

EMINENT DOMAIN AFTER *KELO*

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INTRODUCTION

Most Americans believe in the old saying that “a man’s home is his castle.”¹ Yet, while the power of eminent domain is not expressly stated in the United States Constitution, it has been accepted as an inherent power of the sovereign.² This is reflected in the Fifth Amendment to the Constitution:³ “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.”⁴

On its face, read literally, the Fifth Amendment says that a governmental body can take private property only if it both makes a public use of the property and pays for the property.⁵ Prior to the United States Supreme Court’s 2005 decision in *Kelo v. City of New London, Connecticut*,⁶ the original concept of public use was that it meant use by a governmental body for public roads, schools, parks, and such; or, if the property would be owned by a private entity, it would be used by a railroad, utility, bridge, etc., to which the public would have broad access.⁷ The proponents of the narrow view of “public use” maintained that it meant that property acquired by eminent domain must be actually used by the public or the public must have the opportunity to use the property.⁸ On

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¹ See *Steagald v. United States*, 451 U.S. 204, 229 (1981).

² See *United States v. Carmack*, 329 U.S. 230, 241–42 (1946) (referring to the Takings Clause as a “tacit recognition of a preexisting power”).

³ U.S. CONST. amend. V.

⁴ *Id.*

⁵ See *id.*

⁶ 545 U.S. 469 (2005).

⁷ *Id.* at 512 (Thomas, J., dissenting).

⁸ Cf. *County of Wayne v. Hathcock*, 684 N.W.2d 765, 787 (Mich. 2004). The Michigan Supreme Court overruled *Poletown Neighborhood Council v. Detroit*, 304 N.W.2d 455, 459 (Mich. 1981) (holding an economic benefit to the community justifies the taking of private property by eminent domain). In *Wayne*, the court concluded that *Poletown* was a “radical departure from fundamental constitutional principles and over a century of this Court’s
(continued)

the other hand, there is a much more liberal and permissive approach, which essentially equates “public use” with public benefit.⁹

Eminent domain is, of course, coercive. It exists so that property owners cannot thwart projects deemed to be beneficial by forcing them to sell when they do not wish to do so, either because the condemnor’s offer is below the property owner’s asking price, or because the owner wants to continue his¹⁰ ownership for personal reasons.¹¹ Especially in the latter case, the exercise of the power of eminent domain can have a profound impact. A property owner lives in a nice house that he is very happy in, and he does not want to move. Or he owns a successful small business that is thriving on the good will built up in the neighborhood but knows that the good will cannot be transferred to a new location.

Yet the emotional impact and other effects on unwilling sellers will not deter the actions of a condemning authority which has an opportunity to put a parcel of property in the hands of a new private owner who will build a factory, shopping center, or other project which will create many new jobs and tax revenues.¹² There is little question that the new use of the property will produce a “public benefit.” But is this a “public use,” as required by the Fifth Amendment? After *Kelo*, the answer is “yes,” so far as the United States Constitution is concerned.¹³ However, both before and after *Kelo*, many states have acted to accept Justice Stevens’ invitation in the majority opinion to narrow the definition of “public use.”¹⁴

eminent domain jurisprudence.” 684 N.W.2d at 787. It adopted a more narrow constitutional approach that economic benefit does not justify eminent domain. *Id.* at 781–87. See also MICH. CONST. art. 10 § 2; MICH. COMP. LAWS ANN. § 213.23 (West, 1998 & Supp. 2007).

⁹ See *Kelo*, 545 U.S. at 473–75.

¹⁰ When the gender for a personal pronoun could be either male or female, I use the masculine pronoun generically, due to habit and my masculine personal orientation. By doing so I avoid the rather awkward “he or she” and the grammatically incorrect “they.” I trust that female authors will balance the scales on the other side.

¹¹ Charles E. Cohen, *Eminent Domain After Kelo v. City of New London: An Argument for Banning Economic Development Takings*, 29 HARV. J.L. & PUB. POL’Y 491, 536 (2006).

¹² *Kelo*, 545 U.S. at 506 (Thomas, J., dissenting).

¹³ *Id.* at 483–84 (majority opinion).

¹⁴ *Id.* at 488. See also Terry Pristin, *Voters Back Limits On Eminent Domain*, N.Y. TIMES, Nov. 15, 2006, at C6 (“34 states have adopted laws or passed ballot measures in response to the Connecticut case, *Kelo v. New London*, which upheld the right of local officials to require the forced sale of homes and businesses for private development intended to increase the tax base of one of the state’s poorest cities”).

If the *Kelo* definition of “public use” is applied, no private property will be protected from condemnation. A small business will always provide fewer jobs and tax revenues than a big national retail chain. The same can be said if a church is replaced by a large hotel, or a community of homes by a large manufacturing plant.

I. THE ROAD TO *KELO*

The Supreme Court and other courts regularly applied the narrow definition of “public use”—i.e., to be used for schools, parks, railroads, utilities, and the like—prior to 1954, when the Supreme Court decided the case of *Berman v. Parker*.¹⁵ *Berman* expanded the concept of “public use” to include “public benefit” in some circumstances, and also directed the courts to show substantial deference to decisions of the legislatures.¹⁶ To qualify as a “public use” when the property would end up in private hands, there had to be a clear public purpose involved in the initial taking.¹⁷ For example, in *Berman* the Court upheld a plan in Washington, D.C., which designated a blighted area for redevelopment.¹⁸ About 5,000 people lived in the area, and most of the housing was beyond repair.¹⁹ The area was to be condemned and replaced by public facilities.²⁰ If any land remained, it could be sold to private parties for other uses such as low-cost housing.²¹

A store owner whose store was in good repair²² challenged the condemnation plan, arguing that it did not satisfy the “public use” requirement.²³ The Court rejected that argument and upheld the plan.²⁴ The Court also gave substantial deference to decisions of a legislature.²⁵

Thirty years later the Supreme Court was again faced with the question of whether the “public use” requirement is satisfied if a plan has a valid

¹⁵ 348 U.S. 26 (1954).

¹⁶ *Berman*, 348 U.S. at 32–33; Adam P. Hellegers, *Eminent Domain as an Economic Development Tool: A Proposal to Reform HUD Displacement Policy*, 2001 L. REV. M.S.U.-D.L.C. 901, 943 (2001).

