Seeing the Light: Ignoring Collateral Economic Benefits to the Public When Enforcing Servitudes

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...No restriction determined to be of such actual benefit shall be enforced or declared to be enforceable, except in appropriate cases by award of money damages, if...(5) enforcement, except by award of money damages, is for any other reason inequitable or not in the public interest.¹

In the words of provision (5)...we take judicial notice of the exceedingly high property tax rates current in the city of Boston and the beneficial effect on the tax base of the petitioners' plan to construct a multimillion dollar project.²

There is, moreover, no principled way of distinguishing economic development from other public purposes that we have recognized.³

I. INTRODUCTION

In 1974 in Blakeley v. Gorin,⁴ the Massachusetts Supreme Judicial Court abrogated significant non-fee property rights in the Commonwealth by refusing to enforce specifically servitudes known as Commonwealth Restrictions in Boston's Back Bay neighborhood.⁵ The Commonwealth Restrictions at issue in Blakeley provided certain property owners with a vested interest in maintaining the flow of ambient light and air through the alleyway that runs between and behind the parcels of land subject to the

¹ MASS. GEN. LAWS ch. 184, § 30 (2005).
⁵ Id. at 913-14.
restrictions. In holding that property owners could build a sky-bridge that would necessarily limit their neighbors' access to ambient air and light, the court explained that the sky-bridge would increase the tax base for the city of Boston and thus the intrusion on non-fee private property rights was justified. The legal vehicle that allowed the Court to reduce petitioners' building's access to ambient light and air was Massachusetts General Law Chapter 184 § 30. The question whether the Supreme Judicial Court in Blakely v. Gorin facilitated an unconstitutional taking under the United States Constitution became moot when the United States Supreme Court announced its decision — legitimizing a private party taking for economic development as a sound "public use" — in Kelo v. City of New London.

The national reception of Justice Stevens' Kelo decision has been hostile, and the response to it could be characterized as a property rights defense movement. I contend that the Massachusetts General Court should participate in this movement not only by passing legislation to protect fee interests as other states have done, but also by passing legislation to protect non-fee interests such as the Commonwealth Restrictions at issue in Blakely. Amending Massachusetts General Law c. 184 § 30 to preclude the taking of non-fee property interests for collateral economic benefits, I believe, would return the statute to its original purpose by relegating matters collateral to use and occupancy of land to non-factors.

This note proceeds in the following manner: First, I will investigate

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6 Id. at 906.
7 See Blakely, 313 N.E.2d at 914. Chief Justice Hennessy wrote that the outcome of the case was not dispositive for future, different controversies in the Back Bay regarding other parcels also subject to the Commonwealth Restrictions. Id. at 913-14. Prominent in Chief Justice Hennessey's reasoning was the fact that petitioners, developers of the Ritz-Carlton Hotel on Arlington Street, would be able to garner more tax revenues for Boston once respondents' building's ambient light and air could be obstructed by a sky-bridge. Id. at 913-14.
8 See id. at 913; see also JOSEPH WILLIAM SINGER, PROPERTY LAW: RULES, POLICIES AND PRACTICES 476-82 (3d ed. 2002). Singer must have found the statute and case to be symbiotic enough to place them in immediate succession in order to be mutually explanatory. Id. at 476-84.
9 See Kelo, 545 U.S. at 484 (stating economic growth is indistinguishable from other valid public purposes in eminent domain jurisprudence); see also infra note 139 (setting forth current proposal to the Massachusetts Constitution to provide new state protections); cf. infra note 135 (suggesting Massachusetts constitutional private property rights are no more protective than the Federal Constitution).
10 See infra notes 117-142 and accompanying text (cataloging the forms the national response to Kelo that have taken place since the decision).
11 See infra notes 143-151 and accompanying text (explaining the benefits such an amendment would bring).
12 See infra notes 19-83 and accompanying text (explaining the original purpose of the statute and the corpus of its jurisprudence).
and report the legislative history and purpose of G.L. c. 184 § 30.\textsuperscript{13} Second, an explication of G.L. c. 184 § 30 is warranted. In particular, I will stress that the statute, except for the amorphous "public interest" clause, explicitly regulates or has been held to regulate either the equitable conduct of parties or some type of tangible, three-dimensional use or occupancy of land.\textsuperscript{14} Third, I will investigate how the statute was used in \textit{Blakeley v. Gorin}, and I will discuss Justice Quirico's dissent.\textsuperscript{15} Fourth, I will discuss \textit{Kelo} with an eye toward explaining two points: how \textit{Kelo} relied on precedent to arrive at a holding that is counter to the plain text of the Fifth Amendment and, therefore, how Justice Quirico's Constitutional dissent was rendered moot thereby.\textsuperscript{16} Fifth, \textit{Kelo} has spawned a property rights defense movement with popular, judicial, and legislative responses, and I will argue that any response to it in Massachusetts needs to legislative.\textsuperscript{17} Last, I will argue that my proposal to amend the statute will broaden the protection of significant property interests while also serving the original purpose of the statute.\textsuperscript{18}

\section*{II. THE HISTORY AND PURPOSE OF MASSACHUSETTS GENERAL LAW CHAPTER 184 § 30}

Massachusetts General Law Chapter 184 § 30 was passed into law by the Massachusetts General Court on May 10, 1961 as part of "An Act To Protect Land Titles From Uncertain And Obsolete Restrictions And To Provide Proceedings In Equity Thereto."\textsuperscript{19} The aforementioned act was not passed in order to facilitate the state's exercise of eminent domain power through condemnation.\textsuperscript{20}

The act simply subjects all parcels in the Commonwealth with re-

\textsuperscript{13} See infra notes 19-24 and accompanying text (explaining why the statute was passed into the General Laws).

