The “Public Use” of Private Sports Stadiums: *Kelo* Hits a Homerun for Private Developers

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“Eminent domain is the right or power to take private property for public use.”1 “The Fifth Amendment . . . provides [property owners] with important protection against abuse of the power of eminent domain by the Federal Government.”2 The Fifth Amendment to the United States Constitution states, “nor shall private property be taken for public use, without just compensation.”3 In its Fifth Amendment jurisprudence, the Supreme Court has struggled to determine what exactly constitutes a legitimate “public use.”

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3. U.S. CONST. amend. V.
One point on which the Court seems to agree is that a “sovereign may not take the property of A for the sole purpose of transferring it to another private party B, even though A is paid just compensation.”4 The Court’s early decisions construed the “public use” requirement narrowly by requiring public ownership of the condemned property,5 but the Court later expanded its understanding of the provision and allowed for transfer of condemned private property to other private entities as long as the property was put to a “public use.”6 Many argue that the Court’s present-day interpretation is overly broad in reading “public use” to mean “public purpose,” thus rendering the “public use” requirement essentially meaningless and superfluous.7

There are new concerns, however, over the proper breadth of the interpretation of the “public use” requirement in light of the Court’s 2005 decision in Kelo v. New London.8 In Kelo, the Court explains that the transfer of property from one private party to another, where that transfer is part of an economic development plan, is a legitimate “public use.”9 Therefore, states are free to transfer private property from one private party to another through eminent domain where the legislature has determined that the transfer would create economic growth and development.

Today, several cities have decided, or are considering whether or not to enhance their communities and promote economic growth by building new sports stadiums, either to attract new professional sports franchises, or to entice an existing sports franchise to remain in that city. These cities believe that the sports franchise, and consequently a new stadium, will create economic growth and community development. Therefore, some cities argue that the use of eminent domain is necessary for the completion of each of these stadium projects. For example, on December 31, 2005, the Indianapolis Building Authority filed an eminent domain case against the Hurst bean factory to secure more parking spaces for the Indianapolis Colts’

6. Id.
7. Kelo, 125 S.Ct. at 2678 (Thomas, J., dissenting).
8. Id. at 2665 (allowing a private development corporation to acquire a private home through eminent domain for the purposes of building a new hotel).
9. Id.
new stadium.\textsuperscript{10} Battles over the propriety of eminent domain for stadium projects are hotly contested issues in cities such as Indianapolis and Brooklyn. Property owners and community groups are extremely concerned about the latitude given to local legislatures to take property by eminent domain for such projects.

Part I of this note briefly discusses the principle of eminent domain and the evolution of the Supreme Court’s interpretation of the Takings Clause. Part II analyzes the application of the Court’s interpretations of the “public use” requirement of the Takings Clause on the issue of whether it is proper for a state to exercise its power of eminent domain pursuant to a stadium development project. Finally, Part III offers a solution to the conflict between property owners’ interests in keeping their land and cities’ interests in creating economic growth.

I. BACKGROUND: INTRODUCTION TO EMINENT DOMAIN IN AMERICAN JURISPRUDENCE

Eminent domain “is an inherent and necessary attribute of sovereignty and exists independently of constitutional provisions and is superior to all property rights.”\textsuperscript{11} “If the United States has determined its need for certain land for a public use that is within its federal sovereign powers, it must have the right to appropriate that land.”\textsuperscript{12} “Otherwise, the owner of the land, by refusing to sell it or by consenting to do so only at an unreasonably high price, is enabled to subordinate the constitutional powers of Congress to his personal will.”\textsuperscript{13} “The Fifth Amendment, in turn, provides [property owners] with important protection against abuse of the power of eminent domain by the Federal Government.”\textsuperscript{14} The Fifth Amendment to the United States Constitution states that “private property [shall not] be taken for public use, without just compensation.”\textsuperscript{15} Although this provision, commonly referred to as the Takings Clause, does not mention what would happen if the government took private property for private use, the Court has tacitly recognized the clause as a

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\item \textsuperscript{10} A Blight on the Law: Thanks to Indianapolis’ Lust for the Colts, Perhaps All Our Property Will Be a Little Safer, FT. WAYNE NEWS SENTINEL (Ind.), Jan. 5, 2006, at A4, available at 2006 WLNR 252194.
\item \textsuperscript{12} United States v. Carmack, 329 U.S. 230, 236 (1946).
\item \textsuperscript{13} Id.
\item \textsuperscript{14} Id. at 236-37.
\item \textsuperscript{15} U.S. CONST. amend. V.
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statement of a “preexisting power to take private property for public use, rather than a grant of new power.”16 Thus, “it imposes on the Federal Government the obligation to pay just compensation when it takes another’s property for public use in accordance with the federal sovereign power to appropriate it.”17 The Court has never interpreted the Takings Clause to allow the government to take private property for purely private purposes.

In the case of U.S. v. Carmack, the Court recognized that the question of whether a taking is for a public use is one solely for the judiciary to consider.18 Prior to Carmack, there was some confusion over whether the right of judicial review existed for public use determinations.19 This confusion probably arose because of numerous cases where the courts had held that the “legislative determination that the use was public did not exceed the constitutional bounds.”20 As the Court recited in United States v. 170.88 Acres of Land,

[The courts have [the] power to determine whether the use for which private property is authorized by the legislature to be taken is in fact a public use, yet, if this question is decided in the affirmative, the judicial function is exhausted; . . . the extent to which such property shall be taken for such use rests wholly in the legislative discretion, subject only to the restraint that just compensation must be made.21

A. Judicial Interpretation and the Evolution of the Public Use Requirement

Although the Court has made it perfectly clear that a “sovereign may not take the property of A for the sole purpose of transferring it to another private party B, even though A is paid just compensation,”22 the Court has also stated that “a State may transfer property from one private party to another if future ‘use by the public’

