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KELO V. NEW LONDON AND THE STATE LEGISLATIVE REACTION: EVALUATING THE EFFICACY AND NECESSITY OF RESTRICTING EMINENT DOMAIN FOR ECONOMIC REDEVELOPMENT AT THE STATE LEVEL

Ryan Frampton

ABSTRACT

When the U.S. Supreme Court handed down its *Kelo v. City of New London* decision in June 2005, it sparked a firestorm of controversy. The opinion was decried as the downfall of our private property scheme, with its loudest critics noting that the opinion could be read broadly enough to support an interpretation that allowed a state entity to exercise eminent domain any time it sought to improve tax revenue. Disregarding whether this is the case necessarily stands for such a broad proposition, the legislative reaction was swift and wide ranging. Within five weeks of the publication of the opinion, at least 28 states had legislation pending, frequently including proposed state constitutional amendments, to limit the impact of *Kelo*. Eminent domain procedures are necessarily complex, seeking to limit the harm to individual property owners while procuring increased social utility for the community. Consequently, amendments to these broad state law schemes should be carefully considered to avoid unintended consequences and insure that the protections purportedly afforded by the legislation are actually achieved.

This note attempts to review proposed legislation in selected states against the backdrop of the pre-existing eminent domain schemes in each state to determine how best to balance the competing interests that have always been embodied in eminent

domain jurisprudence; the rights of the individual against the betterment of the community. The argument is not that states should not alter their scheme to reflect evolving understanding of federal constitutional limits on eminent domain, but rather than such legislation should be thoughtfully crafted to fit within the existing scheme. No one benefits from legislation that fails to achieve its goal because it was needlessly rushed through the legislative process. Addressing only some of the eminent domain system or handcuffing municipalities by bright line rules may drive unintended consequences as harmful as any of the applications of *Kelo*. These outright bans are likely to drive more use of the blight declaration, an area where local entities have been left broad discretion, sloughing a disproportionate share of takings onto lower income neighborhoods. On the other hand, some proposed laws contain real improvements to understanding the current patterns of governmental takings, increasing transaction costs inherent to eminent domain such that it will not be an economically efficient choice of developers, and increasing accountability and transparency of these extreme exercises of the police power. Legislatures should take this as an opportunity to modernize and improve eminent domain law, not just another one for a politically convenient sound bite on the evening news.

I. INTRODUCTION - THE *KELO* DECISION SPARKS A VIOLENT DEBATE

On June 23, 2005 the U.S. Supreme Court handed down its decision in *Kelo v. New London*,[1] affirming the Connecticut Supreme Court in a 5-4 vote.[2] The majority holding in this case can be read to allow for deference to any municipal determination consistent with a redevelopment plan that the community is best served through the exercise of eminent domain for purely economic redevelopment.[3] This decision has been roundly criticized in the mainstream media, legal journals

[1] 545 U.S. 469 (2005)

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

[3] *Id.* at 478-79.

and by the general public.[4] The legislative reaction to this case, as arguably encouraged by the *Kelo* Court,[5] has been swift and far reaching.[6] As early as August 3, 2005, barely a month after the decision was published, more than half of the states in the Union had some legislation pending intended to limit the discretion of municipalities in exercising their delegated eminent domain power.[7] Soon after, legislation was introduced in both the House and the Senate designed to prohibit the use of eminent domain in cases where the only public good was private economic development.[8]

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[4] *See, e.g.*, Edward J. Trawinski, *Kelo ruling: destroying the American dream*, NEW JERSEY LAWYER, July 4, 2005 Vol. 14, No. 27, at 7 (arguing that a ruling in favor of *Kelo* and the homeowners would in fact not limit the ability of the municipality to use its eminent domain power, but would merely adequately compartmentalize the power into appropriate circumstances where there is "an imminent and palpable threat to public health and safety). *See also* Terry Pristin, *Eminent Domain Revisited: A Minnesota Case*, N. Y. TIMES, at C9. (observing that "Few recent Supreme Court opinions have aroused as much public outrage as *Kelo v. City of New London*, *Conn.*, the June ruling that reaffirmed the use of eminent domain to promote economic development. Critics on both the left and the right politically have said that the *Kelo* decision potentially endangers every home and business. Bills to limit condemnation powers have been introduced in 31 states, according to the Institute for Justice, a property rights group."). *See also*, Jeffrey W. Lem & Brian G. Clark, *Focus on Real Property Law: U.S. Supreme Court Decision Encourages Municipalities to Use Expropriative Powers*, THE LAWYERS WEEKLY, September 30, 2005 Vol. 25, No. 20. (reporting that the decision received 98% or 99% disapproval in polls).

[5] *Id.* at 82 (noting that the opinion doesn't restrict the States from tightening controls over municipal exercise of public use takings and that in practice many States have already exceeding "the federal baseline" in this regard).

[6] Tresa Baldas, *States Ride Post-Kelo Wave of Legislation*, THE LEGAL INTELLIGENCER, August 3, 2005, Vol. 232, No. 151, at 4.

[7] *Id.* Legislatures in 28 states had over 70 bills pending within 5 weeks of the *Kelo* decision. Several states, such as Texas, Michigan, and Georgia, as will be discussed herein, were working towards passing state constitutional amendments to ensure that private economic development would not qualify as a public good to support the use of eminent domain.

[8] Terry Sheridan, *Senator Seeks to Block Use of Eminent Domain for Private Gain*, DAILY BUSINESS REVIEW, September 27, 2005, http://www.law.com/jsp/newswire_article.jsp?id=1127738117084.

Despite all of the controversy surrounding the *Kelo* decision, a review of the prior jurisprudence reveals that it is not a giant leap as it has been portrayed, but rather represents a growth in the definition of public use. Moreover, while it is entirely within the legislative province to limit municipal use of eminent domain to a more traditional understanding of public use,[9] I posit that any legislation should be carefully considered, particularly in an area that is complicated by numerous competing public interests.

This note will assess the state of public use jurisprudence in the aftermath of *Kelo*, with particular emphasis on the changes proposed in the legislation across the country. A more thorough understanding of eminent domain in each state, combined with a thoughtful review of the impact of the pending legislation will further the debate over *Kelo* as opposed to offering sound bite solutions to a complicated problem. This discussion begins with the understanding that eminent domain, even if exercised as in *Kelo,* is not inherently bad, provided that it is not used as tool by developers to maximize profits by removing transaction costs through political clout at the local government level at the expense of individual homeowners. Differentiating on the basis of who specifically benefits, in the absence of any imbalance of power, provides no meaningful basis for rationally analyzing such a complex issue particularly given the history of eminent domain jurisprudence. The issue is one of balancing the interests of individual homeowners' fair compensation against the aggregate benefit to the surrounding community. I propose that it is the appearance of impropriety and overreaching through political channels that greatly offends the American public. The flip side of this, although rarely addressed, is the slowing of development when an individual homeowner holds out for sentimental reasons or in an attempt to negotiate a better-than-fair-market price.[10] This allows continued

[9] *Kelo,* 545 U.S. at 482, (observing that this opinion is applicable only to the Federal "baseline" for the use of eminent domain, however, individual states remain free to limit the use of the doctrine as they see fit).

[10] Steven M. Crafton, *Taking the Oakland Raiders: A Theoretical Reconsideration of the Concepts of Public Use and Just Compensation*, 32 EMORY L.J. 857, 889–91 (1983) (discussing the economic dilemma stemming from the requirement of just compensation applied to an unwilling seller and the shift away from objective worth in valuing the property by the seller);

degradation of local economic conditions and municipal services in communities that are desperate for economic stimulation to address a host of social problems (i.e. unemployment, drug use, crime, declining municipal services, etc.).[11] Such unwillingness to sell would not stop the exercise of eminent domain for an off ramp from the highway. It is equally offensive to the common good to allow one person to benefit to the detriment of the community; this view is the foundation of the indisputably valid power of eminent domain.[12] Therefore, merely asking individuals to subrogate their interest for the betterment of the greater good cannot be the motivating factor for the extreme negative reaction seen in the aftermath of *Kelo*. I propose that it is related to the view that incidents of exercising eminent domain are seen as a corruption of government, bending its will to that of rich and powerful business leaders.[13] This is the offensive view that has driven the backlash against *Kelo*.[14] Thus,

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Steven E. Buckingham, *The Kelo Threshold: Private Property and Public Use Reconsidered*, 39 U. RICH. L. REV. 1279, 1287–88 (2005) (providing background on the dilemma that confronted New London, Connecticut in the face of a viable and necessary redevelopment plan with no means other than eminent domain to execute it due to reluctant homeowners).

[11] Ashley J. Fuhrmeister, *In the Name of Economic Development: Reviving "Public Use" As A Limitation On the Eminent Domain Power In the Wake of Kelo v. City of New London*, 54 DRAKE L. REV. 171, 204–06 (2005). Fuhrmeister argues that economic development is distinguishable from the "deleterious living conditions" at issue in *Berman v. Parker*, discussed *infra* note 25, based on the direct and contemporaneous nature of the public benefit. This view, however, overlooks the simple fact that if left unabated, an area in economic decline will reach a blighted condition as individual and government resources dwindle with the tax base and job opportunities. In this regard, it is arguable that takings for economic development represent a species of *Berman* takings in that, in both cases, the benefit is dependent upon prosperous redevelopment.

