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# THE INTERDISCIPLINARY UNDERGRADUATE LAW JOURNAL

**An Excerpt**

## THE U.S. SUPREME COURT DECISION THAT NEVER WAS: *KELO V. CITY OF NEW LONDON* AND THE ENDURING SIGNIFICANCE OF MICHIGAN'S *COUNTY OF WAYNE V. HATHCOCK*

Wesley Sudduth – The Johns Hopkins University

AMHERST COLLEGE
AMHERST, MA

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# Editor's Note

With great pleasure, I present the first issue of the Amherst College Interdisciplinary Undergraduate Law Journal. A year in the making, this issue has been an educational experience for each of us involved in its development and implementation.

Today's difficult, juridical questions require an approach that goes beyond the scope of traditional legal training and scholarship. The IULJ seeks to fulfill the goal of the Amherst College Department of Law, Jurisprudence, and Social Thought in bringing a unique multi-disciplinary approach to answering these complex multi-faceted societal issues. We hope to publish articles that focus on a variety of areas, including history, philosophy, ethics, the law, popular culture, literature, and film, to more fully address these modern juridical problems.

I would like to offer my many thanks to all those who helped in the process of starting and producing this journal. I would like to thank: the Editorial Board for their tireless work in sending out the many calls for papers to colleges and universities across the globe and for reviewing, evaluating, and editing submissions; our advisor, Professor Adam Sitze, for his help in shaping the ideas I had in mind when starting this publication and for offering encouragement and guidance along the way to make this journal what it now is and will become; Professor Austin Sarat for his guidance and wisdom in the formulation and operation of the journal; Megan Estes, the department coordinator, for her help with countless essential administrative tasks; Professor Nasser Hussain, the Department Chair, for allowing the journal the opportunity to be associated with the LJST department; and finally all those that contributed articles to this issue.

We hope you enjoy the issue and find it informative.

Sincerely,

Adam Shniderman

Editor-in-Chief/Founder

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**Wesley Sudduth**
*The Johns Hopkins University* – Class of 2010

**Abstract:**

Few cases in recent U.S. Supreme Court history have sparked as comparable a firestorm of controversy as the 2005 decision *Kelo v. City of New London,* 545 U.S. 469 (2005). The decision stated that New London's plan – to rejuvenate an aging area of the city by seizing private properties – amounted to a permissible public purpose and its eminent domain takings were thus valid under the "public use" requirement of the Fifth Amendment.

Outside of the legal community, however, few people know that only one year earlier the Michigan Supreme Court faced a case comparable to *Kelo*, *County of Wayne v. Hathcock*, 471 Mich. 445 (2004), in which it took the opposite road, issuing a unanimous decision in favor of the private property owners.

In this article, I follow the evolution of the "takings clause" in landmark decisions throughout the history of U.S. Supreme Court, especially in light of two Michigan Supreme Court decisions, *Poletown Neighborhood Council v. City of Detroit*, 410 Mich. 616 (1981), and *Hathcock*. In doing so, I argue that the *Hathcock* line of argument should have been adopted in *Kelo*, and I conclude by illuminating the importance that *Hathcock* retains for future court decisions nationwide, despite – and indeed because of – the *Kelo* decision.

## Introduction:

*There is nothing which so generally strikes the imagination, and engages the affections of mankind, as the right of property; or that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe.*

- *William Blackstone*[153]

Few cases in recent U.S. Supreme Court history have sparked as comparable a firestorm of controversy within the judicial system, state legislatures, and the American public forum as the 2005 decision *Kelo v. City of New London,* 545 U.S. 549. At issue in *Kelo* are the circumstances

[153] William Blackstone, *Blackstone's Commentaries on the Laws of England*, ed. Thomas McIntyre Cooley (Clark: The Lawbook Exchange, Ltd., 2003), 320.

in which the government can justify its taking of an individual's private property using the power of eminent domain – that is, the power of sovereign government to expropriate property from a private individual without that individual's consent. Virtually all significant constitutional arguments for eminent domain cases argued in front of the Supreme Court rest squarely on a single phrase of the Fifth Amendment known as the "takings clause," which reads as follows: "[N]or shall private property be taken for public use, without just compensation."[154] The Framers of the Constitution intended the clause, in its most fundamental sense, to protect the natural and inalienable right of an individual to own property while also granting the government limited eminent domain powers under "public use" and "just compensation" requirements.

In *Kelo v. City of New London*, the Supreme Court addressed the constitutionality of the government's use of its eminent domain powers for private economic development projects. City authorities had condemned the properties of 15 homeowners in a working-class neighborhood in New London, Connecticut, in order to ensure a contiguous plot of land for an economic revitalization plan spearheaded by a quasi-public city corporation and the Pfizer Corporation. The homeowners sued the city, claiming it had no right to condemn the properties, and the case eventually made its way to the Supreme Court. Despite the fact that the condemned properties were to be taken from their original owners and turned over to private developers, the Court decided 5-4 in favor of the city of New London and its broad interpretation of eminent domain powers. The decision, written by Justice Stevens, stated that the justification for the city's plan – to rejuvenate an aging area of New London – amounted to a permissible public purpose and, based on the past century of precedents, was thus valid under the takings clause's "public use" requirement.

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[154] U.S. Const. amend. V.

Public reaction to *Kelo* was almost uniformly one of outrage and bewilderment. The decision made headlines in major newspapers across the county, and countless opinion editorials were written in response. Surprisingly, critics arose from both ends of the political spectrum, conservative and liberal alike. Law journals overflowed with *Kelo* articles; federal and state legislatures immediately began drafting anti-*Kelo* bills; and the White House issued statements that emphasized the sanctity of private property.[155] Even the average newspaper-perusing American likely read that Justice Stevens later publicly declared that he was sorry for the decision he had penned but felt that the precedents in favor of the city had been irrefutable.[156]

Only one year earlier, however, a similarly significant eminent domain decision had gone relatively unnoticed. Few people outside of the legal community knew that the Michigan Supreme Court had faced a case comparable to *Kelo* entitled *County of Wayne v. Hathcock*, 471 Mich. 445 (2004), which also addressed the issue of a local government's exercise of eminent domain for a private economic development project. Specifically, the government of Wayne County – of which Detroit is the county seat – had condemned several privately-owned properties in order to aid in the construction of the Pinnacle Aeropark land development project in conjunction with county's newly developed additional airport terminal; the homeowners, like those in *Kelo*, had sued. The Michigan Supreme Court, however, took a road diametrically opposed to the one the U.S. Supreme Court would soon take in *Kelo*. In a landmark decision, the Michigan Supreme Court decided unanimously in favor of the private property owners, adopting a much narrower view of the "public use" requirement that limits eminent domain powers. In another blow to supporters of broad eminent domain powers, the *Hathcock* decision effectively

[155] "Executive Order: Protecting the Property Rights of the American People," 23 June 2006, The White House, http://www.whitehouse.gov/news/releases/2006/06/20060623-10.html (accessed September 7, 2008).

