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THE ROBIN HOOD ANTITHESIS – ROBBING FROM THE POOR TO GIVE TO THE RICH: HOW EMINENT DOMAIN IS USED TO TAKE PROPERTY IN VIOLATION OF THE FIFTH AMENDMENT

DANIEL C. ORLASKEY*

“Power tends to corrupt . . . and absolute power corrupts absolutely.”

-Lord Acton (Nineteenth Century Historian)

I. INTRODUCTION

Eminent domain jurisprudence in the United States has slowly eroded private property rights since the first adjudications of the validity of government “takings” in the late Nineteenth and early Twentieth century.¹ The most notable erosion has occurred under the “public use” clause of the Fifth Amendment.² The line of cases defining “public use” has had a profound effect on the security of an individual’s right to own property in the United States. Recently, in *Kelo v. City of New London*, the United States Supreme Court took the final step in effectively removing the “public use” clause from the Fifth Amendment.³ Consequently, the Constitution no longer offers any real protection to property owners, and the obvious losers are not going to be the upper class who can afford drawn out legal battles, but the lower classes, who cannot.⁴

The public outcry towards eminent domain takings has mostly been directed toward the large corporations that tend to be the eventual beneficiaries of the government taking.⁵ This public rancor, however, is often misdirected. It is the government, not developers, who is to

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1. See generally *Fallbrook Irrigation Dist. v. Bradley*, 164 U.S. 112 (1896) (holding that to render the use of water for the irrigation of arid lands a public use, every resident of the district need not have the right to use the water); see also *Mo. Pacific Ry. Co. v. Nebraska*, 154 U.S. 403 (1896).

2. U.S. CONST. amend. V (“nor shall private property be taken for public use, without just compensation.”).

3. *Kelo v. City of New London*, 545 U.S. 469, 494 (2005) (O’Connor, J., dissenting).

4. *Id.* at 2686-87 (Thomas, J., dissenting).

5. See STEPHEN GREENHUT, *ABUSE OF POWER: HOW THE GOVERNMENT MISUSES EMINENT DOMAIN* 190 (2005).

blame for eminent domain abuse because it gives developers a means to take the property of others.⁶

This article examines the history of the eminent domain issue and the law upon which it is founded. It also discusses recent developments and how they have, and will continue to have, a disproportionate impact on the lives of the lower and middle classes, while benefiting the rich. The purpose of this article is to point out where the judiciary has gone wrong and what can be (and is being) done to stop eminent domain abuse.

II. LEGAL BACKGROUND

A. Development and Expansion of "Public Use"

The right of government to take private land for public use originated with the British common law system under which the power to take private land was considered inherent in the power granted to the sovereign.⁷ William Blackstone explained the origin of this right as follows:

The reason of originally granting out this complicated kind of interest, so that the same man shall, with regard to the same land, be at one and the same time tenant in fee-simple and also tenant at the lord's will, seems to have arisen from the nature of villenage tenure. . . . [T]hough they were willing to enlarge the interest of their villeins, by granting them estates which might endure for their lives, or sometimes by descendible to their issue, yet did not care to manumit them entirely . . . and for that reason it seems to have been contrived, that a power of resumption at the will of the lord, should be annexed to these grants, whereby the tenants were still kept in a state of villenage, and no freehold at all was conveyed to them in their respective lands⁸

6. *Id.*

7. See 2 WILLIAM BLACKSTONE, COMMENTARIES *105 ("it being a received, and now undeniable, principle in the law, that all the lands in England are holden mediately or immediately of the king.").

8. *Id.* at *148-49.

Simply put, Blackstone was saying that the Lord retained the authority to retake land that he had granted to certain vassals.⁹ The United States adopted the English common law at the country's inception and codified the government's right to take private property for public use in the Fifth Amendment to the Constitution.¹⁰ The Fifth Amendment's "takings" clause states that no "private property shall be taken for public use, without just compensation."¹¹

In the United States, a basic limitation on the government's right of eminent domain is that the government may not take land from a private citizen and give it to another private citizen for a private purpose. Justice Chase, in the 1793 case of *Calder v. Bull*, justified this limitation with the following:

[A] law that takes property from A.[sic] and gives it to B: 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. The genius, the nature, and the spirit, of our State Governments, amount to a prohibition of such acts of legislation; and the general principles of law and reason forbid them.¹²

Originally, "public use" literally meant that the general public would have the right to use the land that was taken by the government. These takings, generally, were for public works projects like highways and railroads.¹³ One of the earliest cases of eminent domain jurisprudence, for example, was *Strickley v. Highland Boy Gold Mining Company*.¹⁴ There, the United States Supreme Court held that the establishment of an aerial bucket line over the property of the appellant qualified as a "public use." The Court made the following determination:

9. *Id.*

10. U.S. CONST. amend. V.

11. *Id.*

12. *Calder v. Bull*, 3 U.S. 386, 388 (1798) (emphasis in original).

13. *See Kelo v. City of New London*, 545 U.S. 469, 512 (Thomas, J., dissenting). Justice Thomas discussed the early history of eminent domain being for "public goods, such as public roads, toll roads, ferries, canals, railroads, and public parks." *Id.*

14. 200 U.S. 527 (1906).

In the opinion of the legislature and the supreme court of Utah the public welfare of that state demands that [aerial] lines between the mines upon its mountain sides and the railways in the valleys below should not be made impossible by the refusal of a private owner to sell the right to cross his land.¹⁵

This interpretation of the “public use” doctrine is considered to be more consistent with the framers original intent.¹⁶

The Supreme Court, however, expanded the definition of a “public use” beyond the literal meaning of the term. In 1954, in *Berman v. Parker*, the Court interpreted the “public use” doctrine, based on the ruling in *Strickley*, to include those takings that are meant to remove conditions injurious to the public good.¹⁷ There, the city of Washington, D.C. used its power of eminent domain to remove conditions of “blight,” which the Court considered a valid “public use.”¹⁸

In *Hawaii Housing Authority v. Midkiff*,¹⁹ the Supreme Court relied on both *Strickley* — a public use could be economic in nature²⁰ — and *Berman* — a public use can include the elimination of blight.²¹ The Court ruled that transferring property from one private individual to another was permissible because of the public benefit gained by correcting a market deficiency that was deemed to be “injuring the public . . . welfare.”²² In this case, the Hawaii legislature found that forty-seven percent of the State’s land was owned by only seventy-two

15. *Id.* at 531.

