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# The *Kelo* Legacy: Political Accountability, Not Legislation, Is the Cure

Elisabeth Sperow\*

## I. INTRODUCTION

When first announced, the Supreme Court's ruling in *Kelo v. City of New London*<sup>1</sup> was denigrated by some as the death of property<sup>2</sup> and hailed by others as the word of God.<sup>3</sup> Now that a year has passed and the dust has cleared, the initial legacy of this controversial decision can be evaluated. So far, the main result has been a great deal of publicity and debate regarding the use of eminent domain; actual change in the treatment of eminent domain has appeared in legislation in thirty-seven states, one congressional appropriations bill, and an executive order of limited application. Ironically, the public outcry, rather than the enacted legislation, may prove to be the wake-up call needed to ensure that elected officials reserve the use of eminent domain for truly public purposes. Individuals concerned about the use of eminent domain need to hold their representatives accountable at the polls to ensure that they exercise the eminent domain power responsibly.

This article assesses how, although the *Kelo* opinion invited the states' response, newly passed legislation does not root out the actual evil of eminent domain: abuse by government officials. It has always been and continues to be the case that courts defer to the opinions of government officials regarding what is best for the people absent clear and convincing evidence that the governing bodies' opinions are misguided. Eminent domain can play an important role in society by allowing the government to serve the public interest through the acquisition of property the government might not otherwise be able to obtain.<sup>4</sup> The *Kelo* decision merely adhered to the Court's holdings in a previous line of cases applying a broad interpretation of what constitutes a public use under the

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

2. See, e.g., Joseph Sabino Mistick, *Farewell Sweet Friend*, PITTSBURGH TRIB. REV., July 3, 2005 ("The United States Supreme Court announced the death of property when it ruled in *Kelo v. City of New London* that local officials can take your property and give it to anyone that they deem more worthy.").

3. See Joshua Kurlantzick, *Condemnation Nation: The Big Business of Eminent Domain*, HARPER'S MAG., Oct. 2005, at 75 (quoting then House Minority Leader Nancy Pelosi as saying the *Kelo* ruling was "as if God had spoken").

4. 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, 534-35 (2006) (discussing how many "socially useful projects may not be completed" without eminent domain).

Fifth Amendment. This broad interpretation is necessary to give governments the flexibility to serve the public good, yet still provide a necessary check in case of abuse. The interesting lesson of the *Kelo* case has been the haste with which politicians condemned the ruling and attempted, with mixed results, to strip themselves of the ability to exercise their discretion rather than vowing to use it more appropriately. Instead of condemning the ruling and passing new laws, these politicians should look at how they use eminent domain and make sure they do so only in the best interest of the public. When politicians fail to serve the public interest, voters should be ready to vote them out of office.

This article begins in Part II by discussing the development of eminent domain from the British system to more recent United States Supreme Court rulings.<sup>5</sup> Part III analyzes the *Kelo* decision to show its place among recent eminent domain precedents.<sup>6</sup> Next, Parts IV, V, and VI address the response to the *Kelo* decision from the federal legislature,<sup>7</sup> some state legislatures,<sup>8</sup> and the executive branch of the federal government.<sup>9</sup> These Parts show that while these responses may have been well-intentioned, the responses fail to resolve the real issue. Part VII analyzes the response in the state and federal court systems.<sup>10</sup> Finally, the article proposes that, while many critics lambasted *Kelo* as a grievous injury to homeowners' rights throughout America, it actually did little to change the overall status of eminent domain in the United States.<sup>11</sup> Although many politicians, citizens' groups, and legal scholars have called for dramatic revisions to eminent domain law, this article argues that application of the Fifth Amendment, coupled with political accountability and judicial oversight, is the appropriate remedy.<sup>12</sup>

## II. HISTORY OF EMINENT DOMAIN

### A. *British Origins*

Despite the popular belief that "a man's home is his castle"<sup>13</sup> and is therefore off limits to government seizure, the use of eminent domain to seize private property significantly predates the founding of the United States. Hugo Grotius, a

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5. See *infra* Part II.

6. See *infra* Part III.

7. See *infra* Part IV.

8. See *infra* Part V.

9. See *infra* Part VI.

10. See *infra* Part VII.

11. See *infra* Part VIII.

12. See *infra* Part IX.

13. It is believed that this phrase was coined by Sir William Coke to mean that, in a military context, an Englishman had the right to use deadly force to defend his home. SIR EDWARD COKE, THE THIRD PART OF THE INSTITUTES OF THE LAWS OF ENGLAND: CONCERNING HIGH TREASON AND OTHER PLEAS OF THE CROWN AND CRIMINAL CAUSES 161-62 (R.H. Helmholz & Bernard D. Reams, Jr. eds., 1986).

legal scholar and writer, first coined the phrase “eminent domain” in the seventeenth century.<sup>14</sup> Generally, historians find that governments derive the ability to exercise eminent domain from natural law as an incident of sovereign power.<sup>15</sup> In early Britain, the sovereign could seize private property for his or her personal pleasure or for the public’s use.<sup>16</sup> Because the sovereign was deemed the ultimate owner of all property, and private citizens were merely being given the right to use the land, no compensation was provided or necessary in the event of a seizure.<sup>17</sup> Later, property rights were placed in the hands of Parliament, where they remain today.<sup>18</sup>

The early British tradition continued into Colonial America, where eminent domain was used frequently for things such as building roads and dams.<sup>19</sup> In fact, as early as 1639, formal statutes existed that allowed local governments to take private land to build roads.<sup>20</sup> Additionally, many state constitutions did not have clauses requiring just compensation in the event of a taking.<sup>21</sup>

### B. *The United States Constitution and Eminent Domain*

After the American Revolution and the creation of the independent government of the United States, the United States Constitution provided greater protections for private property than early Colonial law had afforded.<sup>22</sup> Yet, along with these greater protections,<sup>23</sup> the Constitution codified eminent domain with the addition of the Fifth Amendment, providing that “nor shall private property be taken for public use, without just compensation.”<sup>24</sup> The wording of the clause, while controversial, implies that it is permissible for the government to take

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14. Martin J. King, *Rex Non Protest Peccare???: The Decline and Fall of the Public Use Limitation on Eminent Domain*, 76 DICK. L. REV. 266, 268 n.11 (1971-1972) (citing HUGO GROTIUS, DE JURE BELLICI AC PACIS, Lib. III, Cap. xx (1631)).

15. *United States v. Carmack*, 329 U.S. 230, 241-42 (1946).

16. Elizabeth U. Witmer, *Looking to the States to Ride Herd on Kelo*, THE METROPOLITAN CORP. COUNS., 47 Vol. 14, No. 4, Apr. 2006 at 4.

17. Katherine M. McFarland, Note, *Privacy and Property: Two Sides of the Same Coin: The Mandate for Stricter Scrutiny for Government Uses of Eminent Domain*, 14 B.U. PUB. INT. L.J. 142, 145 (citing Francesco Parisi, *Entropy in Property*, 50 AM. J. COMP. L. 595 (2002)).

18. Daniel Cole, *Why Kelo is Not Good News for Local Planners and Developers*, 22 GA. ST. U. L. REV. 803, 847-48 (2006).

19. JULIUS L. SACKMAN, NICHOLS ON EMINENT DOMAIN, § 7.01[3] (3d ed. 2005).

20. Cohen, *supra* note 4, at 491.

21. 545 U.S. 469, 508 n.1 (citing *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1056-57 (1992)) (Blackmun, J., dissenting).

22. See U.S. CONST. amends. III & IV; RICHARD ALLEN EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 29 (1985); JOHN N. RAKOVE, ORIGINAL MEANINGS; POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 295 (1996).

23. For example, the Third Amendment prohibits the quartering of soldiers in homes without consent and the Fourth Amendment requires probable cause prior to the search and seizure of property. U.S. CONST. amends. III-IV.

24. U.S. CONST. amend. V.

private property for public use as long as the government provides just compensation. Or, as Judge Plager of the Federal Circuit stated, “A man’s home may be his castle, but that does not keep the government from taking it.”<sup>25</sup>

The Supreme Court acknowledged the historical foundation of eminent domain when it noted that the Fifth Amendment was a “tacit recognition of preexisting power to take private property for public use rather than [a] grant of new power.”<sup>26</sup> The Court further affirmed that “[t]he power of appropriating private property to public purposes is an incident of sovereignty.”<sup>27</sup> Accepting that some types of takings are constitutionally permissible and even socially necessary, the remaining questions are what is “public use” and what is “just compensation?” Although some legal theorists and judges may argue otherwise, there is no conclusive legislative history to assist in interpreting what the Framers meant by these phrases;<sup>28</sup> thus, the courts have exercised judicial review to establish the confines of eminent domain.