[12] Thomas W. Merrill, *The Economics of Public Use*, 72 CORNELL L. REV. 61, 74–77 (1986).

[13] Stephen J. Jones, *Trumping Eminent Domain Law: An Argument For Strict Scrutiny Analysis Under the Public Use Requirement of the Fifth Amendment*, 50 SYRACUSE L. REV. 285, 302–05 (2000).

[14] Notably, takings for economic development have been occurring since *Berman v. Parker*, discussed *infra* note 25, without such a backlash. This may suggest that where the taking is in a poor section of town such that the taking can be justified by "blight," issues of ulterior motives, including racial

tailoring the response to *Kelo* to avoid either that impression, or more importantly instances where that is in fact occurring, should be the goal in legislating. Implicit in this view is that legislation, particularly when related to such a complex issue as eminent domain, should be drafted based on reason and with a mind to the goal sought rather than a knee jerk reaction to be the front-runner in a race to denounce the evil of *Kelo*. Certainly, to some extent, *Kelo* approves an oppressive and inequitable application of eminent domain power. However, is the oppression lessened in any manner if the benefit goes to the local utility as opposed to a less regulated corporation?[15] The challenge here, therefore, is to appropriately balance the protection of individual property owners from exploitation at the hands of the wealthy and influential while avoiding unnecessarily impeding local government from attending to the needs of the local community.[16]

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implications, may arise. Paul Boudreaux, *Eminent Domain, Property Rights, and the Solution of Representation Reinforcement*, 83 DENV. U. L. REV. 1, 28–29 (2005). However, *Kelo* raised the specter of equal opportunity for loss of property, thus driving the backlash and extensive legislative response. Arguably, this is a classic tale of "much ado about nothing" as the much of the legislation does little to change the blighting process. Consequently, homeowners who are more affluent, and therefore more likely to wield some measure of political influence at the local level, are the primary beneficiaries of the new legislation even though their economic status afforded them essentially the same protections beforehand. This leaves the poorer neighborhoods equally vulnerable despite politicians declaring that property rights are safe again. *See* Zygmunt J. B. Plater and William Lund Norine, *Through the Looking Glass of Eminent Domain: Exploring the "Arbitrary and Capricious" Test and Substantive Rationality Review of Governmental Decisions*, 16 B.C. ENVTL. AFF. L. REV. 661, 679 (1989).

[15] *See, e.g.,* Kevin L. Cooney, *A Profit For the Taking: Sale of Condemned Property After Abandonment of the Proposed Public Use*, 74 WASH. U. L.Q. 751, 751–52 (1996); Christian M. Orme, *Kelo v. New London: An Opportunity Lost to Rehabilitate the Takings Clause*, 6 NEV. L.J. 272, 276–77 (2005) (suggesting that the grant to mills as public utilities of the right of eminent domain was beginning of the erosion of property rights which culminated in *Kelo*).

[16] Elizabeth F. Gallagher, *Breaking New Ground: Using Eminent Domain For Economic Development*, 73 FORDHAM L. REV. 1837, 1867–68 (2005) (arguing that eminent domain for economic development is not inherently bad due to the protections inherent in the political process, but should not be used as a first resort); Plater and Norine, *supra* note 13, at 722–25 (arguing for the application of the "less-drastic-means" doctrine

II. THE *KELO* OPINION AND THE RECENT HISTORY OF PUBLIC USE JURISPRUDENCE

The City of New London, Connecticut faced a situation familiar to many municipalities across the nation: a declining tax base and declining population, caused by a stagnating economy.[17] The City addressed these problems with the help of a private non-profit redevelopment corporation[18] by attempting to attract large corporations to the area bringing with them valued jobs, tax dollars, and civic benefits associated with such a site including attracting other business to the community.[19] After comprehensively reviewing several site plans,[20] New London city council authorized the NLDC to obtain the property necessary for such a project either through negotiation or the exercise of eminent domain. When negotiations fell through with some of the residents,[21] the city filed for condemnation,

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within the framework of deference to the legislature in judicial review of eminent domain); Merrill, *supra* note 11, at 75–78 (discussing the varying market conditions in which eminent domain power is efficiently exercised).

[17] *Kelo*, 545 U.S. at 472. Specifically, New London had recently lost 1,900 jobs in the government sector and an additional 1,000 jobs had been transferred out from a United States Naval Base. Kelo v. City of New London, 843 A.2d 500, 510 (Conn. 2004).

[18] New London Development Corporation (Hereafter "NLDC").

[19] Kelo, 545 U.S. at 472-73, Kelo, 843 A.2d at 510 (asserting the prospective benefits of the project to be between 518 and 867 construction jobs, 718 and 1,362 direct jobs, and 500 and 940 indirect jobs with an increase in tax revenue between $80,544 and $1,249,843). According to the City of New London's website, the city had a population of 25,671 in 2000. Thus, the benefit of the program would be approximately an additional $26.50 - $48.69 in available government dollars per individual annually on property taxes alone.

[20] *Kelo*, 545 U.S. at 473, n.2 (observing that numerous state agencies and consultants evaluated the proposals with concern for potential social, economic, and environmental impact to the community).

[21] These residents consisted of 10 property owners out of 115 parcels involved in the redevelopment area. Kelo, 843 A.2d at 507-08, n.2. The Connecticut Supreme Court noted that the reasons that the owners refused to sell included the amount of time that they had lived at that residence, the amount of work that they had put into their homes, and the proximity to the

thereby beginning the litigation that would reach the U.S. Supreme Court and ultimately result in a nationwide legislative backlash.[22]

The primary issue in *Kelo* is whether or not the touchstone of eminent domain, public use, may be interpreted to include a transfer of property from a private individual to another private entity for the purposes of improving the overall economy of the community.[23] The manifest purpose of the Takings Clause is to ensure a fair distribution of negative consequences[24] that flow naturally from certain necessary community development functions.[25] "Public use" first obtained prominence in a redevelopment context following *Berman v. Parker*.[26] *Berman*

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water and the view associated therein. *Id.* Avoiding normative judgment on such rationales, it seems that for the most part adequate compensation could account for the feeling of loss reflected in these sentiments. However, this may mean adjusting the market value of certain houses to cover the additional costs incurred in updating new homes, moving costs, or proximity to water or aesthetically pleasing pastoral settings.

[22] Kelo, 545 U.S. at 473-74; *supra* notes 6-7. Notably, the Connecticut Supreme Court eschewed a strict construction of the term "public use," instead finding allowable definitions that relate to public utility or useful, thus implicating a calculus of productive benefit to the public. Kelo, 843 A.2d at 522. Implicit in this understanding is that "a public use defies absolute definition, for it changes with varying conditions of society, new appliances in the sciences, changing conceptions of the scope and functions of government, and other differing circumstances brought about by an increase in population and new modes of communication and transportation." *Id.* at 524 (quoting *Katz v. Brandon*, 245 A.2d 579, 586 (Conn. 1968)).

[23] *Kelo*, 545 U.S. at 472, n.1. "Nor shall private property be taken for public use, without just compensation," (quoting U.S. CONST. amend. V).

[24] Palazzolo v. Rhode Island, 533 U.S. 606, 618 (2001) (stating that the Takings Clause "is to prevent the government from 'forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole'.").

[25] *See, e.g., Kelo*, 545 U.S. at 487 (O'Connor, J., dissenting) (synthesizing case law to show that it is undisputed that a sovereign may deprive a private person of their property for the purposes of building roads, hospitals, railroads, and stadiums).

[26] 348 U.S. 26 (1954); *See also* Benjamin D. Cramer, *Eminent Domain for Private Development – An Irrational Basis for the Erosion of Property Rights*, 55 CASE W. RES. L. REV. 409, (2004) (portraying *Berman* as a

involved the constitutionality of a Congressional Act designed to combat the decline of urban Washington, D.C.[27]Although at issue in *Berman* was a functioning, non-blighted department store,[28] the court found it an appropriate exercise of the state police power to determine community standards for the use of eminent domain.[29] Viewing eminent domain as a vehicle for redevelopment duly chosen by the legislature according to its determination of public values, the court refused to mandate the precise methodology by which the legislature implemented its goals.[30]

Public use has also been found in a case that may have created more controversy than *Kelo*,[31] except that it was limited in practical scope to Hawaii.[32] In a circumstance unique to

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"landmark case" that provided the basis for a broad interpretation of public use founded on a deferential review of the state's police power).

[27] Berman, 348 U.S. at 28. As briefly summarized by the *Berman* Court, Congress issued findings that "substandard housing and blighted areas…are injurious to the public health, safety, morals, and welfare." The statute also asserted that the resolution of this problem required the acquisition of properties in the area.

[28] *Id.* at 31.

[29] *Id.* at 32–33 (noting that police power is not limited to issues of public health or safety and viewing the determination of the aesthetic standards for a community as within the scope of legislative powers in municipalities).

[30] *Id.* at 33–34. ("But the means of executing the project are for Congress and Congress alone to determine, once the public purpose has been established." The Court further observed that it would not second guess the view adopted by Congress that a wholesale redevelopment of the area served the public good most completely by providing the greatest chance of avoiding an eventual backslide into future slum conditions).

