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BEWARE OF WOODEN NICKELS: THE PARADOX OF FLORIDA'S LEGISLATIVE OVERREACTION IN THE WAKE OF *KELO*

Ann Marie Cavazos*

This article addresses Florida's reaction to the United States Supreme Court decision in Kelo v. City of New London. In Kelo, the Court provided a more expansive view of "the public use" of the Fifth Amendment Takings Clause to include taking property from one private owner and transferring it to a corporation or non-private citizen when the transfer is deemed by the lawmakers to be in the public good or for a public purpose.

Florida, together with several other states, concluded that such eminent domain takings, while constitutionally permissible, offend the states' sense of fair play as it relates to private homeowners' property rights. Several states sought legislative solutions to ameliorate the Court's decision. The most reactive solution to date was enacted by the Florida legislature.

The Florida statutory amendments cured the pernicious act of governmental taking of private property from one citizen and conveying it to another who promises to make "better use" of the property by specifically prohibiting it; however, this flat prohibition on economic development or blight condemnation eliminated a legitimate municipal tool serving all residents, albeit at the expense of a few affected homeowners.

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Consequently, the amendments may have unintended side effects which are worse than the ill they purported to cure.

This article also examines the negative impact of these amendments on counties, towns, and municipalities which have traditionally relied on lawful takings to modernize their urban areas, attract financing and industry, and increase their tax bases. After Kelo, Florida hoped to be a model of legislative responsibility; however, upon further analysis, Florida's reaction might prove to be premature and counterproductive.

In short, the rush to enact laws to protect homeowners from the holding in Kelo has resulted in potentially more harm than intended and is a "Pyrrhic" victory at best.

"There is surely nothing so useless as doing with great efficiency what should not be done at all."¹

I. INTRODUCTION

In 2005, the United States Supreme Court, in *Kelo v. City of New London*, allowed a municipality to take property for just compensation for the public purpose of economic development.² The 5-4 decision caused uproar among private property advocates nationwide.³ The fear that

1. PETER F. DRUCKER, CLASSIC DRUCKER: ESSENTIAL WISDOM OF PETER DRUCKER FROM THE PAGES OF HARVARD BUSINESS REVIEW 83 (Thomas A. Stewart ed., Harvard Business Press 2006).

2. *Kelo v. City of New London*, 545 U.S. 469, 489–90 (2005) (emphasizing that the Court's authority extends only to determining whether the City's proposed condemnations are for a "public use" within the meaning of the Fifth Amendment to the Federal Constitution through interpretation of a century of case law). The author of this article recognizes that this area of the law has many issues. Certainly, those on the lower socio-economic ladder are the ones most harmed by eminent domain takings. It is not the intent of this article to address that aspect; rather, the focus is on restrictive legislation and its effect on local government. For further discussion on the impact of eminent domain takings on the poor, see George Lefcoe, *Redevelopment Takings After Kelo: What's Blight Got to Do With It?*, 17 S. CAL. REV. L. & SOC. JUST. 803 (2007-2008); Tom I. Romero, II, *Kelo, Parents and The Spatialization of Color (Blindness) in the Berman-Brown Metropolitan Heterotopia*, 2008 UTAH L. REV. 947 (2008); JANE JACOBS, THE DEATH AND LIFE OF GREAT AMERICAN CITIES (1993); Pat Beall, *Riviera Beach Eminent Domain Case Draws National Spotlight*, PALM BEACH POST, Dec. 11, 2005, http://www.palmbeachpost.com/localnews/content/local_news/epaper/2005/12/11/c1a_blight_1211.html.

3. See *Kelo*, 545 U.S. at 458 (holding that the city's condemnation of private property met the "public use" test of the Fifth Amendment, where the property was thereafter to be handed over to Pfizer for the construction of its research and development headquarters). Pfizer has since decided to close its research and development headquarters in New London, Connecticut. The City spent \$78 million bulldozing the condemned properties and failed to realize its initial goals of producing tax benefits and creating jobs. Unfortunately, the land remains vacant. See Editorial, *Pfizer and Kelo's Ghost Town*, WALL ST. J., Nov. 9, 2009, at

money-minded municipalities would conspire with greedy developers to take desirable, as well as undesirable, property from individual homeowners and convert it to the developers' own profitable use was more than some state legislatures, and their constituents, could endure.⁴ Lawmakers in many states rushed to pass restrictive legislation to ameliorate the perceived "evils" of *Kelo*.⁵ New legislation focused on narrowing the definition of "public purpose," a key phrase in eminent domain law.