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17. Id. at 242.
18. Id. at 236-37 (stating that the judicial review required by “[t]he Fifth Amendment . . . provides [a property owner] with important protection against abuse of the power of eminent domain by the Federal Government”). For another case explaining the power of the judiciary to decide such matters, see United States ex rel. v. Tennessee Valley Authority v. Welch, 327 U.S. 546, 558 (1946) (Frankfurter, J., concurring) (stating that “whether a taking is for a public purpose is not a question beyond judicial competence”).
20. Id.
is the purpose of the taking.” 23 This distinction has created much controversy over the years as the Supreme Court developed and refined its interpretation thereof. The Court first construed the requirement narrowly by requiring public ownership of the condemned property, but then expanded the meaning of public use to allow for transfer of condemned private property to other private entities as long as the property was put to a “public use.” Later, however, the Court construed the “public use” requirement as more of a “public purpose” requirement. Many argue that the transformation of the requirement from “public use” to “public purpose” is an overly broad interpretation that essentially renders the “public use” requirement entirely meaningless and superfluous. 24 These three historical interpretations are discussed in more detail below.

1. Public Ownership

“Public ownership” has always been regarded as an “uncontroversial minimal definition” of the “public use” requirement of the Fifth Amendment Takings Clause. 25 “Under this basic definition, a taking is for public use if the government will own and control the property after the condemnation is complete.” 26 A typical assertion of eminent domain that would fit within this definition includes acquiring land for a highway. 27

2. Actual Use by the Public

Beginning in the early 1800s, courts began entrusting the power of eminent domain to private entities such as privately-owned railroads, canals and turnpikes. 28 This practice shows that “courts have almost never regarded public ownership as a complete definition of public use.” 29 Under this much more inclusive interpretation of the “public use” requirement, the Court has allowed transfers of

23. Id.
24. Id. at 2686 (Thomas, J., dissenting) (“Once one permits takings for public purposes in addition to public uses, no coherent principle limits what could constitute a valid public use—at least, none beyond Justice O’Connor’s . . . appeal to the text of the Constitution itself.”).
25. Merrill, supra note 5, at 16; see Twp. of W. Orange v. 769 Assocs., 800 A.2d 86 (N.J. 2002) (holding that condemnation of property was for a public use where municipality retains ownership and the road remains open to the public).
26. Merrill, supra note 5, at 16.
27. Id.
28. Id.
29. Id.
condemned property to other private entities where the property would be put to “actual use” by the public.

In *Clark v. Nash*, however, the Supreme Court “recognized the inadequacy of use by the general public as a universal test.” The Court held that in arid land states, private individuals may condemn a right of way across another’s property in order to enlarge a ditch for irrigation purposes. The Court found that in Western states a private individual’s use of water for irrigation could be considered a public use.

The *Clark* decision began the expansion of the “public use” requirement to include “public purpose” or “public benefit.” In *Mt. Vernon-Woodberry Cotton Duck Co. v. Alabama Interstate Power Co.*, the Court ruled in favor of a private power company’s right to condemn land for the “public purpose” of manufacturing, supplying, and selling water power to the public. Responding to the property owners’ contention that the purpose of the condemnation was not a public one, the court stated that

> [I]n the organic relations of modern society it may sometimes be hard to draw the line that is supposed to limit the authority of the legislature to exercise or delegate the power of eminent domain. But to gather the streams from waste and to draw from them energy, labor without brains, and so to save mankind from toil that it can be spared, is to supply what, next to intellect, is the very foundation of all our achievements and all our welfare. If that purpose is not public, we should be at a loss to say what is. The inadequacy of use by the general public as a universal test is established.

**3. Public Purpose or Public Benefit**

The Supreme Court has stated that “where the exercise of the eminent domain power is rationally related to a conceivable public purpose, [this] Court has never held a compensated taking to be proscribed by the Public Use Clause.” It is also well recognized that “[t]he mere fact that property taken outright by eminent domain is transferred in the first instance to private beneficiaries does not

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33. See *id.*
35. *Id.*
condemn that taking as having only a private purpose.” 37 In fact, there are many instances where the Court has found that the transfer of private property to other private entities serves a public purpose, thus falling within the limits of the Fifth Amendment Takings Clause. Among these are (1) the elimination of blight, 38 (2) regulation of an oligopoly, 39 and (3) economic development. 40

a. Elimination of Blight

Prior to Berman v. Parker, the Court looked for “public ownership” to satisfy the “public use” requirement with respect to community redevelopment projects. 41 In Berman, however, the Court expanded the public use doctrine by recognizing that public ownership is not the only way to promote the public purposes of community redevelopment projects. 42 The Supreme Court broadly interpreted “public use” to include the “public purpose” of eliminating blighted areas. 43 The Court found that because blighted areas are “injurious to the public health, safety, morals, and welfare,” the government, by eliminating such injurious conditions, creates a public benefit and furthers a public purpose by protecting and promoting the welfare of the people. 44 The properties condemned in Berman were considered to be blighted because most of the buildings, which housed a large number of the area’s residents, were beyond repair. 45 The city created a redevelopment plan under which the entire area would be condemned (even certain properties that were not beyond repair) to facilitate the construction of streets, schools, and other public facilities or the sale to private parties, who would in turn build low-cost housing. 46 Writing for a unanimous Court, Justice Douglas affirmed the public use underlying the taking:

37. Id. at 243-44.
41. Cf. Old Dominion Land Co. v. United States, 269 U.S. 55 (1925) (holding as constitutional Congress’s authorization of takings by the Secretary of War of land for military housing purposes); Rindge Co. v. County of Los Angeles, 262 U.S. 700 (1923) (upholding the California legislature’s authorization of the taking of land for two public highways that would be used by the public for travel).
42. Berman, 348 U.S. at 34.
43. Id. at 35.
44. See id. (holding that “the [eminent domain] standards prescribed were adequate for executing the plan to eliminate not only slums . . . but also the blighted areas that tend to produce slums”).
45. Id. at 30.
46. Id.
We do not sit to determine whether a particular housing project is or is not desirable. The concept of the public welfare is broad and inclusive . . . The values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled. In the present case, the Congress and its authorized agencies have made determinations that take into account a wide variety of values. It is not for us to reappraise them. If those who govern the District of Columbia decide that the Nation's Capital should be beautiful as well as sanitary, there is nothing in the Fifth Amendment that stands in the way.47

b. Regulation of an Oligopoly

In contrast to Berman, where the Court recognized the elimination of blight as an appropriate public purpose, Hawaii Housing Authority v. Midkiff embarked upon the public purpose of reducing the high concentration of land ownership in Hawaii which resulted from a centuries-old land oligopoly.48 The Court ultimately upheld the lower court’s decision, which transferred private property from lessors to lessees for just compensation. The Court rejected the view that the condemnation was “a naked attempt on the part of the state of Hawaii to take the property of A and transfer it to B solely for B’s private use and benefit” and reaffirmed the deferential Berman approach to legislative judgments.49 According to the Court, “[t]he mere fact that property taken outright by eminent domain is transferred in the first instance to private beneficiaries does not condemn that taking as having only a private purpose.”50 “[I]t is only the taking’s purpose, and not its mechanics, that must pass scrutiny under the Public Use Clause.”51

c. Economic Development

In Kelo v. City of New London, the Supreme Court held that economic development qualified as a valid public use, such that eminent domain could be used to convert private property into commercial space.52 As a city with high unemployment, New London hoped that the nearby construction of a pharmaceutical research
facility would rejuvenate the area. To capitalize on the new facility, the city developed a plan which included a waterfront conference hotel, restaurants, retail shops, marinas, new residences, a museum, offices, and "water-dependent commercial uses." "In addition to creating jobs, generating tax revenue, and helping to 'build momentum for the revitalization of downtown New London,' . . . the plan was also designed to make the City more attractive and to create leisure and recreational opportunities." Creating such a development required the taking of several residential properties, despite the absence of any "allegation that any of these properties is blighted or otherwise in poor condition; rather, they were condemned only because they happen to be located in the development area."

The Court had already "rejected any literal requirement that condemned property be put into use for the general public," and therefore did not hold New London to that standard in Kelo. Instead, the Court deferred to the city's "determination that the area was sufficiently distressed to justify a program of economic rejuvenation." As the city had a "carefully considered" development plan, the Court did not believe that the City was "taking property under the mere pretext of a public purpose, when its actual purpose was to bestow a private benefit." The Court ultimately stated, "For more than a century, 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."

Justice Thomas, in dissent, stated that this jurisprudence has "strayed from the Clause's original meaning" and that the Court should reconsider its interpretation. Thomas believes that the Court has transformed the "Public Use" Clause into the "Public Purpose" Clause or the "Diverse and Always Evolving Needs of Society Clause." In a separate dissent, Justice O'Connor stated that the

53. Id. at 2658-59. The development plan was "projected to create in excess of 1,000 jobs, to increase tax and other revenues, and to revitalize an economically distressed city." Id. at 2658 (quoting Kelo v. City of New London, 843 A.2d 500, 507 (Conn. 2004)).
54. Id. at 2659.
55. Id.
56. Id. at 2660.
57. Id. at 2662 (quoting Haw. Hous. Auth. v. Midkiff, 467 U.S. 229, 244 (1984)).
58. Id. at 2665.
59. Id. at 2661.
60. Id. at 2664.
61. Id. at 2677 (Thomas, J., dissenting).
62. Id. (quoting Justice Stevens's majority opinion, id. at 2662).
majority “holds that the sovereign may take private property currently put to ordinary private use, and give it over for new, ordinary private use, so long as the new use is predicted to generate some secondary benefit for the public.” She continued, “nearly any lawful use of real private property can be said to generate some incidental benefit to the public,” which means that the Court’s reading of “the words ‘for public use’ do[es] not realistically exclude any takings, and thus do[es] not exert any constraint on the eminent domain power.”

B. Standard of Scrutiny for Public Use Takings: Rational Basis Test

In Midkiff and Berman, the Supreme Court declared that “a taking should be upheld as consistent with the Public Use Clause as long as it is ‘rationally related to a conceivable public purpose.’” As Justice Kennedy points out in his Kelo concurrence, “[t]his deferential standard of review echoes the rational-basis test used to review economic regulation under the Due Process and Equal Protection Clauses.” Under the rational basis test, however, it is still necessary for the Court to determine whether a transfer to a private party created only “incidental or pretextual public benefits.”

A court applying rational-basis review under the Public Use Clause should strike down a taking that, by a clear showing, is intended to favor a particular private party, with only incidental or pretextual public benefits, just as a court applying rational-basis review under the Equal Protection Clause must strike down a government classification that is clearly intended to injure a particular class of private parties, with only incidental or pretextual public justifications.

Thus, with this standard in mind,

Where the purpose [of a taking] is economic development and that development is to be carried out by private parties or private parties will be benefited, the court must decide if the stated public purpose—economic advantage to a city sorely in need of it—is only incidental to the benefits that will be confined on private parties of a development plan.