16. *See supra* note 13.

17. *Berman v. Parker*, 348 U.S. 26 (1954) (holding that using eminent domain to remove conditions of blight was allowable as a “public use”).

18. *Id.* at 29. “Blight” was not specifically defined by the District of Columbia Redevelopment Act; however, the term “substandard housing conditions” was defined as: the conditions obtaining in connection with the existence of any dwelling, 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 in the opinion of the Commissioners detrimental to the safety, health, morals, or welfare of the inhabitants of the District of Columbia.

Id. at 28.

19. 467 U.S. 229, 232 (1984).

20. *See Strickley*, 200 U.S. at 527 (holding that the use of eminent domain to support the mining industry was a valid “public use”).

21. *See Berman*, 348 U.S. at 26 (holding that using eminent domain to remove conditions of blight was allowable as a “public use”).

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

private owners.²³ The legislature determined that this land oligopoly was responsible for driving up land prices, “skewing the State’s residential fee simple market,” and, thus, injuring the public welfare.²⁴

Thus, in both *Berman* and *Midkiff*, the United States Supreme Court upheld uses of eminent domain in order to correct a condition deemed to be injurious to the public²⁵ — the land oligopoly in *Midkiff* and urban blight in the area condemned in *Berman*.

B. State Interpretations of “Public Use”

State courts, in considering eminent domain rights, have not always interpreted “public use” as broadly as the United States Supreme Court. One of the more controversial instances of eminent domain by local government took place in Detroit, Michigan in 1981 in *Poletown Neighborhood Council v. Detroit*.²⁶ There, the Michigan Supreme Court upheld the taking of a large tract of land that encompassed the Poletown area of Detroit, which was then given to General Motors for the construction of an assembly plant.²⁷ The only public benefit accomplished by this taking was the creation of new jobs and additional tax revenue.²⁸

The Michigan Supreme Court, however, later overturned *Poletown* in *County of Wayne v. Hathcock*, another case where the county attempted to take private property for the purpose of economic development.²⁹ In *Hathcock*, the Michigan Supreme Court held that, despite the ruling in *Poletown*, such a taking violated the “public use” requirement of the Michigan Constitution.³⁰ The Michigan Supreme Court stated that the pursuit of profit by a private entity was never meant to be considered a “public use” just because the private entity’s increased profits supported the general economy of the area.³¹

23. *Id.* An additional forty-nine percent of the State’s land was owned by the State and Federal governments. *Id.*

24. *Id.*

25. Compare *Berman*, 348 U.S. at 26, with *Midkiff*, 467 U.S. at 229. In both cases, the condition to be remedied through the use of eminent domain was considered to be damaging to the public good.

26. 304 N.W.2d 455 (Mich. 1981).

27. *Id.* at 457 (per curiam).

28. *Id.* at 467 (Ryan, J., dissenting). No conditions of blight existed in the area taken. *Id.* at 640 (Fitzgerald, J., dissenting).

29. 684 N.W.2d 765, 770-71 (Mich. 2004).

30. *Id.* at 784. The Michigan Constitution permits the use of eminent domain only for “public use.” MICH. CONST. art. 10 § 2 (amended 2006).

31. *Hathcock*, 684 N.W. at 786.

III. KELO V. NEW LONDON

The nine petitioners in *Kelo v. New London* owned fifteen properties, in the Fort Trumbull area of New London, Connecticut, that the city of New London had condemned.³² New London planned to lease the property to a private developer for economic revitalization.³³ The New London Development Corporation (NLDC), a private non-profit entity that the city used to plan economic development, formulated the development plan.³⁴

Due to many years of economic decline and the closing of the Naval Undersea Warfare Center in 1996,³⁵ the state of Connecticut declared that the city needed economic revitalization.³⁶ To facilitate this, the state authorized a bond worth \$5.35 million to “support the planning activities of the NLDC.”³⁷ Soon after, Pfizer, a pharmaceutical company, announced that it would be moving to the area and building a \$300 million facility.³⁸ The city hoped to leverage this new development in its plan for economic revitalization.³⁹ To this end, the NLDC announced a plan to redevelop ninety acres of land in the Fort Trumbull area.⁴⁰ The city approved the plan in 2000 and authorized the NLDC to use its power of eminent domain to acquire any property that it could not successfully purchase.⁴¹ The petitioners were unwilling to sell their homes and, therefore, the NLDC condemned their property even though there was never a contention that the properties were blighted or “otherwise in poor condition.”⁴² They were condemned only because they were located in the ninety acre area the city wanted to redevelop.⁴³

32. 545 U.S. 469, 475 (2005).

33. *Id.* at 474.

34. *Id.* at 475. Corcoran Jennison will be the private developer. *Id.* at 492.

35. *Id.* at 473. The Naval Undersea Warfare Center had employed over 1,500 people in the area. *Id.*

36. *Id.* at 473-74.

37. *Id.* An additional \$10 million bond was issued for the creation of a state park. *Id.* at 473.

38. *Id.*

39. *Id.*

40. *Id.* at 474. The plan that was approved by the state was divided into seven parcels, with each parcel having a different use. *Id.*

41. *Id.* at 475.

