KEEP OFF MY PROPERTY!: FEDERAL AND STATE LEGISLATURES' ATTEMPT TO BEHEAD THE *KELO* HYDRA[1]

I. INTRODUCTION

Contrary to popular belief, the Fifth Amendment does not permit the government to seize private property. Rather, the Fifth Amendment is a self-imposed limitation on the sovereign right, prohibiting the government from seizing private property unless the property is both seized for a "public use" and the owner is justly compensated.[2] While this seemingly simple test has been heavily litigated in American jurisprudence, no aspect has been more confusing than the Courts' attempts to define "public use."

On June 23, 2005, the United States Supreme Court delivered *Kelo v. City of New London*.[3] Heralded as the watershed of government overreaching, the case provided little change to Fifth Amendment analysis.[4] That notwithstanding, the decision unleashed a firestorm of

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[1]In Greek mythology, a Hydra, or Lernean Hydra, was an ancient serpent-like water beast which possessed numerous heads. It is believed each head was equipped with dangerous weapons, such as poisonous fumes, fire, or flaming arrows. In order to defeat the beast, all of its heads would have to be severed. Wikipedia, Encyclopedia, *Lernaean Hydra*, http://en.wikipedia.org/wiki/Lernaean_Hydra (last visited July 28, 2006).

[2]U.S. CONST. amend. V "[Private property shall not] be taken for 'public use,' without just compensation."); *see also City of Grafton v. Otter Trail Power Co.*, 86 N.W.2d 197, 202 (1957) ("The state is . . . subject to the self-imposed limitations of its own constitution [and that of the U.S. Constitution]."); *Landgraf v. USI Film Products*, 511 U.S. 244, 266 (1994) ("The Fifth Amendment's Takings Clause prevents the Legislature (and other government actors) from depriving private persons of vested property rights except for a 'public use' and upon payment of 'just compensation.'"); Mark C. Christie, *Economic Regulation in the United States: The Constitutional Framework*, 40 U. RICH. L. REV. 949, 959 – 60 (Mar. 2006) ("The Takings Clause does not prohibit the government from taking private property. It allows the government to exercise the power of 'eminent domain' if two requirements are met: (1) the taking must be for a public use, and (2) the property owner must be paid fairly for his or her property").

[3] *Kelo v. City of New London*, __ U.S. __; 125 S. Ct. 2655 (2005).

[4]NewsHour (PBS television broadcast June 24, 2005) (interviewing Indianapolis Mayor Bart Peterson who stated the *Kelo* decision merely affirmed the status quo and did not change anything in the realm of property law); The Supreme Court and Its Future (KPCC radio broadcast July 14, 2005) (interviewing Professor Erwin Chemerinsky who stated the *Kelo* decision did not change the law but rather restated the law as it has been in the past.); Karin P. Sheldon, *Introduction*, 7 VT. J. ENVTL. L. 1 (2005-06) ("Privately, . . . most lawyers concluded that the *Kelo* case did not make a major change in takings law, but clarified the scope of the Fifth Amendment's public use requirement"); Jeffrey W. Post and Melissa A. Baer, *Limits of Urban Redevelopment?*, 62-AUG BENCH & B. MINN. 14 (2005) (stating the *Kelo* decision merely,

public criticism,[5] leading some to even seek the seizure of Justice David H. Souter's private property.[6] To quell the rising tide, federal and state legislatures convened to promulgate laws further limiting the governments' power to seize private land.[7]

This article explores the efforts by legislatures to curtail the exercise of eminent domain post-*Kelo*. To better understand eminent domain in its present state, Part II will first discuss the history and evolution of eminent domain. Part III examines *Kelo v. City of New London, Connecticut*, presenting the factual and procedural background of the case as well as the majority's holding. Part IV addresses the legislative response to *Kelo*.

II. BACKGROUND: THE HISTORY OF EMINENT DOMAIN

The Magna Carta[8] represents the first attempt by a Western government to limit the power of eminent domain. However, it was not until approximately 400 years later that scholars began to struggle with the modern concept of eminent domain.[9] That struggle, largely centered

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"reaffirms the deferential standard of review applied by the Court to the government's exercise of eminent domain.").