Defining “just compensation,” so far, has been easier to do: just compensation is commonly considered the fair market value of the property at the time of the taking.<sup>29</sup> In certain circumstances, however, condemnees may also be entitled to reasonable moving expenses and other bonus payments above the fair market value of their property.<sup>30</sup> Many scholars argue that the fair market value standard provides inadequate compensation because it does not account for sentimental or other non-economic value condemnees may place on their homes.<sup>31</sup> Some even argue that increasing the amount of compensation the government must pay condemnees is a better route to curtailing the government’s use of eminent domain than limiting the definition of public use.<sup>32</sup> Although the Supreme Court has recently addressed the issue of just compensation,<sup>33</sup> the current focus of the *Kelo*-inspired eminent domain debate, and of this article, is on answering the first question: What is a public use?

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25. *Hendler v. United States*, 952 F.2d 1364, 1371 (Fed. Cir. 1991).

26. *United States v. Carmack*, 329 U.S. 230, 241-42 (1946).

27. *Mayor of New Orleans v. United States*, 35 U.S. 662 (1836).

28. See William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 COLUM. L. REV. 782, 791 (1995) (evaluating whether the Takings Clause may have originally been intended to protect against physical takings rather than to determine fair value).

29. *United States v. Miller*, 317 U.S. 369, 374 (1945); *Olson v. United States*, 292 U.S. 246 (1934).

30. 42 U.S.C.A. §§ 4601-4655 (West 2000); COLO. REV. STAT. §§ 24-56-101 to -113 (2003); CONN. GEN. STAT. §§ 8-266 to -282 (2001).

31. See, e.g., Stephen J. Jones, Note, *Trumping Eminent Domain Law: An Argument for Strict Scrutiny Analysis Under the Public Use Requirement of the Fifth Amendment*, 50 SYRACUSE L. REV. 285, 297-98 (2000); Thomas W. Merrill, *The Economics of Public Use*, 72 CORNELL L. REV. 61, 83 (1986).

32. John Fee, *Eminent Domain and The Sanctity of the Home*, 81 NOTRE DAME L. REV. 783, 785 (2006).

33. *Brown v. Legal Found. of Wash.*, 538 U.S. 216 (2003); *Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning Agency*, 535 U.S. 302 (2002); *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001); *City of Monterey v. Del Monte Dunes*, 526 U.S. 687 (1999); *Dolan v. City of Tigard*, 512 U.S. 374 (1994).

### C. Defining “Public Use”

Traditionally, courts have interpreted the public use requirement to allow the government, under its police powers,<sup>34</sup> to seize property to develop public necessities such as roads, utilities, hospitals, and other publicly used facilities.<sup>35</sup> Most of the outrage over *Kelo* focused on the fact that the government was taking land from private individuals and giving it to other private individuals for economic development with the anticipation that the new private individuals’ use would reap public benefits such as new jobs and increased tax revenue. While much disdained, the *Kelo* decision was simply a continuation of the consistent deference the Court has shown to publicly elected state<sup>36</sup> and federal entities in determining public uses.<sup>37</sup> Despite commentary to the contrary, this broad interpretation of a public use may be the best way to preserve private property rights.<sup>38</sup> If the interpretation of public use is too narrow, governments may resort to other powers, such as regulatory or tax powers, to achieve their goals without having to pay any compensation.<sup>39</sup> A broad interpretation of the Fifth Amendment, as in *Kelo*, however, allows governments to use eminent domain as they deem necessary as long as they provide just compensation to the injured parties. Prior to *Kelo*, the Court approved the use of eminent domain in two situations where the publicly seized land ended up in the hands of private owners.

### D. Supreme Court Precedent Paving the Way for *Kelo*

In *Berman v. Parker*,<sup>40</sup> the Court outlined its deference to elected bodies, stating, “The role of the judiciary in determining whether [eminent domain] power is being exercised for a public purpose is an extremely narrow one.”<sup>41</sup> The *Berman* Court approved the District of Columbia’s use of eminent domain to end “substandard housing and blighted areas” by allowing it to redevelop privately owned land and sell it to private parties.<sup>42</sup>

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34. Pa. Coal Co. v. Mahon, 260 U.S. 393, 414 (1922).

35. Kurlantzick, *supra* note 3, at 72.

36. The Takings Clause applies to the states through the incorporation of the Fifth Amendment via the Due Process Clause of the Fourteenth Amendment. *Dolan*, 512 U.S. at 406 (“[C]ases have interpreted the Fourteenth Amendment’s substantive protection against uncompensated deprivations of private property by the States as though it incorporated the text of the Fifth Amendment’s Taking Clause.”).

37. Although the Court shows great deference to federal and state legislatures, it has not completely relinquished its role and has noted that “the nature of a use, whether public or private, is ultimately a judicial question.” *Rindge Co. v. County of Los Angeles*, 262 U.S. 700 (1923).

38. *See infra* Part V.

39. *Id.*

40. 348 U.S. 26 (1954).

41. *Id.* at 32.

42. *Id.* at 32-33.

In 1945, Congress passed the District of Columbia Redevelopment Act “to provide for the replanning and rebuilding of slum, blighted, and other areas of the District of Columbia.”<sup>43</sup> In response, the National Capital Planning Commission identified an area in the southwest of the District of Columbia where more than fifty-seven percent of the buildings had outside toilets, more than sixty percent had no baths, and over sixty-four percent were deemed beyond repair.<sup>44</sup> The Planning Commission proposed to condemn the area to create a more attractive and safe community and to improve public health.<sup>45</sup> The plaintiff’s department store, while not itself a dilapidated housing building, fell within the parameters of the designated area and was thus subject to condemnation.<sup>46</sup> The plaintiff argued that it was unconstitutional to take his property because it was commercial and ultimately it was going into private hands for a private use.<sup>47</sup> The Court rejected the plaintiff’s arguments and held that the goal of redeveloping the blighted neighborhood was within congressional power and, “once the object is within the authority of Congress[,] the means by which it will be attained is also for Congress to determine.”<sup>48</sup> Thus, *Berman* clearly established that it is constitutionally acceptable for the government to use eminent domain to transfer private property from the hands of one private party to another when the goal is to achieve an appropriate public benefit.

The next public use case came thirty years later. In *Hawaii Housing Authority v. Midkiff*,<sup>49</sup> a unanimous Court affirmed *Berman*’s precedent and foreshadowed *Kelo*. In *Midkiff*, the Court continued its deference to the determinations of publicly elected bodies by rejecting the plaintiffs’ challenge to the Hawaii Legislature’s Hawaii Land Reform Act of 1967. This Act allowed the use of eminent domain to redistribute land from lessors to lessees, ending a long-standing land oligopoly in the state.<sup>50</sup> The Court stated that it would not substitute its judgment for that of the Hawaii Legislature regarding what is a public use “unless the use be palpably without reasonable foundation.”<sup>51</sup> Furthermore, the Court stated that “if a legislature, state or federal, determines there are substantial reasons for an exercise of the taking power, courts must defer to its determination that the taking will serve a public use.”<sup>52</sup>

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43. Act of Aug. 2, 1946, 79 Pub. L. No. 592, 60 Stat. 790 (1945).

44. *Berman*, 348 U.S. at 30.

45. *Id.*

46. *Id.*

47. *Id.* at 31.

48. *Id.* at 33.

49. 467 U.S. 229 (1984).

50. *Id.* at 245.

51. *Id.* at 241.

52. *Id.* at 244 (quoting *United States v. Gettysburg Elec. Ry. Co.*, 160 U.S. 668 (1896)).

In *Midkiff*, Hawaii was attempting to break up a historically created land oligopoly that had resulted in ownership of forty-seven percent of Hawaiian property by a mere seventy-two individuals.<sup>53</sup> The law allowed the Hawaii Housing Authority to condemn certain property to enable current lessees to purchase it from the lessors.<sup>54</sup> Not surprisingly, the lessors challenged the law as an unconstitutional use of eminent domain because it resulted in private property being placed in the hands of other private individuals.<sup>55</sup> Foreshadowing *Kelo*, the Court rejected this argument and held that a public use can still be served even if the property ends up in the hands of private individuals.<sup>56</sup> *Midkiff*, in keeping in line with *Berman*, continued the Court's deference to a publicly elected body's determination regarding the appropriate goal and how best to achieve it. Here, the public purpose of breaking up the land oligopoly was served by redistributing the land through forced sales. In *Kelo*, the Court would go one step further by allowing an *anticipated* public benefit to suffice.

### III. THE *KELO* DECISION

In *Kelo*, the Court followed "a century of precedent"<sup>57</sup> when it considered whether the city of New London's use of eminent domain to acquire property from unwilling sellers to further a development plan qualified as a public use under the Fifth Amendment.<sup>58</sup> The Court considered three questions: 1) whether the taking constituted a public purpose;<sup>59</sup> 2) whether the Court should adopt a bright-line rule that economic development does not qualify as a public purpose;<sup>60</sup> and 3) whether the Court should require a reasonable certainty that the expected benefits will accrue before approving the taking.<sup>61</sup>

The property in question was located in the Fort Trumbull area of the city.<sup>62</sup> Fort Trumbull housed the Naval Undersea Warfare Center until the federal government closed it in 1996.<sup>63</sup> Even before the closing of the Center and the resultant firing of 1500 people, the state had designated the area as a "distressed municipality."<sup>64</sup> The state and city asked the New London Development Corporation (NLDC), a non-profit development agency created by the city, to try

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53. *Id.* at 232.