This article explores the evolution of the definition of "public purpose" and the unintended consequences of legislative reactions to the *Kelo* decision. Part II discusses the *Kelo* decision and its precedent. Part III examines legislative reactions to *Kelo* across the nation. Part IV offers a case-study focusing on Florida's legislative reaction, an example of a hasty legislative reaction which may have the unintended consequence of unnecessarily restricting local governments' ability to redevelop blighted communities for the public health, public safety, morals, peace, and welfare.⁶ Part V explores the unintended consequences of Florida's reaction to *Kelo*. Part VI discusses an alternative to Florida's approach that protects individual property rights and prevents developer abuses without unduly restricting local governments' ability to improve economic conditions for all residents.

II. EMINENT DOMAIN: *KELO* AND ITS PRECEDENT

Eminent domain is, generally speaking, the term given to actions of a municipal, county, state, or federal government taking private property for a public use without the owner's consent.⁷ It is an inherent sovereign power of the government.⁸ The last clause of the Fifth Amendment provides the Constitutional basis for governmental restraint on eminent domain actions.⁹ More commonly referred to as the Takings Clause,¹⁰ the

A20 (discussing the aftermath of *Kelo*).

4. Fred Lucas, *Eminent Domain Outcry Pierces Statehouses*, STATELINE.ORG (Mar. 16, 2008), <http://www.stateline.org/live/details/story?contentId=96421>.

5. See *Pfizer and Kelo's Ghost Town*, *supra* note 3 (reporting voter concern over the once-forgotten government power of eminent domain); see also Tresa Baldas, *States Ride Post-Kelo Wave of Legislation*, LAW.COM (Aug. 2, 2005), <http://www.law.com/jsp/law/LawArticleFriendly.jsp?id=900005544647> (stating that lawmakers in 28 states have introduced more than 70 post-*Kelo* bills).

6. *Berman v. Parker*, 348 U.S. 26, 33 (1954).

7. BLACK'S LAW DICTIONARY 346 (9th ed. 2009).

8. *Daniels v. State Rd. Dep't*, 170 So. 2d 846, 848 (Fla. 1964).

9. See U.S. CONST. amend. V (requiring that the property be taken for "public use" and the owner be given "just compensation").

10. "[N]or shall private property be taken for public use without just compensation." *Id.* This clause provides the greatest amount of economic justice to individuals. It should

Just Compensation Clause,¹¹ or the Public Use Clause,¹² this section prohibits taking private property for public use without just compensation.¹³ Although the Takings Clause specifically limits only federal actions, courts apply the restraints to the states though the Due Process Clause of the Fourteenth Amendment.¹⁴

The Fifth Amendment imposes two limitations or restrictions on the power of eminent domain. First, the government can take private property only if it provides “just compensation” to the owner,¹⁵ and second, the property taken must be for public use.¹⁶ These two limitations, in theory together, safeguard property owners against excessive, unpredictable, and unfair use of the government’s eminent domain power.¹⁷ States enact legislation within these limitations, and local governments must, in turn, comply with the state law when exercising eminent domain power. When local action is challenged, the reviewing court will consider whether the exercise of eminent domain power was rationally related to a conceivable public purpose and whether the legislature might reasonably consider the

be noted that the Takings Clause comes from the Magna Carta and the founding fathers thought it essential to include it in the Constitution. William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 COLUM. L. REV. 782 (1995) (discussing the history of the Takings Clause).

11. *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg’l Planning Agency*, 535 U.S. 302, 307 (2002).

12. *Hawaii Hous. Auth. v. Midkiff*, 467 U.S. 229, 231 (1984).

