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## Imminent Change: A Recommended Response for Missouri in the Wake of the Supreme Court's Eminent Domain Decision in *Kelo v. City of New London*

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**IMMINENT CHANGE: A RECOMMENDED RESPONSE FOR  
MISSOURI IN THE WAKE OF THE SUPREME COURT'S EMINENT  
DOMAIN DECISION IN *KELO* v. *CITY OF NEW LONDON***

I. INTRODUCTION

“A man’s home is his castle,”<sup>1</sup> but not if his municipality wants to build a Wal-Mart. An individual’s home holds a unique place in United States jurisprudence.<sup>2</sup> It is protected from a myriad of intrusions,<sup>3</sup> but it appears it is not protected from the almighty dollar. The power of eminent domain is granted to the federal government through the Fifth Amendment and to local state governments through their own respective constitutional provisions.<sup>4</sup> In particular, the Fifth Amendment establishes that an individual’s private property will not be taken from him and put to public use unless just compensation is paid.<sup>5</sup> The Takings Clause is a very small notation in our Constitution, but recently its interpretation has sparked enormous scholarly

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

2. *See Payton v. New York*, 445 U.S. 573, 601 (“[N]either history nor this Nation’s experience requires us to disregard overriding respect for the sanctity of the home that has been embedded in our traditions since the origins of the Republic.”).

3. *See, e.g., Kyllo v. United States*, 533 U.S. 27 (2001) (home is protected from thermal imaging); *Frisby v. Shultz*, 487 U.S. 474 (1988) (home is protected from residential picketing); *FCC v. Pacifica*, 438 U.S. 726 (1978) (home is protected from the broadcast media).

4. *See* ALA. CONST. art. I, § 24; ALASKA CONST. art. I, § 18; ARIZ. CONST. art. II, § 17; ARK CONST. art. II, § 22; CAL. CONST. art. I, § 19; COL. CONST. art. II, §§ 14-15; CONN. CONST. art. I, § 11; DEL. CONST. art. I, § 8; FLA. CONST. art. X, § 6; GA. CONST. art. I, § 3, P 1; HAW. CONST. art. I, § 20; IDAHO CONST. art. I, § 14; ILL. CONST. art. I, § 15; IND. CONST. art. I, § 21; IOWA CONST. art. I, § 18; KAN. CONST. art. XII, § 4; KY. CONST. § 13; LA. CONST. art. I § 4; ME. CONST. art. I, § 21; MD. CONST. art. III, §§ 40-40A; MASS. CONST. pt. I, art. X; MICH. CONST. art. X, § 2; MINN. CONST. art. I, § 13; MISS. CONST. art. III, § 17; MO. CONST. art. I, §§ 26-28; MONT. CONST. art. II § 29; NEB. CONST. art. I, § 21; Nev. CONST. art. I, § 8; N.H. CONST. pt. 1, art. 12; N.J. CONST. art. I, P 20; N.M. CONST. art. 2, § 20; N.Y. CONST. art. I, § 7; N.C. CONST. art. I, § 19; N.D. CONST. art. I, § 16; OHIO CONST. art. I, § 19; OKLA. CONST. art. II, §§ 23-24; OR. CONST. art. I, § 18; PA. CONST. art. I, § 10; R.I. CONST. art. I, § 16; S.C. CONST. art. I, § 13; S.D. CONST. art. VI, § 13; TENN. CONST. art. I, § 21; TEX. CONST. art. I, § 17; UTAH CONST. art. I, § 22; VT. CONST. ch. I, art. 2; VA. CONST. art. I, §§ 6, 11; WASH. CONST. art. I, § 16; W. VA. CONST. art. III, § 9; WIS. CONST. art. I, § 13; WYO. CONST. art. I, §§ 32-33.

5. *See* U.S. CONST. amend. V (“[N]or shall private property be taken for public use, without just compensation.”). That Clause is made applicable to the States by the Fourteenth Amendment. *See Chicago, Burlington & Quincy R.R. Co. v. Chicago*, 166 U.S. 226 (1897).

debate throughout the country.<sup>6</sup> At the center of this debate is the Supreme Court's decision in *Kelo v. City of New London*.<sup>7</sup> The 5-4 opinion held that New London's decision to use eminent domain to take property for the purpose of economic development did indeed satisfy the public use requirement of the Fifth Amendment.<sup>8</sup> At first glance, the decision seems to be utterly inconsistent with the text of the Constitution, but upon further investigation the holding is merely the final result of a natural progression of years of decisions which have gradually eroded individual property rights through eminent domain.

Despite the defeat of individual property rights advocates in this particular case, the Supreme Court noted that individual states had the ability to limit or restrict eminent domain powers as they wished.<sup>9</sup> As a result, the *Kelo* decision has placed the eminent domain controversy at the forefront of political debate in numerous state legislatures across the country, including Missouri, because at the moment it appears all property is subject to eminent domain so long as the proposed "new use" creates general economic benefits for the city.<sup>10</sup> Currently Alabama, Delaware, Texas, and Ohio have enacted legislation which restricts the government's ability to exercise its eminent domain power.<sup>11</sup> This comment will examine the legislation of those states that have restricted the government's taking power and also examine the possible actions the Missouri General Assembly could take in response to the *Kelo* decision. As of this time of this writing, Missouri has not enacted legislation to restrict eminent domain powers. Action must be taken in order to preserve its citizens' property rights and to limit the scope of eminent domain powers.

#### A. *The Kelo Case*

The controversy in this case centers on the town of New London, Connecticut.<sup>12</sup> The city was designated a "distressed municipality" in 1990.<sup>13</sup> The Naval Undersea Warfare Center, which had employed 1,500 people in the

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6. See, e.g., Ashley J. Fuhrmeister, *In the Name of Economic Development: Reviving "Public Use" as a Limitation on the Eminent Domain Power in the Wake of Kelo v. City of New London*, 54 DRAKE L. R. 171 (2005).

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

8. *Id.* at 2665.

9. *Id.* at 2668.

10. See National Conference of State Legislatures, Eminent Domain-2005 State Legislation, <http://www.ncsl.org/programs/natres/post-keloleg.htm> (last visited June 11, 2006) (a web site dedicated to keeping track of all eminent domain legislation introduced across the United States after the *Kelo* decision) [hereinafter National Conference]; see also Fuhrmeister, *supra* note 6, at 178.

11. See ALA CODE § 11-47-170; DEL CODE ANN TIT. 29, § 9505 (2005); S.B. 167, 126th Gen. Assem., Reg. Sess. (Ohio 2005); TEX. GOV'T CODE ANN. § 2206.001 (Vernon 2005).

12. *Kelo*, 125 S. Ct. at 2658.

13. *Id.*

town, was closed by the federal government in 1996, and in 1998 the city's unemployment rate became double the average of the rest of the state.<sup>14</sup> In order to aid the struggling community, state officials sought the help of a private, the New London Development Corporation ("NLDC"), nonprofit group, to develop an economic revitalization plan for the community.<sup>15</sup> To assist the NLDC, the state legislature approved the issuance of bonds totaling around fifteen million dollars in January of 1998.<sup>16</sup> One month later, Pfizer, Inc. announced plans for a three hundred million dollar research center in the community which local officials hoped would jumpstart the area's resurgence.<sup>17</sup>

The NLDC continued to develop its revitalization plans, and submitted their formal plans to the appropriate state agencies for approval.<sup>18</sup> The final plan involved ninety acres in the Fort Trumbull area of the city.<sup>19</sup> The development plan contained seven parcels which were made up of around 115 privately owned properties, and thirty-two acres of the previously closed Navy base.<sup>20</sup> Each parcel was individually designated for a specific development, and the NLDC hoped this would attract new commerce to the community.<sup>21</sup> The city council approved the final plan, and according to state statute, chose the NLDC as the development agent.<sup>22</sup> The NLDC had the ability to purchase all the private property required in the plan or to use the city's eminent domain power.<sup>23</sup> The NLDC purchased all but fifteen of the properties.<sup>24</sup> As a result, condemnation proceedings were brought against the owners of the fifteen properties, and the owners subsequently filed an action claiming these

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14. *Id.*

15. *Id.* at 2659.

16. *Id.*

17. *Id.*

18. *Kelo*, 125 S. Ct. at 2659.

19. *Id.*

20. *Id.*

21. *Id.* The development plan involved seven individual parcels. Parcel 1 was designated for a conference hotel in the center of a "small urban village" which was comprised of restaurants and shopping. Parcel 2 was to be the site of eighty new residential properties connected by a walkway to the rest of the development. Parcel 3 was to contain about 90,000 square feet of research and development office space. Parcel 4A contained 2.4 acres and it was to be used to support the state park or the marina by providing parking and retail facilities. Parcel 4B included the marina and the last stretch of the river walk. Parcels 5, 6, and 7, provided additional land for future development of offices, retail stores, parking, or marine commercial uses. *Id.*

22. "Any municipality which has a planning commission is authorized, by vote of its legislative body, to designate the economic development commission or the redevelopment agency of such municipality or a nonprofit development corporation as its development agency and exercise through such agency the powers granted under this chapter . . ." CONN. GEN. STAT. § 8-188 (2005).

23. *Kelo*, 125 S. Ct. at 2660.

24. *Id.*

attempted takings were in violation of the Fifth Amendment because these properties were not designated as blighted, and the condemnation actions arose solely because of their location in the development plan.<sup>25</sup>

In December of 2000, the case was heard in the New London Superior Court.<sup>26</sup> The court approved half of the takings, and held the other half unconstitutional, causing both parties to appeal the decision to the Supreme Court of Connecticut.<sup>27</sup> The Connecticut Supreme Court approved all of the takings, reasoning that they were valid under the state's municipal development statute.<sup>28</sup> The Connecticut Supreme Court also held that economic development was a public use.<sup>29</sup> This decision was appealed, and the U.S. Supreme Court granted certiorari to decide if the power of eminent domain allowed a state to take private property for economic development under the Fifth Amendment.<sup>30</sup>

The Supreme Court ultimately upheld the Connecticut Supreme Court's decision, holding that the city's exercise of eminent domain power with the goal of economic development was constitutional under the Fifth Amendment.<sup>31</sup> While this decision is troubling to individual property rights advocates because it seemingly broadens the scope of the state's eminent domain powers, *Kelo* was the result of the proper application of years of legal precedent. The problem with *Kelo* is not the holding itself, but rather with the likely effects of the holding. All property is now theoretically subject to eminent domain proceedings if restrictive eminent domain legislation is not enacted. This note examines recent history of eminent domain decisions by the Supreme Court before *Kelo*, individual state reactions to the *Kelo* decision, and suggests the direction Missouri should take so that its legislature can enact meaningful legislation which would establish boundaries for the exercise of eminent domain.

