Trouble in Fort Trumbull: Using Eminent Domain for Economic Development in *Kelo v. City of New London*

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TABLE OF CONTENTS

I. The Trouble Begins ................................... 547

II. History and Background .............................. 550
   A. History of Eminent Domain .......................... 550
   B. The Development Timeline ........................... 553

III. The Case of *Kelo v. City of New London* .......... 555
   A. The Connecticut Supreme Court Decision .......... 555
   B. The United States Supreme Court Affirms the Connecticut Decision .................................. 556

IV. The Court's Decision in *Kelo* Signals a Further Descent down a Slippery Slope .......................... 558
   A. Further down the Slope ............................... 558
   B. Under Heightened Judicial Scrutiny, the New London Takings *May* be Constitutional .......... 563
   C. Planning for the Future: Avoiding the Implications of *Kelo* in Nebraska ....................... 564
      1. Avoiding *Kelo* Through State Constitutional Interpretation .................................... 565
      2. Avoiding *Kelo* Through Legislative Action .... 568

V. Conclusion ............................................ 573

I. THE TROUBLE BEGINS

A traveler passing through the Fort Trumbull area of New London, Connecticut, in recent years would likely not find it all that notewor-
The area is not home to shiny skyscrapers or fancy hotels. There are few modern architectural designs at which to marvel. Instead, the area is dotted with seemingly “ordinary” single-family homes, apartments, and other structures. While the area may not be as aesthetically pleasing as wealthier or more modern neighborhoods, it is still home to many residents. Some local residents have lived in the same houses for decades. Others have only recently moved to the area but nonetheless have quickly come to appreciate the scenery and proximity to the water. Still others have owned investment properties in the area for several years and have continuously spent time and money on improvements.

As citizens of the State of Connecticut and the United States, these property owners are afforded the constitutional assurance that the government will be precluded from taking their property absent two requirements: the taking is for a “public use” and the owners receive “just compensation” for their property. These constitutional limits imposed upon the government are clearly necessary. Without such restraints, the government could whimsically divest individuals of arguably their most valuable asset. Balanced with this right to freely possess property is the governmental need to acquire land for the purpose of building highways, railroads, and other large-scale public projects. Regardless of the disputes that may erupt concerning the adequacy of monetary compensation for the view enjoyed from one’s front porch or from the comfort of a life-long home, the Founders of this country thought it necessary to afford the sovereign with such power as long as the property was being taken for a public use.

Because the power of the government to exercise eminent domain is confined to public uses, legislators, courts, and scholars have long debated the appropriate interpretation and meaning of the phrase “public use.” Over the course of the twentieth century, interpretation of public use has grown exceedingly broad. The most recent attempt to broaden the meaning of public use has arisen in the context of governmental takings purely for the purpose of economic redevelopment. Illustratively, in January 2000, the City of New London, Connecticut,

1. See infra section II.B.
2. See infra section II.B.
4. Id.
5. U.S. Const. amend. V.
6. See infra section II.A.
7. The issue of what amount of money is “just compensation” has generated a large body of case law and commentary. Such discussion is outside the scope of this Note.
8. See infra note 19 and accompanying text.
acting pursuant to Connecticut law, authorized a development corporation to exercise the power of eminent domain in conjunction with its plan to economically rejuvenate the distressed Fort Trumbull area. The power was to be exercised only if negotiations with property owners proved unsuccessful. Upon the refusal of Susette Kelo and a handful of her neighbors [hereinafter property owners] to accept the development corporation's monetary offers, eviction notices were tacked to their doors the day after Thanksgiving in November 2000.

The property owners sought to enjoin the development corporation from exercising the city's eminent domain powers, claiming that the use of eminent domain would ultimately benefit private entities. Eventually, the United States Supreme Court found the dispute at its doorstep, granting certiorari to the decision of the Connecticut Supreme Court which ruled wholly in favor of the city. On review, the Court upheld the decision, affording great deference to the determination of the Connecticut General Assembly.

This Note illustrates that by affording such a high level of deference to state legislature's determination that economic development is a legitimate public use pursuant to the Takings Clause of the United States Constitution, the Court markedly extended its prior eminent domain precedent and lessened the constitutional rights of individual landowners. These rights have been slowly eroded over the past fifty years, and the Court's decision in Kelo serves as a signal that this erosion will continue indefinitely. As is demonstrated throughout this Note, it is now up to the individual states—either through state constitutional interpretation or legislative action—to counterbalance the Kelo decision and refortify the fundamental right to possess individual property.

Part II of this Note provides a general overview of the progression of eminent domain jurisprudence as well as New London's development plan. Part III presents a detailed factual background of the case of Kelo v. City of New London. Particular attention is paid to the statutory and constitutional analysis applied by the Connecticut Supreme Court as well as the United States Supreme Court. Part IV provides a critical analysis of the Court's majority opinion, revealing a subtle, yet significant departure from its prior precedent when faced with the re-

9. See infra section II.B.
10. See infra section II.B.
14. See infra section III.B.
sponsibility to review the constitutionality of the proposed use of eminent domain. Finally, this Note presents suggestions for reestablishing the rights of individual property owners. A suggestion for heightened judicial review of economic development takings devised by the Michigan Supreme Court in *County of Wayne v. Hathcock*\(^{15}\) is examined as well as state legislative action with a special emphasis on the State of Nebraska and the recent response of the Nebraska Unicameral.

II. HISTORY AND BACKGROUND

While most legal scholars and commentators would likely agree eminent domain is necessary at least to some degree, the debate over the breadth of this power is alive and well. In response to a handful of landmark decisions from the United States Supreme Court, states like Connecticut have enacted statutes giving the government wide discretion in exercising this power.

A. History of Eminent Domain

The Fifth Amendment to the United States Constitution provides in pertinent part that "private property [shall not] be taken for public use, without just compensation."\(^{16}\) Traditionally, the government has exercised this power to further the implementation of projects clearly for use of the public, such as the construction of roads, railways, dams, and other projects providing for public utility.\(^{17}\) The government's retention of this ability is of paramount importance. Without reserving such power in the sovereign, it would be virtually impossible to assemble miles upon miles of contiguous land for the creation of necessary improvements such as the interstate highway system. Regardless of how inclusive or exclusive the drafters of the Constitution intended this power to be, over the last half of the twentieth century, courts became increasingly receptive to a broader interpretation.\(^{18}\) As one commentator noted,

\(^{15}\) 684 N.W.2d 765 (Mich. 2004).
\(^{16}\) U.S. CONST. amend. V.
\(^{18}\) See, e.g., Haw. Hous. Auth. v. Midkiff, 467 U.S. 229 (1984) (finding a valid public use in the transfer of privately held land to other private individuals for the purpose of breaking up a land oligopoly); Berman v. Parker, 348 U.S. 26, 28–29 (1954) (holding a taking of property with the intention of transferring it to a private entity in order to effectuate a blight-clearance plan as a public use); Poletown Neighborhood Council v. City of Detroit, 304 N.W.2d 455 (1981) (hold-
During the twentieth century . . . governments began to employ eminent domain for purposes whose public utility was strained, if not tenuous. This trend has continued until the present, and it is now a rather routine occurrence for the homes and businesses of private citizens to be claimed by the government and transferred to private entities in pursuit of a more efficient use of the land.19