42. *Id.*

43. *Id.* Four properties are located in parcel 3 of the development plan and eleven are located in parcel 4A. *Id.*

Petitioners sued the NLDC and the City of New London, in the New London Superior Court, and claimed that the takings were a violation of the “public use” clause of the Fifth Amendment.⁴⁴ The Superior Court granted the petitioners a permanent restraining order against taking the properties located in parcel 4A of the development plan because the plan was vague as to how this particular parcel of land would be used.⁴⁵ It upheld the takings of the properties located in parcel 3.⁴⁶ Both the petitioners and the respondents appealed to the Connecticut Supreme Court,⁴⁷ which overturned the lower court’s grant of a permanent injunction as to parcel 4A.⁴⁸ The Connecticut Supreme Court upheld the takings on the grounds that they were authorized by chapter 132 of the municipal development statute.⁴⁹ They also referred to *Berman* and *Midkiff* to support their finding that economic development as a public use did not violate the Fifth Amendment.⁵⁰

The United States Supreme Court granted certiorari to decide the question of whether economic development satisfies the “public use” requirement.⁵¹ In a 5-4 decision the Court upheld the ruling of the Connecticut Supreme Court, finding the takings to be permissible under the Fifth Amendment.⁵²

IV. THE COURT’S REASONING

The majority in *Kelo* affirmed the Connecticut Supreme Court’s ruling that the use of eminent domain, strictly for the purposes of economic development, was appropriate under the “public use” clause of the Fifth Amendment.⁵³ To justify this holding, Justice Stevens, writing for the majority, relied on three principles: first, based

44. *Kelo v. New London*, 843 A.2d 500 (Conn. 2004).

45. *Kelo*, 545 U.S. at 475-76. In the development plan, this area is listed to be used for “park support.” *Id.* at 495 (O’Connor, J.,dissenting).

46. *Id.* at 476. Land in this area was to be used for office space. *Id.*

47. *Id.*

48. *Id.* The Connecticut Supreme Court held that the use assigned to parcel 4A in the development plan was sufficiently clear and “had been given ‘reasonable attention’ during the planning process.” *Id.* at 476-77.

49. See CONN. GEN. STAT. §8-186 (2005). Chapter 132 of the municipal development code allows the state to take developed land as part of an economic development plan. Economic development is considered a “public use.” *Kelo*, 545 U.S. at 476.

50. *Id.*

51. *Id.* at 477.

52. *Id.* at 471.

53. *Id.* at 490.

on the Court's rulings in *Berman* and *Midkiff*, the term "public use" had long been interpreted to include "public purpose";⁵⁴ second, that the area to be taken was "sufficiently distressed" to justify the taking and that deference should be given to the state legislature's determination;⁵⁵ and finally, that promoting economic development is a valid public use.⁵⁶

The Court recognized that governments may not take the land of a private citizen for the sole benefit of another private citizen,⁵⁷ however, the Court reasoned that the taking in *Kelo* was orchestrated in accordance with a "carefully considered" development plan that was meant to benefit the public through economic revitalization.⁵⁸ The Court further reasoned that the "public purpose" was not mere pretext for a benefit to a private individual (even though the taken land would not be opened to the general public) because the taking was not meant to benefit a particular private entity.⁵⁹ To support this reasoning, the Court looked to *Berman* and *Midkiff* to support the broad interpretation that "public use" includes public purposes.⁶⁰

Second, the Court deferred to the state legislature's decision that the area was not blighted, but rather "sufficiently distressed to justify a program of economic rejuvenation."⁶¹ To support this proposition, the Court merely noted that the city's plans were "carefully formulated."⁶²

The Court again looked to *Berman* and *Midkiff* to support its conclusion that there was no proper way to exempt economic development from the "traditionally broad understanding of public purpose."⁶³ In addition, Justice Stevens looked to *Berman* for the

54. *Id.* at 477-82.

55. *Id.* at 484.

56. *Id.* The Court also stated that "there is no principled way" to differentiate economic development from other recognized public uses. *Id.*

57. *Id.* at 477.

58. *Id.* at 478.

59. *Id.* The land was eventually leased to Corcoran Jennison, a private development firm. *Id.* at 476.

60. *See supra* note 25. Justice Stevens mentioned the statement made by Justice Holmes referring to the "inadequacy of the use by the general public as a universal test" for the "public use" clause. *Kelo*, 545 U.S. at 480 (quoting *Strickley v. Highland Boy Gold Mining Co.*, 200 U.S. 527, 531 (1906)).

61. *Id.* at 483.

62. *Id.* The closest thing to a precedent supporting this proposition is *Lingle v. Chevron, U.S.A.*, cited later in the opinion, which is a regulatory takings case stating that the use of a test requiring a reasonable certainty that the public benefit will happen "would empower--and might often require--courts to substitute their predictive judgments for those of elected legislatures." *Id.* at 488 (citing *Lingle v. Chevron, U.S.A.*, 125 S. Ct. 2074, 2085 (2005)).

63. *Id.* at 485.

proposition that a public benefit may be best implemented by a private entity,⁶⁴ and looked to *Midkiff* for the proposition that federal courts should not be involved in determining the “wisdom of takings.”⁶⁵ Justice Stevens then used these propositions to justify striking down the petitioners assertion that there should be some reasonable assurance that the public benefit used to justify the takings would occur.⁶⁶

Justice Stevens then concluded by stating that nothing in the ruling was meant to preclude the states from imposing their own rules regarding the use of eminent domain.⁶⁷ Rather, he stated that the Court’s only power in this case was to determine if the city’s use of eminent domain violated the “public use” clause of the Fifth Amendment.⁶⁸

Justice Kennedy, in his concurring opinion, stated that in the future there may be a circumstance where stricter scrutiny should be exercised in reviewing the validity of the use of eminent domain in taking private property for the benefit of another private entity.⁶⁹ He declined, however, to clarify when such a higher level of scrutiny would be warranted, except to say that a taking for a purely economic benefit alone would not be enough to trigger such scrutiny.⁷⁰ It seems Kennedy has left open an intriguing avenue that may eventually have the effect of bringing Fifth Amendment takings cases more in line with Free Speech and Equal Protection cases, where strict scrutiny is often employed under certain circumstances.⁷¹

In her dissenting opinion, joined by Justices Scalia and Thomas and Chief Justice Rehnquist, Justice O’Connor outlined the three accepted circumstances where eminent domain is properly used:

First, the sovereign may transfer private property to public ownership - such as for a road, a hospital, or a military base. Second, the sovereign may transfer private

64. *Id.* at 486 (quoting *Berman v. Parker*, 348 U.S. 26, 33 (1954)).

