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Cover Page Footnote

J.D. candidate, University of Tennessee College of Law, graduating in May, 2008, with a Concentration in Business Transactions; B.A., summa cum laude, 2005, The University of Tennessee at Martin. The author would like to thank Dr. Otis Stephens, and his assistants, for their invaluable guidance and input on this essay. The author dedicates this essay to his wife, Stacey, and daughter, Sarah Elizabeth, and expresses his thanks for their support and patience while writing this piece.

OPINION PIECE

REFORMING EMINENT DOMAIN IN TENNESSEE AFTER *KELO*: SAFEGUARDING THE FAMILY FARM

Beau Pemberton*

Introduction

Take a journey back in time to the summer of 2005. Visualize a seventy-five year old, widowed grandmother living on her farm in rural Middle Tennessee. This thirty-acre farm in the middle of the county is all that she has left to call her own. The world has grown around her farm for many years, inviting mini-malls, restaurants, condominiums, and interstate ramps on all sides of this picturesque setting. Now, imagine the grandmother's shock when she receives a letter from the local Economic Development Board notifying her that it is going to condemn her property via eminent domain as part of the county's Master Economic Redevelopment Plan.

The letter states that her land will serve as the relocation site for a major automobile manufacturer, which will bring eight hundred new jobs and nearly $2 million a year in new tax revenues to the economically distressed county. This redevelopment plan provides the public purpose that justifies taking the land by eminent domain. Developers' attractive monetary offers caused her former neighbors to sell out and move away, but because the grandmother had

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emotional ties to the property, she was determined to spend the rest of her life on her farm. She was hardly reassured by the promise that she would receive just compensation for her taken property.

After recovering from the initial shock of the letter, she visits her lawyer to determine her options. The lawyer tells her that little can be done to stop the taking of her land for this economic redevelopment plan or to stop the bulldozers that will make way for the new automobile factory. Her only realistic recourse is to litigate over the amount of money she will receive for her land and for the resulting displacement from her home. This news is cold comfort to her because it means that she will be forced to live out her days somewhere else.

The above described scenario is similar to the experience of property owners in New London, Connecticut. Their challenge to the taking of their property for economic redevelopment purposes led to the 2005 landmark decision, *Kelo v. City of New London,* 545 U.S. 469 (2005), and resulted in a ripple effect that is currently reforming eminent domain law throughout the United States. To appreciate how *Kelo* has affected Tennessee's eminent domain law, the decision must be examined in detail.

***Kelo v. City of New London*'s Facts**

The *Kelo* litigation began when Susette Kelo, as well as several of her neighbors in the Fort Trumbull area of New London, Connecticut, challenged the taking of their property under an economic redevelopment plan (Plan) implemented by New London Development Corporation (NLDC) and the City of New London (City).[1] The Plan's original purposes were "to create in excess of 1,000 jobs, to increase tax . . . revenues, and to revitalize an economically

[1] Kelo v. City of New London, 545 U.S. 469, 475 (2005).

distressed city."[2] Several factors encouraged this Plan including (1) the 1996 closing of the United States Government's Naval Undersea Warfare Center, located in the Fort Trumbull area; (2) a city unemployment rate double of that for all of Connecticut; and (3) a decreased city population.[3] The Plan intended to use the taken property for "the creation of a Fort Trumbull State Park" on the former site of the Naval Undersea Warfare Center; a $300 million research facility for Pfizer, Inc., adjacent to the park; land for a new Coast Guard Museum; and property set aside for residential, commercial, retail, parking, and other purposes.[4]

During the Plan's initial stages, NLDC hosted a "series of neighborhood meetings to educate the public about the process"[5] and eventually won approval from state officials who determined that the plan "was consistent with relevant state and municipal development policies."[6] After state approval, NLDC finalized the Plan by focusing on a ninety-acre tract in the Fort Trumbull area of New London.[7] In January 2000, New London's city council approved the Plan's final version and authorized NLDC to acquire the Fort Trumbull property by purchase or by eminent domain.[8] After purchase negotiations with Susette

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[2] *Id.* at 472.
[3] *Id.* at 473.
[4] *Id.* at 473-74. The Court notes that NLDC was attempting to capitalize on Pfizer's new research facility as a catalyst to meet the redevelopment plan's original purposes of creating new jobs, tax revenues, and New London's eventual revitalization. *Id.* at 473.
[5] *Id.* at 473.
[6] *Id.* at 473-74 n.2. Given the nature of this case, I wonder just how effective the public meetings held by NLDC were at addressing concerns of the affected landowners.
[7] *Id.* at 474.
[8] *Id.* at 475.

Kelo and her neighbors failed, NLDC initiated proceedings to take their property by eminent domain.[9]

After the eminent domain declaration by NLDC, Kelo and several of her neighbors filed an action against NLDC in state court and alleged that the taking was unconstitutional under the Fifth Amendment of the United States Constitution because the taking violated the Fifth Amendment's "'public use' restriction."[10] NLDC then announced that it would enter into leasing agreements with private companies, including Corcoran Jennison, to develop the property.[11] This arrangement appeared to be a harmless way to meet the Plan's goals, but it essentially condemned private land for the benefit of private individuals and developers. This arrangement strengthened the petitioner's argument because the authors of the Fifth Amendment presumably did not envision the taking of private land for private use.

After a bench trial before the New London Superior Court, the petitioners obtained a permanent restraining order to prevent the taking of Parcel 4-A, but they lost regarding Parcel 3.[12] The petitioners appealed this incomplete victory to the Connecticut Supreme Court, which sustained *all* the takings at issue.[13] First, the court upheld the takings on statutory grounds, noting that the state's

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[9] *Id.* Specifically, petitioners owned a total of fifteen properties in the Fort Trumbull area, with four of the properties located in Parcel 3 of the Plan, immediately north of the proposed Pfizer facility and eleven of the properties located in Parcel 4-A of the Plan. *Id.* at 474. Parcel 3 was slated for office space, and Parcel 4-A was slated for a park or marina usage. *Id.* at 476.

[10] *Id.* at 475.

[11] *Id.* at 476 n.4.

[12] *Id.* at 475-76. The Court notes that this trial on the proposed takings was a bench trial, which raises the question: Why did the petitioners not demand a jury trial regarding the proposed takings because a jury would likely have been more sympathetic to a landowner's concerns than a governmental agency's plan? *See id.* at 475.