Two landmark decisions from the United States Supreme Court, Berman v. Parker20 and Hawaii Housing Authority v. Midkiff,21 have fueled this expansive understanding and are often used to demonstrate the Court's willingness to afford the phrase a broad interpretation.22 In Berman, the Court was asked to determine whether taking land within an area deemed "blighted" for the purpose of community redevelopment was consistent with the Takings Clause.23 Specifically, the dispute was brought by a business owner who happened to own property within a blighted area tagged for redevelopment although his particular property was not in fact blighted.24 The owner did not object to the rejuvenation of his neighborhood, but contended that since his property was not classified as blighted, he should be able to remain in his present location.25 The Court disagreed, and found that the comprehensive plan developed by Congress was entitled deference. Thus, the Court reasoned, if Congress deemed the removal of all existing structures an integral component of its plan, it was not the Court's place to disagree.26 The Court ultimately found that "attack[ing] the problem of the blighted parts of the community" was clearly a public use according to the Takings Clause regardless of the condition of any individual structure.27

In Midkiff, the issue presented to the Court was whether the taking of individuals' property for redistribution to other citizens in the furtherance of a plan to break up a land oligopoly was a public use

22. See infra notes 23–31 and accompanying text.
24. Id. at 34–36.
25. Id.
26. Id.
27. Id. at 34. See also Thomas W. Merrill, The Economics of Public Use, 72 CORNELL L. REV. 61, 65 (1986) (postulating that if courts insist on affording extreme deference to the ends accomplished by the takings, the courts should at least attempt to evaluate the proposed means by which to achieve those ends).
within the meaning of the Constitution. The Court noted the extreme disparity in land ownership on the various Hawaiian islands along with the well-documented escalating prices of real property. It then determined that since Hawaii’s legislature could have rationally determined that the disputed redistribution scheme would put an end to this situation, it was a valid public use under the takings clauses of the state and federal constitutions. The Court, relying on language from its decision in Berman, found that deference to the state legislature’s plan to rid the state of the “social and economic evils of a land oligopoly” was appropriate and consistent with precedent.

Undeniably, a great number of lower courts have afforded a broad and inclusive interpretation to the phrase “public use” relying on one or both of these landmark decisions. Illustratively, in Poletown Neighborhood Council v. City of Detroit, the Michigan Supreme Court upheld the validity of taking private property for the creation of an automobile assembly plant. The local development corporation that sought to exercise the sovereign’s power of eminent domain predicted a significant increase in tax revenue and jobs for the local community, thus providing relief from economic distress. In upholding the application of the state statute, the court relied upon the United States Supreme Court’s holding in Berman and held that “when a legislature speaks, the public interest has been declared in terms ‘well-nigh conclusive.’” In response to such favorable judicial appraisal of statutes permitting takings for the purpose of economic development, the Connecticut General Assembly enacted legislation providing that similar

28. Haw. Hous. Auth. v. Midkiff, 467 U.S. 229 (1984). The Hawaii Legislature determined that while forty-nine percent of the state’s land was held by the federal and state governments, a group of seventy-two private landowners held forty-seven percent of the remaining land. Id. at 232. Based upon these disparate percentages, the legislature further determined that such a land distribution was wholly responsible for the state’s inflated real estate market. Id.
29. Id.
30. Id. at 241–45.
31. Id. at 241–42. Arguably, the Court’s holding in Midkiff greatly expanded upon its holding in Berman by declaring that eminent domain authority is “coterminous with the scope of a sovereign’s police powers.” Id. at 240. Some commentators have noted that this language from Midkiff provides a virtually unrestrained ability among the states to exercise eminent domain authority. See, e.g., Rachel A. Lewis, Strike That, Reverse It: County of Wayne v. Hathcock: Michigan Redefines Implementing Economic Development Through Eminent Domain, 50 VILL. L. REV. 341, 355–56 (2005) (citations omitted).
33. Id. at 465 (Ryan, J., dissenting).
34. See MICH. COMP. LAWS ANN. § 125.1622 (West 2006) (authorizing municipalities to acquire property by condemnation and to transfer such property to private users in furtherance of essential public purposes such as industrial and commercial development).
35. Poletown, 304 N.W.2d at 459 (quoting Berman v. Parker, 348 U.S. 26, 32 (1954)).
projects, when implemented in accordance with detailed criteria, would be consistent with the limitations delineated by the state and federal constitutions.\(^{36}\) Upon this general background, the City of New London attempted to implement such a project.

**B. The Development Timeline**

The economy of New London, Connecticut, has long been driven by defense contracts with the federal government.\(^{37}\) At the conclusion of the Cold War, the economy of southeastern Connecticut, and in particular New London, plummeted with the massive reduction in defense spending and the decreased need for new vessels of war.\(^{38}\) Thousands of jobs were lost, and the waterfront area, once the center of city economic activity, became vacant.\(^{39}\) In an effort to reinvigorate the local economy and provide the financial support required for redevelopment of the depressed waterfront—specifically the Fort Trumbull area—the Connecticut State Bond Commission authorized the use of bonds in early 1998.\(^{40}\) Shortly thereafter, Pfizer, Inc. announced its plans to build a $270 million global research and development facility on a site adjacent to the Fort Trumbull area, known as New London Mills.\(^{41}\) Envisioning a golden opportunity to redevelop the Fort Trumbull area in concert with Pfizer’s plans, New London city officials sought to designate a ninety-acre area around New London Mills for the construction of several commercial and residential improvements.\(^{42}\)

\(^{36}\) Conn. Gen. Stat. Ann. §§ 8-186 to -200b (West 2006). The declaration of policy provides that the economic welfare of the state depends upon the continued growth of industry and business . . . [and] that permitting and assisting municipalities to acquire and improve unified land . . . and, in distressed municipalities, to lend funds to businesses and industries . . . are public uses and purposes for which public moneys may be expended; and that the necessity in the public interest for the provisions of this chapter is hereby declared as a matter of legislative determination.


\(^{38}\) Id.


\(^{41}\) Id.; see also Gallagher, *supra* note 39, at 1837–38.

\(^{42}\) Laura Mansnerus, *Ties to a Neighborhood at Root of Court Fight*, N.Y. Times, July 24, 2001, at B5. Mr. Mahoney, former director of the New London Development Corporation, conceded that Pfizer representatives were involved in the initial planning stages of the development plan and that plans for a four-star hotel and an upscale housing development were largely driven by the belief that the presence of Pfizer would necessitate such projects. Kelo v. City of New London, No. 557299, 2002 WL 500238, at *38 (Conn. Super. Ct. Mar. 13, 2002), rev’d in part, 843 A.2d 500 (Conn. 2004), aff’d, 125 S. Ct. 2655 (2005). In fact, Pfizer explicitly requested a four-star hotel and conference center. Id.
In accordance with chapters 130, 132, and 588 of the Connecticut Statutes, the City of New London gave approval to a nonprofit development corporation to begin the development of a comprehensive plan.\(^{43}\) The highly detailed plan predicted several advantageous consequences for the community. In the words of the Connecticut Supreme Court, the plan was “projected to create in excess of 1000 jobs, to increase tax and other revenues, and to revitalize an economically distressed city, including its downtown and waterfront areas.”\(^{44}\) More specifically, the court noted that the “plan is expected to generate approximately between: (1) 518 and 867 construction jobs; (2) 718 and 1362 direct jobs; and (3) 500 and 940 indirect jobs.”\(^{45}\) In addition to the increase in jobs, it was estimated that the plan could provide as much as $1,249,843 in tax revenue for the city.\(^{46}\) The plan itself was further organized into seven distinct parcels, with each parcel’s anticipated attributes detailed to a greater or lesser degree of specificity.\(^{47}\)

Despite careful planning, the development corporation still faced the formidable task of juxtaposing the plan over the heart of a nonsymmetrical colonial city.\(^{48}\) Particularly on the East Coast, the centers of many aged urban areas are arranged in seemingly random and complex fashion as a result of several redevelopment and restoration projects dating back to colonial times. Indeed, in New London, the proposed site was comprised of 115 individual land parcels made up of residential and commercial interests owned by numerous individuals.\(^{49}\) Recognizing the inherent difficulty in assembling large contiguous tracts of land for the purpose of community redevelopment, the state legislature had enacted legislation affording the ability of a development corporation to condemn nonblighted land that is “essential to complete an adequate unit of development.”\(^{50}\)

Acting upon the authority granted to it by the legislature, in January 2000, the city approved the development corporation’s plan and granted the corporation the ability to acquire the necessary prop-

\(^{43}\) *Kelo*, 843 A.2d at 508; see also supra note 36 and accompanying text.