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25. Nine petitioners filed a claim under the Fifth Amendment. Four of the remaining fifteen properties were in Parcel 3 and eleven were Parcel 4A. The owners occupied ten of the parcels, while five were held as investment properties. *Id.* at 2660.

26. *Id.*

27. *See id.* Properties in Parcel 4A were granted a permanent restraining order. *Id.*

28. The development statute states:

[P]ermitting and assisting municipalities to acquire and improve unified land and water areas and to acquire and improve or demolish vacated commercial plants for industrial and business purposes and, in distressed municipalities, to lend funds to businesses and industries within a project area in accordance with such planning objectives 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.

Conn. Gen. Stat. § 8-186 (2005).

29. *Kelo*, 125 S. Ct. at 2660.

30. *Id.* at 2661.

31. *Id.* at 2665.

## II. HISTORY

The *Kelo* decision hinged on whether a city's plan for economic development was a public purpose under the Fifth Amendment.<sup>32</sup> The Supreme Court has previously recognized three different categories of takings which have been held to meet the constitutional requirement of the Takings Clause.<sup>33</sup>

A. *Three Recognized Constitutional Takings through the Eminent Domain Power*

Two of three categories are relatively simple.<sup>34</sup> The first category is where the state or federal government exercises its eminent domain power to transfer individual private property to the general public.<sup>35</sup> Different examples of this category include situations where a government takes private land and converts it into "a road, a hospital, or a military base."<sup>36</sup> A second category of takings allows the state to take private property and pass it to private parties.<sup>37</sup> These private parties, however, must develop the land for use by the public.<sup>38</sup> Specific examples of this eminent domain power include "a railroad, a public utility, or a stadium."<sup>39</sup>

A third category has developed because not every situation can be easily placed into the previous categories.<sup>40</sup> The two categories are simply too narrow to encompass the entire reach of the Takings Clause.<sup>41</sup> As a result, the Supreme Court has ruled takings constitutional where the taking eventually serves a public purpose even though the property will be for private use.<sup>42</sup>

This third category began to develop in 1954 in *Berman v. Parker*,<sup>43</sup> where the Supreme Court upheld a plan which designated a blighted area in Washington, D.C. for redevelopment.<sup>44</sup> The targeted area had about 5,000 residents, and most of their housing was not repairable.<sup>45</sup> The plan proposed

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32. *Id.* at 2663 (O'Connor, J., dissenting).

33. *Id.*

34. *Id.*

35. *Kelo*, 125 S. Ct. at 2673 (O'Connor, J., dissenting).

36. *See, e.g.*, *Old Dominion Land Co. v. United States*, 269 U.S. 55 (1925); *Rindge Co. v. County of Los Angeles*, 262 U.S. 700 (1923).

37. *Kelo*, 125 S. Ct. at 2673 (O'Connor, J., dissenting).

38. *Id.*

39. *See, e.g.*, *Nat'l R.R. Passenger Corp. v. Boston & Maine Corp.*, 503 U.S. 407 (1992); *Mt. Vernon-Woodberry Cotton Duck Co. v. Ala. Interstate Power Co.*, 240 U.S. 30 (1916).

40. *Kelo*, 125 S. Ct. at 2673 (O'Connor, J., dissenting).

41. *Id.*

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

43. *Berman*, 348 U.S. 26.

44. *Id.* at 29.

45. *Id.*

condemning the area and constructing public facilities.<sup>46</sup> Any remaining land could be sold to private parties for other purposes, such as low-cost housing.<sup>47</sup>

A department store owner challenged the condemnation plan because his store was in good repair.<sup>48</sup> He argued that the proposed governmental goal of a “better balanced, more attractive community” did not satisfy the public use requirement of the Fifth Amendment.<sup>49</sup> The Court rejected this argument and upheld the taking, reasoning that community development programs cannot be examined on an individual basis.<sup>50</sup> The Court also gave great deference to the decisions made by the legislature in determining which development projects a community chose to implement.<sup>51</sup>

Thirty years later in *Hawaii Housing Authority v. Midkiff*,<sup>52</sup> the Supreme Court was once again confronted with the question of whether a public purpose taking can be constitutional under the Takings Clause of the Fifth Amendment.<sup>53</sup> A land condemnation plan was challenged where title was taken away from lessors and given to lessees.<sup>54</sup> The Hawaiian government developed the plan in order to increase the number of owners of real property.<sup>55</sup> At the time of the plan a majority of the state’s land was in control of the state government, federal government, and seventy-two private landowners.<sup>56</sup> The legislature determined that the concentration of land ownership was “skewing the State’s residential fees simple market, inflating land prices, and injuring the public tranquility and welfare.”<sup>57</sup>

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46. *Id.*

47. *Id.*

48. *Id.*

49. *Berman*, 348 U.S. at 29.

50. *Id.* at 35 (“If owner after owner were permitted to resist these redevelopment programs on the ground that his particular property was not being used against the public interest, integrated plans for redevelopment would suffer greatly.”).

51. *Id.* at 33 (“We do not sit to determine whether a particular housing project is or is not desirable. The concept of the public welfare is broad and inclusive. . . . The values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled. In the present case, the Congress and its authorized agencies have made determinations that take into account a wide variety of values. It is not for us to reappraise them. If those who govern the District of Columbia decide that the Nation’s Capital should be beautiful as well as sanitary, there is nothing in the Fifth Amendment that stands in the way.”).

52. *Hawaii Hous. Auth. v. Midkiff*, 467 U.S. 229 (1984).

53. *Id.*

54. *Id.* at 230.

55. *Id.*

56. *See id.* at 232. The state and the federal government owned about forty-nine percent of the state’s land, while another forty-seven percent was owned by a group of seventy-two private citizens. *Id.*

57. *Id.*

In *Midkiff*, just as in *Berman*, the Court upheld the taking and transfer of the land by power of eminent domain.<sup>58</sup> Once again the Court gave great deference to the legislature's developmental determination.<sup>59</sup> The Supreme Court held that a state's wish to diminish the "social and economic evils of a land oligopoly" is a public use under the Fifth Amendment despite the fact that in certain instances, property was essentially being transferred from one citizen to another for private use.<sup>60</sup>

### III. DISCUSSION

#### A. *The Kelo Decision*

The *Kelo* case was originally heard in the New London Superior Court, which approved half of the takings, and held the other half unconstitutional, causing both parties to appeal the decision to the Supreme Court of Connecticut.<sup>61</sup> Subsequently, the Connecticut Supreme Court approved all of the takings, reasoning they were valid because of the state's municipal development statute.<sup>62</sup> The Connecticut Supreme Court also held that economic development was a public use.<sup>63</sup> This decision was appealed, and the Supreme Court granted certiorari to resolve the petitioners' Fifth Amendment claims.<sup>64</sup>

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58. See *infra* pp. 20-24 for a thorough discussion outlining the reasoning behind the deference afforded to the legislatures by the Supreme Court when the legislature makes a "public use" determination.

59. See *Midkiff*, 467 U.S. at 232. ("Once the object is within the authority of Congress, the right to realize it through the exercise of eminent domain is clear. For the power of eminent domain is merely the means to the end. . . . Once the object is within the authority of Congress, the means by which it will be attained is also for Congress to determine. Here one of the means chosen is the use of private enterprise for redevelopment of the area. Appellants argue that this makes the project a taking from one businessman for the benefit of another businessman. But the means of executing the project are for Congress and Congress alone to determine, once the public purpose has been established." (quoting *Berman v. Parker*, 348 U.S. 26, 32 (1954)).

60. *Id.* at 241-42.

61. *Kelo v. City of New London*, 125 S. Ct. 2655, 2660 (2005).

62. See CONN. GEN. STAT. § 8-186 (2005) (The development statute states that "permitting and assisting municipalities to acquire and improve unified land and water areas and to acquire and improve or demolish vacated commercial plants for industrial and business purposes and, in distressed municipalities, to lend funds to businesses and industries within a project area in accordance with such planning objectives 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.").

63. *Kelo*, 125 S. Ct. at 2660.

64. See *id.* at 2658.



### B. *The Majority Opinion*

The *Kelo* case presented the Court with the opportunity to decide whether the City of New London's proposed economic development plan, and subsequent use of its eminent domain power, qualified as a constitutional "taking" within the meaning of the Fifth Amendment.<sup>65</sup> Justice Stevens authored the Court's majority opinion.<sup>66</sup> The opinion began with a brief introduction into the meaning of the Fifth Amendment's Takings Clause.<sup>67</sup> Justice Stevens saw two clear categories of eminent domain cases in which the law was unambiguous.<sup>68</sup>

Justice Stevens first noted it was well settled law that the government could not take the property of one individual and transfer it solely to another individual even if compensation was paid.<sup>69</sup> It was clear no entity can take a citizen's land to provide a private benefit to an individual.<sup>70</sup> The majority also noted the government could not use its eminent domain power "under the mere pretext" of a public use.<sup>71</sup> The *Kelo* case, however, did not fit into either of these categories, as the City of New London had a legitimate economic plan for the area and that plan was adopted for no particular individual.<sup>72</sup>

By way of contrast, the majority opinion noted it was equally well settled law that the government could take an individual's property and open it for general public use such as a road or a park.<sup>73</sup> The *Kelo* case, likewise, did not fit into this judicial category.<sup>74</sup> Rather, the *Kelo* case was decided solely on whether the plan for New London constituted a "public purpose."<sup>75</sup>

The Court has given a broad interpretation to the term "public purpose."<sup>76</sup> The rationale behind this interpretation was that a bright line, narrow interpretation of this term would be unworkable as a judicial standard because society and its needs are fluid, and thus no consistency could exist.<sup>77</sup> Consequently, legislatures have been granted wide latitude by the courts to decide what actually constituted a "public purpose."<sup>78</sup> The majority opinion then went on to explain recent decisions which illustrated the Court's adoption

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65. *Id.* at 2665.