54. *Id.* at 233.

55. *Id.* at 243.

56. *Id.* at 245.

57. *Kelo v. City of New London*, 545 U.S. 469, 490 (2005).

58. The Fifth Amendment provides: "[N]or shall private property be taken for public use, without just compensation." U.S. CONST. amend. V.

59. *Kelo*, 545 U.S. at 477.

60. *Id.* at 484.

61. *Id.* at 487.

62. *Id.* at 473.

63. *Id.*

64. *Id.*

to revitalize the area's economy. The NLDC, with the help of funding through bonds, created Fort Trumbull State Park.<sup>65</sup> In addition, Pfizer, Inc. announced plans to build a \$300 million research facility immediately adjacent to the Fort Trumbull area.<sup>66</sup> The NLDC then submitted a plan to build a waterfront conference hotel, restaurants, stores, marinas for recreational and commercial usage, eighty new residences, a United States Coast Guard museum, and 90,000 square feet for research and development office space and other facilities.<sup>67</sup> To achieve their goal, the NLDC purchased most of the property in the ninety-acre area.<sup>68</sup> However, there were nine homeowners who refused to sell their property. The NLDC then exercised the city's power of eminent domain to acquire the remaining property, which the property owners challenged.<sup>69</sup>

The petitioners included Susette Kelo, who had lived in her Fort Trumbull area home since 1997, Wilhelmina Dery, who was born in her home in 1918 and lived in it her whole life, and seven other homeowners.<sup>70</sup> They argued that the city's use of eminent domain to further economic development violated the public use requirement in the Fifth Amendment and urged the Court to adopt a bright-line rule stating that economic development could never qualify as a legitimate public use.<sup>71</sup>

The City of New London argued that its plan would serve a public use because it was "projected to create in excess of 1,000 jobs, to increase tax and other revenues, and to revitalize an economically distressed city."<sup>72</sup> Thus, while the condemned property was not being turned over directly to the public or a public entity, the anticipated economic advantages that would flow from the redevelopment of the area would benefit the public.

In a divided court,<sup>73</sup> Justice Stevens wrote the majority opinion, which was joined by Justices Souter, Kennedy, Ginsburg, and Breyer, holding that the plan "unquestionably serves a public purpose" and thus the proposed takings were constitutional under the Fifth Amendment.<sup>74</sup> The Court recognized that "it has long been accepted that the sovereign may not take the property of *A* for the sole purpose of transferring it to another private party *B*, even though *A* is paid just compensation."<sup>75</sup> In this case, however, the Court found that even though the taking resulted in the transfer of private property from the hands of one group of private individuals to the hands of another group of private individuals, the

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65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.* at 475.

69. *Id.*

70. *Id.*

71. *Id.* at 484.

72. *Id.* at 475 (quoting *Kelo v. City of New London*, 843 A.2d 500, 507 (Conn. 2004)).

73. *Kelo* was a five to four decision with Justices O'Connor and Thomas filing dissents. *Id.* at 471.

74. *Id.* at 484.

75. *Id.* at 477.

transfer was permissible. It held the transfer was part of a “carefully considered” plan that was designated to benefit the community as a whole and not just one individual.<sup>76</sup> Thus, the difference between an unconstitutional transfer of property between two private individuals and a constitutional one seems to lie in the motives of the political bodies and the anticipated beneficiaries. Justice Kennedy, in his separate opinion, elaborated on this point, making it clear that if the government’s intent had been to confer private benefits onto private parties, the taking would be unconstitutional.<sup>77</sup> Therefore, although benefits arguably flow to private parties in situations like *Kelo*, where the intent is to construe benefits on the public as a whole, as in *Berman*, *Midkiff*, and *Kelo*, the taking is constitutional.

The Court also rejected the petitioners’ request for the adoption of a bright-line rule against allowing economic development to serve as a public purpose because it would create an artificial restraint on the concept of public use.<sup>78</sup> The Court noted that it has long considered economic development to be an appropriate use of eminent domain and, “[c]learly, there is no basis for exempting economic development from [its] traditionally broad understanding of public purpose.”<sup>79</sup>

In addition, the Court rejected requiring some level of reasonable certainty that the expected benefits will actually accrue, holding such a requirement would hinder the ability of governments to exercise the power of eminent domain.<sup>80</sup> The Court noted that a holding that required postponing a judicial ruling on every alleged taking until this level of certainty had been met would “unquestionably impose a significant impediment to the successful consummation of many such plans.”<sup>81</sup>

The controversial nature of this decision is clearly exhibited in the dissenting opinions written by Justices O’Connor and Thomas. Justice O’Connor, joined by Justices Rehnquist, Scalia, and Thomas, argued that the decision abandoned the long-term holding that the government may not take property from *A* and give it to *B*<sup>82</sup> and that *Kelo*’s broad interpretation effectively deleted the words “public use” from the Takings Clause.<sup>83</sup> She distinguished *Berman* and *Midkiff* by stating that the language the *Kelo* Court relied on as precedent from those opinions was actually “unnecessary” and even “errant” dicta.<sup>84</sup> She further distinguished those cases as examples where the pre-condemnation nature of the properties

76. *Id.*

77. *Id.* at 492 (Kennedy, J., concurring).

78. *Id.* at 487-88 (majority opinion).

79. *Id.* at 485.

80. *Id.* at 488.

81. *Id.*

82. *Id.* at 494 (O’Connor, J., dissenting).

83. *Id.*

84. *Id.* at 501.

themselves necessitated the taking of the property to serve the public purpose: the blighted condition in *Berman* and the unfair land distribution in *Midkiff*.<sup>85</sup>

In his dissent, Justice Thomas went a step further and stated his belief that the Court should reconsider all of the current eminent domain cases, including *Berman* and *Midkiff*, which, in his view, have “strayed from the Clause’s original meaning.”<sup>86</sup> He then focused on his interpretation of the original meaning of the Fifth Amendment and what he considered its “natural reading” to find that the Court had created much too broad an interpretation of “public use.”<sup>87</sup> Finally, he argued that *Kelo* rendered the public use requirement of the Fifth Amendment a “virtual nullity.”<sup>88</sup> Both dissenting opinions attempt to distinguish or question the very validity of the Court’s eminent domain precedent. Justice O’Connor’s attempt to discredit the persuasive language of *Midkiff* and *Berman* failed to attract the support of the majority of the Court. In any event, as a result of the *Kelo* decision, the language she discredited is now binding precedent. Her attempt to factually distinguish the intended uses of the properties also failed to persuade a majority of the Court. In all three cases, the elected bodies were attempting to meet a public need best served by transferring ownership of the properties. Furthermore, if the Court is to follow its practice of deferring to the judgment of publicly elected bodies, it should not question the particular use of each plot of land, but rather, as in *Kelo*, make sure that the taking is part of a well-considered plan motivated to benefit the public as a whole. Justice Thomas’ desire to revisit the Court’s eminent domain jurisprudence and apply a different historical interpretation of the Fifth Amendment may come to pass someday, but at this time it appears he is alone on the Court in holding that novel view.

Overall, the *Kelo* decision correctly stands for the proposition that the Court will give great deference to a legislative body’s decision to use eminent domain and continue to apply a broad interpretation of the Fifth Amendment’s “public use” clause to mean any “public purpose,” even one that is speculative. While it is always disturbing to hear of someone’s home being taken by the government, our society has long held that sometimes the rights and interests of the individual must give way to the greater good.<sup>89</sup> Despite the uproar indicating the contrary, the *Kelo* ruling adhered closely to precedent in this area and was an example of the Court deferring to the determinations of politically elected bodies regarding the public’s best interest; it was not the Court engaging in judicial activism. In fact, two months after issuing the ruling, Justice Stevens told an audience that had he been a legislator, instead of a judge bound by precedent, he would have

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85. *Id.* at 498-99.

86. *Id.* at 506 (Thomas, J., dissenting).

87. *Id.* at 508-14.

88. *Id.* at 506.

89. Alberto B. Lopez, *Weighing and Reweighing Eminent Domain’s Political Philosophy*, 41 WAKE FOREST L. REV. 237, 243-44 (2006) (discussing how our nation was shaped by a belief that individual interests were to be sacrificed for the greater good).

voted differently.<sup>90</sup> The *Kelo* Court, perhaps anticipating the public uproar the opinion would generate, clearly passed the baton to the legislative branch to determine what limits there should be on eminent domain, stating, “nothing in our opinion precludes any State from placing further restrictions on its exercise of the takings power.”<sup>91</sup> Thus, in a misguided flurry, state and federal legislatures picked up the baton and ran with it.