[13] *Id.* at 476.

municipal development code expressed a clear legislative determination that land taken for economic redevelopment, regardless of whether it is developed, is still "a 'public use' and in the 'public interest.'"[14] Next, the court, adhering to federal precedent, sustained the takings for the Plan's pronounced public use.[15] Finally, the court analyzed whether the takings were "'reasonably necessary' to achieving the City's intended public use" and "whether the takings were for 'reasonably foreseeable needs.'"[16] This analysis produced a mixed result.

The three dissenting justices discussed the City's failure to adduce evidence of future economic benefits flowing from the Plan and the proposed takings.[17] The dissent maintained that this lack of evidence should have invalidated all of NLDC's takings as unconstitutional, despite the Plan's intent "to serve a valid public use."[18] The dissenting justices stated that a "'heightened' standard of . . . review" was needed to evaluate these takings because they were purely for economic redevelopment instead of the typical eminent domain purposes (e.g. roads or parks).[19] Upon granting certiorari, the United States Supreme Court observed that the main issue was "whether a city's decision to take property for . . . economic development satisfies" the Fifth Amendment's public use requirement.[20]

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[14] *Id.*
[15] *Id.* (citing Haw. Hous. Auth. v. Midkiff, 467 U.S. 229 (1984); Berman v. Parker, 348 U.S. 26 (1954)).
[16] *See id.*
[17] *Id.* at 477.
[18] *Id.*
[19] *Id.*
[20] *Id.*; *see also* U.S. CONST. amend. V, § 1 ("[N]or shall private property be taken for public use, without just compensation.").

The State of the Law before *Kelo v. City of New London*

The United States Supreme Court's decision in *Kelo* is by no means a groundbreaking decision. For several decades, the Court has maintained that whether a taking satisfies the Fifth Amendment's public purpose requirement requires deference to legislative judgments governing this area.[21] The first landmark case in this area was *Berman v. Parker*, 348 U.S. 26 (1954), which the Court handed down over fifty years ago.[22] *Berman* dealt with a redevelopment plan in Washington, D.C., and the plan for this "blighted area" condemned the existing structures, including Berman's department store, to make way for roads, schools, and other public structures.[23] The rest of the condemned property was leased back to private parties for further development, including low-income housing.[24] *Berman* parallels *Kelo* in that the petitioner challenged the taking as inconsistent with the Fifth Amendment's public use clause because another private party would eventually control and redevelop the taken property.[25]

The Court's unanimous decision deferred to legislative determinations on what constituted a valid public use under the Fifth Amendment.[26] The Court, speaking through Justice William O. Douglas, stated that it had no right to overrule a public use determination because "Con-

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[21] *Kelo,* 545 U.S. at 483.

[22] Berman v. Parker, 348 U.S. 26, 26 (1954).

[23] *Id.* at 28-31.

[24] *Id.* This redevelopment plan arose "under the District of Columbia Redevelopment Act of 1945," which sought to eliminate blighted and slum residential areas of the District as a way of fostering new and publicly acceptable development. *Id.* at 28.

[25] *Id.* at 31. Petitioner contended that taking his purely commercial property (i.e. a department store) was inconsistent with the plan's stated purpose of "ridding the area" of residential slum property and that creating a "better balanced, more attractive community" is not a valid public purpose to sustain the Act. *Id.*

[26] *Id.* at 33.

gress and its authorized agencies" had decided that this redevelopment plan met several, well-established public purposes, consistent with its police power function.[27] Furthermore, the Court refused to dictate "the means of executing the [plan]" and noted that the plan's execution was within the sole discretion of the legislature, including the use of private enterprise for implementing the plan.[28] *Berman* should have been instructive to the *Kelo* petitioners because both cases involved takings for public uses that were less concrete than in a typical takings case.[29]

Next, the Court discussed *Hawaii Housing Authority v. Midkiff*, 469 U.S. 229 (1984), a landmark takings decision. *Midkiff* focused on the constitutionality of the Hawaiian government condemning and taking residential rental property from private landlords and transferring fee simple title to the existing lessee living on the property.[30] The public purpose of Hawaii's law, titled the Land Reform Act of 1967, was to break up the property oligopoly of a relatively small number of individual landowners in Hawaii.[31] The Supreme Court reversed the Ninth Circuit's holding that the statute was "a naked attempt . . . of Hawaii

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[27] *Id.* at 32-35.

[28] *Id.* at 33-34 ("We cannot say that public ownership is the sole method of promoting the public purposes of community redevelopment projects.").

[29] For example, a typical takings case would likely involve the appropriation of private land for a tangible public good, such as an interstate or a post office. *Berman*'s redevelopment plan, which included concrete elements such as streets and parks as part of its public purpose, also included less tangible and arguably more abstract elements such as "prevent[ing], reduce[ing], or eliminate[ing] . . . blight." *Id.* at 29. *Kelo*'s Plan followed a similar path because its public purposes included parks and other public facilities and increased tax revenues and economic revitalization. *See* Kelo v. City of New London, 545 U.S. 469, 474 (2005).

[30] Haw. Hous. Auth. v. Midkiff, 467 U.S. 229, 233 (1984).

[31] *Id.* at 232-33.

to take the private property of A and transfer it to B solely for B's private use and benefit."[32]

Justice O'Connor, writing for the Court, stated that "[t]he 'public use' requirement is . . . coterminous with the scope of a sovereign's police powers" and that redistributing land and effectively eliminating an undesirable land oligopoly via a compensated taking is clearly within a state's police power justifying the use of eminent domain.[33] The Court maintained that its role of reviewing legislative determinations of public use was "'an extremely narrow' one."[34] Reaffirming prior decisions, the Court stated that it would not substitute its judgment for legislative determinations of a public use "'unless the use [is] palpably without reasonable foundation.'"[35] The Court asserted that its focus was not on the end-result behind the taking, but strictly on the plan's public purpose for the takings and whether the means for the plan's execution were rational.[36]