The Court in Kelo concluded that benefiting Pfizer Corporation, the private entity, was not “the primary motivation or effect of this
development plan,” and that “[t]here is nothing in the record to indicate that . . . [respondents] were motivated by a desire to aid [other] particular private entities.” 70 According to Justice Kennedy, *Kelo* survived the “meaningful rational basis review that . . . is required under the Public Use Clause.” 71 Justice Kennedy does leave room for a possible heightened standard of scrutiny in cases where there are “private transfers in which the risk of undetected impermissible favoritism of private parties is so acute that a presumption (rebuttable or otherwise) of invalidity is warranted under the Public Use Clause.” 72 However, Justice Kennedy also asserted that a stricter level of scrutiny is not required “simply because the purpose of the taking is economic development.” 73

Thus, although it has been well recognized and long accepted that a “sovereign may not take the property of A for the sole purpose of transferring it to another private party B, even though A is paid just compensation,” 74 it is equally clear that in certain cases, where the government’s strategy for a condemned parcel of land includes the use of a private party (such as a private developer), the Court has justified such a transfer of property to a private party as serving some kind of “public purpose.” 75

Justice O’Connor, in *Midkiff*, greatly expanded the Supreme Court’s “public purpose” jurisprudence by stating that the government does not surpass its eminent domain power as long as the taking is “rationally related to a conceivable public purpose.” 76 In light of Justice O’Connor’s statement, the Court’s recent decision in *Kelo*, although controversial, merely “carries out the Court’s eminent domain jurisprudence to its logical extreme.” 77 As Justice Stevens reminds us in *Kelo*,

> [F]or more than a century, [the Court’s] 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 takings power. 78 . . . When the legislature’s purpose is legitimate and its means are not irrational,

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70. *Id.* at 2670 (Kennedy, J., concurring) (alterations in original) (quoting the trial court in the case).
71. *Id.*
72. *Id.*
73. *Id.*
74. *Id.* at 2661.
78. *Kelo*, 125 S. Ct. at 2664.
our cases make clear that empirical debates over the wisdom of takings – no less than debates over the wisdom of other kinds of socioeconomic legislation – are not to be carried out in the federal courts.\textsuperscript{79}

There have been several instances since the ruling in \textit{Kelo} where states encounter the eminent domain issue in the context of building professional sports stadiums.\textsuperscript{80} As long as the sports stadium is completely publicly funded, any taking is arguably justified under the “public ownership” prong of the Court’s eminent domain jurisprudence. It is also fairly clear that any privately-owned sports stadium would need to rely on \textit{Kelo} and the economic development prong of the Court’s eminent domain jurisprudence (in the absence of blight) in order to justify a taking. What is less clear is whether a partially privately-funded sports stadium would similarly need to rely on \textit{Kelo} and economic development. Where such stadium projects must rely on \textit{Kelo} to justify a taking, it seems that as long as a stadium project is tied to some sort of economic development plan (which the Court in \textit{Kelo} agrees is a valid public purpose) then the taking should not violate the Fifth Amendment’s Takings Clause unless it is proven that stadium projects are an irrational means of furthering an economic development scheme or that the state’s primary motivation is to aid the stadium/franchise owners.

\section*{II. Analysis}

Whether one agrees with the Court’s ruling in \textit{Kelo},\textsuperscript{81} states are going forward with eminent domain procedures under this new interpretation of the law.\textsuperscript{82} The issue addressed here is whether states should be able to take private property to build professional sports stadiums. Courts have considered sports stadiums a public use even before the \textit{Kelo} opinion was handed down.\textsuperscript{83} Since many stadiums now

\textsuperscript{79} Id. at 2667 (quoting Haw. Hous. Auth., 467 U.S. at 242) (internal quotation marks omitted)


\textsuperscript{83} N.J. Sports & Expo. Auth. v. McCrane, 292 A.2d 580, 589 (N.J. Super. Ct. Law Div. 1971) (stating that “the determination of what constitutes a public purpose is primarily a function of the Legislature and should not be overruled by the courts except in instances where that determination is clearly arbitrary, capricious or unreasonable”) (citation omitted).
receive at least partial private funding, and are privately operated, these stadium projects would need to rely on the economic development rationale in *Kelo* to justify a taking. The first section of this analysis considers whether or not private and semi-privately owned sports stadiums should qualify as “economic development” for purposes of the public use requirement. The second section discusses whether, assuming such sports stadiums are not an appropriate public use, there is anything that can be done to prohibit states from using the power of eminent domain to take property from private owners to build public or private sports stadiums.

Several states, such as New York and Indiana, are currently dealing with this issue. In Brooklyn, New York City is preparing to construct a new $3.5 billion Atlantic Yards project. 84 Forest City Ratner Companies, headed by Bruce Ratner, is the private developer for the project, which will ultimately include offices, retail space, housing and a stadium for the New Jersey Nets professional basketball team. 85 Financing for the stadium has been secured through private investors as well as public funds. 86 The city and state are each slated to contribute $100 million to the estimated $1 billion project, whereas Forest City Ratner Companies, the private developing company, is the biggest owner with a 21% stake. 87 In an amicus brief submitted in *Kelo* supporting the City of New London Development Group, the community organization Brooklyn United for Innovative Local Development (BUILD) argued that such a project was necessary to promote economic development for the benefit of those living in the area and is a legitimate objective. 88 In their brief, BUILD also argued that the ruling in *Kelo* would have no effect on the proposed Atlantic Yards project, since it will be built in a blighted area, and New York law “does not authorize eminent domain exclusively for economic development purposes.” 89 Other community groups in Brooklyn, however, vehemently oppose the development project and the prospect of Ratner using eminent domain to obtain the

85. Id.
86. Id.
87. Id.
89. Id.
last few parcels of necessary land, arguing that the project will destroy “a vibrant neighborhood - not what Forest City calls a blighted area.”

Indiana is also fighting the eminent domain battle over its new stadium project for the Indianapolis Colts football team. Colts owner Jim Irsay and the Indianapolis mayor agreed to the stadium project late last year. Under the agreement, the Colts would contribute $100 million to the approximately $625 million dollar project. The contribution came, however, only after the city agreed to pay the Colts $48 million in order to break their current lease. The lone holdout in the Colts stadium saga is the Hurst Bean Factory, against whom the Indiana Stadium and Convention Center Building Authority recently filed an eminent domain lawsuit. The actual stadium will not even sit on the Hurst property. The Hurst Bean Factory is slated to be replaced by a stadium parking lot.