\textsuperscript{14} See infra notes 25-83 and accompanying text (arguing the statute's jurisprudence is concerned with land or equity).

\textsuperscript{15} See infra notes 84-98 and accompanying text (explaining what was at stake in \textit{Blakeley v. Gorin}).

\textsuperscript{16} See infra notes 99-116 and accompanying text (arguing that Justice Quirico's constitutional dissent in \textit{Blakeley v. Gorin} is moot after \textit{Kelo}).

\textsuperscript{17} See infra notes 117-142 and accompanying text (cataloging the various forms the reaction to \textit{Kelo} has taken nationally).

\textsuperscript{18} See infra notes 142-151 and accompanying text (arguing such an amendment would accomplish both tasks).

\textsuperscript{19} See 1961 Mass. Acts 448. The other statutes passed as part of this act are Massachusetts General Laws Chapter 184 §§ 26-29 (2005). \textit{Id.; see also Edward C. Mendler, Massachusetts Conveyancers' Handbook with Forms § 10:1 (2005) (referencing the involvement of the conveyancing bar of Massachusetts in legislative real estate reform).}

\textsuperscript{20} See supra notes 21-24 and accompanying text (contending the act tends to serve the purposes named in its title).
strictions that run with the land to the provisions of the statute.\textsuperscript{21} The act further provides that restrictions on such parcels are not enforceable unless recorded, and the act requires that any such restriction must be re-recorded thirty years after its inception and every twenty years after that in order to be enforceable.\textsuperscript{22} G.L. c. 184 § 30 provides for equity proceedings to regulate, limit or eliminate uncertain or obsolete restrictions.\textsuperscript{23} Given the express and implied purpose of the legislation of which Chapter 184 § 30 was an integral piece, it is doubtful that the court's decision in \textit{Blakely v. Gorin} served the statute well.\textsuperscript{24}

III. EXPLICATING MASSACHUSETTS GENERAL LAW
CHAPTER 184 § 30

A. The "actual and substantial benefit" requirement

No restriction shall in any proceeding be enforced or declared to be enforceable, whether or not the time for recording a notice or extension under section twenty-seven or twenty-eight has occurred, or such a notice or extension has been recorded, unless it is determined that the restriction is at the time of the proceeding of actual and substantial benefit to a person claiming rights of enforcement.\textsuperscript{25}

The first part of the statute's initial sentence makes explicit that recording requirements of restrictive covenants and equitable servitudes and the possibility of their enforcement are entirely separate inquiries in the Commonwealth.\textsuperscript{26} For our present purposes the latter half of the statute's first sentence, the "unless" clause, is more crucial as it serves as a gateway for my contention that the statute aims to regulate the three-dimensional use of land.\textsuperscript{27} The Massachusetts Court of Appeals and the Supreme Judi-

\textsuperscript{24} See supra notes 19-23 and accompanying text (explaining the purposes intended to be served by the 1961 Act do not include condemnation).
\textsuperscript{27} Cf. infra notes 28-83 and accompanying text (arguing the vast majority of the statute's jurisprudence is concerned only with land).
cial Court have announced that "actual and substantial benefits" contemplated under the statute cannot be collateral to the enforcing party's use of land at issue.  

A wide variety of actual and substantial benefits, however, have been recognized as legitimate in the case law so long as the benefit concerns the three-dimensional use or occupation of land. For example, in *Connaughton v. Payne* a restriction limiting the number of single family dwellings the plaintiff could build on her property was upheld. At trial, experts offered testimony that "[further] development of plaintiff's property would upset the species diversity and populations of both plant and animal life on the defendants' property." The restriction did provide an actual and substantial benefit to the defendants by protecting the ecosystem on their land they had sought to nurture and protect.

Aesthetic and economic considerations have also been taken into account by fact-finders when determining whether a restriction provides an actual and substantial benefit to a party seeking its enforcement. In *Atwood v. Walter* a development's restriction in Barnstable, in keeping with traditional Cape Cod building practices, required all roofs in the development to be constructed with wooden shingles or shakes. The unique architectural character of the development neighborhood, Jacob's Farm Village, was worth protecting, and the defendant was benefited by the restriction as it served to preserve a unique and aesthetically pleasing set of homes. Similarly, in *Kline v. Shearwater Association, Inc.* a development's restrictions aimed toward creating a uniform scheme of development that protected the natural topography of the area. The trial judge's finding that the covenants at issue thus provided "an actual and substantial

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28 See infra notes 29-56 and accompanying text (explaining that the appellate cases have held that the benefits concern the use and occupancy of land).

29 See infra notes 31-48 and accompanying text (setting out the myriad ways in which an actual and substantial benefit can affect use and occupancy of land).


31 See id. at 686 (deferring to trial judge's finding that a protected ecosystem on the defendants' property constituted an actual and substantial benefit).

32 Id. at 686.

33 See id. at 686; see also id. at 684 (setting forth a list of plants and animals on the defendants' property that would be disturbed by further development).