\(^{44}\) *Kelo*, 843 A.2d at 507.

\(^{45}\) *Id.* at 510.

\(^{46}\) *Id.* Absent the new development, the entire ninety-acre area had an annual tax revenue of $325,000. *Kelo*, 2002 WL 500238, at *40.

\(^{47}\) *Kelo*, 843 A.2d at 509–10. One of the main arguments presented by the property owners was that parcel 4A of the plan, which encompassed several of their homes, did not provide a definite explanation as to its future use. *Id.* at 569. Indeed, the Court noted that the 2.4 acres that constituted parcel 4A would be used “either to support the adjacent state park, by providing parking or retail services for visitors, or to support the nearby marina.” *Kelo* v. City of New London, 125 S. Ct. 2655, 2659 (2005).

\(^{48}\) An appendix to the court’s opinion provides a map for the area affected by the Fort Trumbull Municipal Development Plan. *Kelo*, 843 A.2d at 603.

\(^{49}\) *Id.* at 509.

After negotiations with several private landowners stalled, the corporation voted to use the power of eminent domain to condemn the properties despite resistance. In November 2000, the corporation filed condemnation proceedings to remove the remaining landowners, and one month later the property owners brought suit against the city challenging its exercise of eminent domain via the development corporation. The property owners represent a diverse group of citizens, some having lived in the same homes since birth, some having recently purchased homes, and others holding property for investment purposes. The property owners alleged the city violated equal protection and due process, and the Superior Court for the Judicial District of New London responded by granting in part their request for a permanent injunction of the proposed plan. All involved parties appealed that decision to the state’s supreme court.

III. THE CASE OF KELO V. CITY OF NEW LONDON

As the case worked its way through the Connecticut Supreme Court and eventually to the United States Supreme Court, many in the legal profession excitedly anticipated a detailed pronouncement from the Court answering the questions left open by its previous decisions concerning eminent domain. Indeed, some scholars tried to predict the course the Court would take.

A. The Connecticut Supreme Court Decision

One of the pivotal issues on appeal to the state supreme court was whether a taking for economic development satisfied the public-use clauses of the state and federal constitutions. Specifically, the property owners argued that economic development could not constitute a

51. Kelo, 843 A.2d at 510.
52. Id. at 510–11.
53. Id. at 511.
55. Kelo, 2002 WL 500238, at *112. The Superior Court denied the taking of property owners’ land in a few specific parcels under which the ultimate use was overly vague and provided a temporary injunction pending resolution of the issues at the appellate level. Id. at *76–77, 112.
56. See, e.g., Buckingham, supra note 19, at 1283 (“[T]he ultimate conclusion of this article is that Kelo will deliver a limitation upon the ability of governments to exercise eminent domain and rein in what has become a nearly unfettered power to condemn private property.”).
public use as a general matter.\textsuperscript{58} In the alternative, they claimed that even if such takings are constitutional, the takings in the instant case were not, especially in the context of parcels 3 and 4A.\textsuperscript{59} Conversely, the city contended that the lower court afforded appropriate deference to legislative determinations that takings for economic development are a valid public use and that the takings in New London were valid examples of such.\textsuperscript{60}

As a matter of first impression, the court agreed with the city and held that "economic development projects created and implemented pursuant to chapter 132 . . . satisfy the public use clauses of the state and federal constitutions."\textsuperscript{61} The court based its decision upon prior state and federal precedent providing that legislative determinations are to be afforded extreme deference by reviewing courts, and that if the state legislature made the determination that certain takings were for a public use, the court had limited authority to intervene to the contrary.\textsuperscript{62} Indeed, the court found substantial assistance from the United States Supreme Court, which had previously held that "if a legislature, state or federal, determines there are substantial reasons for an exercise of the taking power, courts must defer to its determination that the taking will serve a public use."\textsuperscript{63} In its overly thorough opinion, the state supreme court clearly asserted its intention to broadly interpret the state and federal constitutional limitations regarding takings.\textsuperscript{64} The court was not unanimous in this determination; three members advocated for heightened judicial review in their opinion concurring in part and dissenting in part to that of the majority.\textsuperscript{65}

**B. The United States Supreme Court Affirms the Connecticut Decision**

In a 5–4 decision, the United States Supreme Court determined that in light of past precedent on both state and national levels, a broad and inclusive interpretation of what constitutes public use was appropriate.\textsuperscript{66} Thus, it found no error in the analysis employed by the Connecticut Supreme Court. The Court relied heavily on its previous decisions in *Berman v. Parker* and *Hawaii Housing Authority v.*

\textsuperscript{58} Id.
\textsuperscript{59} Id.; see also supra note 47 and accompanying text.
\textsuperscript{60} *Kelo*, 843 A.2d at 520.
\textsuperscript{61} Id.
\textsuperscript{62} Id. at 522–31.
\textsuperscript{63} Id. at 527 (quoting Haw. Hous. Auth. v. Midkiff, 467 U.S. 229, 244 (1984)).
\textsuperscript{64} Id. at 520–21.
\textsuperscript{65} Id. at 587–600 (Zarella, J., dissenting). Specifically, the dissenting justices argued for the adoption of a four-step process which shifts the burden of proof between the involved parties at various stages. Id. at 587.
Midkiff, noting that the broad interpretation of public use reflects the Court's "longstanding policy of deference to legislative judgments in this field."67 In Berman and Midkiff, the Court justified the use of eminent domain for the purposes of blight removal and the destruction of a land oligopoly, respectively.68 Similarly, in Kelo the Court reasoned that the city's desire to economically rejuvenate a distressed area was likewise entitled deference, noting not only its tradition for affording deference, but also its belief that the city's development plan was thoroughly deliberated and was comprehensive in its character.69

The majority also determined that a heightened form of judicial review would be wholly inappropriate and especially disadvantageous in certain situations.70 Specifically, the Court reasoned that "[a] constitutional rule that required postponement of the judicial approval of every condemnation until the likelihood of success of the plan had been assured would unquestionably impose a significant impediment to the successful consummation of many such plans."71 Moreover, Justice Kennedy, in his concurring opinion, asserted that "[a] broad per se rule or a strong presumption of invalidity . . . would prohibit a large number of government takings."72 In sum, the majority found the application of the "rational basis" test to be an appropriate and sufficient safeguard against the taking of property specifically to favor a private party and offering public benefits as a mere pretext.73