#### IV. FEDERAL LEGISLATIVE RESPONSE TO THE *KELO* RULING

Immediately following the *Kelo* ruling, Congress appeared to spring into action in such a forceful manner that the Washington Post dubbed Congress’s action “an unprecedented uprising to nullify a decision by the highest Court in the land.”<sup>92</sup> The *New York Times* called it “a rare display of unanimity that cuts across partisan and geographic lines.”<sup>93</sup> This bi-partisan effort included pairing members from opposite sides of the political spectrum, such as placing conservative Republican Speaker of the House Tom DeLay with liberal Democratic Representative Maxine Waters.<sup>94</sup> The House of Representatives took the unusual step of adopting by a vote of 365 to 33 a resolution deploring the Court’s ruling and stating that state and local governments “should not construe *Kelo* as justification to abuse the power of eminent domain.”<sup>95</sup> Although this act may seem insignificant, it may actually have been the most appropriate path for Congress to take: it reminded governments they should not abuse the eminent domain power, but it did not create any new laws or requirements.

The majority of the congressional criticism seemed to focus on the Court’s approval of “economic development” as an appropriate public purpose.<sup>96</sup> Many politicians denounced the ruling as an attack on African Americans, homeowners, small business owners, and poor people and even called the decision “anathema to our basic core values.”<sup>97</sup> Senate Judiciary Committee Chairman F. James Sensenbrenner, Jr. went so far as to compare it with one of the most reviled judicial decisions of all times by calling it the “Dred Scott of the 21st Century.”<sup>98</sup>

In addition to the verbal lambasting of the decision, senators and representatives introduced fourteen unnecessary bills in the House and Senate

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90. John M. Broder, *States Curbing Right to Seize Private Homes*, N.Y. TIMES, Feb. 21, 2006, at A1.

91. *Kelo*, 545 U.S. 489 (majority opinion).

92. Kenneth R. Harney, *Eminent Domain Ruling Has Strong Repercussions*, WASH. POST, July 23, 2005, at F1.

93. John M. Broder, *supra* note 90, at A1.

94. Mike Allen & Charles Babington, *House Votes to Undercut High Court on Property*, WASH. POST, July 1, 2005, at A1.

95. H.R. Res. 340, 109th Cong. (2005).

96. See, e.g., Jennifer Dobner, *Utah Senator to Introduce Federal Property Rights Bill*, AP PRESS ST. & LOC. WIRE, July 6, 2005, at A1 (quoting Utah Senator Orin Hatch).

97. David Lightman, *Lawmakers Stand up to Court, Bipartisan Coalitions Hope to Dilute Impact of Eminent Domain Ruling*, HARTFORD COURANT, July 1, 2005, at A1 (quoting Texas Senator John Cornyn).

98. *Id.* (referring to *Scott v. Sandford*, 60 U.S. 393 (1857), which was repudiated in Fourteenth Amendment to the United States Constitution).

that would place different types of limits or restrictions on eminent domain.<sup>99</sup> However, despite the vocal condemnations and flurry of bill writing, in the year following the *Kelo* ruling, Congress passed only one federal law addressing the issue, and it came in the form of an amendment restricting the use of funds in an appropriations bill.

On November 30, 2005, President Bush signed House Resolution 3058 into law.<sup>100</sup> The Act approved funding for the Departments of Transportation, Treasury, and Housing and Urban Development, the Judiciary, the District of Columbia, and other independent agencies for fiscal year 2006.<sup>101</sup> The funding provision clearly refutes the *Kelo* ruling by providing that none of the money appropriated to these agencies “may be used to support any Federal, State, or local projects that seek to use the power of eminent domain, unless eminent domain is employed only for a public use . . . [F]or purposes of this section, public use shall not be construed to include economic development that primarily benefits private entities.”<sup>102</sup> Thus, Congress used one of its most powerful weapons, the power of the purse, to restrict the ability of several federal agencies to use federal funding in *Kelo*-type situations where the property is going to be used by other private parties for economic development. This law does address the issue, but does not go as far as one might expect given the vehement denunciations made by so many legislators.

There were two significant bills introduced in the Senate but neither made it beyond the Senate Judiciary Committee. The first, House Resolution 4128, the Private Property Rights Protection Act of 2005,<sup>103</sup> would have penalized state and local governments that use eminent domain to obtain private property that is later used for economic development by denying them federal economic funds for a two-year period. This bill passed in the House by a 378 to 38 margin on November 3, 2005, but never made it beyond the Senate Judiciary Committee. The bill was too harsh in its scope. It would have deterred local governments from exercising the long-established right to use eminent domain for actions such as revitalizing blighted areas.<sup>104</sup>

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99. See Am. Planning Ass’n, *Federal Eminent Domain Legislation in the 109th Congress: Status of Key Bills*, <http://www.planning.org/policyconference/pdf/eminentdomainchart.pdf> (last visited Apr. 9, 2007) (on file with the *McGeorge Law Review*) (listing the proposed bills: S.B. 1313, S.B. 1704, S.B. 1883, H.R. 3058, H.R. 340, H.J. Res. 340, H.R. 3083, H.R. 3087, H.R. 3135, H.R. 3315, H.R. 3405, H.R. 4088, and H.R. 4128).

100. Transportation, Treasury, Housing and Urban Development, The Judiciary, The District of Columbia, and Independent Agencies Appropriations Act, Pub. L. No. 109-115, 119 Stat. 852 (2005).

101. *Id.*

102. *Id.*

103. H.R. Res. 4128, 109th Cong. (2005).

104. An example of the successful use of eminent domain to revitalize a blighted area can be found in the author’s former hometown of Silver Spring, Maryland. See Andrew Ackerman, *Voters in 10 States Pass Measures to Curb Eminent Domain*, 358 BOND BUYER 7 (Nov. 9, 2006) (quoting the director of the Montgomery County Finance Department as saying that eminent domain was an “important tool” in completing this transformation).

The second bill, Senate Bill 1313, Protection of Homes, Small Businesses, and Private Property Act of 2005, would have prevented states from using federal funds in any way to exercise eminent domain for economic development purposes.<sup>105</sup> It was introduced in the Senate on June 27, 2005 and it also never left the Senate Judiciary Committee.<sup>106</sup> It too shared the flaw of being overbroad in scope and deterring states from using the eminent domain power in ways that may be necessary for the public good.

Despite the limited success of the 109th Congress, when the 110th Congress convened in 2007, it once again tackled the issue by introducing new legislation. There are two bills that specifically address *Kelo*: The Private Property Rights Protection Act<sup>107</sup> and the Strengthening the Ownership of Private Property Act of 2007 (“STOPP Act”).<sup>108</sup> The Private Property Protection Act was introduced in the House on January 4, 2007 and was referred to a committee. It specifically denounces *Kelo* and would deny federal funds for the use of eminent domain for other than a narrowly defined “public purpose” or “public use.”<sup>109</sup> The STOPP Act, which was introduced in the Senate on February 4, 2007, would prohibit the use of eminent domain to take property from one private entity and give it to another except in a few limited cases, such as building a prison or a hospital, or in instances of a natural emergency.<sup>110</sup> As of April 2007, both bills were sitting in committees. The introduction of these bills so close to the opening of the new congressional term shows that this issue is still very much on the minds of congressional members. It will be interesting to see if, unlike their predecessors in the 109th Congress, the members of the 110th Congress will enact these bills into law.

Thus, despite strong words and much grandstanding, so far, the only congressional limitation passed to limit the federal government’s use of eminent domain has been to restrict the spending of a handful of government agencies. Congress can rarely be praised for inaction, but in this case, public denunciation of the *Kelo* opinion followed by little actual change has been the appropriate response. Any law Congress enacts and the President signs that seeks to overrule *Kelo* would almost certainly be overturned as unconstitutional by the Supreme Court.<sup>111</sup> Furthermore, while laws that do not directly seek to overturn *Kelo* but

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105. Protection of Homes, Small Businesses, and Private Property Act of 2005, S.B. 1313, 109th Cong. (2005).

106. *Id.*

107. Private Property Rights Protection Act, S. 48, 110th Cong. (2007), available at <http://www.govtrack.us/congress/bill.xpd?bill=s110-48> (last visited May 7, 2007).

108. Strengthening the Ownership of Private Property Act of 2007, H.R. 926, 110th Cong. (2007), available at <http://www.govtrack.us/congress/bill.xpd?bill=s110-48> (last visited May 7, 2007) [hereinafter STOPP Act].

109. Private Property Rights Protection Act, *supra* note 107.

110. STOPP Act, *supra* note 108.

111. Bernard Bell, *Legislatively Revising Kelo v. City of New London: Eminent Domain, Federalism, and Constitutional Powers*, 32 J. LEGIS. 165, 182 (2006).

instead seek to limit or whittle down the uses of eminent domain might be constitutionally permissible,<sup>112</sup> they would be ill-advised.