34 See infra notes 36-45 and accompanying text (explaining the appellate cases that have so held).


37 See id. at 369 (noting the benefits of architectural and aesthetic uniformity to the developer brought about by restrictive covenants in Jacob's Farm Village).


value" was upheld by the Appeals Court.\textsuperscript{40}

Restrictions conducive to pleasing aesthetics have been held to provide actual and substantial benefits even when they have the additional effect of reducing economic competition within a certain area.\textsuperscript{41} In \textit{Gulf Oil Corporation v. Fall River Housing Authority} a redevelopment authority divided one area into two parcels.\textsuperscript{42} In one of the areas service stations were not allowed to be constructed if they had been permitted in the other.\textsuperscript{43} This had the effect of limiting gas station competition in the former area.\textsuperscript{44} The restriction was upheld because it provided a benefit of a mutually helpful, orderly development for the area of Fall River at issue.\textsuperscript{45}

Restrictive covenants that have the effect and purpose of limiting business competition have also been upheld.\textsuperscript{46} In \textit{Exit 1 Properties Limited Partnership v. Mobil Oil Corp.} mutually restrictive covenants between two parcels, once owned by a common grantor, had the effect of allowing sales of gasoline only on one of the parcels and the sale of food only on the other.\textsuperscript{47} Thus, by promoting the restaurant business conducted on the latter parcel, the covenant provided an actual and substantial benefit to its owner.\textsuperscript{48}

The above cases demonstrate actual and substantial benefits within the meaning of the statute take various forms, but in all circumstances the covenant aids use or occupation of land somehow.\textsuperscript{49} In \textit{Garland v. Rosen shein}\textsuperscript{50} the Supreme Judicial Court held that a covenant barring development on a parcel's adjoining land was not of actual and substantial benefit where the grantor-defendant owned no other land in the same town.\textsuperscript{51}

\textsuperscript{40} See id. (holding that preserving the natural topography did provide an actual and substantial benefit to parcel owners in the development).
\textsuperscript{41} See \textit{Gulf Oil Corp. v. Fall River Hous. Auth.}, 306 N.E.2d 257, 262 (Mass. 1974) (upholding the validity of a restriction despite its effects on local commerce).
\textsuperscript{42} See \textit{id}. at 259 (explaining that the effect of the redevelopment plan was to partition a neighborhood in two).
\textsuperscript{43} See \textit{id}.
\textsuperscript{44} See \textit{id}. at 262 (noting economic benefits to owner of service station already established in the more restricted area).
\textsuperscript{45} See \textit{id}. (holding that an orderly plan of development constitutes an actual and substantial benefit despite economic effects).
\textsuperscript{47} See \textit{id}. at 116 (explaining the effects on competition the restrictive covenants had on each of the subject parcels).
\textsuperscript{48} See \textit{id}. at 117 (holding that a restaurant owner did receive an actual and substantial benefit from a restriction on neighboring land proscribing the sale of food on that neighboring land by a service station).
\textsuperscript{49} See \textit{supra} notes 29-48 and accompanying text (explaining how the appellate courts allow for actual and substantial benefits to take a number of different forms).
\textsuperscript{50} 649 N.E.2d 756 (Mass. 1995).
\textsuperscript{51} See \textit{Garland v. Rosen shein}, 649 N.E.2d 756, 757 (Mass. 1995) (explaining that the defendant had no land that could be benefited by the restriction).
covenant did not help the defendant use or occupy his own land anywhere. The defendant, moreover, could not claim that the price of releasing the covenant - what Justice Nolan coined as its "hold-up price" - provided him with an actual and substantial benefit.

Actual and substantial benefits, therefore, are spatial and aid enforcing parties with the use, occupancy and enjoyment of their land. Actual and substantial benefits are never collateral to the spatial use of land. In the interests it tries to protect, scuttle or regulate, therefore, the statute is only concerned with how the subject land is used.

B. Proving actual and substantial benefits

There shall be a presumption that no restriction shall be of such actual and substantial benefit except in cases of gifts or devises for public, charitable or religious purposes, if any part of the subject land lies within a city or town having a population greater than one hundred thousand persons unless (1) such restriction at the time it was imposed is not more burdensome as to requirements for lot size, density, building height, set back, or other yard dimensions than such requirements established by restriction or restrictions applicable to the land of the persons for whose benefit rights of enforcement are claimed; or (2) such restriction is part of a common scheme applicable to four or more parcels of contiguous except for any intervening streets or ways to land of the grantor or other premises purported to be benefited thereby; or (3) unless such restriction is in favor of contiguous land of the grantor.

The enforcing party's burden of proving an actual and substantial benefit is case specific depending on the population size of the town or municipality where the subject land is located: if the affected parcels are in a town or city with a population under 100,000 persons impliedly there is no presumption concerning the existence of an actual and substantial benefit, but if the subject land is in a larger municipality the enforcing party must overcome the presumption that the servitude does not provide him an

52 See id.
53 See id. at 758 (holding the benefit of a restriction cannot be the prospect of releasing that restriction for consideration).
54 See supra notes 29-53 and accompanying text (explaining the case law on actual and substantial benefits requires some benefit to use and occupancy of land).
55 See id.
56 See id.
57 MASS. GEN. LAWS. ch. 184, §30 (2005).
actual and substantial benefit in the use of his land.  

There are many other cases in which the enforcing party has no presumptive burden to overcome. In latter cases, for instance, if the restriction is part of a gift or a devise for religious, charitable, or public purposes the presumption against the party seeking enforcement does not exist. In latter cases furthermore, the presumption against the enforcing party also does not exist if the restriction when it was imposed or created was not more burdensome to the servient estate(s) than similar restriction placed on the dominant estate.