[31] *See infra* note 34, detailing the process of forced sales to tenants through condemnation proceedings. *Compare* Kelo, 545 U.S. at 485 (O'Connor, J., dissenting), quoting as the foundation of the dissent, Justice Chase in *Calder v. Bull,* 3 U.S. 386 (1798): "An ACT of the Legislature (for I cannot call it a law) contrary to the great first principles of the social compact, cannot be considered a rightful exercise of legislative authority . . . .[A] law that takes property from A. and gives it to B: It is against all reason and justice, for a people to entrust a Legislature with SUCH powers; and, therefore, it cannot be presumed that they have done it."

[32] Hawaii Hous. Auth. v. Midkiff, 467 U.S. 229 (1984).

Hawaii in 20th Century America, a very few landowners controlled a majority of the land on the islands.[33] The legislature believed that this fact was causing a severe imbalance in real estate values and artificially inflating the cost of living.[34] The Hawaii legislature then effectuated legislation designed to implement a system of forced sales of pieces of property in what is facially a blatant transfer "from A to B."[35] The *Midkiff* Court viewed Berman as the logical foundation of the analysis beginning with the premise that takings power rests within a State's inherent police power.[36] Viewing the judiciary's role as a "narrow one,"[37] the court applied the rationale basis test in accepting the Hawaiian Legislature's approach to solving the problem of a dominant land owning group.[38] The court went on to note that property that is condemned need not be used by the government to satisfy the Takings Clause, clarifying instead that it is an accepted principle that property can be transferred to private parties provided the purpose is not one of purely private benefit.[39] Also, made clear is that *Berman's* operative fact was

[33] *Id.* at 232 (observing that as of the mid 1960s, State and Federal government owned 49% of all land in Hawaii and only 72 landowners owned 47% of the land. On Oahu, only 22 people owned 72% of island.

[34] *Id.*

[35] *Id.* at 234 (describing the practice of the Hawaii Housing Authority ("HHA") of condemning titles for resale to tenants where the funding for the condemnation award was gathered from the tenants who eventually obtained title from the State).

[36] *Id.* at 239–40, (culminating in the opinion that "[t]he 'public use' requirement is thus coterminous with the scope of a sovereign's police power.")

[37] *Id.* at 240–241, (following the *Berman* Court's approval of *Old Dominion Co. v. United States*, 269 U.S. 55, 66 (1925), in a case involving condemnation of land to preserve buildings constructed by the Federal government as lessees of the property, which stated that legislative determinations of "public use" are "entitled to deference until it is shown to involve an impossibility.")

[38] *Midkiff*, 467 U.S. at 241–42.

[39] *Id.* at 243–44. ("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").

not that the legislation was an act of Congress, but rather, any state legislature is entitled to the same degree of deference.[40]

Thus, the stage for *Kelo* was set. Despite its negative perception and portrayal, this case need not stand for the proposition that any municipality empowered by delegation of the state's condemnation power may take any property under the guise of "economic development."[41] Nevertheless, the Supreme Court's approval of NLDC's condemnation[42] of single family homes to make way for private redevelopment sent shockwaves throughout the country and resulted in a rapid response from federal and state legislatures.[43] A review of these reactions provides a myriad of solutions with varying effectiveness to the concerns raised in response to the *Kelo* decision.

III. STATES AND THEIR REACTIONS

A. CALIFORNIA

Under current California eminent domain law, the state may exercise its taking power only if the property being acquired is for a public use, however, a public use is found where the legislature has provided by statute that eminent domain may be used to fulfill such a purpose.[44] A public entity seeking to exercise eminent domain power must satisfy three

[40] *Id.* at 244. ("Thus, if a legislature, state or federal, determines there are substantial reasons for an exercise of taking power, courts must defer to its determination that the taking will serve a public use.").

[41] *Kelo*, 545 U.S. at 475-76 (observing that that takings in this case are under a "carefully considered" development plan and there is no indicia of any private purpose such that it may be said that the municipality's rational is merely a justification for a plan designed "to benefit a particular class of identifiable individuals.")

[42] The approval of this condemnation may be more accurately understood as a refusal to find such condemnations unconstitutional following jurisprudential precedent and separation of powers views.

[43] *See supra* notes 6 and 8.

[44] CALIFORNIA CODE CIV. PROC. § 1240.010 (West 2005).

requirements: (1) the proposed project associated with the taking is necessary for the public interest;[45] (2) the project has been planned to provide the greatest public good while minimizing the attendant private harm;[46] and (3) that the taking is in fact necessary for the completion of the project.[47]

Despite the fact that the eminent domain statute is considered fairly comprehensive,[48] the California legislature has responded[49] to the debate spawned by *Kelo* with two proposed bills[50] and two proposed state constitutional amendments.[51]

A.B. 590 would amend CALIFORNIA CODE CIV. PROC. § 1240.010 to include language barring the use of eminent domain

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45 CALIFORNIA CODE CIV. PROC. § 1240.030(a) (West 2005).

46 CALIFORNIA CODE CIV. PROC. § 1240.030(b) (West 2005).

47 CALIFORNIA CODE CIV. PROC. § 1240.030(c) (West 2005).

48 Harry D. Miller & Marvin B. Starr, MILLER AND STARR CALIFORNIA REAL ESTATE 3D, §30A:2 (3d ed. West 2006).

49 Both proposed bills and one of the proposed constitutional amendments were originally drafted prior to publication of the *Kelo* decision (June 23, 2005). However, A.B. No. 1162 was drafted on February 22, 2005, the date of oral argument before the U.S. Supreme Court in *Kelo*, with amendments in August and September to change the focus from the nature of the use of the property to banning the exercise of eminent domain that results in a net transfer to a private party. Proposed A.B. No. 590 was originally written February 16, 2005 but was amended July 13, 2005 to broaden its proscriptive effect on eminent domain practice. Proposed constitutional amendment S.C.A. No. 12, although originally drafted on February 23, 2005, received an overhaul to focus on eminent domain usage on August 15, 2005. The final proposed constitutional amendment was drafted July 13, 2005. Consequently, I categorize all proposed actions as reactive to the *Kelo* decision since all were drafted or amended in a time when the legislature was aware of the potential for a U.S. Supreme Court ruling on the matter and in fact received substantive changes following the publication of *Kelo v. New London*.

50 A.B. No. 1162, 2005–2006 Reg. Sess., (CA 2005) and A.B. No. 590, 2005–2006 Reg. Sess., (CA 2005).

51 S.C.A. No. 12, 2005–2006 Reg. Sess., (CA 2005) and S.C.A. No. 15, 2005–2006 Reg. Sess., (CA 2005).

to take property for economic development.[52] However, the language provides no definition for economic development to distinguish from community redevelopment as authorized elsewhere in the statutory scheme.[53] Community redevelopment is provided by statute where the "purpose is sound development and redevelopment of blighted urban areas." [54] Further, case law has established that the use of eminent domain by a redevelopment commission for redevelopment purposes is a public use[55] where efforts by a private developer are insufficient.[56] The Community Redevelopment Law generally applies in cases where the area being developed has a declaration of blight attached.[57] Once a redevelopment plan is duly adopted in compliance with the Community Redevelopment Law, a conclusive presumption of blight attaches to the area covered by such a plan.[58]

Thus, it seems that A.B. 590 may significantly limit a municipality's ability to combat urban decline even through the use of condemnation proceedings against properties in a blighted area. A.B. No. 1162 only further cements this

[52] A.B. No. 590, (inserting subsection (b) providing that "[i]n the exercise of eminent domain, 'public use' does not include the taking or damaging of property for private use, including, but not limited to, the condemnation of property for economic development.")

[53] CAL. HEALTH & SAF. CODE §33000 - §33855 (West 2005).

[54] Redevelopment Agency of the City of Chula Vista v. Rados Bros., 115 Cal. Rptr. 2d 234 (Cal. Ct. App. 2001).

[55] *Id.*

[56] CAL. HEALTH & SAF. CODE §33037(b) (West 2005).

[57] CAL. HEALTH & SAF. CODE §33037(a); (West 2005); CAL. HEALTH & SAF. CODE §33030 (West 2005); CAL. HEALTH & SAF. CODE §33031 (West 2005). *Compare* CAL. HEALTH & SAF. CODE §33020 (West 2005), defining redevelopment broadly as "the planning, development, replanning, redesign, clearance, reconstruction, or rehabilitation, or any combination of these, of all or part of a survey area, and the provision of those residential, commercial, industrial, public, or other structures or spaces as may be appropriate or necessary in the interest of the general welfare."

[58] Sweetwater Valley Civic Assn. v. City of National City, 555 P.2d 1099 (Cal. 1976).

conclusion. This bill seeks to amend the eminent domain law to ban the use of condemnation proceedings against owner occupied residential real property by a community redevelopment agency if the end result is that such property is transferred to a private party.[59] This seems to directly contradict the legislative findings in the Community Redevelopment Law.[60] Moreover, it tends to vitiate the ability of any community redevelopment agency to fulfill its mission since, in terms of rehabilitating a blighted area, it is likely that the net result should be a transfer of the land to a private entity.[61]

A.B. 1162 also includes a sunset clause and provisions requiring a report from the California Research Bureau of the State Library to the legislature.[62] The report seeks to evaluate the usage of eminent domain to acquire residential property between 1998 and 2003. This law would require a second report the following year evaluating the same information in regards to commercial property acquired through eminent domain.[63] Such

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[59] *See* A.B. No. 1162, 2005 – 2006 Reg. Sess., (CA 2005), (inserting §1240.060 which would provide in pertinent part: "no community redevelopment agency... shall exercise the power of eminent domain to acquire owner-occupied residential real property if ownership of the property will be transferred to a private party or private entity.").

