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That Land Is Your Land, This Land Is My Land. . . Until
the Local Government Can Turn It for a Profit: A Critical
Analysis of *Kelo v. City of New London*

*“The Courts must declare the sense of the law; and if they should be
disposed to exercise WILL instead of JUDGMENT, the consequences
would equally be the substitution of their pleasure to that of the
legislative body.”*

- *The Federalist No. 78*

In 2005, the U.S. Supreme Court decided *Kelo v. City of New London*, arguably the most controversial case in American history concerning the Takings Clause of the Fifth Amendment.¹ The majority in *Kelo* determined that a public benefit satisfied the public use requirement of the Fifth Amendment.² In her dissent, Justice O'Connor claimed the use of eminent domain is only lawful when private property owners are imposing costs on others, such as in blighted neighborhoods.³ In his dissent, Justice Thomas claimed that *Berman v. Parker* and *Hawaii Housing Authority v. Midkiff* were both improperly decided and that *Kelo* could not possibly be a lawful use of eminent domain.⁴

Because the *Berman* and *Midkiff* interpretations of public use were tenuous at best (these decisions equated public benefit and public purpose with public use), the Supreme Court had the latitude to find for the respondent in *Kelo* without overturning either of their two previous decisions.⁵ The holding in *Kelo* is detrimental for property owners because it allows perceived economic benefits to qualify as a public use

1. 125 S. Ct. 2655 (2005).

2. *See id.*

3. *See id.* at 2671 (O'Connor, J., dissenting).

4. *See id.* at 2677 (Thomas, J., dissenting).

5. *Berman v. Parker*, 348 U.S. 26, 31-32 (1954) (holding a redevelopment plan to remove blight conformed to the statutory language in providing for a public benefit); *Haw. Housing Authority v. Midkiff*, 467 U.S. 229, 241 (1984) (holding the regulating of a land oligopoly scheme was rationally related to a conceivable public purpose, and, therefore, was a valid exercise of the eminent domain power); *see discussion infra* Part IV.A. Given that Justice O'Connor wrote for the unanimous court in *Midkiff* and dissented in *Kelo*, she obviously believed that *Midkiff* did not dictate the decision in *Kelo*. *See Midkiff*, 467 U.S. at 231; *Kelo*, 125 S. Ct. at 2671 (O'Connor, J., dissenting).

for purposes of the Fifth Amendment. Given that all redevelopment is for economic gain, it is difficult to imagine a government imposed taking for redevelopment that would not satisfy this standard.

This note will examine how another jurisdiction has approached the same issues presented in *Kelo*.⁶ A recent Michigan case could serve as a model for lawmakers and judges in curtailing the abuse of eminent domain by greedy governmental entities: The Michigan Supreme Court overturned a twenty-year old precedent and determined that economic development was not sufficient as a public use to justify a taking of private property.⁷ Additionally, this note will discuss legislative reactions to the decision in *Kelo*, both on the federal and state levels, and what can be done by states to protect their resident property owners.⁸

I. TAKINGS

The Declaration of Independence first underscored the importance of property ownership in a free society by providing for a common goal of “life, liberty, and the pursuit of happiness.”⁹ Scholars of constitutional law agree that “property is the foundation of every right we have, including the right to be free.”¹⁰ The philosopher John Locke, the primary source of inspiration for the Founding Fathers, included life, liberty, and estates in his conception of property.¹¹ James Madison clarified this idea when he said, “As a man is said to have a right to his property, he may be equally said to have a property in his rights.”¹² More recently, another advocate of free market and private property rights observed, “economic freedom is the foundation of our individual freedom.”¹³ Tellingly, Americans are driven daily to work in order to acquire property as a means for guaranteeing their independence.¹⁴

6. See discussion *infra* Part IV.B.

7. Compare *Poletown Neighborhood Council v. City of Detroit*, 304 N.W.2d 455 (1981) (per curiam) with *County of Wayne v. Hathcock*, 684 N.W.2d 765 (2004). In *Poletown*, the Michigan Supreme Court determined that the possibility of increased jobs and increased tax revenue was a public use because it would benefit the public. In *Hathcock*, however, the Michigan Supreme Court expressly overturned *Poletown* and held that perceived economic benefits were not enough to justify the use of eminent domain in transferring property from private owners to private entities.

8. See discussion *infra* Part IV.C.

9. THE DECLARATION OF INDEPENDENCE, pmbl. (U.S. 1776).

10. Cato Handbook on Policy, 226 (6th ed. 2005).

11. *Id.*

12. *Id.*

13. *Testimony on Takings of Private Property: Presented Before the Senate State Affairs Committee*, 79th Second Called Session (Tex. 2005) (statement of Bill Peacock, Economic Freedom Policy Analyst, Texas Public Policy Foundation), available at <http://www.texaspolicy.com/pdf/2005-07-06-BP-senate.pdf> [hereinafter *Peacock*].

14. Cato Handbook on Policy, 227 (6th ed. 2005).

According to the Fifth Amendment of the Constitution, the federal government may not take private property for public use without just compensation.¹⁵ When a legislative body passes a law that restricts how a property owner may use his property, a regulatory taking occurs. A long line of cases address various issues surrounding regulatory takings, namely whether or not a taking occurs and how much of a loss in value occurs to the property owner.¹⁶ In some cases, no compensation is due; however, in other cases, if the regulation “goes too far,” then just compensation is due to the property owner.¹⁷ To determine whether or not compensation is due, the courts balance the general public interest and welfare against the magnitude of the taking.¹⁸ Courts consider three factors: (1) the property owner’s financially backed expectations in developing the property at the time of purchase;¹⁹ (2) any denial of economic use of the property;²⁰ and (3) the complete loss in economic value or productivity to the property owner which would lead to an automatic taking warranting just compensation.²¹ With steady increases in environmental regulations, regulatory takings have been center stage of Fifth Amendment jurisprudence for the last twenty years.²²

Another form of a taking is the physical taking of property through the use of eminent domain power. According to the Supreme Court, physical taking occurs when private property is taken by a government entity, through the power of eminent domain, for a public use; the governmental entity then provides just compensation to the owner for the property.²³ The traditional purposes for physical takings are purely public uses: parks, hospitals, schools, highways, and common carrier transportation, such as railroads and airports.²⁴ As early as 1789, in *Calder v. Bull*, the Supreme Court recognized that the Public Use Clause of the Fifth Amendment was intended as a limit on governmental use of the eminent domain power.²⁵ With respect to the transfer of private

15. U.S. CONST. amend. V.

16. See *Pa. Coal Co. v. Mahon*, 260 U.S. 393 (1922); *Penn Cent. Transp. Co. v. New York*, 438 U.S. 104 (1978); *Keystone Bituminous Coal Ass’n v. DeBenedictis*, 480 U.S. 470 (1987); *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992).

17. *Pa. Coal*, 260 U.S. at 415.

18. See *Keystone*, 480 U.S. at 492.

19. *Penn Cent.*, 438 U.S. at 127 (citing *Pa. Coal*, 260 U.S. 393 (1922)).

20. See *Keystone*, 480 U.S. at 501.

21. See *Lucas*, 505 U.S. at 1017.

22. See, e.g., *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001); *Conti v. United States*, 291 F.3d 1334 (Fed. Cir. 2002); *Florida Rock Indus. v. United States*, 18 F.3d 1560 (Fed. Cir. 1994); *Loveladies Harbor, Inc. v. United States*, 28 F.3d 1171 (Fed. Cir. 1994).