In closing, the Court reiterated its position that the Fifth Amendment does not impose "any literal requirement that condemned property be put into use for the general public."[37] Specifically, the Court stated, "It is not essential that the entire community, nor even any considerable portion, . . . directly enjoy or participate in any improvement in order [for it] to constitute a public use."[38] In short, the Court determined that the Hawaii statute, which utilized

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[32] *Id.* at 235.
[33] *Id.* at 240-42.
[34] *Id.* at 240 (quoting Berman v. Parker, 348 U.S. 26, 32 (1954)).
[35] *Id.* at 241 (quoting United States v. Gettysburg Elec. Ry. Co., 160 U.S. 668, 680 (1896)); *see also Berman*, 348 U.S. at 32-35.
[36] *Midkiff*, 467 U.S. at 242-43. In addition, the Court stated that debating the wisdom of takings legislation and its attending public purposes is improper in the federal courts.
[37] *Id.* at 244.
[38] *Id.* (quoting Rindge Co. v. L.A., 262 U.S. 700, 707 (1923)).

eminent domain, "pass[es] scrutiny of the Public Use Clause."[39]

In essence, both *Berman* and *Midkiff* set a deferential tone for the Court's review in takings cases when examining what constitutes a valid public use. The *Kelo* Court, following this deferential tone, abandoned any idea that the stated legislative purposes behind eminent domain takings are simply *post hoc* rationalizations of the taking.[40] Interestingly, both *Berman* and *Midkiff* provide considerable latitude to the possibility of private owners becoming both the end-users and owners of property taken from their neighbors by eminent domain.

These cases demonstrate that *Kelo* is not earth-shattering takings jurisprudence, despite two decades separating *Midkiff* and *Kelo* and over fifty years dividing *Berman* and *Kelo*. The effects of *Kelo* have been aggrandized because of an age in which newspapers, twenty-four hour news channels, and internet news websites report and often sensationalize stories, including United States Supreme Court decisions.[41] The majority opinion in *Kelo*, while not jurisprudentially novel, follows the past decisions of *Berman* and *Midkiff* by holding that the taking of the petition-

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[39] *Id.* at 243.

[40] *See* Brief for the States of Vermont et. al. as Amici Curiae Supporting Respondents, Kelo v. City of New London, 545 U.S. 469 (2005) (No. 04-108) (highlighting several states' positions, including Tennessee, that the courts should give deferential treatment to state determinations of public use in takings cases and limit interference in this area by the federal courts. This limited influence prevents unnecessary judicial entanglement and is established precedent in the Court's takings jurisprudence).

[41] *See e.g.*, Linda Greenhouse, *Justices Uphold Taking Property for Development*, N.Y. TIMES, June 24, 2005, at A1; Assoc. Press, *High Court Expands Reach of Eminent Domain*, FOX NEWS, June 23, 2005, http://www.foxnews.com/printer_friendly_story/0,3566,160479,00.html.

ers' land under an economic redevelopment plan was constitutional under the Fifth Amendment.[42]

Analyzing the *Kelo* Decision

After writing the majority opinion in *Kelo*, Justice John Paul Stevens attempted to set himself apart from the decision, calling the outcome "unwise," but qualifying his statement by adding that "the law compelled a result that [he] would have opposed if [he] were a legislator."[43] Despite Justice Stevens' misgivings, his majority opinion began by emphasizing the Court's limited scope of review and deference to legislative determinations of public use for eminent domain.[44] The Court determined that the Plan at issue "unquestionably serves a public purpose," thereby meeting the Fifth Amendment's public use requirement.[45] Specifically, the Court stated that "[p]romoting economic development is a [longstanding objective] of government" and that "there is . . . no other principled way of distinguishing economic development from . . . other public purposes."[46] The Court explained that holding the benefits derived from NLDC's Plan as an invalid public use would be "incongruous" from its prior takings jurisprudence.[47]

Aside from sustaining NLDC's takings as constitutional, the Court refused to adopt the petitioner's proposed bright-line rule that would automatically invalidate eco-

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[42] *See* Kelo v. City of New London, 545 U.S. 469, 489-90 (2005). The majority included Justices Stevens, Souter, Ginsburg, Breyer, and Kennedy. *Id.* at 470.

[43] Linda Greenhouse, *Justice Weighs Desire v. Duty (Duty Prevails)*, N.Y. TIMES, Aug. 25, 2005, at A1.

[44] *Kelo,* 545 U.S. at 482-83.

[45] *Id.* at 484. (noting that other factors justifying the validity of their result, including extensive deliberation prior to the Plan's adoption and statutory authorization for this Plan in Connecticut).

[46] *Id.* at 484.

[47] *Id.* at 485; *see, e.g.*, Berman v. Parker, 348 U.S. 26, 32 (1954).

nomic development as a public use.[48] Thus, the *Kelo* majority rejected the petitioner's contention that "eminent domain for economic development impermissibly blurs the boundary between public and private takings."[49] Again, the Court deferred to its past jurisprudence and noted that it "'cannot say . . . public ownership is the *sole* method of promoting the public purposes of . . . redevelopment projects.'"[50] The majority's decision focused solely on the Plan's purpose and its attendant takings, not the mechanics required to implement the Plan or the takings.[51]

Essentially, the Court, through a five-person majority, openly sanctioned the ancillary private use of property taken by eminent domain, if the public purpose behind the taking is constitutional and if the property's development occurs within the parameters of a redevelopment plan.[52] The Framers of the Constitution likely never intended eminent domain as a mechanism to take private land for a purported (even incidental) public purpose and later allow another private party to benefit directly from the taking. The Fifth Amendment of the Constitution prohibits the deprivation of private property without due process of law or without just compensation.[53] This opinion militates against the Framers' intent of the Fifth Amendment, specif-

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[48] *Kelo*, 545 U.S. at 485; *see also Berman*, 348 U.S. at 35-36 (noting that economic redevelopment can be a valid public use).

[49] *Kelo,* 545 U.S. at 485.

[50] *Id.* at 486 (quoting *Berman*, 348 U.S. at 33-34) (emphasis added).

[51] *See id.* at 489 ("Once the question of . . . purpose has been decided, the amount and character of land to be taken for the project and the need for a particular tract . . . rests in the discretion of the legislative branch.").

[52] *Id.* at 486-87 (noting that the Court will not examine any hypothetical case in which a condemning authority transfers land from one private citizen to another for the purpose of increasing the property's productivity, even though they would substantiate the petitioner's bright-line rule prohibiting economic development as a public use).