66. *Id.* at 2658.

67. *Id.* at 2662.

68. *Id.*

69. *Kelo*, 125 S. Ct. at 2662.

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.* at 2662.

75. *Kelo*, 125 S. Ct. at 2663.

76. *Id.*

77. *Id.* at 2664.

78. *Id.*

of the broader definition.<sup>79</sup> The opinion cited *Berman v. Parker*,<sup>80</sup> in which the Supreme Court refused to examine an individual eminent domain challenge.<sup>81</sup> The Court reasoned that in order for a development plan to work, the government or agency must be able to plan the area as a whole.<sup>82</sup> In the unanimous decision, great deference was granted to the legislature to plan redevelopment projects, and the Court reiterated its view that the Takings Clause of the Fifth Amendment should be interpreted broadly.<sup>83</sup>

The majority opinion subsequently cited *Hawaii Housing Authority v. Midkiff*,<sup>84</sup> which reaffirmed the deference given to the legislature to develop land use projects.<sup>85</sup> The fact that land was in some cases transferred directly from one individual to another did not affect the outcome of the case.<sup>86</sup> The Court noted that “it is only the takings purpose, and not its mechanics” that is relevant for the determination of public use.<sup>87</sup> The Court reasoned that the legislature’s goal of eliminating the “social and economic evils of land oligopoly” was indeed a public use within the meaning of the Fifth Amendment.<sup>88</sup>

With this background and precedent, the majority opinion proceeded to apply the developed law to the situation in New London. The opinion conceded that the city of New London was not faced with a “need to remove blight,” but nonetheless the majority believed the poor economic situation entitled the legislature’s decision to judicial deference as had occurred in both *Berman* and *Midkiff*.<sup>89</sup> Citing a detailed economic plan, careful legislative reflection throughout the process, and the decision in *Berman*, the majority chose to make the ruling based on the developmental plan as a whole, rather than on each individual claim.<sup>90</sup> In this light, the majority ultimately rejected the petitioner’s Fifth Amendment argument and held that the plan did qualify as a public purpose.<sup>91</sup>

In reaching this decision, the majority refuted a number of the petitioners’ arguments.<sup>92</sup> The petitioners’ first argument was that in no case can economic

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79. *Id.* at 2663-64.

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

81. *Id.* at 28.

82. *Id.* at 34.

83. *Id.* at 33 (“The concept of public welfare is broad and inclusive.”).

84. *Hawaii Hous. Auth. v. Midkiff*, 467 U.S. 229 (1984).

85. *Id.* at 241-42.

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

87. *Id.* at 2664.

88. *Id.* (quoting *Midkiff*, 467 U.S. at 241-42).

89. *Id.*

90. *Id.* at 2665.

91. *Id.*

92. *See Kelo*, 125 S. Ct. at 2665, 2667.

development qualify as a public use.<sup>93</sup> The majority dismissed this contention, stating that it was supported by neither “precedent nor logic.”<sup>94</sup> The opinion proclaimed that it was impossible to discern a difference between economic development and other kinds of public uses.<sup>95</sup> Economic development as a public purpose was consistent with the broad interpretation of the Takings Clause recognized by the Court throughout its recent history.<sup>96</sup>

The majority opinion continued by refuting petitioners’ notion that economic developments “blur[] the boundary between public and private takings.”<sup>97</sup> The Court reasoned that often times a public purpose benefits private individuals and that the petitioners’ same argument was already heard and denied in *Berman*.<sup>98</sup> The majority cited numerous cases in which the public good or public purpose goes hand-in-hand with a benefit for private parties.<sup>99</sup>

Additionally, the Court refused to rule on petitioners’ contention that after this ruling nothing would stand in the way of a city taking a citizen’s land and giving it to another citizen solely to produce more tax dollars.<sup>100</sup> The Court’s rationale was that if such hypotheticals arose, they will be confronted in due time.<sup>101</sup> The majority felt no need to rule on a case that was not before them.<sup>102</sup>

Petitioners’ final argument which the majority addressed was the notion that the Court should adopt a “reasonable certainty” requirement that the proclaimed public benefits will be realized.<sup>103</sup> The Court refused to adopt such a standard because the majority reasoned it would represent a significant break from past precedent.<sup>104</sup> The Court had previously declined to engage in “empirical debates” over legislative plans, and the majority saw no need to change that approach.<sup>105</sup> Likewise, the Court reasoned that if it were required to engage in such empirical debates, it would take extraordinary amounts of time, which would create a significant barrier to numerous potential development plans.<sup>106</sup> The Court refused to “second guess” a legislature’s

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93. *Id.* at 2665.

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.* at 2666.

98. *See Kelo*, 125 S. Ct. at 2666 (citing *Berman v. Parker*, 348 U.S. 26, 33 (1954)).

99. *See id.* (citing *Nat’l R.R. Passenger Corp. v. Boston & Maine Corp.*, 503 U.S. 407, 422 (1992); *Brown v. Legal Found. of Wash.*, 538 U.S. 216 (2003)).

100. *Id.*

101. *Id.* at 2667.

102. *Id.*

103. *Id.*

104. *Kelo*, 125 S. Ct. at 2667.

105. *Id.*

106. *Id.* at 2668.

determination as to what property needed to be condemned in order to see the development plan come to fruition.<sup>107</sup>

Despite ruling against the petitioners, the Court concluded the opinion with an invitation for state governments and officials to further define their eminent domain powers.<sup>108</sup> The Court held that the opinion placed no limits or restrictions on a state's ability to create stricter requirements for the takings power different than the "federal baseline."<sup>109</sup> The Court noted that many states already had stricter requirements either through their constitutions or eminent domain statutes.<sup>110</sup> The majority conceded that the use of eminent domain for economic development is a matter for "public debate," but attempted to distance themselves from this debate as they acknowledged that the Court's only responsibility was to determine if a city's economic development plan is a "public use" within the Takings Clause of the Fifth Amendment.<sup>111</sup>

### C. Concurring Opinion

Justice Kennedy authored the concurring opinion.<sup>112</sup> In his determination, a taking is constitutionally valid so long as the taking is "rationally related to a conceivable public purpose."<sup>113</sup> Justice Kennedy continued by comparing the deferential standard pronounced in other Fifth Amendment Takings cases to that of the rational basis test used by the Court in Due Process cases.<sup>114</sup> He tempered this analogy, however, by noting that any takings which benefit particular individuals "with only incidental or pretextual public benefits" are not valid within the meaning of the Fifth Amendment and must be renounced by the Court.<sup>115</sup> Justice Kennedy declared the proper determination of a public taking was whether the proposed public purpose is incidental to the benefits provided to individuals. If so, then the taking should be declared invalid.<sup>116</sup>

The examination of the proposed taking began with the presumption that the government's plans were rational.<sup>117</sup> The assumption by the Court should be that the plans of a government will serve a public purpose.<sup>118</sup> Justice Kennedy continued by examining the *Kelo* facts, citing testimony,

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107. *Id.*

108. *Id.*

109. *Id.*

110. *Kelo*, 125 S. Ct. at 2668.

111. *Id.*

112. *Id.* at 2669 (Kennedy, J., concurring).

113. *Id.*

114. *Id.*

115. *Id.*

116. *Kelo*, 125 S. Ct. at 2669 (Kennedy, J., concurring).

117. *Id.*

118. *Id.*

documentary evidence, and economic statistics relied on by the trial court to show that the public benefits in the instant case are more than merely incidental.<sup>119</sup> He disputed the idea that the plan was conceived with the intention to benefit a single private entity.<sup>120</sup>

The concurring opinion subsequently addressed the petitioners' argument that the Court should adopt a "*per se* rule" to invalidate takings justified through economic development.<sup>121</sup> Justice Kennedy found no merit to this argument because such a broad rule would hurt the efficiency of certain development projects intended to benefit the public.<sup>122</sup> However, it is noteworthy that the opinion does suggest that certain takings may require a stricter standard than that of *Midkiff* and *Berman* so that the Court can ensure the constitutional qualifications are met.<sup>123</sup> Justice Kennedy, however, does not provide specifics on what certain situations may call for the heightened standard.<sup>124</sup>

#### D. *The O'Connor Dissent*

Justice O'Connor authored the first dissent.<sup>125</sup> Justice O'Connor noted that a great principle of our system is that property cannot be taken from person A and given to person B. The people would not entrust a government with the ability to do this.<sup>126</sup> The dissent concluded that the *Kelo* decision has "abandon[ed]" this governmental limitation.<sup>127</sup> As a result, "all private property" was in danger of this fate under the vague notion of economic development.<sup>128</sup> The only qualification was that the land must be put to a more

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119. *See id.* ("The trial court considered testimony from government officials and corporate officers; documentary evidence of communications between these parties; respondents' awareness of New London's depressed economic condition and evidence corroborating the validity of this concern; the substantial commitment of public funds by the State to the development project before most of the private beneficiaries were known; evidence that respondents reviewed a variety of development plans and chose a private developer from a group of applicants rather than picking out a particular transferee beforehand; and the fact that the other private beneficiaries of the project are still unknown because the office space proposed to be built has not yet been rented.").

120. *Id.*

121. *Id.* at 2670 (Kennedy, J., concurring).

122. *Kelo*, 125 S. Ct. at 2670.

123. *See id.* (citing *Eastern Enter. v. Apfel*, 524 U.S. 498, 549-50 (1998) (Kennedy, J., concurring in part and dissenting in part)).

124. *Id.*

125. *Id.* at 2671 (O'Connor, J., dissenting).

126. *Id.* (O'Connor, J., dissenting).