23. See *Penn Cent.*, 438 U.S. at 123-24.

24. *Id.* at 128.

25. 3 U.S. 386 (1798).

property from A to B (both private entities), the Court stated, “It is against all reason and justice, for a people to entrust a Legislature with SUCH powers; and, therefore, it cannot be presumed that they have done it.”²⁶

The Amicus Curiae Brief submitted in *Kelo v. City of New London* by the Property Rights Foundation of America, Inc. highlighted some important historical jurisprudence surrounding takings.²⁷ The idea that government cannot take private property for use by another private entity was put to the test during the late 1600s through the early 1800s in a line of cases commonly referred to as the Mill Acts cases.²⁸ The Mill Acts passed by the various states authorized states to condemn private land which was necessary for the operation of mills.²⁹ More specifically, a land owner on one side of a river could have the land on the other side of the river condemned so that he could dam the river and provide power for his mill.³⁰ While it would seem this constituted the taking of private land to give to another private entity, it was, in actuality, more similar to the use of eminent domain in order to facilitate public utilities.³¹ At that time, and until the invention of the steam engine in the 1860s, water was the main source of power.³² The Court explained the use of water was necessary for the production of food and thereby constituted a public use for purposes of satisfying the requirements of the Fifth Amendment.³³ Once the mills were built, the access and price for products were regulated by the government, bolstering the concept that this was a public use.³⁴ Just like public utilities, roadways, schools, and hospitals, the grist mills were necessary for the well-being of the general public—an obvious public use.

While the controversy surrounding regulatory takings has gained notoriety during recent years, the Public Use Clause of the Fifth Amendment has not received much attention until very recently. Although the Supreme Court addressed the public use requirement of physical takings in *Berman v. Parker* in 1954,³⁵ thirty years lapsed before

26. *Id.* at 388.

27. Brief of Amicus Curiae of the Property Rights Foundation of America, Inc., et al. at 15, *Kelo v. City of New London*, 125 S. Ct. 2655 (2005) (No. 04-108).

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.*

34. *See id.*

35. 348 U.S. 26 (1954).

they returned to the same issue in *Hawaii Housing Authority v. Midkiff*.³⁶ It then took an additional twenty years following the *Midkiff* decision for the Supreme Court to address the issue in the recent case, *Kelo v. City of New London*.³⁷ Relying heavily on *Berman* and *Midkiff*, the Court in *Kelo* ultimately determined that a transfer of private property to a private entity indeed satisfied the public use requirement of the Fifth Amendment.³⁸

II. FACTUAL AND PROCEDURAL BACKGROUND

In January 1998, the State of Connecticut authorized a \$5.35 million bond issue to support the redevelopment of the Fort Trumbull area of New London, Connecticut (New London).³⁹ In February 1998, Pfizer Corporation announced it would build a \$300 million facility in the Fort Trumbull area of New London.⁴⁰ In May of the same year, after initial approval from the city council and neighborhood meetings to discuss the plans, New London authorized the New London Development Corporation (NLDC) to submit plans to the appropriate state agencies for approval.⁴¹

In 2000, New London approved a development plan intended to revitalize the distressed city through increased tax revenues and creation of jobs.⁴² In order to implement the plan, New London began to purchase needed land from willing sellers and proposed to use the power of eminent domain to obtain the land from unwilling landowners in exchange for just compensation.⁴³ New London intended to acquire land in seven parcels: parcel one for a waterfront hotel and conference center, parcel two for eighty new residences as part of a new urban neighborhood, parcel three for research and development office space for either Pfizer or other new businesses, parcel four that would support either the park or the marina, and, parcels five, six, and seven for additional office and retail space, parking and water-dependent commercial uses.⁴⁴

Petitioners, including Suzette Kelo, brought suit in December 2000 in the Superior Court of Connecticut, claiming “that the taking of their

36. 467 U.S. 229 (1984).

37. 125 S. Ct. 2655 (2005).

38. *See id.* at 2655-68.

39. *See id.* at 2659.

40. *Id.*

41. *Id.*

42. *Id.* at 2658.

43. *Id.*

44. *Id.* at 2659.

properties would violate the ‘public use’ restriction in the Fifth Amendment.”⁴⁵ The petitioners own fifteen properties in the Fort Trumbull area, four of which are in parcel three of the development plan and the other eleven are in parcel four of the development plan.⁴⁶ The Superior Court granted relief in the form of a restraining order as to the properties located in parcel four (park or marina support), but denied relief to those properties located in parcel three (office space).⁴⁷

Both parties brought appeals in the Supreme Court of Connecticut, which upheld the trial court’s determination as to the properties located in parcel three; however, the court reversed the trial court as to parcel four.⁴⁸ The majority found the statutory language relied upon by New London to be valid and constitutional.⁴⁹ The statute “expresses a legislative determination that the taking of the land, even developed land, as part of an economic development project is a ‘public use’ and in the ‘public interest.’”⁵⁰ However, “[t]he three dissenting justices would have imposed a ‘heightened’ standard of judicial review for takings justified by economic development” under Connecticut law.⁵¹ The dissenting justices agreed that the redevelopment plan was intended to serve for a “valid public use,” but found all the takings unconstitutional because New London “failed to adduce ‘clear and convincing evidence’ that the economic benefits of the plan would in fact come to pass.”⁵² Evidence considered by the court included detailed plans submitted by the New London Development Corporation stating purposes for the disputed parcels of land, even though the ultimate disposition or owners of the properties was not ascertainable at that time.⁵³ Subsequently, the Supreme Court 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.”⁵⁴

45. *Id.* at 2660.

46. *Id.*

47. *Id.*

48. *Id.* at 2660-61.

49. *Id.* at 2660.

50. *Id.*

51. *Id.* at 2661 (quoting *Kelo v. City of New London*, 843 A.2d 500, 587-88 (Conn. 2004) (Zarella, J., joined by Sullivan, C.J., and Katz, J., concurring in part and dissenting in part.))

52. *Id.* (quoting *Kelo v. City of New London*, 843 A.2d 500, 587-88 (Conn. 2004) (Zarella, J., joined by Sullivan, C.J., and Katz, J., concurring in part and dissenting in part.))

53. *See id.* at 2661-62.

54. *Id.* at 2661.

III. EMINENT DOMAIN AND PUBLIC USE: USING POLICE POWER JUSTIFICATION TO REMEDY SOCIAL AND ECONOMIC ILLS

The Public Use Clause of the Fifth Amendment permits the government to take private property if it is taken for public use.⁵⁵ As discussed above, the Public Use Clause has not traditionally been the core of litigation surrounding the Fifth Amendment; however, in *Kelo v. City of New London*, the Supreme Court addressed the issue, basing its decision on its earlier rulings in *Berman* and *Midkiff*.⁵⁶

A. *Berman v. Parker: Use of Eminent Domain to Remedy Social Ills*

In *Berman*, petitioner challenged the constitutionality of the District of Columbia Redevelopment Act of 1945.⁵⁷ The statute authorized the District of Columbia to seize property through eminent domain power for “the redevelopment of blighted territory in the District of Columbia and the prevention, reduction, or elimination of blighting factors or causes of blight.”⁵⁸ Once the redevelopment plan was approved, the agency created by the Act was “authorized to acquire and assemble the real property in the area” necessary to fulfill the plan.⁵⁹ The Act also specified “[p]reference is to be given to private enterprise over public agencies in executing the redevelopment plan.”⁶⁰

Berman owned a department store in a blighted area slated for redevelopment.⁶¹ Although the store was a successful business in an otherwise blighted neighborhood, the district court allowed the taking of Berman’s property as part of the overall redevelopment scheme.⁶² Berman argued that his property could “not be taken constitutionally for

55. U.S. CONST., amend. V.

56. See *Kelo*, 125 S. Ct. at 2663.

57. *Berman v. Parker*, 348 U.S. 26, 28 (1954); see also District of Columbia Redevelopment Act of 1945, Pub. L. No. 592, 60 Stat. 790 (1946).