[53] *See* U.S. CONST. amend. V, § 1 (prohibiting deprivation of a person's property without due process of law or just compensation).

ically the Takings Clause, and runs contrary to the idea that eminent domain takings should benefit all citizens.

The remainder of *Kelo*'s majority opinion continued the litany of deference by reiterating that legislative decisions on public use are paramount, and that the Court is an improper forum to debate the wisdom of a taking or the plan behind it.[54] In sum, the Court's majority validated NLDC's Plan, the takings, and the stated public purposes through a form of rational-basis review.[55] Not surprisingly, Justice Stevens would be eager to distance himself from such a broad pronouncement of power under the Takings Clause, especially if he was a legislator.[56]

Compared to the majority opinion, Justice Kennedy's concurrence and the dissenting opinions in *Kelo* are more realistic.[57] Justice Kennedy strongly criticized the majority's deferential treatment of NLDC's takings and the stated public purposes behind them, calling them "incidental or pretextual."[58] Validating takings based on "incidental or pretextual public benefits," he writes, is expressly forbidden by the Constitution.[59] Accordingly, Justice Kennedy determined that a proactive inquiry into an economic development plan's public purpose is needed to discover whether the benefits conferred on the private parties are *merely incidental*, contrary to the usual standard of rational-basis deference.[60] Justice Kennedy concurred with the majority that a presumptive invalidity of public purpose for

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[54] *See Kelo*, 545 U.S. at 488-90.

[55] *Id.* at 490 (Kennedy, J., concurring) ("This deferential standard of review echoes the rational-basis test used to review economic regulation under the Due Process and Equal Protection Clauses . . . .").

[56] *See* Greenhouse, *supra* note 43, at A1.

[57] Justice Kennedy's concurrence in *Kelo* highlights his significance as a "swing-vote" because he voted with the majority to sustain NLDC's taking as constitutional but also filed a separate concurrence justifying his decision.

[58] *Kelo*, 545 U.S. at 490 (Kennedy, J., concurring).

[59] *Id.*

[60] *Id.* at 491 (emphasis added).

economic development plans is unwarranted; however, his opinion was sage enough to advocate against a standard that could allow for widespread takings of private land under pretextual or incidental public purposes.[61] Kennedy's opinion demonstrated an apparent understanding that legislative pronouncements on public uses often occur with little public input or meaningful thought.[62]

The *Kelo* decision yielded two strong dissenting opinions by Justices O'Connor[63] and Thomas, [64] respectively. First, the O'Connor dissent, joined by Justices Scalia, Thomas, and Chief Justice Rehnquist, focused on the majority's essential obliteration of "any distinction between private and public use" under the Fifth Amendment.[65] Essentially, Justice O'Connor determined that the majority opinion allows "incidental public benefits" derived from economic redevelopment to serve the same function as a direct public use, contrary to the Fifth Amendment's public use clause.[66] Specifically, Justice O'Connor noted that *Berman* and *Midkiff*, which the majority relied on, involved a taking that conferred a *direct* public benefit.[67] Since direct public benefits resulted from those takings, returning the taken property to private individuals was inconsequential.[68] The Court correctly sustained the takings and their public purposes in those direct benefit cases.[69] With the *Kelo* takings, the lack of a direct relationship between the public purpose of NLDC's Plan and public benefit conferred consternated the dissenting justices. As a property rights advo-

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[61] *Id.* at 493.
[62] *Id.*
[63] *Id.* at 494 (O'Connor, J., dissenting).
[64] *Id.* at 505 (Thomas, J., dissenting). The dissenters were Justices O'Connor, Thomas, Scalia, and Chief Justice Rehnquist.
[65] *Id.* at 494 (O'Connor, J., dissenting).
[66] *Id.*
[67] *Id.* at 500.
[68] *Id.*
[69] *Id.*

cate, this author joins Justice O'Connor's condemnation of the majority's permissive posture of allowing an *indirect* public purpose to serve the textual and direct public purpose required by the Fifth Amendment for takings.

Justice Thomas's dissent complements Justice O'Connor's dissent by addressing a strictly textual and historical interpretation of the Fifth Amendment.[70] This dissent used a detailed overview of the extensive judicial history and precedents underlying takings cases and explained how the Court's prior takings jurisprudence has led it to the current (and arguably incorrect) result in *Kelo*.[71] Interestingly, both dissenting opinions noted that the economically poor of society will shoulder the constant threat of having their property taken and redistributed to more affluent and politically astute persons for redevelopment under a likely incidental or pretextual "public purpose."[72]

In short, the *Kelo* dissenters highlighted the majority opinion's shortcomings and warned those who read *Kelo* that the Court's most recent pronouncement on takings will impact landowners in a way never contemplated by the Fifth Amendment. The effect of *Kelo* is akin to the erosion of a hillside that will eventually cause a landslide on unsuspecting landowners. This author agrees with the dissenting justices in using eminent domain to obtain a direct public

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[70] *See id.* at 506, 511, 521 (Thomas, J., dissenting) (noting that the public use restriction in the Fifth Amendment means that the taken private property is actually employed for a direct public good instead of some merely conceivable public benefit (e.g. increased taxes)). This dissent advocates a return to the plain textual meaning of the Takings Clause, which is evidenced by Justice Thomas's dedication to strictly construing the text, in a manner similar to Justice Hugo Black. *See id.* at 523.

[71] *Id.* at 512-18.

[72] *Id.* at 505 (O'Connor, J., dissenting); *id.* at 521-22 (Thomas, J., dissenting) (specifically noting Justice Thomas's reference to the "'discrete and insular minorities'" of *United States v. Carolene Products Co.*, 304 U.S. 144, 152 (1938), that would be directly affected by the majority's holding in *Kelo*).

benefit and with Justice Kennedy insofar that a more in-depth inquiry is needed for economic redevelopment plans and their alleged direct public purposes under the Fifth Amendment. Tennessee, like many other states, understood *Kelo*'s potential impact on eminent domain and the concerns of the dissenting justices. Under intense electoral pressure, Tennessee changed its takings law to counteract *Kelo* and its future implications.