The Court concluded its discussion by addressing the fact that the condemnations may impose extreme hardships on the individuals involved.74 In light of this reality, the Court emphasized that individual states are free to impose more stringent regulations on the taking of private land via state judicial refinements, amendments to state constitutions, or through statutory action.75 Since the Court determined that precedent dictated a broad interpretation of the phrase "public

67. Id. at 2663.
68. Midkiff, 467 U.S. at 229; Berman v. Parker, 348 U.S. 26 (1954); see also supra notes 23–31 and accompanying text.
70. Id. at 2667–68.
71. Id. at 2668.
72. Id. at 2870 (Kennedy, J., concurring).
73. Id. at 2667. In the context of takings, the rational basis test provides that a court can only disturb a legislature's determination that a taking is necessary if there is no rational basis for a belief that such a taking will bestow a benefit upon the public. See Ruckelshaus v. Monsanto, 467 U.S. 986, 1015–16 & n.18 (1984). In applying this standard of review, the Court found no such abuses on the part of the Connecticut Legislature in this case. Kelo, 125 S. Ct. at 2667–68.
74. Kelo, 125 S. Ct. at 2668.
75. Id. Indeed, the Michigan Supreme Court has recently limited the ability to take for economic development by overruling its infamous decision in Poletown. See County of Wayne v. Hathcock, 684 N.W.2d 765 (2004); see also infra subsection IV.C.2.
use," the takings at issue before them complied, and thus any application of heightened levels of judicial review would be inappropriate.76

IV. THE COURT’S DECISION IN KELO SIGNALS A FURTHER DESCENT DOWN A SLIPPERY SLOPE

In its majority opinion, the Court reasoned that its conclusion is wholly consistent with the previous decisions of Berman v. Parker and Hawaii Housing Authority v. Midkiff.77 However, a close examination of the opinion in Kelo v. City of New London reveals a subtle departure from the established precedent created by these two decisions, and correspondingly a further erosion of the protection afforded personal property rights under the United States Constitution.

A. Further down the Slope

The progression of the Court’s eminent domain jurisprudence, from Berman v. Parker to Hawaii Housing Authority v. Midkiff, and now to Kelo v. City of New London, presents a good illustration of what is known as a “slippery slope.” The idea that a particular decision, while desirable in and of itself, is objectionable due to the possibility of laying the groundwork for an undesirable extension at some point in the future has long been a concern of judicial scholars.78 This concern, however, is counterbalanced by the realization that one should not evade making a fundamentally sound decision today based solely on speculation of future misapplication.79 This tension is often intensified in the judiciary because judges are bound to apply prior precedent when reaching a decision in any given case. As Professor Eugene Volokh explains in his article The Mechanisms of the Slippery Slope, “[J]udges may well conclude that they should assume that the precedents are morally or empirically sound, at least unless there’s some strong reason to doubt their soundness.”80 Such conclusions may lead to a reluctance to overrule broadly drafted precedent and instead “fit” future decisions within the prior reasoning.81 The result is a gradual expansion and broadening of the justifications initially underlying the first decision, thereby creating a slippery slope.82 This phenomenon is apparent when one traces the Court’s eminent domain jurisprudence from Berman to Midkiff and now to Kelo.

76. Kelo, 125 S. Ct. at 2667-68.
77. See supra notes 66–73 and accompanying text.
79. Id. at 1029–30.
80. Id. at 1098.
81. Id. at 1097–99.
82. Id.
In *Berman*, the Court arguably took the first step down the slope by holding that the Takings Clause did not preclude the government from taking privately held land only to turn it over to a different private entity for the purpose of redevelopment. By refusing to hold that "public ownership is the sole method of promoting the public purposes of community redevelopment projects," the Court set the stage for a slow erosion of personal property rights. In *Midkiff*, the Court continued down the slope, arguably creating a rather significant extension by holding that "[t]he 'public use' requirement is . . . coterminous with the scope of a sovereign's police powers." As previously noted, the Court determined that governmental redistribution of privately held land constituted a public use when the legislature sought to rid the state of a well-entrenched land oligopoly.

In *Berman* and *Midkiff*, the Court delineated a policy of legislative deference as a justification for the government takings at issue. While the decisions reached in *Berman* and *Midkiff* may be desirable in and of themselves, the opinions left the door open for broader future interpretations. Indeed, as Professor Volokh has described, "One of the most common 'A will lead to B' arguments is the argument that judicial decision A would 'set a precedent' for decision B. This generally means that (1) A would rest on some justification J and (2) justification J would also justify B." Moreover, "[a] related legal effect slippery slope may happen when the justification underlying A is vague enough that it could justify B, even if this effect isn't certain."

Applying this reasoning to the Court's eminent domain jurisprudence, the presence of a slippery slope becomes evident. The Court's justification for allowing the exercise of eminent domain in *Berman* and *Midkiff* was removing the social harms of blight and a land oligopoly, respectively. However, the language used to justify these takings was broad enough to open the door to a myriad of interpretations. In *Kelo*, the Court walked through this open door and used the language to justify governmental takings for purely economic reasons. Indeed, the cases are distinguishable as the type of harm sought to be alleviated by the disputed takings in *Berman* and *Midkiff* was qualitatively different than the harm present in *Kelo*. In *Kelo*, there was no harm being inflicted upon society by the current use to which the property

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83. 348 U.S. 26, 33–35; see also supra notes 23–27 and accompanying text.
84. *Berman*, 348 U.S. at 34.
85. See *Buckingham*, supra note 19.
86. 467 U.S. 229, 240. See also supra notes 28–31 and accompanying text.
87. See supra note 28 and accompanying text.
89. Volokh, supra note 78, at 1064 (footnotes omitted).
90. Id. at 1065.
owners put their homes. While the area was classified as "economically distressed," this by no means was a result of any activity of the property owners. In Berman and Midkiff, the "precondemnation use of the targeted property inflicted affirmative harm on society ... [a]nd in both cases, the relevant legislative body had found that eliminating the existing property use was necessary to remedy the harm." Despite this qualitative difference, the justifications underlying the prior precedent were sufficiently vague so as to lay the framework for an extension. As Justice O'Connor succinctly explained in her dissent, this extension provides 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." There appears to be no end it sight to the Court's slide down the slippery slope of eminent domain jurisprudence. With its decision in Kelo, the Court has determined that the public benefit of increased tax revenue falls within the public use requirement of the Fifth Amendment. Justice O'Connor is rightly concerned that if the benefit the public could derive from tax revenue is a public use, the Court is lim-

91. The trial court determined that the property owners' homes, in contrast to the general Fort Trumbull area, "all seem to be in fine condition and many of [the property owners] have spent considerable time and resources in maintaining their property." Kelo v. City of New London, 2002 WL 500238, at *40 (Conn. Super. Ct. Mar. 13, 2002), rev'd in part, 843 A.2d 500 (Conn. 2004), aff'd, 125 S. Ct. 2655 (2005). To the contrary, in Midkiff, the very ownership of the private property at issue is what furthered the land oligopoly. Midkiff, 467 U.S. at 233.


94. Kelo, 125 S. Ct. at 2675 (O'Connor, J., dissenting). At the risk of beleaguerign the point, the Court has progressed from determining that private enterprises removing blight from a downtown area pursuant to a redevelopment plan is a public use (Berman) to determining that redistributing land among private parties to end a land oligopoly is a public use (Midkiff) to most recently determining that a potential for increased tax revenues spurred by private development is a public use (Kelo). There appears to be no end in sight to this erosion.