58. *Berman*, 348 U.S. at 29. Even though the statute being challenged in *Berman* provided for blight removal, the statute did not define blight. *Id.* at 28 n.1. However, the Supreme Court relied on other language in the statute to define blight:

substandard housing conditions’ means the conditions obtaining in connection with the existence of any swelling, or dwellings, or housing accommodations for human beings, which because of lack of sanitary facilities, ventilation, or light, or because of dilapidation, overcrowding, faulty interior arrangement, or any combination of these factors, is . . . detrimental to the safety, health, morals, or welfare of the inhabitants . . .

Id.

59. *Id.* at 29-30.

60. *Id.* at 30. The Supreme Court ultimately concurred with the legislature by stating that private development corporations were better suited to carry out redevelopment plans. *Id.* at 33-34.

61. *Id.* at 31.

62. *Id.*

[the] project. It [was] commercial, not residential property; it [was] not slum housing; it [would have been] put into the project under the management of a private, not a public, agency and redeveloped for private, not public, use.”⁶³ The Court seemed to agree with *Berman*, stating, “[t]o take for the purpose of ridding the area of slums is one thing; it is quite another . . . to take a man’s property merely to develop a better balanced, more attractive community.”⁶⁴

The Court distinguished the removal of slums from pure economic redevelopment based on the existence of conditions in slums that might be “injurious to the public health, safety, morals and welfare.”⁶⁵ In the Court’s opinion, the use of traditional police power authority to protect the public from these possible harms justified the use of the eminent domain power for the redevelopment plan.⁶⁶

In an effort to avoid “suffocating the spirit,” the Court imposed its own philosophical reasons when formulating its determination that the public good was best served by the taking of private property.⁶⁷ The Court also justified the taking of private property to give to another private entity by stating, “The public end may be as well or better served through an agency of private enterprise than through a department of government—or so the Congress might conclude.”⁶⁸ Further, “[w]e cannot say that public ownership is the sole method of promoting the public purposes of community redevelopment projects.”⁶⁹

Berman claimed that his business did not endanger the health or safety of the public, nor did it contribute to the slum or blighted area.⁷⁰ The experts who designed the development plan argued the plan had to be executed as a whole, requiring the taking of Berman’s property, in order for the plan to be successful in restoring the neighborhood.⁷¹ The

63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.* at 32. The Court explained

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.

67. *Id.* at 32-33.

68. *Id.* at 33-34.

69. *Id.* at 34.

70. *Id.*

71. *Id.*

Court held the standards set out in the redevelopment plan to be reasonable, and justified the taking of Berman's property.⁷² The Court ultimately claimed "If owner after owner were permitted to resist these redevelopment programs on the ground that his particular property was not being used against the public interest, integrated plans for redevelopment would suffer greatly."⁷³

This reasoning highlighted the failure of the Court to adhere to the true essence of the Fifth Amendment in protecting private property from government intrusion, and the Court did not rectify the situation by again relying on similar reasoning in *Kelo*. Instead, the *Berman* case authorized use of eminent domain power to take property from one private owner and give it to another private owner if the overall purpose was to remedy social ills such as blight and slums.⁷⁴ Thirty years later in *Hawaii Housing Authority v. Midkiff*, the Supreme Court further eroded Fifth Amendment protections for private property owners when it equated the perception of economic injustice with actual social injustice, which was justified by the Court in *Berman*, and held that remedying economic injustice was a permissible public use that could justify the taking of private property.⁷⁵

B. Hawaii Housing Authority v. Midkiff: Use of Eminent Domain to Remedy Economic Ills

In *Hawaii Housing Authority v. Midkiff*, the petitioner challenged the constitutionality of the Hawaii Land Reform Act of 1967.⁷⁶ The Act provided for the taking of private property by the state government to make land available for sale to private, individual buyers.⁷⁷ By condemning the land for resale, the Hawaii Legislature expected to redistribute the land from a small number of owners to other residents of the state.⁷⁸ The Act provided that individuals who lived on a leased plot of land at least five acres in size could ask the State to condemn the land and sell it to them.⁷⁹ The statute was designed to remedy economic ills brought about by a land oligopoly.⁸⁰ The question presented to the

72. *Id.* at 35.

73. *Id.*

74. *See id.*

75. *See Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229 (1984).

76. *Id.* at 234-35.

77. *Id.* at 233.

78. *Id.* The Hawaii Legislature found the state and federal government owned nearly 49% of the State's land, while only 72 private landowners owned another 47% of the State's land. *Id.* at 432.

79. *Id.* at 233.

80. *See id.* at 233-35.

Supreme Court was “whether the Public Use Clause of [the Fifth] Amendment . . . prohibits the State of Hawaii from taking, with just compensation, title in real property from lessors and transferring it to lessees in order to reduce the concentration of ownership of fees simple in the State.”⁸¹ The Court held the statute did not violate the Public Use Clause of Fifth Amendment.⁸²

The Court relied heavily on *Berman v. Parker* in its determination of a public use.⁸³ Writing for a unanimous Court, Justice O’Connor stated, “Where the exercise of the eminent domain power is rationally related to a conceivable public purpose, the Court has never held a compensated taking to be proscribed by the Public Use Clause.”⁸⁴ The Court reasoned that “[r]egulating oligopoly and the evils associated with it is a classic exercise of a State’s police powers.”⁸⁵ It did not matter whether the Act actually achieved its goals, but rather that its purpose was to benefit society as a whole by remedying perceived social and economic ills preserved by a land oligopoly.⁸⁶ Justice O’Connor explained the Hawaii statute’s purpose was “not to benefit a particular class of identifiable individuals but to attack certain perceived evils of concentrated property ownership in Hawaii—a legitimate public purpose.”⁸⁷ Therefore, the Court concluded that use of eminent domain power to achieve that purpose was not irrational.⁸⁸

C. *Two Wrongs Don’t Make a Right: The Problems with Berman and Midkiff*

The broad definitions of public use fashioned by the *Berman* and *Midkiff* Courts paved the way for future distortion of the Public Use Clause of the Fifth Amendment. *Berman* allowed for the transfer of private property to a private entity in order to remove blight and protect the health, welfare, and safety of the citizens of the District of Columbia.⁸⁹ By allowing a non-blighted property to be included in the permissible taking of blighted properties, the *Berman* Court drew no boundaries as to where public benefit (the removal of blighted properties) would give way to an impermissible taking (the removal non-

81. *Id.* at 231-32.

82. *Id.*

83. *Id.*

84. *Id.* at 241.

85. *Id.* at 242.

86. *Id.*

87. *Id.* at 245.