Similarly, if the restriction is part of a common scheme for four or more contiguous parcels divided only by streets, roads, or rights of way the same presumption does not come into play. For example, in *Lipton Professional Soccer, Inc. v. Bay State Harness Horse Racing and Breeding Association*, a covenant restricting events in a stadium continued to be valid as it was part of a common scheme to develop a commercial real estate locus, despite the fact that the original owner of the dominant estate was no longer thereby benefited. A common scheme, moreover, does not require that all affected parcels are affected uniformly, but that a harmonious use of the whole area is contemplated. Last, like in situations of a common scheme, there is no presumptive burden for the enforcing party to overcome where the restrictions benefit contiguous parcels of the grantor.

**C. Eliminating specific enforcement of legitimate servitudes**

No restriction determined to be of such benefit shall be enforced or declared to be enforceable, except in appropriate cases by money damages, if (1) changes in the character of the properties affected or their neighborhood, in available construction materials or tech-

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58 See id.
59 See id.
60 See id.
61 See id.
62 See id.
63 See *Lipton Prof'l Soccer, Inc. v. Bay State Harness Horse Racing and Breeding Ass'n*, Inc., 395 N.E.2d 470, 475-76 (Mass. App. Ct. 1979) (noting the parcel was subject to a common scheme against the original parties' successors in interest); see also *Guillette v. Daly Dry Wall*, 325 N.E.2d 572, 575 (Mass. App Ct. 1973) (finding that a common grantor's restrictions placed successors on constructive notice).
64 See *Gulf Oil Corp.*, 306 N.E.2d at 261 (stating that uniformity of parcels' treatment is not required of a valid common scheme); see also *Harrod v. Rigelhaupt*, 298 N.E.2d 872, 877-78 (Mass. App Ct. 1973) (finding that a common grantor's effort at private zoning through restrictions placed subject land under the aegis of a common scheme).
65 See *MASS. GEN. LAWS ch. 184, §30* (2005).
niques, in access, services or facilities, in applicable public controls of land use or construction, or in any other conditions or circumstances, reduce materially the need for the restriction or the likelihood of the restriction accomplishing its original purposes or render it obsolete or inequitable to enforce except by award of money damages, or (2) conduct of persons from time to time entitled to enforce the restriction has rendered it inequitable to enforce except by award of money damages, or (3) in case of a common scheme the land of the person claiming rights of enforcement is for any reason no longer subject to the restriction or the parcel against which rights of enforcement are claimed is not in a group of parcels still subject to the restriction and appropriate for accomplishment of its purposes, or (4) continuation of the restriction on the parcel against which enforcement is claimed or on parcels remaining in a common scheme with it or subject to like restrictions would impede reasonable use of land for purposes for which it is most suitable, and would tend to impair the growth of the neighborhood or municipality in a manner inconsistent with the public interest or to contribute to deterioration of properties or to result in decadent or substandard areas or blighted open areas, or (5) enforcement, except by award of money damages, is for any other reason inequitable or not in the public interest.66

This provision of the statute operates as an escape clause of sorts by limiting the remedy for restrictions that provide actual and substantial benefits to enforcing parties solely to money damages in myriad situations.67 I contend that like the statute's requirement of an actual and substantial benefit and the provisions setting forth the situations in which an enforcing party must overcome a presumptive burden, the provisions of the statute that limit an enforcing party's remedy to money damages are concerned with the use and occupancy of land or an inquiry into parties' equitable conduct.68 Justice Hennessey's inquiry into the collateral public benefits which would result from terminating the enforcement of the Commonwealth Restrictions at issue in Blakeley v. Gorin, therefore, was a mistaken anomaly within the statute's jurisprudence.69

66 MASS. GEN. LAWS ch. 184, § 30 (2005).
67 See infra notes 70-80 and accompanying text (explaining how the inquiry remains fixed on spatial uses and occupancy of land).
68 See supra notes 29-53 and accompanying text (explaining the spatial nature of actual and substantial benefits); see also infra notes 70-80 and accompanying text (explaining remedies are affected by equitable conduct or spatial use of land).
69 Cf. Blakeley, 313 N.E.2d at 913 (noting the collateral effects abrogating viable restrictions would produce for Boston).
The first situation in which the statute mandates limiting remedies solely to money damages concerns changes in building practices, materials or parcels' neighborhoods. For example, one matter at issue in *Atwood v. Walter* was whether cedar wood roofing materials were obsolete given their high expense and low durability in comparison to asphalt shingling materials. Expense alone does not make a material or building technique obsolete. Changes in the Back Bay in *Blakeley v. Gorin* rendered obsolete restrictions prohibiting mercantile and commercial land utilization, but urban encroachment did not render obsolete restrictive covenants that preserved ambient light and air but actually made them more valuable.

The third and fourth situations named in the statute also examine how subject parcels' use or occupancy is affected, not collateral matters or benefits. For example, enforcing parties who receive an actual and substantial benefit from a restriction will have their remedy curtailed solely to money damages if their own use or occupancy of their land is no longer subject to a common scheme that once restricted all nearby parcels. In addition, use of land is of paramount importance if a restriction retards the reasonable use of land or tends to deteriorate a neighborhood.