[156] Carla T. Main, "How Eminent Domain Ran Amok." *Policy Review* (2005).

overturned *Poletown v. City of Detroit*, 410 Mich. 616 (1981), a case notorious as an example of how eminent domain powers may be abused by government.[157]

As the *Kelo* decision illustrated so clearly, the conditions for a valid exercise of eminent domain powers and the "public use" requirement, in particular, have undergone significant reinterpretation since the writing of the U.S. Constitution. In the rest of this article, I follow the evolution of the "takings clause" in landmark decisions throughout the history of the United States Supreme Court, especially in light of two Michigan Supreme Court decisions, *Poletown* and *Hathcock*. I argue that the *Kelo* decision went too far in its expansion of eminent domain powers and that adoption of the *Hathcock* line of argument would have been a wiser course. I conclude by illuminating the importance that *Hathcock* retains for future court decisions nationwide, despite – and indeed because of – the contrary *Kelo* decision.

**The Birth of the "Takings Clause":**

Much of the development of the "takings clause" has occurred comparatively recently in America's history, nearly all within the last century or so. In the years following America's founding, virtually all Supreme Court decisions on eminent domain matters stuck to a very strict interpretation of "public use": any use of eminent domain exercised by government could only be justified by usage of the land strictly for the public, such as for a new state courthouse or a public road. Despite such strict beginnings, the courts' interpretation of the clause began traveling a different path well prior to *Kelo*. Many experts cite the Mill Acts of the 19th century as one of the first indicators of the change that lay in store for eminent domain. The Mill Acts were laws passed in several states that gave to "private" grist-mills land taken through eminent domain and license to operate as long as state or local governments maintained general

[157] Mary Ross, "Public Use: Does County of Wayne v. Hathcock Signal a Revival of the Public Use Limit to the Taking of Private Property?" 37 Urban Lawyer 243 (2005). Reprinted in *Eminent Domain Use and Abuse: Kelo in Context* (Chicago: American Bar Association Publishing, 2006), 5.

oversight, especially of fees – a practice analogous in some respects to government's relationship with public utility companies today. As one scholar reasoned, "The involvement of the government, plus the widespread and immediate benefit to the public, softened the blow of a taking in which the ultimate owner was to be another private party."[158] The Mill Acts, conducted under state law, formed much of the precedent to which later judicial decisions on eminent domain hewed.

As Justice Thomas discussed in his *Kelo* dissent, the 1885 U.S. Supreme Court made clear that not only was it constitutionally acceptable to secure through eminent domain the land used for the construction of these grist mills, but it was similarly acceptable for such mills – which virtually uniformly used water as their means of power – to flood upstream landowners, as long as the mills paid due compensation for the lands "taken," as ruled in *Head v. Amoskeag Mfg. Co.,* 113 U.S. 9 (1885).[159] In fact, since at least 1832, courts had ruled in favor of mills that flooded neighbors, as long as the mills paid for the land.[160] However, even in *Head* and other parallel cases, such a ruling came under the due process clause of the Fourteenth Amendment to the Constitution,[161] and as late as the second half of the 19th century, the eminent domain power-to-be lay dormant.

In later years, however, the "takings clause" mushroomed. One of the first landmark cases in this evolution was not, strictly speaking, about eminent domain at all, but rather about the constitutionality of zoning ordinances. The case, known as *Village of Euclid v. Ambler Realty Co*, involved sixty-eight acres of land owned by Ambler Realty Company in the village of

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[158] Main, 7.

[159] *Kelo v. City of New London*, 545 U.S. 469 (2005).

[160] Main, 8.

[161] *Head v. Amoskeag Mfg. Co.,* 113 U.S. 9 (1885).

Euclid, adjacent to Cleveland, Ohio. In an effort to prevent the Realty Company from selling parcels of the land to industrial corporations and thereby decreasing the aesthetic value of Euclid, the village's officials decided to create a zoning board that would mandate certain conditions for building by which owners of the property would be forced to abide. These criteria, which included different classes for building height, area, as well as usage restrictions, were then systematically imposed throughout the land, including Ambler Realty's parcels. Ambler Realty sued on the grounds that, *inter alia*, the zoning ordinances significantly decreased the value of its land by making the land more difficult to sell or develop and thus constituted an unlawful regulatory taking without due process of law.[162]

Though Ambler Realty was successful in district court, its claim was met with stiff opposition when the case reached the Supreme Court. The majority opinion, penned by Justice Sutherland, declared zoning ordinances to be within a community's police powers. The decision raised the floodgates for local legislatures across the country to implement strict zoning regulations, a practice so common today that it is taken more or less for granted. More significantly for eminent domain, the *Euclid* decision allowed courts and legislatures throughout the United States to broadly construe the extent to which governmental officials can control private property on behalf of the welfare of their cities, an interpretation that had never before been endorsed by the nation's highest court.