88. *Id.*

89. *See Berman v. Parker*, 348 U.S. 26 (1954).

blighted properties).⁹⁰ *Midkiff* allowed for the transfer of private property to a private entity in order to cure social ills brought about by a traditional land ownership scheme that provided an inequitable distribution of wealth for the residents of Hawaii.⁹¹ In essence, the *Midkiff* Court allowed a private entity to condemn private property (with the state of Hawaii's blessing) and sell that property to private individuals—hardly a public use.⁹² In justifying such a decision, the unanimous *Midkiff* Court reasoned the inequities provided by the traditional land ownership scheme harmed the public at large, and the remedy provided by the Hawaii Housing Authority conferred a public benefit.⁹³ Both the *Berman* and *Midkiff* decisions sought to remedy perceived harm present in the general public.⁹⁴ Both decisions equated public benefit with public use, which set an apparently nonrestrictive and incredibly subjective standard for future cases challenging the Public Use Clause.⁹⁵ Indeed, according to an amicus brief filed on behalf of petitioners, “*Berman* and *Midkiff* provide minimal guidance for determining when the purpose to be accomplished through a condemnation is a public use.”⁹⁶ After all, what benefits a portion of the general public (the post-condemnation recipient of the property in question) confers harm on another portion of the general public (the owner of the property in question) through the loss of private property. In *Kelo*, the Supreme Court stretched the holdings from *Berman* and *Midkiff* to allow for the transfer of private property to a private entity simply to improve the local economy, not to remove blight or remedy social ills brought about by an inequitable land ownership scheme.

IV. THE EXACERBATION OF EMINENT DOMAIN JURISPRUDENCE

Over eighty years ago, Justice Holmes ominously cautioned, “We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change.”⁹⁷ Mindful of that

90. *See id.*

91. *See Midkiff*, 467 U.S. 229.

92. *See id.*

93. *See id.*

94. *See supra* notes 93-97 and accompanying text.

95. *See supra* notes 93-97 and accompanying text.

96. Brief of Amicus Curiae of James Buchanan and Gordon Tullock and Pacific Legal Foundation, *Kelo v. City of New London*, 125 S. Ct. 2655 (2005) (No. 04-108). Timothy Sandefur further stated, “*Midkiff* asserts that eminent domain may not be used for private purposes, but when a government agency asserts that a condemnation is a valid public purpose, the courts generally take their most deferential perspective in reviewing that assertion.” *Id.*

97. *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 416 (1922).

warning, the elusive goal of improved economic conditions should not suffice to justify the use of eminent domain power to transfer property from one private owner to another.

A. The Kelo Catastrophe: Eminent Domain Used to Improve Economic Conditions

In what was arguably the most important property rights case in recent memory, the U.S. Supreme Court was asked to determine if the redevelopment of a neighborhood by a corporation justified the taking of private property.⁹⁸ The Superior Court of Connecticut had held because the corporation planned to restore park areas, increase jobs for the area, and restore residential living to the area, the city of New London's seizure and redistribution to NDLC was a justifiable use of eminent domain power.⁹⁹ The Supreme Court 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."¹⁰⁰ The Court heard oral arguments on February 22, 2005, and rendered its decision on June 23, 2005.¹⁰¹

1. Speculative public benefits as a public use

Given there was no evidence of an illegitimate purpose in *Kelo*, it was accepted that New London's development plan was not adopted "to benefit a particular class of identifiable individuals."¹⁰² In this case, the majority justified the taking because it would be carried out in accordance with a "carefully considered" development plan, which would benefit the general public.¹⁰³ Justice Stevens, writing for the majority, conceded "the City would no doubt be forbidden from taking petitioners' land for the purpose of conferring a private benefit on a particular private party."¹⁰⁴ Additionally, Justice Stevens said, "Nor would the City be allowed to take property under the mere pretext of a public purpose, when its actual purpose was to bestow a private benefit."¹⁰⁵

New London was not confronted with the issue of removing blight,

98. *Kelo v. City of New London*, 125 S. Ct. 2655, 2663 (2005).

99. *See id.*

100. *Id.* at 2661.

101. *Id.* at 2655.

102. *Id.* at 2662 (citing *Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229, 245 (1984)).

103. *Id.* at 2661 (citing *Kelo v. City of New London*, 843 A.2d 500, 536 (Conn. 2004)).

104. *Id.* (citing *Midkiff*, 467 U.S. at 245).

105. *Id.*

but only with improving an economically distressed neighborhood; there was no potential harm for the residents as a result of their living conditions and no evidence of crime as a result of the condition of the neighborhood.¹⁰⁶ Because the redevelopment plan was a proposed remedy to the situation, the Court viewed the plan as a viable option in New London's furtherance of that goal.¹⁰⁷ The Court considered the redevelopment plan as a whole, rather than its specific parts, and concluded that the proposed plan better served the general public.¹⁰⁸

In denying petitioners' plea for a bright-line rule that would deny public use status for economic development, the Court stated, "Promoting economic development is a traditional and long accepted function of government. There is, moreover, no principled way of distinguishing economic development from the other public purposes that we have recognized."¹⁰⁹ This reasoning was flawed because *Berman* and *Midkiff* themselves demonstrated a method of distinguishing the different public purposes. The opinions in those cases were based on the use of states' police power to remedy perceived social ills in the general public brought on by severe blight and inequitable land oligopoly schemes.¹¹⁰ These social ills were perceived as being harmful to the general public, and tradition dictated that it fell within the states' power to protect the health, safety, and general welfare of its citizens.¹¹¹ No similar situation existed in New London; there was no evidence of harm to the general public brought about by the conditions present in Susette Kelo's neighborhood.¹¹²

Justice Stevens explained that the holding in *Berman* extended beyond the removal of blight—it also allowed the taking of a non-blighted department store to achieve the larger goal of area redevelopment.¹¹³ The comparison ignored that the purpose of the redevelopment plan for New London was not to remove blight from the area, but ostensibly to improve the local economy. The taking of petitioners' land was part of a larger scheme; however, the general purpose did not measure up to the *Berman* standard of blight removal. Further, Justice Stevens noted, "[t]he owner of the department store in *Berman* objected to 'taking from one businessman for the benefit of

106. *Id.* at 2664-65.

107. *Id.* at 2665.

108. *Id.*

109. *Id.*

110. *See Berman v. Parker*, 348 U.S. 26 (1954); *Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229 (1984).

111. *Id.*

112. *See Kelo*, 125 S. Ct. at 2664-65.

113. *Id.* at 2665 n.13.

another businessman,' referring to the fact that, under the redevelopment plan, land would be leased or sold to private developers for redevelopment."¹¹⁴ According to Justice Stevens, the *Berman* Court's rejection of that contention was relevant to *Kelo* because "[t]he public end may be as well or better served through an agency of private enterprise than through a department of government—or so the Congress might conclude. We cannot say that public ownership is the sole method of promoting the public purposes of community redevelopment projects."¹¹⁵

The potential implications of Justice Stevens' words are quite alarming for home and business owners in the United States: If economic stability is now a 'public use,' it would be easy to justify practically any taking for development by a private party with deeper pockets than the government. A shopping mall or strip center would provide greater economic benefits to the local government, through property and sales taxes, than a low- to middle-class neighborhood. Given that every redevelopment plan is contrived to prosper, it is difficult to imagine any such plan not passing the *Kelo* standard, thereby subjecting private property owners to the greedy whims of the local government. Furthermore, the admission that Congress might conclude private entities are better suited to carry out redevelopment plans highlights a serious problem: private entities with deeper pockets than private citizens will be far more persuasive with the local government.