A. Private and Semi-Private Sports Stadiums Should Not Qualify as a Public Use Under the Court’s Current Eminent Domain Jurisprudence

According to the principles set forth by the Supreme Court, a taking does not violate the Fifth Amendment as long as it is “rationally related to a conceivable public purpose.” The Court in Kelo also makes clear that the “mere pretext of a public purpose” would not be sufficient to avoid a Fifth Amendment violation where the “actual purpose [is] to bestow a private benefit.” Since the Court clarified in Kelo that an economic development plan is a conceivable public purpose, a court would have to determine whether a project to build a new professional sports stadium could ever be rationally related to such an economic development plan, and whether an economic development plan centered around the construction of a new sports stadium is merely a pretext of a public purpose.

At the state court level, three dissenting justices in the Kelo case suggested that the court should have “imposed a ‘heightened’
standard of judicial review for takings justified by economic development.” These justices would have required “‘clear and convincing evidence’ that the economic benefits of the plan would in fact come to pass.” Although the Supreme Court rejected this approach, the Court did not state that all economic development plans are inherently rational. In applying the rational basis standard of review, the Court should seriously consider whether or not the construction of sports stadiums is a rational means of creating economic growth and development.

Although the arrival of professional sports teams and the construction of new sports stadiums may contribute to the sense of community and overall satisfaction of city residents, “there is no evidence that either the level or the growth rate of real per capita personal income is enhanced by construction of a sports arena or stadium.” Several reasons are suggested for this negative impact. Public subsidies for such projects “reduce public spending on local infrastructure, public safety, education, and other forms of economic development,” and often increase taxes. In order for any economic benefit to actually accrue, the funds generated by bringing in sports franchises must at least equal the amount of money spent on a new stadium. The majority of the funds being generated by sports franchises, however; never returns to the local economy; rather it goes to the salaries of a relatively small number of players (most of whom are not even residents of the city), scouting and player development costs, and management fees paid to team owners. Furthermore, the funds generated by these sports franchises are, for the most part, not new funds from outside sources such as tourists coming in for the games, but rather from other leisure activities in the local community such as bowling or going to the movies. The income of locally owned recreation and entertainment facilities would remain in the community, but “the income of owners and players, driven by stadium revenues, escapes the local economy . . . .” Where the funds being generated by a new sports stadium are merely being redirected from other leisure activities within the city, it is clear that any economic benefit is a merely illusory.

99. Id. at 2661.
100. Id.
102. Id.
103. Id. at 614.
104. Id. at 615.
105. Id.
The theory of “if you build it, they will come” does not always ring true. Often, cities build stadiums under the false assumption that fans will flock to it by the thousands, spending money and generating an economic boom for the team owners and the surrounding community. In Atlanta, Georgia, however, the city’s investment in a new baseball field for their hometown team, the Atlanta Braves, did not increase attendance or sales. In fact, “the team’s attendance tumbled from 3.46 million in 1997, its first year at Turner Field, to 2.32 million [at the end of the 2004 season].” Thus, new sports stadiums do not always bring the economic boom touted by politicians in election years. The city of Atlanta would have been better off leaving their beloved Braves to play on the old field and investing that money elsewhere. What the city should have asked itself is “if the money spent on the stadium were used differently, would the local economy benefit as much or more than it does when the money is spent on enhancing the sports environment?” Cities and their consultants often “forget” to consider the opportunity costs involved with building sports stadiums when developing overly optimistic economic development plans centered on these stadiums. Most economists agree that sports stadiums are inherently bad investments for cities. For example, in New Jersey, the Meadowlands Stadium is scheduled to be razed and replaced by a new stadium despite the state’s remaining $124 million debt on the old stadium.

In the case of Indianapolis’s new stadium, the Hurst Bean Company will be condemned to make way for a parking lot, not even the stadium itself. A parking lot certainly will not generate as much income as the Bean Company itself, and it will not create the jobs that the Bean Company has created. So what is the rationale for razing a lucrative, local business run by local workers who spend their earnings in the local community to make way for a parking lot, which generates no income or jobs and creates no economic benefit to the community? The Indiana Stadium and Convention Center Building Authority insist that the property is “necessary” for the stadium project to move forward.

106.  FIELD OF DREAMS (Universal Pictures 1989).
108.  Coates & Humphreys, supra note 101, at 602.
The building authority needs the Hurst land because of one of the unholy deals it made with the Colts for the new stadium. The authority agreed to provide 3,000 parking spaces for the new stadium. For every space it doesn’t provide within a certain distance of the stadium, it must provide two spaces. Since the Hurst site could accommodate 600 spaces, that would save the authority from having to buy land for as many as 1,200 spaces.111

Alternatively, the Hurst Bean Company has proposed a land swap in which it would trade the northern part of its 41½ acre property for land that is adjacent to the property.112 Hurst has also agreed to give the Colts access to its parking lots for games.113 In any case, it would cost the state less to build a garage for the 1,200 necessary parking spots than it would cost the Bean Company and the local community to move the factory to another location.114 However, under the Court’s current jurisprudence, the Indiana legislature has the sole discretion to determine whether or not the property is or is not necessary to the stadium project. Under this scenario, the state is not obligated to consider alternative solutions to the parking problem. If the state legislature determines that the development plan as a whole will benefit the public by creating economic development and growth, then eminent domain may be used for the entire project, including parking lots.

The other main issue is whether stadium spending as part of an economic development plan is merely a pretext of a public purpose. Courts must ask whether the actual purpose of these stadium projects is to confer a benefit on the sports franchises and their owners. When examining the lengths that many cities and states will go to in order to attract and retain professional sports franchises, the answer is unclear. The usual process is this: a team owner makes a demand, the city then either meets that demand to gain or keep a sports team, or it does not meet the demand and the sports team goes to another city. The team owner has significant leverage in such situations, especially in smaller cities. The team owner is usually able to extract any number of concessions from the city or state. To illustrate, in Indianapolis, the Colts only have to pay $100 million on the nearly $500 million stadium, which does not include the city’s payment of $48 million to them for breaking their lease on the old stadium. In other words, the Colts have managed to extract a new stadium from the city of Indianapolis, while receiving $48 million from the city to play in this new stadium that they demanded the city build for them. The

112. McNeil, supra note 110.  
113. Id.  
114. Id.
Colts will also receive 100% of the proceeds from naming and publicity rights for the new stadium. This revenue will likely exceed $50 million over the first five years. This example suggests that cities eager to attract and retain professional sports franchises might be fairly willing to create a public purpose in order to accomplish this goal.