[5] James C. Smith, *Supreme Court Refuses to Hamstring Local Governments*, 20-FEB PROB. & PROP. 17 (2006) (stating *Kelo* has "drawn heavy fire" from the public.); Donald E. Sanders and Patricia Pattison, *The Aftermath of Kelo*, 34 REAL EST. L.J. 157 (2005) ("The response to *Kelo* was immediate, strong, and negative. In the media, commentators were almost unanimous in their outcry against the decision.").

[6]Logan Darrow Clements, *Freestar Media: "Lost Liberty Hotel" proposed on Justice Souter's land*, http://www.freerepublic.com/focus/f-news/1432150/posts (last visited June 27, 2005).

[7] Gideon Kanner, *The Public Use Clause: Constitutional Mandate or "Hortatory Fluff"?*, 33 PEPP. L. REV. 335, 366 (2006) ("The legal battle line over improper takings has now shifted to the state legislatures and state courts."); Nat'l Conference of State Legislatures, *Eminent Domain*, available at http://www.ncsl.org/programs/natres/post-keloleg.htm (last visited Apr. 26, 2006) (stating forty-four states have convened to discuss legislation concerning eminent domain after the *Kelo* decision was rendered. Of those forty-four states, twenty-eight have either passed legislation or are awaiting legislation to be passed in November of 2006).

[8] The Magna Carta was issued in 1215 and is regarded as having the most significant early influence on constitutional law. The Magna Carta placed importance upon the rights of property owners by stating "no freeman shall be . . . disseized . . . save by the lawful judgment of his peers or by the law of the land." The Magna Carta was repealed in 1828, leaving only four clauses in tact. Clause 39 remained, proclaiming no property would be taken from a freeman. Despite its importance, the Magna Carta failed to articulate appropriate grounds for a fair seizure of land as well as just compensation for such land. The Wikipedia Encyclopedia, *Magna Carta*, available at http://en.wikipedia.org/wiki/Magna_Carta (last visited July 27, 2006).

[9] The first of these scholars was Hugo de Groot ("Grotius"), a pioneering natural rights theorist of the late 16th and early 17th centuries. Hugo de Groot, DE JURE BELLI AC PACIS (ON THE LAW OF WAR AND PEACE), 219 (Francis W. Kelsey trans., Oxford 1925) (1625). Grotius argued the ability of the government to condemn a property against a person's wishes should only occur if it serves the "public advantage" and the person is fairly compensated. *Id.*

Grotius' works were later refined by a German jurist and historian, Samuel von Pufendorf. Pufendorf argued the government should be prohibited from seizing private property unless the property serves a "public purpose" or has a "public use." Samuel von Pufendorf, DE JURE ET GENTIUM (OF THE LAW OF NATURE AND OF NATIONS) 160 (Basil Kennett ed., Oxford 1703) (1673). He asserted the taking of property

around articulating the concept of "public use," eventually became incorporated into both the Fifth Amendment and its jurisprudence.[10]

After the Fifth Amendment's adoption, the courts initially interpreted the Fifth Amendment in a narrow context, holding no seizure is constitutional unless the general public has the right to a definite and fixed use of appropriated property.[11] However, as the country grew and became more industrialized, the courts strayed from interpreting "public use" in a narrow context.[12] Rather, "public use" became synonymous with "public purpose" and expanded to validate economic development.[13] This philosophical change laid the groundwork for *Kelo*.

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should not be based upon whether property can be used more advantageously but whether property can serve the public as a whole. *Id.*

Thereafter, in 1737, Cornelius van Bynkershoek, a Dutch writer on international law, wrote QUAESTIONES JURIS PUBLICI (QUESTIONS OF PUBLIC LAW). Cornelius van Bynkershoek, QUAESTIONUM JURIS PUBLICI (QUESTIONS OF PUBLIC LAW) 218 (Tenney Frank trans., Oxford 1930) (1737). Bynkershoek blended the theories of both Grotius and Pufendorf to comprise a new philosophical test - "public necessity."