13. U.S. CONST. amend. V.

14. U.S. CONST. amend. XIV, § 1, ratified July 9 1968, provides that “[n]o state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.” For a discussion of how the concerns raised by the Thirteenth Amendment manifest themselves in the context of takings cases, see *Kelo v. City of New London*, 545 U.S. 469, 504 (2005), *Strickley v. Highland Boy Gold Mining Co.*, 200 U.S. 527, 531 (1906), and *Chicago, Burlington & Quincy R.R. Co. v. City of Chicago*, 166 U.S. 226 (1897). Justice Stevens, in the *Kelo* opinion, cites *Strickley*, among others, as precedent for the U.S. Supreme Court’s use of the broader “public purpose” test, as opposed to the narrow “use by the public” test. *Kelo*, 545 U.S. at 479-80.

15. *Tahoe-Sierra Pres. Council*, 535 U.S. at 307 n.1.

The Fifth Amendment provides that private property shall not be taken for public use without just compensation. And “just compensation” means the full monetary equivalent of the property taken. The owner is to be put in the same position monetarily as he would have occupied if his property had not been taken. In enforcing the constitutional mandate, the Court at an early date adopted the concept of market value: the owner is entitled to the fair market value of the property at the time of the taking.

U.S. v. Reynolds, 397 U.S. 14 (1970).

16. *Kelo*, 545 U.S. at 507 (Thomas, J., dissenting).

17. *Id.* at 496 (O’Conner, J., dissenting).

use public.¹⁸

In *Kelo*, the City of New London (“City” or “New London”) sought to rejuvenate a waterfront section of the town that was designated as a “distressed municipality.”¹⁹ Such rejuvenation would allow the City to attract new industry, specifically Pfizer Corporation, which would create jobs and increase tax revenue.²⁰ To reach this goal, the City designated the New London Development Corporation (NLDC) to spearhead redevelopment efforts.²¹ The NLDC successfully negotiated the purchase of the majority of the parcels of land within the targeted redevelopment area, but a minority of property owners refused to sell their property.²² In response to the holdout property owners, the NLDC instituted condemnation proceedings.²³ The owners of the condemned property filed suit, and the case eventually worked its way to the U.S. Supreme Court.²⁴ At issue was whether the City’s decision, pursuant to a Connecticut state statute, to take property for the purpose of economic development satisfied the “public use” requirement of the Fifth Amendment.²⁵ The statute expressed “a legislative determination that the taking of land, even developed land, as part of an economic development project [was] a ‘public use’ and in the ‘public interest.’”²⁶ The *Kelo* court examined the Connecticut statute²⁷ and concluded that a fair interpretation of the term

18. *Id.* at 476.

19. *Id.* at 473.

20. *Id.* at 495.

21. *Id.* at 473.

22. *Id.* at 472.

23. *Id.* at 473.

24. Originating in the New London Superior Court of Connecticut in 2000, a permanent restraining order prohibiting the taking of some of the properties was granted, but relief was denied as to other properties. *Kelo v. City of New London*, No. KNL-CV-01-0557299-S, 2002 WL 500238 (Conn. Super. Ct. March 13, 2002). On appeal in 2004, the Connecticut Supreme Court affirmed in part and reversed in part, holding that the “economic development” in question qualified as a valid public use under federal and state law and all of the City’s proposed takings were valid. *Kelo v. City of New London*, 843 A.2d 500 (Conn. 2004). On certiorari, the United States Supreme Court affirmed, rendering its decision in 2005. *Kelo v. City of New London*, 545 U.S. 469 (2005). A rehearing was denied later that same year. *Id.* at 1158.

25. *Id.* at 477.

26. *Id.* at 476.

27. CONN. GEN. STAT. § 8-186 (2011). The Connecticut statute expressing that an economic development project is in the “public use” states:

It is found and declared that the economic welfare of the state depends upon the continued growth of industry and business within the state; that the acquisition and improvement of unified land and water areas and vacated commercial plants to meet the needs of industry and business should be in accordance with local, regional and state planning objectives; that such acquisition and improvement often cannot be accomplished through the ordinary operations of private enterprise at competitive rates of progress and economies of cost; that

“public use” would encompass economic development, even if such development occurred at the hands of a private developer.²⁸