Given that specific enforcement of restrictions is equitable in nature, the statute - in subsections (2) and (5) quoted above - mandates that a restriction that does provide an actual and substantial benefit will not be specifically enforced if the equities of a controversy do not favor an enforcing party once his use of his own land has been characterized. For example, in *Atwood v. Walter* the roofing material restriction, although it did provide an actual and substantial benefit, was not specifically enforced. Specific enforcement was not appropriate given that the defendant had unclean hands: he had breached a corresponding promise by installing an asphalt shingle roof on his own residence in Jacob's Farm Village. Laches may also estopp an enforcing party, but the inquiry still

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70 See MASS. GEN. LAWS ch. 184, § 30 (2005).
71 See *Atwood*, 714 N.E.2d at 371 (deferring to trial judge's finding that expense alone did not render wood shingle roofs obsolete).
72 See *id*.
73 See *Blakeley*, 313 N.E.2d at 911-12 (explaining the difference between obsolescence of one restriction and the viability of the other in light of neighborhood changes).
74 See MASS. GEN. LAWS ch. 184, § 30 (2005).
75 See *id*.
76 See Whitinsville Plaza, Inc. v. Kotseas, 390 N.E.2d 243, 252 (Mass. 1979) (barring specific enforcement of restriction of commercial land use if proof of restriction's unreasonableness or its obstruction of the public interest is shown).
77 See MASS. GEN. LAWS ch. 184, § 30 (2005); see also *infra* notes 78-80 and accompanying text (investigating equity's role in the enforcing the statute).
78 See *Atwood*, 714 N.E.2d at 371.
79 See *id.* (estopping a developer - through the equitable doctrine of "unclean hands" or breach of corresponding promise - from receiving injunctive relief to prevent the defen-
remains limited to how subject parcels are being used or occupied.\textsuperscript{80}

Subsection (5) quoted above is the only part of the statute that does not concern itself solely with the use or occupancy of land.\textsuperscript{81} In \textit{Blakeley v. Gorin} Chief Justice Hennessey allowed matters collateral to the use and occupancy of land to trump property rights and execute a private condemnation.\textsuperscript{82} A legislative response is required to block this possibility and keep the statute focused on its purposes.\textsuperscript{83}

**IV. CHAPTER 184 § 30 IN BLAKELEY V. GORIN**

The Commonwealth Restrictions at issue in \textit{Blakeley v. Gorin} date back to the middle of the 19th century when the City of Boston decided to fill in the tidal flats area where the Back Bay neighborhood now sits, as drainage problems were creating a public nuisance.\textsuperscript{84} Commencing in 1857 the city as common grantor sold lots to private grantees that were all subject to the same or substantially similar restrictions as part of a comprehensive land use scheme for the entire neighborhood.\textsuperscript{85} The petitioners in \textit{Blakeley v. Gorin} owned 2, 4, 6, 8, and 10 Commonwealth Avenue, which at the time was a vacant lot, as well as 13-15 Arlington Street abutting 1, 3, and 5 Newbury Street, all today the TAJ-Boston Hotel site.\textsuperscript{86} The respondents who were seeking specific enforcement of the Commonwealth Restrictions were the owners of an apartment building located at 12-14 Commonwealth Avenue, which was immediately west of the petitioners' vacant lot.\textsuperscript{87}

All the parcels involved in the litigation were subject to the Com-
monwealth Restrictions. In particular, both parties' parcels were subject to the following restrictive covenant: "[t]hat a passageway sixteen feet wide, is to be laid out in the rear of the premises, the same to be filled in by the Commonwealth, and to be kept open and maintained by the abutters in common..." (emphasis added). Leaving the passageway open allowed for the flow of ambient light and air for the buildings whose backs abutted the passageway, Public Alley No. 437, including the respondents'.

Litigation developed because the petitioners proposed to build a sky-bridge between its existing hotel, located at the corner of Arlington and Newbury Streets, to a building they planned to construct on the vacant lot located at 2, 4, 6, 8, and 10 Commonwealth Avenue. The bridge as planned - sheathed as a finished building would be - would begin thirteen feet above Public Alley No. 437 and extend upwards for twelve stories. The bridge/building would have the effect of blocking and cutting off the flow of ambient light and air to thirty-two apartments on the back side of respondents' apartment building whose primary source of light and air was one window opening to the alley.

Chief Justice Hennessy of the Massachusetts Supreme Judicial Court held that the restriction would not be specifically enforced as it would impede a development project that would result in a higher tax base for the City of Boston, a collateral matter to the actual use and/or occupancy of the subject parcels. In dissent, Justice Quirico argued that violating the restriction amounted to a taking of respondents' property rights in violation of the Fifth Amendment of the United States Constitution and Article X of the Massachusetts Declaration of Rights. The impetus of Justice Quirico's dissent was elegantly simple: "...the total absence of any public use or public purpose to support giving the petitioners the right to take away the respondent's property rights embodied in the [Commonwealth] restrictions."

Over this dissent, Chief Justice Hennesssey wrote that a taking had not occurred, but simply that a change in the covenant's enforcement was effectuated by operation of the statute.  