[10] At the time of the American Revolution, not all colonial governments embraced the concept of indemnifying property owners for lands the government seized. William Michael Treanor, Note 42, *The Origins and Original Significance of the Just Compensation Clause of the Fifth Amendment*, 94 YALE L.J. 694, 786 n.14 (noting the charter provisions of Massachusetts and the Carolina's required just compensation for the taking of land. However, other colonial governments did not).

Nonetheless, James Madison, one of the Founding Fathers of the Constitution, influenced by Grotius, Pufendorf, and Bynkershoek, incorporated their theories into the Fifth Amendment. Int'l Review of the Red Cross, *The Philosophy of International Law: Suarez, Grotius and Epigones*, available at http://www.icrc.org/Web/Eng/siteeng0.nsf/iwpList163/F126153B0408F65DC1256B66005B0666 (last visited Oct. 31, 1997) (asserting Grotius' works were consulted and regarded highly by James Madison).

Madison asserted the sacrifice of an owner's private property must only be put to a "public use" and the owner should be fairly and justly compensated. U.S. CONST. amend. V ("No person shall . . . be deprived of life, liberty, or property, without due process of law nor shall private property be taken for public use, without just compensation"); *see* Charles E. Cohen, *Eminent Domain After Kelo v. City of New London: An Argument For Banning Economic Development Takings*, 29 HARV. J.L. & PUB. POL'Y 491, 532 (2006) (Madison originally drafted the Takings Clause to state "[n]o person shall be . . . obliged to relinquish his property, where it may be necessary for public use, without just compensation.").

[11] *Kelo*, 125 S. Ct. at 2662 ("[M]any state courts in the mid-19th century endorsed "use by the public" as the proper definition of public use."); *Varner v. Martin*, 21 W.Va. 534 (1883) (holding the public must have a definite and fixed use of the property or the taking is unconstitutional.); *Dayton Gold & Silver Mining Co. v. Seawell*, 11 Nev. 394, 410, (1876) (holding "use by the public" constituted general public occupation and enjoyment); *see Kohl v. United States*, 91 U.S. 367, 373-74 (1875) ("[Eminent domain] is a right belonging to a sovereignty to take private property for its own public uses, and not for those of another.");

[12] *Strickley v. Highland Boy Gold Mining Co*, 200 U.S. 527, 531 (1906) (discussing the inadequacy of use by the general public as a universal test); *Brewer v. Bowman*, 9 Ga. 37, 40 (1850) (holding the public can obtain a benefit even though a private individual was the primary beneficiary); *see* Jonathon N. Portner, *The Continued Expansion of the Public Use Requirement In Eminent Domain*, 17 U. BALT. L. REV. 542, 544 (1988) (noting the definition of "public use" no longer requires a use by the public, thereby broadening the definition of what constitutes a valid "public use").

[13] The true watershed event in constitutional eminent domain jurisprudence occurred when the United States Supreme Court delivered *Berman v. Parker* and *Hawaii Housing Authority v. Midkiff*.

III. ENTER *KELO V. CITY OF NEW LONDON, CONNECTICUT*: MORE OF THE SAME

The city of New London, Connecticut ("the City") is a small, whaling town bordering the Thames River.[14] The City retains much of its historic 19th century charm and has continued to serve maritime functions for over two centuries.[15] Despite its charm, the City experienced a tumultuous economic decline in the twentieth century.[16] Subsequently, inspired by the lucrative redevelopment projects in waterfront property, such as Baltimore's Inner Harbor, the City began initiatives to reform its waning town.[17]

In 1998, Pfizer, Inc., a multi-million dollar pharmaceutical company, announced its intention to construct a $300,000,000.00 research facility on the outskirts of the Fort Trumbull neighborhood of New London.[18] Believing this to be the opportunity it needed to reenergize its faltering economy, the City reactivated the New London Development Corporation ("NLDC"), a private, nonprofit entity under the control of the City, created to aid the City's potential for economic development.[19] Intending to capitalize on the arrival of the Pfizer facility and the commerce it expected to attract, the NLDC drafted a plan to revitalize New London by introducing a resort hotel, a conference center, a new state park, roughly eighty new residences,

