

KELO V. NEW LONDON: AN OPPORTUNITY LOST TO REHABILITATE THE TAKINGS CLAUSE

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IN NO OTHER COUNTRY IN THE WORLD IS THE LOVE OF PROPERTY KEENER OR MORE ALERT THAN IN THE UNITED STATES, AND NOWHERE ELSE DOES THE MAJORITY DISPLAY LESS INCLINATION TOWARD DOCTRINES WHICH IN ANY WAY THREATEN THE WAY PROPERTY IS OWNED.¹

I. INTRODUCTION

Eminent domain is the inherent power of the sovereign to acquire privately owned property, when necessary, to further its legitimate activities and purposes.² Although few people dispute the necessity and utility of enabling government entities to acquire private property to fill indispensable societal needs, this power often conflicts with the fundamental rights of an individual to own and use private property.³ Indeed, individual property rights have been referred to as the “guardian of every other right,” and to deprive people of individual property rights “is in fact to deprive them of their liberty.”⁴

Thus, it is no surprise that the crowning achievement of the American Revolution, the U.S. Constitution, provides significant protection for individual property interests.⁵ The most critical of these protections is the “Takings Clause” in the Fifth Amendment, which prohibits “private property [from being] taken for public use without just compensation.”⁶ The U.S. Supreme Court so valued the right to private property that it made the Fifth Amendment

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¹ ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 614 (J.P. Mayer & Max Lerner eds., George Lawrence trans., Harper & Row 1966).

² BLACK’S LAW DICTIONARY 562 (8th ed. 2004).

³ Joseph J. Lazzarotti, *Public Use or Public Abuse*, 68 UMKC L. REV. 49 (1999).

⁴ ARTHUR LEE, *AN APPEAL TO THE JUSTICE AND INTERESTS OF THE PEOPLE OF GREAT BRITAIN, IN THE PRESENT DISPUTE WITH AMERICA* 14 (4th ed. 1775).

⁵ Lazzarotti, *supra* note 3, at 58.

⁶ Donald J. Kochan, “*Public Use*” and the Independent Judiciary: *Condemnation in an Interest-Group Perspective*, 3 TEX. REV. LAW & POL. 49, 51 (1998).

first among the rights enumerated in the Bill of Rights to be incorporated through the Fourteenth Amendment as a protection against state-action.⁷

Despite the historical importance of private property rights in America, the current interpretation of the Takings Clause provides insufficient protection for individual property rights.⁸ The current paucity of protection for individual property rights became national news on June 23, 2005, when the U.S. Supreme Court held, in *Kelo v. City of New London* (“*Kelo*”), that local governments could seize homes, business, churches, and any privately owned property for private and public economic development.⁹

Although *Kelo* made front-page news, the attack on individual property rights has been gaining momentum for years. A list of recent examples will help illustrate this point. In Riviera Beach, Florida, the local city council spent \$1.25 billion taxpayer dollars on a development plan that condemned the property of 300 local businesses and 1,700 residential homes—homes that housed around 5,100 people.¹⁰ The city planned to sell the land to private developers for yachting, shipping, and tourism interests.¹¹

In Kansas City, Kansas, Wyandotte County took private property belonging to 150 families and turned it over to the Kansas International Speedway for a NASCAR racing track.¹² The legislature argued that the racetrack would create 1,700 jobs and \$300 million in economic activity.¹³ Although some residents had lived in their homes for up to fifty-two years,¹⁴ the Supreme Court of Kansas held that construction of the racetrack was a “valid public purpose” and authorized the use of eminent domain.¹⁵

In Long Branch, New Jersey, developers have current plans to “redevelop the central core of the city” by razing beachfront residential properties for high-end condos.¹⁶ Understandably, some residents have no desire to sell.¹⁷ One resident, Denise Hoagland, was so disgusted with the developer’s attempts to buy her home that she painted “NOT FOR SALE” in red, white, and blue on

⁷ See ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 478-79, 482 (2d ed. 2002) referencing *Chicago, Burlington & Quincy R.R. Co. v. City of Chicago*, 166 U.S. 226 (1897).

⁸ Kochan, *supra* note 6, at 51.

⁹ See *Kelo v. City of New London*, 125 S. Ct. 2655 (2005).

¹⁰ Brief for Better Gov’t Ass’n et al. as Amici Curiae supporting Appellants, *Kelo v. City of New London*, 125 S. Ct. 2655 (2005) (No. 04-108) (citing Scott McCabe, *Residents Vow to Fight Riviera Plan*, THE PALM BEACH POST, Dec. 17, 2001) [hereinafter Better Government Association].

¹¹ *Id.* (citing Thomas R. Collins, *Many Businesses Feeling Put Out by Riviera Plans*, THE PALM BEACH POST, Jan. 6, 2003, at 1A).

¹² DANA BERLINER, PUBLIC POWER, PRIVATE GAIN: A FIVE-YEAR, STATE-BY-STATE REPORT EXAMINING THE ABUSE OF EMINENT DOMAIN 79 (2003); see *Tomasic v. United Gov’t.*, 962 P.2d 543 (Kan. 1998).

¹³ Lazzarotti, *supra* note 3, at 57.

¹⁴ *Id.* at 56.

¹⁵ *Tomasic*, 962 P.2d at 543.

¹⁶ Emily Bazar, For N.J. Family, Ruling May Doom Beach Cottage, USA Today, August 2, 2005, at A-1, available at http://www.usatoday.com/news/nation/2005-08-02-eminent-domain-inside_x.htm. (last visited Sept. 15, 2005).

¹⁷ *Id.*

her fence.¹⁸ The City of Long Branch is prepared to use eminent domain if the residents will not cooperate and sell their property.¹⁹

Finally, in Las Vegas, Nevada, the Las Vegas Redevelopment Agency condemned and demolished an entire city block to make way for more casino parking.²⁰ Although the block contained many thriving businesses and residential homes that were neither blighted nor posed any threat to the community, the Nevada Supreme Court ruled in favor of the casino because the benefits of the casino parking would trickle down and benefit the community at large.²¹

The U.S. Supreme Court sanctioned this behavior in *Kelo*. Rather than enforce the Takings Clause as a protection for private property interests, the Court essentially eliminated the role of the Takings Clause as a bona fide limit on government power.²² The Court's broad interpretation of the Takings Clause in *Kelo* permits large corporations, big box retailers, and wealthy developers to influence local governments and legislatures to use eminent domain for private purposes.²³ In essence, the Court in *Kelo* abdicated its responsibility to restrict the use of eminent domain and uphold the Takings Clause.²⁴ As Chief Justice Joseph Story commented:

[G]overnment can scarcely be deemed free where the rights of property are left solely dependent upon the will of a legislative body without any restraint. The fundamental maxims of a free government seem to require that the rights of personal liberty and private property should be held sacred. . . . We know of no case in which a legislative Act to transfer the property of A to B without his consent has ever been held a constitutional exercise of legislative power in any State of the Union.²⁵

To understand the significance of *Kelo*, an examination of the historical development and a survey of the current status of the Takings Clause is necessary. Following an examination of historical development, this note evaluates *Kelo* specifically. Finally, this note suggests that the U.S. Supreme Court made a mistake in *Kelo* by allowing eminent domain for private development, and that there exists a better framework for analyzing the Takings Clause.

II. HISTORICAL DEVELOPMENT

The history of the Takings Clause is one of continued erosion. This section evaluates this erosion in three historical developments. The first analyzes the zealous protection of individual property rights in early America. The second chronicles the continued erosion of these same rights by the Supreme

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *City of Las Vegas Downtown Redevelopment Agency v. Pappas*, 76 P.3d 1 (Nev. 2003), *cert denied*, 124 S. Ct. 1603 (2004).

²¹ *See id.*

²² *Kelo*, 125 S. Ct. at 2671 (O'Connor, J., dissenting).

²³ *See Poletown Neighborhood Council v. Detroit*, 304 N.W.2d 455, 458 (Mich. 1981), *overruled by County of Wayne v. Hathcock*, 684 N.W.2d 765 (2004). *See also* Parija Bhatnagar, *Eminent Domain: A Big Box Bonanza?*, June 23, 2005, *available at* http://money.cnn.com/2005/06/23/news/fortune500/retail_eminentdomain/index.htm. (last visited June 24, 2005).

²⁴ *Kelo*, 125 S. Ct. at 2677 (O'Connor, J., dissenting).

²⁵ Steven M. Simpson, *Judicial Abdication and the Rise of Special Interests*, 6 CHAP. L. REV. 173, 198 (2003) (quoting *Wilkinson v. Leland*, 27 U.S. (2 Pet.) 627, 657-58 (1829)).

Court. The third segment analyzes the current renaissance of individual property rights occurring at the state level as a result of the negative public sentiment toward the Kelo decision.²⁶

A. *Protection of Private Property Interests*

After the collapse of the Articles of Confederation, the authors of the Constitution recognized the need for a strong central government.²⁷ The smaller states and federalist supporters shared a common concern regarding how best to restrain this newly created, and very powerful, central government from infringing on state and individual rights.²⁸ In the arena of individual property rights, the founders sought to limit the power of the central government via the Fifth Amendment in the Bill of Rights, which prohibits "private property [from being] taken for public use without just compensation."²⁹

Initially, the Supreme Court took great measures to curb the "despotic power" of eminent domain.³⁰ In *Vanhorne's Lessee v. Dorrance*, the Supreme Court was faced with a challenge to a statute enacted by the Pennsylvania Legislature in 1795, which sought to resolve a festering land dispute between a group of Pennsylvania residents and a subsequent group of settlers from Connecticut.³¹ The statute vested the settlers from Connecticut with title, thereby taking the property of the Pennsylvania claimants.³² However, the Supreme Court held the statute unconstitutional, reasoning that it is "difficult to form a case in which the necessity of a state can be of such a nature, as to authorize or excuse the seizing of landed property belonging to one citizen, and giving it to another citizen."³³

Three years later, in *Calder v. Bull*, the Court continued its staunch defense of private property.³⁴ In *Calder*, the plaintiff argued that the Court should reverse a probate court decision ex post facto because the Connecticut Legislature enacted a statute that undermined the decision of the probate court.³⁵ The Court refused to support a decision that "takes property from A and gives it to B."³⁶ The Court further noted that "the genius, the nature, and the spirit of our State Governments" is that "the general principles of law and

²⁶ Emily Bazar, States Move to Protect Property, USA Today, August 3, 2005, available at http://www.usatoday.com/news/nation/2005-08-02-eminent-domain_x.htm. Many state legislators and courts are starting to align themselves with the positions of advocates like Alabama state senator Jack Biddle who expressed this view when he said, "we don't like anybody messing with our dogs, our guns, our hunting rights, or trying to take property from us." *Id.*

²⁷ CHEMERINSKY, *supra* note 7, at 10.