Finally, the *Kelo* majority refused to create a test defining public use for future cases.¹¹⁶ Plaintiffs argued that "without a bright-line rule nothing would stop a city from transferring citizen *A*'s property to citizen *B* for the sole reason that citizen *B* will put the property to a more productive use and thus pay more taxes."¹¹⁷ The Court responded

Such a one-to-one transfer of property, executed outside the confines of an integrated development plan, is not presented in this case. While such an unusual exercise of government power would certainly raise a suspicion that a private purpose was afoot, the hypothetical cases posited by petitioners can be confronted if and when they arise. They do not warrant the crafting of an artificial restriction on the concept of public use.¹¹⁸

114. *Id.* at 2666.

115. *Id.* (citing *Berman*, 348 U.S. at 33).

116. *Id.* at 2666-67.

117. *Id.*

118. *Id.* at 2667.

Leaving the flood gate open for future cases challenging the Public Use Clause of the Fifth Amendment, the Court guaranteed the future emergence of costly litigation.¹¹⁹

Since the majority opinion in *Kelo* was a determination of the constitutionality of a local ordinance in New London, the holding does not reach other states through constitutional interpretation.¹²⁰ Undoubtedly, however, the *Kelo* holding opens the door for even more challenges to the constitutionality of state and local laws governing eminent domain. Notably, the majority stated, “Nothing in our opinion precludes any State from placing further restrictions on its exercise of the takings power.”¹²¹

In his concurring opinion, Justice Kennedy pointed to evidence presented in the trial court that New London’s development plan was comprehensive and warranted the taking of any and all property to achieve its goal of economic improvement in a distressed area.¹²² Justice Kennedy also addressed the lack of a test for future cases: “My agreement with the Court that a presumption of invalidity is not warranted for economic development takings in general . . . does not foreclose the possibility that a more stringent standard of review . . . might be appropriate for a more narrowly drawn category of takings.”¹²³ Justice Kennedy further explained, “There may be private transfers in which the risk of undetected impermissible favoritism of private parties is so acute that a presumption (rebuttable or otherwise) of invalidity is warranted under the Public Use Clause.”¹²⁴ Unwilling to formulate a test on his own, Justice Kennedy opined that, for now, *Kelo* follows *Berman* and *Midkiff*, and until a different fact scenario warrants a test, it was not necessary for the Court to address any hypothetical situations.¹²⁵

2. *Public use means specific use by the general public*

In a scathing dissent by Justice O’Connor, joined by Chief Justice Rehnquist and Justices Scalia and Thomas, the *Kelo* minority warned, “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

119. See discussion *infra* Part IV.C.

120. See *Kelo*, 125 S. Ct. at 2668.

121. *Id.*

122. See *id.* at 2669-70 (Kennedy, J., concurring).

123. *Id.* at 2670.

124. *Id.*

125. *Id.*

way that the legislature deems more beneficial to the public—in the process.”¹²⁶ This was an ominous warning for property owners nationwide given that the conversion of residential property into commercial property would always produce greater economic benefits to the local economy, thereby constituting a public use under the *Kelo* majority holding.

Justice O’Connor explained that while the Court has historically given full deference to legislatures in determining the bounds of public use, leaving the public/private distinction solely to the political branches would render the Public Use Clause “little more than hortatory fluff.”¹²⁷ The danger in leaving the full determination to local governments rests in the opportunity for corruption by those private entities looking for a profit.¹²⁸ Additionally, Justice O’Connor stated that two categories of uses, defined by the Court, have unilaterally justified physical takings: (1) transfer “private property to public ownership—such as for a road, a hospital, or a military base;” and (2) “transfer private property to private parties, often common carriers, who make the property available for the public’s use—such as a railroad, a public utility, or a stadium.”¹²⁹ Only in rare circumstances, such as those in *Berman* and *Midkiff*, had the Court departed from these guidelines.¹³⁰

Interestingly, Justice O’Connor wrote the unanimous opinion in *Midkiff* while she dissented in *Kelo*, demonstrating a distinction between the two cases. Justice O’Connor pointed out that in *Berman* the blighted neighborhood was composed of 64.3% dwellings that “were beyond repair.”¹³¹ The blight presented injurious conditions to the general public and the redevelopment plan for the neighborhood had the primary purpose of remedying social ills to preserve the health and safety of the general public.¹³² Even though Mr. Berman’s store was not blighted, the Court deferred to the legislature in determining that the entire area was needed in order to implement the redevelopment plan for the public good.¹³³ Justice O’Connor pointed out different social ills that were present in *Midkiff*, namely an inequitable distribution of land based on traditional distribution schemes that denied property ownership to a majority of the state’s citizens.¹³⁴ Justice O’Connor repeated an

126. *Id.* at 2671 (O’Connor, J., dissenting).

127. *Id.* at 2673.

128. *See id.* at 2675-76.

129. *Id.*

130. *Id.*

131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.* at 2674.

admonition from *Midkiff*, “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.”¹³⁵ In both *Midkiff* and *Berman*, the public purpose was accomplished when the harmful status of the property was eliminated.

In *Kelo*, New London did not claim that the plaintiffs’ homes were a source of “social harm,” nor could New London make that claim without clearing the way for any single home to be condemned in order to erect an apartment building, retail store, or church.¹³⁶ Justice O’Connor further clarified the distinction between the *Berman* and *Midkiff* cases and *Kelo*

In moving away from our decisions sanctioning the condemnation of harmful property use, the Court today significantly expands the meaning of public use. It holds that the sovereign may take private property currently put to ordinary private use, and give it over for new, ordinary private use, so long as the new use is predicted to generate some secondary benefit for the public—such as increased tax revenue, more jobs, maybe even aesthetic pleasure. But nearly any lawful use of real private property can be said to generate some incidental benefit to the public. Thus, if predicted (or even guaranteed) positive side-effects are enough to render transfer from one private party to another constitutional, then the words “for public use” do not realistically exclude *any* takings, and thus do not exert any constraint on the eminent domain power.¹³⁷

This factual distinction existed in the use of a state’s police power to provide for the health and safety of its citizens in both *Berman* and *Midkiff*.¹³⁸ Right or wrong, the use of police power to abolish harm to the general public has been deemed a valid public use, but such conditions were not present in *Kelo*. Even though there was a misuse of this power in *Berman* and *Midkiff*, it is important to consider the similarities and differences between those two cases and *Kelo* because the majority in *Kelo* so heavily relied upon them.¹³⁹

As for the lack of a test presented by the majority or concurring opinions in *Kelo*, Justice O’Connor speculated that the future of takings is sure to be detrimental to private property rights.¹⁴⁰ Criticizing Justice

135. *Id.* (quoting *Hous. Auth. v. Midkiff*, 467 U.S. 229, 245 (1984))

136. *Id.* at 2675.

137. *Id.* (emphasis in original).