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In *Berman*, Berman and other owners of a department store in Washington D.C. sued the National Capital Planning Commission, the Commissioners of the District of Columbia, and the District of Columbia Redevelopment Land Agency, seeking to enjoin the condemnation of their property. The three-judge District Court dismissed the complaint, ruling the condemnation did not violate the Fifth Amendment. Berman appealed to the United States Supreme Court and on writ of certiorari, the Court held property deemed by the government as "blighted" or unsafe and injurious to the public's welfare can be lawfully condemned, as removal of such dilapidated property constitutes a valid "public use." *Berman*, 348 U.S. at 33 – 34.

Thereafter, in *Hawaii Housing Authority v. Midkiff*, the Hawaii legislature passed a law to transfer land from large landowners to their lessees. When the HHA attempted to take some land from large landowners under this new law, the landowners sued, claiming the law was unconstitutional. The trial court held the law constitutional because the goals of the law were "within the bounds of the State's police powers," and the means of taking land was not "arbitrary, capricious, or selected in bad faith." The landowners, Midkiff and others, appealed, and the Ninth Circuit reversed, holding law was unconstitutional because it did not serve a legitimate "public us." The HHA appealed to the United States Supreme Court, and the Court reversed, holding redistribution of property to diminish a land oligopoly is a valid "public use." *Midkiff*, 467 U.S. at 29.

[14] The New London Gazette, *225th Anniversary of the Burning of New London*, Vol. 11, No. 5 (Aug. 2005).

[15] *Id.*

[16] *Kelo*, 125 S. Ct. at 2658; Iver Peterson, *As Land Goes to Revitalization, There Go the Old Neighbors*, N.Y. TIMES, Jan. 30, 2005, at A1 (stating the Naval Undersea Warfare Center closed in 1996, causing 1,400 people to be out of work); Richard O. Brooks, *Kelo and the "Whaling City": The Failure of the Supreme Court's Opportunity to Articulate A Public Purpose of Sustainability*, 7 VT. J. ENVTL L. 5 (2005-2006) (stating New London's unemployment rate doubled that of its own state).

[17] *Kelo*, 125 S. Ct. at 2655.

[18] *Id.*

[19] *Id.*

and various research, office, retail, and parking spaces.[20] The development would be immediately adjacent to the Pfizer facility, forcing construction to commence in the Fort Trumbull area.[21]

The Fort Trumbull area is a ninety-acre tract of land that is home to 115 residential and commercial lots.[22] When the City approved this plan, the NLDC offered to purchase all 115 lots.[23] Of those 115 lots, all but fifteen owners accepted.[24] Thereafter, the NLDC held a meeting with the remaining owners, and in a "take-it-or-leave-it" information session, informed the remaining owners if they failed to sell their properties to the City, the City would exercise its power of eminent domain.[25] Unable to garner acceptance of its purchase offer, in November of 2000, the NLDC initiated condemnation proceedings against the remaining homeowners. As a result, in December of 2000, Susette Kelo and the remaining property owners ("the Petitioners") sued the City, alleging the City violated the Petitioner's Fifth Amendment rights.

After hearing the matter, the New London Superior Court ("the Trial Court") held the City violated the Petitioner's Fifth Amendment rights as to eleven of the properties.[26] However, the Trial Court held the City did not violate the Petitioner's rights as to the remaining properties because the City provided a plan detailing specific developments on the debated parcels of land.[27]

Both parties appealed to the Supreme Court of Connecticut. The Supreme Court of Connecticut affirmed in part and reversed in part, holding the City's redevelopment plan was a legitimate "public use" under both the United States Constitution and the Connecticut State Constitution, and thus, the City did not violate the Petitioner's Fifth Amendment rights. [28]

The Petitioners subsequently appealed to the United States Supreme Court, arguing economic redevelopment was insufficient to satisfy the "public use" requirement of the Fifth Amendment.

The Court affirmed, ruling economic development is a legitimate "public purpose," notwithstanding that the property will be immediately transferred to another private party.[29]

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[20] *Id*. at 2659.