²⁸ Lazzarotti, *supra* note 3, at 58.

²⁹ See U.S. Const. amend. V.

³⁰ *Vanhorne's Lessee v. Dorrance*, 2 U.S. 304, 311 (1795).

³¹ *Id.* at 304.

³² *Id.*

³³ *Id.* at 311.

³⁴ 3 U.S. 386 (1798).

³⁵ *Id.* at 386-87.

³⁶ *Id.* at 388.

reason" prohibit these types of legislation.³⁷ The Court summed up its rationale by stating:

The Legislature may enjoin, permit, forbid, and punish; they may declare new crimes; and establish rules of conduct for all its citizens in future cases; they may command what is right, and prohibit what is wrong; but they cannot change innocence into guilt; or punish innocence as a crime; or violate the right of an antecedent lawful private contract; or the right of private property. To maintain that our Federal, or State, Legislature possesses such powers. . . . [is] a political heresy, altogether inadmissible in our free republican governments.³⁸

After the Civil War, on July 9, 1868, the states ratified the Fourteenth Amendment, which applied some of the protections guaranteed by the Bill of Rights concerning the federal government to the individual states.³⁹ The Court again showed its support of individual property rights by making the Fifth Amendment the first portion of the Bill of Rights to be incorporated against the states through the Fourteenth Amendment.⁴⁰ This was, perhaps, its last show of strong support for such rights.

B. Erosion of Private Property Interests

Although the Supreme Court initially interpreted the Takings Clause narrowly, the Court began to erode this precedence in *Head v. Amoskeag Manufacturing Co.*⁴¹ In *Head*, the Court evaluated the constitutionality of the Mill Acts.⁴² The Mill Acts were statutes that permitted riparian landowners who operated mills, to flood neighboring lands in order to power their grist mills.⁴³ The Court held that this was a valid taking under the Takings Clause because the mills were open for public use, benefited the public, and served as a public utility.⁴⁴ However, in addition to the public mills, the Court appeared to approve takings by private mills operated purely for the benefit of the private owners.⁴⁵ This was a landmark decision because, until this point, the only pri-

³⁷ *Id.*

³⁸ *Id.* at 388-89.

³⁹ Lazzarotti, *supra* note 3, at 58-59.

⁴⁰ *Chicago, Burlington & Quincy R.R. Co. v. City of Chicago*, 166 U.S. 226 (1897). *See* CHEMERINSKY, *supra* note 7, at 478-79, 482 (referencing the incorporation of different amendments).

⁴¹ 113 U.S. 9 (1885).

⁴² *See* Brief for Prop. Rights Found. of Am., as Amicus Curiae Supporting Appellants, *Kelo v. City of New London*, 125 S. Ct. 2655 (2005) (No. 04-108) [hereinafter Brief for Prop. Rights Found. of Am.].

⁴³ *Id.* Grist mills are used to grind grain and corn. WEBSTER'S NEW WORLD DICTIONARY OF AMERICAN ENGLISH 595 (3rd Col. ed. 1988). In general, grist mills were open to the entire public on a nondiscriminatory basis for the grinding of corn. *See* RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 172 (1985).

⁴⁴ *Head*, 113 U.S. at 18-19.

⁴⁵ *Head*, 113 U.S. at 9. The Court decided the case in favor of the local government "based on the ground that the statute was a permissible regulation of the riparian owners' common interest in a stream of water adjacent to their lands." Brief for Prop. Rights Found. of Am., *supra* note 42. Although the Supreme Court appeared to recognize that condemning neighboring land for the use of a private entity violated the A to B principle articulated by Justice Story, the Court ultimately refused to address directly the issue of transferring land from private groups to other private groups. *Id.*

vate companies that had been allowed to invoke the power of eminent domain were railroad companies, which most considered a public highway.⁴⁶

Nearly seventy years later, the Court continued to erode the potential protection offered by the Takings Clause to private property owners in *Berman v. Parker*.⁴⁷ In *Berman*, the District of Columbia condemned several parcels of "slum" land in an effort to eradicate blight.⁴⁸ The action was pursuant to a declaration by Congress to eliminate "substandard housing and blighted areas."⁴⁹ However, the proposed taking of private property for a private developer was contested by property owners who argued that taking land from one private property owner in order to turn it over to a different private property owner violated the Takings Clause.⁵⁰

The Court held that "when the legislature has spoken . . . [t]he role of the judiciary in determining whether that power is being exercised for a public purpose is an extremely narrow one."⁵¹ In using the term "public purpose," the Court seemed to adopt the notion that any public purpose was tantamount to a "public use."⁵² Thus, while a narrow interpretation of *Berman* would merely allow local governments to use eminent domain to eradicate blighted areas,⁵³ a more legislature-friendly interpretation of *Berman* would permit the use of eminent domain not only for public use, but also for the public benefit. The legislature-friendly interpretation encouraged many local and state legislatures to use eminent domain as a tool for luring and retaining corporations. Perhaps the most infamous example of this behavior is *Poletown Neighborhood Council v. City of Detroit*.⁵⁴

In *Poletown*, General Motors Corporation announced that it planned to close its Cadillac and Fisher plants in Detroit, Michigan.⁵⁵ However, GM offered to build a new assembly plant if it could obtain a suitable site, requiring that the site be at least 450-500 acres, rectangular in shape, and provide access to a long-haul railroad line and to the freeway system.⁵⁶ To avoid massive unemployment and to keep the assembly plant local, Detroit condemned the entire residential community of Poletown for \$200 million.⁵⁷ The condemna-

⁴⁶ Brief for James M. Buchanan et al. as Amicus Curiae Supporting Appellants, *Kelo v. City of New London*, 125 S. Ct. 2655 (2005) (No. 04-108) [hereinafter Brief for James M. Buchanan et al.].

⁴⁷ 348 U.S. 26 (1954).

⁴⁸ *Id.* at 31.

⁴⁹ *Id.* at 28. It is important to note that Congress is the legislative authority in the District of Columbia, which includes police powers that are normally excluded from Congressional reach. *Id.* at 31.

⁵⁰ *Id.* at 31.

⁵¹ *Id.* at 32.

⁵² Robert H. Freilich and Robin A. Kramer, *Condemnation for Economic Development Violates Takings Clause: The Michigan Supreme Court Overturns Historic Poletown Decision*, 27 No. 10 ZONING & PLAN. L. REP. 1, 2 (Patricia Salkin & Kenneth Young eds. 2004).

⁵³ *See id.*

⁵⁴ 304 N.W.2d 455 (Mich., 1981).

⁵⁵ *Id.* at 460 (Fitzgerald, J., dissenting).

⁵⁶ *Id.*

⁵⁷ Stephen J. Jones, *Trumping Eminent Domain Law: An Argument for Strict Scrutiny Analysis Under the Public Use Requirement of the Fifth Amendment*, 50 SYRACUSE L. REV. 285, 295 (2000).

tion included churches, schools, and hospitals, and displaced 3,438 residents.⁵⁸ After the condemnation, in an obviously transparent move to benefit GM, "the city then resold the land to GM for \$8 million, a mere 4% of the purchase value of the town."⁵⁹

Although the residents of Poletown protested the condemnation on the basis that it did not constitute a public use,⁶⁰ the city argued persuasively that the eminent domain seizures were justified to prevent the pending unemployment crisis and to spur "economic development."⁶¹ Specifically, the city claimed that the transfer of land would increase jobs via the construction and operation of the plant, and improve the local economy; a legitimate public purpose under *Berman*.⁶²

The Supreme Court of Michigan agreed with the city. The court stated that the judicial standard for determining a public use is whether the city can provide substantial proof that the public will be the primary beneficiary of the condemnations.⁶³ In other words, as one scholar has noted, "[b]y shifting the analysis to 'benefits,' the [*Poletown*] court established a standard which looks to the effects of a taking, thereby converting the determination into a matter of policy instead of a matter of law."⁶⁴

Although the majority decision in *Poletown* illustrated the increasingly blurred line between public and private use created by the Court in *Berman*, the dissent by Justice Ryan provides a point of needed perspective. He noted, "how easily government, in all branches, caught up in the frenzy of perceived economic crisis, can disregard the right of the few in allegiance to the always disastrous philosophy that the ends justify the means."⁶⁵

Three years after *Poletown*, the U.S. Supreme Court, rather than reinforce the Takings Clause, continued to expand the broad interpretation of the Takings Clause in *Hawaii Housing Authority v. Midkiff*.⁶⁶ At the time of *Midkiff*, seventy-two private landowners controlled nearly one-half of the property in Hawaii.⁶⁷ The Hawaiian legislature criticized the oligopoly for "skewing the State's residential fee simple market, inflating land prices, and injuring the public tranquility and welfare."⁶⁸ To correct the situation, the legislature passed the Land Reform Act of 1967.⁶⁹ The legislature intended to redistribute Hawaiian property in order to reduce the concentration of land and eliminate

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Poletown Neighborhood Council v. City of Detroit*, 304 N.W.2d 455, 461 (Mich. 1981).