138. See discussion *supra* Part IV.A.1.

139. See discussion *supra* Part IV.A.1.

140. See *id.*

Kennedy's concurrence, Justice O'Connor suggested that courts will have no standard by which to judge future cases with even slightly different facts from *Kelo*: "Whatever the details of Justice Kennedy's as-yet-undisclosed test, it is difficult to envision anyone but the 'stupid staffer' failing it."¹⁴¹ Finally, Justice O'Connor noted the problem with economic development takings is that private benefits and incidental public benefits become difficult to distinguish and mutually reinforcing.¹⁴²

Justice Thomas also filed a separate dissent presenting issues not considered by the Court.¹⁴³ In adhering to originalism as his method of constitutional interpretation, Justice Thomas turned to "founding-era dictionaries" to define the term "use."¹⁴⁴ According to its Latin origin, the term use means "to use, make use of, avail one's self of, employ, apply, enjoy, etc."¹⁴⁵ Given that definition, Justice Thomas stated it is difficult to say the public is employing property when the government takes it from the private owners and transfers it to another private owner.¹⁴⁶ Justice Thomas pointed to two other instances in the Constitution where the term use appears; in both instances, the narrower meaning given in the Latin definition is undeniably understood.¹⁴⁷

Justice Thomas further argued that the *Berman* and *Midkiff* decisions were improperly decided, and suggested that those decisions should be reconsidered by the Court.¹⁴⁸ In justifying his sentiments, Justice Thomas argued the police power relied upon in both prior cases was actually used to remedy a public nuisance; therefore, the takings were not really takings and just compensation was not due to the property owners when their property was taken to cure a social ill.¹⁴⁹ According to Justice Thomas, the misapplication of *Berman* and *Midkiff* to the present case hinged on the principle that the power of a state to take property using police power and the power of a state to take property using the power of eminent domain are two separate legal concepts.¹⁵⁰

Finally, Justice Thomas criticized the majority for not presenting a

141. *Id.* (quoting *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1025-26 n.12 (1992). "[T]his amounts to a test of whether the legislature has a stupid staff." *Id.* at 1026.)

142. *Id.*

143. *Id.* at 2677 (Thomas, J., dissenting).

144. *Id.* at 2679.

145. *Id.* (citations omitted).

146. *Id.*

147. *See id.* at 2679-80.

148. *Id.* at 2682-84.

149. *Id.* at 2685-86.

150. *Id.*

test to be used in future cases.¹⁵¹ Justice Thomas explained, “It is far easier to analyze whether the government owns or the public has a legal right to use the taken property than to ask whether the taking has a ‘purely private purpose’ -unless the Court means to eliminate public use scrutiny of takings entirely.”¹⁵² As Justice Thomas eloquently stated, “Obliterating a provision of the Constitution, of course, guarantees that it will not be misapplied.”¹⁵³ The lack of a test for future cases assures uncertainty and inconsistency in takings jurisprudence.

B. The Michigan Model: Limits on Public Use Property Owners Can Tolerate

As one commentator noted in January 2005, “[s]o rank have been the outrages [of recent property rights decisions] that . . . the Michigan Supreme Court expressly overruled its *Poletown* decision”¹⁵⁴ In *Poletown Neighborhood Council v. City of Detroit*, the Michigan Supreme Court approved the use of eminent domain to transfer private property to a private entity for economic gain; however, in *Wayne County v. Hathcock*, the Michigan Supreme Court expressly overruled *Poletown*, holding that mere improvement in economic conditions did not constitute a public use.¹⁵⁵ The test for public use formulated in *Wayne County v. Hathcock* should serve as a model to other jurisdictions struggling with the concept of public use in justifying a taking.

1. Poletown Neighborhood Council v. City of Detroit: Possible economic benefits erroneously qualify as a public use to justify use of eminent domain

The 1981 Michigan Supreme Court case of *Poletown Neighborhood Council v. City of Detroit* involved a plan for the City of Detroit (Detroit) to acquire, through eminent domain if necessary, “a large tract of land to be conveyed to General Motors Corporation as a site for construction of an assembly plant.”¹⁵⁶ Plaintiffs were comprised of a neighborhood

151. *Id.* at 2686.

152. *Id.*

153. *Id.*

154. Doug Bandow, *Legal plundering Eminent domain equals corporate welfare*, WASH. TIMES, Nov. 9, 2004, at A19, available at http://www.cato.org/pub_display.php?pub_id=3518 (last visited Oct. 1, 2005).

155. *Wayne County v. Hathcock*, 684 N.W.2d 765, 787 (Mich. 2004); see *Poletown Neighborhood Council v. City of Detroit*, 304 N.W.2d 455 (1981) (per curiam).

156. *Poletown*, 304 N.W.2d at 457 (per curiam).

association and affected residents of the Poletown area of Detroit.¹⁵⁷ The primary issue brought before the Michigan Supreme Court was whether the taking of the property from one private owner to give to a private entity for redevelopment purposes constituted a public use.¹⁵⁸ The court held there was an ascertainable public benefit when condemnation power was used to take private property and give it to a private entity for development which created more jobs.¹⁵⁹ The court explained, “[T]he condemnation power is exercised in a way that benefits specific and identifiable private interests, a court inspects with heightened scrutiny the claim that the public interest is the predominant interest being advanced.”¹⁶⁰ The court’s reasoning focused on the depressed economy in the area and the creation of new jobs, which would benefit the public as a whole.¹⁶¹ In his dissent, Justice Fitzgerald reasoned, “It is only through the acquisition and use of the property by General Motors that the ‘public purpose’ of promoting employment can be achieved. Thus, it is the economic benefits of the project that are incidental to the private use of the property.”¹⁶² The taking of the property in *Poletown* would only pass the public purpose test *after* given to a private entity and this, according to the dissent, violated previous case law in Michigan.¹⁶³

In a more sweeping dissent, Justice Ryan predicted “[t]his case will stand . . . despite the sound intentions of the majority, for judicial approval of municipal condemnation of private property for private use.”¹⁶⁴ Distinguishing the cases relied upon by the majority to justify the public use involved, Justice Ryan said the use of eminent domain power in the *Slum Clearance* cases was a valid public use because the purpose of the condemnation used in such cases is not to convey it to a private entity, “but to erase blight, danger and disease.”¹⁶⁵ Further, Justice Ryan stated, “In the case before us the reputed public ‘benefit’ to be gained is inextricably bound to ownership, development and use of the property in question by one, and only one, private corporation.”¹⁶⁶ Therefore, the resulting public benefit is not determined by the public, but solely by a

157. *Id.*

158. *Id.*

159. *Id.* at 459-60.

160. *Id.*

161. *See id.* at 458.

162. *Id.* at 462 (Fitzgerald, J., dissenting).

163. *Id.*

164. *Id.* at 465 (Ryan, J., dissenting).

165. *Id.* at 477; *see In re Slum Clearance in Detroit*, 50 N.W.2d 340 (Mich. 1951). The Slum Clearance cases held that “slum clearance is a public use for which eminent domain may be employed;” however, in those cases the decision to exercise eminent domain power existed entirely apart from “considerations relating to private corporations.” *Poletown*, 304 N.W.2d at 477.