Tennessee's Legislative Response to *Kelo v. City of New London*

During the 2006 legislative session, the Tennessee General Assembly enacted Public Chapter 863 to revise Tennessee's eminent domain statutes.[73] In changing the law, the General Assembly responded to constituents' demands that Tennessee revise its antiquated eminent domain law to prevent a *Kelo*-type scenario from occurring.[74] Public Chapter 863 addressed several different areas, including the legislative intent for eminent domain, the definition of public purpose, and the revision of specific eminent domain procedures.[75]

The Tennessee General Assembly began its statutory revisions by declaring that eminent domain should "be used sparingly" and that a narrow construction of the eminent domain statutes was required to prevent any uninten-

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[73] *See* Scott Griswold, *Property Rights vs. Public Use*, TENN. B.J., Feb. 2007, at 14, 15.

[74] For ease of reference, I will reference the Tennessee Code Annotated section affected by Public Chapter 863 when discussing the changes to Tennessee's eminent domain law.

[75] *See* TENN. CODE ANN. § 29-17-101 (Supp. 2007) (stating the General Assembly's intent on the appropriate use of eminent domain); TENN. CODE ANN. § 29-17-102 (Supp. 2007) (defining both eminent domain and public use for the purposes of eminent domain); *See e.g.*, TENN. CODE ANN. § 29-17-903(c) (Supp. 2007) (amending the time period for the "quick-take" procedure from five days to thirty days, among other procedural changes enacted by Public Chapter 863).

tional enlargement of the state's ability to take private land for public purposes.[76] This statute is the General Assembly's statement of legislative intent for eminent domain. In an interview with State Senator Doug Jackson, he explained that the recent changes were a reactionary response that attempted to balance the concerns of those who feared that *Kelo* would occur in Tennessee, such as the Tennessee Farm Bureau, and those fearing that the General Assembly's response to *Kelo* would unduly narrow eminent domain, such as local governments.[77] Senator Jackson estimated that Public Chapter 863 represents the final compromise between several dozen bills filed immediately after *Kelo* and should effectively prevent any *Kelo*-type scenarios from occurring in Tennessee.[78]

Next, Public Chapter 863 attempted to define both eminent domain and what constitutes public use for eminent domain purposes.[79] Interestingly, this aspect of Tennessee's eminent domain law was notably absent for many years.[80] The statute first defines eminent domain as "the authority conferred upon the government . . . to condemn and take . . . private property . . . so long as the property is taken for a legitimate public use."[81] Public use is then

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[76] TENN. CODE ANN. § 29-17-101 (Supp. 2007).

[77] Telephone Interview with State Sen. Doug Jackson, representing the 25th Senatorial District and sponsor of S.B. 3296, the parent legislation of Public Chapter 863 (Mar. 19, 2007).

[78] *Id.*

[79] TENN. CODE ANN. § 29-17-102 (Supp. 2007); *see also* Griswold, *supra* note 73, at 15-16.

[80] *See* Griswold, *supra* note 73, at 15.

[81] TENN. CODE ANN. § 29-17-102(1) (Supp. 2007); *see* TENN. CONST. art. I, § 21 ("[N]o man's particular . . . property taken, or applied to public use . . . without just compensation . . . ."). Interestingly, Section 102 states that a legitimate public use must be "in accordance with the fifth and fourteenth amendments to the United States Constitution, the Constitution of Tennessee, Art. 1, §21, and the provisions of chapter 863 of the Public Acts of 2006," as codified in the Tennessee Code Annotated. TENN. CODE ANN. § 29-17-102(1) (Supp. 2007).

defined broadly and negatively as follows: "[direct] private use or benefit, or the indirect public benefits resulting from private economic development and private commercial enterprise, including increased tax revenue and increased employment opportunity" are *not* public uses for eminent domain.[82] Through this language, the General Assembly responded directly to *Kelo* by defining public use for eminent domain in terms of the Court's most recent pronouncement of what is acceptable as a public purpose for taking private land.[83]

Aside from the public use definition, the revisions included exceptions that permitted takings for traditional public purposes (e.g. roads and highways); common carriers and other utilities; housing authorities or community development agencies; and industrial parks.[84] Another revision in this statute provided that private property taken pursuant to an urban renewal or redevelopment plan must occur to eliminate a "blighted area."[85] "Blighted area" is defined under Tennessee Code Annotated section 13-20-201(a) as an "[area] (including slum areas) with buildings or other improvements" that are detrimental to, *inter alia*, the overall "welfare of the community" because of the statutory reasons therein.[86] The statute also exempted

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[82] TENN. CODE ANN. § 29-17-102(2) (Supp. 2007).

[83] *See generally* Kelo v. City of New London, 545 U.S. 469 (2005) (defining acceptable public uses for eminent domain).

[84] TENN. CODE ANN. § 29-17-102(2)(A)-(C), (E) (Supp. 2007).

[85] *Id.* at (2)(C).

[86] *Compare* TENN. CODE ANN. § 13-20-201(a) (Supp. 2007) (stating that "[w]elfare of the community does not include solely a loss of property value to surrounding properties . . . [or] the need for increased tax revenues" as sufficient justifications to deem the property blighted), *with Kelo*, 545 U.S. at 494, 501 (O'Connor, J., dissenting) (noting Justice O'Connor's concern of taking property so that government can upgrade the property and get more revenue from it via taxes).

farmland used in agricultural production from the definition of blight.[87]

Despite the General Assembly's best efforts, only judicial interpretation of this broad and vague standard of public use will dictate its effectiveness for preventing *Kelo*-type takings.[88] Litigious landowners can litigate the true meaning of the broad and vague definition of blighted area,[89] or whether a government project causing a taking is actually conferring a direct public benefit.[90] Adverse effects on poorer neighborhoods and less affluent property owners are likely thanks to these recent changes in the law because they are often subjected to redevelopment plans similar to those in *Kelo* and *Berman*.[91]

In addition to the obvious effects discussed above, a concern exists that the recent changes still permit the very mechanisms that caused *Kelo*: takings by economic redevelopment agencies conferring only indirect public benefits.[92] The statute prohibits taking for *private* development that has indirect public benefits as their public use justification; however, takings by redevelopment agencies are still accepted by the revised statute.[93] These plans often include private developers as the catalyst to fulfill the plan. This issue causes consternation because a close reading of the revised statute appears to leave open a possibility for another *Kelo* type taking in Tennessee, despite the General

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[87] TENN. CODE ANN. § 1-3-105(2)(A) (Supp. 2007) (defining agriculture and agricultural uses); TENN. CODE ANN. § 13-20-201(a) (Supp. 2007).