⁶¹ Editorial, *Review & Outlook: Poletown's Revenge*, WALL ST. J., Aug. 3, 2004, at A10. See also *Poletown*, 304 N.W.2d at 475 (Ryan, J., dissenting) (stating that the majority's reliance on *Berman* "was particularly disingenuous").

⁶² See *Poletown*, 304 N.W.2d at 459.

⁶³ *Id.*

⁶⁴ Kochan, *supra* note 6, at 71.

⁶⁵ *Poletown*, 304 N.W.2d at 465 (Ryan, J., dissenting).

⁶⁶ 467 U.S. 229 (1984).

⁶⁷ *Id.* at 232.

⁶⁸ *Id.* The State and Federal Governments owned almost forty-nine percent of the land in Hawaii while seventy-two private landowners owned forty-seven percent of the land. This problem was traceable to the original ownership rights vested in high chiefs of the Hawaiian Islands. *Id.*

⁶⁹ *Id.* at 233.

the oligopoly.⁷⁰ In response, the landowners complained that the State was merely taking their non-blighted property in order to give it to another private owner. They argued that this was a violation of the protections afforded them by the Fifth Amendment.⁷¹

The Court reiterated that it is within the "legislature's judgment as to what constitutes a public use."⁷² However, the Court further stated that it would enter the fray *only* if the public use was "palpably without reasonable foundation."⁷³ Indeed, *Midkiff* made the public use requirement coterminous to the scope of the local government's police power so long as the state could provide a reasonable foundation.⁷⁴ The Court effectively interpreted the Takings Clause so broadly that it stripped itself of any authority to protect an individual's private property interests.⁷⁵ The Supreme Court had placed the Takings Clause on a slippery slope, one that "[s]tate and local governments have been happily sliding down . . . ever since."⁷⁶

C. *The Current Status of the Takings Clause and County of Wayne v. Hathcock*

In spite of the *Kelo* decision, many state courts and legislatures have found the use of eminent domain for private economic development unpalatable.⁷⁷ For instance, Alabama and Delaware have already passed laws to mitigate the effects of *Kelo*, while California, Colorado, Illinois, Michigan, Nevada, New Jersey, New York, Oregon, Pennsylvania, Texas, and Utah have bills pending.⁷⁸

⁷⁰ *Id.*

⁷¹ *See id.* at 234-35.

⁷² *Id.* at 241.

⁷³ *Id.* (quotations omitted).

⁷⁴ *Id.* at 240.

⁷⁵ The notion of the Supreme Court abdicating its responsibility to protect individual property rights was noted by Justice Sandra Day O'Connor noted in her dissent in *Kelo*. *Kelo v. City of New London*, 125 S. Ct. 2655, 2677 (2005) (O'Connor, J., dissenting).

⁷⁶ *Poletown's Revenge*, *supra* note 61, at A10 ("[T]oday we have governments taking land from Peter because they'd rather Paul have it."); *see also* DANA BERLINER, PUBLIC POWER, PRIVATE GAIN: A FIVE-YEAR, STATE-BY-STATE REPORT EXAMINING THE ABUSE OF EMINENT DOMAIN 2 (2004) (indicating that 10,282 cases of condemnations by eminent domain were filed or threatened in forty-one states from Jan. 1, 1998, to Dec. 31, 2002). However, this number may be too low. Normally, states do not keep such records. The number above was taken from newspapers, published and unpublished court opinions and any other court documents, which mentioned a taking. Connecticut, ironically, is the only state to keep such records, indicated that 543 redevelopment condemnations were officially filed, but the Connecticut press only reported thirty-one of them. Thus, the number of cases, though staggering, may only represent a small portion of the total number of takings. *Id.*

⁷⁷ These states include Arkansas, Kentucky, Maine, New Hampshire, South Carolina, and Washington. *See generally*, *City of Little Rock v. Raines*, 411 S.W.2d 486 (Ark. 1967); *City of Owensboro v. McCormick*, 581 S.W.2d 3 (Ky. 1979); *Opinion of the Justices*, 131 A.2d 904, 906 (Me. 1957); *Karesh v. City Council*, 247 S.E.2d 342 (S.C. 1978); *Petition of Seattle*, 638 P.2d 549 (Wash. 1981). This list of cases is available at <http://www.ncsl.org/programs/natres/emindomainuphold.htm> (last visited October 18, 2005).

⁷⁸ Alabama: H.R. 14, 1st Spec. Sess. (Ala. 2005); S. 68, 1st Spec. Sess. (Ala. 2005); California: Assemb. Const. Amend. 22 (Cal. 2005); S. Const. Amend. 15 (Cal. 2005); Assemb. 590, 2005-2006 Legis. Sess. (Cal. 2005); Colorado: H.R. 1203, 64th Gen.

In an ironic twist, Michigan has led the way in protecting private property rights by overturning the *Poletown* decision in *County of Wayne v. Hathcock* and opting for stricter interpretation of its own takings clause.⁷⁹ Further, the Michigan Supreme Court provided a framework for evaluating condemnations that better adheres to the original intent of the Takings Clause than the Supreme Court's decision in *Kelo*.

Although the *Hathcock* decision "must come as cold comfort to the citizens of Poletown," it represents a realization by a state supreme court that the protection of individual property rights guaranteed in the Fifth Amendment is not for sale.⁸⁰ Hathcock County renovated its Metropolitan Airport by producing a new terminal and jet runway.⁸¹ However, the new runway generated a tremendous amount of noise, which not only annoyed local residents, but also depreciated the value of their homes.⁸² To solve this problem, the county started the Pinnacle Project ("the Project");⁸³ a 1300-acre public area denoted to developers for the development of business and technology.⁸⁴

To accomplish the Project, the county, with the help of the Federal Aviation Administration ("FAA"), began to purchase neighboring properties through voluntary sales.⁸⁵ However, the plots purchased were "scattered in a checkerboard pattern throughout the areas south of Metropolitan Airport."⁸⁶ Finally, the county managed to acquire over 1000 acres, leaving just forty-six private and seemingly unobtainable parcels.⁸⁷ To remedy the situation, in April 2001, the county commenced a series of condemnation actions for the remainder of the land needed for the Project.⁸⁸

Assemb., Reg. Sess. (Colo. 2004); Delaware: S. 217, 143rd Gen. Assemb., Reg. Sess. (Del. 2005); Illinois: H.R. 4091, 94th Gen. Assemb. (Ill. 2005); Michigan: H.R. 5060, 2005-2006 Legis. Sess. (Mich. 2005); Nevada: Assemb. 143, 73rd Sess. (Nev. 2005); S. 326, 73rd Sess. (Nev. 2005); New Jersey: S. 2739, 211th Leg. (N.J. 2005); New York: Assemb. 8865, 2005-2006 Reg. Sess. (N.Y. 2005); S. 5936, 2005-2006 Reg. Sess. (N.Y. 2005); S.5938, 2005-2006 Reg. Sess. (N.Y. 2005); Oregon: H.R. 3505, 73rd Legis. Assemb. (Or. 2005); Pennsylvania: H.R. 1835, 2005 Gen. Assemb. (Pa. 2005); H.R. 1836, 2005 Gen. Assemb. (Pa. 2005); Texas: H.R. 12, 79th Leg., 2d Spec. Sess. (Tex. 2005); H.R. 16, 79th Leg., 2d Spec. Sess. (Tex. 2005); S. 7, 79th Leg., 2d Spec. Sess. (Tex. 2005); H.J. Res. 11, 79th Leg., 2d Spec. Sess. (Tex. 2005); S.J. Res. 5, 79th Leg., 2d Spec. Sess. (Tex. 2005); H.R.J. Res. 19, 79th Leg., 1st Spec. Sess. (Tex. 2005); S.J. Res. 10, 79th Leg., 1st Spec. Sess. (Tex. 2005); S. 62, 79th Leg., 1st Spec. Sess. (Tex. 2005); Utah: S. 184, 2005 Gen. Sess. (Utah 2005). Information and status of state bills are available at <http://www.ncsl.org/programs/natres/post-keloleg.htm> (last visited September 15, 2005), and <http://www.ncsl.org/programs/natres/emindomainleg.htm> (last visited September 15, 2005). Congress has also proposed a bill for minimizing the use of eminent domain. S. 1313, 109th Cong. (2005).

⁷⁹ 684 N.W.2d 765 (Mich. 2004). The author would like to note and give attribution to Robert Freilich and Robin A. Kramer's article on the *Hathcock* and *Poletown* cases. It was very helpful. See generally, Freilich, *supra* note 52.

⁸⁰ *Poletown's Revenge*, *supra* note 61, at A10.

⁸¹ *County of Wayne v. Hathcock*, 684 N.W.2d 765, 770 (Mich. 2004).

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.* As part of the agreement to purchase the property, the County had agreed with the FAA to put the land to economical use. *Id.*

⁸⁷ *Id.* at 771.

⁸⁸ *Id.*

Relying on *Poletown*, the county argued that the use of eminent domain was appropriate for the Project, regardless of the lack of blight, because the Project was rationally related to the conceivable public purpose of improving the local economy.⁸⁹ Specifically, the county argued that the Project would “create thousands of jobs, and tens of millions of dollars in tax revenue, while broadening the County’s tax base from predominantly industrial to a mixture of industrial, service, and technology.”⁹⁰

The county also argued that the Project would “enhance the image of the County in the development community,” help the area “meet the needs of the 21st century,” and “attract national and international businesses, leading to accelerated economic growth and revenue enhancement.”⁹¹ One expert testified that the Project would create thirty-thousand jobs and add \$350 million in tax revenue for the county.⁹² The Michigan Supreme Court was not persuaded and disagreed with the use of eminent domain.