95. There are many implications to this determination both unaddressed by the Court and outside the scope of this Note. Examples include the following: How much of an increase in tax revenue is needed for the "public benefit" threshold to be crossed? Should this benefit be counterbalanced by the cost of the displacement of the previous residents? And finally, Is there any disparity between the price the government entity paid for the land versus the price for which the land was sold to the private enterprise that must be recouped before any benefit is actually recognized? These are just a few of the potential issues necessarily raised by the Court's decision.
ited only by the imaginations of its members as to what else may be determined a public use in the future.

One could argue that Kelo is consistent with past decisions because the Court simply deferred to a local legislative judgment.96 Whether it be the judgment of the legislature that eminent domain should be invoked to remove blight, break up a land oligopoly, or cure economic distress, the Court is in all cases merely upholding a reasonable determination by the legislature. Indeed, the oft-cited language from Berman provides that when a legislature has spoken, as long as its proclamation is rational, the federal judiciary is not the appropriate place to debate such a determination.97 However, even though it is appropriate for the Court to afford deference to legislative determinations, it is likewise appropriate that the Court retain its role in "reviewing a legislature's judgment of what constitutes a public use."98

Such review was appropriately applied in Berman and Midkiff where the Court twice found that even though private parties would ultimately benefit from the forced transfer of property, the public would still receive the essential benefit since the takings effectuated the removal of something detrimental. It is well established that the question of whether a proposed taking is truly for a public use is one for the judiciary to analyze, and this analytical power is indeed necessary to maintain constraints on the government's use of eminent domain.99

The Court noted that if it were to be confronted with a situation where a private party was clearly the primary beneficiary of a government-authorized taking, it would not pass constitutional muster.100 While this language is rampant throughout the Court's opinion, in actuality, it will likely prove exceedingly difficult to enforce.101 In the context of takings for the purpose of economic development it may serve as no limitation whatsoever. As Justice O'Connor noted, "The

96. Indeed, "[i]n the absence of some constitutional or statutory provision to the contrary, where the use for which property is sought to be taken under the power of eminent domain is public, the necessity, expediency, or propriety of exercising the power ordinarily is a legislative or political, and not a judicial, question." 29A C.J.S. Eminent Domain § 62 (2006) (citing Rindge Co. v. L.A. County, 262 U.S. 700 (1923); Joslin Mfg. Co. v. City of Providence, 262 U.S. 668 (1923)).
97. Kelo, 125 S. Ct. at 2663–68; see also supra section III.B.
98. Kelo, 125 S. Ct. at 2674 (O'Connor, J., dissenting); Midkiff, 467 U.S. at 240; Berman v. Parker, 348 U.S. 26, 32 (1954).
99. See Kelo, 125 S. Ct. at 2674 (O'Connor, J., dissenting); Cincinnati v. Vester, 281 U.S. 439, 446 (1950).
100. Kelo, 125 S. Ct. at 2661–63. The Court again premises this statement on the rational basis test, holding that as long as the legislative body providing the taking power could have rationally believed that such a plan was for a public purpose, it is not the Court's duty to interfere.
101. See Volokh, supra note 78, at 1093 (contending that judges concerned with the possibility of a decision being extended beyond its justifications could alleviate this problem by making their justifications explicit in their opinions or by providing detailed examples of when an application would not be appropriate).
trouble with economic development takings is that private benefit and incidental public benefit are, by definition, merged and mutually reinforcing." If the legislature is only required to believe that there could be a rational purpose to effectuate a taking, it strains the imagination to come up with a situation (absent the blatant and absurd examples) which would not be "rational." It seems to follow logically from the Court's opinion that "[n]othing 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" since each of these would rationally create more tax revenue and jobs, and thereby potentially "benefit" the public.

Despite writing for the losing side of the 5-4 opinion, Justices O'Connor and Thomas have subsequently found some support for their positions from an unusual source. In a remarkably candid moment, Justice John Paul Stevens, the author of the Court's opinion in *Kelo*, has since announced his personal views regarding the case. Seemingly struggling with the views expressed in the dissenting opinions of Justices O'Connor and Thomas, Justice Stevens was quoted as saying that he personally thought the decision was imprudent, but that he "was convinced that the law compelled a result that [he] would have opposed if [he] were a legislator." While Justice Stevens surely made the point that he remains faithful to his idea of interpre-


103. See Gallagher, *supra* note 39 (providing a comprehensive analysis of individual states that have decided the constitutionality of using eminent domain to effectuate economic development).

104. *Kelo*, 125 S. Ct. at 2676 (O'Connor, J., dissenting). Justice Thomas, in his dissent, further emphasized the absurdity of "affording almost insurmountable deference to legislative conclusions" by drawing a relation to the Court's review of abuses concerning other sections of the Bill of Rights. *Kelo*, 125 S. Ct. at 2684 (Thomas, J., dissenting). For instance, Justice Thomas opined that the Court would not defer to a legislature's determination of the various circumstances that establish, for example, when a search of a home would be reasonable, or when a convicted double-murderer may be shackled during a sentencing proceeding without on-the-record findings, or when state law creates a property interest protected by the Due Process Clause. *Id.* (citations omitted). Pointedly, affording such deference in the context of governmental takings is inconsistent with established precedent, and indeed, the quintessential purpose of the Court. See Volokh, *supra* note 78, at 1100 (noting that judges "may want to be concerned when crafting their proposed tests" so that a decision they intended to rest on a limited principle is not later interpreted as supporting a much broader principle).


106. *Id.* Prior to these statements by Justice Stevens, the Court announced its decision to deny a rehearing of the *Kelo* controversy. See Eminent Domain Denied Rehearing, *Lincoln J. Star*, Aug. 23, 2005, at 4A.
ination, his statements likely offer no consolation to the property owners evicted from their homes in New London.

B. Under Heightened Judicial Scrutiny, the New London Takings May be Constitutional

Had the Court simply applied the holdings of *Berman v. Parker* and *Hawaii Housing Authority v. Midkiff* to the factual context of *Kelo* rather than further extending the level of legislative deference afforded, it is debatable whether the takings at issue were in accordance with the Constitution. The Court generally has a responsibility to serve as a final check on the propriety of state laws that may impinge on the constitutional rights of citizens. The Connecticut Constitution, similar to that of the United States, provides that “[t]he property of no person shall be taken for public use, without just compensation therefor.” In order to streamline the process of redeveloping distressed areas throughout the state, the legislature enacted a series of laws that brought economic development projects within the purview of public use. Despite great debate over whether such takings are truly for public use, the Court deferred to the legislature and effectively rubber-stamped the statute as constitutional.

Many commentators, as well as the Court in *Kelo*, have recognized that a bright-line proscription of takings for economic development paints too broad a stroke. However, the Court’s decision to approve the legislature’s determination with almost no review tips the scales too far in the other direction. Some sort of middle ground must be reached in order to maintain the necessary limitations placed upon the government’s ability to exercise its power of eminent domain. Noting the sensitive nature of economic development plans and the multitude of variables in each specific plan, one commentator has suggested a nonexhaustive list of factors that should be examined by a reviewing court. The desired end product in *Kelo*—a revitalized economy for

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107. *See generally* Keystone Bituminous Coal Ass’n *v.* DeBenedictis, 480 U.S. 470, 481 n.10 (1987) (stating in dicta that the restriction on taking of public property for public use without just compensation is made applicable to the states through the Fourteenth Amendment).