New London defended its conduct by asserting that taking private property for economic development, even when such development would be executed by a private developer, rather than directly by the government, served a public purpose because the resulting economic benefits, in the form of jobs and tax revenue, would inure to the benefit of *all* citizens of New London, including the displaced homeowners.²⁹ Agreeing with the City’s rationale, the Court found that the potential increase in local tax revenues by the ultimate redevelopment of the condemned property satisfied the public use prerequisite of the Fifth Amendment.³⁰

The *Kelo* majority clarified that taking property for a “public purpose” qualified as a permissible “public use,” pursuant to the Fifth Amendment,³¹ despite the fact that the taken property would not be open to the general public.³² This holding, expanding precedent, was instituted at the close of the nineteenth century; a time when the Supreme Court applied the Fifth Amendment to the States and embraced a broader interpretation of public use as an equivalent to public purpose.³³ In 1954, the Court’s holding in *Berman v. Parker*³⁴ gave broad deference to the state legislatures to define public purpose by allowing the District of Columbia to condemn property, not only if an area was slum or blighted, but also for prevention of future blight that would injure the public health, safety, morals, or welfare.³⁵ Provided the taking was within the State’s definition of public purpose, the Court found it of no consequence that: (1) some of the property within the designated blighted area was non-blighted, or commercial property, and (2) portions of the land acquired through eminent domain could be sold or leased to private interests.³⁶ It concluded:

permitting and assisting municipalities to acquire and improve unified land and water areas and to acquire and improve or demolish vacated commercial plants for industrial and business purposes and, in distressed municipalities, to lend funds to businesses and industries within a project area in accordance with such planning objectives are public uses and purposes for which public moneys may be expended; and that the necessity in the public interest for the provisions of this chapter is hereby declared as a matter of legislative determination.

Id.

28. *Kelo*, 545 U.S. at 490.

29. *Kelo*, 545 U.S. at 483.

30. *Id.* at 490.

31. U.S. CONST. amend. V.

32. *Kelo*, 545 U.S. at 479.

33. *Id.* at 480.

34. 348 U.S. 26, 28 (1954).

35. *Id.* at 31.

36. *Id.* at 31, 35.

Property may of course be taken for this redevelopment which, standing by itself, is innocuous and unoffending. But we have said enough to indicate that it is the need of the area as a whole which Congress and its agencies are evaluating. If owner after owner were permitted to resist these redevelopment programs on the ground that his particular property was not being used against the public interest, integrated plans for redevelopment would suffer greatly. The argument pressed on us is, indeed, a plea to substitute the landowner's standard of the public need for the standard prescribed by Congress. But as we have already stated, community redevelopment programs need not, by force of the Constitution, be on a piecemeal basis—lot by lot, building by building. . . . If the Agency considers it necessary in carrying out the redevelopment project to take full title to the real property involved, it may do so. It is not for the courts to determine whether it is necessary for successful consummation of the project that unsafe, unsightly, or insanitary buildings alone be taken or whether title to the land be included, any more than it is the function of the courts to sort and choose among the various parcels selected for condemnation. The rights of these property owners are satisfied when they receive that just compensation which the Fifth Amendment exacts as the price of the taking.³⁷

Further, in 1984, in the next well-publicized and sweeping eminent-domain case, *Hawaii Housing Authority v. Midkiff*,³⁸ the Court permitted local government, acting within the statutory definition of public use, to transfer ownership from one private individual to another through eminent domain. The Court considered whether the Public Use Clause permitted the State of Hawaii to take, with just compensation, title in real property from one class of private individuals (lessors), and transfer it to another (lessees). This was done for a stated public purpose of reducing the concentration of fee simple ownership in the State, where fewer than seventy-two individuals owned nearly fifty percent of the land.³⁹ Holding that the “public use” requirement was coterminous with the scope of the state’s police powers, the majority, led by Justice Sandra Day O’Connor, expounded that so long as the eminent domain power was rationally related to a conceivable public purpose, courts must not find a compensated taking

37. *Id.* at 35-36.

38. 467 U.S. 229 (1984).