In its decision, the Michigan Supreme Court established a group of three tests (“the *Hathcock* Tests”) for determining whether to justify a condemnation under Michigan state law. Satisfaction under any of the *Hathcock* Tests is sufficient for the use of eminent domain. First, eminent domain must be limited to those enterprises that generate public benefit, and whose very existence depends on the use of land that can only be provided by the central government (“Public Necessity Test”).⁹³ Second, a public use exists where the private entity remains accountable to the public in its use of that property (“Public Accountability Test”).⁹⁴ Third, a public use exists when the selection of the condemned land for a private interest is based on immediate public concerns and facts of independent public significance (“Public Concern Test”).⁹⁵

Justice Ryan originally suggested the Public Necessity Test in his dissenting opinion in *Poletown* where he listed “highways, railroads, canals and other instrumentalities of commerce” as examples of this type of necessity.⁹⁶ This type of situation merits a legitimate taking under the Takings Clause because the public requires these instrumentalities of commerce and their construction would be “a logistical and practical nightmare” without the use of eminent domain.⁹⁷

The *Hathcock* majority also noted that if the necessity test did not exist, it would allow citizens to extort the government and delay essential public works projects. For example:

A corporation constructing a railroad, for example, must lay track so that it forms a more or less straight path from point A to point B. If a property owner between points A and B holds out—say, for example, by refusing to sell his land for any amount less than fifty times its appraised value—the construction of the railroad is

⁸⁹ *Id.*

⁹⁰ *Id.* at 770.

⁹¹ *Id.* at 770-71.

⁹² *Id.* at 771.

⁹³ *Id.* at 781.

⁹⁴ *Id.* at 782.

⁹⁵ *Id.* at 783.

⁹⁶ *Id.* at 781 (citing *Poletown Neighborhood Council v. City of Detroit*, 304 N.W.2d 455, 473 n.16 (Ryan, J., dissenting) (1981)).

⁹⁷ *Id.* at 782.

halted unless and until the railroad accedes to the property owner's demands. And if owners of adjoining properties receive word of the original property owner's wind-fall, they too will refuse to sell.⁹⁸

The Michigan Supreme Court held that the takings in *Hathcock* did not satisfy the Public Necessity Test.⁹⁹ The court stated that the creation of a business and technology park was "not an enterprise 'whose very existence depends on the use of land that can be assembled only by the coordination of the central government.'"¹⁰⁰ On the contrary, the country is "flecked with shopping centers, office parks, clusters of hotels, and centers of entertainment and commerce."¹⁰¹

The second test adopted by the Michigan Supreme Court was the Public Accountability Test.¹⁰² The court noted that the transfer of condemned property is consistent with the public use as long as the private entity remains accountable to the public in its use of that property.¹⁰³ For example, the court disallowed a "condemnation that would facilitated the generation of water power by a private corporation because the power company '[would] own, lease, use, and control' the water power."¹⁰⁴ However, the court added that a private entity could take by eminent domain if that same taking would be "devoted to the use of the public, independent of the will of the corporation."¹⁰⁵ For example, as Justice Ryan noted in *Poletown*, "a petroleum pipeline . . . used pursuant to directions from the . . . Public Service Commission, and the state would be able to enforce those obligations" is the type of public use that is still accountable to the public.¹⁰⁶

The court in *Hathcock* again found that the Project failed to pass Constitutional muster. The court held that the project was not under the oversight of the public, and had provided no way to ensure that the community would have access to use the property.¹⁰⁷ Specifically, the private owners and operators involved in the Project were free to "pursue their own financial welfare with the single-mindedness expected of any profit-making enterprise."¹⁰⁸ In addition, there was no "formal mechanism" to ensure that the businesses would continue to benefit the local economy.¹⁰⁹

The final test applied in *Hathcock* was the Public Concern Test. This test required the court to evaluate the controlling purpose in the condemnation. One example that the court gave was described in *In re Slum Clearance*.¹¹⁰ In *Slum Clearance*, the city of Detroit removed unfit housing sectors to advance

⁹⁸ *Id.* at 781-82.

⁹⁹ *Id.* at 783.

¹⁰⁰ *Id.* (quoting *Poletown*, 304 N.W.2d at 478) (Ryan, J., dissenting) (emphasis in original)).

¹⁰¹ *Id.*

¹⁰² *Id.* at 782.

¹⁰³ *Id.*

¹⁰⁴ *Id.* (quoting *Berrien Springs Water Power Co. v. Berrien Circuit Judge*, 94 N.W. 379 (1903); *Poletown*, 204 N.W.2d at 479) (Ryan, J., dissenting)).

¹⁰⁵ *Id.* (quoting *Poletown*, 304 N.W.2d at 476) (Ryan, J., dissenting) (emphasis in original)).

¹⁰⁶ *Id.* (citing *Lakehead Pipe Line Co. v. Dehn*, 64 N.W.2d 903 (1954)).

¹⁰⁷ *Id.* at 784.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *In re Slum Clearance*, 50 N.W.2d 340 (Mich. 1951).

public safety and health because public safety and health were legitimate public purposes justifying condemnation.¹¹¹ Regardless of the destination of the subsequent resale of land, the economic ramifications caused by the resale were incidental to the goal of the condemnation.¹¹²

The Project again failed under the third test.¹¹³ The court found nothing in the Project that suggested that the condemnation of the property would be an immediate and clearly understood public benefit.¹¹⁴ Contrary to the test, the court held that the only public benefits for the project were to occur well after the condemnation.¹¹⁵

Hathcock was a striking reversal of judicial philosophy in the area of protecting private property rights. Although the Michigan Supreme Court evaluated the *Hathcock* taking under the Michigan Takings Clause located within the Michigan Constitution, both the Michigan and federal Takings Clauses allow the use of eminent domain for a “public use.”¹¹⁶

III. *KELO V. CITY OF NEW LONDON*¹¹⁷

A. *General Background*

New London, Connecticut, is a picturesque and historic town, located at the junction of the Thames River and the Long Island Sound.¹¹⁸ Despite its beautiful surroundings and historic heritage, New London has fallen into hard economic times.¹¹⁹ In fact, the New London economy became so stagnate that the State Office of Policy and Management designated it a “distressed municipality.”¹²⁰

To improve the local economy, local government officials created the New London Development Corporation (“NLDC”).¹²¹ In January 1998, the State authorized over \$15 million in bonds toward the support of the NLDC and the creation of Fort Trumbull State Park.¹²² One month later, Pfizer, Inc., (“Pfizer”), an international pharmaceutical company, announced that it was

¹¹¹ *Id.*

¹¹² *Id.* at 343.

¹¹³ *Hathcock*, 684 N.W.2d at 784.

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ MICH. CONST. art. X, § 2. The Michigan Constitution states, “Private property shall not be taken for public use without just compensation therefor [sic] being first made or secured in a manner prescribed by law. Compensation shall be determined in proceedings in a court of record.” *Id.* The public use requirement in the Michigan Constitution, like the Takings Clause in the U.S. Constitution, allows the use of eminent domain only for a “public use.” See, *Hathcock*, 684 N.W.2d at 770.

¹¹⁷ 125 S. Ct. 2655 (2005).

¹¹⁸ *Id.* at 2658.

¹¹⁹ *Id.* New London recently lost approximately 1900 government sector positions, and the closure of the United States Naval Undersea Warfare Center resulted in a transfer of more than 1000 positions to Rhode Island. *Kelo v. City of New London* (“*Kelo I*”), 843 A.2d 500, 510 (Conn. 2004). New London’s unemployment rate was nearly double that of Connecticut and its population was at its lowest mark since 1920. *Kelo*, 125 S. Ct. at 2658.

¹²⁰ *Kelo*, 125 S. Ct. at 2658.

¹²¹ *Id.* at 2659.

¹²² *Id.*

developing a \$300 million global research center in Fort Trumbull.¹²³ At roughly the same time as the announced Pfizer project, and upon State approval, New London adopted the Fort Trumbull Municipal Development Plan ("development plan"), which was prepared and recommended by the NLDC to coordinate Fort Trumbull State Park and the Pfizer site.¹²⁴

The development plan covered approximately ninety acres, broken into seven "parcels" of land designated for different development projects.¹²⁵ These parcels included plans for a waterfront hotel and conference center, marinas for both transient tourist boaters and commercial fishing vessels, a public walkway along the waterfront, an urban neighborhood, 90,000 square feet of high-technology research space, and 140,000 square feet of parking and retail space to be developed by private developers under the city's supervision.¹²⁶

Although the NLDC was able to obtain most of the seven parcels without eminent domain, several property owners refused to sell.¹²⁷ As a result, the NLDC, under the authority of the city, voted to use the power of eminent domain to acquire the properties within the needed area from the owners who remained unwilling to sell.¹²⁸ However, the NLDC did not file the actions under Connecticut's urban renewal plan,¹²⁹ which allowed the use of eminent domain to clear slums or blighted areas, but under its authority to create Municipal Development Projects.¹³⁰ The private landowner petitioners sought declaratory and injunctive relief from the condemnation actions from the New London Superior Court who granted the landowners relief on one disputed piece of property, but denied relief on the other.¹³¹ Both sides appealed the decision to the Supreme Court of Connecticut.¹³²

B. Connecticut Supreme Court

The Connecticut Supreme Court evaluated the taking under the U.S. Constitution by applying the expanded definition of public use created in *Berman* and *Midkiff*, i.e., courts should defer to the state legislature's police power as long as the use of eminent domain was rationally related to a conceivable public purpose.¹³³ Thus, if a taking could be classified as a function of the local government's police power, which includes the regulation of public health, safety, morals, and general welfare, then the taking does not violate the Fifth

¹²³ *Id.*

¹²⁴ Brief for the Petitioner, *Kelo v. City of New London*, 125 S. Ct. 2655 (2005) (No. 04-108).