111. *Id.* (rejecting the “bright-line rule that economic development does not qualify as a public use”); *see also* Joseph J. Lazzarotti, *Public Use or Public Abuse*, 68 UMKC L. Rev. 49, 68–74 (1999) (offering several alternatives to a bright-line rule deciding the public-use issue in a per se manner).

112. Lazzarotti, *supra* note 111, at 68. Lazzarotti’s list includes such things as the project’s goals, the project’s probable success, the existence of alternatives “which are less intrusive on property rights,” whether a “disproportionate burden” could fall on the condemnees, the extent of the private benefits to be conferred, “the
New London—is clearly a valid goal. However, no matter how valid or exceptional the end goal appears, the judiciary still has the obligation to serve as a check on the means being employed to accomplish that end.\textsuperscript{113} If this check is removed, there is literally no limit to what will pass constitutional scrutiny.\textsuperscript{114} Thus, in the absence of any meaningful review or limitations hereinafter adopted by the Supreme Court, other avenues by which to reimpose the necessary restrictions on the government's ability to exercise the power of eminent domain must be developed.

C. Planning for the Future: Avoiding the Implications of \textit{Kelo} in Nebraska

While the United States Supreme Court is the ultimate interpreter of the United States Constitution, individual state courts are still free to interpret their state constitutions as affording greater protections for their citizens.\textsuperscript{115} As the United States Supreme Court continues to erode the constitutional boundaries of eminent domain, it is now up to the individual states to refortify those boundaries. This can conceivably be accomplished via any of the following courses of action: (1) providing greater constitutional rights under individual state constitutions through narrow interpretation of eminent domain powers; (2) the adoption of constitutional amendments; or (3) modifying state statutes via legislative action. In order to correctly ascertain the appropriate course, one must first discern what limitations or express grants of power a given state's constitution and statutes provide.

\textsuperscript{113} See McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 421 (1819). In the landmark case upholding Congress's ability to incorporate a national bank, the Court famously noted, "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consistent with the letter and spirit of the constitution, are constitutional." \textit{Id.}

\textsuperscript{114} See supra note 104 and accompanying text.

\textsuperscript{115} The United States Constitution serves as a floor on individual rights, below which a state cannot traverse. \textit{See generally} Michigan v. Long, 463 U.S. 1032 (1983) (holding that if a state court bases its interpretation of a provision found in both the state and federal constitutions upon adequate state grounds the United States Supreme Court has no right to review the decision).
1. Avoiding Kelo Through State Constitutional Interpretation

The Nebraska Constitution provides that "[t]he property of no person shall be taken or damaged for public use without just compensation therefor."116 The similarity of the Nebraska takings clause to that in the United States Constitution necessarily suggests that if presented with the issue of deciding the constitutionality of exercising the power of eminent domain to effectuate an economic development plan, the Nebraska Supreme Court could rely upon Kelo to approve such a plan. Indeed, without adjustments to the state constitution or statutes explicitly precluding the exercise of eminent domain in the context of economic development, the only thing that would prohibit the Nebraska Supreme Court would be its own jurisprudence and a desire to distinguish its interpretation of the Nebraska Constitution from that of the United States Constitution.117

The Nebraska Supreme Court has not had the opportunity to review the constitutionality of utilizing eminent domain for the purpose of economic development. However, language found in several of the court's opinions indicates its willingness to retain the judicial function of determining what constitutes a public use.118 To be sure, oft-cited language from the court's decision in Burger v. City of Beatrice provides that "it is essential that a use under the power of eminent domain must be a public use, and whether or not the use is public or private is a judicial question and not a legislative one."119 In a recent decision, the court maintained its position that it will ensure that the statutory and constitutional requirements for the use of eminent domain are met, holding "[t]he power of eminent domain must be exercised 'in strict accordance with its essential elements in order to protect the constitutional right of the citizen to own and possess property against an unlawful perversion of such right.'"120

If an issue factually similar to that presented in Kelo were to come before the Nebraska Supreme Court it would be a matter of first impression. Therefore, the court is in an advantageous position and has the ability to learn from the trials and errors of other state supreme courts already confronted with such issues. Recent case law from the Michigan Supreme Court provides a good source of guidance for Nebraska and other states faced with the decision of how to balance per-

117. See supra note 115 and accompanying text.
119. Burger, 181 Neb. at 217, 147 N.W.2d at 788.
personal property rights with the sovereign's interest in exercising its power of eminent domain.

In order to appreciate recent holdings from the Michigan Supreme Court, it is necessary to review the precedent that was overruled. In its 1981 landmark decision of *Poletown Neighborhood Council v. City of Detroit*, the Michigan Supreme Court deferred to a legislative finding and held that the city's transfer of property to General Motors for the purpose of economic development satisfied the public-use requirement of the state constitution.\(^1\) Under the plan, the city projected that the new plant General Motors planned to build would provide 6,150 jobs and millions of dollars in tax revenue, thus easing the economic distress of the local community.\(^2\) Despite these grandiose projections, the development plan grossly failed to live up to expectations.\(^3\) Partly in light of this failure, the Michigan Supreme Court reviewed the appropriateness of affording such a high level of deference to a legislative determination twenty-three years later in *County of Wayne v. Hathcock*.\(^4\)

In *Hathcock*, the issue before the court was whether a proposed economic development plan designed to supplement the renovation of the Detroit Metropolitan Wayne County Airport was a valid public use.\(^5\) After determining that the proposed plan satisfied the statutory requirements necessary to effectuate the taking, the court then turned to the constitutional analysis, which ultimately led the court to overrule its decision in *Poletown*.\(^6\) Rather than rejecting the validity of exercising the power of eminent domain for economic development as a fundamental matter, the court provided an analytical framework under which to review such proposals. The court delineated three criteria which must be met in order for a transfer of condemned property to a private entity to be appropriate:

1. where "public necessity of the extreme sort" requires collective action; 2. where the property remains subject to public oversight after transfer to a private entity; and 3. where the property is selected because of "facts of independent public significance," rather than the interests of the private entity to which the property is eventually transferred.\(^7\)

The court subsequently found that the proposed development plan did not present an appropriate situation for the exercise of eminent

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2. *Id.* at 467 (Ryan, J., dissenting).
6. *Id.* at 787.
7. *Id.* at 783. See also Lewis, *supra* note 31, at 365–70 (providing an analysis of these three situations).
domain. Additionally, the court noted that the only authority upon which the county based its argument was that of the majority opinion in Poletown, and as such, the court overruled its infamous 1981 decision to the extent that it was inconsistent with Hathcock.

The decision by the Michigan Supreme Court in Hathcock provides great guidance for other states faced with determining the constitutionality of takings for economic development. Not only does the test delineate a plausible way to evaluate the constitutionality of such takings, it also addresses the difficulties presented by blatantly relying on legislative determinations that public benefits will be forthcoming from a government taking.

Indeed, applying the Hathcock test to the factual context of Kelo could have very well changed the outcome of the case. First of all, the existence of a "public necessity of the extreme sort" requiring collective action is questionable. As previously mentioned, the New London area was "economically distressed," but whether or not this situation was so extreme as to require collective action via eminent domain is debatable. Regardless, such a discussion would have been highly relevant and it undeniably would have provided at least some justification for a decision that has become one of the most controversial of the 2004 Term.

The second part of the Hathcock test, continued oversight of the use of the property, potentially could be satisfied in this situation. The record is replete with references to the ability of the city to recapture the property if not used in accordance and furtherance of the development plan. Moreover, the Connecticut statutes permitting the use of eminent domain for economic development stipulate that the submitted proposal must contain an "administrative plan" and if the plan is substantially modified, such modification needs to be approved by the legislature.