65. *Id.* at 488 (quoting *Haw. Housing Auth. v. Midkiff*, 467 U.S. 229, 242 (1984)).

66. *Id.*

67. *Id.* at 489.

68. *Id.* at 490.

69. *Id.* at 493 (Kennedy, J., concurring).

70. *Id.* (Kennedy, J., concurring).

71. Steven J. Eagle, *Kelo v. City of New London: A Tale of Pragmatism Betrayed*, in *EMINENT DOMAIN USE AND ABUSE: KELO IN CONTEXT* 195, 211 (Dwight H. Merriam & Mary Massaron Ross eds., 2006) (“When all is said and done, the U.S. Supreme Court will attempt to split the difference with a relaxed definition of “public use,” enforced through a higher level of judicial scrutiny . . .”).

property to private parties, often common carriers, who make the property available for the public's use—such as with a railroad, a public utility, or a stadium. . . . [Third,] we have allowed that, in certain circumstances and to meet certain exigencies, takings that serve a public purpose also satisfy the Constitution even if the property is destined for subsequent private use.⁷²

Justice O'Connor stated that the Court's previous rulings in both *Berman* and *Midkiff* allowed the use of eminent domain to remedy a situation where the property in question was injurious to the public.⁷³ The property in question in *Kelo*, according to Justice O'Connor, therefore did not fall within the three circumstances where eminent domain may be properly used.⁷⁴

Justice Thomas also wrote a dissenting opinion, in which he reiterated the points made by Justice O'Connor and went on to point out that the harm of this decision would fall disproportionately on poor minorities.⁷⁵

V. LEGISLATIVE AND PUBLIC BACKLASH

In *Kelo*, the United States Supreme Court suggested that state governments were free to pass laws that were more restrictive of government use of the eminent domain power.⁷⁶ A large and growing group of public, governmental, and private actors has emerged since *Kelo* to do just that — protect individual property rights against purely economic takings.

The Institute for Justice, for instance, which represented the property owners in *Kelo*,⁷⁷ has begun a nation-wide lobbying campaign called “Hands off My Home.”⁷⁸ The goal of the campaign,

72. *Kelo*, 545 U.S. at 498 (O'Connor, J., dissenting) (citation omitted).

73. *Id.* at 504 (O'Connor, J., dissenting).

74. *Id.*

75. *Id.* at 521-22 (Thomas, J., dissenting).

76. *Id.* at 489.

77. Institute For Justice, Cases, New London, Connecticut, *Kelo v. New London*: Lawsuit Challenging Eminent Domain Abuse in New London, Connecticut, http://www.ij.org/private_property/connecticut/index.html (last visited October 24, 2006).

78. Web Release, Institute for Justice, IJ's \$3 Million National Campaign Tells Lawmakers: “Hands Off My Home” (June 29, 2005), http://www.ij.org/private_property/castle/6_29_05pr.html.

which is operated through the Institute for Justice's Castle Coalition,⁷⁹ is to give ordinary citizens the means to combat eminent domain abuse in their communities.⁸⁰ To do this, the campaign advocates for stricter state laws concerning purely economic takings and asks government officials to pledge to oppose eminent domain abuse.⁸¹

The Institute for Justice also submitted a petition for rehearing to the Supreme Court for the *Kelo* case.⁸² In the petition, the Institute for Justice specifically rebutted Justice Stevens, who stated that the holding in *Kelo* would not result in the "hypothetical cases" and "parade of horrors" that Justice O'Connor warned of in her dissent.⁸³ The petition cited a large number of cases where local governments commenced eminent domain proceedings against private land owners where the property was to be transferred to another private party for purely economic benefit.⁸⁴ The United States Supreme Court nonetheless rejected the petition and refused to rehear the case.⁸⁵

Kelo also has triggered strong governmental responses against abuses of eminent domain.⁸⁶ State and federal legislators have submitted new bills to curb eminent domain abuse almost as fast as private developers and governments are clamoring to exploit the decision.⁸⁷ So far, forty-seven states have passed laws limiting the power of eminent domain, are considering bills that portend to limit eminent domain abuse, have created resolutions condemning the *Kelo* decision, and/or have pledged to do so in 2006.⁸⁸ Some notable bills are Alabama House Resolution 49A, which expresses "grave disapproval" with the *Kelo* decision and passed the Alabama House of

79. *Id.* The Castle Coalition is a grassroots organization of activists across the country that are fighting against eminent domain abuse. *Id.*

80. Castle Coalition, About Us, <http://www.castlecoalition.org/profile/index.html> (last visited Oct. 24, 2006).

81. *Id.*

82. Petition for Rehearing, *Kelo v. City of New London*, 545 U.S. 1158 (2005) (No. 04-108) [hereinafter Petition].

83. *Id.* at 1.

84. *Id.* at 2-7.

85. *Kelo v. City of New London*, 545 U.S. 1158 (2005). See also Web Release, Institute for Justice, U.S. Supreme Court Denies Homeowners' Request to Rehear *Kelo* (Aug. 22, 2005), http://www.ij.org/private_property/connecticut/8_22_05pr.html [hereinafter Petition Denial Article].

86. *Eminent Domain Ruling Spurs Flurry of Legislation*, MORTGAGENEWSAILY.COM, July 25, 2005, http://www.mortgagenewsdaily.com/7252005_Supreme_Court_Eminent_Domain.asp.

87. Compare Castle Coalition, State Legislative Actions, <http://maps.castlecoalition.org/legislation.html> (last visited Oct. 24, 2006), with Petition, *supra* note 82.

88. See Castle Coalition, State Legislative Actions, <http://maps.castlecoalition.org/legislation.html> (last visited Oct. 24, 2006).