¹²⁵ *Kelo*, 125 S. Ct. at 2659.

¹²⁶ *Kelo I*, 843 A.2d 500, 509 (Conn. 2004). See also *Kelo*, 125 S. Ct. at 2659.

¹²⁷ *Kelo*, 125 S. Ct. at 2660.

¹²⁸ *Kelo I*, 843 A.2d at 510-11. Although the development plan needed the entire seven parcels to complete the project, only parcels 3 and 4 required the use of eminent domain. Brief for the Petitioner, *supra* note 124. In parcel 3, the development required the condemnation of four properties owned by three landowners for the construction of private office space and parking. *Id.* Parcel 4 required the city to condemn eleven homes owned by four individuals for "park support." *Id.*

¹²⁹ CONN. GEN. STAT. § 8-124 (2003).

¹³⁰ *Id.* § 8-186. See Brief for the Petitioner, *supra* note 124.

¹³¹ Brief for the Petitioner, *supra* note 124.

¹³² *Kelo*, 125 S. Ct. at 2660.

¹³³ *Kelo I*, 843 A.2d at 527 (citing *Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229, 232 (1984)).

Amendment.¹³⁴ New London, like many other cities, saw eminent domain “as a means to enhance private economic development via the new public benefit test.”¹³⁵

Under this analysis, New London argued that eminent domain was appropriate because the development plan served a public benefit. New London anticipated that the development would revitalize the rest of the city and build a “momentum” toward economic improvement for New London.¹³⁶ Specifically, the city anticipated that the project would generate between:

(1) 518 and 867 construction jobs; (2) 718 and 1362 direct jobs; and (3) 500 and 940 indirect jobs. The composite parcels of the development plan also are expected to generate between \$680,544 and \$1,249,843 in property tax revenues for the city, in which 54 percent of the land area is exempt from property taxes. . . . These gains would occur in a city that, with the exception of the new Pfizer facility . . . has experienced serious employment declines Indeed, the state office of policy and management has designated the city a “distressed municipality.”¹³⁷

The tenants argued that the taking was wholly unconstitutional and unfair for several reasons. Many of the tenants wished to remain in their homes where their families were raised and had lived for decades.¹³⁸ They also argued that they had grown attached to their homes and the Fort Trumbull area, especially because of its access to the waterfront.¹³⁹ Indeed, many of them had expended a significant amount of time, money, and effort renovating their properties.¹⁴⁰

On March 9, 2004, the Connecticut Supreme Court held that none of the condemnations violated the Takings Clause in the U.S. Constitution because New London’s proposed economic development was a valid public use.¹⁴¹ The court stated several reasons for this holding. First, the court evaluated the taking based on the intent and motives of the legislature.¹⁴² In other words, the court was convinced that the legislature and city intended to benefit the community through the research park.¹⁴³ Second, the court found that the takings were reasonably necessary¹⁴⁴ and for “reasonably foreseeable needs.”¹⁴⁵ Finally, the court was inclined that this was the realm of the legislature and that the courts should defer to the legislature’s judgment in matters of economic

¹³⁴ See 26 AM. JUR. 2D *Eminent Domain* § 47.1 (2004).

¹³⁵ See Freilich, *supra* note 52, at 1.

¹³⁶ *Kelo I*, 843 A.2d at 509.

¹³⁷ *Id.* at 510.

¹³⁸ *Id.* at 511. Petitioner, Wilhemina Dery was born in her Fort Trumbull house in 1918 and lived there her entire life. *Kelo*, 125 S. Ct. at 2660.

¹³⁹ *Kelo I*, 843 A.2d at 511. Susette Kelo had lived in the Fort Trumbull Area since 1997 and had made substantial improvements to her home and prized her view of the water. *Kelo*, 125 S. Ct. at 2660.

¹⁴⁰ *Kelo I*, 843 A.2d at 511.

¹⁴¹ *Id.* at 500.

¹⁴² *Id.* at 512.

¹⁴³ *Id.* at 512, 542-43.

¹⁴⁴ *Id.* at 552.

¹⁴⁵ *Id.* at 558-59. The three dissenting justices would have imposed a “heightened” standard of review and would have found the taking unconstitutional because New London failed to show that the economic benefits would surely come to pass. *Id.* at 574.

development.¹⁴⁶ The U.S. Supreme Court granted certiorari to determine whether the city's takings satisfied the Takings Clause.¹⁴⁷

C. U.S. Supreme Court

On June 23, 2005, the Supreme Court, in a 5-4 decision,¹⁴⁸ with Justice Stevens writing for the majority, upheld the Connecticut Supreme Court's decision.¹⁴⁹ The majority held that New London's development plan fell within the scope of the Takings Clause because it would serve a public purpose.¹⁵⁰ The Court emphasized that the judicial branch must defer to the legislature when deciding whether a public purpose is valid and justifies the use of the takings power.¹⁵¹ Thus, in the eyes of the majority, New London's plan for economic rejuvenation was a valid public purpose and entitled to judicial deference.¹⁵²

Although the majority of justices upheld the Connecticut Supreme Court's decision, the minority was very vocal in its criticism of the decision. Justice O'Connor, in a stinging dissent, claimed that the majority had effectively "delete[d] the words 'for public use' from the Takings Clause of the Fifth Amendment."¹⁵³ She argued that *Berman* and *Midkiff* were distinguishable from *Kelo* in that the public use in both of those cases was the elimination of a public problem,¹⁵⁴ where as the public use in *Kelo* would allow the taking of property from one private person and the transfer of it to another private owner, so long as the local legislatures and governments put the property to a "higher use."¹⁵⁵ She concluded that the Court had abdicated its responsibility to enforce the Constitution.¹⁵⁶

Justice Thomas also wrote a dissenting opinion. Justice Thomas agreed wholeheartedly with Justice O'Connor's notions that the majority had read the Takings Clause out of existence.¹⁵⁷ Justice Thomas, however, would have reconsidered the entire body of case law dealing with the Takings Clause and allowed the government to "take property only if the government owns, or the public has a legal right to use, the property, as opposed to taking it for any public purpose or necessity whatsoever."¹⁵⁸

¹⁴⁶ *Id.* at 569.

¹⁴⁷ *Kelo v. City of New London*, 125 S. Ct. 27 (2004).

¹⁴⁸ *Kelo v. City of New London*, 125 S. Ct. 2655, 2658 (2005). The majority included Justices Stevens, Kennedy, Souter, Ginsburg, and Breyer. The dissent included Justices O'Connor, Rehnquist, Scalia, and Thomas.

¹⁴⁹ *Id.* at 2668. Although Justice Kennedy concurred with the majority's decision, he wrote a concurring opinion advocating courts to look into the purposes and intent of the taking to discover impermissible favoritism. See *id.* at 2669-70 (Kennedy, J., concurring).

¹⁵⁰ *Id.* at 2662. The Court specifically mentioned that the public purpose interpretation of the Takings Clause was the "broader and more natural interpretation." *Id.*

¹⁵¹ *Id.* at 2663-64.

¹⁵² *Id.* at 2665. As though expecting a public outcry, the majority explicitly invited states to place further restrictions on the exercise of eminent domain. *Id.* at 2668.

¹⁵³ *Id.* at 2671 (O'Connor, J., dissenting).

¹⁵⁴ *Id.* at 2675 (O'Connor, J., dissenting).

¹⁵⁵ *Id.* at 2677 (O'Connor, J., dissenting) (citing *Poletown Neighborhood Council v. City of Detroit*, 304 N.W.2d, 455 (Mich. 1981)).

¹⁵⁶ *Id.* (O'Connor, J., dissenting).

¹⁵⁷ *Id.* at 2678 (Thomas, J., dissenting).

¹⁵⁸ *Id.* at 2679 (Thomas, J., dissenting).

IV. THE SUPREME COURT WAS WRONG TO ADOPT THE *KELO* DECISION

Although the need for eminent domain for the public good is readily apparent, and local governments always want additional revenue, the U.S. Supreme Court was wrong to adopt the *Kelo* decision. First, *Kelo* allows the legislature to decide whether its use of eminent domain is congruent with the Takings Clause. This precedent is undesirable because the unchecked judgment of the legislature is not adequate protection for the protection of private property rights. Second, the *Kelo* decision, while intending to promote local economies at a seemingly low cost, creates a number of economic and non-economic problems. Third, *Kelo* set a much more dangerous precedent and is more detrimental to private property rights than either *Berman* or *Midkiff*. At their core, *Berman* and *Midkiff* required an already existing problem before any taking could occur. *Kelo*, however, does not require an existing problem in connection with the property, but allows legislatures to trade up property for a more lucrative result.

For these reasons, this Note recommends that the Court adopt a series of tests similar to those created in *Hathcock* for evaluating the constitutionality of the Takings Clause. The *Hathcock* Tests would re-enthron the judiciary as the guardian of private property rights and thereby avoid many of the pitfalls that will likely result from the adoption of the *Kelo* rationale.

A. *The Legislature is Inadequate Protection Against Eminent Domain Abuse*

The judicial branch is, and must be, the protector of individual property rights for several reasons. First, the Constitution directs that the judiciary is to serve as “an intermediate body between the people and the legislature, in order, among other things, to keep the latter within the limits assigned to their authority.”¹⁵⁹ As James Madison stated:

[C]onstitutional interpretation must be left to the reasoned judgment of independent judges, rather than to the tumult and conflict of the political process. If every constitutional question were to be decided by public political bargaining, the Constitution would be reduced to a battleground of competing factions, political passion and partisan spirit.¹⁶⁰

Indeed, the Court memorialized this ideology in *Marbury v. Madison* in which Chief Justice Marshall stated, “[i]t is emphatically the province and duty of the judicial department to say what the law is.”¹⁶¹

Second, local governments, even well-intentioned local governments, cannot adequately protect individual property rights because it is fundamentally contrary to their design. The essential purpose of the legislative branch of local government is to correct and improve local municipalities. Indeed, their continuing status as our elected representatives depends upon their ability to pro-

¹⁵⁹ THE FEDERALIST NO. 78, at 524-25 (Alexander Hamilton) (Jacob E. David Wootton ed., 2003).