127. *Id.*

128. *Kelo*, 125 S. Ct. at 2671.

lucrative use.<sup>129</sup> Post *Kelo*, no line can be drawn between what constitutes a private taking and what constitutes a public taking.<sup>130</sup>

The dissent next addressed the Fifth Amendment and its limitations.<sup>131</sup> The Justices relied on the text of the Fifth Amendment for their discussion.<sup>132</sup> There are two inherent limitations on the power of eminent domain in the United States.<sup>133</sup> The first is that “the taking must be for a public use and [the second is that] just compensation must be paid to the owner.”<sup>134</sup> These limitations protect individuals against an unjust sovereign.<sup>135</sup> In particular, the public use qualification establishes the “very scope of the eminent domain power.”<sup>136</sup>

The dissent conceded that the Court has given great deference to legislative determinations on public projects, but the dissenting Justices acknowledge that the Court must maintain its duty to uphold the Constitution.<sup>137</sup> As a result, it is up to the Court to decide if a public taking is truly public or if it is a private taking.<sup>138</sup> This duty cannot be simply disregarded.<sup>139</sup>

The dissent subsequently explained the three types of takings cases that have been recognized by the Court.<sup>140</sup> It was acknowledged that the Court is guided by stare decisis, and in particular, its holdings in *Berman* and *Midkiff*, but distinguishes those cases from the immediate set of facts in *Kelo*.<sup>141</sup> In both *Berman* and *Midkiff*, there was a tangible harm being inflicted upon those communities.<sup>142</sup> In *Berman*, poverty created an area in Washington D.C. which became blighted, and in *Midkiff*, the real estate market was distorted because ownership of the land was so concentrated.<sup>143</sup> The use of eminent domain in those respective cases “directly achieved a public benefit,” and it was irrelevant that the land was placed in private hands.<sup>144</sup> No such

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129. *Id.*

130. *Id.*

131. *See id.* at 2672 (O'Connor, J., dissenting). The Fifth Amendment provides that “private property [shall not] be taken for public use, without just compensation.” U.S. CONST. amend. V.

132. *See Kelo*, 125 S. Ct. at 2672 (O'Connor, J., dissenting) (“[W]e begin with the unremarkable presumption that every word in the document has independent meaning . . .”).

133. *Id.*

134. *See id.* (quoting *Brown v. Legal Found. of Wash.*, 538 U.S. 216, 231-32 (2003)).

135. *Id.*

136. *Id.* at 2673.

137. *Id.*

138. *See Kelo*, 125 S. Ct. at 2673 (“It is well established that . . . the question [of] what is a public use is a judicial one.”).

139. *Id.*

140. *Id.*

141. *Id.* at 2674.

142. *Id.*

143. *Id.*

144. *Kelo*, 125 S. Ct. at 2674 (O'Connor, J., dissenting).

circumstance exist the *Kelo* case.<sup>145</sup> The petitioners' homes were neither blighted nor contributing to any "social harm."<sup>146</sup> The public benefits that the majority believes the economic development will contribute to, things such as increased taxes and jobs, are entirely incidental.<sup>147</sup> The dissent felt the majority had unexplainably broadened the scope of "public use" because it had abandoned the harmful property use precedent of *Berman* and *Midkiff*.<sup>148</sup> This new standard allows the government to take land at will because "any lawful use of real private property can be said to generate some incidental benefit to the public."<sup>149</sup> The public use limitation essentially loses all of its meaning.<sup>150</sup>

The dissent criticized the majority because the holding provides no direction or standard on how the Court is to examine future public taking questions.<sup>151</sup> The majority matter of factly concluded that the facts will be examined when they are provided to the Court, but no specifics were given as to what the Justices should look for to determine if a true public taking has occurred within the meaning of the Fifth Amendment.<sup>152</sup> The dissenting Justices were also troubled because in economic development takings, the private benefits and incidental public benefits are "merged and mutually reinforcing."<sup>153</sup> Despite the true motives of the government, incidental public benefits will always occur if the land is put into private individuals' hands, and as a result, an argument can always be made that the use is serving a public purpose.<sup>154</sup>

In addition, the dissenting Justices found nothing unique about the particular facts of the *Kelo* case.<sup>155</sup> The dissent did not find it significant that there were detailed development plans, or that there were many legislative studies trying to determine the exact amount of incidental public benefits.<sup>156</sup> The facts were not of any legal consequence, and there was nothing in the majority's opinion to suggest what level of detail was needed or how much revenue or jobs must be created in order for development plans in future cases to reach the significance they seemed to reach in the *Kelo* case.<sup>157</sup> The dissent concluded by noting that the majority's suggestion of reliance on state

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145. *Id.* at 2674-75.

146. *Id.*

147. *Id.* at 2675 (O'Connor, J., dissenting).

148. *See id.* ("In moving away from our decisions sanctioning the condemnation of harmful property use, the Court today significantly expands the meaning of public use.").

149. *Id.*

150. *Kelo*, 125 S. Ct. at 2673.

151. *Id.* at 2675.

152. *Id.*

153. *Id.*

154. *See id.* at 2676.

155. *Id.*

156. *Kelo*, 125 S. Ct. at 2676.

157. *Id.*

governments to limit economic development takings was “an abdication of our responsibility.”<sup>158</sup>

*E. The Thomas Dissent*

Justice Thomas authored the second dissent.<sup>159</sup> He was adamant that the Court abandoned the text of the Constitution in order to reach its holding.<sup>160</sup> He argued that the Constitution allows a government to take an individual’s property only if the government plans to control the land or if the land can be used by the public.<sup>161</sup> Justice Thomas qualified his reading of the Constitution with a thorough documentation of the history and meaning of such words as “use,”<sup>162</sup> “public use,”<sup>163</sup> and “general welfare.”<sup>164</sup>

Justice Thomas continued in his critique of the holding by laying out the history of the Court’s “Public Use Clause jurisprudence.”<sup>165</sup> He contended that the Court has made two distinct mistakes throughout its recent history in this legal area.<sup>166</sup> The first of these errors was the “adopt[ion of] the ‘public purpose’ interpretation of the clause,” while the second was “in cases deferring to legislatures’ judgments regarding what constitutes a valid public purpose.”<sup>167</sup> The genesis of the former concept originates in dictum in *Fallbrook Irrigation Dist. v. Bradley*<sup>168</sup> and the latter from *United States v.*

158. *Id.* at 2677.

159. *Id.* (Thomas, J., dissenting).

160. *See id.* at 2678 (“If such economic development takings are for a public purpose, any taking is, and the Court has erased the Public Use Clause from our Constitution . . .”).

161. *Id.*

162. *See Kelo*, 125 S. Ct at 2679 (Thomas, J., dissenting). The definition of “use” is “the act of employing any thing to any purpose.” Justice Thomas does not understand how a government could give land to a private person or entity and claim that the public was using the land, regardless of any benefits bestowed upon the public. He concedes there may be broader definitions for “use,” but does not find them in the text of the Constitution. *Id.*

163. *See id.* “Public use” must mean “the government or its citizens as a whole must actually ‘employ’ the taken property.” *Id.*

164. *See id.* If the Founding Fathers had wished to grant such broad powers with the Takings Clause, they would have used a word such as “general welfare” as they had in other parts of the Constitution. This can only seem to mean that the Framers had a narrow view of government’s power under the Takings clause. *Id.*

165. *See id.* at 2682 (Thomas, C., dissenting).

166. *Id.*

167. *Id.*

168. 164 U.S. 112 (1896). The issue in *Bradley* was whether land could be taken under eminent domain for the construction of an irrigation ditch. *Id.* at 161. The Court declared the taking was a public use because “[t]o irrigate and thus to bring into possible cultivation these large masses of otherwise worthless lands would seem to be a public purpose and a matter of public interest, not confined to landowners, or even to any one section of the state.” *Id.*



*Gettysburg Electric Railroad Co.*<sup>169</sup> He opined that the Court incorporated these two concepts into its lines of reasoning in public use analysis with no apparent authority, but previous dictum.<sup>170</sup> He concluded that it was from “these two misguided lines of precedent” that the Court was able to reach its decision in both the *Berman* and *Midkiff* cases.<sup>171</sup>

#### IV. AUTHOR’S ANALYSIS

The defeat of individual property rights advocates in the *Kelo* case has caused the Supreme Court to come under criticism.<sup>172</sup> The criticism has originated from various entities,<sup>173</sup> but the message seems to be that the *Kelo* decision has effectively robbed the Fifth Amendment of its public use requirement.<sup>174</sup> This barrage of criticism, while not completely without merit, is better placed on the potential effects of the decision rather than the legal analysis used to reach it. Despite the large public backlash, the *Kelo* decision was not an abdication of duty by the Supreme Court as the dissent claimed.<sup>175</sup> In fact, the Court thoroughly examined and applied the years of legal precedent before it in reaching its decision.<sup>176</sup> If anything, the Supreme Court could be criticized for simply applying the precedents without weighing the potential effects of its decision. The *Kelo* decision was not the result of a sudden ideological shift in the Court, but rather the final result of eminent domain decisions which over time have demonstrated the Supreme Court’s willingness to defer to legislative determinations.<sup>177</sup>

Ironically, in spite of the apparent setback to individual property rights in the United States, the *Kelo* decision can provide property rights advocates just

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169. 160 U.S. 668 (1896). The issue in *Gettysburg* was whether the government had the power to take land in order to build memorials on the former war site. *Id.* at 679.

170. *Kelo*, 125 S. Ct at 2684.

171. *Id.* at 2685 (Thomas, J., dissenting).

172. See generally Fuhrmeister, *supra* note 6.

173. In November, the United States House of Representatives voted 376 to 38 to pass an act which threatened to cut off federal funding to states that seized homes for private commercial use as a form of economic development. The legislation is currently in the Senate and it is known as the Private Property Protection Act. See Warren Richey, *Eminent Domain in State Hands*, CINCINNATI POST, Dec. 15, 2005, available at <http://news.cincypost.com/apps/pbcs.dll/article?AID=/20051215/NEWS01/512150362>.

174. See *Kelo*, 125 S. Ct at 2671 (O’Connor, J., dissenting).

175. *Id.* at 2677.