166. *Id.* (Ryan, J., dissenting).

private corporation.¹⁶⁷ Twenty-three years later, however, in *Wayne County v. Hathcock*, the Michigan Supreme Court would revisit the issue of public use and find the holding in *Poletown* to be an abomination upon private property rights.¹⁶⁸

2. *Wayne County v. Hathcock: Possible economic benefits do not qualify as a public use to justify the exercise of eminent domain*

Poletown was recently overturned by the Michigan Supreme Court and accordingly, the court narrowed the definition of public use.¹⁶⁹ In *Wayne County v. Hathcock*, the court determined that the taking of property from one private owner to give to another for development, for the sole purpose of economic benefits, was not justifiable.¹⁷⁰

In *Hathcock*, Wayne County wanted to use its eminent domain power to condemn defendants' real properties for the development of an office and technology park.¹⁷¹ The owners of those properties alleged that the condemnations exceeded Michigan constitutional bounds.¹⁷² The Pinnacle Project proposed to create more jobs and increase the tax revenue for the county.¹⁷³ Wayne County was able to procure many of the tracts needed through voluntary sales by the property owners; however, other landowners were not willing to sell and they brought suit to stop the condemnations.¹⁷⁴

Several issues were initially presented to the Michigan courts, including a challenge to the constitutionality of the condemnations based on the argument that the Pinnacle Project did not serve a public purpose.¹⁷⁵ Based on Justice Ryan's dissent in *Poletown*, the Michigan Supreme Court outlined a three-prong test for the circumstances which qualify as a public use

(1) where "public necessity of the extreme sort" requires collective action; (2) where the property remains subject to public oversight after transfer to a private entity; and (3) where the property is selected because of "facts of independent public significance," rather than the interests of the private entity to which the property is eventually

167. *See id.*

168. *See id.*; *Wayne County v. Hathcock*, 684 N.W.2d 765 (Mich. 2004).

169. *See Hathcock*, 684 N.W.2d 765.

170. *See id.* at 786.

171. *Id.* at 770.

172. *Id.*

173. *Id.*

174. *Id.* at 771.

175. *See id.* at 772.

transferred.¹⁷⁶

Applying this test, the court first determined the Pinnacle Project was not exclusively dependent on defendants' land. The court reasoned that this country is "flecked with shopping centers, office parks, clusters of hotels, and centers of entertainment and commerce" and collective action was not necessary to achieve the project's goals.¹⁷⁷ In addition, the Pinnacle Project did not provide for public oversight once transferred to a private entity for development.¹⁷⁸ Wayne County intended the "private entities purchasing defendants' properties to pursue their own financial welfare with the single-mindedness expected of any profit-making enterprise."¹⁷⁹ Any public benefit arising from the Pinnacle Project was contingent on the actual development of the property by private entities.¹⁸⁰ The private entities were not to be held accountable to any public entity for actually developing and maintaining the property acquired for the purpose of a public benefit.¹⁸¹ Finally, the court determined that nothing about the condemnations required by the Pinnacle Project served the public good.¹⁸² Unlike other cases relied upon in *Poletown*, there were no facts of independent significance, "such as the need to promote health and safety" that might justify the condemnations.¹⁸³

Citing Justice Ryan's dissenting opinion in *Poletown*, the Michigan Supreme Court pointed out that, prior to *Poletown*, the Michigan courts had never gone so far as to equate a "generalized economic benefit" with public use.¹⁸⁴ In overturning *Poletown*, the court held "[justifying] the exercise of eminent domain solely on the basis . . . that the use of the property by a private entity seeking its own profit might contribute to the economy's health is to render impotent our constitutional limitations on the government's power of eminent domain."¹⁸⁵ While the Michigan case was not controlling for the rest of the country, it reflected a growing

176. *Id.* at 783 (quoting *Poletown Neighborhood Council v. City of Detroit*, 304 N.W.2d 455, 478 (Mich. 1981) (Ryan, J., dissenting)).

177. *Id.*

178. *Id.* at 784.

179. *Id.*

180. *Id.*

181. *See id.*

182. *Id.*

183. *Id.* *Poletown* relied on the "Slum Clearance" cases to justify the physical takings present in that case. The justification was based on promotion of public health and safety. *Poletown Neighborhood Council v. City of Detroit*, 304 N.W.2d 455, 475-76 (Mich. 1981) (Ryan, J., dissenting).

184. *See Hathcock*, 684 N.W.2d at 786 (quoting *Poletown Neighborhood Council v. City of Detroit*, 304 N.W.2d 455, 478 (Mich. 1981) (Ryan, J., dissenting)).

185. *Id.*

sentiment in protecting private property from physical takings that convey the property from one private owner to another for the sole purpose of speculative public economic benefits.

3. *If Suzette Kelo lived in Michigan. . .*

Applying the test from the Michigan Supreme Court to the facts in *Kelo* would have undoubtedly produced a different outcome for Suzette Kelo. First, the disputed tracts of land in *Kelo* were not necessary to implement the development plan.¹⁸⁶ At the time of the original lawsuit, plans for the disputed tracts of land were unclear and certainly not so unique as to require *specific* tracts of land – the tracts were to be used for a park or marina and additional office space.¹⁸⁷ Arguably, a park or additional office space do not require specific tracts of land, whereas a marina only requires waterfront property, which was readily available otherwise. Second, the disputed property would not remain subject to public scrutiny once acquired through condemnation and conveyed to a private entity, the NLDC.¹⁸⁸ Lastly, the selection of the disputed property was not based on facts of independent significance regarding the property itself, such as blight, but, rather, the property was specifically chosen for the primary benefit of the private entity.¹⁸⁹ If Suzette Kelo lived in Michigan, she and the other plaintiffs would still own their homes today. The *Hathcock* decision went further in protecting private property rights than did *Kelo* by disallowing economic redevelopment as a public use. This increased protection of private property rights would also likely pass constitutional muster as a heightened restriction on takings, especially given that *Kelo* passed constitutional muster as an abhorrent infringement on private property rights.

4. *Legislative Action to Limit Public Use in Response to Kelo*

Within five days of the announcement of the *Kelo* decision, Sen. John Cornyn (R-TX) proposed the Protection of Homes, Small Businesses, and Other Private Property Rights Act of 2005, which would withhold federal funds from states that use eminent domain power for economic development.¹⁹⁰ In the findings of the proposed legislation,

186. See discussion *supra* Part II.

187. See discussion *supra* Part II.

188. See discussion *supra* Part II.

189. See discussion *supra* Part II.

190. Protection of Homes, Small Businesses, and Private Property Act of 2005, S. 1313, 109th Cong. (2005), available at <http://www.govtrack.us/congress/bill.xpd?bill=s109-1313> (last visited Dec. 11, 2005).

Sen. Cornyn specifically criticized the Supreme Court for their decision in *Kelo* and urged Congress and the states to take action to reign in the decision.¹⁹¹ The proposal would exclude economic development as a public use: “the term ‘public use’ shall not be construed to include economic development.”¹⁹² The proposed legislation would apply to all exercises of eminent domain power by the federal, state, and local governments through the use of federal funds.¹⁹³ Such swift, strong action by Congress echoed property owners’ reactions to the *Kelo* decision across the nation.¹⁹⁴

Governor M. Jodi Rell and other Democratic leaders of Connecticut, the state of origin for *Kelo*, compared the public reaction to the Boston Tea Party¹⁹⁵ and “call[ed] on local municipalities to observe a moratorium on using their eminent domain powers until lawmakers can figure out what to do next.”¹⁹⁶ Connecticut Republican leaders have proposed three different amendments to current law to “restrict eminent domain use . . . but all three failed amidst Democratic opposition.”¹⁹⁷ Perhaps due to pressure from property owners of both political parties, Democrats in the Connecticut Legislature subsequently called for hearings on the matter, which Governor Rell supported.¹⁹⁸

Prior to the *Kelo* decision, several states retained laws against the use of eminent domain for economic development: “At least eight states, including A[rkansas], F[lorida], K[entucky] and M[aine], already bar using eminent domain as an economic development tool, while U[tah] and N[evada] passed laws last year that greatly restrict the practice.”¹⁹⁹ On the other hand, five states (Kansas, Maryland, New York, North Dakota, and Minnesota) currently have laws which expressly allow the use of eminent domain for economic development.²⁰⁰ In the aftermath of the Supreme Court decision in *Kelo*, several states have considered legislation to guard against similar outcomes.²⁰¹ States that have

191. *See id.*

192. *Id.*

193. *Id.*

194. *See supra* notes 190-93 and accompanying text.