[21] *Id.*

[22] *Id.*

[23] *Id.*.

[24] *Id.*

[25] *Id.*

[26] *Id.*

[27] *Id.*

[28] *Id.*

[29] *Id.* at 2663-65.

IV. Responses to *Kelo*

In response to *Kelo* and the resulting public outcry, legislatures have proposed various "remedies" minizing its impact. In essence, the proposed "remedies" center around two main themes – the need to limit economic development as a "public use" and the need to prevent governments from using eminent domain to redistribute property from one private citizen to another. Unfortunately, the majority of the proposed legislation is either untailored and still subject to abuse or unrealisitic and insensitive to public growth.

A. Untailored

The hallmark of untailored legislation is its failure to adequately limit the definition of "blight."

Local communities play a large role in the development of their infrastructures and economies. Thus, to further economic development, local communities have an inherent interest in ridding themselves of properties that are "blighted." While a comprehensive, effective definition of "blight" is difficult to discern, and is in fact the focus of the larger legislative discussion because of this difficulty, "blighted" property can be generally defined as property that constitutes a public nuisance.

While that definition of "blight" is not difficult to comprehend, significant problems arise when legislatures attempt to permit condemnation for legitimate "blight" while preventing local governments from abusing the definition for the purpose of pure economic development. [30]

For instance, on August 3, 2005, Alabama unanimously passed S.B. 68A[31] which amends ALA. CODE § 11-47-170 and ALA. CODE § 11-80-1 and is intended, by its terms, to limit the government's power to condemn property for economic development.[32]

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[30] Peter M. Angetti, *Are You Still Master of Your Domain? Abuses of Economic Development Takings, and Michigan's Return to "Public Use" In County of Wayne v. Hathcock*, 79 ST. JOHN'S L. REV. 1259, 1274-75 (2005) ("Traditionally, the term 'blighted' meant that the property was so run down and dilapidated that its mere presence would constitute a public nuisance. [Today], 'it has become common for city [and community] leaders to define 'blighted' as: 'Not developed as nicely as we'd prefer' [or] '[n]ot developed by the people we'd prefer.'").

[31] S. 68A (2005).

[32] Specifically, the amendments provide:

> Notwithstanding any other provision of law, a municipality or county may not condemn property for the purposes of private retail, office, commercial, industrial, or residential development; or primarily for enhancement of tax revenue; or for transfer to a person, nongovernmental entity, public-private partnership, corporation, or other business entity. Provided, however, the provisions of this subsection shall not apply to the use of eminent domain by any municipality, housing authority, or other public entity based upon a finding of blight in an area covered by any redevelopment plan or urban renewal plan pursuant to Chapters 2 and 3 of Title 24, ...[32]

(emphasis added).

The legislation has a sweeping exception for "blighted" properties. While the term "blight" is defined elsewhere in Alabama's Code, the term is not sufficiently defined to prevent abuse. Rather, a casual reading of the definition would permit condemnation under the guise of blight for a number of subjective reasons, such as pure aesthetics.[33]

Furthermore, because Alabama's urban renewal statutes permit "blighted" properties to be taken pursuant to eminent domain and then transferred to private parties for development, the Alabama legislature has accomplished little in the way of preventing *Kelo* from occurring in its state.

Similar problems exist on varying scales with legislation proposed in Ohio,[34] Wisconsin,[35] Vermont,[36] and Nebraska.[37]

B. Unrealistic

As a response to Kelo, a number of legislatures drafted legislation entirely prohibiting the use of eminent domain to foster "economic development."[38]

These statutes are typically not encumbered by overbroad definitions of "blight," as they are generally sweeping in nature and provide no exceptions to their prohibitions. These enactments, however, are unrealistic, prohibiting the use of eminent domain for even the most limited economic growth.