¹⁶⁰ U.S. SUPREME COURT BOOKLET, THE COURT AND CONSTITUTIONAL INTERPRETATION, available at <http://www.supremecourtus.gov/about/constitutional.pdf> (last visited Oct. 6, 2005) (quoting James Madison).

¹⁶¹ *Marbury v. Madison*, 5 U.S. 137, 177 (1803).

vide constituents with a better today and promises of a better tomorrow. As a logical consequence, the community expects that their representatives act to improve the general community in the most rigorous manner accepted under the law. Therefore, the option to create jobs, increase the local tax base, improve the local economy, and ensure their own reelection is too irresistible for even the most noble local governments because these are the exact functions that they were elected to perform. Thus, representatives will always place the perceived greater good of the community, and their own reelection, before the rights of an individual. The logical role of the legislature is not, and never can be, to protect individual property rights.

To prevent local governments from succumbing to the pressure and allurements of large corporations, the U.S. Supreme Court should have strengthened the Takings Clause to prevent the destructive lobbying efforts of large corporations and wealthy developers. As James Madison stated, "[i]n framing a government which is to be administered by men over men, the great difficulty lies in this: You must first enable the government to control the governed; and in the next place oblige it to control itself."¹⁶² In order for the government to control itself, the judicial branch must create a narrow interpretation of the Takings Clause to force the government to control itself effectively, thereby protecting individual property rights.

B. A Broad Interpretation of the Takings Clause Creates Both Economic and Non-Economic Problems.

The obvious justification for the use of eminent domain by local governments is to benefit their communities. Generally, the alleged community benefits take the form of a perceived improvement to the local economy. However, local economies do not always reap the rewards of the perceived improvements. Instead, yielding to private interests can create a variety of unintended consequences and dangerous economic and non-economic problems.

1. Economic Problems

Perhaps the most ironic pitfall caused by property takings intended to improve local economies is that the city itself does not always recoup what it loses from a change of land ownership. For example, a recent study in Mississippi evaluated the economic impact of introducing a Wal-Mart into the local area and concluded that the "net increases [were] minimal as the new big-box stores merely capture[d] sales from existing business in the area."¹⁶³ Further, not only did the big store merely capture existing business, the study demonstrated that the local economy was actually worse off because the bulk of the money generated by the large store did not remain in the local area.¹⁶⁴ Many of the savings created by the large corporation were due to cost-saving and specializing maneuvers that reinvested the money elsewhere.¹⁶⁵ The new store

¹⁶² THE FEDERALIST NO. 51, at 356 (James Madison) (David Wootton ed., 2003).

¹⁶³ Better Government Association, *supra* note 10 (citing Anthony Bianco & Wendy Zellner, *Is Wal-Mart Too Powerful?*, BUS. WEEK, Oct 6, 2003).

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

actually was a drain on the local economy because local merchants were much more likely to reinvest locally.¹⁶⁶

In addition to the loss of money in the local economy, the introduction of large corporations and developments inflict additional economic losses due to the relocation and displacement of individuals.¹⁶⁷ For instance, eighty-six percent of individuals that relocated after the city condemned their property were paying more rent because of their dislocation.¹⁶⁸ The increase in rents and mortgages created an unwanted incentive to relocate into more affordable areas.

Along with the economic losses created by displaced individuals, the loss of local businesses also strains the local economy. National numbers indicate that roughly between twenty-five and forty percent of businesses fail after being relocated because of renewal projects.¹⁶⁹ In particular, one study of 139,000 businesses reported that one out of every three failed after relocation due to eminent domain.¹⁷⁰ This is not surprising since most local businesses rely on intangibles such as customer relationships, tradition, or their unique locations for their success. Local businesses cannot readily replace the intangibles that made them successful. The loss of local businesses is particularly disturbing when viewed in the light of job growth because, by one estimate, small businesses account for sixty to eighty percent of all new jobs annually created in the United States, and employ at least half of all private sector workers.¹⁷¹

The introduction of large companies makes local markets much more susceptible to outside market factors. For instance, a nationwide store in a local, vibrant market may nevertheless be in danger of closing because of uncontrollable market factors elsewhere. For example, when K-Mart filed for bankruptcy, 600 of its "box-like" stores never reopened.¹⁷² These closed stores depreciated local areas, blighted local landscapes, and left local communities extremely challenged to pick up the slack. K-Mart also laid off 55,000 employees in the process, leaving most without the skills necessary to start their own businesses.¹⁷³

Moreover, the corporations often cannot live up to their own promises and expectations. In *Poletown*, General Motors promised the city of Detroit that

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ *Id.* (citing HERBERT J. GANS, *THE URBAN VILLAGERS: GROUP AND CLASS IN THE LIFE OF ITALIAN-AMERICANS* 380 (2d. 1982)).

¹⁶⁹ Brief for America's Future, Inc. et al. as Amici Curiae Supporting Petitioner, *Kelo v. City of New London*, 125 S. Ct. 2655 (2005) (No. 04-108) [hereinafter Brief for America's Future, Inc.] (citing John P. Elwood, *Focus on Urban America: Re-thinking Government Participation in Urban Renewal: Neighborhood Revitalization in New Haven*, 12 YALE L. & POL'Y REV. 138, 180 (1994)).

¹⁷⁰ Better Government Association, *supra* note 10 (citing RICHARD BERNARD ET AL., *DOWNTOWN, INC.: HOW AMERICA REBUILDS CITIES* 35 (1989)).

¹⁷¹ Brief for America's Future, Inc., *supra* note 169 (citing *SEC Tells Congress It Hopes to Minimize Sarbanes-Oxley Impact on Small Business*, FINANCIALWIRE, Sept. 7, 2004)).

¹⁷² *Id.* (citing Sridhar Krishnaswami, *K-Mart to Merge with Sears, Roebuck & Co.*, BUSINESS LINE, Nov. 18, 2004).

¹⁷³ *Id.*

the construction of a new car factory would create more than 6,000 jobs.¹⁷⁴ To placate General Motors, Detroit destroyed 1,400 residential structures, 600 businesses, and paid \$200 million as just compensation to those displaced.¹⁷⁵ However, seven years later, the General Motors Plant had only created half of the promised number of jobs.¹⁷⁶

Another economic problem created by a broad definition of the Takings Clause is that it precipitates rent-seeking behavior. According to one commentator, one of the fundamental purposes of the Constitution is to protect against "a single underlying evil: the distribution of resources or opportunities to one group rather than another solely on the ground that those favored have exercised the raw political power to obtain what they want."¹⁷⁷ Economists refer to this "underlying evil" as rent-seeking behavior. Rent-seeking occurs when a member of society expends energy or resources "in order to bring about an uncompensated transfer of goods or services from another person or persons to one's self as the result of a 'favorable' decision on some public policy."¹⁷⁸

Rent-seeking in the arena of the Takings Clause occurs when corporations or private developers encourage government officials to condemn private property for the specific purposes of a few. Special treatment by local governments provides these rent seekers with land sites at "the expense of the taxpayers, consumers, or other groups or individuals with which the beneficiaries may be in economic competition."¹⁷⁹ This behavior is an unfair and economically wasteful practice that enables private developers and corporations to use the government's power of eminent domain to capture a surplus value that is not available to other members of the marketplace.¹⁸⁰ For example:

Suppose government takes one dollar from each of 100 people and gives it all to person X. It is in X's interest to spend at most \$100 to convince the government to

¹⁷⁴ Better Government Association, *supra* note 10. (citing Ilya Somin, *Poletown Decision did not Create Desired Benefits*, DETROIT NEWS, Aug. 8, 2004, at 13A).

¹⁷⁵ *Id.* (citing Ilya Somin, *Poletown Decision did not Create Desired Benefits*, DETROIT NEWS, Aug. 8, 2004, at 13A; Marie Michael, *Detroit at 300: New Seeds of Hope for a Troubled City*, DOLLARS AND SENSE, July 2001).

¹⁷⁶ *Id.* (citing Ilya Somin, *Poletown Decision did not Create Desired Benefits*, DETROIT NEWS, Aug. 8, 2004, at 13A).

¹⁷⁷ Cass R. Sunstein, *Naked Preferences and the Constitution*, 84 COLUM. L. REV. 1689 (1984).

¹⁷⁸ Paul M. Johnson, *A Glossary of Political Economy Terms*, http://www.auburn.edu/~johnspm/gloss/rent-seeking_behavior.html (last visited Aug. 25, 2005).

¹⁷⁹ *Id.*

¹⁸⁰ Brief of James M. Buchanan et al., *supra* note 46 (citing RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 163-64 (1985)).

If the sum of all wealth in the state of nature is 100 and that in society is 150, then there is a potential surplus of 50, which must be distributed. . . . The surplus created by political life is distributed not only at the formation of the state but also during the course of its operation. When the state acquires private property for public use, the public use requirement should ensure the "fair" allocation of surplus by preventing any group from approaching more than a pro rata share. Takings for private use are therefore forbidden because the takers get to keep the full surplus, even if just compensation is paid.

Id.

do this again; but it is only in the interest of each victim to spend \$1 to convince it to leave them alone.¹⁸¹

In other words, the taxpayers and property owners assume the costs of the gratuitous gift, while the benefits go alone to the rent-seeker.¹⁸² Indeed, if some private interest groups get what they want, other corporations will begin to rent-seek at the expense of the taxpayer.¹⁸³ Eventually the government could, or has already, become a pawn in a chess game of large money interests. In this type of game, the loser will always be the taxpayer.