¹⁷ *See Berman*, 348 U.S. at 33–34.

¹⁸ *Id.* at 35.

¹⁹ *Id.* at 30.

²⁰ *Id.*

²¹ *Id.* at 30–31.

²² *Id.* at 31.

²³ *Id.*

²⁴ *Id.* at 35.

²⁵ *Id.* at 33.

public purpose. In *Hawaii Housing Authority v. Midkiff*,²⁶ the government of Hawaii proposed to condemn land of lessors and transfer it to the lessees.²⁷ The purpose of the plan was to increase the number of owners of real property.²⁸ At the time, most of the land in the state was controlled by the state or federal government, and by seventy-two private owners.²⁹ The legislature had decided that this concentration of land ownership was “skewing the State’s residential fee simple market, inflating land prices, and injuring the public tranquility and welfare.”³⁰

As it had in *Berman*, the Court in *Midkiff* showed great deference to the decision of the legislature.³¹ And in what, prior to *Kelo*, appeared to be an important part of “public use” and “public purpose,” in both cases an important public purpose was accomplished at the time of the taking: in *Berman*, the elimination of blight³² and in *Midkiff*, the spread of property ownership.³³

II. KELO V. CITY OF NEW LONDON³⁴

A. *The Majority Opinion*

The decision in *Kelo* depended on whether the city’s plan for economic development was a “public use” under the Fifth Amendment.³⁵ A strong hint as to the views of the Court’s majority could be found in the statement of Justice Stevens, that in eminent domain cases the Court has a “longstanding policy of deference to legislative judgments”³⁶ The city of New London created a plan in the Fort Trumbull area of the city to achieve economic revitalization.³⁷ The plan called for the use of the city’s power of eminent domain to acquire private property of homeowners in the area, including the home of Suzette Kelo.³⁸ There was no claim that the

²⁶ 467 U.S. 229 (1984).

²⁷ *Id.* at 233.

²⁸ *Id.* at 232–33.

²⁹ *Id.* at 232.

³⁰ *Id.*

³¹ *Id.* at 244.

³² *Berman v. Parker*, 348 U.S. 26, 35 (1955).

³³ *Midkiff*, 467 U.S. at 239, 245.

³⁴ 545 U.S. 469 (2005).

³⁵ *Id.* at 472.

³⁶ *Id.* at 480.

³⁷ *Id.* at 473–74 (discussing the proposed benefits the economic development plan would have for the city of New London).

³⁸ *Id.* at 475.

area involved in the development plan was blighted.³⁹ Despite that, the Court held that the homes of resisting property owners in the Fort Trumbull area could be condemned because their homes had the misfortune to be located in the development area, which was projected to be a new urban neighborhood, with upscale hotels, restaurants, and shopping, plus a \$300 million research facility for Pfizer, Inc., the giant pharmaceutical company.⁴⁰ It was also expected to create more than “1,000 jobs, to increase tax and other revenues, and to revitalize an economically distressed city, including its downtown and waterfront areas.”⁴¹

The majority acknowledged that this was

not a case in which the City is planning to open the condemned land—at least not in its entirety—to use by the general public. Nor will the private lessees of the land in any sense be required to operate like common carriers, making their services available to all comers.⁴²

The majority recognized that a “government’s pursuit of a public purpose will often benefit individual private parties.”⁴³ It continued by emphasizing that “public ownership is [not] the sole method of promoting the public purposes of community redevelopment projects.”⁴⁴ After acknowledging the authority of the States to further restrict the exercise of the takings power in their states, and perhaps impliedly inviting the states to do so, Justice Stevens went on to hold that the condemnations in New London were “for a ‘public use’ within the meaning of the Fifth Amendment to the Federal Constitution.”⁴⁵

³⁹ *Id.*

⁴⁰ *Id.* at 473–74, 489.

⁴¹ *Id.* at 472 (quoting *Kelo v. City of New London*, 843 A.2d 500, 507 (Conn. 2004)).

⁴² *Id.* at 478–79.

⁴³ *Id.* at 485.

⁴⁴ *Id.* at 486 (citing *Berman v. Parker*, 348 U.S. 26, at 33–34 (1954)).

⁴⁵ *Id.* at 489–90 (Stevens, J., delivered the opinion of the Court, in which Kennedy, Souter, Ginsberg, and Breyer, J.J. joined.).

*B. The Dissents**1. Justice O'Connor*⁴⁶

Under the banner of economic development, all private property is now vulnerable to being taken and transferred to another private owner, so long as it might be upgraded—i.e., given to an owner who will use it in a way that the legislature deems more beneficial to the public—in the process.⁴⁷

In the view of Justice O'Connor, the reasoning of the majority of the Court eliminates “any distinction between private and public use of property—and thereby effectively . . . delete[s] the words ‘for public use’ from the Takings Clause of the Fifth Amendment.”⁴⁸ Justice O'Connor went on to opine that “[w]hile the government may take [people’s] homes to build a road or a railroad or to eliminate a property use that harms the public, . . . it cannot take their property for the private use of other owners simply because the new owners may make more productive use of the property.”⁴⁹

Noting that there was no blight or other existing evil present in the New London situation, Justice O'Connor pointed out:

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.⁵⁰

And finally Justice O'Connor came to the obvious conclusion that is a deep concern to her and to many others.

For who among us can say she already makes the most productive or attractive possible use of her property? The specter of condemnation hangs over all property. Nothing

⁴⁶ *Id.* at 494–505 (O'Connor, J., dissenting joined by Rehnquist, C.J. & Thomas, J.); *Poletown Neighborhood Council v. Detroit*, 304 N.W.2d 455, 459 (Mich. 1981).

⁴⁷ *Kelo*, 545 U.S. at 494 (O'Connor, J., dissenting).

⁴⁸ *Id.*

⁴⁹ *Id.* at 496.

⁵⁰ *Id.* at 501.