Representatives in a single day,⁸⁹ Connecticut House Bill 5038, which would exempt all residential property from eminent domain takings for economic benefit,⁹⁰ and Maryland House Bills 44 and 79, both of which propose amendments to the Maryland Constitution that would limit the ability of the government to condemn private property.⁹¹

Federal legislators have also been very active in trying to limit eminent domain abuse. Since the *Kelo* decision, and up to the date of this writing, there have been at least thirteen bills or resolutions in the Senate and House of Representatives that propose limits on the power of eminent domain,⁹² or simply express dissatisfaction toward the *Kelo* decision.⁹³ House Resolution 3135, for example, proposes using the spending power to prohibit projects that receive any federal funding from using the power of eminent domain to take private property for purely economic benefit.⁹⁴ In fact, House Resolution 3135 is also one of the most widely supported of the federal bills that proposes eminent domain restriction, with 136 cosponsors.⁹⁵ It would seem, therefore, that there has been wide-spread disapproval in Congress toward the Supreme Court's holding in *Kelo*.

Finally, a new twist to the *Kelo* backlash occurred recently, when BB&T, the ninth largest financial holdings corporation in the United States, issued a statement that said it would not lend to commercial developers who benefit from the government taking of private land through the use of eminent domain.⁹⁶ This is yet another example of the widespread disagreement with *Kelo* — even a lending institution, which stands to benefit financially from the decision, is willing to take a stand against it.

89. H.R. 49A, 2005 Reg. Sess. (Al. 2005).

90. H.B. 5038, 2006 Gen. Assem., Feb. Sess. (Ct. 2006).

91. See H.R. 44, 2006 Gen. Assem., Reg. Sess. (Md. 2006); See H.R. 79, 2006 Gen. Assem., Reg. Sess. (Md. 2006).

92. See Castle Coalition, Current Proposed Federal Legislation on Eminent Domain, <http://www.castlecoalition.org/legislation/federal/index.html> (last visited Oct. 24, 2006).

93. See H.R. Res. 340, 109th Cong. (2005) (passed the House by a vote of 365-33).

94. Private Property Rights Protection Act of 2005, H.R. 3135, 109th Cong. (2005).

95. *Id.*

96. Web Release, Institute for Justice, BB&T Respects Property Rights, Won't Fund Eminent Domain Abuse (Jan. 25, 2006), <http://www.ij.org/editorial/bbt-wont-fund-ED.html>; Web Release, Institute for Justice, Montgomery Bank Won't Finance Eminent Domain Abuse, Second Bank within Week to Reject Eminent Domain for Private Gain (Feb. 6, 2006), <http://www.ij.org/editorial/2ndbank-not-to-fund-ED.html>.

VI. ANALYSIS

The Court expended a great deal of effort, in its majority opinion, comparing the situation in *Kelo* to two previous eminent domain cases that do not bear a very close factual resemblance to *Kelo*.⁹⁷ Additionally, the majority completely ignored the far more analogous *Poletown* case.⁹⁸ By doing so, the Court ignored the more effective rule that the Michigan Supreme Court formulated in *Wayne v. Hathcock*, the decision that overturned *Poletown*.⁹⁹

A. Is Kelo more like Poletown than Berman or Midkiff?

To make an accurate determination about what kind of effect the United States Supreme Court's holding in *Kelo v. New London* will have, it is important to ask one question: is the situation in *Kelo* more like that in *Berman* and *Midkiff*, or is it more like the situation in *Poletown*? The majority tried very hard to analogize *Kelo* to the former cases to justify its opinion,¹⁰⁰ but ignored some very stark differences that make it far more akin to *Poletown*.

The Court glossed over significant differences between *Kelo* and *Berman*, on the one hand, and *Midkiff* on the other. The Court ignored the important distinction that the property in *Kelo* was not solely responsible for the social ill to be remedied by the taking, as were the areas at issue in *Berman* and *Midkiff*.¹⁰¹ Although the takings in *Kelo* were justified as necessary for the economic rejuvenation of the city,¹⁰² the Fort Trumbull area was not more responsible than other areas of the city for the distressed economy, as was found in *Midkiff*.¹⁰³ In addition, no conditions of blight were present, as in *Berman*.¹⁰⁴ The Court tried to dismiss this dichotomy, in a footnote, by stating that the properties at issue in *Strickley* and *Berman* were not harmful to the

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

98. Compare *Kelo*, 545 U.S. 469 and *Poletown Neighborhood Council v. Detroit*, 304 N.W.2d 455 (Mich. 1981). In both cases, property was taken through eminent domain in order to complete a plan of economic revitalization. See *id.* The property in both cases was to be given to a private entity for development. See *id.* Also, neither area was considered in a condition injurious to the public. See *id.*

99. See *Wayne v. Hathcock*, 684 N.W.2d 765 (Mich. 2004).

100. See *supra* Part III.

101. See *supra* note 50 and accompanying text.

102. See *Kelo*, 545 U.S. at 480.

103. See *id.* at 499 (O'Connor, J., dissenting). The property in question was part of a land oligopoly that was causing distress to the fee simple market in Hawaii. *Id.*

104. *Id.* at 498 (O'Connor, J., dissenting).

public.¹⁰⁵ However, the Court had already relied on the ruling in *Berman* that “community redevelopment programs need not . . . be on a piecemeal basis — lot by lot, building by building,”¹⁰⁶ to illustrate that the area as a whole was in need of redevelopment because of the predominantly “blighted” condition.¹⁰⁷ It seems, therefore, that this dichotomy is not so easily explained away, as the majority attempted to do.

Kelo, on the other hand, bears a striking resemblance to *Poletown*. In both cases, property was taken in an area that was not considered blighted, or otherwise injurious to the public.¹⁰⁸ Also, in both cases, the public benefit that was to be accomplished via the taking was economic in nature, and the property was to be given to a private party for development.¹⁰⁹ The one main difference between *Kelo* and *Poletown* is that in *Poletown*, the private beneficiary was known to be General Motors,¹¹⁰ whereas in *Kelo*, the private beneficiary was not specified at the time of the takings.¹¹¹ Nonetheless, in *Kelo* the proposed development would not be open to the general public.¹¹² Therefore, why should it make any difference if the private beneficiary was not known at the time of the taking? Nowhere in Justice Chase’s statement from *Calder v. Bull*, which was quoted by Justice Stevens, does it say that a “law that takes property from A.[sic] and gives it to B” is invalid,¹¹³ unless B happens to be a specific private entity, in which case the law is then valid. This difference, therefore, seems to be one that was artificially fabricated by the majority to dissuade dissenters from making any comparisons to the *Poletown* decision, which was overruled in the Michigan Supreme Court in the 2004 case of *Wayne v. Hathcock*.¹¹⁴ If history is any indication of what will happen in the future, and hopefully it is, the *Kelo* ruling will suffer the same fate as the *Poletown* ruling.