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88 Id. at 906.  
89 Id.  
85 See Blakeley v. Gorin, 313 N.E.2d 903, 917-18 (Mass. 1974) (Quirico, J., dissenting) (stating there exists no public use for this taking and the Supreme Judicial Court's holding places in private individuals' hands the state power of eminent domain).  
86 Id. at 920.  
87 Id. at 907 (majority opinion).
Hennessey also wrote that even if a taking had occurred by operation of the statute, it would not be unconstitutional because valid public purposes would be served.\(^{98}\)

V. CURRENT FIFTH AMENDMENT TAKINGS JURISPRUDENCE: KELO V. CITY OF NEW LONDON

The Fifth Amendment to the United States Constitution provides *inter alia* that "...private property [shall not be taken] for public use, without just compensation."\(^{99}\) Despite the two strict rules embodied in that section of the Fifth Amendment, however, the Supreme Court of the United States upheld a taking that would facilitate a private developer's plans for other privately held land.\(^{100}\) Justice Stevens coalesced three concurrent developments in Fifth Amendment jurisprudence in his strained and tortured Kelo opinion: (1) the public use clause of the Fifth Amendment can be satisfied when takings further some public purpose; (2) economic development is one such valid public purpose; and (3) when a polity exercises condemnation pursuant to state legislative acts it is afforded great deference.\(^{101}\)

Public use necessarily implies that members of the public, its agents, or the public as a whole will somehow actually utilize property in some physical sense.\(^{102}\) Such a public employment of property, however, is no longer required in order to satisfy the public use clause, and the plain

\(^{98}\) See *id.* at 909, 913 (stating the public purposes include promoting the proper use of land and increasing real estate marketability and Boston's tax base).

\(^{99}\) U.S. CONST. amend. V.

\(^{100}\) See *Kelo v. City of New London*, 545 U.S. 469, 489-90 (2005) (holding a private plan of development satisfied the public use clause given that economic redevelopment is a valid public use).


\(^{102}\) See *Kelo*, 545 U.S. at 507 (2005) (Thomas, J., dissenting) (stating the public use clause requires public “employment” of property by either the government or the citizenry as a whole).
meaning of public use has been under attack in the Supreme Court since 1896.103 A pair of mining cases decided in 1896 and 1906 noted the "inadequacy" of the public use test.104 Ten years after Strickley, the Court in Mt. Vernon-Woodbury Cotton Duck Co. v. Alabama Interstate Power Co.105 established that public use is an inadequate test in Fifth Amendment takings jurisprudence.106 Public use jurisprudence, relied upon by the Court in Kelo, has essentially written the public use test out of Fifth Amendment takings jurisprudence.107

Economic development or re-vitalization is a valid public purpose which satisfies the public use clause of the Fifth Amendment, according to Kelo and the jurisprudence it relied upon.108 Berman v. Parker109 and Hawaii Housing Authority v. Midkiff110 established that taking private real estate to further economic development does not violate the Fifth Amendment.111 Economic development has also been declared a valid public purpose, thus satisfying the public use test, in non real estate takings litigation.112

Last, the Court in Kelo also continued in elevating legislative decisions on what constitutes a local or state level public purpose.113 The Court was quite impressed with the fact that New London was acting pursuant to a Connecticut statute that authorized economic development tak-

103 See id. at 479-80 (tracing the inception of the public purpose test version of the public use clause).
104 See Fallbrook Irrigation Dist. v. Bradley, 164 U.S. 112, 158-64 (1896) (upholding a taking to facilitate an ore-transporting zip-line over land the mining company did not own); see also Strickley v. Highland Boy Gold Mining Co., 200 U.S. 527, 531 (1906) (noting that in exceptional circumstances the public welfare requires concessions by individuals that are usually within the realm of private contract).
105 240 U.S. 30 (1916).
106 See id. at 32 (explaining how in the context of modern hydro-electric power plants the public use test proves inadequate).
107 See Ruckelhaus v. Monsanto Co., 467 U.S. 986, 1014-15 (1984) (holding use by the general public is not necessary to satisfy the public use clause). "This Court, however, has rejected the notion that a use is public only if the property taken is put to use for the general public." Id.
108 See Kelo, 545 U.S. at 480-82 (2005) (discussing precedents amenable to the Court's decision).
111 See Kelo, 545 U.S. at 480, 481-82. In Berman, the land was taken in order to redevelop a blighted area of Washington, D.C. Id. In Midkiff, the Court upheld a taking that aimed to disrupt a harmful land oligopoly in the residential real estate market. Id.
112 See Ruckelhaus, 467 U.S. at 986 (taking of trade secrets to make pesticide market more competitive was a valid public purpose satisfying the public use clause).
113 See Kelo, 545 U.S. at 482-83 (noting that federalism inspired "great respect" owed to state legislatures and courts also extends to takings power exercised by state because local needs are best determined locally); see also Hairston v. Danville & Western R. Co., 208 U.S. 598, 606-07 (1908) (noting that local needs are best taken into account by State courts when they review questions about what is or is not a private use).
ings before moving on to a holding allowing a taking of one person's private property and the subsequent transfer of it to another.\textsuperscript{114} Kelo coalesced three strands of Fifth Amendment takings jurisprudence to render a decision that flies in the face of the plain text of the Fifth Amendment: a citizen's private property was taken from her and given to another person because collateral economic benefits might have accrued from the transfer of the land.\textsuperscript{115} Justice Quirico's dissent in \textit{Blakeley v. Gorin}, therefore, no longer has any force vis-à-vis the Federal Constitution.\textsuperscript{116}

VI. POST-KELO PROPERTY RIGHTS DEVELOPMENTS

Whatever one's political affiliations or proclivities in Constitutional interpretation, it is undeniable that the national reaction to Justice Stevens' \textit{Kelo} decision has originated from many quarters.\textsuperscript{117} There have been reactions from the populace, the United States Congress, academics urging judicial re-assessment of state law or appreciation of state constitutions, and state legislatures.\textsuperscript{118} Below I will briefly discuss the first three in order to make clear that the reaction to \textit{Kelo} is substantial and that my proposal to amend G.L. c. 184 § 30 can only fit in the last category of pro-property rights reactions to \textit{Kelo}.\textsuperscript{119} To conclude this section I will report the vastness of state legislative proposals promulgated or proposed to counter \textit{Kelo}, including Massachusetts' pending legislation, and argue my proposal is in line with those.\textsuperscript{120}