176. See *infra* pp. 20-24.

177. See Charles Cohen, *Eminent Domain After Kelo v. City of New London: An Argument for Banning Economic Development Takings*, 29 HARV. J.L. & PUB. POL’Y 491 (2006) and Paul W. Tschetter, *Kelo v. New London: A Divided Court Affirms the Rational Basis Standard of Review in Evaluating Local Determinations of ‘Public Use.’* 51 S.D. L. REV. 193 (2006) for the proposition that the *Kelo* case was decided correctly as a matter of law, but contrast with Orlando E. Delogu, *Kelo v. City of New London—Wrongly Decided and a Missed Opportunity for Principled Line Drawing with Respect to Eminent Domain Takings*, 58 ME. L. REV. 17 (2006).

the ammunition needed to stem the erosion. It must not be overlooked that the Supreme Court essentially requested that the state legislatures solve the eminent domain dilemma themselves.<sup>178</sup> This apparent invitation, combined with the extraordinary publicity of this issue, can pave the way for restrictive eminent domain legislation across the country. Currently Alabama, Delaware, Texas, and Ohio have used the outcry against the *Kelo* decision to enact restrictive legislation, and Missouri needs to take this opportunity to follow suit in order to limit the scope of eminent domain powers.<sup>179</sup>

A. *Limited Scope of Review for Kelo*

The position of the Supreme Court is summed up by Justice Stevens in one phrase. Justice Stevens, writing for the majority, notes that in regards to eminent domain decisions, the Supreme Court has a “longstanding policy of deference to legislative judgments in this field.”<sup>180</sup> The *Kelo* decision is the apex of that deferential policy. The dissent attempts to distinguish the past cases of *Berman* and *Midkiff*, on which the majority heavily relies, from the *Kelo* facts, but it simply holds no weight because to rule against the legislature in this case would require the Court to turn its back on years of legislative deference.<sup>181</sup>

The notion of legislative deference in eminent domain decisions begins with the concept of a state exercising its police powers. Police powers allow a sovereign “to legislate as to the protection of the lives, limbs, health, comfort, and quiet of all persons.”<sup>182</sup> The extent and scope of these powers has no readily defined limit in United States jurisprudence, and as such, there is a narrow role for judicial review when a state acts under its police powers.<sup>183</sup>

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178. See *Kelo*, 125 S. Ct. at 2668 (“In affirming the City’s authority to take petitioners’ properties, we do not minimize the hardship that condemnations may entail, notwithstanding the payment of just compensation. We emphasize that nothing in our opinion precludes any State from placing further restrictions on its exercise of the takings power.”).

179. See ALA CODE § 11-47-170; DEL CODE ANN TIT. 29, § 9505 (2005); S.B. 167, 126th Gen. Assem., Reg. Sess. (Ohio 2005); TEX. GOV’T CODE ANN. § 2206.001 (Vernon 2005).

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

181. See *id.* at 2668 (“Because over a century of our case law interpreting that provision dictates an affirmative answer to that question, we may not grant petitioners the relief that they seek.”).

182. *Metro. Life Ins. Co. v. Mass.*, 471 U.S. 724, 756 (1985); see also *City of Columbus v. Ours Garage & Wrecker Serv., Inc.*, 536 U.S. 424, 439 (2002) (holding that public safety falls within the police power); *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 541 (2001) (holding that control of advertising is within the police power); *Cleveland v. United States*, 531 U.S. 12, 21 (2000) (holding that the establishment of regulatory or licensing schemes are within the police power); *Medtronic, Inc. v. Lohr*, 518 U.S.470, 485 (1996) (holding that the regulation of compensation through tort remedies was within the police power).

183. See *Berman v. Parker*, 348 U.S. 26, 32 (1954) (“An attempt to define [police powers] reach or trace its outer limits is fruitless, for each case must turn on its own facts. The definition

Additionally, it is the legislature's role, not the judiciary's, to determine the location, method, and purpose of the application of these broad powers.<sup>184</sup>

The Supreme Court has previously recognized the power of eminent domain to be "equated with the police power,"<sup>185</sup> and thus the public use requirement embedded within the power of eminent domain is "coterminous with the scope of the sovereign's police powers."<sup>186</sup> Consequently, whenever a state chooses to use eminent domain, it is subject only to minimal review by a court.<sup>187</sup> In fact, the Supreme Court wrote in *Midkiff* that "it will not substitute its judgment for a legislature's judgment as to what constitutes a public [purpose] 'unless the [purpose] be palpably without reasonable foundation.'"<sup>188</sup> Essentially, the only question left to the judiciary after *Midkiff* was to determine whether the legislature had reasonable grounds to claim a proposed project could benefit the public.

The dissent claims that the *Kelo* case is an "issue of first impression,"<sup>189</sup> and while this might be true with regard to a proposed taking for the purpose of economic development, it was of no bearing on the outcome of this decision. Under the scope of review, as laid out by *Berman* and *Midkiff*, the Supreme Court had to ask and answer one question in the case. So even though the majority claims that the case "turn[ed] on the question whether the City's development plan serves a 'public purpose,'"<sup>190</sup> it is better stated that the case actually turned on whether the proposed economic development could reasonably benefit the public.

The controlling precedents dictated the Supreme Court's scope of review. The only determination relative to the outcome of the case was the government's ability to show that the proposed construction plan and subsequent economic development were reasonably going to benefit the public. Once that determination was made, the Supreme Court theoretically reached the limits of its scope of review because of the deference afforded to the legislature. This is exactly how the majority proceeded and decided the case.<sup>191</sup> The dissent authored by Justice O'Connor, curiously chides the

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is essentially the product of legislative determinations addressed to the purposes of government, purposes neither abstractly nor historically capable of complete definition.").

184. *See id.* ("In such cases the legislature, not the judiciary, is the main guardian of the public needs to be served by social legislation . . . . This principle admits of no exception merely because the power of eminent domain is involved.").

185. *Hawaii Hous. Auth. v. Midkiff*, 467 U.S. 229, 240 (1984).

186. *See id.*

187. *Berman*, 348 U.S. at 32.

188. *Midkiff*, 467 U.S. at 241 (quoting *United States v. Gettysburg Elec. R.R. Co.*, 160 U.S. 668, 680 (1896)).

189. *See Kelo v. City of New London*, 125 S. Ct. 2655, 2673 (2005) (O'Connor, J., dissenting).

190. *See id.* at 2663.

191. *See supra*, note 177.

majority for placing “special emphasis” on the particular facts of the case and concludes that “none has legal significance.”<sup>192</sup> However, when deciding whether a development plan and its proposed economic benefits are reasonably going to benefit the public, one has no choice but to look at particular facts of a case to make this determination. Consequently, the majority examined the condition of proposed condemned land, the economy of the surrounding area, the scope of the development plan, and its projected benefits before concluding that the plan itself was reasonable.<sup>193</sup> It was these particular facts, along with the scope of review from *Berman* and *Midkiff*, which not only had legal significance, but were dispositive in reaching the majority’s decision.

The dissent claims that the “Court’s holdings in *Berman* and *Midkiff* were true to the principle underlying the Public Use Clause,”<sup>194</sup> thus implying that *Kelo* somehow was not. This characterization of *Kelo* is completely inaccurate. The outcomes of both the *Berman* and *Midkiff* decisions were not dictated by the specific intended public purpose of each case. Rather, those takings were held constitutional because the Court recognized its limited scope of review and decided that it should not substitute its own judgment for that of the legislature when determining a public use. This was the same principled analysis applied to the *Kelo* case.<sup>195</sup>

The dissent stresses the fact that in both of the prior cases, a harmful use was eliminated.<sup>196</sup> However, neither of the prior holdings ever specified that the elimination of a harmful use was necessary or required to make a taking under eminent domain constitutional. The fact that in the *Kelo* case there was no claim that the city was removing a harmful use was immaterial. The crucial determination in those cases was that the Court would be hesitant to question the legislature’s determination as to what constitutes a public purpose.<sup>197</sup> The surviving principle of the Public Use Clause from *Berman* and *Midkiff* was judicial deference to the legislature. Therefore, even though the *Kelo* case presented a different public purpose, it was irrelevant “because *Berman* and *Midkiff* dictate[d] the outcome of [the *Kelo*] case based not on their specific public purposes, but on their jurisprudential attitude.”<sup>198</sup>

The Supreme Court did not abdicate its duty as the dissent claimed.<sup>199</sup> It applied a century of case law in order to reach its decision.<sup>200</sup> Under the scope

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192. See *id.* at 2676 (O’Connor, J., dissenting). Justice O’Connor believes the findings of the legislature to be nothing but mere “prognostications.” *Id.*

193. See *id.* at 2665.

194. See *id.* at 2674 (O’Connor, J., dissenting).

195. See Cohen, *supra* note 177.

196. *Id.*

197. *Kelo*, 125 S. Ct. at 2663.

198. See Respondents’ Brief in Opposition for Writ of Certiorari at 12, *Kelo*, 125 S. Ct. 2655 (No. 04-108).

199. *Kelo*, 125 S. Ct. at 2677 (O’Connor, J., dissenting).

of review outlined in *Midkiff* and *Berman* for eminent domain, the question to be answered was whether the stated public purpose, economic development, would reasonably benefit the public. The majority found it to be, and thus found in favor of New London after determining that economic development was a public use.

*B. Lingering Questions*

The *Kelo* case was decided correctly based on precedent, but it is very easy to understand why the public reacted so negatively to the outcome.<sup>201</sup> Seemingly, all property is subject to eminent domain after the *Kelo* decision.<sup>202</sup> The majority, while adhering to its past cases, did not address the many concerns of the dissenting Justices. In her dissent, Justice O'Connor notes 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."<sup>203</sup> Justice Stevens merely dismisses these possibilities by noting that if such case ever were to arise that the Court would deal with it in the future.<sup>204</sup> The majority has no satisfactory answer to these hypotheticals, and it is because of this lack of answers that restrictive eminent domain legislation needs to be passed to provide assurances to individual property rights advocates. Exactly what are the limits whenever a state decides to exercise its eminent domain powers against its citizens? An individual knows that they will be paid a compensation, but that appears to be the only bright line rule after *Kelo*. The fear that the government will begin to take peoples' homes and give the land to any business with a development plan is overstated, but it exists because of the broadness of the public use requirement and the Court's deferential attitude towards the legislature.