105. *Id.* at 485 n.13.

106. *Id.* at 481 (quoting *Berman v. Parker*, 348 U.S. 26, 35 (1954)).

107. *Id.*

108. See *supra* note 50 and accompanying text.

109. *Kelo*, 545 U.S. at 485-86.

110. See *Poletown Neighborhood Council v. Detroit*, 304 N.W.2d 455, 457 (Mich. 1981).

111. See *Kelo*, 545 U.S. at 476.

112. *Id.* at 478-79.

113. *Id.* at 478 n.5 (quoting *Calder v. Bull*, 3 U.S. 386, 388 (1798)).

114. 684 N.W.2d 765 (Mich. 2004).

B. The Wayne v. Hathcock Alternative

In 2004, the Michigan Supreme Court overruled the 1980 holding in *Poletown*.¹¹⁵ Instead of following the extremely unpopular precedent set in the *Poletown* case, the Michigan Supreme Court decided to create a new rule for when the government may use the power of eminent domain to take private property.¹¹⁶ This new test identifies three specific sets of circumstances where this type of taking would be considered valid.¹¹⁷

First, condemnations in which private land is constitutionally transferred by the condemning authority to a private entity involve “public necessity of the extreme sort otherwise impracticable.”¹¹⁸ Some of the examples given by Judge Young, who wrote the opinion in *Hathcock*, of these types of condemnations were “highways, railroads, canals, and other instrumentalities of commerce.”¹¹⁹ This type of condemnation was valid, according to the court, because it allowed essential projects to commence without having to pay private landowners exorbitant prices for the land taken.¹²⁰ This is the same type of situation the United States Supreme Court reviewed in *Strickley*¹²¹ and is consistent with how Justice Thomas has interpreted the original intent of the Fifth Amendment takings clause.¹²²

Second, the transfer of condemned property to a private entity is consistent with the Constitution’s “public use” requirement when the private entity remains accountable to the public in its use of that property.¹²³ Therefore, as long as the public maintained a measure of control over the property after the taking, it would be considered valid.¹²⁴

Finally, condemned land may be transferred to a private entity when the selection of the land to be condemned is itself based on public concern.¹²⁵ This provision would allow the use of eminent domain to take private property when it is necessary to eliminate

115. *Id.*

116. *See id.* at 781.

117. *Id.* at 781–82.

118. *Id.* at 781.

119. *Id.* at 781. (citing *Poletown Neighborhood Council v. Detroit*, 304 N.W.2d 455, 478 (Mich. 1981) (Ryan, J., dissenting)).

120. *Id.* at 782.

121. *See supra* Part II.A.

122. *See supra* note 13.

123. *Hathcock*, 684 N.W.2d at 782.

124. *Id.*

125. *Id.* at 783.

conditions of “blight” or some other condition that is considered injurious to the public good.¹²⁶ This was also the justification given by the Supreme Court in both *Berman* and *Midkiff*.¹²⁷ In *Berman* the taking was justified due to the blighted condition of the area to be taken,¹²⁸ and in *Midkiff* the land to be taken was part of a land oligopoly that was economically damaging to the public.¹²⁹ The taking in *Kelo* would not fall under this test because the area itself was not the cause of the public harm that the taking was meant to remedy.

While the doctrine of *stare decisis* did not require the Supreme Court to follow the ruling of the Michigan Supreme Court when deciding *Kelo*, it seems logical that they would have learned from the debacle of the *Poletown* case. The United States Supreme Court should have tried to avoid such a result by adopting a rule similar to the one adopted in *Hathcock*. The argument for such a rule becomes even more compelling when one realizes that nearly all of the major precedents cited by the majority in *Kelo* could be justified on one or more of the three circumstances for valid use of the eminent domain power laid out in *Hathcock*.¹³⁰ It seems unlikely that it was simple ignorance that pushed the majority in *Kelo* to such a misguided result, especially when one considers that Justices O’Connor and Thomas, in their dissents were fully aware of the *Poletown* case.¹³¹ Since the Supreme Court has, unfortunately, refused to rehear the case, we will never know why the majority ignored such an obviously workable and far more reasonable alternative.¹³²

C. Robbing from the poor (or not quite so rich) to give to the rich(er)

Governments have often used eminent domain to take private property from one business in order to benefit another private business that they deem to be more desirable.¹³³ A recent case where this very situation occurred was *99 Cents Only Stores v. Lancaster*

126. *Id.*

127. See *supra* note 25.

128. *Berman v. Parker*, 348 U.S. 26, 29 (1954).

129. *Haw. Housing Auth. v. Midkiff*, 467 U.S. 229, 232 (1984).

130. Compare *Strickley v. Highland Boy Gold Mining Co.*, 200 U.S. 527 (1904), *Berman*, 348 U.S. at 29, and *Midkiff*, 467 U.S. at 232, with *Hathcock*, 684 N.W.2d at 781-83.

131. *Kelo v. City of New London*, 545 U.S. 469, 503 (2005) (O’Connor, J., dissenting); *Id.* at 522 (Thomas, J., dissenting).

132. Petition, *supra* note 82.

133. Dean Starkman, *Take and Give: Condemnation is Used to Hand One Business Property of Another*, WALL ST. J., Dec. 2, 1998, at A1.