Although popular opinion cannot directly change the law, it is the vital impetus of the common life of any polity that purports to be a constitutional republic with democratically elected legislators and executives, and the populace's voice has been raised in reaction to \textit{Kelo}.\textsuperscript{121} The public's reaction has been as extreme as threatening death or as docile as regis-

\textsuperscript{114} See \textit{Kelo}, 545 U.S. at 482-83 (following \textit{Hairston} as to state courts and reading into \textit{Hairston} the same deference to state legislatures).

\textsuperscript{115} See \textit{U.S. CONST.} amend. V; see also notes 106-114 and accompanying text (tracing the constituent elements of Fifth Amendment jurisprudence upon which Justice Stevens relied in \textit{Kelo}).

\textsuperscript{116} See supra notes 95-96 and accompanying text (reporting Justice Quirico's dissent in \textit{Blakeley v. Gorin}); \textit{cf supra} notes 102-112 and accompanying text (economic development is a valid public purpose which satisfies the public use clause).

\textsuperscript{117} See infra notes 118-138 and accompanying text (cataloging the forms of the nation's response to \textit{Kelo}).

\textsuperscript{118} See id.

\textsuperscript{119} See infra notes 121-136 and accompanying text (explaining why Massachusetts is legally situated to mount only a legislative response).

\textsuperscript{120} See infra notes 137-139 and accompanying text (naming the states that are currently legislating some type of response).

\textsuperscript{121} See infra note 122 and accompanying text (noting the variety of types of public reactions to \textit{Kelo}).
tering disapproval of the decision in public opinions polls, but whatever one's assessment of the reaction it must be recognized as actual and widespread.\textsuperscript{122} Public reaction to cases like \textit{Kelo} and \textit{Blakeley v. Gorin} must, therefore, be an integral part of any political solution to them despite its lack of direct rehabilitative force.

The Congress of the United States has also reacted negatively to the \textit{Kelo} decision, but similarly to public opinion, the actions of the United States Congress have only persuasive force to any property rights defense movement interested in rectifying state law in the Commonwealth of Massachusetts. In fact, the House of Representatives passed House Resolution 340 condemning the decision and supporting the dissenting opinions.\textsuperscript{123} In addition, the 2006 appropriations bill was amended in order to prohibit any federal funds from being used to enforce the judgment of the case.\textsuperscript{124}

Congressional reaction to \textit{Kelo}, however, has not only been limited to retrospective condemnation of the Supreme Court, but also has been aimed toward prospectively limiting the impact of the decision.\textsuperscript{125} Douglas W. Dahl II has identified three areas in which Congress has attempted to ameliorate \textit{Kelo}'s effects: proposing Constitutional amendments; proposals to circumscribe public use; and restraining federal spending.\textsuperscript{126} For example, House Joint Resolution 60 proposes a Constitutional Amendment that bans takings that would transfer ownership or control over property from one person to another private person.\textsuperscript{127} Representative of the second category are Senate Bill 1313 and House Bill 3083, which both circumscribe public use as not including economic development.\textsuperscript{128} The last category of Congressional response proposes that federal funds be withdrawn from state or local governments that use eminent domain for economic development.\textsuperscript{129}


\textsuperscript{124} See Bell, supra note 123, at 172 (mentioning the rider passed to accomplish that goal).

\textsuperscript{125} See \textit{infra} notes 126-129 and accompanying text (delineating how Congress is trying to limit the effect of \textit{Kelo}).

\textsuperscript{126} See Dahl, supra note 123, at 458-62.

\textsuperscript{127} See id. at 458.

\textsuperscript{128} See id. at 459.

\textsuperscript{129} See id. at 460-61.
Some in academic circles have sought refuge from *Kelo* in the particular protections afforded to some under their state's constitutional principles. For example, Texas and Michigan are two states whose constitutions and case law would not allow the type of taking that occurred in *Kelo*. To illustrate, Timothy Sandefur argues that Texas takings jurisprudence does not allow economic development takings, and that Texas courts have rarely strayed from this principle which was derived from the founding of the Republic of Texas, kept alive at its first state constitutional convention, and purposely reiterated in its second constitutional convention. As Brett D. Liles and Joshua E. Baker have pointed out, the Michigan Supreme Court in *Wayne County v. Hathcock* overruled a previous Michigan case that had allowed economic development takings on strict state Constitutional grounds to afford residents of Michigan similar protections.

Residents of Massachusetts, unfortunately, simply do not have the same types of state constitutional protections afforded to those in Texas or Michigan. State jurisprudence concerning urban redevelopment cases have upheld takings that effectuate the transfer of land from one private person to another that are incidental to public purposes, such as slum clearance.

By far, the most widespread and effective reaction to *Kelo* has come from state legislative bodies. Although states' legislatures' responses to *Kelo* have taken various approaches to reigning the case in, a majority of the states have or are considering passing appropriate legislation: Alabama, California, Colorado, Connecticut, Delaware, Florida, and others.

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130 See infra notes 131-134 and accompanying text (explaining how economic development takings are barred in Texas and Michigan).