[60] CAL. HEALTH & SAF. CODE §33037(b) (West 2005), (asserting the California policy that "whenever the redevelopment of blighted areas cannot be accomplished by private enterprise alone, without public participation and assistance in the acquisition of land, in planning and in the financing of land assembly, in the work of clearance, and in the making of improvements necessary therefore, it is in the public interest to employ the power of eminent domain, to advance or expend public funds for these purposes, and to provide a means by which blighted areas may be redeveloped or rehabilitated").

[61] Rados Bros., 115 Cal. Rptr. 2d at 240 (observing that "[t]he success of any redevelopment project is dependent upon whether private lenders, developers, owners, and tenants can be persuaded to participate in the process. Thus, a redevelopment agency is unique among public entities since . . . to achieve its objective of eliminating blight it must rely upon cooperation with the private sector" (quoting County of Santa Cruz v. City of Watsonville, 223 Cal. Rptr. 272, 282 (Cal. Ct. App. 1985)).

[62] A.B. No. 1162 at proposed §1240.060(d) and §§ 2, 3, 4.

[63] *Id.*

willingness to reconsider the options based on actual data rather than a hasty reaction is to be commended even if it is included in the aforementioned rash of legislation.

A review of the proposed state constitutional amendments causes concern as to the viability of the current eminent domain scheme in the face of such an amendment. Both contain a prohibition on taking or damaging private property for anything other than a public use. [64] However, the mechanism of the current scheme provides for a conclusive presumption of blight that attaches after the adoption of a redevelopment plan. Since a declaration of blight can represent damage to a property bordering on a taking,[65] it may no longer be possible to implement a redevelopment plan for an area containing dilapidated warehouses mixed with residential neighborhoods.[66]

B. MICHIGAN

The constitutionality of eminent domain in a redevelopment context in Michigan came under fire in *County of Wayne v. Hathcock* prior to *Kelo* reaching the U.S. Supreme Court.[67] Prior to this case, Michigan's redevelopment condemnation jurisprudence represented the high water mark for takings

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[64] S.C.A. No. 12 and S.C.A. No. 15.

[65] *See, e.g.,* Richmond Elks Hall Assoc. v. Richmond Redevelopment Agency, 561 F.2d 1327 (9th Cir. 1977) (for the proposition that a declaration of blight may impair property value absent any action specifically against that property).

[66] S.C.A. No. 15 would ban the use of eminent domain as to all properties in the area unless they remain owned by a government agency. S.C.A. No. 12 bans damaging private property for anything but a public use and clarifies that "[p]ublic use does not include the taking of owner-occupied residential property for private use." However, a declaration of blight attached to an area for the purposes of taking and renovating run- down warehouses may serve to damage the property of an owner-occupied residential property in the immediate vicinity, and thus at least facially run afoul of the constitutional amendment.

[67] County of Wayne, 684 N.W. 2d 765 (Mich. 2004) (finding unconstitutional the taking of property to be redeveloped as an industrial park because there was no evidence of any independent public significance, such as the removal of blight, to the proposed condemnation).

justified solely on economic benefits.[68] In *County of Wayne*, the Michigan Supreme Court reasoned that, while the exercise of eminent domain was consistent with the statutory scheme,[69] even for a taking of non-blighted property to create a private industrial park, such a taking cannot be vetted against the strictures of the Michigan State Constitution.[70] Thus, the state of the law in Michigan as it stood on June 23, 2005[71] arguably precludes the application of *Kelo* in the state of Michigan ab initio. Nevertheless, the Michigan legislature has seen fit to propose two joint resolutions to amend the state constitution[72] and three additional bills amending the statutory eminent domain process.[73] Acknowledging that it may be prudent to

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[68] *See, e.g.,* Timothy Sandefur, *A Gleeful Obituary For Poletown Neighborhood Council v. Detroit*, 28 HARV. J.L. & PUB. POL'Y 651, 664 (2005); Gallagher, *supra* note 15, at 1845–46, n.75 (collecting academic criticism of *Poletown Neighborhood Council v. City of Detroit*, 304 N.W.2d 455 (Mich. 1981) (per curiam). *See also* County of Wayne, 684 N.W. 2d at 786 (asserting that *Poletown* stood for the unique proposition that "a generalized economic benefit was sufficient under Art. 10, §2 of the Michigan Constitution to justify the transfer of condemned property to a private entity.").

[69] County of Wayne, 684 N.W. 2d at 773–78; MICH COMP. LAWS. ANN. §213.23 (West 2004).

[70] County of Wayne, 684 N.W. 2d at 482 ("Every business, every productive unit in society, does, as Justice Cooley noted, contribute in some way to the commonwealth. To justify the exercise of eminent domain solely on the basis of the fact that the use of that property by a private entity seeking its own profit might contribute to the economy's health is to render impotent our constitutional limitations on the government's power of eminent domain.").

[71] The date that the *Kelo* decision was published by the U.S. Supreme Court.

[72] S.J. Res. E , 93rd Leg., Reg. Sess. (Mich. 2005); H.J.Res. P, 93rd Leg., Reg. Sess. (Mich. 2005).

[73] S. B. No. 693, 93rd Leg., Reg. Sess. (Mich. 2005); H.B. 5202, 93rd Leg., Reg. Sess. (Mich. 2005); H.B. No. 5078, 93rd Leg., Reg. Sess. (Mich. 2005). S.B. 693 and H.B. 5078 seek to amend MCL 213.23, the statutory basis for eminent domain discussed at length in *County of Wayne*. H.B. 5202 seeks to amend statutes related to the designation of blight and is included because a potential unintended consequence of the further tightening of condemnation

incorporate desirable standards into the statutory scheme and state constitution given the judicial history at play in the background on this issue,[74] nevertheless, the public is best served by the adoption of a unified approach to such a complex problem.

Of these bills, the three seeking to amend MCL 213.23 focus primarily upon protecting private property from taking and subsequent transfer to a private entity for less than public use.[75] However, H.B. No. 5078 does little more than codify the holding of *County of Wayne* and provides no additional guidance in determining when a taking is for the "primary benefit of [a] private entity."[76] Thus, as with other laws using the "bright line rule," the analysis remains essentially one of judicial interpretation. S.B. 693 presents a much more comprehensive view on the problem, providing that under no circumstances will public use encompass a transfer to a private entity for general economic development, and enumerating three factors upon which a justification of the exercise of eminent domain may be based.[77] While the more expansive attempt to provide

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statutes may be greater reliance on declarations of blight. *See*, *e.g*. Cramer, *supra* note 25 at 417.

[74] *Compare* Poletown Neighborhood Council, 304 N.W.2d at 455, with County of Wayne, 684 N.W.2d at 765.

[75] H.B. No. 5078, 93rd Leg., Reg. Sess. (Mich. 2005) provides the operative language to include "[a] taking of private property under subsection (1) is not considered to be for the use or benefit of the public if the property is transferred to a private entity for the primary benefit of the private entity."

[76] H.J.Res. P, 93rd Leg., Reg. Sess. (Mich. 2005) suffers from the identical shortcoming and represents another example of attempting a bright-line demarcation.

[77] S. B. No. 693, 93rd Leg., Reg. Sess. (Mich. 2005) proposes the following three categories, a showing of any one of which may authorize a condemnation:

(a) "A public necessity of the extreme sort exists that requires collective action to acquire land of instrumentalities of commerce…"

(b) "The property or use of the property will remain subject to public oversight and accountability after the transfer of the property…"

reasonable criteria as guideposts should be applauded, the language of the proposed statute itself virtually highlights the potential for the abuse of the designation of blight. Notably, while amending the statutes regarding blighting of property, H.B. 5202 offers essentially cosmetic changes in language such that no additional restrictions upon blight designations are implemented.[78]

As suggested by Cramer, perhaps the real problem inherent in the system is unfettered discretion at the local levels providing an incentive for developers to rely on eminent domain through political leverage to enhance profit margins and an incentive for local politicians to pander to such interests.[79] Viewed in this light, S.B. No. 693 fails to achieve its goal of shoring property owners' defenses against overzealous condemnors acting under the ambit of *Kelo*. Rather, it provides an incentive to execute such a transfer under a declaration of blight, thereby decreasing the property owner's chance of recovering a fair market value for the property.[80]

An intriguing solution to this problem may be found in S.J.Res. E.[81] This includes similar language clarifying that public use does not include a transfer to a private entity to stimulate economic development or bolster tax rolls.[82] This resolution also provides that any taking of residential property shall only be compensated at the rate of at least one hundred

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(c) "The property is selected on facts of independent public significance or concern, including blight, rather than the private interests of the entity to which the property is eventually transferred."

[78] H.B. 5202, 93rd Leg., Reg. Sess. (Mich. 2005).