Redevelopment Agency.¹³⁴ This case was also one of the few that Justice Stevens actually discussed in his majority opinion in *Kelo* as being an invalid use of the power of eminent domain.¹³⁵ In this case, Costco, a large retailer in the city of Lancaster, threatened to move their operations from the city unless Lancaster would take the property of 99 Cents Only Stores, which was located adjacent to Costco's store, so that Costco could expand into that space.¹³⁶ The Lancaster Redevelopment Agency argued that the taking would generate increased tax revenue and, therefore, was for a public benefit.¹³⁷ The District Court for the Central District of California granted summary judgment to 99 Cents Only Stores on the grounds that the proposed taking was not for a public use.¹³⁸ However this taking would have created increased tax revenue and, therefore, would be valid under the Supreme Court's ruling in *Kelo*.¹³⁹

Costco lost this particular case; however, they have been one of the most prolific abusers of the power of big business to put pressure on local governments to use the eminent domain power for their benefit.¹⁴⁰ While Costco is by no means the only large corporation that has few qualms about abusing wealth and influence to procure land through eminent domain, it has been involved in an inordinately high number of controversial projects that involved the use of eminent domain takings.¹⁴¹ Costco has become so synonymous with the use of eminent domain that one journalist has dubbed it the nation's "Corporate Darth Vader of Eminent Domain."¹⁴² Probably one of the more egregious cases involving Costco involved the Cottonwood Christian Center and the city of Cypress, California.¹⁴³ The city of Cypress attempted to take land, through the use of eminent domain, that had been purchased by Cottonwood Christian Center, a church.¹⁴⁴ It was well-known that the intended beneficiary of the taking would be Costco, whose president — in response to a Wall Street Journal Article on the situation¹⁴⁵ — had the nerve to blame the church for buying the

134. 237 F.Supp.2d 1123 (C.D. Cal. 2001).

135. *Kelo*, 545 U.S. at 487 (citing *99 Cents Only Stores*, 237 F.Supp.2d. at 1123).

136. *99 Cents Only Stores*, 237 F.Supp.2d at 1126.

137. *Id.* at 1129.

138. *Id.* at 1130.

139. See Eagle, *supra* note 71, at 205.

140. See GREENHUT, *supra* note 5, at 192.

141. *Id.*

142. *Id.*

143. *Id.* at 193.

144. *Id.*

145. Editorial, *The First Church of Costco*, WALL ST. J., May 30, 2002, at A14.

land in the first place.¹⁴⁶ It is this type of corporate hubris that makes the government's eminent domain power, especially after *Kelo*, so dangerous to property owners. Even more unfortunate is the fact that it is not only businesses that are at risk, but people's homes as well.

In their dissents in the *Kelo* case, both Justice O'Connor and Justice Thomas mentioned that the inevitable consequence of *Kelo* would be that those with less political and financial influence would be the ones who were disproportionately affected.¹⁴⁷ In *Berman*, ninety-seven percent of the people whose property was taken were poor African-American people.¹⁴⁸ Similarly, in *Poletown*, the neighborhood taken for the building of a General Motors plant was made up almost entirely of elderly, lower income people.¹⁴⁹ The petitioners in *Kelo* may not have been poor, but they certainly were not rich, or, at least, not rich enough to keep the city of New London from finding a more lucrative use for their homes.

On the other hand, based on the wealth at their disposal and their importance to the economic health of a community, private companies have a disproportionate influence over the political process. These private companies, therefore, will benefit most from the *Kelo* decision. In *Poletown*, General Motors, after closing three other facilities, was able to assert pressure on the city of Detroit by promising to build an assembly plant if the city could provide a suitable site.¹⁵⁰ This is an excellent example of the type of disproportionate influence Justice O'Connor warned of in her dissent, where she stated that "the beneficiaries are likely to be those citizens with disproportionate influence and power in the political process, including large corporations and development firms."¹⁵¹ Justice Thomas also supported this argument with the following:

[E]xtending the concept of public purpose to encompass any economically beneficial goal guarantees that these losses will fall disproportionately on poor communities. Those communities are not only

146. *Id.*

147. *Kelo v. City of New London*, 545 U.S. 469, 505 (2005) (O'Connor, J., dissenting) (stating that the beneficiaries will likely be those with greater degrees of political influence); *id.* at 521 (Thomas, J., dissenting) (stating that the losses from this decision are likely to fall on poor communities).

148. *Berman v. Parker*, 348 U.S. 26, 30 (1954).

149. *Kelo*, 545 U.S. at 522 (Thomas, J., dissenting).

150. *Poletown Neighborhood Council v. Detroit*, 304 N.W.2d 455, 469 (Mich. 1981) (Ryan, J., dissenting).

151. *Kelo*, 545 U.S. at 505 (O'Connor, J., dissenting).

systematically less likely to put their lands to the highest and best social uses, but are also the least politically powerful.¹⁵²

The statistics, cited by Justice Thomas in his dissent in *Kelo*, are also startling. They show that the vast majority of people that were displaced by urban renewal projects in the 1950s and 1960s were poor minorities.¹⁵³ It would be naïve to think that these trends would not continue under the Supreme Court's mandate in *Kelo*.

In October of 2005, in *City of Norwood v. Horney*, the Ohio Court of Appeals upheld the ruling of the trial court that the city of Norwood, Ohio rightfully condemned the property of the petitioners because the area in question was "deteriorating."¹⁵⁴ The land in question was to be transferred to a private real estate developer for redevelopment into a large scale retail and residential complex.¹⁵⁵ Much of the Ohio Court of Appeals justification rested on a study, paid for by the private developer after choosing the land needed for the project, that found the area was deteriorating.¹⁵⁶ Amazingly, part of the reason cited in the study for the area's need for redevelopment was the "diversity of ownership," which basically meant that the area should be taken because many people owned their homes and businesses.¹⁵⁷ Thankfully, the Ohio Supreme Court recently ruled that the city of Norwood could not use its power of eminent domain to take the private property of the petitioners.¹⁵⁸ In a ruling that will hopefully set an example for courts throughout the country, the Ohio Supreme Court explicitly rejected the Supreme Courts ruling in *Kelo* and, instead, chose to protect the property rights of individuals.¹⁵⁹

Another case of eminent domain abuse is occurring in Riviera Beach, Florida where the city is attempting to take the property of between 5,000 and 6,000 predominantly black residents so the area can be redeveloped into a multi-billion dollar marina, waterfront retail and

152. *Id.* at 521 (Thomas, J., dissenting).