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.⁵¹

2. *Justice Thomas*

Justice Thomas began by suggesting that the Court was effectively replacing the Public Use Clause with a Public Purpose Clause.⁵² Thus, “a costly urban-renewal project whose stated purpose is a vague promise of new jobs and increased tax revenue, but which is also suspiciously agreeable to the Pfizer Corporation, is [held by the majority to be] for a ‘public use.’”⁵³ Justice Thomas continued, objecting that “[i]f such ‘economic development’ takings are for a ‘public use,’ any taking is, and the Court has erased the Public Use Clause from our Constitution”⁵⁴

In Justice Thomas’s view, the proper construction of the Public Use Clause “is that it allows the government to take property only if the government owns, or the public has a legal right to use, the property, as opposed to taking it for any public purpose or necessity whatsoever.”⁵⁵

C. *Does Kelo Enable Abuse by Government?*

The Court’s ruling in *Kelo* provides governments with the clear opportunity to use the power of eminent domain to acquire property which can then be put to a more economically beneficial use, which now seems to fall within the classification of “public use.”⁵⁶ The Court in *Kelo* held that the potential for increased tax revenue and general economic revitalization is deemed to be “public use” under the Takings Clause,⁵⁷ which seems to leave no limit at all on the use of the power of eminent domain to aid private entities if there is some potential benefit to the public.⁵⁸ The public benefit is expected (hoped?) to come from jobs created by the new development, improved economic health of the community, and an increased tax base.⁵⁹

⁵¹ *Id.* at 502 (citations omitted).

⁵² *Id.* at 506 (Thomas, J., dissenting).

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.* at 508.

⁵⁶ *Id.* at 483–84.

⁵⁷ *Id.* at 472, 484.

⁵⁸ *Id.* at 504 (O’Connor, J., dissenting).

⁵⁹ *Id.* at 474.

Even where elimination of “blight” is a stated reason for condemnation and private re-development, the redeveloper is not really seeking slum and truly blighted areas in which to build.⁶⁰ Rather, the redeveloper is seeking an area sufficiently downscale to justify a colorable claim of “blight”, but sufficiently upscale so that the new development built there will appeal to the affluent population that lives nearby and whose financial support will be needed to support the shopping malls and other private businesses which will be established on the taken land.⁶¹

The reasoning of the *Kelo* majority exposes all private property to the risk of being taken by eminent domain, because all redevelopment projects, industrial or commercial, can be projected to produce future benefits.⁶² The conversion of residential property to commercial or industrial property will always have the potential to produce greater economic benefits to the local economy, thereby constituting a “public use” in the view of the *Kelo* majority.

III. STATE COURT CASES BEFORE KELO

A. Earlier Cases

Most of the cases in state courts prior to 1990 resulted in findings against the taking based on the application of a fairly strict definition of “public use.” For example, in *City of Little Rock v. Raines*,⁶³ the city sought to take private property by eminent domain for use as an industrial park.⁶⁴ The court held that

[p]rivate property can be taken under the power of eminent domain only for a public use. For a use to be public it is necessary that the public shall be concerned in the use to be made thereof and the purpose for which the property is to be used must in fact be a public one.⁶⁵

⁶⁰ Ilya Somin, *The Limits of Anti-Kelo Legislation*, REASON, Aug./Sept. 2007 at 43, 44–45.

⁶¹ Ludmilla Lelis, *Daytona Businesses Must Sell Property*, ORLANDO SENTINEL, Aug. 20, 2005, at A1.

⁶² This risk was recognized long ago in *Ryerson v. Brown*, 35 Mich. 333 (1877), where the court stated that “every lawful business” is a benefit to the public. *Id.* at 339.

⁶³ 411 S.W.2d 486 (Ark. 1967).

⁶⁴ *Id.* at 488.

⁶⁵ *Id.* at 493.

In a 1975 Florida case,⁶⁶ four square blocks were to be taken and torn down.⁶⁷ Then a shopping center with a parking area would be built.⁶⁸ The court said that the parking area was merely “incidental” to the private shopping mall.⁶⁹ “[C]reation of the shopping mall was to create the need for the public parking proposed.”⁷⁰ The court pointed out that “without the private development there would be no public need for the parking.”⁷¹ It recognized that “an *incidental* private use [is allowable] where the purpose of the taking was clearly and predominantly a public purpose.”⁷² In those situations, “[t]he public interest must dominate the private gain.”⁷³ “[T]he tail cannot wag the dog’ and allow the *public* purpose to be only incidental to a predominantly private one”⁷⁴

A similar judicial response appeared in a 1978 South Carolina case,⁷⁵ in which the court stated that “the proposed plan would allow the City to join hands with a developer and undertake a project primarily of benefit to the developer, with no assurance of more than negligible advantage to the general public.”⁷⁶ The project involved the building of a convention center and a parking garage which, though “ostensibly public facilities,” were “to be leased to the private developer-owner of [a] hotel and operated as an adjunct to the hotel operation itself.”⁷⁷

B. Since 1990

In recent cases, some state courts have been quite willing to adopt a very liberal definition of “public use” comparable to that adopted in 2005

⁶⁶ *Baycol, Inc. v. Downtown Dev. Auth. of Ft. Lauderdale*, 315 So. 2d 451 (Fla. 1975).

⁶⁷ *Id.* at 453.

⁶⁸ *Id.*

⁶⁹ *Id.* at 457.

⁷⁰ *Id.* at 458.

⁷¹ *Id.*

⁷² *Id.* at 455.

⁷³ *Id.* at 456 (quoting *Demeter Land Co. v. Fla. Pub. Serv. Co.*, 128 So. 402 (Fla. 1930)).

⁷⁴ *Id.* at 456.

⁷⁵ *Karesh v. City Council of Charleston*, 247 S.E.2d 342 (S.C. 1978).

⁷⁶ *Id.* at 344 (citing *Anderson v. Baehr*, 217 S.E.2d 43 (S.C. 1975)).