*Euclid* paved the way for *Berman v. Parker*, 348 U.S. 26 (1954), a case decided twenty-eight years later. In *Berman*, the Supreme Court addressed the constitutionality of the District of Columbia Redevelopment Act of 1945, a law passed in order to ameliorate blighted housing conditions in D.C. through a comprehensive, area-wide remedy to eliminate unsafe and/or

[162] *Euclid v. Ambler Realty*, 272 U.S. 365 (1926).

unaesthetic buildings; the act called for the use of D.C.'s police powers to designate land for private uses, such as housing, businesses and industry, and for public uses like public buildings and reservations. The plaintiff was a private business owner who ran a department store within the blighted area, though the department store itself was not in poor condition. After his department store was condemned and the city designated the land for a different private use, the owner sued, claiming that the Redevelopment Act violated the takings clause of the Fifth Amendment as well as the due process clause. He argued that his department store was not blighted and that the undeserved taking would simply pass the property into another private individual's hands. These arguments notwithstanding, in *Berman* the Court decided unanimously that the District of Columbia had the power to implement the Redevelopment Act, condemning buildings and designating uses for the land as it saw fit, regardless of whether or not the land would fall into public or private hands: "We cannot say that public ownership is the sole method of promoting the public purposes of community redevelopment projects."[163] Though the decision makes no reference to *Euclid* name, the principles of the prior decision were very much at play. In one notable pair of paragraphs, Justice Douglas declared the following:

> Miserable and disreputable housing conditions may do more than spread disease and crime and immorality. They may also suffocate the spirit… 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.[164]

With the broadening of the Fifth Amendment's "public use" requirement to include physical, aesthetic, and monetary benefits – even abstract benefits such as "improvement of the human spirit" – the Court effectively reinterpreted the clause such that any eminent domain acts serving

[163] *Berman v. Parker*, 348 U.S. 26, 34 (1954).

[164] *Berman,* 348 U.S. at 33.

a public purpose, not just those securing land for public use, could be constitutionally justified; no longer would condemned land need to be used for schools, roads, or the like.

**Michigan Case #1 – *Poletown Neighborhood Council v. Detroit*:**

If *Berman* was where the train left the station toward a newly interpreted, broader takings clause that need be justified only by a "public purpose" requirement, then *Poletown Neighborhood Council v Detroit* was where the train threw on some coal and charged full speed ahead. While the case was decided by the Michigan – not the United States – Supreme Court, its influence stretched nationwide. In the years following the decision, federal and state courts adopted similar interpretations,[165] and in fact even the U.S. Supreme Court followed in the wake of *Poletown*'s reasoning three years later with *Midkiff v. Hawaii Housing Authority*.

The neighborhood of Poletown was located within the greater metropolitan area of Detroit, in Wayne County, Michigan. In 1980, the nation was in the midst of a rough recession, struggling in the face of high oil prices, increased competition from overseas, inflationary pressures, and high unemployment. The recession had hit the auto-making industry, the lifeblood of Detroit's economy, especially hard, causing Detroit unemployment rates to skyrocket. At its worst, the city's unemployment rate in the early 1980s was estimated to be somewhere between 16.3 and 18.3 percent.[166][167] In the autumn of 1980, General Motors Corporation, the largest of Detroit's "Big Three" automakers, proposed the construction of a new automobile plant within the city, promising the creation of thousands of new jobs. GM's management placed significant economic and political pressure on the city to provide land and tax breaks for the plant's development, threatening to build the factory somewhere else. Desperate to alleviate its grave

[165] Timothy Sandefur, "A Gleeful Obituary For Poletown Neighborhood Council v Detroit." *Harvard Journal of Law and Public Policy* 28 (2006): 651.

[166] Main, 14.

[167] Sandefur, 651.

economic problems, Detroit, under Mayor Coleman Young, agreed to the proposal. According to GM's wishes, the land had to be "500 contiguous acres and be accessible by highway and rail, cleaned of any toxic waste, leveled of any structures, and suitably cheap."[168] In addition, GM required that Detroit fulfill the contract by May 1, 1981, giving the city roughly seven months to find an acceptable piece of land.[169] The city chose Poletown, a neighborhood of low- to middle-income, working class individuals, and moved swiftly to clear the area. All told, the project to bulldoze Poletown "meant condemning over 1000 properties and the homes of 3438 people."[170]

In response, Poletown homeowners sued the city and filed for an injunction. After the district court ruled in favor of the city on December 9, the case went to the Michigan Supreme Court. Only ten days after oral arguments had been heard, the state's highest court decided 5-2 in favor of the city. One of the dissenting justices, Justice Ryan, submitted his dissent alone several days later and included an admonishment of the Court for having acted so hastily.[171]

*Poletown* had a national influence far beyond the typical Michigan Supreme Court decision. After 1981, many other courts, state and federal alike, adopted *Poletown* reasoning in similar cases.[172] What made the decision so influential? Firstly, the decision contained extremely broad language that was easily adaptable to similar cases in other courts. The clause in Article 10, Section 2, of the 1963 Michigan Constitution, which was carefully examined in *Berman*,

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[168] Main, 14.

[169] Main, 14.

[170] Sandefur, 653.

[171] *Poletown*, 304 N.W.2d at 465. "My separate views are set down some days after the Court's 5-to-2 decision…I take this unusual step for a number of reasons…[among them] the speed with which this case was submitted, argued, considered and decided has meant preparation of opinions which, in my view, do not adequately address the constitutional issues involved."

[172] Sandefur, 651. "Hawaii Housing Authority v. Midkiff, 467 U.S. 229 (1984); General Bldg. Contractors v. Bd. Of Shawnee County Comm'rs 66 P.3d 873 (Kan. 2003); House. and Redevelopment Auth. Of Richfield v. Walser Auto Sales, 630 N.W.2d 662, 668 (Minn. Ct. App. 2001); City of Toledo v. Kim's Auto & Truck Serv., 2003 WL 22390102 (Ohio Ct. App. 2003)."

reads, "Private property shall not be taken for public use without just compensation therefore being first made or secured in a manner prescribed by law."[173] In interpreting such a passage, identical in meaning and similar in text to the appropriate clauses of the U.S. Constitution's Fifth Amendment and in other state constitutions, the Court's decision provided a neat template for any court wishing to adopt a similar line of reasoning. Missing from the opinion was any description of the unique economic hardships that Detroit was facing at the time or the significance of the automobile industry to the area, politically and economically significant external circumstances that the Michigan Supreme Court may have considered in addition to the legal and constitutional issues. But the Court gave short shrift to any factual context of the case. Instead, the Court declared the following:

> Plaintiff-appellants urge us to distinguish between the terms "use" and "purpose," asserting they are not synonymous and have been distinguished in the law of eminent domain. We are persuaded the terms have been used interchangeably in Michigan statutes and decisions in an effort to describe the protean concept of public benefit. The term "public use" has not received a narrow or inelastic definition in this Court.[174]

Since *Berman*, the entire debate surrounding eminent domain had hinged on the distinction between "public use" and "public purpose" requirements, so this statement in *Poletown* constituted an enormous shift in interpretation of the takings clause. Whether or not Michigan had used the two terms interchangeably in its own particular legal history was beside the point. The decision was broad and adaptable enough that other courts could easily pick up the language.