[88] *See* Griswold, *supra* note 73, at 17 (reaching the same prediction as the author for these recent legislative changes).

[89] TENN. CODE ANN. § 13-20-201(a) (Supp. 2007).

[90] TENN. CODE ANN. § 29-17-102 (Supp. 2007).

[91] *See Kelo*, 545 U.S. at 505, 521-22 (O'Connor and Thomas, JJ., dissenting) (mirroring the same arguments of a disproportionate impact on less affluent and prosperous people through the majority's opinion in the case); Griswold, *supra* note 73, at 16-17.

[92] TENN. CODE ANN. § 29-17-102(2) (Supp. 2007).

[93] *Id.* at (2)(C).

Assembly's efforts to "cure" the problems caused by *Kelo* and rendering the new public use definition ineffective.

Another concern arises out of the statutory revisions. Putting aside the issue of whether a taking confers a direct public benefit, one of the public use exceptions states that "private use that is merely *incidental* to a public use" is a permissible public use, as long as the land condemned is *not* "*primarily* . . . [for] the incidental private use."[94] This exception appears to impute an intent requirement into takings law that was previously unknown (and likely never intended) in eminent domain.

For example, suppose a city takes thirty acres of land for a new park. This city is economically impoverished and often lacks tax revenues. When the city takes the property through eminent domain, the city *intends* to develop the park, as its stated public purpose for the taking. Everyone knows, however, that the money will never be there to fulfill the project. The land is held for several years with no progress made towards the park (i.e. the public purpose for the taking). Eventually, the county sells the condemned property to a private company that later develops the land into a new car factory, which generates new jobs and added tax revenues.[95] The park never materializes, but the city has a new employer and revenue source.

The preceding example demonstrates that private property can be taken for a (purported) public purpose and later turned over to a private developer as an "incidental" use because the primary purpose for taking the land initial-

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[94] TENN. CODE ANN. § 29-17-102(2)(D) (Supp. 2007).

[95] *Compare* TENN. CODE ANN. § 29-17-1003(a) (Supp. 2007) (stating that when "land acquired by eminent domain" is subsequently disposed of by a condemning authority "to another public or quasi-public entity or to a *private person, corporation, or other entity*," fair market value for the property or better must be received by the transferor), *with* GA. CODE ANN. § 22-1-2(b) (Supp. 2007) (providing that no conversion of property "for any use other than a public use" shall take place until twenty years after the initial taking).

ly was a permissible public use. The private use for the property did not arise until several years later and is merely incidental to changing times, economics, and political priorities. Essentially, the exception could gut the newly enacted public use definition because an intent requirement is superimposed on the public use definition. A governmental body can potentially take land intending it for a public use, only to never have the means to fulfill the purpose and later sell the property off to private individuals as an "incidental" occurrence to the taking. The transfer would fulfill the statute's literal requirements for public use, but would circumvent the legislative intent behind eminent domain. Thus, this process would render the public use definition meaningless because the actual events would run totally contrary to the statutory language.[96] Challenging takings based on this scenario would require a showing of bad faith regarding the government's intent behind the initial taking and subsequent property transfer to a private individual (i.e. the proof would require that the governmental body took private land by eminent domain and then transferred it to another private party, *knowing* that the taking's public purpose would never materialize at the time of the original taking).[97]

An example of how Public Chapter 863 revised specific eminent domain procedures is evidenced by the revision of the "quick-take" procedure for public agency takings. Prior to 2006, a condemning authority in Tennessee, such as the Department of Transportation, could give a

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[96] *See* TENN. CODE ANN. § 29-17-102 (Supp. 2007) (noting that these takings of land for an intended public use, selling to a private party, and then enjoying the indirect public benefits derived from the private development run directly contrary to the language of indirect public benefits caused by private developments and shall not be a public use for eminent domain).

[97] *See, e.g.*, Washington v. Davis, 426 U.S. 229 (1976) (noting that the petitioner's failure to demonstrate intent on the part of the government by concrete evidence proved fatal to their case).

landowner only *five* days notice before being entitled to physical possession of the property pursuant to its power of condemnation.[98] The revised law now requires the condemning authority to give the landowner a thirty-day notice before taking possession of the property.[99] Based on personal work experience, the thirty-day notice requirement benefits landowners by giving them time to plan for the imminent condemnation and devise an appropriate response. The condemning authority also benefits because it litigates dozens of other condemnation actions concurrently that require an equal amount of attention.[100] Despite contentions that this added time will only delay eminent domain litigation, practitioners on both sides will likely agree that the marginal cost is outweighed by the added benefits of the extra time in the interest of fairness and justice.

In closing, the recent changes to Tennessee's eminent domain law will have far-reaching implications for Tennessee practitioners. Aside from litigation over specific procedural issues, such as how to correctly value the condemned property, broader issues dealing with a taking's constitutionality will likely occur due to the formulation of a more narrow and vague public use definition, including

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[98] TENN. CODE ANN. § 29-17-803(b) (2005). The "quick-take" procedure most often involves land acquisitions for highway right-of-ways; however, this type of taking is one of the most common uses of eminent domain in Tennessee.

[99] TENN. CODE ANN. § 29-17-903(c) (Supp. 2007). This statute applies to situations in which the private landowners are not contesting condemnation and the private landowners contest either the condemnation itself or the amount of just compensation due to them for the taking. Note that Part 8 of the statute, dealing with the "quick-take" procedure was moved to Part 9 of the Tennessee Code following the 2006 statutory revisions.