Another question left unanswered in the wake of the decision is what exactly is the difference between a public taking and private taking?<sup>205</sup> Seemingly, there is no difference after *Kelo*. The majority notes that the creation of new jobs and additional tax revenue benefited the public in *Kelo*; therefore, the taking was not a purely private taking so as to make it

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200. *Id.* at 2668.

201. Different public opinion polls show public opposition has ranged from anywhere from seventy percent to ninety percent in the wake of the *Kelo* decision. *See* Richey, *supra* note 173.

202. *Kelo*, 125 S. Ct. at 2671 (O'Connor, J., dissenting).

203. *See id.* at 2676.

204. *See id.* at 2667 ("[Hypotheticals] do not warrant the crafting of an artificial restriction on the concept of public use.").

205. *See id.* at 2671 ("To reason, as the Court does, that the incidental public benefits resulting from the subsequent ordinary use of private property render economic development takings 'public use' is to wash out any distinction between private and public use of property . . .").

unconstitutional.<sup>206</sup> That distinction, however, creates more questions than it answers. What type of property use could not be said to create some kind of ancillary benefit for the public?<sup>207</sup> Is there a certain amount of tax revenue which needs to be created? Essentially, if a government takes property from one private citizen and transfers it to another, will it ever fail the public purpose test as outlined in *Kelo* so long as some benefit is realized by the public?<sup>208</sup> Consequently, if no transfer ever fails the public purpose test, what restraints are there on the government's power of eminent domain except that compensation is paid to the displaced landowners?<sup>209</sup> The majority's decision does not address these concerns, and as a result many individual citizens fear that their property could be the future target of an eminent domain action if restrictive legislation is not passed.

C. *The Kelo Compromise: The Majority's Decision to Place Power in the State's Hands*

Despite the majority's holding, it is not entirely clear that they truly believed in what they were writing. In fact, the majority may very well have been troubled by those lingering questions discussed in the previous section. As noted earlier, the holding was based on sound legal principles and *stare decisis*, but those two notions are of little comfort to individual property rights advocates across the country. Likewise, it appears that the majority was somewhat skeptical with the result despite their principled decision.

First, the opinion goes out of its way to acknowledge the consternation that those individuals who lose their homes may feel.<sup>210</sup> The majority clearly sympathizes with an individual who will lose a home to a business. Secondly, the opinion readily acknowledges that the "wisdom and necessity" of condemnations for the purpose of economic development would still be important topics of public debate, thus revealing their trepidation as to the concept of economic development takings.<sup>211</sup> However, the most telling sign of the majority's uneasiness with their own decision was its invitation to the states to restrict eminent domain powers as they saw fit.<sup>212</sup> The opinion even provides examples of some restrictive legislation already in place at the time of

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206. *Id.* at 2665.

207. *Id.* at 2675 (O'Connor, J., dissenting).

208. *Kelo*, 125 S. Ct. at 2675.

209. *Id.*

210. *See id.* at 2668 ("In affirming the City's authority to take petitioner's properties, we do not minimize the hardship that condemnations may entail, notwithstanding the payment of just compensation.").

211. *Id.*

212. *Id.*

the Court's decision.<sup>213</sup> None of these acknowledgements or examples given by the majority was necessary in the opinion, but obviously they felt inclined to include the words. In fact, the entire final paragraph of the opinion has no legal relevance to the holding. It appears that the majority was requesting legislative action to better define the scope of eminent domain because they were not comfortable with the state of eminent domain law after *Kelo*.

The majority may have felt trapped between their skepticism of the wisdom of economic development takings and the legal precedents before them. They chose to apply the legal precedents to the *Kelo* facts, but allowed some of their skepticism to show in the end. Had *Berman* or *Midkiff* never occurred, the decision of *Kelo* may have been different, but it is hard to speculate. Ultimately, had the Supreme Court ruled in favor of the petitioners from Fort Trumbull, the Court would have been turning its back on one hundred years of precedent. Rather than create chaos, the majority made a decision to adhere to the principles established in *Berman* and *Midkiff* but still invited the states to define eminent domain as they wished.

Ironically, despite the defeat in the *Kelo* case, property rights advocates may end up winning in the long run. Instead of sulking over the Supreme Court's decision, property rights advocates need to take advantage of the opportunity the Court gave them. The majority's opinion pointed out that the power and control of eminent domain lies in the hands of the states.<sup>214</sup> Consequently, it is up to them to curb the erosion of individual property rights in the United States. The Supreme Court has invited the states to enact restrictive legislation, and Alabama, Delaware, Texas, and Ohio have taken up their offer.<sup>215</sup> The State of Missouri needs to follow the lead of these proactive states to preserve the property rights of its citizens.

#### D. States' Response to *Kelo*<sup>216</sup>

With the power to restrict eminent domain squarely in the hands of state legislatures, the effects of *Kelo* can be mitigated. If proper legislation is enacted, concerned citizens will not have to fear that their home will be the next home taken for economic development purposes as those homes were in the *Kelo* case. Four states have enacted legislation restricting the use of

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213. *See id.* In California, a city may take land for economic development purposes only in blighted areas. CAL. HEALTH & SAFETY CODE ANN. §§ 33030-33037 (West 1997).

214. *Kelo*, 125 S. Ct. at 2668.

215. *See* ALA CODE § 11-47-170; DEL CODE ANN. TIT. 29, § 9505 (2005); S.B. 167, 126th Gen. Assem., Reg. Sess. (Ohio 2005); TEX. GOV'T CODE ANN. § 2206.001 (Vernon 2005).

216. *See* Timothy Sandefur, *The "Backlash" So Far: Will Citizens Get Meaningful Eminent Domain Reform?*, A.L.I.-American Bar Association Continuing Legal Education (Jan. 5-7, 2006) for the proposition that reform measures taken in Alabama, Texas, Delaware, and Ohio still contain loopholes for abuse of eminent domain.

eminent domain,<sup>217</sup> and while none of these amendments is exactly the same, the effects of these amendments are. The measures passed by these states range from complete bans on property takings for economic development to enhanced regulatory processes requiring greater community involvement earlier in the process.<sup>218</sup> Likewise, numerous other states have legislation pending that should be voted on in the upcoming year.<sup>219</sup>

### 1. Alabama<sup>220</sup>

Alabama has banned all economic development takings as a result of the *Kelo* decision.<sup>221</sup> The legislation in Alabama is very specific and the language of the amendment is seemingly lifted straight from the *Kelo* holding.<sup>222</sup> The Alabama State Senate passed the restrictive legislation during a special session in 2005 immediately following the controversial holding.<sup>223</sup> The legislation does not provide a precise definition of what constitutes a public use, but it does create specific bright line standards for what cannot be considered a public use. Specifically, the Alabama amendment provides:

Notwithstanding any other provision of law, a municipality . . . may not condemn property for the purposes of private retail, office, commercial, industrial, or residential development; or primarily for enhancement of tax revenue; or for transfer to a person, nongovernmental entity, public-private partnership, corporation, or other business entity. Provided, however, the provisions of this subsection shall not apply to the use of eminent domain by any municipality . . . based upon a finding of blight . . . but just compensation, in all cases, shall continue to be first made to the owner.<sup>224</sup>

The Alabama legislature has essentially rendered the *Kelo* holding meaningless in its state. By passing the ban on economic development takings, the power to transfer private properties to other private individuals exists only upon a finding of blight.<sup>225</sup> This is the same exception which was held

217. *Id.*

218. *See* Richey, *supra* note 173.

219. *Id.*; *see also* National Conference, *supra* note 10 (At least eleven other states have legislation pending on eminent domain restrictions.).

220. Alabama had at least six bills introduced into either the House of Representatives or the Senate which failed before their restrictive eminent domain legislation was enacted. National Conference, *supra* note 10.

221. *See supra* note 220 and accompanying text.

222. *Id.*

223. *Id.*

224. ALA. CODE § 11-47-170 (2005).

225. The Alabama legislature has found that blight:

[C]onstitute[s] a serious and growing problem, injurious to the public health, safety, morals, and welfare of the residents of the state; that the existence of such areas contribute[s] substantially and increasingly to the spread of disease and crime, constitutes an economic and social liability imposing onerous burdens which decrease the tax base



constitutional in the *Berman* case.<sup>226</sup> This amendment gives the government sufficient power to ensure the growth of communities by removing blight, but it does not allow such broad powers as the *Kelo* case. Economic development is no longer a viable public use in Alabama.

## 2. Delaware

The Delaware restrictive eminent domain legislation reads as follows:

Notwithstanding any other provision of law to the contrary, the acquisition of real property through the exercise of eminent domain by any agency shall be undertaken, and the property used, only for the purposes of a recognized public use as described at least 6 months in advance of the institution of condemnation proceedings: (a) in a certified planning document; (b) at a public hearing held specifically to address the acquisition; or (c) in a published report of the acquiring agency.<sup>227</sup>

Delaware's legislation is slightly different than the legislation passed in Alabama. As opposed to delineating specific projects eminent domain proceedings cannot be used for, Delaware simply restricts eminent domain acquisitions to those public uses which have already been recognized in the state. The effects, however, are the same. Delaware has previously recognized that property can be transferred to another private party upon a showing of blight, but not merely for economic development.<sup>228</sup> The restrictive eminent domain powers in Delaware are basically the same as those in Alabama. The

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and reduce tax revenues, substantially impairs or arrests sound growth, retards the provision of housing accommodations . . . [and] are focal centers of disease, promote[s] juvenile delinquency, and consume[s] an excessive proportion of public revenues because of . . . police, fire, accident, [and] hospitalization . . . .