39. *Id.* at 231-32. An oligopoly existed within Hawaii, where fewer than 75 individuals owned nearly fifty percent of the land. The Hawaii legislature enacted the Land Reform Act of 1967 to address the concentration of land ownership that was responsible for skewing the state’s residential fee simple market. The legislature believed that such concentration was inflating land prices and injuring the public tranquility and welfare. *Id.* at 232.

to be proscribed by the Public Use Clause,⁴⁰ even when the government does not intend to use the property itself.⁴¹

The rationale utilized in the *Berman* and *Midkiff* decisions paved the way for the *Kelo* Court to acquiesce to the Connecticut State Legislature's broadly defined "public use" so long as the exercise of eminent domain power to take property from a private individual rationally related to a conceivable public purpose.⁴² In *Kelo*, the City acted pursuant to a state statute that authorized the use of eminent domain to redevelop a distressed area as part of a redevelopment plan.⁴³ Despite the fact that non-blighted parcels located within the blighted area were transferred to a private party, the Court found the taking to be valid because the public at large benefited from the redevelopment, potential increase in local jobs, and tax revenues offered by the local government's rejuvenation plan, thus presenting an acceptable public use in accordance with state and federal law.⁴⁴

While Justice Kennedy cautioned against permitting condemnation undertaken as a result of "impermissible favoritism" toward a private party,⁴⁵ Justice O'Connor issued a dissent in which she chided the Supreme Court's failure to determine explicit limitations on how far municipal takings extend.⁴⁶ O'Connor stated:

Under the banner of economic development, all private property is now vulnerable to being taken and transferred to another private owner, so long as it might be upgraded—*i.e.*, given to an owner who will use it in a way that the legislature deems more beneficial to the public—in the process.⁴⁷

Even though the transfer of property in *Berman* and *Midkiff* was also private to private, Justice O'Connor explained that those takings differed from *Kelo* because the legislative entity mitigated harm by removing or redistributing property use.⁴⁸ In *Berman* and *Midkiff*, the takings were consistent with the Public Use Clause because "the extraordinary, precondemnation use of the targeted property inflicted affirmative harm on society—in *Berman* through blight resulting from extreme poverty and in *Midkiff* through oligopoly⁴⁹ resulting from extreme wealth."⁵⁰ Expressing

40. *Id.* at 240–41.

41. *Id.* at 243–44. "The mere fact that property taken outright by eminent domain and transferred in the first instance to private beneficiaries does not condemn that taking as having only a private purpose." *Id.*

42. *Id.* at 241.

43. *Kelo v. City of New London*, 545 U.S. 469, 472 (2005).

44. *Id.* at 483.

45. *Id.* at 491 (Kennedy, J., concurring).

46. *Id.* at 494 (O'Connor, J., dissenting).

47. *Id.*

48. *Id.* at 500.

49. According to Black's Law Dictionary, "oligopoly" is defined as follows: "Control

grave concern that *Kelo* expanded the meaning of “public use” beyond traditional “harm on society” condemnation as in *Berman* and *Midkiff*, O’Connor asserted,

[i]t holds that the sovereign may take private property currently put to ordinary private use, and give it over for new, ordinary private use, so long as the new use is predicted to generate some secondary benefit for the public—such as increased tax revenue, more jobs, or maybe even aesthetic pleasure.⁵¹

O’Connor’s dissent was a rallying cry to private property rights advocates across the nation.⁵² However, this author opines that *Kelo*, like *Berman* and *Midkiff*, was predicated on a public use redevelopment plan designed to eradicate “harm on society.” The transfer of property was also private to private. For that reason, O’Connor’s dissent in *Kelo* was contradictory to her majority opinion in *Midkiff*.

The cornerstone in each of the takings cases, *Berman*, *Midkiff*, and *Kelo*, is the Supreme Court’s deference to Congress and state legislatures.⁵³ The Court consistently ruled that, so long as the legislation can reasonably identify an evil that they are attempting to address, a public purpose will be found, and therefore the statute and the actions taken pursuant to it will pass constitutional muster.⁵⁴ Citing *Midkiff*, the Court reiterated in *Kelo* that “[w]hen the legislature’s purpose is legitimate and its means are not irrational, our cases make clear that empirical debates over the wisdom of takings—no less than debates over the wisdom of other kinds of socioeconomic legislation—are not to be carried out in the federal courts.”⁵⁵

The dissenters offered a narrow test requiring “clear and convincing evidence” to show that the proposed economic benefit would, with reasonable certainty, come to pass.⁵⁶ However, the majority was reluctant to adopt the proposal, concerned that such a test would impose “a

or domination of a market by a few large sellers, creating high prices and low output similar to those found in a monopoly.” BLACK’S LAW DICTIONARY 262 (8th ed. 2004).