Professors Abraham Bell and Gideon Parchomovsky persuasively argue that attacking the eminent domain power is “misguided,” will actually harm rather than help property owners, and will discourage governments from creating publicly needed projects.<sup>113</sup> They contend that the government can achieve its land use goals through its powers of regulation and taxation without paying compensation to private property owners; thus, eminent domain is actually the least damaging route the government can use because it is the only one that guarantees compensation.<sup>114</sup> Therefore, congressional criticism coupled with legislative inaction enabled the public to know that their representatives understood their dissatisfaction with the Court’s ruling yet did not create unnecessary or unconstitutional legislation. The state legislatures, however, were a bit more fruitful in their legislative responses to the *Kelo* ruling.

#### V. STATE LEGISLATIVE RESPONSES TO *KELO*

Just as *Kelo* caused an immediate backlash in Congress, it also “set off a landslide of legislation in statehouses around the country.”<sup>115</sup> In all, forty-seven states introduced more than 325 measures addressing eminent domain in the year following *Kelo*.<sup>116</sup> In California alone, there were eleven bills addressing eminent domain introduced during the 2005-2006 session.<sup>117</sup> “I have never seen a response to a Supreme Court decision this dramatic,” said Larry Morandi, a land use specialist for the National Conference of State Legislatures.<sup>118</sup> The problem with state legislation, however, is that it often is not clear enough to offer any real protections. Also, it has been shown that there is not necessarily a correlation between state regulation, or lack thereof, and the exercise of eminent domain.<sup>119</sup> Thus, while public outrage clearly spurred new state legislation, the states may have been going in the wrong direction. Rather than encouraging legislators to pass bills and constitutional amendments, which may require interpretation by the courts and adherence by elected officials, people should instead focus their

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112. See *id.* (discussing the possible different constitutional bases for such limitations and the potential problems of each).

113. Abraham Bell & Gideon Parchomovsky, *The Uselessness of Public Use*, 106 COLUM. L. REV. 1412, 1415-16 (2006).

114. *Id.*

115. Elizabeth Mehren, *States Acting to Protect Private Property*, L.A. TIMES, Apr. 16, 2006, at A1.

116. *Id.*

117. California Redevelopment Association, *Legislative Bill Report 2005-2006 California State and Federal Legislation Key Eminent Domain Bills*, July 12, 2006 (referencing AB 1162, AB 1990, ACA 15, ACA 22, SB 53, SB 1210, SB 1650, SB 1809, SCA 15, SCA 20, and SCA 24).

118. Mehran, *supra* note 115, at A1.

119. Daniel Cole, *Why Kelo Is Not Good News for Local Planners and Developers*, 22 GA. ST. U. L. REV. 803, 829 (2006) (discussing the great variance in states’ willingness to use eminent domain despite the availability of state law).

efforts on electing individuals who will responsibly exercise the eminent domain power.

Nevertheless, during the year following *Kelo*, legislatures in twenty-eight states passed bills addressing eminent domain, twenty-four of which were enacted, one of which was awaiting signature of the governor, and two of which were vetoed by the governor.<sup>120</sup> In the November 2006 elections, ten states, Arizona, Florida, Georgia, Louisiana, Michigan, New Hampshire, Nevada, North Dakota, Oregon and South Carolina, passed constitutional amendments or citizen initiatives limiting their states' abilities to use eminent domain.<sup>121</sup> Measures in California, Idaho, and Washington addressing eminent domain and regulatory takings failed.<sup>122</sup>

Although the states agreed with the need to quickly adopt new legislation curtailing the use of eminent domain, they took many different approaches in addressing the issue. The different legislative approaches can be placed into five general categories: 1) prohibiting the use of eminent domain for economic development; 2) narrowly defining public use; 3) limiting eminent domain to blighted properties; 4) increasing the procedural requirements involved in exercising eminent domain; and 5) creating committees or taskforces to study the issue. Some of the states limited their laws to one of the above categories<sup>123</sup> while others passed laws encompassing all five.<sup>124</sup> For the reasons discussed below, each category represents a flawed attempt to fix a problem that does not require legislative redress.

In the first category, the states clearly rejected the *Kelo* ruling by prohibiting the use of eminent domain for economic development, such as increased tax revenue, additional jobs, or the transfer of property to a private party.<sup>125</sup> These states, including Alaska, Idaho, Illinois, Kansas, Maine, Missouri, Nebraska, New Hampshire, South Dakota, Tennessee, Vermont, and West Virginia, repudiated the reasoning in *Kelo* and made clear that in their states, anticipated

120. Brian Mitchell, *Property Owners Win and Lose in the Year After Kelo Case Ruling*, INVESTOR'S BUS. DAILY, June 22, 2006, at A1; NAT'L CONFERENCE OF STATE LEGISLATURES, EMINENT DOMAIN 2006 STATE LEGISLATION, Sept. 12, 2006, <http://www.ncsl.org/programs/natres/emindomainleg06.htm> (on file with the *McGeorge Law Review*).

121. Castle Coalition, *2006 Election Wrap Up: Voters Overwhelmingly Passed Eminent Domain Reform*, Nov. 8, 2006, [http://www.castlecoalition.org/media/releases/11\\_8\\_06pr.html](http://www.castlecoalition.org/media/releases/11_8_06pr.html) (on file with the *McGeorge Law Review*); see also John Hill, *Mixed Verdict Nationwide on Eminent Domain Proposals*, SACRAMENTO BEE, Nov. 9, 2006, at A11.

122. Hill, *supra* note 121, at A11; Castle Coalition, *supra* note 121.

123. See, e.g., ALASKA STAT. §§ 09.55.240(d), 29.030(b) (2006) (prohibiting the use of eminent domain for economic development with certain exceptions).

124. See, e.g., 2006 Ind. Legis. Serv. P.L. 163 (2006).

125. See ALASKA STAT. §§ 09.55.240(d), 29.35.030; IDAHO CODE ANN. § 7-701(A)(2) (2006); KY. REV. STAT. ANN. § 416.675(3) (West 2007); ME. REV. STAT. ANN. Tit. 1, § 816 (2007); MO. REV. STAT. § 523.271 (2006); NEB. REV. STAT. § 76-710.04 (2007); N.H. REV. STAT. ANN. § 162-K:2(IX-a)(b) (2007); S.D. CODIFIED LAWS § 11-7-22.1 (2007); TENN. CODE ANN. § 29-17-102(2) (2006); VT. STAT. ANN. Tit. 12, § 1040(a) (2007); W. VA. CODE § 54-1-2(11) (2007); S.B. 323, 2006 Leg. Reg. Sess. (Kan. 2006); S.B. 3086, 95th Gen. Assemb., Reg. Sess. (Ill. 2006) (awaiting the governor's signature).

increases in tax revenues or jobs would not be enough to qualify as public use. If used alone, this approach goes too far and will leave states hamstrung if they need to revitalize blighted areas and find themselves without options other than transferring the blighted property into private hands.

In the second category, states adopted laws specifically defining “public use” as the use or possession of property by public entities or the public at large.<sup>126</sup> These states, Florida, Iowa, Kentucky, Maine, New Hampshire, and Tennessee, refused to accept the broad definition of public use adopted by the *Kelo* Court and mandated a more narrow definition of public use as one where the public directly benefits from the taking. The problem with this approach lies in the inability of a state legislature to correctly anticipate all of the public uses that it may one day deem necessary in the public interest. Thus, the definition either ends up too narrowly drawn or so broadly drawn that it will simply end up back in the courts for judicial interpretation of an appropriate public use. Granted, the courts will have more legislative history and legislative guidance to inform their rulings, but the ultimate decision-maker will still be the courts.

The third category specifically explores, and sometimes limits, the use of eminent domain to remove blight or other health or safety concerns.<sup>127</sup> Most of the states adopting this approach, including Alabama, Missouri, Tennessee, and Wisconsin, prohibit the use of eminent domain to acquire non-blighted properties such as the homes at issue in *Kelo*. Blight is generally defined as a condition of the property that creates health and safety hazards.<sup>128</sup> This category is too restrictive and forecloses the possibility that the government may be able to condemn non-blighted property when necessary to further the public interest. It also smacks of elitism to say that only poor and run-down properties may be subject to public need while the wealthier areas will not be subject to government seizure for the greater good.

The fourth category of legislation makes changes to the eminent domain procedure practiced within states without addressing the issues in *Kelo*. Instead, Kansas, Missouri, and West Virginia aimed to increase public involvement through more hearings or increased public notice prior to the exercise of eminent domain.<sup>129</sup> In the event the enhanced procedures fail to prevent the exercise of eminent domain, several states tried to take the sting out of the taking. For example, Indiana provides that compensation for the taking of a person’s home be 150% of the fair market value<sup>130</sup> while Kansas requires 200% of the fair

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126. See FLA. STAT. § 73.013 (2006); H.F. 2351, 81st Leg., Reg. Sess. (Iowa 2006); KY. REV. STAT. ANN. § 416.675(2) (West 2006); ME. REV. STAT. ANN. Tit. 1, § 816 (2007); N.H. REV. STAT. ANN. § 162-K:2(IX-a)(a) (2007); TENN. CODE ANN. § 29-17-102(2) (2007).