§ 11-99-1 (2005)

226. See *supra* text accompanying notes 43-51.

227. DEL. CODE ANN. tit. 29, § 9505 (2005).

228. In Delaware a "blighted area" means:

[T]hat portion of a municipality or community which is found and determined to be a social or economic liability to such municipality or community because of any of the following conditions:

- a. The generality of buildings used as dwellings . . . are substandard . . . as to be conducive to unwholesome living;
- b. The discontinuance of the use of any building . . . ;
- c. Unimproved vacant land, which has remained so for a period of 10 years . . . ;
- d. Areas (including slum areas) with buildings or improvements which by reason of dilapidation . . . are detrimental to the safety, health, morals, or welfare of the municipality or community;
- e. A growing or total lack of proper utilization of areas . . . resulting in a stagnant and unproductive condition of land potentially useful and valuable for contributing to and serving the public health, safety and welfare . . . .

tit. 31, § 4501 (2005).

state can transfer property through eminent domain to another private party only for blight.<sup>229</sup>

This restrictive legislation also goes a step further than the Alabama legislation because it increases the regulatory process required of entities using eminent domain. Any time eminent domain power is to be used, the government must present the public with a certified plan and must hold a public hearing at least six months before any condemnations can proceed.<sup>230</sup> At the very least an extra burden has been placed on the government in order to grant citizens more time to prepare for their dislocation. However, citizens may use this time to ask additional questions or challenge any legal issues which may present themselves during the process. In short, Delaware goes beyond simply restricting eminent domain capabilities. Delaware's additional regulatory requirements place more power in the hands of the ordinary citizen affected by eminent domain than before the *Kelo* decision.

### 3. Texas<sup>231</sup>

The Texas legislature took the same broad approach that the Alabama legislature did, a complete ban on all economic development takings. In a similar fashion, the amendment banning economic development takings seemed to borrow language straight from the *Kelo* decision. Specifically the amendment reads:

A governmental or private entity may not take private property through the use of eminent domain if the taking:

- (1) confers a private benefit on a particular private party through the use of the property;
- (2) is for a public use that is merely a pretext to confer a private benefit on a particular private party; or
- (3) is for economic development purposes, unless the economic development is a secondary purpose resulting from municipal community development or municipal urban renewal activities to eliminate an existing affirmative harm on society from slum or blighted areas . . . .<sup>232</sup>

A notable difference in the Texas legislation is the restriction of eminent domain authority if the public use is declared to be a pretext to confer a benefit on a private party. This restriction adds one more step to the judicial process regarding eminent domain. The courts must now determine if any pretext

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229. *Id.*

230. *See supra* text accompanying note 227.

231. Texas failed to pass four bills in either the House of Representatives or Senate prior to enacting the current restrictive eminent domain legislation. *See* National Conference, *supra* note 10.

232. TEX. GOV'T CODE ANN. § 2206.001 (Vernon 2005).

exists for any proposed public use. This additional step is one more hurdle the government must overcome to exercise eminent domain power, and thus one more safeguard for individual property owners. The courts in Texas now have a duty to truly examine the decisions and motives of the legislature and are not bound by the precedents of legislative deference as the Supreme Court was in *Kelo*.

Texas does not take the additional regulatory steps that Delaware did, but instead has given its courts broader powers to review proposed eminent domain takings. Private property in Texas will not be transferred to other private citizens for economic development. The state can transfer property through eminent domain to another private party only for blight.<sup>233</sup>

#### 4. Ohio

The Ohio legislature has taken a more cautious approach to its eminent domain legislation. The legislation creates a moratorium on economic development takings in order to study the effects of eminent domain in Ohio. The legislation declares:

[U]ntil December 31, 2006, a moratorium on the use of eminent domain by any entity of the state government or any political subdivision of the state to take, without the owner's consent, private property that is in an unblighted area when the primary purpose for the taking is economic development that will ultimately result in ownership of the property being vested in another private person, to create the Legislative Task Force to Study Eminent Domain and Its Use and Application in the State, and to declare an emergency.<sup>234</sup>

Rather than pass legislation amid all the controversy of the *Kelo* decision, the Ohio legislature will look at the current state of the law of eminent domain in Ohio. This moratorium may not satisfy individual property rights advocates, but the language of the declaration does effectively outlaw *Kelo*-type takings for at least a year.

### V. A CALL FOR EMINENT DOMAIN REFORM IN MISSOURI

Currently in Missouri, eminent domain is a well publicized topic. On July 12, 2005, three weeks after the *Kelo* ruling, Sunset Hills officials decided to allow eighty-five residents' homes and small businesses to be condemned

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233. Texas defines a "blighted area" as:

[A]n area that is not a slum area, but that, because of deteriorating buildings, structures, or other improvements; defective or inadequate streets, street layout, or accessibility; unsanitary conditions; or other hazardous conditions, adversely affects the public health, safety, morals, or welfare of the municipality and its residents, substantially retards the provision of a sound and healthful housing environment, or results in an economic or social liability to the municipality.

§ 374.003.

234. S.B. 167, 126th Gen. Assem., Reg. Sess. (Ohio 2005).

through eminent domain to make way for a shopping mall and offices.<sup>235</sup> Likewise, the city of Arnold has expressed an interest in razing thirty homes and fifteen small businesses, including the Arnold VFW, for a Lowe's Home Improvement Store, and a strip mall because its need for more revenues.<sup>236</sup> Municipalities are using the *Kelo* decision to push forward economic development plans at the expense of its citizens, and the Missouri legislature needs to enact restrictive legislation to preserve its citizens' individual property rights.

If one were to take a quick glance at the Missouri Constitution, it may appear that the possibility of an economic development taking is remote in Missouri. In fact, it could be argued that *Kelo* will have no effect on the eminent domain proceedings because Missouri already has restrictive measures in the law.<sup>237</sup> This contention, however, fails to recognize that the current regulations in place do not completely foreclose economic development takings. In order to shut these loopholes the legislature needs to adopt certain measures recommended by the Missouri Eminent Domain Task Force in order to sharpen the definitions of key words in the statutes such as "blighted area" and "public use."<sup>238</sup> If these steps are taken, Missouri citizens will have more certainty that their homes will not be razed for pure economic development takings because the scope of eminent domain will be narrowed to precise and clear statutory language.

A. *Current Law in Missouri Does Not Effectively Eliminate Economic Development Takings*

In order to know where to strengthen the law, one must know where the law is weakest. The current eminent domain law in Missouri is outlined in its Constitution.<sup>239</sup> It states that an individual's private property will not be taken for a private use.<sup>240</sup> However, this private use prohibition is not without

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235. See Dana Berliner, *Kelo Revisited: Eminent Domain Should Not be Used for Private Development*, CAPITALISM MAGAZINE, Oct. 1, 2005, <http://www.capmag.com/articlePrint.asp?ID=4419>.

236. *Id.*

237. See MISSOURI EMINENT DOMAIN TASK FORCE, FINAL REPORT AND RECOMMENDATIONS 7 (2005) [hereinafter TASK FORCE].

238. *Id.*

239. MO. CONST. art. I, § 28.

240. The Missouri Constitution provides that:

[P]rivate property shall not be taken for private use with or without compensation, unless by consent of the owner, except for private ways of necessity, and except for drains and ditches across the lands of others for agricultural and sanitary purposes, in the manner prescribed by law; and that when an attempt is made to take private property for a use alleged to be public, the question whether the contemplated use be public shall be judicially determined without regard to any legislative declaration that the use is public.

*Id.*

exception.<sup>241</sup> Missouri's Constitution also provides that a city or county may create ordinances which allow for the redevelopment of blighted areas.<sup>242</sup> The determination of what property is blighted is a matter for the legislature to decide.<sup>243</sup> In effect, Missouri law prohibits the use of eminent domain to acquire land to transfer to a private party unless there is a finding of blight.<sup>244</sup>

This blight exception is not unusual. As was discussed earlier, a "blight exception" exists in each of those states which have already passed restrictive eminent domain legislation. Accordingly, it would seem that in Missouri a taking solely for economic development purposes is already outlawed because there would be no finding of blight. Consequently, it follows that Missouri does not need to enact any further legislation because restrictive legislation is already in place to protect against economic development takings.

However, this thought process is flawed. It fails to recognize the possibility that economic development takings could occur under the auspices of the blight exception as the law stands today. This possibility exists because of the broad definition of blight in Missouri and past case history interpreting its meaning.

Blight is defined as:

[The] portion of the city within which the legislative authority of such city determines that by reason of age, obsolescence, inadequate or outmoded design or physical deterioration have become economic and social liabilities, and that such conditions are conducive to ill health, transmission of disease, crime or inability to pay reasonable taxes.<sup>245</sup>

The concerning portion of this definition is that part of the statute which speaks in broad terms of an economic liability. An economic liability simply implies that that portion of the city is not economically advantageous. Does that mean the land is not being used to its fullest economic potential or that the land is

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241. *Id.* art. 6, § 28.

242. The Missouri Constitution provides that:

Laws may be enacted, and any city or county operating under a constitutional charter may enact ordinances, providing for the clearance, replanning, reconstruction, redevelopment and rehabilitation of blighted, substandard or insanitary areas, and for recreational and other facilities incidental or appurtenant thereto, and for taking or permitting the taking, by eminent domain, of property for such purposes, and when so taken the fee simple title to the property shall vest in the owner, who may sell or otherwise dispose of the property subject to such restrictions as may be deemed in the public interest.

*Id.*

243. *Tierney v. Planned Indus. Expansion Auth. of Kansas City*, 742 S.W.2d 146, 150 (Mo. 1987).

244. *See generally* *State ex rel. Dalton v. Land Clearance Auth.*, 270 S.W.2d 44 (Mo. 1954); *see also* *State ex rel. Atkinson v. Planned Indus. Expansion Auth. of St. Louis*, 517 S.W.2d 36 (Mo. 1975) (sustaining the urban redevelopment law as it currently stands); *Annbar Assoc. v. West Side Redev. Corp.*, 397 S.W.2d 635 (Mo. 1965).

245. MO. ANN. STAT. § 353.020 (West 2005).

serving no economic purpose at all? The statutory language gives no direction, and thus it is solely in the government's power to give meaning to the statute by its actions. It is not hard to imagine a situation where a solely economic development taking can be justified under the blight exception.

For example, suppose that there is an area of land which contains low to middle income housing. The housing is structurally sound, but it is quite old. There is a moderate crime rate, but it is not out of the ordinary. This land is also in a municipality struggling for revenue. Looking for ways to stimulate the municipality, the city council conducts a study which determines that a shopping mall would provide ten times the revenue housing does. It is further determined that this additional revenue would allow the municipality to make a host of improvements from increased police presence in order to lower the crime rate to higher educational funding to create better schools. The city now crafts a well developed plan to raze the houses in order to build a mall.<sup>246</sup> Currently, very little stops the city from using Missouri's blight statutes to turn this land into a shopping mall simply for economic development.