However, like in all competitions, where there are losers there must be winners as well. As Justice O'Connor noted:

The beneficiaries are likely to be those citizens with disproportionate influence and power in the political process, including large corporations and development firms. . . . The Founders cannot have intended this perverse result. "[T]hat alone is a *just* government," wrote James Madison, "which *impartially* secures to every man, whatever is his *own*."¹⁸⁴

The ability of large corporations, development firms and influential people to get those benefits that are unavailable to the common populace is neither a fair practice nor constitutional.

2. *Non-Economic Problems*

A broad interpretation of the Takings Clause not only creates economic problems, it also creates non-economic problems. However, unlike many of the economic problems, the non-economic damage to communities and social infrastructures is often irreversible.

The use of eminent domain to condemn neighborhoods threatens organizations that are critical to the community. For example, religious and other charitable entities are especially prone to eminent domain abuse because they are tax-exempt and do not employ many people.¹⁸⁵ Although they do not provide much direct economic benefit to the town, few would question the importance of these institutions to local communities. Many people go to these places during times of national, regional, and personal crises to obtain physical support in the form of food and medical attention. In addition, churches and similar institutions provide spiritual and emotional services that attempt to heal the lonely, depressed, and downtrodden. Even the Supreme Court has noted that religious institutions are "beneficial and stabilizing influences in community life."¹⁸⁶

The abuse of eminent domain for private interests depreciates the value of property rights. A community that values private property interests provides its

¹⁸¹ *Id.* (citing RICHARD A. EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* 163-64 (1985)).

¹⁸² Kochan, *supra* note 6, at 81.

¹⁸³ Brief of James M. Buchanan et al., *supra* note 46. (citing RICHARD A. EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* 163-64 (1985)).

¹⁸⁴ *Kelo v. City of New London*, 125 S. Ct. 2655, 2677 (2005) (O'Connor, J., dissenting) (quoting *For the National Gazette, Property* (Mar. 29, 1792), reprinted in 14 *PAPERS OF JAMES MADISON* 266 (R. Rutland et al. eds., 1983)).

¹⁸⁵ Brief of The Becket Fund for Religious Liberty in Support of Petitioners, *Kelo v. City of New London*, 125 S. Ct. 2655 (2005) (No. 04-108).

¹⁸⁶ *Walz v. Comm'r*, 397 U.S. 664, 673 (1970).

citizens with an incentive to work and improve property.¹⁸⁷ For example, in the arena of foreclosure, the state allows a person to redeem foreclosed property after a judicial sale. This statutory right of redemption depreciates the value of the house at a foreclosure sale because the buyer is unsure that he will retain the property even after the purchase is complete. Similarly, it is also true in a community that operates under the possibility that the government can deprive property owners of the fruits of their labors through a broad use of eminent domain. Indeed, those property owners with valuable property appear most at risk.

Another non-economic pitfall caused by condemnation is the loss of community. Local authorities often fail to realize the social costs of eradication of a functioning social system.¹⁸⁸ The dissolution of a neighborhood scatters church memberships, grade school classes, athletic teams, lifelong friendships, and extended family units. One commentator stated that every neighborhood is like a "sidewalk ballet," where the people and buildings all play unique parts in the lives of the other persons in the neighborhood.¹⁸⁹ Just as it was impossible for the king's soldiers to put Humpty Dumpty together again after his fall, no governmental programs can put these fractured neighborhoods back together. Indeed, it would seem that the writers of the Constitution provided the Fifth Amendment specifically to protect against these societal ills and problems by enabling the judiciary to act as a gatekeeper to protect the property owner when the legislature begins to intrude on a citizen's individual rights.

A broad definition of Public Use will have a disproportionate negative impact on certain groups in the community. As Justice Thomas stated:

Of all the families displaced by urban renewal from 1949 through 1963, 63 percent of those whose race was known were nonwhite, and of these families, 56 percent of nonwhites and 38 percent of whites had incomes low enough to qualify for public housing, which, however, was seldom available to them."¹⁹⁰ In 1981, urban planners in Detroit, Michigan, uprooted the largely "lower-income and elderly" Poletown neighborhood for the benefit of the General Motors Corporation.¹⁹¹ Urban renewal projects have long been associated with the displacement of blacks; "[i]n cities across the country, urban renewal came to be known as 'Negro removal.'"¹⁹² Over 97 percent of the individuals forcibly removed from their homes by the "slum-clearance" project upheld by this Court in *Berman* were black.¹⁹³ Regrettably, the predictable consequence of the Court's decision will be to exacerbate these effects.¹⁹⁴

¹⁸⁷ Kochan, *supra* note 6, at 57 (citing G. WARREN NUTTER, *POLITICAL ECONOMY AND FREEDOM* 94-102 (1983)).

¹⁸⁸ Better Government Association, *supra* note 10. (citing R. SCOTT FOSLER, *DOES ECONOMIC THEORY CAPTURE THE EFFECTS OF NEW AND TRADITIONAL STATE POLICIES ON ECONOMIC DEVELOPMENT IN COMPETITION AMONG STATES AND LOCAL GOVERNMENTS: EFFICIENCY AND EQUITY IN AMERICAN FEDERALISM* 249 (Daphne A. Kenyon & John Kincaid eds., 1991)).

¹⁸⁹ *Id.* (citing JANE JACOBS, *DEATH AND LIFE OF GREAT AMERICAN CITIES*, 50-51 (1961)).

¹⁹⁰ *Kelo v. City of New London*, 125 S. Ct. 2655, 2687 (Thomas, J., dissenting) (quoting B. FRIEDEN & L. SAGALAYN, *DOWNTOWN, INC. HOW AMERICA REBUILDS CITIES* 17, 28 (1989)).

¹⁹¹ *Id.* (quoting J. WYLIE, *POLETOWN: COMMUNITY BETRAYED* 58 (1989)).

¹⁹² *Id.* (quoting Pritchett, *The "Public Menace" of Blight: Urban Renewal and the Private Uses of Eminent Domain*, 21 *YALE L. & POL'Y REV.* 1, 47 (2003)).

¹⁹³ *Id.* (quoting *Berman v. Parker*, 348 U.S. 26, 30 (1954)).

¹⁹⁴ *Id.*

Unfortunately, history and Justice Thomas are correct and the results, as Justice O'Connor stated, "will not be random."¹⁹⁵

C. *Kelo Sets An Uncharted and Dangerous Precedent*

The *Kelo* decision is a dangerous precedent because it introduces a much more expansive interpretation of the Takings Clause than *Berman* or *Midkiff*. Although *Berman* and *Midkiff* expanded the Takings Clause, both decisions required that the legislature identify an already existing problem before taking property by eminent domain. In *Berman*, the legislature was attempting to correct a blighted area that was deemed "injurious to the public health, safety, morals and welfare" of the District of Columbia.¹⁹⁶ In *Midkiff*, the Hawaiian Legislature attempted to correct a damaging oligopoly that was "skewing the State's residential fee simple market, inflating land prices, and injuring the public tranquility and welfare."¹⁹⁷ In the instance of *Kelo*, the homes and properties were not a problem, but merely in the wrong locale.

Perhaps the most dangerous result of *Kelo* is that it does not require legislatures to identify an existing problem before invoking the power of eminent domain. In essence, state legislatures no longer need to rely on their police power to eliminate existing problems. Now legislatures can take property for the sole purpose of trying to improve local economies—a central goal of every legislature. For example, New London conceded that the condemned area was not blighted and that it was a vital part of the neighborhood, but the city nevertheless took the property to improve the local economy nevertheless.¹⁹⁸ This broad interpretation of the Takings Clause justifies condemnations via eminent domain for practically any purpose, so long as the government tethers the proposed use to a potential, or even speculative, economic benefit. To prevent this infringement on private property rights, the Supreme Court should have adopted a test that strengthens the protection of the Takings Clause.

D. *Hathcock is a Better Alternative*

Although there were a variety of tests available for consideration, the Court should have adopted a test permitting local governments to govern their constituencies without unduly infringing on individual property interests.¹⁹⁹

¹⁹⁵ *Id.* at 2677 (O'Connor, J., dissenting).

¹⁹⁶ *Berman*, 348 U.S. at 28.

¹⁹⁷ *Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229, 232 (1984).

¹⁹⁸ *Kelo I*, 843 A.2d 500, 520 (Conn. 2004).

¹⁹⁹ Several tests are currently being used to determine the scope of the Takings Clause. Such tests include a test for heightened scrutiny in Delaware and North Dakota. *Wilmington Parking Auth. v. Land with Improvements*, 521 A.2d 227, 231 (Del. 1987); *City of Jamestown v. Leever*, 552 N.W.2d 365, 372-74 (N.D. 1996). Florida and Washington use a test that poses the question of whether the benefit would exist but for the private benefit. If the answer is yes, then the public purpose is primary and other benefits will not defeat the condemnation. *Baycol v. Downtown Dev. Auth. of the City of Fort Lauderdale*, 315 So.2d 451, 456 (Fla. 1975); *Petition of Seattle*, 638 P.2d 549, 556-57 (Wash. 1981). Finally, New Hampshire, Massachusetts, and Montana all use a test that weighs the net public and private benefits of the taking to determine whether it is for a private purpose. *Appeal of City of Keene*, 693 A.2d 412, 416 (N.H. 1997); *Opinion of the Justices*, 250 N.E.2d 547, 558-60 (Mass. 1969); *City of Bozeman v. Vaniman*, 898 P.2d 1208, 1214 (Mont. 1995).