[79] Cramer, *supra* note 25, at 41820; Jones, *supra* note 12, at 302–05; Jennifer J. Kruckeberg, *Can Government Buy Everything?: The Takings Clause and the Erosion of the "Public Use" Requirement*, 87 MINN. L. REV. 543, 546–48 (2002) (noting the breadth with which "blight" can sweep).

[80] Or at the very least, making such a recovery more difficult by shifting the burden to the homeowner to prove the value prior to the blight designation. *See*, *e.g.*, Brendan T. Guastella, *Lights Out for LILCO: A Look at New York's Takeover Plan*, 53 BROOKLYN L. REV. 723, 753, n.171.

[81] *Supra* note 71.

[82] *Id.*

twenty five (125%) percent of fair market value.[83] Although it is unclear as to why that rate is selected, such a strategy may provide sufficient impetus to dissuade potential condemnors from pursuing eminent domain as the more cost effective solution to their desired development goals.[84]

C. NEW YORK

New York starts from a distinct position relative to States analyzed thus far; that is, an exercise of eminent domain for the purpose of economic redevelopment is expressly considered a public use under the existing statutory scheme and judicial interpretation thereof.[85] Despite this entrenched view, the New York legislature has proposed a wide spectrum of amendments, in twelve new pieces of legislation, to modify the

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[83] S.J.Res. P, 93rd Leg., Reg. Sess. (Mich. 2005) provides in pertinent part:

> If private property consisting of an individual's principal residence is taken for public use, the amount of compensation made and determined for that taking shall be not less than 125% of that property's fair market value, in addition to any other reimbursement allowed by law.

[84] This solution is similar to that offered by Professors Krier and Serkin. *See* James E. Krier and Christopher Serkin, *Symposium: The Death of Poletown: The Future of Eminent Domain and Urban Development After* County of Wayne v. Hathcock*: Public Ruses*, 2004 MICH. ST. L. REV. 859, 866-70 (2004).

[85] *See, e.g., In re* Northeast Parent & Child Society, Inc. v. City of Schenectady Industrial Development Agency, 494 N.Y.S.2d 503, 504 (N.Y. App. Div. 1985) (observing that the agency was authorized by statute to exercise eminent domain to increase the tax base and diversify the local economy as part of "its statutory responsibility to promote the City's economic welfare"); N.Y. GENERAL MUNICIPAL LAW § 858(4) (Consol. 2005); N.Y. GENERAL MUNICIPAL LAW § 852 (Consol. 2005)("It is hereby declared to be the policy of this state to promote the economic welfare…of its inhabitants and to promote, attract, encourage, and develop…economically sound commerce and industry and economically sound projects identified…for the purpose of preventing unemployment and economic deterioration by the creation of industrial development agencies… The use of all such rights and powers is a public purpose essential to the public interest.").

implementation of eminent domain power in direct response to *Kelo*.[86]

The solutions contained in these proposed bills include ideas such as increasing the relocation costs to be afforded,[87] allowing local government "veto power,"[88] the "bright line rule" discussed above,[89] requiring a comprehensive economic plan produced in conjunction with the local government[90] limiting the use of eminent domain to the traditional applications,[91] limiting the use of eminent domain to combating blight,[92] and creating a temporary state commission to review eminent domain law as applied.[93] Of these solutions, several[94] are discussed elsewhere in this note, while others deserve some in-depth treatment.

As it stands now, New York eminent domain law provides for a public hearing of the need for condemnation by the authority exercising eminent domain and the publication of the results of these hearings within 90 days.[95] However, the contents of this

[86] S.B. 5961, 2005–2006 Reg. Sess., (N.Y. 2005); S.B. 5949, 2005–2006 Reg. Sess., (N.Y. 2005); S.B. 5946, 2005–2006 Reg. Sess., (N.Y. 2005); S.B. 5938, 2005–2006 Reg. Sess., (N.Y. 2005); S.B. 5936, 2005–2006 Reg. Sess., (N.Y. 2005); A.B. 8865, 2005–2006 Reg. Sess., (N.Y. 2005); A.B. 9015, 2005–2006 Reg. Sess., (N.Y. 2005); A.B. 9043, 2005–2006 Reg. Sess., (N.Y. 2005); A.B. 9050, 2005–2006 Reg. Sess., (N.Y. 2005); A.B. 9051, 2005–2006 Reg. Sess., (N.Y. 2005); A.B. 9060, 2005–2006 Reg. Sess., (N.Y. 2005); A.B. 9079, 2005–2006 Reg. Sess., (N.Y. 2005). Several of these bills contain overlapping provisions.

[87] A.B. 9050, 2005–2006 Reg. Sess., (N.Y. 2005).

[88] A.B. 9043, 2005–2006 Reg. Sess., (N.Y. 2005).

[89] S.B. 5961, 2005–2006 Reg. Sess., (N.Y. 2005).

[90] S.B. 5946, 2005–2006 Reg. Sess., (N.Y. 2005).

[91] S.B. 5938, 2005–2006 Reg. Sess., (N.Y. 2005).

[92] S.B. 5936, 2005–2006 Reg. Sess., (N.Y. 2005).

[93] A.B. 9060, 2005–2006 Reg. Sess., (N.Y. 2005).

[94] Or at least a reasonably analogous conceptualization thereof such that additional discussion is unwarranted.

[95] N.Y. EM. DOM. PROC. LAW §§ 201-204 (Consol. 2005). These reports must include "(1) the public use, benefit or purpose to be served by the

publication are left to the discretion of the condemnor within some very general guidelines.[96] The proposed change requires some specific details and mandates involvement of the local government where the property is located[97] in the case of a taking under the auspices of an economic development project. Consequently, this represents a significant step forward in addressing criticisms[98] endemic to such an exercise of power.[99]

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proposed public project; (2) the approximate location for the proposed public project and the reasons for

the selection of that location; (3) the general effect of the proposed project on the environment and residents of the locality; (4) such other factors as [the condemnor] considers relevant." N.Y. EM. DOM. PROC. LAW § 204 (Consol. 2005).

[96] *Id.* at §204 (B).

[97] The law implicitly acknowledges that frequently takings are accomplished by quasi-public agencies created under the authority of N.Y. GEN. MUN. LAW § 852 *et seq.* (Consol. 2005) as opposed to lawmakers who answer directly to voters through the electoral process.

[98] *See, e.g.,* Cramer, *supra* note 25 at 417; David B. Fawcett, III, Comment, *Eminent Domain, The Police Power, and the Fifth Amendment: Defining the Domain of the Takings Analysis*, 47 U. PITT. L. REV. 491, 495 (1986) (observing the potential effect of the abuse of eminent domain by capital rich industrial giants); Ralph Nader & Alan Hirsch, Article, *Making Eminent Domain Humane*, 49 VILL. L. REV. 207, 227 n.145 (2004) (suggesting consideration of alternatives to condemnation in judicial evaluations of eminent domain). *But see* Merrill, *supra*, note 11 at 80, discussing the reluctance to exercise eminent domain due to increased transaction costs associated therein.

[99] See S.B. 5946, 2005-2006 Reg. Sess., (N.Y. 2005) which includes provisions creating N.Y. EM. DOM. PROC. LAW § 204 (A). This section would require an economic development plan developed in cooperation with the municipal government to include expected impact in terms of jobs and tax revenue, the types of businesses attracted, and alternatives that are available. After the first draft of this report, a public hearing should be held to incorporate additional public feedback before finalization. This section would also require the development of a "homeowner impact assessment statement" to attempt to balance the harm with the purported benefits of the economic redevelopment plan. Finally, this section calls for an increase in the transaction costs to require compensation at the rate of one hundred and fifty percent (150%) of fair market value.

Similar to the provisions of proposed S.B. 5946, A.B. 9043 attempts to provide for increased involvement at the local government level. This bill implicitly approves of the use of eminent domain power for economic development,[100] however, it grants the municipality in which the property sits the right to vote[101] following the publication of the report required under N.Y. EM. DOM. PROC. LAW § 204.[102] This again provides a greater degree of accountability to the public,[103] although the utility of such provisions is questionable as it is completely dependent upon the degree of scrutiny to which the municipal government is exposed. This scrutiny will typically vary with the population and availability of media coverage to highlight such decisions to the general public. Additionally this bill includes a compensation multiplication factor of one hundred fifty percent (150%) for such economic redevelopment.[104]

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[100] See A.B. 9043, 2005-2006 Reg. Sess., (N.Y. 2005), amending N.Y. EM. DOM. PROC. LAW §103 to include a definition of "economic development project" as "any project for which the acquisition of real property may be required for a public use, benefit, or purpose where such public use, benefit, or purpose is primarily for economic development and where the condemnee's real property is a home or dwelling."

[101] A.B. 9043 proposes amending N.Y. GEN. MUN. LAW § 856 to include § 856-(c), which would require an approval or denial of the redevelopment agency's decision to condemn property within the borders of the municipality by both the governing body and the chief executive of the municipality.

[102] *See supra*, note 94.

[103] Colin Gordon, Special Series, *Developing Sustainable Urban Communities: Blighting the Way: Urban Renewal, Economic Development, and the Elusive Definition of Blight*, 31 FORDHAM URB. L.J. 305, 334 (2004) (advocating reform of redevelopment laws with a goal of "[g]reater transparency and accountability").