Consider that the determination of blight is a legislative determination.<sup>247</sup> After examining the blight statute, the city determines the area can be blighted because the area is outdated and consequently not reaching its potential in terms of tax revenue as compared to the shopping mall.<sup>248</sup> The area can be considered an economic liability in terms of the statutory language.<sup>249</sup> Likewise, the existing conditions are more conducive to a higher crime rate than the proposed use would be. Once that determination is made, courts cannot substitute their judgment unless the original decision is found to be unreasonable.<sup>250</sup> It is highly unlikely a court would consider a lower crime rate and higher education funding unreasonable. Once this area is deemed blighted, the city could accept contract proposals and eventually transfer the land to a private developer.<sup>251</sup> In effect, it is plausible that a Missouri city could engineer an economic development taking similar to *Kelo* under current Missouri law despite the blight requirement.

While this is only a hypothetical, Missouri courts have considered situations similar to these in the past and have held that land can be blighted

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246. "An authority shall not recommend a plan to the governing body of the city until a general plan for the development of the city has been prepared." *Id.* § 100.400 (2005). In the hypothetical, the city could also create an Urban Redevelopment Corporation under MO. ANN. STAT § 353.110 to acquire land through eminent domain. See TASK FORCE, *supra* note 237, at 19.

247. See *Tierney*, 742 S.W.2d at 150.

248. See TASK FORCE, *supra* note 237.

249. *Id.*

250. *Tierney*, 742 S.W.2d at 150.

251. *Allright Mo., Inc. v. Civic Plaza Redev. Corp.*, 538 S.W.2d 320, 324 (Mo. 1976).

simply because of economic under utilization.<sup>252</sup> In *Tierney v. Planned Industrial Expansion Authority*,<sup>253</sup> (“PIEA”) the City Counsel of Kansas City designated land as blighted because of economic underutilization and subsequently developed a reconstruction plan.<sup>254</sup> PIEA eventually accepted a contract proposal from a developer for the land.<sup>255</sup> The owners of some of these properties in the redevelopment plan contended that these designations were unreasonable so as to have the court overturn the blight designation.<sup>256</sup> The court, however, deferred to the legislative determination of blight.<sup>257</sup> Likewise, the owners argued that the city’s concept of economic under utilization was too broad and dangerous.<sup>258</sup> The court did not find this argument persuasive, instead ruling that because “urban land is scarce,” and because there is a problem assembling large enough tracts of land, “industrial development is a proper public purpose.”<sup>259</sup>

The idea of blighting land because of economic under utilization is synonymous with taking land for economic development. It appears that Missouri law is relatively close to the federal baseline of eminent domain established in *Kelo*. Likewise, it would mean that all land is theoretically subject to eminent domain takings because economic under utilization is a valid reason to blight property. Based on case history and the current statutes, the law in Missouri needs to be strengthened so that the possibility of economic development takings cannot continue under the blight exception.

#### B. *The Missouri Eminent Domain Task Force’s Role*

In response to the *Kelo* decision, Governor Matt Blunt created the Missouri Eminent Domain Task Force (“Task Force”) to study the eminent domain law

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252. See *Tierney*, 742 S.W.2d at 151; *Crestwood Commons Redev. Corp., v. 66 Drive-In, Inc.*, 812 S.W.2d 903, 910 (Mo. Ct. App. 1991).

253. *Tierney*, 742 S.W.2d 146.

254. *Id.* at 150.

255. *Id.* The PIEA accepted a contract proposal from the K-A Company which was different than the reconstruction plan originally approved by City Plan Commission three months earlier. *See id.*

256. *Id.* Tierney’s land was not originally designated as blighted. His land became part of the redevelopment project after the PIEA accepted an altered plan from the K-A Company. *See id.*

257. *See id.* (“[The Council’s] authority controls unless its decision is shown to be so arbitrary and unreasonable as to amount to an abuse of legislative process.”).

258. *Id.* at 151. Tierney raised arguments very similar to those which the dissent in *Kelo* raised. He suggested that economic under utilization was “so broad as to confer upon the legislative authority and the PIEA the unlimited discretion to take one person’s property for the benefit of another” because “almost all land could be put to a higher and better use.” *See id.*

259. *Tierney*, 742 S.W.2d at 151.

in the state.<sup>260</sup> In particular, the Task Force was directed to “analyze current state . . . laws governing eminent domain and recommend any changes that would enhance the effectiveness of these laws;” “[t]o develop a definition of ‘public use’ that allows state and local government to use eminent domain when there is a clear an direct public purpose while at the same time ensuring that individual property rights are preserved;” and “[t]o develop criteria to be applied by state and local governments when the use of eminent domain is being proposed.”<sup>261</sup> The Task Force presented its recommendations to Governor Matt Blunt on December 30, 2005.<sup>262</sup> In total, the Task Force recommended eighteen proposals so as to improve eminent domain law in Missouri.<sup>263</sup> If a combination of these recommendations is adopted in Missouri, citizens’ property rights will be preserved despite the *Kelo* ruling because the government will have defined substantive limitations to the legislature’s ability to exercise eminent domain to transfer property to other private parties.

### C. Course of Action for Missouri Eminent Domain Law

#### 1. Reforming the Definition of Blight

The first recommendation is to sharpen the definition of blight. As discussed above, it is plausible to see how the blight exception could be manipulated.<sup>264</sup> Likewise, the Task Force noted that “the current definition of blight has been abused by condemning authorities by making determinations of blight” in unreasonable areas.<sup>265</sup> There needs to be an objective standard or some additional factors added to the definition of blight so as to create a better guideline to ensure more consistency in legislative determinations of blight.<sup>266</sup> This new definition should also explicitly state that economic under utilization is not a proper reason to declare a property blighted.<sup>267</sup>

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260. The Task Force met a total of ten times prior to issuing its final report. During their commission, they heard from over fifty witnesses providing eminent domain testimony. *See* TASK FORCE, *supra* note 237, at 6.

261. *See id.*

262. The recommendations are broken down into three categories. The first category is about redefining the scope of eminent domain; the second category is about improving the procedure required for exercising eminent domain; and the third category provides penalties to condemning authorities if they attempt to abuse the process. *See id.*

263. *Id.*

264. *See* discussion *supra* text Part V.

265. *See* TASK FORCE, *supra* note 237, at 25.

266. *Id.*

267. *Id.*



A possible model of reform for Missouri is to incorporate the legislative findings of Alabama into its blight statute.<sup>268</sup> A key portion of the legislative findings determined that blight “necessitate excessive and disproportionate expenditures of public funds for crime prevention and punishment, public health and safety, fire and accident protection and other public services and facilities.”<sup>269</sup> This type of statute forces the entity seeking a blight designation to at least show that the particular area is costing the state more in preventative measures than the average municipality. Adjustments have to be made for population and geographic size difference between municipalities, but it would at least create a statewide baseline and a more objective frame of reference for determining blight.

## 2. Define “Public Use”

The second recommendation for Missouri is to define the term “public use” as it will apply to eminent domain. One of the goals given to the Task Force was to develop a definition which allows municipalities to use eminent domain, but also one which protects property rights.<sup>270</sup> The definition which the Task Force agreed upon is:

Notwithstanding any other provision of law to the contrary, neither this state nor any political subdivision . . . shall use eminent domain unless it is necessary for a public use. The term “public use” shall only mean the possession, occupation, and enjoyment of the land by the general public, or by public agencies; or the use of land for the creation or functioning of public utilities or common carriers; or the acquisition of abandoned or blighted property.

The public benefits of economic development, including an increase in tax base, tax revenues, employment, or general economic health, standing alone, shall not constitute a public use.<sup>271</sup>

This statute should be enacted because it encompasses the law of eminent domain in Missouri into a single statute. Likewise, it clearly and precisely lays out what can constitute a public use and what cannot. The intent of the legislature is clear, and this statute is open to very little interpretation. The statute also accomplishes Governor Blunt’s goal because it is clear when a municipality may use eminent domain, yet it also restricts the possibility that private property will be transferred to another private entity for economic development, thus preserving individual property rights.

Missouri should adopt both the sharpened blight definition and the proposed public use definition. Together these statutes redefine the scope of

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268. *See supra* notes 220-26 and accompanying text.

269. *Id.*

270. *See* TASK FORCE, *supra* note 237, at 6.

271. *Id.* at 22.

eminent domain law in Missouri. The questions of exactly when and where a municipality can exercise eminent domain will be largely answered because of the new definition of public use. Likewise, individual property rights will be better protected with this recommendation than under the current law in Missouri because at no time will property be transferred to another private party without empirical data confirming an area is blighted or because of economic under utilization. This empirical data will be discovered using objective standards which diminish the chance of potential abuse and provides definite standards which will lead to more consistent results in the determination of blight.

## VI. CONCLUSION

The *Kelo* decision has brought eminent domain to the forefront of American political and social debate. No matter a person's views on the decision, it is clear the Supreme Court applied the same legal principles established in *Berman* and *Midkiff* to the *Kelo* case. The criticism of *Kelo* is not due to the decision itself, but in response to the "green light" given to cities and developers. Because of *Kelo*, it is hard to see where a legislature's authority to use eminent domain ends. The only hard rule is that compensation must be paid. The "public use" clause has evolved simply to be the public benefit clause which is satisfied if the public receives a boost in tax revenue or employment rates. This is troubling because it means any property could theoretically be subject to eminent domain.

The Supreme Court, however, apparently understood these concerns. They have invited the states to enact restrictive legislation to narrow the scope of eminent domain powers. Alabama, Delaware, Texas, and Ohio have effectively done just this. Missouri needs to follow these leads by adopting portions of those laws into their own. Missouri statutes and case law currently allow eminent domain takings such as *Kelo* to occur because of economic under utilization. If Missouri adopts the recommendations of their Eminent Domain Task Force and tightens the definition of "blight" and defines "public use," property rights advocates will not have to fear that their home will be the next taken for a shopping mall.

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