127. See ALA. CODE §§ 24-2-2, 24-3-2 (2007); MO. REV. STAT. § 523.271 (2006); TENN. CODE ANN. § 29-17-102(2)(C) (2007); WIS. STAT. § 32.03(6) (2006).

128. See, e.g., ALA. CODE § 24-2-2(c) (2007); WIS. STAT. § 32.03(6) (2007).

129. S.B. 323, 2006 Leg., Reg. Sess. (Kan. 2006); H.B. 1944, 93d Gen. Assemb., 2d Reg. Sess. (No. 2006); W. VA. CODE § 16-18-6, 51-1-2a (2006).

130. IND. CODE § 32-24-4.5-8(2)(A) (2006).

market value.<sup>131</sup> Additionally, Iowa included a provision enabling the original owner to buy back his or her property if it is not put to a public use within five years of the taking.<sup>132</sup>

The statutes that attempt to make the eminent domain process more transparent and open to public debate are probably the best of the bunch. They will help ensure that the public is able to participate and see the role its government representatives play. If citizens attend hearings and participate only to see their opinions and wishes ignored, they can then hold those representatives accountable in the next election. These statutes are also not direct attacks on the *Kelo* ruling and, instead, attempt to lessen the use and effects of eminent domain takings. Furthermore, they do not directly change the practice of eminent domain. Instead, they allow for greater public participation in the eminent domain process, which may lengthen the condemnation process, but may also lead to better decision-making by the government and less anger on the part of citizens. The statutes increasing compensation, however, are misguided. While the intent behind them may be valid, to lessen the pain of those whose property is being taken and make the action less desirable for the government, the actual result penalizes taxpayers who end up paying higher rates.

Finally, exercising the ultimate in political caution, some states passed legislation placing a moratorium on the use of eminent domain within the state to allow committees or task forces to study the issue and make recommendations.<sup>133</sup> These states, Indiana and Utah, acknowledge their concern about the practice of eminent domain and are seeking further input prior to acting.<sup>134</sup> It is hard to judge the effectiveness of the moratoriums until the committees and task forces have made their recommendations and the states have decided what action, if any, to take.

Under the state laws in the first three categories, the factual situation in *Kelo* would have been resolved differently. New London would not have been able to claim the anticipated economic benefits of the project as a public use and it would not have been able to seize the non-blighted homes. It is unclear how the laws falling into the fourth category would have affected *Kelo* as the city had already held hearings and given public notice prior to the takings, and the amount of compensation was not addressed by the Court. The states adopting laws falling into the fifth category are still awaiting recommendations so it is uncertain what their ultimate effect will be. Overall, in the year following *Kelo*, the state legislatures in less than a third of the states adopted eminent domain laws more restrictive than the Supreme Court outlined.

Interestingly, despite the surge in state legislation, local governments appear to be exercising their eminent domain power more frequently. A study by the

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131. S.B. 323, 2006 Leg., Reg. Sess. (Kan. 2006).

132. H.F. 2351, 81st Leg., Reg. Sess. (Iowa 2006).

133. S.B. 117, 2006 Gen. Sess. (Utah 2006); H.B. 1010, 114 Gen. Assemb., 2d Leg. Sess. (Ind. 2006).

134. *Id.*

Institute of Justice reported that since *Kelo*, 5783 properties have been seized or condemned, which is two-and-a-half times greater than the number of condemnations between 1998 and 2002.<sup>135</sup> This increase may be attributed to the publicity surrounding the Supreme Court's ruling in *Kelo*, which may have emboldened local governments and discouraged citizens from fighting the condemnations. In any event, the most direct and definite approach for the states to combat abuse of eminent domain is to ensure that state and local lawmakers only use it in appropriate cases. This area is particularly ripe for accountability as it is much easier for individuals to participate in the local lawmaking process. Citizens can attend city council or town hall meetings, meet with representatives, and have a much larger impact on local elections. It remains to be seen how the slate of new laws will be applied and interpreted, so it is important for voters to remain involved and hold local and state leaders accountable for their stances on eminent domain cases.

## VI. PRESIDENTIAL RESPONSE TO *KELO*

President Bush joined the side of those condemning the *Kelo* ruling by issuing an executive order providing more symbolic support than actual impact. His actions also proved the inadequacy of legislative responses. On June 24, 2006, the one-year anniversary of the *Kelo* ruling, President Bush signed an executive order entitled "Protecting the Property Rights of the American People."<sup>136</sup> This order prohibits the federal government from taking private property, even with just compensation, "for the purpose of advancing the economic interest of private parties."<sup>137</sup> The order specifically allows the use of eminent domain for public purposes, such as hospitals, roads, parks, and forests.<sup>138</sup>

Although the order clearly rejects the type of taking allowed in *Kelo*, its actual effect is more likely to be symbolic than substantive. Republican Senator John Cornyn praised the order but noted the limited role that the federal government plays in these types of projects.<sup>139</sup> Doug Kendall, executive director of the Community Rights Council, went even further by stating, "This order appears to apply to a null, or virtually null set of government actions . . . I'm not aware of any federal government agency that takes property for economic development."<sup>140</sup> However, by issuing the order, President Bush joins the anti-

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135. Mitchell, *supra* note 120, at A1.

136. Exec. Order No. 13,406, 71 Fed. Reg. 124 (June 28, 2006).

137. *Id.*

138. *Id.*

139. *Bush Signs Executive Order Limiting Eminent Domain Powers of Federal Government*, FOX NEWS, June 24, 2006, [http://www.foxnews.com/printer\\_friendly\\_story/0,3566,200832,00.html](http://www.foxnews.com/printer_friendly_story/0,3566,200832,00.html) (on file with the *McGeorge Law Review*).

140. Jennifer Loven, *Bush Order Would Limit Property Seizures*, ABC News, <http://www.abcnews.go.com/Politics/print?id=2112909> (last visited July 6, 2006) (on file with the *McGeorge Law Review*).

*Kelo* camp and makes it clear that, should the occasion ever arise, the federal government will not be allowed to enjoy the leeway *Kelo* provided.

One area where the President could have a real impact on the issue of eminent domain is in appointing new Justices to the Supreme Court. Since the *Kelo* ruling, President Bush has appointed two Justices to the Supreme Court: Chief Justice John Roberts and Associate Justice Samuel Alito. Although the *Kelo* decision was frequently discussed during both of their confirmation hearings,<sup>141</sup> their views on eminent domain are unlikely to be decisive at this point because they replaced Chief Justice William Rehnquist and Associate Justice Sandra Day O'Connor, who were both in the *Kelo* dissent. Thus, even if Chief Justice Roberts and Justice Alito adhere to a less deferential view of eminent domain power, it will not change the status quo unless another Justice changes his or her view. In the event, however, that President Bush is able to appoint another Justice to the Court, his or her position on *Kelo* could be decisive.

## VII. JUDICIAL AFTERMATH OF *KELO*

### A. *The State Judicial Response*

Disagreement with the *Kelo* ruling was not limited to the legislative and executive branches. The Ohio Supreme Court, the first state supreme court to address the *Kelo* ruling directly,<sup>142</sup> criticized its reasoning and applied a more narrow definition of "public use" in interpreting the Takings Clause of the Ohio Constitution. In *Norwood v. Horney*,<sup>143</sup> the Ohio Supreme Court unanimously rejected the reasoning of *Kelo* and held that, "although economic factors may be considered in determining whether private property may be appropriated, the fact that the appropriation would provide an economic benefit to the government and the community, standing alone," was not enough to constitute a public use under the Takings Clause of the Ohio Constitution.<sup>144</sup> The *Norwood* court correctly noted that it was not bound by the *Kelo* ruling because it was interpreting the Takings Clause of the Ohio Constitution and not the United States Constitution.<sup>145</sup>

A consulting firm retained by the City of Norwood had designated the Norwood neighborhood in question a "deteriorating area."<sup>146</sup> The city adopted that designation and held a number of public hearings before deciding to use

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141. See, e.g., 152 CONG. REC. S35, S57, S145, S174, S189, S235, S536 (2006); 151 CONG. REC. S10,481, S10,529, S10,631, S10,635, S10,565 (2005).

142. Ian Urbina, *Ohio Supreme Court Rejects Taking of Homes for Project*, N.Y. TIMES, July 27, 2006, at A5.

143. *Norwood v. Horney*, 853 N.E.2d 1115, 1135-36 (Ohio 2006).

144. *Id.* at 1123.

145. *Id.* at 1136.

146. *Id.* at 1125.

eminent domain to appropriate the appellants' property as part of a redevelopment plan.<sup>147</sup> The appellants filed suit and the trial court deferred to the city's determination that the expected economic benefits from the appropriation would constitute a public use.<sup>148</sup> The Ohio Supreme Court wrote a detailed analysis of the shifting interpretations of "public use" and approvingly cited Justice O'Connor's dissent in *Kelo*.<sup>149</sup> The court then rejected the notion that the city's determination was entitled to deference and held that "any taking based solely on financial gain is void as a matter of law, and [that] the courts owe no deference to a legislative finding that the proposed taking will provide financial benefit to a community."<sup>150</sup> Thus, the *Norwood* court looked at a factual situation very similar to *Kelo*, acknowledged the Supreme Court's rulings, and went the other way by finding economic benefit to be too broad an interpretation of the intended definition of public use. *Norwood* exemplifies that additional legislation is not needed for state court judges to adopt and follow their own standards of review.