⁷⁷ *Id.* See also *City of Owensboro v. McCormick*, 581 S.W.2d 3, 5 (Ky. 1979) (“Naked and unconditional governmental power to compel a citizen to surrender his productive and attractive property to another citizen who will use it predominantly for his own private profit just because such alternative private use is thought to be preferable in the subjective notion of governmental authorities is repugnant to our constitutional protections.”).

in *Kelo*. Kansas provides an example, first in 1998⁷⁸ in a case where land was condemned to provide an area for an automobile race track.⁷⁹ The court found a valid public purpose but with no real analysis or discussion.⁸⁰ Apparently, by encouraging tourism and development of recreational facilities, the state and its communities would benefit.⁸¹ A few years later, the Kansas Supreme Court held that acquiring property by eminent domain to develop industrial sites in order to encourage economic development was a valid “public purpose.”⁸² The creation of many jobs, increased payroll and standard of living, and an enhanced tax base is a public benefit and satisfies the requirement of a public purpose.⁸³

In a 1998 case⁸⁴ the Minnesota Court of Appeals allowed a mid-priced retailer to take over the property of another commercial landowner in a prime downtown location to hopefully ensure the future vitality of downtown Minneapolis by bringing in profitable economic activity.⁸⁵ According to the city, the public purpose requirement was satisfied by providing moderately priced shopping downtown conveniently close for people working in the central business district.⁸⁶ The city did not argue that the area was blighted but urged, instead, the public benefit in increasing the tax base.⁸⁷ The court also agreed with the city that there would be more benefit from a use by the mid-priced retailer than there would be from a large office building which the property owner had planned to construct.⁸⁸ Thus, “public use” was allowed to include a city’s preference for one redevelopment plan over another.⁸⁹

In a 2001 case that, in retrospect, was surely a forerunner of *Kelo* in Connecticut, the city sought to condemn property and make it part of an

⁷⁸ *State ex rel. Tomasic v. Unified Gov’t of Wyandotte County*, 962 P.2d 543 (Kan. 1998).

⁷⁹ *Id.* at 551.

⁸⁰ *Id.* at 554.

⁸¹ *Id.*

⁸² *Gen. Bldg. Contractors, L.L.C. v. Bd. of Shawnee County Comm’rs of Shawnee County*, 66 P.3d 873, 883 (Kan. 2003).

⁸³ *Id.* at 876.

⁸⁴ *Minneapolis Cmty. Dev. Agency v. Opus Nw, L.L.C.*, 582 N.W.2d 596 (Minn. Ct. App. 1998).

⁸⁵ *Id.* at 598, 601.

⁸⁶ *Id.* at 599–600.

⁸⁷ *Id.* at 599.

⁸⁸ *Id.* at 599–600.

⁸⁹ *Id.*

industrial park.⁹⁰ The city first attempted to negotiate a voluntary sale, but the owners “did not want to leave their homes.”⁹¹ The court seemed to simply assume “that the development of an industrial park constitutes a public use”⁹² The court found it persuasive that “the state had recognized the city as an economically disadvantaged community and that the industrial park would serve the public good by creating or retaining manufacturing jobs, creating additional industrial land in the city and increasing the tax base.”⁹³

Yet there have also been recent cases in the state courts applying the traditional demanding definition of “public use.” The Illinois Supreme Court recently considered an attempted condemnation of property adjacent to a racetrack by a development authority to convey the land to the racetrack so that it could expand its parking capacity after it had increased its seating capacity.⁹⁴ The development authority said the public would benefit from increased tax revenues.⁹⁵ The court said the primary benefit would go to the racetrack, not the public.⁹⁶ The track could have built the parking garage on its own property, but that would have been much more expensive.⁹⁷ Tax revenue expansion alone does not justify the use of eminent domain.⁹⁸

The Court of Appeals of Arizona responded in similar fashion in *Bailey v. Myers*⁹⁹ in 2003. The city argued that a private development of a large retail center would benefit the public “because a portion of the downtown area [would] be revitalized, creating an attractive ‘gateway’ to downtown Mesa; substantial aesthetic enhancement [would] be achieved; property values [would] increase; jobs [would] be created; and tax and utility revenues [would] increase.”¹⁰⁰ The city argued that these public benefits were “sufficient to satisfy the ‘public use’ requirement.”¹⁰¹

⁹⁰ Bugryn v. City of Bristol, 774 A.2d 1042, 1045 (Conn. App. Ct. 2001).

⁹¹ *Id.* at 1045 n.4.

⁹² *Id.* at 1047.

⁹³ *Id.* at 1049.

⁹⁴ Sw. Ill. Dev. Auth. v. Nat’l City Envtl., L.L.C., 768 N.E.2d 1, 4 (Ill. 2002).

⁹⁵ *Id.*

⁹⁶ *Id.* at 10.

⁹⁷ *Id.*

⁹⁸ *Id.* at 10–11.

⁹⁹ 76 P.3d 898 (Ariz. Ct. App. 2003).

¹⁰⁰ *Id.* at 901.

¹⁰¹ *Id.*

The court disagreed that “a beneficial use is not necessarily a public use.”¹⁰² “[W]hen a proposed taking for a redevelopment project will result in private commercial ownership and operation, . . . the anticipated public benefits must substantially outweigh the private character of the end use so that it may truly be said that the taking is for a use that is ‘really public.’”¹⁰³

C. Michigan

Over a 25-year period Michigan covered the whole spectrum, from a very broad and permissive definition of “public use” to a very narrow and demanding definition.¹⁰⁴ In 1981, in *Poletown Neighborhood Council v. Detroit*,¹⁰⁵ the court was faced with “a plan by the Detroit Economic Development Corporation to acquire, by condemnation if necessary, a large tract of land to be conveyed to General Motors Corporation as a site for construction of an assembly plant.”¹⁰⁶

Those opposing the condemnation contended that it was “really a taking for private use and not a public use because General Motors [would be] the primary beneficiary of the condemnation.”¹⁰⁷ The development group, on the other hand, contended that

the controlling public purpose in taking [the] land [was] to create an industrial site which [would] be used to alleviate and prevent conditions of unemployment and fiscal distress. The fact that it [would] be conveyed to and ultimately used by a private manufacturer [would] not defeat this predominant public purpose.¹⁰⁸

The court held that “[t]he power of eminent domain [was] to be used in this instance primarily to accomplish the essential public purposes of

¹⁰² *Id.* at 904 (quoting *Manufactured Hous. Cmty. of Wash. v. State*, 13 P.3d 183, 189 (Wash. 2000)).

¹⁰³ *Id.*

¹⁰⁴ Compare *Poletown Neighborhood Council v. Detroit*, 304 N.W.2d 455, 459 (Mich. 1981) (holding an economic benefit to the community justifies the taking of private property by eminent domain), with *Wayne County v. Hathcock*, 684 N.W.2d 765, 781–87 (Mich. 2004) (expressly overruling *Poletown* and holding an economic benefit does not justify eminent domain).