Of course, in justification for their decision, the majority in *Poletown* tempered this assertion by emphasizing that a taking must provide public benefit, in this case job creation.

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[173] Mich. Const. art. X, § 2.

[174] *Poletown*, 304 N.W.2d at 457.

Recognizing that GM profited greatly from the taking, the Court stated that "[t]he power of eminent domain is restricted to furthering public uses and purposes…Where, as here, the condemnation power is exercised in a way that benefits specific and identifiable private interests, a court inspects with heightened scrutiny the claim that the public interest is the predominant interest being advanced."[175] The Court clarified that the public benefit could not be "speculative or marginal," but had to be "clear and significant."[176] In requiring that such cases be viewed under a stricter form of scrutiny, the majority intended to provide some amount of protection to property owners from state abuse of eminent domain powers.

At first glance, the heightened security safeguard seems reasonable and prudent, and its inclusion was another reason why *Poletown* was so influential, since it helped win over courts initially leery of the expansive decision. Unfortunately, the scrutiny requirement is not quite the guarantee that it appears to be. Quoting in parts directly from *Berman*, the *Poletown* majority declared the following:

> The Legislature has determined that governmental action of the type contemplated here meets a public need and serves an essential public purpose. The Court's role after such a determination is made is limited…The United States Supreme Court has held that when a legislature speaks, the public interest has been declared in terms "well nigh conclusive."[177]

Thus by allowing the legislature to decide whether or not a taking serves a public use or purpose, the Court essentially deferred all judgment of the action's constitutionality to the legislature. By already assuming that the decision of the legislature is always or almost always valid, a court that adopted even the most stringent scrutiny would be hard-pressed to strike down a taking. The resulting process would be merely a rubber-stamping.

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[23] *Poletown*, 304 N.W.2d at 460.

[176] *Poletown*, 304 N.W.2d at 460.

[25] *Poletown*, 304 N.W.2d at 459.

Finally, the extremity of *Poletown*'s decision likely played some part in its adoption in courts across the nation. The case immediately became a part of eminent domain picture; judges and lawyers read about it in journals, and law students studied it in school. If for no other reason, the decision spread because it was widely discussed and examined as a landmark case.

**Eminent Domain Grows Broader:**

The U.S. Supreme Court case *Hawaii Housing Authority v. Midkiff* incorporated aspects of the *Poletown* decision to pick up the conversation where the *Berman* decision had left off thirty years earlier. While the context of the case was very specific to Hawaii and its unique history of monarchical control, the Court made arguments in its decision of *Midkiff* very similar to those concluded in *Berman*. The case arose after the Hawaii legislature passed a bill known as the Land Reform Act of 1967 in order to "reduce the perceived social and economic evils of a land oligopoly traceable to their monarchs."[178] Under this Act, Hawaii residents currently leasing their residential lot from a lessor who owned five acres of land or more could submit a petition to the Hawaii Housing Authority and ask the Authority to hold a public hearing in order to determine if the condemnation of the lessor's land would fulfill the Land Reform Act's public purpose. If the Authority determined at the hearing that it did, then it had the power to condemn the land and pay the lessor fair market value for the property, which the Authority could then sell back at face value to the lessee who originally petitioned to have the land condemned. In this way, the Hawaii legislature planned to disseminate land ownership to a wider portion of the state's populace. At the time, eighteen landholders held over 40% of the land on the islands, which, as the Court correctly argued, skewed the lease market and inflated land prices.[179]

[178] *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 241-242 (1984).

[179] *Midkiff*, 467 U.S. at 232.

In response, a group of lessors filed suit in federal court requesting enjoinment of the Act. After the District Court upheld and the Court of Appeals reversed, the case was granted *certiorari* by the Supreme Court. In the Court's unanimous 8-0 decision, Justice O'Connor[180] argued that any determination of the constitutionality of the Act must first begin with a look at the the argument for a "public purpose" justification adopted in *Berman*. Just as the District of Colombia had the right to exercise its police powers to combat inner-city blight, O'Connor argued, so too did Hawaii have the right to combat unfair and socially harmful land oligopolies: "Regulating oligopoly and the evils associated with it is a classic exercise of a State's police powers."[181] Later in the decision, she echoed an argument made in *Poletown* while expounding upon the idea of public purpose:

> The Court long ago rejected any literal requirement that condemned property be put into use for the general public…it is only the taking's purpose, and not its mechanics, that must pass scrutiny under the Public Use Clause…[T]he Constitution forbids even a compensated taking of property when executed for no reason other than to confer a private benefit on a particular private party…But no purely private taking is involved in these cases. The Hawaii legislature enacted its Land Reform Act not to benefit a particular class of identifiable individuals but to attack certain perceived evils of concentrated property ownership in Hawaii – a legitimate public purpose.[182]

Justice O'Connor did not cite the *Poletown* case in the Court's decision. Nevertheless, the link between the two cases was clear. According to a unanimous U.S. Supreme Court, "public purpose" and "public use" had become virtually synonymous – just as it had appeared to the Michigan Supreme Court.

**Michigan Case #2 – *Couty of Wayne v. Hathcock*:**

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[180] Justice O'Connor later conducted oral proceedings for the *Kelo* case because of the absences of Chief Justice Rehnquist and Justice Stevens, making her the first woman to conduct oral proceedings on the Supreme Court in U.S. history.

[181] *Midkiff*, 467 U.S. at 230.

[182] *Midkiff*, 467 U.S. at 244.

In 2004, a second landmark decision on eminent domain emerged from the Michigan Supreme Court. In *County of Wayne v. Hathcock*, nine homeowners brought suit against Wayne County – the same Michigan county in which Poletown had once been – and requested an injunction of the condemnation proceedings against their properties; their properties were being condemned for the stated public purpose of creating the Pinnacle Aeropark Project. From the start, the case promised to be a fresh look at the then-twenty-three-year-old *Poletown* decision. In its grant of leave to appeal, the Michigan Supreme Court directed the parties to discuss, *inter alia*, "whether the 'public purpose' test set forth in *Poletown*…is consistent with Const 1963, art 10, §2 and, if not, whether this test should be overruled…[and] whether a decision overruling *Poletown*…should apply retroactively or prospectively only."[183] The stage was set.