[104] A.B. 9043, including the terms of § 204 discussed *supra* note 98. The sponsor memo attached to the proposed bill provides as justification for this adjustment: the discretion granted to local government in *Kelo*, concern over the fact that frequently eminent domain is exercised by the quasi-public redevelopment agencies, and balancing the needs of protecting homeowners' and allowing vital public projects, including those that are intended to have only economic benefits, to proceed

D. TEXAS

In the scheme prior to *Kelo*, eminent domain procedure in Texas consisted of an exchange of information between the buyer and the seller relating to the value of the property and the basis for the offer made.[105] Failing an agreement on this, the party interested in acquiring the property applies to the court for assistance.[106] This court assistance has been described as the administrative phase of the procedure.[107] Once the court has appointed special commissioners, a hearing is held to determine whether, in the judgment of the commissioners, the value of the property taken as the amount of damages to be paid by the condemnor.[108] Parties that wish to appeal the determination by the commissioners will find themselves in court litigating the matter as they would any other cause of action.[109] At the point of taking, the government entity must disclose to the condemnee that they have the right to repurchase the property if the public use is cancelled within ten years after the taking.[110]

The legislature successfully enacted S.B. No. 7[111] November 18, 2005 which amended several sections of the code.[112] The

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[105] TEX. PROP. CODE ANN. § 21.0111 (Vernon 2005).

[106] *Id.* at § 21.012. The petition must include: 1) a description of the property; 2) the purpose for the condemnation; 3) the name of the property owner, if known; and 4) a statement that the parties have failed to agree on a price.

[107] W.H. Seals v. Upper Trinity Reg'l Water Dist., 145 S.W.3d 291, 295 (Tex. App. 2004) (Describing the condemnation process as "a two-part procedure involving an administrative proceeding, and if necessary, a judicial proceeding." The administrative piece entails the filing of the initial petition and appointment of special commissioners to determine the correct value.)

[108] TEX. PROP. CODE ANN. § 21.014 (Vernon 2005) (providing for court appointment of three disinterested freeholders as the special commissioners); Id. § 21.015.

[109] *Id.* at § 21.018.

[110] *Id.* at § 21.023.

[111] S.B. No. 7, 79th 2nd Called Session (Tex. 2005).

[112] TEX. GOV'T CODE ANN. § 2206.001 (Vernon 2005). S.B. No. 7 also creates TEX. GOV'T CODE ANN. § 552.0037 (Vernon 2005) and TEX. EDUC.

primary effect of this bill is to limit the use of eminent domain to confer a benefit on a private party or for economic development unless that economic development is merely the consequence of removing slum or blight conditions.[113] TEX. GOV'T CODE ANN. § 2206.001 imports the definitions of blight and slum from TEX. LOC. GOV'T CODE ANN. § 374.003,[114] which tends to provide wide

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CODE ANN. § 51.9045 (Vernon 2005), amends TEX. TRANSP. CODE ANN. § 203.052 (Vernon 2005) and TEX. TRANS. CODE ANN. § 227.041 (Vernon 2005).

[113] TEX. GOV'T CODE ANN. § 2206.001(b) (Vernon 2005).

[114] TEX. LOCAL GOV'T CODE ANN. § 374.003 (Vernon 2005) provides in pertinent part:

> (3)"Blighted area" means an area that is not a slum area, but that, because of deteriorating buildings, structures, or other improvements; defective or inadequate streets, street layout, or accessibility; unsanitary conditions; or other hazardous conditions, adversely affects the public health, safety, morals, or welfare of the municipality and its residents, substantially retards the provision of a sound and healthful housing environment, or results in an economic or social liability to the municipality. The term includes an area certified as a disaster area as provided by Section 374.903.
>
> (19)"Slum area" means an area within a municipality that is detrimental to the public health, safety, morals, and welfare of the municipality because the area:
>
> (A) has a predominance of buildings or other improvements that are dilapidated, deteriorated, or obsolete due to age or other reasons;
>
> (B) is prone to high population densities and overcrowding due to inadequate provision for open space;
>
> (C) is composed of open land that, because of its location within municipal limits, is necessary for sound community growth through replatting, planning, and development for predominantly residential uses; or
>
> (D) has conditions that exist due to any of the causes enumerated in Paragraphs (A)-(C) or any combination of those causes that:
>
> (i) endanger life or property by fire or other causes; or
>
> (ii) are conducive to:
>
> (a) the ill health of the residents;

avenues for local governments to avoid any real bar on using eminent domain for economic development. These definitions allow significant flexibility if a municipal government seeks to impose its will upon an area under the guise of a blight or slum designation, and therefore don't afford significant additional protection to property rights.[115] Additionally, the Texas legislature is considering bills removing the authority of local government entities to exercise eminent domain in circumstances where the purpose is for economic development, unless the area is blighted.[116] This is particularly problematic since the urban renewal statutes define both blighted area and slum area broadly.[117] Given the municipal or county level control over housing inspectors and building ordinances, zoning committees, and health departments, such references to health,

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> (b) disease transmission;
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> (c) abnormally high rates of infant mortality;
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> (d) abnormally high rates of juvenile delinquency and crime; or
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> (e) disorderly development because of inadequate or improper platting for adequate residential development of lots, streets, and public utilities.

[115] *See* R.B. Davis, et al. v. City of Lubbock, et al., 326 S.W.2d 699, 702, 714 (Tex. 1959) (holding that with reference to the definitions provided, the city council has discretion to identify the areas of "blight" or "slums" based upon public policy considerations loosely articulated in the statute).

[116] H.B. No. 73, 79th 2nd Called Session (Tex. 2005), proposing a new section of the Texas Local Government Code at § 274.002 providing that "[a] political subdivision of this state may not take private property through the use of the power of eminent domain if the primary purpose of the taking is for economic development unless the area being developed is a blighted area or slum area."

[117] David B. Brooks, TEXAS PRACTICE SERIES MUNICIPAL LAW AND PRACTICE § 19.12 (2d ed.), available on Westlaw 23 TXPRAC § 19.12 (describing a blighted area as an area that has "sub-standard buildings, inadequate transportation or other unsanitary or hazardous condition that threatens a sound and healthful housing environment")(internal quotations omitted). This can quite easily be read to include virtually any poor neighborhood in America. *See generally*, Jonathan M. Purver, *What Constitutes "Blighted Area" Within Urban Renewal and Redevelopment Statutes*, 45 A.L.R.3d 1096, § 2(b) (observing the breadth with which courts read blight). *See also* Gordon, *supra* note 102, at 315.

housing standards, and adequate infrastructure provide little restriction to a local government that is intent upon pursuing a certain project.

Other solutions considered in Texas include the bright-line ban by state constitutional amendment,[118] constitutional amendment to bar the use of eminent domain for economic development or to benefit any identifiable group and providing that the primary purpose of a taking is a question of fact,[119] a one year moratorium on the use of eminent domain and the concomitant creation of a committee to study the use of eminent domain,[120] and limiting the use of eminent domain beyond the traditionally understood limits.[121]

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[118] S.J.R. No. 10, 79th 2nd Called Session (Tex. 2005); S.J.R. No. 5, 79th 2nd Called Session (Tex. 2005) (barring the use of eminent domain only if the primary purpose is for economic development or "to benefit a particular class of identifiable individuals"); S.J.R. No. 9, 79th 2nd Called Session (Tex. 2005) (providing that public use doesn't include economic development); S.J.R. No. 15, 79th 2nd Called Session (Tex. 2005) (defining economic development and restricting the use of eminent domain to situations where the taking is necessary for a public project or public use or to protect health, safety, morals, or welfare of citizens);

[119] H.J.R. No. 10, 79th 2nd Called Session (Tex. 2005).

[120] H.B. No. 66, 79th 2nd Called Session (Tex. 2005).

[121] H.B. No. 86, 79th 2nd Called Session (Tex. 2005) (providing that no Texas governmental entity may use eminent domain power to take private property to "promote or effect economic development or rejuvenation, to create jobs, to generate tax revenue, to create leisure or recreational opportunities, or to create aesthetic pleasure"). *Compare* Cramer, *supra*, note 25, at 411 ("Works such as roads, bridges, libraries, school, and parks were considered public uses, and the government's right to exercise its power of eminent domain to gather lands for the construction of these works was well established…Both state and federal courts employed this narrow view of eminent domain power."). Thus, it appears that under this law a government entity would not be able to take land for development of a park as this could fall into either the aesthetic pleasure or recreational/leisure opportunities areas. See TEX. PARKS & WILD. CODE ANN. § 21.103 (Vernon 2005) (authorizing the use of eminent domain to acquire park land and the transfer of public use land to the purpose of park land). Moreover, a transfer of public use land to use as a park can result in decreased stability in the property system due to the reversion provisions in the eminent domain code. *See supra*, note 109. This proposed bill illustrates the difficulty in legislating a complex issue such as eminent domain without carefully considering the potential consequences to other aspects of law.

Notably, H.J.R. No. 11 preserves the right of eminent domain for a municipal sports and community project without indicating whether this would apply to land for professional sports stadiums. Arguably, professional sports are no more a public use than any other business, as in order to benefit the public, an individual must purchase admission to the facility, but such stadiums are frequently justified on the basis of the economic benefit to the greater community. Conceivably such takings are more egregious in that they are frequently tied to taxpayers subsidizing the construction of the stadium on the land as well in exchange for mostly low-paying seasonal work staffing the stadium as opposed to full-time employment through the Pfizer research facility, as in *Kelo*.[122] Thus the benefit is even more tightly concentrated in the ownership of the sports organization as opposed to distributed amongst the owners of the company, which arguably can include residents of the municipality in the case of a publicly traded company.