¹⁰⁵ 304 N.W.2d 455 (Mich. 1981).

¹⁰⁶ *Id.* at 457.

¹⁰⁷ *Id.* at 458.

¹⁰⁸ *Id.*

alleviating unemployment and revitalizing the economic base of the community. The benefit to a private interest [was] merely incidental.”¹⁰⁹

A preview of the later view of the Michigan court could be found in the dissenting opinion of Justice Fitzgerald. He began by pointing out that “[c]ondemnation places the burden of aiding industry on the few, who are likely to have limited power to protect themselves from the excesses of legislative enthusiasm for the promotion of industry.”¹¹⁰ In his view, the court’s decision that the “prospect of increased employment, tax revenue, and general economic stimulation makes a taking of private property for transfer to another private party sufficiently ‘public’ to authorize the use of the power of eminent domain means that there is virtually no limit to the use of condemnation to aid private businesses.”¹¹¹

As Justice Fitzgerald went on to point out, “[a]ny business enterprise produces benefits to society at large.”¹¹² If local governments can decide that a different use of property will have more public benefit than its present use, no one’s property will be safe from taking, no matter how productive and valuable it may be to the present owner.¹¹³

In 1987 Michigan moved toward a less permissive definition of “public use.” In *City of Center Line v. Chmelko*,¹¹⁴ the city sought to condemn property on which several private businesses and apartments stood.¹¹⁵ The court held that the city was really acting as an agent for a local car dealership, due to the city’s fear that the dealer would move its business and the city would lose its favorable impact.¹¹⁶ In the court’s view, the city’s purported reasons—blight, lack of parking spaces, etc.—were “a complete fiction”¹¹⁷ and “lacked factual substance.”¹¹⁸ The court went on to state that just because “the automobile dealer [was] a substantial factor in the business life of the city [did] not permit it to use city

¹⁰⁹ *Id.* at 459.

¹¹⁰ *Id.* at 463 (Fitzgerald, J., dissenting).

¹¹¹ *Id.* at 464.

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ See *City of Center Line v. Chmelko*, 416 N.W.2d 401, 406–07 (Mich. Ct. App. 1987).

¹¹⁵ *Id.* at 402.

¹¹⁶ *Id.* at 402–04.

¹¹⁷ *Id.* at 402.

¹¹⁸ *Id.* at 405.

government to eliminate small businesses in order to facilitate its growth.”¹¹⁹

In 2004 Michigan swung all the way over to a traditionally narrow definition of “public use.” In *County of Wayne v. Hathcock*,¹²⁰ the county sought to condemn property to be used for construction of a 1300 acre business and technology park.¹²¹ This was “intended to reinvigorate the struggling economy of southeastern Michigan by attracting businesses, particularly those involved in developing new technologies, to the area.”¹²²

The court held that this would violate the Michigan Constitution.¹²³ The goal of the project, to “create thousands of jobs, and tens of millions of dollars in tax revenue, while broadening the County’s tax base . . . ,” was not a “public use” as required by the Michigan Constitution.¹²⁴

The court expressly rejected the reasoning of *Poletown*, noting that its “‘economic benefit’ rationale would validate practically *any* exercise of the power of eminent domain on behalf of a private entity.”¹²⁵

While it may have been hoped that *Hathcock* would have a strong impact in other states, its influence was undoubtedly limited by the fact that the Michigan court’s decision was based solely on the Michigan Constitution, with no reference to or discussion of the United States Constitution.¹²⁶

Of course, there is a potential downside for Michigan and other states which adopt a strict definition of “public use.” Restricting the use of eminent domain can put these states at a disadvantage in attracting and retaining business and industry.¹²⁷ For example, it seems likely that, had *Poletown* applied a stricter standard, General Motors would have built its plant in another state, and Michigan would have lost the jobs and tax revenues.¹²⁸

¹¹⁹ *Id.* at 407.

¹²⁰ *County of Wayne v. Hathcock*, 684 N.W.2d 765, 787 (Mich. 2004).

¹²¹ *Id.* at 769.

¹²² *Id.* at 770.

¹²³ *Id.* at 784.

¹²⁴ *Id.* at 770, 784.

¹²⁵ *Id.* at 786.

¹²⁶ *Id.* at 788.

¹²⁷ *Poletown Neighborhood Council v. City of Detroit*, 304 N.W.2d 455, 465 (Mich. 1981) (Ryan, J., dissenting).

¹²⁸ *Id.* at 467.

D. Ohio

In one of the few cases decided since *Kelo*, the Ohio Supreme Court interpreted the Ohio Constitution to say that economic benefit alone is insufficient to satisfy the public use requirement.¹²⁹ The court began its opinion by stating that, in deciding a case involving a taking of property from its owner and transferring it to a private entity for redevelopment, it had to “balance two competing interests of great import in American democracy: the individual’s rights in the possession and security of property, and the sovereign’s power to take private property for the benefit of the community.”¹³⁰ The court showed its understanding of the true interest of the property owner by recognizing that there was more involved than

a battle over a plot of cold sod in a farmland pasture or the plat of municipal land on which a building sits. For the . . . property owner, the appropriation is not simply the seizure of a house. It is the taking of a home—the place where ancestors toiled, where families were raised, where memories were made.¹³¹

The court then applied the same rationale as the Michigan court in *Hathcock*. It noted that “[e]very business, every productive unit in society . . . contribute[s] in some way to the [community].”¹³² If a taking could be justified solely because the new use by a private entity “might contribute to the economy’s health”, that would essentially eliminate the “constitutional limitations on the . . . power of eminent domain.”¹³³

The court stated that “economic benefit [could] be considered as a factor among others in determining whether there is a sufficient public use and benefit in a taking, [but] it cannot serve as the sole basis for finding such benefit.”¹³⁴ The court also held that the term “deteriorating area” cannot be used as a standard for a taking, because it inherently incorporates speculation as to the future condition of the property into the decision on

¹²⁹ *City of Norwood v. Horney*, 853 N.E.2d 1115, 1142 (Ohio 2006).

¹³⁰ *Id.* at 1122.