Finally, the third element of the Hathcock test as applied to Kelo could be equally as controversial as the first. The question of whether the property was selected to further the interests of private parties such as Pfizer and Corcoran Jennison or for other facts of public sig-

128. Hathcock, 684 N.W.2d at 783-84.
129. Id. at 787.
130. See supra note 123 and accompanying text.
131. See Mansnerus, supra note 42.
132. See, e.g., David G. Savage, Ascendant Stevens, A.B.A. J., Aug. 2005, at 52, 52-53 (stating that Kelo was the most controversial decision of the term).
significance is contentious. An extensive inquiry into whether private parties were truly the primary beneficiaries of the takings in the context of the Hathcock test could have served to provide much needed support for the Court's opinion in Kelo.

Looking retrospectively at its decision in Poletown, the Michigan Supreme Court concluded that it had chartered the wrong course. It had opened the door to the abuse of the limits placed on the exercise of eminent domain as forewarned by Justice Ryan in his dissent in Poletown. States that have yet to rule on the constitutionality of governmental takings for the purpose of economic development can greatly benefit from the Michigan court's realization that such takings ought to be examined under greater scrutiny. Furthermore, the test adopted by the Michigan court could prove to be a means by which to reestablish the rights of individual land owners absent legislative action.

2. Avoiding Kelo Through Legislative Action

Given the fact that five of the members of the Kelo Court chose to defer to the local legislature, effectively eroding personal property rights, some citizens may be uncomfortable with the prospect of leaving their property rights subject to judicial interpretation. Notwithstanding the Nebraska Supreme Court's past intention to provide review of a legislative determination of what constitutes a public use and to ensure that the requirements for the exercise of such power have been met, the court is not currently precluded from determining that a proposed economic development plan is a constitutional public use. Thus, if the citizens of the State of Nebraska are concerned that a scenario similar to that which played out in New London could manifest itself in Scottsbluff or Omaha, action can be taken in the state legislature to either revise the current statutory situation or to provide the opportunity for citizen approval of a constitutional amend-


138. The point is simply that the court's prior decisions have not addressed the issue of economic development takings, and if faced with one in the future, the court could well decide that such a taking is for a public use. With its decision in Kelo, the Court lowered this floor and thus the Nebraska Supreme Court is free to "sink" that far as well.
Indeed, this is the exact remedy suggested by the Court in *Kelo*.

An amendment to the state constitution could theoretically be as broad or as narrow as the legislature desires so long as it provides more protection than the Federal Constitution. Quite simply, the state constitution could be amended by adding language to the takings clause stipulating that private economic development is not sufficient to constitute a public use. In the wake of *Kelo*, a state senator from California, Tom McClintock, proposed an amendment to the California Constitution that effectively prohibits the use of eminent domain for the benefit of private parties under any circumstance. In the preamble to the proposed amendment, Senator McClintock asserts that although *Kelo* effectively permits the transfer of private property to other private entities for profit under the United States Constitution, *Kelo* does not require a reciprocal grant of power be permitted by California's constitution. The proposed amendment specifically provides that property taken for the benefit of private entities is not a public use and would undeniably provide far greater protection to individual property rights in the State of California than are afforded...

139. Within two months of the Court's decision in *Kelo*, more than seventy bills had been introduced by legislators in twenty-eight states. At least five states had legislators mobilizing support for constitutional amendments, others introduced bills completely precluding the use of eminent domain for private purposes, and others, including Connecticut, introduced bills to tighten eminent domain procedures. Tresa Baldas, *States Ride Post-'Kelo' Wave of Legislation*, NAT'L L.J., Aug. 1, 2005, at 1. In the United States Congress, House Bill 4128 was overwhelmingly passed in the House of Representatives by a vote of 376–38 on November 3, 2005. The bill would prevent the federal government from exercising eminent domain powers for economic development and would deter states from doing so as well by cutting off federal economic development funds to a "violating" state for two fiscal years. Jim Abrams, *House Moves to Counter Supreme Court's 'Kelo' Decision*, LAW.COM, Nov. 4, 2005, http://www.law.com/jsp/article.jsp?id=1131012310814&rss=newswire.

140. *Kelo* v. City of New London, 125 S. Ct. 2655, 2668 (2005) ("We emphasize that nothing in our opinion precludes any State from placing further restrictions on its exercise of the takings power. Indeed, many States already impose 'public use' requirements that are stricter than the federal baseline. Some of these requirements have been established as a matter of state constitutional law, while others are expressed in state eminent domain statutes that carefully limit the grounds upon which takings may be exercised.").

141. Eight states—Alabama, California, Florida, Louisiana, Michigan, New Jersey, Ohio, and Texas—have "currently proposed or are drafting [state] constitutional amendments prohibiting the use of eminent domain for private development." Baldas, *supra* note 139.


143. *Id.*
under the current interpretation of the United States Constitution as illustrated by *Kelo*.\(^{144}\)

While public support could likely be found for this type of expansive limitation in a conservative state such as Nebraska, there are advantages and disadvantages of implementing such a broad prohibition. Notably, this type of amendment may be pushing the debate to the extreme as there could conceivably be *some* factual context in which the use of eminent domain may be necessary to effectuate a development plan that incidentally benefits private parties.\(^{145}\) As previously mentioned, a black-and-white rule either permitting or prohibiting the use of eminent domain for economic development purposes could be too broad of a stroke.\(^{146}\) Moreover, whether good or bad, an amendment to the constitution, when weighed against statutory enactments, is the more permanent of the two options.\(^{147}\) Indeed, in light of these concerns, statutory modification has proven the more popular alternative for several states, including Nebraska, in the wake of *Kelo*.

Illustratively, just over one month after the Court's decision in *Kelo*, a Michigan legislator decided that statutory modification was appropriate.\(^{148}\) Michigan Representative Aldo Vagnozzi's amendment to the Michigan eminent domain statutes provides that "[a] taking of private property . . . is not considered to be for the use or benefit of the public if the property is transferred to a private entity for the primary benefit of the private entity."\(^{149}\) This language is not as sweeping as that proposed by Senator McClintock of California because the language only prohibits transfer in the case of the private entity receiving the *primary* benefit of the taking. Notably, broad language may not be needed in Michigan as the state's supreme court has already decided that takings for economic development benefiting private parties necessitate a higher level of review.\(^{150}\) Indeed, the test adopted by the Michigan Supreme Court in *Hathcock* provides additional safeguards to the bare language of the Michigan Constitution, arguably obviating the need for a state constitutional amendment.\(^{151}\)


\(^{145}\) See supra notes 110–12 and accompanying text.

\(^{146}\) See supra notes 110–12 and accompanying text.

\(^{147}\) In addition to being more permanent, the constitutional amendment process is generally more lengthy than statutory enactments. Thus, other potential factors such as the discouragement of development projects already under way and waning public support as anger over *Kelo* subsides will likely be important considerations for legislators as well.


\(^{149}\) *Id.*

\(^{150}\) See supra subsection IV.C.1.

\(^{151}\) See supra subsection IV.C.1.
Similarly, the Nebraska Unicameral has also responded quickly to *Kelo*. As early as August 2005, state senators were reportedly “considering legislative proposals that would tighten the definition of blight, compensate displaced business owners for lost income, and help move buildings to another site.”\(^{152}\) Legislative Bill 924 eventually worked its way through the Unicameral and was signed by Governor Dave Heineman on April 13, 2006.\(^{153}\) The amendments to the Nebraska statutes are clearly aimed at mitigating the effects of *Kelo* within Nebraska, but there could still be some interpretation issues as the law is applied in the future.