133 684 N.W.2d 765 (Mich. 2004).

134 See Baker, *supra* note 131, at 378 (reporting that economic development is not a valid rationale for takings in Michigan); Liles, *supra* note 131, at 384 (reporting the same).


136 See id.

137 See Donald E. Sanders & Patricia Pattison, *The Aftermath of Kelo*, 34 REAL EST. L. J. 157, 168-70 (2005) (cataloging both the Congressional and State legislative countermeasures to *Kelo*).
Georgia, Hawaii, Illinois, Indiana, Kansas, Kentucky, Michigan, Minnesota, Missouri, Montana, Nevada, New Jersey, New York, Ohio, Oregon, Pennsylvania, Rhode Island, Tennessee, Texas, Utah, Virginia, and the Commonwealth of Massachusetts.\textsuperscript{138} Massachusetts is among the group of states that have proposed both a constitutional amendment and a ban on economic development takings except in cases of blight.\textsuperscript{139}

There has been a deep and widespread reaction to \textit{Kelo} from a number of quarters, and any response to it that would benefit Massachusetts residents needs to be legislative.\textsuperscript{140} The proposed pieces of legislation before the General Court are an appropriate response.\textsuperscript{141} My proposal to rectify G.L. c. 184 § 30 complements them because it seeks also to protect private property interests from being taken for the benefit of another private person because of resulting collateral economic benefits to the public.\textsuperscript{142}

\begin{small}
\textsuperscript{138} \textit{Id.} at 170.


\textit{House Bill No. 4606} provides in part:

Article of Amendment: Except in cases where the elimination or prevention of the development or spread of a substandard, decadent or blighted open area is provided by law, the taking of lands or interests therein by eminent domain for the sole purpose of economic development is hereby declared not to be a public use of the commonwealth under the first paragraph of Article X of Part the First of the Constitution.

\textit{Id.}

Section 1 of \textit{House Bill No. 4605} provides in part:

The General Court hereby finds and declares that the taking of private property by right of eminent domain for the sole purpose of economic development is contrary to the public policy of the Commonwealth and does not satisfy the requirement of a "public use" under Article X of Part the First of the Constitution (Declaration of Rights), except to the extent such takings are authorized for the elimination or prevention of the development or spread of a substandard, decadent, or blighted open area under chapters 121A, 121B and 121C of the General Laws.

\textit{Id.}

\textsuperscript{140} \textit{See supra} notes 117-139 and accompanying text (discussing the nation-wide reaction to \textit{Kelo}).

\textsuperscript{141} \textit{See supra} notes 138-139 and accompanying text (noting Massachusetts' particular reaction's pending legislation).

\textsuperscript{142} \textit{See infra} notes 146-148 and accompanying text (explaining how amending Massachusetts General Law Chapter 184, § 30 is appropriate, post-\textit{Kelo}).
\end{small}
VII. CONCLUDING PROPOSAL

*Blakeley v. Gorin* serves as a case study for what is wrong with G.L. c. 184 § 30. The two most grievous renderings of the statute are that 1) it serves to facilitate condemnation of property interests - something it was never intended to do or 2) it allows courts to take into account collateral benefits to the public that do not concern use or occupancy of land. I contend that an amendment to the statute that prohibits courts from looking to collateral economic benefits that do not concern use or occupancy of land will participate in the post-*Kelo* movement and bring the public interest clause of the statute in line with its original purpose.

First, Chief Justice Hennessey's alternative argument in *Blakeley v. Gorin* - that even if a taking were facilitated by the statute it was not unconstitutional because it furthered the public purpose of higher tax bases for Boston - in the most crucial way anticipated the *Kelo* decision: economic health of the area was the public purpose. There is a movement afoot that seeks to eradicate this type of taking when other property interests are at stake. My proposal would complement that movement by attempting to protect servitude property interests from being taken when the public purpose involves collateral economic benefit to the greater public.

Second, Chief Justice Hennessey's reasoning in *Blakeley v. Gorin* was an anomaly within the corpus of G.L. c. 184 § 30's jurisprudence. It is the only case within that jurisprudence where collateral benefits to third parties that do not concern use of occupancy of land were given any weight whatsoever. My proposal to amend the statute, therefore, not only participates in the post-*Kelo* appreciation and defense of property, it also returns the statute to its original purpose and function.

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143 See infra note 144 and accompanying text.
144 See supra notes 19-83 and accompanying text (explaining the statute's purpose and jurisprudence).
145 See infra notes 146-151 and accompanying text (claiming benefits to such a proposal).
146 See supra note 98 and accompanying text (reporting Justice Hennessey's claim that increasing the tax base is a public purpose).
147 See supra notes 117-142 and accompanying text (reporting the post-*Kelo* defense of property).
148 Cf. supra note 98 and accompanying text (noting the abrogation of the Commonwealth Restrictions in *Blakeley v. Gorin* for collateral economic benefits to the public).
149 See supra notes 25-82 and accompanying text (claiming and arguing the jurisprudence of the statute is almost exclusively devoted to inquiries concerning the use and occupancy of land).
150 Id.
151 See supra notes 19-24 and accompanying text (explaining why the statute was passed into the General Laws).
Much has been made nationally of the recent *Kelo* decision, but Massachusetts property owners should also keep *Blakeley's* dangers in mind. The Massachusetts legislature has a unique opportunity to use the national momentum to protect fee interests and also to pass legislation that will protect significant non-fee interests in Massachusetts.

*Michael S. Schneider*