III. SOLUTION: FEDERAL V. STATE LIMITATIONS ON EMINENT DOMAIN

The Court could overrule *Kelo* and develop a bright-line rule to prevent cities from using the economic development rationale, or, short of a bright-line rule, the Court could create a balancing test in which courts look to the proven economic benefits accruing to the community, the interests of the property owner, and possible alternative solutions short of eminent domain. Although there have been significant changes in the composition of the Court since the *Kelo* decision, it is unlikely that the Court will overrule itself in the near future. The Court specifically noted the difficulty in distinguishing economic development from other public purposes that it has recognized and its reluctance to interfere with legislative prerogative. Judiciary Committee Chairman F. James Sensenbrenner notes that *Kelo* “has the potential of becoming the Dred Scott Decision of the 21st century.” Short of waiting 97 years for another *Brown v. Board of Education* to come to the rescue of property owners everywhere, the Court indicated where they could find salvation. The Court stated in *Kelo* that, despite its ruling that economic development constitutes a public use, states are free to adopt more restrictive measures on the exercise of the takings power. The Court also noted that many states have in fact already imposed stricter “public use” requirements than the federal baseline. The Court made no mention, however, of the role of the United States Congress in restricting the states’ ability to carry out eminent domain proceedings under the rationale articulated in *Kelo*. Indeed, there has been substantial legislative action in response to *Kelo* in both state

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116. *Id*.
120. *Id*.
legislatures and in Congress. Although Congress cannot explicitly undo what the Court has said or done, it can effectively undermine the Court’s decision by exercising its power under the Taxing and Spending Clause of the Constitution.121

In an attempt to combat the logical extreme of the Court’s eminent domain jurisprudence,122 members of both the United States House of Representatives and Senate have proposed legislation to limit the states’ power to take land under an economic development rationale. On June 27, 2005, Senator John Cornyn introduced the Protection of Homes, Small Businesses, and Private Property Act.123 The Act states, “The power of eminent domain shall be available only for public use,” which “shall not be construed to include economic development.”124 Further, it specifies that it applies to “all exercises of eminent domain power by the Federal Government; and . . . by State and local government through the use of Federal funds.”125 Cornyn’s legislation attempts to rein in Kelo by preventing governments from using economic development as a basis for the use of eminent domain.

Likewise, on June 30, 2005, the House voted to use Congress’s spending power to undermine the Kelo ruling that economic development is a “public use” under the Fifth Amendment.126 The House measure was passed as an amendment to an appropriations bill and

would deny federal funds to any city or state project that used eminent domain to force people to sell their property to make way for a profit-making project such as a hotel or mall. . . . A fact sheet said that under the bill the locality or state would “lose any federal funds that would contribute in any way to the project the property would be taken for.”127

Thus, the bill that the House passed in June would serve to “prevent federal transportation funds from being used to make improvements on lands seized for private development.”128

A similar bill was later introduced by Representative F. James Sensenbrenner on October 25, 2005.129 The Private Property Rights

121. U.S. CONST. art. I, § 8, cl. 2.
122. Kelo, 125 S. Ct. at 2675 (O’Connor, J., dissenting) (“if predicted . . . positive side-effects are enough to render transfer from one private party to another constitutional, then the words ‘for public use’ do not realistically exclude any takings, and thus do not exert any constraint on the eminent domain power”).
124. Id. § 3(a)-(b).
125. Id. § 3(c).
126. Allen & Babington, supra note 118.
127. Id.
Protection Act would require that “No State . . . shall exercise its power of eminent domain . . . over property to be used for . . . [or] subsequently used for economic development, if that State . . . receives Federal economic development funds during any fiscal year in which it does so.”\textsuperscript{130} Additionally, the Act mandates that “[t]he Federal Government or any authority of the Federal Government shall not exercise its power of eminent domain to be used for economic development.”\textsuperscript{131} Importantly, the Act defines “economic development”:

\begin{quote}

The term “economic development” means taking private property, without the consent of the owner, and conveying or leasing such property from one private person or entity to another private person or entity for commercial enterprise carried on for profit, or to increase tax revenue, tax base, employment, or general economic health. . . .\textsuperscript{132}

\end{quote}

Defining the term clarifies congressional intent and ensures that legislatures and courts will not misconstrue the Act’s limits on the use of eminent domain.

Enactment of any of the current legislation will require cities and states to think twice before resorting to eminent domain for their stadium projects. Doing so would keep them from receiving any federal funds related to the project, and with such huge projects requiring many infrastructure upgrades, it would inevitably be more than a mere drop in the proverbial bucket. In Newark, New Jersey, the housing authority diverted $3.9 million in federal funds meant for low-income residents to a new arena intended to prevent the Nets basketball team from moving to Brooklyn.\textsuperscript{133} Under the bills proposed in both the House and Senate, New Jersey would lose these funds if it resorts to eminent domain to secure the land for such a project. A narrow withholding of federal funds, however, could have little impact on the advancement of the project under political pressure to build the stadium. Also, these bills will have no effect on those projects that do not need to rely on federal funding to continue.

In an attempt to address the shortcomings of such narrow legislation and substantially impact a state’s eminent domain power under \textit{Kelo}, former House Majority Leader Tom Delay and Majority Whip Roy Blunt wanted to “push for a more inclusive measure that would apply to all federal funds.”\textsuperscript{134} Indeed, on October 19, 2005,

\begin{footnotes}

\textsuperscript{129} H.R. 4128, 109th Cong. (2005).
\textsuperscript{130} Id. at § 2(a).
\textsuperscript{131} Id. at § 3.
\textsuperscript{132} Id. at § 8(1).
\textsuperscript{133} Damien Cave, \textit{While Devils Get a Home, Newark’s Poor Keep Looking}, N.Y. TIMES, May 1, 2005, \textit{available at} 2005 WLNR 6802131.
\textsuperscript{134} Allen & Babington, \textit{supra} note 118.