The new law amends the general eminent domain statutes of Nebraska, in part by inserting the following language:

Sec. 2. (1) A condemner may not take property through the use of eminent domain . . . if the taking is primarily for an economic development purpose. (2) For the purposes of this section, economic development purpose means taking property for subsequent use by a commercial for-profit enterprise or to increase tax revenue, tax base, employment, or general economic conditions.\(^{154}\)

The law goes on to provide seven situations in which this new addition will not affect the use of eminent domain, such as “[p]ublic projects or private projects that make all or a major portion of the property available for use by the general public,”\(^{155}\) projects aimed at eliminating “an immediate threat to public health and safety,”\(^{156}\) and takings “based upon a finding of blighted or substandard conditions under the Community Development Law if the private property is not agricultural land or horticultural land.”\(^{157}\)

These exceptions to the general proscription of the use of eminent domain for an “economic development purpose” could shift the argument to another arena. For instance, one of the exceptions noted

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154. *Id.* § 2.

155. *Id.* (to be codified at NEB. REV. STAT. § 76-710.04(3)(a)).

156. *Id.* (to be codified at NEB. REV. STAT. § 76-710.04(3)(b)).

157. *Id.* (to be codified at NEB. REV. STAT. § 76-710.04(3)(g)).
above turns on "all or a major portion" of the property being available to the general public. This begs the question of what will constitute a "major portion." A similar question could present itself regarding the level of immediateness required for there to be "an immediate threat to public health and safety." While these matters may seem trivial at this juncture, industrious municipalities and developers could attempt to circumvent the intent of the Unicameral's action by careful drafting and planning of redevelopment projects.

The final potential pressure point to be noted is the exception concerning Nebraska's Community Development Law. Nebraska law has long included a Community Development Law, which generally provides for the creation of redevelopment authorities for the purposes of, among other things, "eliminating, remedying, or preventing" blighted and substandard areas with a low probability of improvement, and to salvage "substandard and blighted areas [that] can be conserved and rehabilitated through appropriate public action."^158 The ability of an established authority to exercise the power of eminent domain is expressly contingent upon the local municipality first making the declaration that the area is either "substandard" or "blighted."^159 Thus, a pressure point could exist if local municipalities attempt to massage the statutory definitions of "substandard" and

^158. NEB. REV. STAT. § 18-2102 (Reissue 1997).

^159. Id. § 18-2109. The Community Development Law defines "substandard" as:

[A]n area in which there is a predominance of buildings or improvements . . . which, by reason of dilapidation, deterioration, age or obsolescence, inadequate provision for ventilation, light, air, sanitation, or open spaces, high density of population and overcrowding, or the existence of conditions which endanger life or property by fire and other causes, or any combination of such factors, is conducive to ill health, transmission of disease, infant mortality, juvenile delinquency, and crime . . . and is detrimental to the public health, safety, morals, or welfare[.]

Id. § 18-2103(10). Additionally, "blighted" is defined as:

[A]n area, which (a) by reason of the presence of a substantial number of deteriorated or deteriorating structures, existence of defective or inadequate street layout, faulty lot layout . . . insanitary or unsafe conditions, deterioration of site or other improvements, diversity of ownership, tax or special assessment delinquency exceeding the fair value of the land, defective or unusual conditions of title, improper subdivision or obsolete platting, or the existence of conditions which endanger life or property by fire and other causes . . . substantially impairs . . . the sound growth of the community . . . or constitutes an economic or social liability and is detrimental to the public health, safety, morals, or welfare in its present condition and use and (b) in which there is at least one of the following conditions: (i) Unemployment . . . at least one hundred twenty percent of the state or national average; (ii) the average age of the residential or commercial units in the area is at least forty years; (iii) more than half of the plotted and subdivided property in an area is unimproved land that has been within the city for forty years and has remained unimproved during that time; (iv) the per capita income of the area is lower than the average per capita income of the city or village in which the area is des-
“blighted” so as to bring projects for economic development within their purview.

As long as the modifications to the general eminent domain statutes provided by Legislative Bill 924 remain in force in Nebraska, the Nebraska Supreme Court will not be faced with the same issue as that before the Connecticut Supreme Court—namely, whether or not a taking for an economic development purpose is permissible. However, an issue concerning the interpretation of the new Nebraska laws could very well present itself. It will then once again be in the hands of the judiciary to determine the limitations of the exercise of eminent domain, and ultimately, the rights of individual property owners.

V. CONCLUSION

The Court's decision in Kelo v. City of New London represents a further erosion of arguably the quintessential purpose of the Court: the protection of the individual rights of citizens, specifically the right to possess and enjoy personal property. While various decisions by the Court over the course of this century have methodically chipped away at the limitations imposed by the Takings Clause of the Constitution, the Court's decision in Kelo is an indication that there is no end in sight.

While the Court should generally afford a level of deference to legislative determinations, this deference should not come at the expense of sacrificing individual rights. The Court serves as the final check on the constitutionality of any law enacted by the legislative branches of government, and if the Court effectively “punts” by refusing to critically examine the constitutionality of a given law, this important check is negated. While the Court insists that there are instances in which a taking would be in violation of the Constitution regardless of its holding in Kelo, it fails to provide a decipherable test as to when such a situation would present itself (other than the blatantly obvious circumstances, in which context a law would likely never be passed).

If the Court had merely applied its prior precedent rather than extending it, the takings at issue may still have passed constitutional muster. However, the fact remains that the Court slid further down the slope of its eminent domain jurisprudence by refusing to apply any form of heightened review—a review that could have provided some framework upon which the Court could defend its decision. New London's desire to revitalize its depressed economy and take advantage of the situation created by the presence of Pfizer is surely a worthy goal to strive toward. However, no matter how valid or desirable

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Ignated; or (v) the area has had either stable or decreasing population based on the last two decennial censuses. . . .

Id. § 18-2103(11).
the end may be, the means by which that end is accomplished are not automatically legitimate. New London's development plan, no matter how closely it tracked the requirements provided in Connecticut's eminent domain statutes, should still have been subject to review by the Court to ensure the constitutional rights of the property owners were not impaired.

Since the limits upon what constitutes a public use under the Federal Constitution have been extended to the realm of the public benefit of increased tax revenue, it is now up to the individual states to reestablish the crucial right to use and enjoy property free from the fear of unnecessary government interference. Given the fact that the Court has clearly established that the Federal Constitution provides an exceptionally low floor for this right under which states can not traverse, it is now upon the states to provide greater protection. This protection can be achieved via narrow interpretation of existing state constitutions by adopting a test such as that provided by the Michigan Supreme Court in *County of Wayne v. Hathcock* or fortifying them with amendments. Should state legislators not find the required support for all-encompassing constitutional amendments negating the effects of *Kelo*, there exists the potentially more viable option of statutory modification such as that recently signed into law in Nebraska.

Regardless of the action taken by individual states in the wake of *Kelo*, the fact remains that something needs to be done in order to avert the potential ramifications of the United States Supreme Court's continued slide down a slippery slope of its own devise. The exercise of the government's power of eminent domain should not be proper merely because the legislature says it is, but rather if proper, it should be because such an exercise of power is constitutionally permitted.

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