In addition to Ohio, twenty-nine other state court opinions had referenced the *Kelo* ruling as of April 2007. Of those, eight distinguished *Kelo*,<sup>151</sup> one followed it,<sup>152</sup> and thirty-four merely cited it.<sup>153</sup> Given the greater accountability state

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147. *Id.* at 1125-26.

148. *Id.* at 1136.

149. *Id.* at 1140.

150. *Id.* at 1142.

151. *Pima County v. Clear Channel Outdoor, Inc.*, 127 P.3d 64, 66 (Ariz. Ct. App. 2006); *Cornerstone Group XXII, L.L.C. v. Wheat Ridge Urban Renewal Auth.*, 151 P. 3d 601 (Colo. Ct. App. 2d 2006); *Small v. Going Forward, Inc.*, 915 A.2d 298 (Conn. 2007); *Elec. Wholesalers, Inc. v. M.J.B. Corp.*, 912 A.2d 1117 (Conn. App. Ct. 2007); *Fulmore v. Charlotte County*, 928 So. 2d 1281, 1284 (Fla. Ct. App. 2006); *Mayor of Baltimore v. Valsamaki*, 916 A.2d 324 (Md. 2007); *Balt. Dev. Corp. v. Carmel Realty Assoc.*, 910 A.2d 406 (Md. 2006); *Hous. & Redevelopment Auth. v. Bloomington Prof'l Bldg.*, No. A06-159, 2007 Minn. App. Unpub. LEXIS 105 (Jan. 30, 2007); *In re Daniels*, No. A06-571, 2007 Minn. App. Unpub. LEXIS 41 (Jan. 30, 2007); *Mount Laurel Twp. v. Mipro Homes, L.L.C.*, 878 A.2d 38 (N.J. Super. Ct. App. Div. 2005); *Matter of City of New York*, 828 N.Y.S.2d 756 (2006); *Nevadans for the Prot. of Prop. Rights, Inc. v. Heller*, 141 P.3d 1235 (Nev. 2006); *Bd. of County Comm'rs v. Lowery*, 136 P.3d 639, 650 (Okla. 2006); *In re Redevelopment Auth. Phila.*, 891 A.2d 820, 830-31 (Pa. Commw. Ct. 2006), *cert granted*, 903 A.2d 539 (Pa. 2006); *R.I. Econ. Dev. Corp. v. Parking Co.*, 892 A.2d 87, 104 (R.I. 2006); *R.I. Econ. Dev. Corp. v. Parking Co.*, 892 A.2d 87 (R.I. 2006); *Hoffman Family, L.L.C. v. City of Alexandria*, 272 Va. 274 (2006); *Pub. Util. Dist. No. 2 of Grant County v. N. Am. Foreign Trade Zone Indus., L.L.C.*, 151 P.3d 176 (Wash. 2007); *HTK Mgmt. L.L.C. v. Seattle Popular Monorail Auth.*, 121 P.3d 1166, 1168 (Wash. 2005) (en banc).

152. *Hous. & Redevelopment Auth. v. Exxon Mobil Oil Corp.*, No. A05-511, 2006 Minn. App. Unpub. LEXIS 393, at \*12-14 (Apr. 18, 2006).

153. *Mt. San Jacinto Cmty. College Dist. v. Superior Court*, 151 P. 3d 116 (Cal. 2007); *Syngenta Crop Protection, Inc. v. Helliker*, 138 Cal. Rptr. 3d 191, 218 (Cal. Ct. App. 2006); *Town of Wallingford v. Werbiski*, 877 A.2d 749, 756 (Conn. 2005); *Comm'r of Transp. v. Larobina*, 882 A.2d 1265, 1274 (Conn. Ct. App. 2005); *Cornfield Point Ass'n v. Town of Old Saybrook*, 882 A.2d 117, 135 (Conn. Ct. App. 2005); *Talley v. Hous. Auth.*, 630 S.E.2d 550, 551 (Ga. Ct. App. 2006); *Aaron v. Boston Redevelopment Auth.*, 850 N.E.2d 1105, 1109 n.9 (Mass. Ct. App. 2006); *Kellogg v. Dearborn Info. Servs., L.L.C.*, 119 P.3d 20, 24 (Mont. 2005); *McCarran Int'l Airport v. Sisolak*, 137 P.3d 1110, 1126 n.82 (Nev. 2006); *C/S 12th Ave., L.L.C. v. City of New York*, 815 N.Y.S.2d 516, 525 (App. Div. 2006); *10 Garvies Point Road Corp. v. Glen Cove Indus. Dev. Agency*, 812 N.Y.S.2d 357, 358 (App. Div. 2006); *In re Initiative Petition No. 382*, 142 P.3d 400, 408 (Okla. 2006); *Conti v. R.I. Econ. Dev. Corp.*, 900 A.2d 1221, 1231 (R.I. 2006); *Benson v. State*, 710 N.W.2d 131, 146

judges have to the public, it will be interesting to see if other state courts follow the *Norwood* court's lead and choose a more narrow definition of public use. If not, the public could use its political leverage to ensure that judges with a different interpretation are elected or appointed to the state benches.

### B. *The Federal Judicial Response*

In the federal judiciary, as of April 2007, five court opinions had followed the *Kelo* ruling,<sup>154</sup> twenty-five opinions had cited it,<sup>155</sup> and two opinions had distinguished their cases from *Kelo*.<sup>156</sup> No cases had criticized or declined to follow *Kelo*.<sup>157</sup> One court that distinguished its case from *Kelo* involved a due process challenge to a property lien and was thus factually distinguishable from *Kelo* and not merely an artful attempt to avoid *Kelo*'s precedent.<sup>158</sup> The federal

(S.D. 2006); *Consol. Waste Sys., L.L.C. v. Metro Gov't of Nashville*, No. M2002-02582-COA-R3-CV, 2005 Tenn. App. LEXIS 382, at \*26 (June 30, 2005); *Norfolk Redevelopment & Hous. Auth. v. C&C Real Estate, Inc.*, 630 S.E.2d 505, 509 (Va. 2006); *City of Alexandria v. Hoffman Family, L.L.C.*, 70 Va. Cir. 22, 25 (Cir. Ct. 2005); *Estado Libre Asociado de P.R. v. Planas Parrilla*, No. CC-2004-1105, 2006 T.S.P.R. 3, 18 (P.R. 2006); *Autoridad de Acueductos v. Compania de Parques Nacionales de P.R.*, No. KLCE2006-0251, 2006 PR App. LEXIS 1360, at \*9 (May 30, 2006); *Administracion de Terrenos de P.R. v. Rivera Mercado*, No. KLCE0501241, 2006 PR App. LEXIS 175, at \*10 (Jan. 31, 2006); *Gov't of the Virgin Islands v. Approximately 21.5969 Acres of Land*, 47 V.I. 356, 369 (Super. Ct. 2006).

154. *Western Seafood Co. v. United States*, 202 Fed. App'x 670 (5th Cir. 2006); *MHC Fin. Ltd. P'ship v. City of San Rafael*, No. C 00-3785, 2006 U.S. Dist. LEXIS 89195 (N.D. Cal. Dec. 5, 2006); *Hsiung v. City & County of Honolulu*, 378 F. Supp. 2d 1258, 1266 (D. Haw. 2005); *Matsuda v. City & County of Honolulu*, 378 F. Supp. 2d 1249, 1256 (D. Haw. 2005); *Rumber v. District of Columbia*, No. 04-1170 (RMU), 2005 U.S. Dist. LEXIS 16935 (D.D.C. July 19, 2005).