¹³¹ *Id.*

¹³² *Id.* at 1141 (citing *County of Wayne v. Hathcock*, 684 N.W.2d 765, 786 (Mich. 2004)).

¹³³ *Id.*

¹³⁴ *Id.*

whether a taking is proper rather than focusing that inquiry on the property's condition at the time of the proposed taking.¹³⁵

IV. LEGISLATIVE AND CONSTITUTIONAL ACTION

A. Congress and the States

The *Kelo* interpretation of “public use” set the minimum constitutional requirement for taking by eminent domain.¹³⁶ The states are entirely free to impose stronger restraints on the exercise of eminent domain in their state, either by statute or by amendment or interpretation of the state constitution.¹³⁷ Congress, of course, can also do so on a national basis.¹³⁸

And that indeed has happened since *Kelo*. The Protection of Homes, Small Businesses, and Private Property Act of 2005 was promptly introduced in the Senate.¹³⁹ The intent of the Act was to limit the power of eminent domain and protect the rights of private property owners.¹⁴⁰

Several states passed legislation and constitutional amendments to protect the property rights of their citizens.¹⁴¹ Alabama acted quickly in August 2005.¹⁴² Its statute prohibits governments within the state from using eminent domain to take private property “for the purpose of nongovernmental retail, office, commercial, residential, or industrial development.”¹⁴³ However, the statute does permit takings of blighted areas that can then be transferred to private interests.¹⁴⁴

In Michigan, a constitutional amendment was proposed which restricts the state's power to use “eminent domain for the primary benefit of private entities.”¹⁴⁵

¹³⁵ *Id.* at 1123.

¹³⁶ *Kelo v. City of New London*, 545 U.S. 469, 489–90 (2005).

¹³⁷ *Id.* at 489.

¹³⁸ Bernard W. Bell, *Legislatively Revising Kelo v. City of New London: Eminent Domain, Federalism, and Congressional Powers*, 32 J. LEGIS. 165, 167–68 (2006). See also KipEsquire, *Congress to the Rescue on Kelo*, A STITCH IN HASTE, June 28, 2005, <http://kipesquire.powerblogs.com/posts/1119974538.shtml> (last visited May 4, 2008), and Somin, *supra* note 60, at 43, 45.

¹³⁹ S. 1313, 109th Cong. § 1 (2005).

¹⁴⁰ *Id.*

¹⁴¹ See, e.g., ALA. CODE § 18-1B *et seq.* (LexisNexis Supp. 2006); S.J. Res. E, 93d Leg., R.S. (Mich. 2005); 735 ILL. COMP STAT. ANN. 30/1-1-1–30/99-5-5. (West Supp. 2007).

¹⁴² S.B. 68, 2005 Leg., 1st Spec. Sess. (Ala. 2005).

¹⁴³ ALA. CODE § 18-1B-2.

¹⁴⁴ *Id.*

¹⁴⁵ H.R. J. Res. 16, 93d Leg., R.S. (Mich. 2005).

The Illinois legislature reacted to *Kelo* by enacting a statute which took effect January 1, 2007.¹⁴⁶ The Act divides all possible takings into five categories¹⁴⁷ and establishes requirements for each.¹⁴⁸ Along the continuum of the categories the burdens confronting condemning authorities increase as the nature of the taking becomes more private.¹⁴⁹ Three important benefits are granted to targeted property owners: relocation costs; in many cases, a later date for valuation of the property; and in some cases, attorneys' fees.¹⁵⁰

Of great significance, unless a taking is for land which will be owned and controlled by the condemning authority, the government entity will have the burden of proof rather than the property owner.¹⁵¹ No longer will condemning authorities have the benefit of a general presumption that their takings are justified, leaving property owners usually only able to attack the procedure rather than the substantive right to take the property.¹⁵²

B. Texas

The Texas legislature acted promptly to limit the ability of a government to seize land for purely private benefit.¹⁵³ However, it includes a community development exemption¹⁵⁴ which could become a major loophole. The statute provides that if "economic development is a secondary purpose resulting from municipal community development or municipal urban renewal activities," a government may use eminent

¹⁴⁶ The Equity in Eminent Domain Act, S.B. 3086, 94th Gen. Assem., PA 94-1055 (2006) (codified at 735 ILL. COMP. STAT. ANN. 30/1-1-1-30/99-5-5. (2007)).

¹⁴⁷ 735 ILL. COMP. STAT. ANN. 30/5-5-5(b) (West Supp. 2007) (public ownership and control); 735 ILL. COMP. STAT. ANN. 30/5-5-5(e) (private ownership or control); 735 ILL. COMP. STAT. ANN. 30/5-5-5(c) (elimination of blight); 735 ILL. COMP. STAT. ANN. 30/5-5-5(b) (private ownership or control, public use); 735 ILL. COMP. STAT. ANN. 30/5-5-5(f) (public ownership and private control).

¹⁴⁸ *Id.*

¹⁴⁹ 735 ILL. COMP. STAT. ANN. 30/5-5-5 (b), (c), (d), (e), and (f)

¹⁵⁰ 735 ILL. COMP. STAT. ANN. 30/10-5-62 (West Supp. 2007) (relocation); 735 ILL. COMP. STAT. ANN. 30/10-5-60 (West Supp. 2007) (valuation date); 735 ILL. COMP. STAT. ANN. 30/10-5-70 (West Supp. 2007) (attorney fees).

¹⁵¹ 735 ILL. COMP. STAT. ANN. 30/5-5-5(c).

¹⁵² Illinois statutes set forth a series of rebuttable presumptions favoring the taking authority. *See id.* The two major categories include elimination of blight and utility purposes. *Id.*

¹⁵³ S.B. 7, 79th Leg., 2d C.S. (Tex. 2005).