[100] The author has clerked for two summers for the Tennessee Attorney General's Office in the Real Property Division and has handled condemnation litigation for the State of Tennessee.

what constitutes "incidental private use" or a "blighted area."[101]

Tennessee's Sister States Follow the *Kelo* Revision Movement

After the Court's decision in *Kelo*, states bordering Tennessee have reformed their eminent domain laws in a similar fashion. This section of this essay will briefly discuss the efforts of Kentucky, Georgia, and Alabama in reforming eminent domain as a comparison of how Tennessee's sister states are counteracting *Kelo*.[102] This section will compare each examined sister-state's definition of public use, blight, legislative intent, and other notable innovations in their laws to Tennessee's eminent domain revisions.[103]

Kentucky

Kentucky is the first sister state examined regarding its post-*Kelo* eminent domain changes. During the 2006 legislative session, Kentucky revised its eminent domain statute to specifically define public use and prohibit emi-

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[101] *See* TENN. CODE ANN. § 29-17-102(2) (Supp. 2007) (defining acceptable public uses for eminent domain); TENN. CODE ANN. § 13-20-201(a) (Supp. 2007) (dealing with the definition of blight).

[102] *See generally* National Conference of State Legislatures, 2006 State Legislation, http://www.ncsl.org/programs/natres/emindomainleg06.htm (last visited Sept. 18, 2007) (highlighting the recent efforts among various states to change their respective eminent domain statutes in light of *Kelo*).

[103] *See also* Carol J. Miller & Stanley A. Leasure, *Post*-Kelo *Determination of Public Use and Eminent Domain in Economic Development Under Arkansas Law*, 59 ARK. L. REV. 43, 43 (2006) (discussing Arkansas's revisions to eminent domain after *Kelo*); Dale A. Whitman, *Eminent Domain Reform in Missouri: A Legislative Memoir*, 71 MO. L. REV. 721, 721 (2006) (discussing Missouri's statutory revisions after *Kelo*).

nent domain for economic development projects providing only an *incidental* public benefit as the validating public purpose.[104] Kentucky and Tennessee's eminent domain statutes are similar, in that both statutes define acceptable public uses justifying eminent domain and limit incidental private uses of taken land to those that do not result in taking private land *solely* for incidental private use.[105] Kentucky, like Tennessee, declared that the legislative intent for eminent domain is that it should "be used sparingly" and only for the benefit of all the citizens within the state.[106] One interesting point concerning Kentucky's recent eminent domain revisions is the exemption for land acquisitions financed by state or federal road funds.[107] The constitutionality of taking land for a plainly public purpose, such as a road, would not likely be questioned, but a few situations exist in which takings for roads and highways would cause a *Kelo* type problem for a condemning authority.[108]

Georgia

The next state examined is Georgia and its 2006 Landowner's Bill of Rights and Private Property Protection Act.[109] Georgia, like Tennessee, enacted both specific procedural changes for eminent domain takings and specific definitions for acceptable public uses justifying eminent

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[104] *See* KY. REV. STAT. ANN. § 416.675 (LexisNexis Supp. 2007).
[105] *Compare* KY. REV. STAT. ANN. § 416.675(2) (LexisNexis Supp. 2007), *with* TENN. CODE ANN. § 29-17-102(2) (Supp. 2007).
[106] *Compare* KY. REV. STAT. ANN. § 416.675 (LexisNexis Supp. 2007), *with* TENN. CODE ANN. § 29-17-101 (Supp. 2007).
[107] KY. REV. STAT. ANN. § 416.675(4) (LexisNexis Supp. 2007).
[108] One conceivable situation that could trigger this exemption in Kentucky is when a highway project is funded but never completed, and the property is used later for a private development.
[109] *See* 2006 Ga. Laws, Ch. 444 (serving as Georgia's form of comprehensive statutory eminent domain reform).

domain.[110] However, Georgia's statutory revisions differ from Tennessee's in two respects. First, Tennessee's public use definition is more straightforward than Georgia's definition. Tennessee's definition for public use is contained in one straightforward provision, whereas Georgia's definition is scattered over several different code provisions.[111] In addition, Georgia included both private benefit and indirect public benefit in the definition of economic development and summarily stated that "[t]he public benefit of economic development shall not constitute a public use."[112] Tennessee took the opposite approach and clearly stated what constitutes an acceptable public use for eminent domain, albeit negatively, and notwithstanding exceptions.[113]

Second, Georgia's definition of blight is more restrictive than Tennessee's because Georgia requires that two or more of the statutorily enumerated conditions exist before a property is termed "blighted" for eminent domain purposes.[114] Tennessee has a more inclusive standard for blight, where a property meeting just one of the requirements is determined blighted, including the overly broad "welfare of the community" standard.[115] Interestingly, both states prohibited a finding of blight for eminent domain purposes solely because a property causes the surrounding property values to decline because of its aesthetic condition.[116] Arguably, both states have equally strong defini-

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[110] *Id.*

[111] *Compare* GA. CODE ANN. § 22-1-1(9)(A) (Supp. 2007), *and* GA. CODE ANN. § 22-1-2 (Supp. 2007), *with* TENN. CODE ANN. § 29-17-102(2) (Supp. 2007).

[112] GA. CODE ANN. § 22-1-1(4), (9)(B) (Supp. 2007).

[113] TENN. CODE ANN. § 29-17-102(2) (Supp. 2007).

[114] GA. CODE ANN. § 22-1-1(1) (Supp. 2007) (noting the conditions for findings of blight on the property being uninhabitable, abandoned, environmentally hazardous, or conducive to ill health or disease).

[115] TENN. CODE ANN. § 13-20-201(a) (Supp. 2007).

[116] *Compare* GA. CODE ANN. § 22-1-1(1) (Supp. 2007), *with* TENN. CODE ANN. § 13-20-201(a) (Supp. 2007).

tions of blight and public use; however, the outcome of litigation will determine their effectiveness.

Georgia, like Tennessee, takes a comparable position on the legislative intent behind eminent domain because both states declare that eminent domain is solely for public usages.[117] Georgia's recent revisions included language allowing a landowner to reclaim his property (i.e. right of first refusal) or receive additional compensation if the "property acquired through the power of eminent domain from an owner fails to be put to a public use within five years."[118] Tennessee has a similar provision; however, the procedure is quite complex.[119]

In sum, Georgia has enacted equally forceful eminent domain revisions to curb *Kelo*'s negative effects. Tennessee could easily duplicate some of Georgia's innovative revisions to eminent domain, such as defining blight based on a specific condition/factor test.