Because the *Hathcock* Tests promulgated by the Michigan Supreme Court would have provided the needed balance between community and individual interests, the Supreme Court should have adopted it.²⁰⁰

The Michigan Supreme Court penned one of the most infamous decisions in Takings Clause history in *Poletown*. Indeed, many consider the *Kelo* decision to be equally heinous, but with greater reach.²⁰¹ To correct its error in *Poletown*, the Michigan Supreme Court ultimately adopted a series of tests that protected individual property rights and reinforced the Michigan takings clause. The Supreme Court should have adopted the *Hathcock* Tests because they would have more adequately protected individual property interests while at the same time affording state legislatures the necessary power and discretion to improve their communities.

Hathcock requires that the proposed public use or benefit qualify under one of three possible tests. First, “the exercise of eminent domain for private corporations [must be] limited to those enterprises generating public benefit whose very *existence* depends upon the use of land that can be assembled only by the coordination that the central government is alone capable of achieving” (“Necessity Test”).²⁰² Second, a public use exists where the private entity remains accountable to the public in its use of that property (“Public Accountability Test”).²⁰³ Third, eminent domain is appropriate if the selection of the condemned land for a private interest is based on immediate public concerns and facts of independent public significance (“Public Concern Test”).²⁰⁴ This section will evaluate the benefits of each test and apply each of the three tests to *Kelo*.

1. The Necessity Test

The Necessity Test limits “the exercise of eminent domain for private corporations . . . to those enterprises generating public benefit whose very *existence* depends upon the use of land that can be assembled only by the coordination that the central government is alone capable of achieving.”²⁰⁵ For example, railroads, roads, highways, water lines, sewer lines, levies, and electricity lines are all examples of private business needs that only the government can provide.

This test is better than the *Kelo* framework of “let the legislature do what it wants to do if it has a carefully formulated plan” for several reasons.²⁰⁶ First, this test ensures that eminent domain is an option of last resort because projects that could possibly be located elsewhere without the need of eminent domain would be excluded. This would include, among other things, shopping centers,

²⁰⁰ *County of Wayne v. Hathcock*, 684 N.W.2d 765 (Mich. 2004).

²⁰¹ See generally, Mackinac Center for Public Policy, U.S. Supreme Court Today Delivered Flawed Decision in *Kelo v. New London*, June 23, 2005, <http://www.mackinac.org/article.aspx?ID=7145> (commenting that there was still a “silver lining” for Michigan because the Michigan Supreme Court overruled *Poletown* in *Hathcock*).

²⁰² *Hathcock*, 684 N.W.2d at 781 (emphasis in original) (citing *Poletown Neighborhood Council v. City of Detroit*, 304 N.W.2d 455, 478 (Mich. 1981)).

²⁰³ *Id.* at 782.

²⁰⁴ *Id.* at 782-83.

²⁰⁵ *Id.* at 781.

²⁰⁶ *Kelo v. City of New London*, 125 S. Ct. 2655, 2665 (2005).

malls, and hotels. Second, this test ensures that individual property rights, communities, and the government's power of eminent domain are all protected against undue private influences. Finally, because local governments can only use eminent domain for essential projects, the Necessity Test deters the practice of rent seeking by large corporations and developers.

In applying the necessity test to the facts of *Kelo*, the construction of private office space and associated parking are reminiscent of the facts involved in *Hathcock*. In *Hathcock*, the Michigan Supreme Court stated that eminent domain is not appropriate for an area that is "flecked with shopping centers, office parks, clusters of hotels, and centers of entertainment and commerce."²⁰⁷ New London, and other local governments, would have a difficult time justifying that their use of eminent domain for private office space and parking is essential and could not be provided in a new and different location.

One may argue that the shops and parking lots must be within a close geographic proximity to the Pfizer facility in *Kelo*, or the Airport in *Hathcock*, in order to benefit the Pfizer facility. This argument fails under the Necessity Test for two reasons. First, the development companies had already purchased a significant amount of property in a more appropriate manner, without displacing property owners. The fact that this land could be used for parking or shops and had already been purchased tends to undermine the argument that the use of eminent domain was "necessary." Second, the purpose of the Pfizer research facility is research, not parking or shopping. Even if there was no parking or shopping close by, the fundamental purpose for the use of eminent domain, pharmaceutical research, would still exist. It is difficult to understand how the mere existence of several well-kept homes and yards in the vicinity of the research facility would have stymied any research pursuits. Essentially, the land for parking and shopping was not necessary, just highly desirable.

2. Public Accountability Test

The second *Hathcock* factor reviews whether a private entity benefiting from the use of eminent domain will remain accountable to the public for its use of that property through the local government. For example, most private transit systems, health providers, public utilities, stadiums and private parks are functioning under the control of the local government.²⁰⁸

In *Hathcock*, the Michigan Supreme Court held that the Pinnacle Project did not qualify under the Public Accountability Test. The court noted that private owners would "pursue their own financial welfare with the single-mindedness expected of any profit-making enterprise."²⁰⁹ In addition, according to the court, there is no "formal mechanism" to ensure that the businesses would continue to benefit the local economy.²¹⁰

This test is critical because it serves as a reminder that eminent domain exists to satisfy the necessities of the people. As one legal analyst stated:

²⁰⁷ *Hathcock*, 684 N.W.2d at 783.

²⁰⁸ Kochan, *supra* note 6, at 63. See also *Kelo*, 125 S. Ct. at 2673. (O'Connor, J., dissenting).

²⁰⁹ *Hathcock*, 684 N.W.2d at 784.

²¹⁰ *Id.*

[T]he Supreme Court majority today essentially endorsed the government's position that public officials can justify takings of private property for the purpose of increasing government tax revenues. If the government can expel people from their homes in order to increase the amount of taxes that other people will be forced to pay, *it reverses the proper relationship between the people and the government, where the government serves the people—not the other way around.*"²¹¹

This test provides a means for the government to do the very things that individuals cannot provide for themselves—connect private roads to the public, provide easy access to doctors via ambulances and other public services. In fact, this test discourages private developers from going to the expense of acquiring certain lands when they cannot exercise unfettered control over the lands.

In *Kelo*, a condemned parcel would provide private office spaces and parking for private companies. The developer in-turn would pay the city one dollar for a ninety-nine year lease in order to have full control over marketing and locating tenants. The government would have no formal mechanism or method to control the developer, the tenants, or their personal motivations directed toward their own financial success.

3. Public Concern Test

The third test developed in *Hathcock* questions whether the selection of the condemned land for a private interest is based on immediate public concerns and facts of independent public significance.²¹² Under this factor, the community would be able to provide for community needs that are immediate and serious such as the elimination of blighted areas such as in *Berman*, or the removal of an unwanted economic hindrance like the oligopoly in *Midkiff*. Other examples might include areas that are troubled by fire hazards, drugs, gangs, unpleasant odors (like those from a tannery or slaughterhouse), or eyesores.

In *Hathcock*, the Michigan Supreme Court found that there was nothing in the Pinnacle Project that hinted that the public good was the main reason for condemnation.²¹³ Contrary to this factor, the only public benefits to be derived from the project were to occur after the condemnation, not before.²¹⁴

In *Kelo*, this test appears to fail. By all accounts, the condemned area was not blighted nor did it have any problems of public significance that would require the government to intervene. The principal uses for the property were not to correct a pressing public problem, but purely to obtain potential economic benefits.

V. CONCLUSION

Gordon Gecko, one of the most infamous characters in cinematic history, made the historic insight that "greed—for lack of a better word—is good.

²¹¹ See Mackinac Center for Public Policy, *supra* note 201 (quoting Patrick Wright) (emphasis added).

²¹² *Hathcock*, 684 N.W.2d at 783.

²¹³ *Id.*

²¹⁴ *Id.* at 784.

Greed is right. Greed works. Greed clarifies, cuts through and captures the essence of the evolutionary spirit.”²¹⁵ In *Kelo*, the Supreme Court seems to have agreed with Mr. Gecko holding not only that greed is good, but constitutional if that same greed can possibly lead to economic development. More specifically, the Court held that the government may take private property and transfer it to a different private owner under the Takings Clause, so long as the property can possibly be upgraded to benefit a community.²¹⁶

Although the avarice may not agree, individual property rights are not only a public good, but are also a cornerstone of American liberty and a critical component of our free society. As John Locke stated, “[t]he great end and utility of Mens entering into Society, [is] the enjoyment of their Properties in Peace and Safety,” or, in other words, the principal reason for society is the preservation of a man’s property.²¹⁷ The Court was wrong to abdicate its proper role as the guardian of individual property rights and should have implemented a balanced test to bolster the integrity of the Takings Clause and properly check the power of the legislatures.

The *Hathcock* Tests would adequately provide reasonable restraints on legislatures by allowing court mandated restrictions. Legislatures would still be able to use eminent domain to improve local communities, but only if the taking passed the Necessity Test, Public Accountability Test, or Public Concern Test. The case at hand, *Kelo*, would not have passed the *Hathcock* Tests because there is no discernable use outside of the vague and speculative promises made by the city of New London. Indeed, perhaps after *Kelo*, Americans will better understand the wisdom of the sentiments of William Pitt the Elder when he said:

The poorest man may, in his cottage, bid defiance to all the forces of the Crown. It may be frail; its roof may shake; the wind may blow through it; the storm may enter; the rain may enter; but the King of England may not enter; all his forces dare not cross the threshold of the ruined tenement.²¹⁸

²¹⁵ WALL STREET (20th Century Fox 1987).

²¹⁶ *Kelo v. City of New London*, 125 S. Ct. 2655, 2671 (2005) (O’Connor, J., dissenting).

²¹⁷ See JOHN LOCKE, SECOND TREATISE OF GOVERNMENT 401 (Peter Laslett ed., New American Library 1965) (1690).

²¹⁸ NELSON B. LASSON, I THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION 49-50 (Da Capo Press 1970) (quoting Pitt’s 1763 speech in the House of Lords).