Mandating that determining the primary purpose of a taking is a question of fact may present a double-edged sword. This virtually ensures that any dispute that cannot be settled will end in a full-blown trial, as both parties have little incentive to settle. While this operates to increase transaction costs and may result in less use of eminent domain in the aggregate, in an individual case it pits a homeowner in a mismatch against a redevelopment agency in a court dispute, where the homeowner is bankrolling their own as well as in part their adversary's legal expenses.[123]

Of these solutions, I suggest that the most beneficial is the moratorium and careful study of the issue of eminent domain. Preliminarily it should be noted that, as in any adversarial proceeding, certain portions of the population will always find room to complain about the results of an application of

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[122] Kelo v. New London, 545 U.S. 439, 447 (2005).

[123] *See supra*, notes 104-109. This problem is inherent in litigating any condemnation as the parties will invariably consist of a municipal entity funded by tax dollars and an individual or business that has significantly less resources to devote to litigation. However, it becomes exacerbated when the law provides no means to resolve the issue prior to a complete, and typically costly, fact-finding process.

power.[124] Moreover, eminent domain is authorized in various locations throughout the existing statutory scheme, thus a carefully thought out position to account for the competing interests and scenarios that may be implicated in such changes is necessary to ensure proper governance. Rather than reactively inserting statutory amendments, a careful study of the manner of usage of eminent domain in a specific area is advisable.[125] This type of thoughtful review will drive the debate towards bestowing the greatest possible benefit on the community, and by extension, state as a whole, while still protecting individual property rights.

E. GEORGIA

As it stood prior to post-*Kelo* amendment, eminent domain procedure in Georgia consisted of a series of proceedings similar to those applied in Texas. Upon deciding that a property is desired, the condemnor must serve notice to the owner containing the name of the assessor selected by the condemnor, the date and time of the hearing upon the property, as well as the amount of the interest in the property to be taken.[126] Once the three assessors are selected[127], they will hold the hearing at

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[124] Specifically this includes the homeowners affected, those individuals that believe strongly in individual property rights such that any application of eminent domain is offensive, and those that seek to leverage the opportunity to their political benefit by casting an opponent or party as "pro-eminent domain" or themselves as "for the homeowner," neither of which has any intrinsic meaning or value in this discussion.

[125] The committee formed under the auspices of H.B. No. 66 is authorized to study the application of eminent domain for economic purposes and the necessary pieces of compensation to provide a complete recovery to the homeowner with specific reference to replacement value. The committee will then compile a report to be presented to the complete legislature. The committee will be bicameral composed of five senators and five members of the House of Representatives. This ensures that responsibility for the committee's work product remains with elected officials.

[126] GA. CODE ANN. §§ 22-2-20 - 22-2-26 (West 2005); GA. CODE ANN. § 22-2-26 (West 2005).

[127] *Id.* at§ 22-2-40. This section provides that the condemnee and the condemnor shall each select an assessor and a third assessor shall be agreed upon by the two assessors designated by the parties. All assessors must be a

the selected date and time to assess the value of the property interest taken.[128] A dissatisfied party may appeal as of right to the Georgia Superior Court within ten days of the assessors filing the finding by the.[129] Alternatively,[130] a condemnor desiring an expedited decision regarding the amount of compensation[131] can file a complaint with the Superior Court requesting a hearing before a special master.[132] The special master is an attorney who is in good standing and has at least three years experience practicing law.[133] The special master may either hold the hearing and render a decision independently or in conjunction with one assessor selected by each of the

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certified general real estate appraiser under GA. CODE ANN. §§ 43-39A-1 - 43-39A-26 (West 2005). *Id.*

[128] GA. CODE ANN. § 22-2-63 (West 2005); GA. CODE ANN. § 22-2-62 (West 2005). § 22-2-62 states that assessors shall consider all evidence proffered, including evidence of prospective or consequential damages as well as any increase in the value of the property due to the taking. Assessors are empowered to consider not only the value of the property as currently used but "inquiry may be made as to all other legitimate purposes to which the property or interest could be appropriated." *Id.* at § 22-2-62(d).

[129] *Id.* at § 22-2-40.

[130] Additionally, if there is a question as to the validity of title held by the condemnee, the condemnor may proceed before the court to determine this and any ancillary issues prior to commencing the assessment proceeding. *Id.* at §§ 22-2-130 - 22-2-142.

[131] *Id.* at § 22-2-101. *See, generally*, Daniel F. Hinkel, Georgia Eminent Domain § 2-3 (2000 ed.), available on Westlaw at GAEMDOMAIN § 2-3 (noting that this method is usually implicated when there are "numerous parties, conflicting interests, persons under disability, nonresidents or when there are questions or issues that make judicial supervision desirable").

[132] GA. CODE ANN. § 22-2-102 (West 2005). Under these proceedings a hearing will take place within 15 days. *Id.* Note that this complaint differs from that required under the assessor procedure. It shall contain the facts showing the right to condemnation as well as "such other facts as are necessary for a full understanding of the cause," the names of the party from whom the property is to be taken, and the interest to be taken. *Id.* at § 22-2-102.2.

[133] Id. at § 22-2-103.

parties.[134] Any decision by the special master or special master panel is also appealable of right.[135]

Georgia has also adopted provisions requiring payment of relocation and incidental expenses, availability of relocation assistance services, and litigation costs as allowed under the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970.[136] Also, the Housing Authority can exercise its powers of eminent domain to redevelop areas in combating blight.[137]

Currently pending in the Georgia legislature are eleven bills and four proposed constitutional amendments relating to the use of eminent domain. These include some variations on the solutions proposed elsewhere[138] as well as some unique plans designed to increase accountability. Of the proposed constitutional amendments, all four adopt some variation on the "bright line" approach.[139] It seems that these proposals will

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[134] Id. at § 22-2-108.

[135] Id. at § 22-2-11.

[136] *See generally* GA. CODE ANN. §§ 22-4-1 - 22-4-15 (West 2005); 42 U.S.C.A. §§ 4601-4655 (West 2005). *See also* Torrente v. Metro. Atlanta Rapid Transit Auth., 603 S.E.2d 470, 473 n.5 (Ga. Ct. App. 2004), wherein a business owner was denied further relief above the $1000 cap on costs in searching for a new location, suggesting that such protections fall short of achieving a complete remedy for the taking. As illustrated in *Torrente*, these remedies can still leave property owners far from whole.

[137] GA. CODE ANN. § 8-3-31 (West 2005) (providing that housing authorities have the power to condemn and take property as an exercise of eminent domain); GA. CODE ANN. §§ 8-4-1 - 8-4-12 (West 2005) (regarding the clearing of blight). Notably, § 8-4-2 refers to the negative impact of "areas in the process of becoming blighted" as well as those that are already blighted, thus leaving considerable room for argument as to the status applied to an area "in process of becoming blighted" that is sought to be condemned for redevelopment.

[138] For example, S.B. No. 86, 148th Gen. Assem., Reg. Sess. (Ga. 2005) provides a bright line rule along with the policy declaration that eminent domain should be used sparingly in redevelopment, without addressing the needs of the communities that led to passing redevelopment laws in the first place or discussing the problem communities face in dealing with holdouts stymieing such efforts.

[139] H.R. No. 1051, 148th Gen. Assem., Reg. Sess. (Ga. 2006) (providing that economic development is not a public purpose and limiting eminent

inevitably limit the flexibility of municipalities in addressing development in the first instance or carry significant loopholes with no principled difference from using eminent domain for economic development. For example, H.R. 87 will allow a taking to put a road through a house to reach a newly constructed industrial park,[140] erected on lands duly negotiated for, but wouldn't allow the municipality the discretion to take the same home for the good for the greater community and increasing overall economic opportunities.[141] It is likely that the homeowner in this hypothetical would suffer harms identical to that if the property were taken for economic redevelopment,[142]

domain to purposes of acquiring property for public roads or public transportation, for ownership and use by a governmental entity in performance of governmental functions, and for public utility purposes); S.R. No. 652, 148th Gen. Assem., Reg. Sess. (Ga. 2006); H.R. No. 1036, 148th Gen. Assem., Reg. Sess. (Ga. 2006) (similar to H.R. 1051 except authorizing the General Assembly to define public purpose, provided, however, that such a definition cannot include the exercise of eminent domain for tax revenue or economic development and including a specific clause saving the definition of blight and application of eminent domain thereto); H.R. No. 87, 148th Gen. Assem., Reg. Sess. (Ga. 2005) (pre-*Kelo* legislation providing that "the power of eminent domain shall only be exercised for purposes of public roads and streets, public transportation, railways, utilities, government owned and used buildings, and public facilities for the general use of government or its citizens," however under no circumstances can eminent domain be used "for purposes of increasing the tax revenue of a government, including the transfer of condemned land to a private entity for purposes of economic development"); H.R. No. 1112, 148th Gen. Assem., Reg. Sess. (Ga. 2006).