Alabama

Alabama is the last of Tennessee's sister-states that this paper examines regarding recent eminent domain changes after *Kelo*. Alabama's reforms parallel Tennessee's revisions in defining public use and legislative intent

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[117] *Compare* GA. CODE ANN. § 22-1-2(a) (Supp. 2007) ("[N]either this state nor any political subdivision . . . shall use eminent domain unless it is for public use . . . ."), *with* TENN. CODE ANN. § 29-17-101 (Supp. 2006).

[118] *See* GA. CODE ANN. § 22-1-2(c)(1) (Supp. 2007). Specifically, the property is considered put to a public use when a "substantial good faith effort has been expended . . . to put the property to public use," regardless of whether the project is completed. While a very worthwhile provision for landowners, the provision is flexible and could prove to be heavily litigated.

[119] *See* TENN. CODE ANN. § 29-17-1003 (Supp. 2007) (dealing with the disposal of land acquired by eminent domain); TENN. CODE ANN. § 12-2-112 (2005) (dealing with the disposal of surplus interests in real property held by the state).

governing eminent domain.[120] First, Alabama's statutory revisions prohibited the use of "eminent domain to transfer private property for 'purposes of private retail, office, commercial, industrial, or residential development.'"[121] The revisions further prohibited local condemning authorities from using eminent domain to increase tax revenues or from transferring taken private property to anyone except purely governmental entities.[122] Thus, Alabama's legislative intent, though not explicitly defined, appears to be that eminent domain is a tool to be used strictly for the public welfare. Both Tennessee and Alabama have public use definitions that are comparable in their effect; however, Alabama used more explicit language to define an acceptable public use under eminent domain.[123]

In addition, Alabama's statutory revisions, like Tennessee's, permit the taking and transferring of private property that is termed blighted, under statutory formulations, to private entities under a redevelopment plan.[124] Alabama's revisions also include a buyback provision for landowners who lose their property via eminent domain if the property never materializes into a public use.[125] This

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[120] *See* Anastasia C. Sheffler-Wood, *Where Do We Go from Here? States Revise Eminent Domain Legislation in Response to* Kelo, 79 TEMP. L. REV. 617, 631-32 (2006) (evaluating Alabama's changes to its eminent domain laws). *Compare* ALA. CODE §§ 18-1B-1-2 (LexisNexis 2006), *with* TENN. CODE ANN. §§ 29-17-101-102 (Supp. 2006) (determining legislative purpose and defining public use for eminent domain).

[121] *See* Sheffler-Wood, *supra* note 120, at 631.

[122] *Id.*

[123] *Compare* ALA. CODE § 18-1B-2 (LexisNexis 2007), *with* TENN. CODE ANN. § 29-17-102 (Supp. 2007).

[124] *See* ALA. CODE § 24-2-2(c) (LexisNexis 2007). *Compare* ALA. CODE § 18-1B-2 (LexisNexis 2007), *with* TENN. CODE ANN. § 29-17-102 (Supp. 2007).

[125] *Compare* ALA. CODE § 18-1B-2(b) (LexisNexis 2007) (stating that the right of first refusal in the buyback provision goes to the landowner whom the condemning authority acquired the property from via eminent domain), *with* GA. CODE ANN. § 22-1-2(c)(1) (Supp. 2007) (stat-

provision is similar to Georgia's right of first refusal and Tennessee's buyback provisions; however, Alabama does not appear have a time limitation on this buyback provision.[126]

In sum, Alabama, like Tennessee, appears to have revised its eminent domain law to prevent a *Kelo*-type situation from occurring, but testing the effectiveness of the revisions will occur only through future eminent domain litigation, as is the case in every other state currently revising its eminent domain statutes.

Conclusion

Aside from the critical look at *Kelo* and the comparison of eminent domain revisions between Tennessee and its sister states, the recent revisions to Tennessee's eminent domain law yield several conclusions. First, adding specific definitions for public use, blight, and eminent domain afford Tennessee landowners some certainty for understanding what purposes the government can take their land under the power of eminent domain. Until recently, local governments could determine what constituted a valid public purpose for taking land under eminent domain *sua sponte*.[127] The addition of a quasi-specific public use definition should aid both condemning authorities and landowners in determining when eminent domain takings are appropriate and prevent the possibility of another *Kelo* occurrence. The criticism is that the public use definition is still sufficiently vague and unascertainable, thereby affording the government flexibility in taking property in many

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ing that the former landowner can apply to condemning authority to regain property taken by eminent domain if property is not put to a public use within five years of its taking).

[126] ALA. CODE § 18-1B-2(b) (LexisNexis 2007).

[127] *See* Griswold, *supra* note 73, at 16 (noting that prior to the 2006 revisions, "counties could use eminent domain 'for any county purpose'" deemed appropriate).

cases. This flexibility in takings could be shown when an intended public use eventually yields to an "incidental" private use after the taking or when an economic redevelopment plan uses eminent domain and private development to achieve some indirect public use essentially sanctioned by the statute.

Second, the revision of the "quick-take" procedure affords a greater degree of fairness to landowners and condemning authorities alike. By increasing the notice of a proposed taking to thirty days, both sides have a better opportunity to evaluate the facts and handle the dispute in a mutually beneficial manner. This broadened time frame will hopefully alleviate litigation and encourage settlements of takings cases outside of court.[128]

Finally, the eminent domain revisions are far from complete. Changes will likely be forthcoming to the eminent domain laws in the future, as time passes and circumstances change with litigation. Overall, the recent changes enacted by Tennessee to its eminent domain law in 2006 have likely offset any potential adverse effect created by the *Kelo* decision, if just by the simple fact that the changes to the law have put the electorate on notice that eminent domain is regarded for strictly public purposes.

The recent changes to our eminent domain law would help protect our hypothetical grandmother, introduced at the beginning of this paper, and prevent her land from becoming another *Kelo* type taking. These changes represent progress towards a balance between the government's need and right to take private land for public use and a landowner's right to enjoy property without the threat of unwarranted government seizure.

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[128] In this author's experience with eminent domain cases, many condemnation actions are eventually settled out of court, but this increase notice period of thirty days will hopefully facilitate a greater number of settlements. Many landowners, when confronted with losing their property, often become upset easily or become irrational if forced into a quick decision on compensation or other matters related to the taking.

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