The situation giving rise to the case had been a number of years in the making. As far back as the late 1980s, the Detroit Wayne County Metropolitan Airport Authority had launched the Pinnacle Aeropark Project as part of their efforts to expand the area of their runways. Eventually, the Park was slated to include hotels; shopping, dining, and retail space; buildings for offices; and a golf course.[184] Much of the 1300 acres of land that the Park required had already been purchased by the county, albeit in a hodgepodge manner due to FAA noise reduction requirements.[185] In order to purchase the remaining three hundred acres, the County threatened to condemn all private properties. Under this threat, the county was able to purchase twenty-five properties from "voluntary" homeowners but was forced to condemn the other twenty parcels of land, leading to the filing of the suit on April 26, 2001.[186]

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[183] *Hathcock*, 471 Mich. at 454-5.

[184] Alan Ackerman, "The Changing Landscape and Recognition of the Public Use Limitation: Is *Hathcock* a Precursor to Kelo?" *Michigan State Law Review* 1041 (2004): 1056.

[185] *Hathcock*, 471 Mich. at 452.

[186] Ackerman, 1057.

On December 19, 2001, the circuit court issued its ruling upholding the *Poletown* precedent in favor of the county. The state appellate court also affirmed on April 24, 2003, though not entirely willingly. Though at least one justice openly urged the overruling of *Poletown* and others criticized it, the appellate court justices ultimately conceded that it was not their place to overrule the decision. The homeowners appealed to the Michigan Supreme Court, and on July 20, 2004, the decision was reversed in favor of the homeowners, overturning *Poletown*.

The Court returned to the narrower interpretation of the state constitution's takings clause, reinstating the "public use" requirement and the "prior 150 years of precedent."[187] The Court saw such an interpretation as more in line with common sense and legal tradition: "This common understanding coincides with the traditional use of eminent domain for government office buildings or for public facilities for its citizen, such as schools or parks."[188] The Court also criticized the *Poletown* majority for their deference to the legislature, stating that such a view essentially transferred the power to interpret the constitution from its rightful place, with the judiciary, to the legislature.[189]

In addition, the Court also emphasized the special circumstances that had surrounded the *Poletown* decision. "In Poletown, the circumstances presented were extraordinary – the area where the General Motors manufacturing facility was to be built had high unemployment and was suffering fiscal distress…It was those crucial factual underpinnings that caused the plaintiffs-appellants not to challenge [public purpose theory]."[190] In the circumstances of

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[187] Ackerman, 1061.

[188] Dwight H. Merriam and Mary M. Ross, *Eminent Domain Use and Abuse* (American Bar Association, 2007), 12.

[189] *Hathcock*, 471 Mich. 445.

[190] Brief for Appellant at 44, *County of Wayne v. Hathcock*, 471 Mich. 445.

*Hathcock*, however, "nothing of the kind exist[ed]."[191] The Court stressed the fact that the area's economy was sound, and there was no question of blight, which had been the most widely accepted justification for property condemnation since *Berman*.[192]

Much seemed to lay in store for *Hathcock*'s future. The U.S. Supreme Court had followed its *Poletown* decision with *Midkiff* two years later. In a striking parallel, less than a year after *Hathcock*, the U.S. Supreme Court faced a case with a similar set of circumstances.

**All Lines Converge on *Kelo*:**

The port city of New London sits at the mouth of the Thames River on the southeastern coast of Connecticut. Founded in 1646, the city grew in importance as the whaling industry's significance to New England's economies increased in the 19th century. With the industry's decline, however, the city's fortunes fared worse with each passing decade. By 1998, New London had an unemployment rate almost double that of the state of Connecticut.[193] In particular, an area of the city known as Fort Trumball experienced such drastic decline that state and city officials were motivated to formulate solutions for an economic revival.

In order to achieve this, the city's government officials, in conjunction with the state of Connecticut, resurrected the New London Development Corporation (NLDC) to plan the revival. The NLDC was a private not-for-profit corporation that the city had established years earlier in response to similar concerns. After Connecticut authorized $5.35 million for the NLDC (along with another $10 million to create a Fort Trumball State Park) and the Pfizer Corporation announced that it would build a $300 million research facility adjacent to the south boundary of the Trumball area, the city's urban planners drew up a comprehensive redevelopment plan meant

[191] Brief for the appellant, 44.

[192] *Hathcock*, 471 Mich. 445.

[193] *Kelo*, 545 U.S. 469.

to capitalize on the potential of the Pfizer facility, create jobs, generate tax revenue, build momentum for New London's revitalization, make the city more attractive, and create leisure and recreational opportunities on the waterfront and in the park.[194]

The plan itself involved 90 acres of Fort Trumball land, 32 of which were publicly owned as the Trumball State Park or as part of a former naval facility, and the rest composed of approximately 115 private properties. City planners divided these ninety acres into seven parcels, each with its own separate and unique function within the redevelopment plan. Parcel 1, for instance, was designed "for a waterfront conference hotel at the center of a 'small urban village' that will include restaurants and shopping …[and] also have marinas for both recreational and commercial uses."[195] Other parcels were designated for purposes such as new residences; retail, research and development, or commercial office space; parking areas for the marinas and state park; and a U.S. Coast Guard Museum.

In June 1998, the Pfizer Corporation bought adjacent property, known as the "New London Mills site," and in January 2000, the city council approved the final redevelopment plan. From the six originally proposed, the final plan was a "composite of the most beneficial features of…[the] alternative development plans."[196] The city council charged the NLDC with the plan's implementation, authorizing the corporation to acquire the property needed for the redevelopment from private owners and, if necessary, to exercise eminent domain powers in the city's name in order to do so. While most private owners in the area sold their land willingly, nine resisted. When the NLDC began legal procedure to condemn these owners' properties, the

[194] *Kelo*, 545 U.S. 469.

[195] *Kelo*, 545 U.S. at 474.