[140] This proposal expressly authorizes the taking for a public road but offers no further guidance reasons for the necessity of the road. Thus, identical issues of political overreaching can occur and an influential corporate entity can afford to pay more in negotiating to buy the land knowing they can save the additional cost elsewhere. A similar criticism applies to H.R. No. 1051, 148th Gen. Assem., Reg. Sess. (Ga. 2006).

[141] *See, e.g.,* Richard C. Kramer, Article, *Poverty, Inequality, and Youth Violence*, 567 ANNALS AM. ACAD. POL. & SOC. SCI. 123, (2000) (discussing the link between poverty and violent crime), *and* Pablo Fajnzylber, Daniel Lederman, & Norman Loayza, Article, *Inequality and Violent Crime*, 45 J. L. & ECON. 1 (2002) (discussing income inequality as a driver of violent crime globally).

[142] Notably, none of the proposed constitutional amendments suggest a solution to the problem of "just compensation."

and it is far from clear that the impact to the community in the aggregate would be any different. Additionally, H.R. 1036 in reserving the broad definition of blight, a term which defies a specific definition as it inherently incorporates some subjective analysis which must be applied to current societal norms,[143] vests considerable discretion in the municipal governments to which the judiciary is bound to yield to.[144] However, H.R. 1112, while including the same limitations on the use of eminent domain as the other proposals, also seeks to demand greater accountability from the elected officials by limiting the use of eminent domain to legislative bodies.[145] While this may decrease the efficiency of the operation of redevelopment authorities, it will necessarily put elected policy makers on the record regarding the use, thereby allowing voters to incorporate that information in future elections.[146]

[143] Berman, 348 U.S. at 33 ("The concept of the public welfare is broad and inclusive. The values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled"). *See also* Gordon, *supra*, note 102. In regard to the standard evolving over time, I think it goes without saying that inner-city conditions in tenement housing in the early 1900s would not comport with our modern minimum standards. *See also supra*, notes 114 – 116, discussing the penchant for abuse of blight designations.

[144] Allen v. City Council of Augusta, 113 S.E.2d 621, 623-624 (Ga. 1960); Berman, 348 U.S. at 33-34.

[145] Specifically this proposed amendment requires that "[t]he power of eminent domain shall be exercised only by the state, a county, municipality, or consolidated government of the state, or a public utility and shall not be exercised by any other government authority, government created entity or corporation, private entity or person." H.R. No. 1112, 148th Gen. Assem., Reg. Sess. (Ga. 2006). H.B. No. 976, 148th Gen. Assem., Reg. Sess. (Ga. 2006) follows this line of thinking, including a provision that the notice of condemnation must be signed by the head of the agency executing a taking.

[146] Of course the extent to which voters will take notice of this information or that it will influence their electoral decisions is debatable; nevertheless, increased transparency in this area, as opposed placing responsibility on appointed authorities, offers additional protection to the homeowners. This transparency may have the additional side effect of limiting the use of eminent domain to situations where it is absolutely necessary as officials are less willing to expend their political capital.

Several of the proposed bills include sections espousing the public policy of Georgia as applied to eminent domain indicating a desire to limit the use of eminent domain to the traditional applications.[147] Acknowledging the absolute right of the state legislature to declare public policy limited only by the bounds of the Federal and State Constitutions, it seems somewhat anomalous to rest this decision on considerations of the traditional understanding of eminent domain, but still include the right for public utilities and railroads.[148] The past rationale for such inclusions is definitively less forceful than in decades past. Railroads are no longer the "common carrier" required for participation in interstate commerce as airplanes and tractor trailers now provide meaningful options.[149] While utilities remain heavily regulated, the grant of a virtual monopoly that comes along with this is increasingly valuable in the global business environment; therefore, the necessity of singling these organizations out for additional special treatment is debatable.

Other ideas proposed in the Georgia legislature are primarily concerned with limiting the amount of time that an entity has to

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[147] H.B. No. 976, 148th Gen. Assem., Reg. Sess. (Ga. 2006) (questioning the legitimacy of takings for conveyance to an entity who has merely an interest to use the property for profit and asserting the need to protect "the private property rights of residents and businesses...over the speculative interests of private developers and corporations"); H.B. No. 960, 148th Gen. Assem., Reg. Sess. (Ga. 2006) (asserting the need to protect property as committed to by the founders, therefore attempting to restrict the application of *Kelo* by enacting a 90 day moratorium on the use of eminent domain for redevelopment); S.B. No. 391, 148th Gen. Assem., Reg. Sess. (Ga. 2006) (similar to H.B. 960 but with a 120 day moratorium).

[148] Matthew P. Harrington, Article,*"Public Use" and the Original Understanding of the So-Called "Takings" Clause*, 53 HASTINGS L.J. 1245 1253-1254 (2002); Tillman L. Lay, Article, *Some Thoughts on Our System of Federalism In a World Of Convergence*, 2000 L. REV. MICH. ST. U. DET. C.L. 223, 225 (2000).

[149] *See* Jennifer Maude Klemetsrud, Note, *The Use of Eminent Domain For Economic Development*, 75 N. D. L. REV. 783, 792 (1999) (justifying the expansion of eminent domain to railroads in the 1800s based upon the necessity of land for tracks); Michael J. Coughlin, Comment, *Absolute Deference Leads to Unconstitutional Governance: The Need For a New Public Use Rule*, 54 CATH. U.L. REV. 1001, 1037 (2005) (justifying railroads use of eminent domain since the alternative free market purchase is "cost prohibitive").

use the property for the public purposes. If the entity fails to do so, the property must be divested with a right of first refusal going to the former owner.[150] However, such provisions are of limited benefit to the average homeowner. Within the three year timeframe, the homeowner is likely to have purchased another home and is in no longer capable of repurchasing the home without sustaining a loss on brokerage fees to sell the second property. Additionally, if the right to purchase isn't exercised, the property is auctioned providing an avenue for developers to get the property at the determined fair market value.[151] Other legislation precludes the use of property taken by eminent domain from being used by any non-governmental entity for a period of seven years, followed by a right of first refusal to the original owner at a set price.[152] One of the more promising bills leaves the judiciary and municipalities with some discretion in the process by requiring negotiation in good faith and the consideration of alternative sites.[153] This allows local government to exercise eminent domain in cases where the legislature finds it necessary, however, it leaves the courts with adequate oversight in evaluating the site selection and negotiation process. This bill would also further level the playing field by allowing increased damages to make the property owner whole, including moving expenses and lost goodwill in the case of a business.[154]

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[150] H.B. No. 976, 148th Gen. Assem., Reg. Sess. (Ga. 2006) (setting a period of three years before the property must be disposed of).

[151] H.B. No. 976 provides that in no case shall the property be sold for less than fair market value.

[152] H.B. No. 1091, 148th Gen. Assem., Reg. Sess. (Ga. 2006). This right to purchase is at the price paid in the condemnation proceeding.

[153] S.B. No. 460, 148th Gen. Assem., Reg. Sess. (Ga. 2006) states that "[t]he condemnor shall negotiate in good faith with the owner of the property the condemnor seeks to obtain *prior to* exercising the power of eminent domain" with an identical requirement for consideration of "alternative sites suggested by the owner of the property."

[154] *Id.* (Providing that damages may include "the loss in value of the goodwill of any business located on such property as a result of the taking and a resulting need to relocate such business; the moving expenses incurred by the property owner as a result of having to relocate a residence or business as a result of such taking; and the cost of obtaining a comparable building,

IV. CONCLUSION

The *Kelo* decision, for good or bad, has sparked a significant debate in American society. I suggest that this debate is furthered through frank analysis of the shortcomings of the current system and striving to achieve a balance between property rights and municipal flexibility in exercising the state police powers. Offering sound-bite legislation, that is legislation that sounds good but has little practical import, only serves to muddy the waters. As with any complex problem, careful consideration should be given prior to amending the law even in the face of mounting political pressure. Therefore, limiting the scope of eminent domain should be done from analytically defensible positions.

In this regard, it makes little sense to retain exceptions for railroads and public utilities while arguing for a strict construction of the U.S. Constitution, as clearly the term 'public use' has undergone some necessary evolution. Moreover, creating outright bans on economic redevelopment as a valid purpose for takings while retaining broad definitions of blight may force municipalities, facing declining tax revenues and increasing demands on local services, to pursue development through declarations of blight. This will only further exacerbate the problems in just compensation, frequently the area of disagreement that leads to the necessity of eminent domain in the first instance. Additionally, adding facial safeguards with little benefit to the original property owner, such as rights of first refusal in seven years, don't address the concerns regarding fairness of the transaction.

Legislation requiring study of the issue and revisitation of the issue following such research will provide for a better final product that addresses modern day systemic concerns over the use of eminent domain, instead of shunting its application more heavily onto the poorest in society through increased usage of blight as one of the few remaining options to a desperate local government. In the meantime, efforts to increase the transaction costs of using eminent domain by adjusting the amount paid to the homeowner will function both as a deterrent

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property, or dwelling having substantially the same characteristics of the property sought to be taken.")

to flippant use of the power and alleviate some of the complaints of undercompensation when it is resorted to. Finally, states should incorporate measures to increase both transparency and accountability in the use of eminent domain by requiring elected officials in the government exercising eminent domain to sign off on use of the power.