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[33] The Alablama Code defines "blighted areas" as "[a]reas, including slum areas, with buildings or improvements which, by reason of dilapidation, obsolescence, overcrowding, faulty arrangement or design, lack of ventilation, light and sanitary facilities, excessive land coverage, deleterious land use or obsolete layout, or any combination of these or other factors, are detrimental to the safety, morals or welfare of the community . . . ." *City of Birmingham v. Tutwiler Drug Co., Inc.*, 475 So.2d 458 (Ala. 1985) (holding ALA. CODE ANN. § 2-2-1 defines the term "blighted") (emphasis added).

[34] S. 167, 126th Cong. (2005) ("[U]ntil December 31, 2006, no public body shall use eminent domain to take . . . private property that is not within a blighted area . . . .").

[35] A. 657 (2005) (prohibiting the condemnation of property which is not "blighted" and stating blighted property is "any property that, by reason of . . . deterioration, age or obsolescence, inadequate provisions for ventilation, light, air, or sanitation, high density of population and overcrowding, faulty lot layout in relation to size, adequacy, accessibility, or usefulness . . .").

[36] S. 246 (2006) (prohibiting the use of eminent domain primarily for economic development purposes, and defining a "blighted" area as "an area which by reason of the presence of . . . deteriorated or deteriorating structures, . . . faulty lot layout in relation to size, adequacy, accessibility or usefulness . . . substantially impairs or arrests the sound growth of a municipality, retards the provision of housing accommodations or constitutes an economic or social liability and is a menace to the public health, safety, morals, or welfare in its present condition and use.").

[37] L. 924, 99th Cong. (2006) (prohibiting the use of eminent domain for economic development purposes, unless the property is "blighted").

[38] Because of the sweeping nature of these provisions, legislatures rarely define this term.

The best example of this type of legislation is U.S. Senate Bill 1313.[39] Senate Bill 1313,[40] provides in pertinent part:

> (b) In General - The power of eminent domain shall be available only for public use.
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> (c) Public Use – In this Act, the term 'public use' shall not be construed to include economic development.
>
> (d) Application – This Act shall apply to –
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> (1) all exercises of eminent domain power by the Federal Government; and
>
> (2) all exercises of eminent domain power by State and local government[s] through the use of Federal funds.[41]

Notwithstanding its intended purpose, the legislation does not limit a government from exercising its powers of eminent domain to transfer property from one private citizen to another.

Furthermore, as is obvious, the proposed legislation does not provide any definition for "public use"[42] or "economic devlopment" and does not provide any exceptions for "fundamental services" potentially effected by the legislation. Thus, services such as airports may be unnecessarily affected.

More distressing, of course, is the failure of the U.S. Senate to recognize that the limited use of eminent domain for economic development is, at least to some extent, essential to the growth of local communities. Thus, the legislation would openly permit the use of eminent domain to redistribute private property but would severly limit economic growth.

Similar proposed legislation exists in West Virginia.[43]

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[39] S. 1313, 109th Cong. (June 27, 2005). The Bill was introduced by Senator John Cornyn and is also sponsored by Senators Alexander Lamar, George Allen, Jim Bunning, Richard Burr, Tom Coburn, Mike Crapo, John Ensign, Chuck Hagel, James M. Inhofe, Jon Kyl, Mel Martinez, Lisa Murkowski, Pat Roberts, Olympia J. Snowe, Craig Thomas, David Vitter, Wayne Allard, Barbara Boxer, Conrad R. Burns, Saxy Chambliss, Larry E. Craig, Jim DeMint, Michael B. Enzi, Kay Bailey Hutchison, Johnny Isakson, Trent Lott, John McCain, Bill Nelson, Rick Santorum, Jim Talent, John Thune, and John Warner.

The Bill is still pending before the Senate.

[40] The Bill specifically states it is intended to limit the effects of *Kelo*.

[41] This Bill is identical to two bills filed in the House of Representatives – namely H.R. 3087 and H.R. 3083. H.R. 3087 is sponsored by Representatives Phil Gingrey, James A. Leach, and Pete Sessions. H.R. 3083 is sponsored by Representatives Dennis R. Rehberg, Rodney Alexander, Richard H. Baker, Jerry F. Costello, Louie Gohmert, Walter B. Jones, Jr., Connie Mack, Stevan Pearce, Ted Poe, Pete Sessions, Joe Wilson, Spencer Bachus, Ken Calvert, Wayne T. Gilchest, Gene Green, John R. Kuhl, Jr., John M. McHugh, Collin C. Peterson, Dana Rohrabacher, Charles H. Taylor, and C.W. Bill Young.