[196] *Kelo v. City of New London*, 843 A.2d 500, 510 (Conn. 2004).

owners, bankrolled by the Institute for Justice, [197] brought the case to the New London Superior Court.

Between the nine of them, the plaintiffs owned a total of fifteen properties within the area encompassed by the redevelopment plan – four in parcel 3, the parcel slated for office and retail space, and eleven in parcel 4A. Plans for the usage of Parcel 4A had not yet been finalized, though several proposals had been suggested and city officials ultimately intended for the land to somehow support the Trumball State Park or the nearby marina. Relationships of the resisting private individuals to their properties were mixed. For instance, one elderly woman, Wilhelmina Dery, had lived in her Fort Trumball house since her birth in 1918. On the other hand, five of the fifteen lots were investment properties; neither the owner nor any family members occupied these, and most were rentals. Susette Kelo, the eponymous plaintiff in the case, had bought her Fort Trumball house in 1997 and had made many improvements on it, including painting it salmon pink, her favorite color. She referred to it as her "little, pink cottage…with beautiful views of the water."[198]

The U.S. Supreme Court granted *certiorari* to the case and listened to oral arguments in February 2005. Four months later, on June 23, the Court issued its decision, finding in favor of the city of New London by a vote of 5-4. *Hathcock*'s reasoning was little heeded by the Court majority.

**A Difference of Interpretation:**

*The Majority Opinion*

[197] The Institute for Justice, or IJ, is a libertarian public interest law firm. <http://www.ij.org/index.html>

[198] Susette Kelo, "Testimony on the Kelo Decision: Investigating Takings of Homes and Other Private Property," Senate Judiciary Committee, Sept. 20, 2005, <http://judiciary.senate.gov/testimony.cfm?id=1612&wit_id=4657> (accessed April 30, 2005).

In the opinion that Justice Stevens wrote for the majority, the Court placed great emphasis on the nature of New London's plan, stating that it was both comprehensive and "carefully considered." While it would certainly be unconstitutional to transfer property from one private individual to another for the second private party's benefit (even if compensation were justly paid), whether expressly or under the pretext of the public good, the Court's majority opinion stated that, in this case, the takings were pursuant to a "carefully considered" development plan.[199] Furthermore, the Court argued that a strict interpretation of eminent domain, such as that argued by many 19th century courts, had grown into a much broader concept in order to stay in line with the nation's ever-evolving needs. To this end, the Court pointed out several decisions made at the turn of the 20th century in which the meaning of the phrase "public use" shifted from "use by the public" into "for a purpose in the public's benefit."[200] This change, the Court argued, was a good thing as the nation evolves: "the needs of society…have evolved over time in response to changed circumstances. Our earliest cases in particular embodied a strong theme of federalism…[Now] our public use jurisprudence has wisely eschewed rigid formulas and intrusive scrutiny in favor of affording legislatures broad latitude in determining what public needs justify the use of the takings power."[201]

The opinion then discussed whether or not the city's plan fulfilled the "public purpose" requirement (instead of "public use"), using *Berman* and *Midkiff* as precedent. It rejected the argument by the petitioners that all takings justified solely on grounds of economic development should be automatically turned down as unconstitutional, a so-called "bright-line rule." Citing

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[199] *Kelo*, 545 U.S. 469.

[200] See *Fallbrook Irrigation Dist v. Bradley* (164 U.S. 112); *Strictley v. Highland Boy Gold Mining Co.* (200 U.S. 527); *Mt. Vernon-Woodbury Cotton Duck Co. v. Alabama Interstate Power Co.* (240 U.S. 30); *Ruckelshaus v. Monsanto Co*. (467 U.S. 986).

[201] *Kelo*, 545 U.S. at 482-3.

these past cases, it reasoned that, because the Court had consistently adhered to a broad interpretation of public purpose, the bright-line rule would follow "neither precedent nor logic."[202]

Throughout the decision, in fact, the Court deferred to the New London city council on most matters of controversy. For instance, in a nod to *Berman*, the opinion admitted that "those who govern the City were not confronted with the need to remove blight in the Fort Trumball area" but went on to explain that "their determination that the area was sufficiently distressed to justify a program of economic rejuvenation is entitled to our deference."[203] The Court also relied upon the judgment of the city council in determining whether the development plan could with "reasonable certainty" provide the public benefits that developers projected. Once the Court had determined a taking to be consistent with the Constitution and state law, it did not see itself as having the responsibility or duty to oversee the specifics in the taking's implementation.

In Justice Kennedy's brief concurrence, he included an additional caveat to the Court's acceptance of using eminent domain for economic development projects. While he ultimately agreed with the majority decision, he said that the Court should carefully examine circumstances in which a single private party – such as Pfizer Corporation – is a major player who stands to benefit from the taking. According to Kennedy, while the Court should not adopt a bright-line rule, it should be wary of such cases and exercise a higher state of scrutiny, an argument similar to that of the *Poletown* majority:

> My agreement with the Court that a presumption of invalidity is not warranted for economic development takings in general, or for the particular takings at issue in

[202] According to at least one constitutional scholar, this argument by the plaintiffs for a bright-line rule was a grave miscalculation of strategy. "[The defense's] primary task was not to persuade the conservatives on the bench; they were already pre-disposed in the petitioner's favor. By arguing for a bright-line rule, IJ [the Institute of Justice] was preaching to the choir and alienating the very audiences it most had to persuade." (Main, 20).

[203] See Justice Kennedy's concurring opinion in *Kelo v. New London*, 545 U.S. 469 (2005), http://www.supremecourtus.gov/opinions/04slipopinion.html (accessed September 1, 2008).

> this case, does not foreclose the possibility that a more stringent standard of review than that announced in *Berman* and *Midkiff* might be appropriate for a more narrowly drawn category of takings.[204]

*The Dissents*

The Court's dissenting justices (O'Connor, Scalia, Thomas, and Chief Justice Roberts), strongly admonished the majority decision, contending that it destroyed the distinctions between private and public use of property and effectively deleted the words "for public use" from the takings clause.[205]

O'Connor's dissent put forth three circumstances of eminent domain in which the takings clause may be constitutionally upheld: first, those in which the property is retained and owned by the public, i.e. a road or courthouse; second, those in which the property is transferred to a private party with "common carrier" duties, such as land for a train; and third, those certain *exceptions* "in certain circumstances and to meet certain exigencies…that serve a public purpose." In this way, the dissenting opinion distinguished the case from the precedents set by *Berman* and *Midkiff*, cases which the majority opinion had heeded.