¹⁵⁴ TEX. GOV'T CODE ANN. § 2206.001(b)(3) (Vernon Supp. 2006).

domain “to eliminate an existing affirmative harm on society from slum or blighted areas.”¹⁵⁵

The concern, of course, is how government authorities will define “blight.” The definition needs to be comprehensive yet carefully circumscribed. It can be too easy for eager public officials to include in “blight” a home with a one-car garage or one bathroom, or a very small side yard.¹⁵⁶

C. Only to Eliminate Slums and Blight

Where private economic development is involved, it seems wise to follow the lead of Texas and allow a taking only where the primary purpose is the elimination of slums and blights. And the government should bear the burden of showing the blight which creates a “public use” by its elimination. Also, if the blighted property is condemned, any unblighted property within the area should not be automatically included in the taking.¹⁵⁷

The use of eminent domain to eliminate a true slum is generally accepted as a “taking for public use.”¹⁵⁸ Slums are usually a magnet for crime, drugs, disease and poverty. The difficulty lies in defining “slums and blight” objectively. If subjective interpretation by public officials is allowed, the opportunity for misuse is apparent.¹⁵⁹

D. Defining Blight

The definition of blight needs to be sharpened so that it cannot be easily manipulated. Objective guidelines will ensure more consistency in governmental determinations of blight. The definition should also specify that economic under-utilization of property is not a valid reason for declaring property blighted. To constitute blight it should be found that present conditions “necessitate excessive and disproportionate expenditures of public funds for crime prevention and punishment, public

¹⁵⁵ *Id.*

¹⁵⁶ Texas has attempted to describe a blighted area carefully. *See* TEX. GOV'T CODE ANN. § 2206.001(b)(3)(A), (B) (referencing TEX. LOCAL GOV'T CODE ANN. § 374.003(3) (Vernon 2002) (defining blighted area) and TEX. TAX CODE ANN. § 311.005(a)(1)(I) (Vernon Supp. 2006) (exempting “single-family residential structures” from reinvestment zone designation)).

¹⁵⁷ *See* *Berman v. Parker*, 348 U.S. 26, 31 (1954) (condemning owners' property solely because it lay within the blighted area, though their property was not classified as blighted).

¹⁵⁸ *Id.* at 33–34.

¹⁵⁹ *Kelo v. City of New London*, 545 U.S. 469, 521–22 (2005) (Thomas, J., dissenting).

health and safety, fire and accident protection, and other public services and facilities.”¹⁶⁰ This would force a government seeking a blight designation to at least show that the area in question is costing the government more in preventive measures than the ordinary community requires.

E. If There Is Blight, Are There Other Ways to Eliminate It?

Property owners in an area deemed blighted should be given ample time to rehabilitate their properties before the properties can be condemned. If the goal of urban redevelopment is to eliminate the harm to the community of slums and blight, as it should be, then property owners should be given an opportunity to remedy the situation.

Too often slums and blight result from the failure of governmental bodies to enforce their own building and safety codes; denial of building permits needed to effect needed repairs; or failure to provide adequate law enforcement in the area.¹⁶¹ In effect, the “blighting” of these areas becomes a self-fulfilling prophecy.¹⁶²

The question should be “is the taking the only reasonable way for the governmental entity to accomplish its goal?” rather than “can some reasonable government goal be achieved by the taking?” The taking need not be the only possible means of accomplishing the governmental goal, but it should be shown that it is the only means that could *reasonably be considered* in accomplishing the goal.

It is also important to keep in mind, while considering how to define and eliminate blight, that economic development should constitute only a secondary goal and not a primary goal. The public benefits of economic development, including an increase in the tax base, tax revenues,

¹⁶⁰ W. VA. CODE § 16-16-2 (2006). See also National Conference of State Legislatures, Eminent Domain—2005 State Legislation, <http://www.ncsl.org/programs/natres/post-keloleg.htm> (last visited May 4, 2008). This website is dedicated to keeping track of all eminent domain legislation introduced across the United States after the *Kelo* decision.

¹⁶¹ Gideon Kanner, *Kelo v. New London: Bad Law, Bad Policy, and Bad Judgment*, 38 URB. LAW. 201, 203 (2006) (citing Gideon Kanner, *Condemnation Blight: Just How Just is Just Compensation?*, 48 NOTRE DAME L. REV. 765, 767–69 n.18 and accompanying text (1973); *Richmond Elks Hall Ass’n v. Richmond Redev. Agency*, 561 F.2d 1327, 1329–30 (9th Cir. 1977); *Amen v. City of Dearborn*, 363 F. Supp. 1267, 1272 (E.D. Mich. 1973); *Foster v. Detroit*, 254 F. Supp. 655, 660 (E.D. Mich. 1966)).

¹⁶² Kanner, *Kelo v. New London: Bad Law, Bad Policy, and Bad Judgment*, *supra* note 161, at 203.

employment, and general economic health, standing alone, should not constitute a “public use.”

V. WHAT ELSE CAN AND SHOULD BE DONE?

A. Raise Compensation for Property Taken

Even if a government entity is not successful in its attempted taking, the mere threat of condemnation will cause problems for the property owners involved.¹⁶³ It creates great uncertainty for property owners during their resistance to the taking.¹⁶⁴ They are not likely to improve their homes or expand their businesses.¹⁶⁵ This pressure and the cost of resistance will force most property owners to give up and settle for whatever the government deems to be “just compensation,” even if they do not want to leave the area and have a strong case on the merits.¹⁶⁶

In most cases the property owner will not be credited at all with the enhanced value resulting from the proposed project.¹⁶⁷ He will, however, suffer from the existing negatives attached to the area.¹⁶⁸ The owner is entitled to receive “fair market value,” which is often defined as “what a willing buyer would pay in cash to a willing seller” at the time of the taking of the property.¹⁶⁹ Under this view, “fair market value” does not include any special values which inhere in the property for this owner.¹⁷⁰

Business owners are neither compensated for the loss of good will when they move nor for losses from the interruption of the business while it is relocating.¹⁷¹ Nor are property owners compensated for any

¹⁶³ Brett D. Liles, Note, *Reconsidering Poletown: In the Wake of Kelo, States Should Move to Restore Private Property Rights*, 48 ARIZ. L. REV. 369, 378 (2006).

¹⁶⁴ *Id.* (citing Dana Berliner, *Public Use, Private Use—Does Anyone Know the Difference?*, in INVERSE CONDEMNATION AND RELATED GOV'T LIABILITY 789, 807 (ALI-ABA Course of Study, Apr. 22–24, 2004), available at SJ052 ALI-ABA 789 (Westlaw)).