[42] The Senate's failure to include a definition of "public use" is striking, given that the Supreme Court has ruled "public use" for purposes of Fifth Amendment analysis is synonymous with "public purpose."

[43] H. 4048 (2006) (2006) (This bill prohibits the use of economic domain primarily for private economic development.) "Notwithstanding any other provision of law, eminent domain may not be used to condemn

C. The Balance

A number of states have generated proposed legislation that would limit the effects of *Kelo* while also permitting legitimate public growth.

For instance, the South Carolina House of Representatives has proposed H. 4502,[44] seeking to amend Article I, § 13 of the South Carolina Constitution.[45]

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property for: (1) Private retail, office, commercial, industrial or residential development, or for enhancement of tax revenue; or (2) To purchase property for a purpose that results in a transfer in fee of the property to a person, nongovernmental entity, corporation or other business entity to fulfill the purpose of the use of eminent domain.").

[44] H. 4502, 116th Cong. (2006).

[45] South Carolina has three other pending pieces of legislation, namely S. 982, S. 1030, and H. 4295.

The first of these, S. 982 seeks to amend S.C. CODE ANN. § 28-2-20 (1976) and is sponsored by Senator Elliott. S. 982, 116th Cong. (2006).

Senate Bill 982 states the legislation is intended not to "alter the substantive law of condemnation as interpreted by the Supreme Court of this State prior to the decision by the United States Supreme Court in Kelo v. City of New London, Connecticut, 125 S. Ct. 2655 (No. 04-108, decided June 23, 2005) Additionally, the Bill proposes to define legislatively "public use" as "a fixed, definite, and enforceable right of use by the general public."

As of January 11, 2006, the Bill has been referred to a Subcommittee comprised of Senators Gregory (ch.), Ford, Elliott, Rankin, Sheheen, and Campsen.

The second of these, S. 1030, seeks to create the "South Carolina Private Property Rights Protection Act." The Bill is co-sponsored by Senators Campsen, McConnell, Martin, Peeler, Bryant, Mescher, Grooms, Hayes, Ryberg, Richardson, Fair, Leatherman, Alexander, Scott, Gregory, Thomas, Courson, O'Dell, Ritchie, Verdin, Leventis, Ford, and Elliott.

In pertinent part, the legislation provides: "private property shall not be taken for private use . . . or for public use without just compensation . . . Private property shall not be condemned by eminent domain for any purpose or benefit, including, but not limited to, the purpose or benefit of economic development, unless the condemnation is for public use."

As of June 1, 2006, S. 1030 has been sent to the House of Representatives and committed to the Committee on Judiciary as HJ-29.

The final of these, H. 4295, seeks to amend S.C. CODE ANN. § 28-2-20 and define "'[p]ublic purpose' or 'public use' [as] mean[ing] a purpose or use that results in a significant and direct benefit to the public[, as opposed to] a secondary benefit to the public which is merely incidental, indirect, or pretextual when the primary benefit inures to a private person or entity." (emphasis as in original).

The Bill is sponsored by Representatives Barfield, Clark, Bailey, Altman, Vaughn, Loftis, Taylor, M.A. Pitts, Littlejohn, Sandifer, E.H. Pitts, Bowers, Clemmons, Kirsh, Bales, Hamilton, Mahaffey, McCraw, Witherspoon, Leach, Miller, Battle, Chalk, Ceips, Scarborough, Brady, Dantzler, Viers, Vick, and Funderburk.

As of January 10, 2006, the Bill has been referred to the Committee on the Judiciary as HJ-19.