\end{footnotes}
Senator John Ensign introduced a much broader bill, also named the Private Property Rights Protection Act, which would limit the states’ power of eminent domain even further. The Act stated that when a state condemns property pursuant to its eminent domain power, and the property is not condemned for a proper “public use,” then that state would “not be eligible to receive any Federal funds, including any funds appropriated by Congress or otherwise expended from the Federal treasury.” The Act, in defining “public use,” stated that property is put to a proper “public use” when it is:

[(A)](i) used by a governmental entity; (ii) owned, operated, or maintained by a government entity and used by the public as a right-of-way; or (iii) used by a common carrier; and (B) includes . . . (ix) . . . public buildings, [such as] . . . (V) sports stadiums . . . [and] other public entertainment venues provided that any takings for these projects is limited solely to the real property necessary for—(aa) the construction of such stadiums . . . ; and (bb) parking facilities . . . [for] such stadiums . . .

Although the Act makes specific exceptions for sports stadiums, it does so under the implication that they are “public buildings.” Thus, the Act would still apply to private sports stadiums and could also potentially apply to semi-privately owned or financed sports stadiums.

Even so, Ensign’s proposed bill, if passed, most likely would be struck down by the Supreme Court as an unconstitutional exercise of Congress’s spending power under South Dakota v. Dole. In South Dakota v. Dole, the Supreme Court set limits on Congress’s use of the spending power. In so doing, the Court held that Congress does not exceed those limits by conditioning a state’s receipt of federal highway funds on its enactment of a minimum drinking age of twenty-one years old. The Spending Clause in the Constitution states that Congress has the power to “lay and collect Taxes, Duties, Imposts, and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States.”

Incident to this power, Congress may attach conditions on the receipt of federal funds, and has repeatedly employed the power “to further broad policy objectives by conditioning receipt of federal moneys upon compliance by the recipient with federal statutory and administrative directives.”

137. Id. §3.
138. Id.
140. Id. at 212.
The *Dole* Court made clear that Congress need not be able to regulate the activity directly when it is relying expressly on its spending power.143 The Court noted four limitations on Congress’s spending power: (1) “the exercise of the spending power must be in pursuit of ‘the general welfare,’” and “courts should defer substantially to the judgment of Congress” in determining whether such an action is for the general welfare;144 (2) any condition on federal funds must be set forth unambiguously, thus “enabl[ing] the States to exercise their choice knowingly, cognizant of the consequences of their participation”;145 (3) conditions on federal grants must be related “to the federal interest in particular national projects or programs”;146 (4) “other constitutional provisions may provide an independent bar to the conditional grant of federal funds.”147

In her dissent, however, Justice O’Connor attacked the majority’s conclusion that minimum drinking age laws are sufficiently related to the federal interest in funding interstate highways: “If the spending power is to be limited only by Congress’ notion of the general welfare, the reality, given the vast financial resources of the Federal Government, is that the Spending Clause gives power to the Congress to tear down the barriers, to invade the states’ jurisdiction, and to become a parliament of the whole people, subject to no restrictions save such as are self-imposed.”148 Justice O’Connor also took issue with the majority’s application of the federal interest requirement.149 In O’Connor’s view, the Court’s current application of the federal interest requirement is too broad, and thus “Congress could effectively regulate almost any area of a State’s social, political, or economic life on the theory that use of the interstate transportation system is somehow enhanced.”150

Thus, under the rule of *Dole*, the Private Property Rights Protection Act would almost certainly fail the federal interest requirement. Under the Act, there is no requirement of any relation whatsoever between the federal government’s condition on federal funds and the federal interest in such a national project.151 Instead,
Congress is conditioning the receipt of federal funds on a state abstention from using eminent domain procedures to condemn land pursuant to an economic development plan. Some of the federal funds received by states are in the form of federal hospital funding. Therefore, under the Act, if a state uses eminent domain as part of an economic development plan, Congress will cease federal funds for the state’s hospitals. It is difficult to relate hospital funding to a state’s eminent domain power, yet such a relationship is required under Dole.

To make the condition constitutional, Congress must argue that there is some rational relationship between limiting a state’s power of eminent domain and keeping public hospitals open. This example illustrates that such a broad condition on the receipt of federal funds is merely a thinly veiled attempt by Congress to regulate state activity and would thus be unconstitutional.

It seems, therefore, that property owners’ best bet is to rely on state legislatures to expand their property rights. Many states, in fact, already had more restrictive statutes before the Kelo decision, and many more have acted since in order to reassure their citizens that their rights are protected. Colorado, for example, amended its eminent domain law just prior to Kelo to restrict the use of eminent domain by redevelopment agencies seeking to transfer private property from one private party to another by adding the requirement that a property must first be determined to be blighted itself or “located in a blighted area,” or it must be determined that the exclusion of the property in a condemnation proceeding for a larger parcel of land would render the “redevelopment or rehabilitation of the remaining parcels . . . not viable under the urban renewal plan.”