153. *Id.* at 522 (Thomas, J., dissenting) (citing B. FRIEDEN & L. SAGALAYN, DOWNTOWN, INC.: HOW AMERICA REBUILDS CITIES 17, 28 (1989)).

154. *Norwood v. Horney*, 830 N.E.2d 381, 388 (Ohio Ct. App. 2005).

155. *Id.* at 384-85.

156. Web Release, Institute for Justice, Ohio Supreme Court Hears Eminent Domain Abuse Case (Jan. 10, 2006), http://www.ij.org/private_property/norwood/1_10_06pr.html.

157. *Id.*

158. Web Release, Institute for Justice, Ohio Supreme Court Rules Unanimously to Protect Property from Eminent Domain Abuse (July 26, 2006), http://www.ij.org/private_property/norwood/7_26_06pr.html.

159. *Id.*

residential area.¹⁶⁰ The residents to be displaced were selected because their property was deemed to be “blighted” based on a 2001 survey that has been shown to have a number of holes in it.¹⁶¹ While it is clearly true that a large portion of the homes in Riviera Beach are “blighted,”¹⁶² what is truly remarkable about this case is not whether the homes are blighted, but rather the sheer number of homes subject to condemnation, which is estimated at 2,000.¹⁶³ In fact, this taking could eclipse the largest taking on record — the 1954 taking in the *Berman* case of 5,000, mostly black, residents of Washington, D.C.¹⁶⁴

The statement of Lord Acton, quoted above, seems very fitting in this situation. Since the Supreme Court’s ruling in *Kelo*, the number of new cases where eminent domain is sought to remove lower and middle class people from their property in the name of “economic development” has grown.¹⁶⁵ Thankfully, many state legislatures have responded to *Kelo* by drafting new laws to limit the uses of eminent domain to protect the property rights of individual citizens from takings such as those in *Kelo* and in *Poletown*.¹⁶⁶ Unfortunately, thanks to *Kelo*, these changes will come too late to protect many private citizens from losing the rights and homes.

VII. CONCLUSION

Justice Stevens’s statement that states are permitted to make laws that restrict government uses of eminent domain more stringently than the federal laws shows the Court’s uneasiness with its decision in *Kelo*.¹⁶⁷ By saying this in the majority opinion, it appears as if Justice Stevens is unwilling to stand behind the opinion completely.¹⁶⁸ In other words, the obvious reason for Justice Stevens to take the time to

160. Joyce Howard Price, *Florida City Considers Eminent Domain*, WASH. TIMES, Oct. 3, 2005, available at <http://www.washtimes.com/national/20051003-122623-2136r.htm>.

161. Pat Beall, *Riviera Beach Eminent Domain Case Draws National Spotlight*, PALM BEACH POST, Dec. 11, 2005, available at http://www.palmbeachpost.com/politics/content/local_news/epaper/2005/12/11/c1a_blight_1211.html.

162. *Id.* (“At the time of the 2000 U.S. Census, one out of every four homes in Riviera Beach had three rooms or less, a figure associated with overcrowding. Eighty had no plumbing; 327 had no source of heat at all.”).

163. Price, *supra* note 160.

164. *Id.*

165. See Castle Coalition, Current Controversies, http://www.castlecoalition.org/current_controversies/index.html (last visited Oct. 30, 2006).

166. See *supra* Part IV.

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

168. See Eagle, *supra* note 71, at 208.

emphasize something that any state lawmaker should already know — that the states are permitted to pass any laws not prohibited by the Constitution¹⁶⁹ — is to put the onus on the states. In her dissent, Justice O'Connor voiced her disapproval of this approach by stating the following: "States play many important functions in our system of dual sovereignty, but compensating for our refusal to properly enforce the Federal Constitution (and a provision meant to curtail state action, no less) is not among them."¹⁷⁰

The Supreme Court, in *Kelo*, has done severe damage to the right of citizens to own property, with the inevitable result being that the less privileged members of American society will bare the ultimate brunt of the decision.¹⁷¹ One of the more unfortunate aspects of the *Kelo* decision is that the Court chose to apply federal precedent that was far less analogous to the situation than precedent set in a state court.¹⁷² By doing so, the Supreme Court, in essence, repeated errors that had been committed in the past and later remedied.¹⁷³ Judging by the volume of the public outcry against the decision, it seems that *Kelo* will likely follow the same course as the *Poletown* case. It is sad, however, that by the time the *Kelo* decision is rendered obsolete, whether by judicial or legislative action, many more people of limited means will likely have lost their most dear possession — their home.

Fortunately, there are already many reasons to be hopeful that the Supreme Court's decision in *Kelo* will have only a limited effect on the public as a whole. This is illustrated by the legislative action in a large number of states attempting to curtail government abuse of eminent domain as well as state court cases that will have the same effect.¹⁷⁴

Hopefully, in the future the *Kelo* decision will amount to nothing more than a bad decision that caused a relatively minimal loss of personal property. Unfortunately, it will likely cause state legislators and state judges to waste a great deal of time and effort in rendering *Kelo* obsolete — time that could have been better spent if the Supreme Court had simply chosen to protect individual property rights. Furthermore, the Court would not have had to look far — the Michigan Supreme Court and its ruling in the *Hathcock* case — to find

169. *Id.*

170. *Kelo*, 545 U.S. at 504 (O'Connor, J., dissenting).

171. See *supra* note 4 and accompanying text.

172. See *supra* Part VI.A.

173. See *supra* Part VI.B.

174. See *supra* Part V.

a much better alternative.¹⁷⁵ By reiterating the *Hathcock* ruling, the Court would have been able to uphold all of the federal precedents cited in the *Kelo* opinion, while still protecting personal property rights.¹⁷⁶

Hopefully, with the recent affirmation of Chief Justice Roberts and Justice Alito, the Supreme Court will be infused with a new perspective on the Constitutional validity of the public use clause.

175. *See supra* Part VI.B.

176. *Id.*