The Bill provides the following in pertinent part:

> Private property must not be taken is, at any time, the public body condemning the property, or its designee, intends to convey fee title or lesser interest to all or a portion of the real property, to another private party unless the owner consents. This paragraph does not apply to:
>
> (a) the condemnation of improved or unimproved property that constitutes a danger to the safety and health of the community by reason of lack of ventilation, light, and sanitary facilities, dilapidation, deleterious land use, or any combination of these factors;
>
> (b) the granting of a nonpossessory interest in the property for the purpose of financing the acquisition of the property;
>
> (c) property necessary for transportation of utility facilities or transmission systems; or
>
> (d) conveyance by a public body of an interest lesser than fee title to a privately-owned business for the provision of retail services designated primarily to serve the patrons of the facility in a public facility.

(emphasis as in original).[46]

As is obvious, the initial provision provides a limitation on the government's ability to use eminent domain to transfer private property to other private entities. However, the Bill then provides exceptions by which property could be transferred to private entities. One of those exceptions is essentially a narrowly-tailored "blight" provision, providing the property must constitute "a danger to the safety and health of the community" to be eligible for "blight" condemnation.

Thus, the legislation balances the desire to limit overreaching by the government while permitting legitimate economic development.[47]

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[46] The Bill was proposed and is sponsored by Representatives Edge, Harrison, Harrell, Merrill, Young, Bingham, Bailey, Loftis, Perry, Haskins, Witherspoon, Cato, Vaughn, Altman, Sandifer, G.R. Smith, Walker, Jefferson, Ott, Mack, Vick, Clemmons, Bales, Clark, Simrill, Viers, Duncan, M.A. Pitts, Rice, Mahaffey, Hinson, and Davenport. http://www.scstatehouse.net/sess116_2005-2006/bills/4502.htm.

[47]To the extent this legislation inadequately provides a definition for "public use," the South Carolina Supreme Court has defined the term for purposes of state constitutional analysis. Furthermore, with the additions of this legislative language, the prior precedents of the South Carolina are essentially preserved, notwithstanding *Kelo*. *See Ga. Dept. of Trans. v. Jasper County*, 355 S.C. 631, 586 S.E.2d 853 (2003) (noting the distinction between "public use" and "public purpose" and reaffirming South Carolina's adoption of "public use" for purposes of state constitutional analysis); *Karesh v. City Council of City of Charleston*, 271 S.C. 339, 247 S.E.2d 342 (1978) ("While in other jurisdictions the power of eminent domain may be exercised for a public purpose, benefit or the public welfare, the courts of South Carolina have adhered to a strict interpretation of our constitutional provision."); *Tuomey v. Hospital v. City of Sumter*, 243 S.C. 544, 134 S.E.2d 744 (1964) ("It is essential to a public use, as the term is used in proceedings involving the law of condemnation or eminent domain, that the public must, to some extent, be entitled to use or enjoy the property, not by favor, but as a matter of right."), overruled on other grounds by,

Similarly effective legislation has been proposed by the states of Georgia[48] and Indiana.[49]

V. CONCLUSION

The Supreme Court's decision in *Kelo*, as written, was not a watershed event in eminent domain jurisprudence. Nevertheless, the legislative reaction has forever altered the face of state and federal constitutional jurisprudence by focusing attention to the role of government in the development and growth of communities. To achieve a positive effect, a balance between the government's need for eminent domain and a citizen's need for protected property rights must be met.

Ga. Dept. of Trans. v. Jasper County, 355 S.C. at 631, 586 S.E.2d at 853; *Riley v. Charleston Union Station Co.*, 71 S.C. 457, 51 S.E. 485 (1905) ("A more restrictive view [of the public use doctrine] would seem to better comport with the due protection of private property against spoliation under the guise of eminent domain . . . [Accordingly,] "the public must have a definite and fixed use of the property to be condemned, independent of the will of the [party] taking title under condemnation."); *but see Anderson v. Baehr*, 265 S.C. 153, 217 S.E.2d 43 (1975) (holding the Bond Act unconstitutional for failure to provide a "public purpose"); *McNulty v. Owens*, 188 S.C. 377, 199 S.E.2d 425 (1938) (holding a city's elimination of slum areas serves a "public purpose").

[48] H. 1313 (2006).

[49] H. 1010, 114th (2006).