The dissenters acknowledged that courts should sometimes defer to the legislature but, in contrast with the majority, stressed that deference to the legislature in such matters is not always acceptable: "But were the political branches the sole arbiters of the public-private distinction, the Public Use Clause would amount to little more than hortatory fluff. An external, judicial check on how the public use requirement is interpreted, however limited, is necessary if this constraint of government power is to retain any meaning."[206] Thus, according to O'Connor's opinion, in

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[204] *Kelo*, 545 U.S. at 493.

[205] *Kelo*, 545 U.S. at 494.

[206] *Kelo*, 545 U.S. at 497.

cases in which the proposed taking may not fundamentally adhere to the Fifth Amendment, the Court should examine the plan less deferentially. Passing off such responsibility to the states in the manner suggested by the majority opinion would force those states to compensate for the Court's refusal to properly enforce a clause of the Constitution meant to curtail the states' powers in the first place.[207]

The dissenting opinion also shrugged off the suggestion within Kennedy's concurrence that the Court should be wary of economic development takings plans yet not adopt a bright-line rule. To disguise a plan meant to aid certain specific private parties as a plan in the public benefit would be easy for all but the "stupid staff[er]." According to the dissent, it's better to be safe than sorry, and the Court should rule out all such suspect plans. At its heart, the dissenting opinion argued that the majority decision eliminated all significant constraints on eminent domain, thus putting all private property at risk: "The specter of condemnation hands over all property. Nothing 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."[208]

In his separate dissent, Justice Thomas proclaimed that the Court's error in eminent domain cases ran deeper than the majority decision in *Kelo*. Thomas called for "absolute fidelity" to the clause's original meaning and a return to the basics of public use. The phrase "public use," he argued, most naturally alludes to the first two circumstances to which Justice O'Connor referred: those circumstances in which the public owns the property and employs it to the public's benefit, and those in which the public fully regulates a quasi-public common carrier. According to Justice Thomas, the Court had not given this original meaning its due attention and had instead "adopted its modern reading blindly," allowing legislatures to determine for

[207] *Kelo*, 545 U.S. at 504.

[208] *Kelo*, 545 U.S. at 503.

themselves what constitutes public uses or public purposes with little judicial oversight: "There is no justification, however, for affording almost insurmountable deference to legislative conclusions that a use serves a 'public use.'"[209]

Both O'Connor's and Thomas's dissents offered dire warnings about the consequences of the Court's decision. Both also warned that a disproportionate amount of unwanted and illegal takings would be directed toward low-income, politically weak, and minority communities. For instance, Thomas pointed to statistics showing that "over 97 percent of the individuals forcibly removed from their homes by the 'slum-clearance' project upheld by this Court in *Berman* were black. Regrettably, the predictable consequence of the Court's decision will be to exacerbate these effects."[210]

**The Backlash:**

Perhaps most extraordinary and fascinating about the *Kelo* decision was the extent of the backlash it sparked among the public, as well as in legislative and executive bodies across the country.

Prior to the *Kelo* decision, over forty *amicus curiae* briefs were filed for the case for the Supreme Court, the majority of which were in favor of the petitioners. Even more notable was the range of organizations, think tanks, and lobby groups allied against New London. Susette Kelo's supporters ranged from the Institute for Justice – the organization which also sponsored the petitioners' lawyers and paid all legal fees – to the ACLU, the NAACP, and the AARP. A *New York Times* article written one year after the case described the result of the *Kelo* decision as a "revolt," saying that "the decision provoked outrage from Democrats and Republicans, liberals

[209] *Kelo*, 545 U.S. at 517.

[210] *Kelo*, 545 U.S. at 522.

and libertarians, and everyone betwixt and between."[211] In the same article, Professor Richard Epstein, an expert scholar on the takings clause at the University of Chicago, said the backlash arose because the decision kindled "a very strong, visceral response."[212] In a CNN poll conducted online on the day of the Supreme Court's decision, over 66% of just under 178,000 respondents answered "Never" to the statement "Local governments should be able to seize homes and business"; 33% responded "For public use"; and only 1% responded "For private economic development."[213]

In the face of such overwhelming public indignation, legislatures nationwide reacted swiftly. According to one study conducted only two months after the decision, "legislatures in 28 states…introduced more than 70 bills aimed at curbing local eminent domain powers, and legislators in five states…proposed constitutional amendments to prohibit eminent domain for private development."[214] Congress has introduced similar bills to curtail eminent domain takings for economic development, though none have been successful as of yet. At the time of this writing, the Private Property Rights Protection Act of 2007 has been referred to the House Judiciary Committee for deliberation.[215]

The uproar did not escape the notice of the presidency either. Exactly one year after the *Kelo* decision, President George W. Bush issued an executive order stating that the federal executive branch had a duty "to protect the rights of Americans to their private property,

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[211] Adam Litak, "Case Won on Appeal (To Public)," *New York Times*, July 30, 2006, http://www.nytimes.com/2006/07/30/weekinreview/30liptak.html?_r=2&oref=slogin&oref=slogin (accessed April 30, 2008).

[212] Litak.

[213] CNN QUICKVOTE, CNN.com, June 23, 2005, http://www.cnn.com/POLLSERVER/results/18442.exclude.html (accessed April 30, 2008).

[214] Main, 22.

[215] "Private Property Rights Protection Act of 2007" (H. R. 3053, July 16, 2007) *Thomas* (Library of Congress), http://thomas.loc.gov (accessed December 15, 2008).

including by limiting the taking of private property by the Federal Government to situations in which the taking is for public use, with just compensation, and for the purpose of benefiting the general public and not merely for the purpose of advancing the economic interest of private parties to be given ownership or use of the property taken."[216] However, the executive order also made sure to specify the particular situations in which the federal government would be justified in employing eminent domain powers, emphasizing situations in which the property would be for public ownership "such as for a public medical facility, roadway, park, forest, governmental office building, or military reservation."[217]

**The Ongoing Significance of *Hathcock*:**

The Court's decision in *Kelo* was an unfortunate one, not only for Suzette Kelo and her fellow neighbors, but for all United States citizens. By ignoring constitutional history and the Framers' intent and greatly expanding the federal government's eminent domain powers based upon relatively recent questionable precedents, the majority arrived at a result that was both legally indefensible and morally objectionable. Legal analyses abound examining the *Kelo* decision from every possible angle – from its economic implications to its racial ones – and many reach a similar conclusion.[218] The majority in *Kelo* decided against following the *Hathcock*

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[216] "Executive Order: Protecting the Property Rights of the American People," The White House, June 23, 2006, http://www.whitehouse.gov/news/releases/2006/06/20060623-10.html (accessed April 30, 2008).