Many other states have adopted similar restrictions requiring a finding of blight or necessity before lawful resort to eminent domain procedures. In Indiana, property must first be defined as blighted before it may be properly taken under the state’s current eminent domain laws. The major problem with state laws which require

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153. See Nev. Rev. Stat. § 279.471(1) (2005)(“An agency may exercise the power of eminent domain to acquire property for a redevelopment project only if the agency adopts a resolution that includes a written finding by the agency that a condition of blight exists for each individual parcel of property to be acquired by eminent domain.”); id. § 279.471(2) (“An agency may exercise the power of eminent domain to acquire property for a redevelopment project only if: (a) The property sought to be acquired is necessary to carry out the redevelopment plan. . . .”). See also S.B. 184, 2005 Gen. Sess. (Utah 2005) (prohibiting a “redevelopment agency from adopting a project area plan for certain redevelopment projects from July 1, 2005 through June 30, 2006 unless a blight study has been commissioned and completed by certain dates”).
blight as a prerequisite to any taking for economic development purposes is that many of the laws (such as in Indiana) are very poorly drafted, so “just about any parcel can be declared blighted.” 155 According to Samuel R. Staley, Director of Urban and Land Use for the Reason Foundation, “Over the years . . . [the] term (urban blight) has become little more than a name for property a government wants to take.” 156 Thus, property owners may not be able to sufficiently rely on state legislators to protect their property rights, especially when those legislators are faced with the political pressures associated with bringing a large professional sports franchise to town, or perhaps more importantly, keeping them in town. For example, Texas recently passed a statute restricting eminent domain, but the statute expressly exempted any voter approved sports and entertainment facility from the strictures of the act. 157

Due to limits on the federal government’s power to regulate state activity, 158 and on the states’ inability or unwillingness to sufficiently rein in their own power, the only real solution may be a federal constitutional amendment. Use of a constitutional amendment to address what the country sees as a misstep by the Supreme Court has been effective in past. In fact, four amendments have been passed to address such situations: 159 (1) the Eleventh Amendment, 160 which overruled Chisolm v. Georgia; 161 (2) the Thirteenth Amendment 162 and the first sentence of the Fourteenth Amendment, 163 which overruled Dred Scott v. Sanford; 164 (3) the Sixteenth Amendment, 165 which

155. Id.
156. Id.
158. As previously discussed, Congress may not explicitly overrule the Supreme Court and, in the case of eminent domain, is limited to exercising its power under the taxing and spending clause of the Constitution. See supra text accompanying note 121.
159. Joan Schaffner, The Federal Marriage Amendment: To Protect the Sanctity of Marriage or Destroy Constitutional Democracy?, 54 AM. U. L. REV. 1487, 1518 (2005) (citing Thomas Baker, Towards a “More Perfect Union”: Some Thoughts on Amending the Constitution, 10 WIDENER J. PUB. L. 1, 9 n.37 (2000) (“Three other amendments could be understood to impliedly reject earlier Supreme Court understandings of the Constitution: The Seventeenth Amendment (1913) (direct election of Senators); the Nineteenth Amendment (1920) (women’s suffrage); and the Twenty-Fourth Amendment (1964) (abolition of poll taxes in federal elections).”)).
160. U.S. CONST. amend. XI.
161. 2 U.S. 419 (1793).
162. U.S. CONST. amend. XIII.
163. U.S. CONST. amend. XIV.
164. 60 U.S. 393 (1856).
165. U.S. CONST. amend. XVI.
overruled Pollack v. Farmer’s Loan & Trust Co.;\textsuperscript{166} and (4) the Twenty-Sixth Amendment,\textsuperscript{167} which overruled Oregon v. Mitchell.\textsuperscript{168} “[E]ach amendment was in harmony with the basic principles that underlie the Constitution—individual rights, separation of powers, and federalism. Moreover, in the cases where fundamental liberty interests were at stake, the amendment reestablished individual rights in light of the Court’s limited interpretation of those rights.”\textsuperscript{169}

Consistent with these cases, at issue in the present case are fundamental liberty interests. As James Madison wrote in the Federalist Papers, “Government is instituted no less for the protection of property, than of the persons, of individuals.”\textsuperscript{170} The Supreme Court itself also clearly stated the fundamental nature of property rights in Vanhorne’s Lessee v. Dorrance, when it stated that “possessing property, and having it protected, is one of the natural, inherent, and unalienable rights of man.”\textsuperscript{171} Moreover, Justice Story, in Wilkinsin v. Leland, stated that

\begin{quote}
[Government can scarcely be deemed to be 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.\textsuperscript{172}
\end{quote}

Thus, it is clear that the use of the amendment power to overrule the Court’s decision in \textit{Kelo} is consistent with basic democratic principles and necessary to secure the fundamental and inherent right of man to his own private property.

\section*{IV. CONCLUSION}

The Supreme Court held in \textit{Kelo v. City of New London} that economic development qualified as a valid public use, and therefore that eminent domain could be used to convert private property into commercial space.\textsuperscript{173} Such an application of eminent domain ultimately fails in the context of professional sports stadiums. Finding that a professional sports stadium qualifies as a public use under the

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\begin{itemize}
\item \textsuperscript{166} 158 U.S. 601 (1895).
\item \textsuperscript{167} U.S. CONST. amend. XXVI.
\item \textsuperscript{168} 400 U.S. 112 (1970).
\item \textsuperscript{169} Schaffner, \textit{supra} note 159, at 1519.
\item \textsuperscript{170} THE FEDERALIST NO. 54 (James Madison).
\item \textsuperscript{171} 2 U.S. 304, 310 (1795).
\item \textsuperscript{172} 27 U.S. 627, 657 (1829).
\item \textsuperscript{173} \textit{Kelo v. City of New London}, 125 S. Ct. 2655, 2665 (2005) (holding that because the redevelopment scheme invoking eminent domain “unquestionably serves a public purpose, the takings challenged here satisfy the public use requirement of the Fifth Amendment”).
\end{itemize}
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rationale of economic development ignores the fact that stadiums are often more of a burden to tax payers and the economy than they are sound economic planning.

Recognizing the Court’s potential misstep in Kelo, Congress has acted to limit the states’ ability to pursue such projects through the use of eminent domain. Congress’s authority, however, to sufficiently rein in state action where the court has ruled it constitutional, stops short of the security land owners ultimately seek. Thus, it is left in the states’ hands to limit their own power of eminent domain to that which will satisfy angry property owners and voters. Based upon current and past legislation, it is unclear whether states will go far enough in protecting property owners’ rights from such invasions. Therefore, the only way to resolve this issue is through a constitutional amendment narrowly defining “public use,” and excluding from such the availability of any economic development rationale.

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