155. *Cormack v. Settle-Beshears* 474 F.3d 528 (8th Cir. 2007); *Buffalo Teachers Fed'n v. Tobe*, 464 F.3d 362 (2d Cir. 2006); *Presley v. City of Charlottesville*, 464 F.3d 480 (4th Cir. 2006); *Didden v. Vill. of Port Chester*, 173 F. App'x 931, 933 (2d Cir. 2006); *Tal v. Hogan*, 453 F.3d 1244, 1257 (10th Cir. 2006); *Brody v. Minnich*, 434 F.3d 121, 134 (2d Cir. 2005); *McQ's Enters. Phila. Parking Auth.*, 143 F. App'x 439 (3d Cir. 2005); *M&A Gabee v. Cmty. Redevelopment Agency of L.A.*, 419 F.3d 1036, 1038 (9th Cir. 2005); *Ash v. Redevelopment Auth.*, 143 Fed. App'x 439, 442 (3d Cir. 2005); *Waldon v. Ramirez*, No. CIV S-06-2139 MCE GGHP, 2007 U.S. Dist. LEXIS 21446 (E.D. Cal. Mar. 9, 2007); *Mustard v. Lehman*, No. CV-05-103-RHW, 2006 U.S. Dist. LEXIS 89785 (E.D. Wash. Dec. 12, 2006); *Lytle v. Potter*, No. 3:05CV7254, 2006 U.S. Dist. LEXIS 72974 (N.D. Ohio Oct. 6, 2006); *Two Tenn., L.L.C. v. City of N. Little Rock*, No. 3:06CV00063 JLH, 2006 U.S. Dist. LEXIS 63809 (E.D. Ark. Aug. 23, 2006); *Franco v. District of Columbia*, 422 F. Supp. 2d 216, 218 (D.D.C. 2006); *Autozone Dev. Corp. v. District of Columbia*, No. 05-0476 (RMU), 2006 U.S. Dist. LEXIS 11731, at \*10 (D.D.C. Mar. 2, 2006); *Buffalo S. R.R. v. Village of Croton-On-Hudson*, 434 F. Supp. 2d 241, 254 (S.D.N.Y. 2006); *City of Guymon v. Cal. Farley's Boys Ranch Found.*, No. CIV-04-457-BA, 2005 U.S. Dist. LEXIS 38506, at \*10 (W.D. Okla. Dec. 30, 2005); *Faith Temple Church v. Town of Brighton*, 405 F. Supp. 2d 250, 256 (W.D.N.Y. 2005); *Benckini v. Upper Saucon Twp.*, No. 04-4304, 2005 U.S. Dist. LEXIS 23765, at \*18 (E.D. Pa. Oct. 17, 2005); *Korsinsky v. Godici*, No. 05 Civ. 2791 (DLC), 2005 U.S. Dist. LEXIS 20850, at \*14 (S.D.N.Y. Sept. 22, 2005); *FMC Corp. v. AMVAC Chem. Corp.*, 379 F. Supp. 2d 733, 739 (E.D. Pa. 2005); *Los Altos El Granada Investors v. City of Capitola*, No. C-04-5138-JF (PVT), 2005 U.S. Dist. LEXIS 36804 (N.D. Cal. July 26, 2005); *Rumber v. District of Columbia*, 427 F. Supp. 2d 1, 6 (D.D.C. 2005); *George Wash. Univ. v. District of Columbia*, 391 F. Supp. 2d 109, 114 (D.D.C. 2005); *Cienega Gardens v. United States*, 67 Fed. Cl. 434, 470 (2005).

156. *Pima County v. Clear Channel Outdoor, Inc.*, 212 Ariz. 48 (Ariz. App. Ct. 2006); *Griggs v. Strumpffer*, No. CV-F-05-1313 REC SMS, 2006 U.S. Dist. LEXIS 38438, at \*8 (E.D. Cal. May 30, 2006).

157. A Shepard's Report from May 8, 2007 does not identify any federal cases as having criticized *Kelo*.

158. *Griggs v. Strumpffer*, No. CV-F-05-1313 REC SMS, 2006 U.S. Dist. LEXIS 38438, at \*8 (E.D. Cal. May 30, 2006).

judiciary's failure to criticize *Kelo* is not surprising given the precedential value of the Supreme Court ruling for the federal judiciary, as compared to the independence state courts have in interpreting their own constitutions. Whether the lower courts of the federal judiciary will embrace *Kelo*, attempt to distinguish their cases from *Kelo*, or openly criticize the ruling has yet to be seen.

Given the one-vote margin of victory in the *Kelo* ruling and the apparent misgivings of at least one Justice in the majority,<sup>159</sup> it will be interesting to see if the Supreme Court revisits the issue in the near future. Until then, Supreme Court precedent allowing anticipated economic benefits to qualify as a "public use" under the Fifth Amendment shall reign and states remain free to interpret their own constitutions as they see fit. This broad interpretation, coupled with deference to political leaders, makes it clear that the real place to ensure the appropriate use of eminent domain is the political arena.

#### VIII. POLITICAL ACCOUNTABILITY, NOT LEGISLATION IS THE APPROPRIATE REACTION

Despite the time, money, and other resources spent to develop legislative change in the status of eminent domain law, many questions remain regarding what lasting repercussions these newly enacted state laws will have on the issue. Will they withstand constitutional challenges? Will they be interpreted in a meaningful way by the courts? Will they prove to be so overly restrictive that they seriously hamper the government's ability to fulfill its necessary goals? All of these questions need not be posed if we simply rely on the Fifth Amendment, combined with political accountability and judicial review. In fact, political accountability and participation even worked for Susette Kelo, the named plaintiff. After negotiating with government officials, she was able to keep her house, although it was moved to another location.<sup>160</sup>

Thus, for the best results, individuals should participate in the process and negotiate with politicians. The politicians who are decrying the *Kelo* ruling and calling out for reform are the very same individuals to whom the Court in *Kelo* and its predecessors have deferred. *Kelo* is not an example of judicial activism run amok, but rather carefully applied judicial restraint. In its eminent domain jurisprudence, the Court has shown time and again that it will allow politically-elected bodies great deference in determining what is an appropriate use of eminent domain. Thus, the answer to the problem is for politically-elected officials to carefully limit their use of eminent domain to cases where it is truly necessary. If democratically elected bodies do not like the judicial deference

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159. John M. Brooder, *States Curbing Right to Seize Private Homes*, N.Y. TIMES, Feb. 21, 2006, at A1 (quoting Justice Stevens as saying had he been a state legislator he would have ruled differently); Urbina, *supra* note 142, at A5 (quoting Justice Stevens as calling the *Kelo* decision "unwise").

160. Elizabeth Mehren, *Eminent Domain Plaintiff Will Keep Her House*, L.A. TIMES, July 1, 2006, at A15.

being paid to them, perhaps the public needs to elect new leaders who feel more capable of handling this task.

Rather than lobbying for the passage of new laws or lambasting the Court for its deference, the public needs to participate in the process and hold its democratically elected representatives accountable. Politicians need to listen to the demands of their constituents and respond accordingly. Political accountability, not unnecessary and flawed legislation, is the solution to the *Kelo* debate. Any constitutional amendment or law is subject to judicial review, so the better action is to strike at the source of the problem: the government leaders. Instead of attacking the courts for upholding government actions, the public should challenge the government for taking these actions. So it is up to the public, grassroots movements,<sup>161</sup> and politicians to ensure that eminent domain is used appropriately and not abused. For those cases where the government does abuse its use of eminent domain, the Fifth Amendment, subject to judicial review, remains in place as a check.<sup>162</sup> As Judge Richard Posner noted: "Property owners and the advocates of property rights are not some helpless, marginalized minority. They have plenty of political muscle, which they are free to use . . ." <sup>163</sup> Therefore, rather than wasting time and money drafting and passing problematic legislation or criticizing the courts for their deferential stance, the public needs to flex its muscles and force politicians to adhere to the values they have professed or replace them with those who will.

## IX. CONCLUSION

Now that a year has passed and the rhetoric has cooled, it is interesting to see that the main action against the *Kelo* decision occurred in the very place invited by the decision itself: the states. The real question today is whether the public outcry and newly enacted state legislation will be enough to change the way public officials exercise their power of eminent domain or, like *Kelo*, whether it

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161. Interestingly, grassroots movements are finding some success in this area. See Brett D. Liles, Comment, *Reconsidering Poletown: In the Wake of Kelo, States Should Move to Restore Private Property Rights*, 487 ARIZ. L. REV. 369, 394 (2006) (discussing the success of grassroots movements opposed to the use of eminent domain in Arizona, Missouri, Pennsylvania, and New York).

162. Contrary to the opinion that courts view eminent domain as a blank check for government officials, courts have been willing to overturn the use of eminent domain where they deemed it appropriate. See, e.g., *Cottonwood Christian Ctr. v. Cypress Redevelopment Agency*, 218 F. Supp. 2d 1203, 1229-30 (C.D. Cal. 2002) (finding that a church had a likelihood of success on its Fifth Amendment takings claim where its property had been taken to allow development by a discount retailer); *99 Cents Only Stores v. Lancaster Redevelopment Agency*, 237 F. Supp. 2d 1123, 1129 (C.D. Cal. 2001) (finding that the city's attempt to take land from a small business to favor Costco was unconstitutional under the Fifth Amendment); *County of Wayne v. Hathcock*, 689 N.W.2d 765, 787 (Mich. 2004) (finding that the taking of property surrounding the Detroit Metropolitan Airport to build a technology park for the purpose of economic revitalization was not a public use under Michigan's eminent domain Clause).

163. Richard A. Posner, *The Supreme Court 2004 Term: Foreword: A Political Court*, 119 HARV. L. REV. 32, 98 (2005).

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was all much ado about nothing. In any event, the sure-fire way to prevent the abuse of the eminent domain power is for the public to participate in the condemnation process, follow the actions of their elected officials, and vote accordingly.