[217] "Executive Order: Protecting the Property Rights of the American People." That said, President Bush was not the first United States President to issue such an executive order. On March 15, 1988, President Reagan issued an executive order 12630 along similar lines. President Reagan's order, however, referred primarily to regulatory takings, rather than the *Midkiff* decision that had taken place 4 years earlier. See "Presidential Executive Order 12630," Bureau of Land Management http://www.blm.gov/nhp/news/regulatory/EOs/eo_12630.html (accessed April 30, 2008).

[218] Innumerable articles exist. See examples from a range of scholars: Richard Epstein, "Kelo: An American original of grubby particulars and grand principles," *The Green Bag* 8.4 (Summer 2004). Bruce L. Benson, "The Evolution of Eminent Domain," *The Independent Review* XII (Winter 2008). Ralph Nader and Alan Hirsch, "Making Eminent Domain Humane," Villanova Law Review 49 (2004). Carla T. Main, "How Eminent Domain Ran Amok," *Policy Review* 133 (October 2005). Tony Mauro, "In Kelo arguments, justices feel for homeowners. *"* *New Jersey Law Journal* (2005). Joshua Baker, "Quieting the Clang: *Hathcock* As A Model of the State-Based Protection Of Property Which *Kelo* Demands," *William and Mary Bill of Rights Journal* 14 (2005-2006).

approach – that of deep textual analysis into the takings clause and examination of the long history of a strict "public use" requirement – and their decision is poorer for it.

Of course, it is of the utmost importance to note that in ruling that economic revitalization projects may fulfill a valid "public purpose," the Court majority only set the baseline for federal protection of a citizen's rights in eminent domain situations: "We emphasize that nothing in our opinion precludes any State from placing further restrictions on its exercise of the takings power. Indeed, many States already impose 'public use' requirements that are stricter than the federal baseline."[219] This statement was a double-edged sword for *Hathcock*. On one hand, it might have led to its failure as a model for *Kelo*; though speculation about the Court is not perfect, it seems possible that without such a statement, the Court may have been hard-pressed to find a majority for its decision. Justice Kennedy in particular, who felt the need to write a cautionary concurrence even with the statement included in the decision, might have sided with the dissenting justices, thus deciding 5-4 in favor of a decision more along the lines of *Hathcock*. On the other hand, the statement provided – and still provides – the perfect opportunity for *Hathcock* to serve as a model for other state courts that desire a stricter takings clause interpretation. In the majority decision, *Hathcock* is mentioned just once, in a footnote to this line: "Some of these [stricter 'public use'] requirements have been established as a matter of state constitutional law…See, e.g., *County of Wayne v Hathcock*."[220] Most states eager to have away with broad eminent domain interpretations in the wake of *Kelo* have done so expeditiously through legislative statutes.[221] Nonetheless, when faced with the question in the judicial system,

[219] *Kelo*, 545 U.S. at 489.

[220] *Kelo*, 545 U.S. at 489.

[221] Steven J. Eagle and Lauren A. Perotti. "Coping with Kelo: a potpourri of legislative and judicial responses." *Real Property, Probate and Trust Journal*, 42.4 (Wntr 2008): 799(52). *LegalTrac*. Gale. Library of Congress. 30 May 2008. See also: Christopher W. Smart, "Legislative and judicial reactions to Kelo: eminent domain's continuing role

*Hathcock* serves as the best model to follow. Only one year after *Kelo*, for example, the Ohio Supreme Court faced its own eminent domain case, *Norwood v. Horney*, on an economic revitalization project, and ruled in favor of the homeowners; and the majority in the Ohio decision cited *Hathcock* numerous times, stating the following in summary:

> [W]e have never found economic benefits alone to be a sufficient public use for a valid taking. We decline to do so now. Rather, we find that the analysis by the Supreme Court of Michigan in *Hathcock*…and those presented by the dissenting judges of the Supreme Court of Connecticut and the dissenting justices of the United States Supreme Court in *Kelo* are better models for interpreting Section 19, Article I of Ohio's Constitution…Our understanding of the individual's fundamental rights in property, as guaranteed by the Ohio Constitution and our consistent holdings throughout the past two centuries that a genuine public use must be present before the state invokes its right to take, is better reflected by *Hathcock*'s holdings.[222]

Ultimately, *Hathcock*'s importance lies in providing a crucial counterpoint to *Kelo* in the eminent domain debate. Its reversal of *Poletown* has gone a long way to solidifying opposition to a broadening of takings clause interpretations. This debate has continued for decades as the "takings clause" has matured. Since *Poletown* and *Kelo*, it has only intensified. In its most fundamental sense, the takings clause sits at the nexus between two philosophical claims: the inalienable freedom of an individual to own property and the right of a community to control the direction of its collective fate for the common good. Rarely is a case that pits two such established and important ideals against one another ever satisfyingly and definitively solved; rather, the debate merely evolves. Far from settling the growing tension between private individual property rights and the mandate of the community to act in its common interest, *Kelo* merely highlighted the controversy, bringing national attention to bear on the issue. Just as *Roe v.*

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in redevelopment," *Probate & Property*. 22.2 (March-April 2008): 60(5). *LegalTrac*. Gale. Library of Congress. 30 May 2008.

[222] *Norwood v. Horney*, 110 Ohio St. 3d 353, 377 (2006).

*Wade* provided a highly visible target against which the pro-life movement could rally, *Kelo v. New London* is providing the incentive for change, and *Hathcock* the model. Though *Hathcock* failed to be the decision that ruled on *Kelo*, it is not going away, and its significance cannot be easily overstated.