestations—specifically, the direction of the swing that separates institutional manifestations of ideas from the physical. That is, they argue whether the words should create

more physical spaces bound by physical descriptions—public buildings, roads, etc.—or whether those words should represent spaces that are ideas.

Moreover, the argument that this model represents—that constitutional debate is about whether the ideas of the Constitution are physically manifested or institutionally manifested—is equally applicable to areas outside of takings doctrine or public use definitions. Consider fundamental rights protection. One could argue that the Constitution limits only those fundamental rights expressed in the contours of the document, such as the right to vote as described in the Fifteenth, Nineteenth, and Twenty-Sixth amendments. On the other hand, the Supreme Court has not extended constitutional protection to areas like education,⁶⁴ yet has numerous times upheld the need to equalize institutions or provide the same basis of education for persons of different races and genders.⁶⁵ The definitions of spaces in fundamental rights cases are debates about the ideas of limiting due process by certain physical criteria: is this a right we can limit by determinable criteria; is it in the document; or is it defined by a penumbra around the Constitution that encompasses more than the rights specifically spelled out?⁶⁶ The very categorization of certain classes of rights as warranting “strict scrutiny” or “heightened scrutiny” versus certain categories of access that warrant similar review suggests a blurred line of demarcation to the idea that certain traits are determinative (physical) while others may be assimilated, but not necessarily included.

At the same time, as the diagrams above show, the reality remains that all we are talking about is ideas. The physical places are simply ideas themselves. O’Connor’s and Thomas’s descriptions of the home are more about an idea of what the home is about or what it should protect than about a physical location called “home.” The textual limi-

64. See *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 37-38 (1973).

65. See, e.g., *Brown v. Bd. of Educ.*, 349 U.S. 294 (1955); *United States v. Virginia*, 518 U.S. 515 (1996).

66. See *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965) (“The foregoing cases suggest that specific guarantees in the bill of rights have penumbras, formed by emanations from those guarantees that help give them life and substance.”). Consider the different (yet similar) views of the “penumbra effect” of constitutional guarantees expressed by Justice Harlan II and Chief Justice Rehnquist. See Jeff Powell, *The Compleat Jeffersonian: Rehnquist and Federalism*, 91 *YALE L.J.* 1317, 1358 (1982).

tation factor that some would place upon substantive due process claims resides in an idea of the original intent, aims, and purpose of constitutional law. In this sense, the images created by constitutional language tend to define what the parameters of the Constitution are supposed to adhere to. Images like Ms. Kelo's "well-maintained home[]"⁶⁷ attempt to narrow lines of constitutional discourse by associating place. On the other hand, institutional images that genericize particular things abstract constitutional discourse and lead to a wider gambit of applicability, many times beyond the treatment established in the tradition of law.

V. CONCLUSION

I started this Essay by describing how language creates images. I conclude this Essay by suggesting that language employed by the courts creates institutional images that either result in a concrete manifestation of constitutional norms or constitutional ideas. Perhaps the descriptive tendencies of judges (such as O'Connor's conceptualization of home or her use of institutional images of hotels) are just as important for interpreting the cases as the results themselves. But more likely, the Court's conclusion leaves us with the uneasy feeling that all the Court is really talking about is ideas.

67. *Kelo v. City of New London*, 545 U.S. 469, 500 (2005) (O'Connor, J., dissenting).