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ *United States v. Miller*, 317 U.S. 369, 379 (1943); *United States ex rel. Tenn. Valley Auth. v. Powelson*, 319 U.S. 266, 275–76 (1943); *United States v. Reynolds*, 397 U.S. 14, 16–17 (1970).

¹⁶⁸ See, e.g., FLA. STAT. ANN. § 73.071(5)(West 2004).

¹⁶⁹ *Miller*, 317 U.S. at 374; see also *Sacramento S. R.R. Co. v. Heilbron*, 104 P. 979, 980 (Cal. 1909).

¹⁷⁰ *Miller*, 317 U.S. at 375; see also *United States v. Petty Motor Co.*, 327 U.S. 372, 377–78 (1946).

¹⁷¹ *Petty*, 327 U.S. at 377–78; see also Liles, *supra* note 163, at 378.

sentimental or subjective value of their property, the inconvenience of moving, or the cost of locating comparable property.¹⁷²

While there is understandable reluctance to include subjective injuries in the computation of just compensation, because of their speculative nature, one need only look to the slow but steady recognition of mental distress as a compensable legal injury to find justification for a change in eminent domain law. Non-economic damages are routinely awarded in cases based on intentional infliction of emotional distress and medical malpractice.¹⁷³ Surely such damages are speculative to the same degree as subjective injuries in eminent domain takings.

B. If Cost of Compensation Higher, Use of Eminent Domain Will Be Less Attractive

A project involving the use of eminent domain must have more value than the compensation paid to property owners if it is to make economic sense. If “just compensation” understates the full social cost of a taking, so that the government entity does not pay all of the costs involved in the taking, governments will be likely to take advantage of that situation even if the true social costs of the project exceed its benefits.¹⁷⁴ If just compensation accurately reflects the true cost of a taking it will force governments to fairly balance public needs against the harm to property owners. On the other hand, we do not want to impose unrealistically high costs on eminent domain takings, as this could unduly impede the carrying out of desirable projects.

VI. WHERE IS THE PROPER BALANCE?

The *Kelo* Court invited the states to impose stronger restrictions on eminent domain takings.¹⁷⁵ But that is not the answer: the states have always been able to do so,¹⁷⁶ some have acted,¹⁷⁷ and perhaps more will do so. A viable answer can only come from the Supreme Court and Congress.

¹⁷² *Petty*, 327 U.S. at 377–78.

¹⁷³ Giovanni Comandé, *Towards a Global Model for Adjudicating Personal Injury Damages: Bridging Europe and the United States*, 19 TEMP. INT’L & COMP. L. J. 241, 250, 257 (2005); see also Laura A. Quigley, *Reparation Rights Tax Relief Restores Human Rights as a Civil Right in Tax Tort Reform*, 40 VAL. U. L. REV. 42, 68–69 (2005).

¹⁷⁴ Abraham Bell & Gideon Parchomovsky, *Taking Compensation Private*, 59 STAN. L. REV. 871, 882 (2007).

¹⁷⁵ *Kelo v. City of New London*, 545 U.S. 469, 489 (2005).

¹⁷⁶ *Id.*

Advocates for condemnation for the purpose of economic development are concerned that if their state restricts such takings, developers will take their project to another state with less restrictive standards for “public use.”¹⁷⁸ Only uniformity will work—if all states are bound by the same restrictions on economic development taking, private interests will not be able to shop around for eminent domain bargains.

A recent example of this exercise of bargaining by private interests can be found in *99 Cents Only Stores v. Lancaster Development Agency*.¹⁷⁹ Costco, an anchor tenant in a shopping center, wanted the land under the 99 Cents store for expansion and threatened to move its store to another city if it could not get this land.¹⁸⁰ Costco could have expanded onto other adjacent property but it refused.¹⁸¹ So the development agency tried to condemn the land and 99 Cents’s leasehold.¹⁸² The agency said that if Costco moved out other businesses would suffer and this might lead to “future blight.”¹⁸³ The court was not persuaded and held that such a taking is not for a “public use.”¹⁸⁴

Developers looking for new economic opportunities will be drawn to states with easier requirements for condemnation. This will create pressure to restrict private property rights in order to attract new developments promising tax revenues, jobs, and economic well-being for the community.¹⁸⁵

No one wants to stop urban redevelopment; it is vital to prevent further urban decline.¹⁸⁶ Redevelopment will often involve slum clearance aimed at improved housing, a secondary purpose of commercial or industrial

¹⁷⁷ Gerald Korngold, *Resolving the Intergenerational Conflicts of Real Property Law: Preserving Free Markets and Personal Autonomy for Future Generations*, 56 AM. U. L. REV. 1525, 1579 (2007).

¹⁷⁸ See *Poletown Neighborhood Council v. Detroit*, 304 N.W.2d 455, 467 n.4 (Mich. 1981).

¹⁷⁹ 237 F. Supp. 2d 1123 (C.D. Cal. 2001).

¹⁸⁰ *Id.* at 1126.

¹⁸¹ *Id.*

¹⁸² *Id.* at 1126–27.

¹⁸³ *Id.* at 1129–30.

¹⁸⁴ *Id.* at 1130.

¹⁸⁵ See Arden Reed Pathak, Comment, *The Public Use Doctrine: In Search of a Limitation on the Exercise of Eminent Domain for the Purpose of Economic Development*, 35 CUMB. L. REV. 177, 201–02 (2004).

¹⁸⁶ See *Berman v. Parker*, 348 U.S. 26, 32–33 (1955) (eminent domain used to eliminate urban blight).

development, and attracting more private development.¹⁸⁷ It is the third potential result that must be carefully restricted.

If the permissive standard of *Kelo* is widely adopted, it is easy to picture urban areas crowded with factories, corporate headquarters, large chain stores, and the like, with adjacent parking lots. Local politicians are notoriously reluctant to raise taxes but still want to increase tax revenues. By facilitating property development by the use of eminent domain, they will continue to hope that will result in greater tax revenues, new jobs, and general economic prosperity for the community. Only a national definition of “public use” which carefully restricts takings will properly protect private property rights.

¹⁸⁷ See, e.g., *id.* at 28–30 (redevelopment involving slum clearance and development); *Kelo v. City of New London*, 545 U.S. 469, 472–75 (2005) (redevelopment for commercial development and attracting private development).