195. Timothy Egan, *Ruling Sets Off Tug of War Over Private Property*, N.Y. TIMES, July 30, 2005, at A1, available at <http://www.nytimes.com/2005/07/30/national/30property.html> (last visited Aug. 5, 2005) [hereinafter *Egan*].

196. Rich Ehsen, comp., *Changes Imminent for Eminent Domain*, ST. NET CAP. J., Vol. XIII, No. 25, July 18, 2005, available at http://www.statenet.com/capitol_journal/07-18-2005 (last visited Aug. 25, 2005) [hereinafter *Changes*].

197. *Id.*

198. *Id.*

199. *Id.*

200. *Id.*

201. *See Egan, supra* note 199.

considered such legislation in the summer of 2005 are: California, Tennessee, Delaware, Florida, Minnesota, New Jersey, Georgia, Missouri, Idaho, New Hampshire, Oklahoma, and Virginia.²⁰² While it is desirable that states formulate their own more restrictive definitions of public use, the expense of such legislation could have been avoided by a different holding in *Kelo*. Furthermore, property owners in states like Kansas, Maryland, New York, North Dakota, and Minnesota would have been given greater protection than their state legislatures are willing to provide.

In Texas, Governor Rick Perry added the issue of eminent domain to a special legislative session originally called to discuss education.²⁰³ Both Texas legislative houses passed bills limiting eminent domain; however, state legislators did not reconcile the two versions of the bills before the first special session ended.²⁰⁴ The bills sought to remedy the current law surrounding takings in Texas, which “are so eaten away by exceptions and limitations that, in the end, takings causes of action are created only in certain limited circumstances.”²⁰⁵ During a second special session, however, Senate Bill 7 passed both houses and is awaiting action by Governor Perry.²⁰⁶

Alabama was the first state to actually pass legislation specifically designed to counteract the holding in *Kelo*.²⁰⁷ During a special legislative session, Governor Bob Riley signed a bill that prohibits local government from taking private property in order to give it “to retail, industrial, residential, or office developers.”²⁰⁸ Governor Riley explained that the Court’s ruling in *Kelo* was “‘misguided’ and a ‘threat to all property owners.’”²⁰⁹ Bolstering sentiments across the country, Governor Riley stated, “A property rights revolt is sweeping the nation, and Alabama is leading it.”²¹⁰ Notably, the Alabama law does permit physical takings for private development if it is determined the properties are

202. See *Changes*, *supra* note 200. California bills are A.C.A. 22 and S.C.A. 15; Tennessee bills are H.B. 2426, S.B. 2413, and S.B. 2418; Delaware bills are S.B. 217 and S.B. 221; Florida bill is H.B. 31 [2006]; Minnesota bills are H.B. 117a, H.B. 118a and H.B. 123a; and, New Jersey bill is A.C.R. 255. *Id.*

203. *Egan*, *supra* note 199.

204. *Id.*

205. Daniel Anderson, *The Texas “Takings” Statute: Ten Basic Facts to Know*, 60 TEX. B. J. 12, 14 (1997) [hereinafter *Anderson*].

206. National Conference of State Legislatures, *available at* <http://www.ncsl.org/programs/natres/post-keloleg.htm> (last visited Aug. 28, 2005).

207. Donald Lambro, *Alabama Limits Eminent Domain*, WASH. TIMES, Aug. 4, 2005, *available at* <http://washtimes.com/national/20050804-120711-4571r.htm> (last visited Aug. 4, 2005) [hereinafter *Lambro*].

208. *Id.*

209. *Id.*

210. *Id.*

blighted. This traditional view of eminent domain law remains within the bounds of the holding of *Berman*.²¹¹

V. CONCLUSION: CAVEAT EMPTOR!

As *Kelo* demonstrates, a more definitive test for public use is needed. If the Supreme Court is unwilling to draw a line, then the States must do so. Even so, the question remains: Whose job is it to draw the line in the sand? Traditionally, the legislatures defined the laws that governed their people; however, in recent years, the task seems to have fallen more and more into the hands of the judicial branch. In the absence of stricter state definitions of public use, the Supreme Court is left to apply its own factual analysis of whether or not a taking for a public use has occurred. Without a test to apply, this presents a difficult task. When five men and women can so disastrously change the course of private property rights, with no check on their power to do so, the purpose of having written laws and elected officials to enforce them becomes obsolete. If the Framers intended for the Constitution and the rights it affords to change so dramatically over time, they would have left blanks to be filled in later. The Framers did not do this. Instead, the Framers did provide for a constitutional amendment process that could be used to redefine or expand the Constitution.²¹² As a matter of fact, they left very specific language to guide our interpretation in the future: “nor shall private property be taken for public use without just compensation.”²¹³ Timothy Sandefur of Pacific Legal Foundation points out that “Madison, who wrote the Public Use Clause, explained that government was created to ‘*impartially* secure[] to every man whatever is his own.’”²¹⁴ Sandefur continues, “But strong interest groups – or ‘factions,’ as [Madison] called them – could take over the government and use it to their own benefit by stealing the property of their opponents.”²¹⁵ Surely, “public use” was never meant to be construed as the possibility of increased tax revenue for the local government.²¹⁶

According to the majority in *Kelo*, a “possible” public benefit is

211. See *Berman v. Parker*, 348 U.S. 26, 28 (1954); Lambro, *supra* note 211.

212. U.S. CONST. art. V.

213. U.S. CONST. amend. V.

214. Brief of Amicus Curiae of James Buchanan and Gordon Tullock and Pacific Legal Foundation, *Kelo v. City of New London*, 125 S. Ct. 2655 (2005) (No. 04-108) (emphasis in original) (citation omitted).

215. *Id.*

216. See *Kelo v. City of New London*, 125 S. Ct. 2655, 2665 (2005). “The City has carefully formulated an economic plan that it believes will provide appreciable benefits to the community, including-but by no means limited to-new jobs and increased tax revenue.” *Id.*

enough to satisfy the public use requirement of the Fifth Amendment.²¹⁷ Justice O'Connor stated public use is satisfied only when a private property owner is imposing a cost on others, such as in the case of blight, slums, and land oligopolies.²¹⁸ Justice Thomas argued that none of the uses described by the majority or by Justice O'Connor satisfy the Public Use Clause of the Fifth Amendment.²¹⁹ Justice Thomas emphasized the need to revisit the holding in *Berman* and *Midkiff* in order to avoid stretching the law so far as to include public economic benefits as a public use.²²⁰ Barring legislative action by all fifty states to restrict the definition of public use and protect private property owners, the remedy suggested by Justice Thomas is the best scenario for avoiding further miscarriages of justice. Revisiting *Berman*, *Midkiff*, and *Kelo* in hopes of finding a consistent justification for public use that does not infringe on private property owners for the benefit of private parties seems like the next step in this debate. Ironically, given the public outcry against the holding in *Kelo*, the Supreme Court may get the chance sooner rather than later.

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217. *See id.* at 2662-64.

218. *See id.* at 2675.

219. *See id.* at 2677-87.

220. *Id.* at 2682-83.

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