50. *Kelo*, 545 U.S. at 500 (O’Connor, J., dissenting).

51. *Id.* at 501.

52. *See id.* at 494 (citing the Bill of Rights to emphasize the importance of freedom from governmental interference with regards to personal property).

53. *See, e.g.*, *Hawaii Hous. Auth. v. Midkiff*, 467 U.S. 229, 239-40 (1984) (“Subject to specific constitutional limitations, when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive. In such cases the legislature, not the judiciary, is the main guardian of the public needs to be served by social legislation, whether it be Congress legislating concerning the District of Columbia . . . or the States legislating concerning local affairs.”)

54. *Id.* at 245.

55. *Kelo*, 545 U.S. at 488 (quoting *Midkiff*, 467 U.S. at 242-43).

56. *Kelo*, 545 U.S. at 505 (O’Connor, J., dissenting).

'heightened' standard of judicial review for takings justified by economic development" and represent a greater departure from precedent.⁵⁷ The Court emphasized that "[a] constitutional rule that required postponement of the judicial approval of every condemnation until the likelihood of success of the plan had been assured would unquestionably impose a significant impediment to the successful consummation of many such plans."⁵⁸ After considering the consequences, the Court again chose to defer to state legislatures to define public use and leave to the courts the question of whether the government's purpose in taking the property is rationally related to a public use.⁵⁹

It further reminded the dissenters that the doctrines of state sovereignty and states' rights would allow legislatures to determine whether to impose tighter restrictions on economic development despite the majority's ruling:⁶⁰

We emphasize that nothing in our opinion precludes any State from placing further restrictions on its exercise of the takings power. Indeed, many States already impose "public use" requirements that are stricter than the federal baseline. Some of these requirements have been established as a matter of state constitutional law, while others are expressed in state eminent domain statutes that carefully limit the grounds upon which takings may be exercised.⁶¹

Thus, it is incumbent on state legislatures to carefully consider their definition of "public purpose" or "public use" and to strive to achieve balance between the rights of private property owners and the needs of counties and municipalities to maintain local vitality and viability.

57. *Id.* at 477.

58. *Id.* at 488.

59. *Id.*

60. The deference is expressed in the doctrine of "the adequate and independent state ground," which was addressed by U.S. Supreme Court Justice Robert Jackson in *Herb v. Pitcairn*, 324 U.S. 117, 125 (1945).

This Court from the time of its foundation has adhered to the principle that it will not review judgments of state courts that rest on adequate and independent state grounds. The reason is so obvious that it has rarely been thought to warrant statement. It is found in the partitioning of power between the state and federal judicial systems and in the limitations of our own jurisdiction. Our only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights. And our power is to correct wrong judgments, not to revise opinions. We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its view of federal law, our review could amount to nothing more than an advisory opinion.

TALBOT D'ALEMBERTE, *THE FLORIDA STATE CONSTITUTION: A REFERENCE GUIDE* 18 (1991).

61. *Kelo*, 545 U.S. at 489.

III. REACTION TO *KELO*

With some exceptions, the reaction to *Kelo* was uniformly negative as naysayers opined that local governments would run amok with speculative redevelopment plans.⁶² For example, elected officials and the general populace widely condemned the decision as an unprecedented expansion of local government power to seize private property for dubious purposes.⁶³ Attorneys representing property owners were outraged that the government could take one person's property and give it to another in the name of economic development, which is not in line with the well-established American principles of private ownership.⁶⁴ On the other hand, "attorneys representing municipalities and private developers in eminent domain cases hailed the high Court's ruling, maintaining that eminent domain is essential to economic development, and that critics of the ruling are overreacting."⁶⁵ Meanwhile, during the last four years, scholars, distinguished professors, and newspapers have written extensively on post-*Kelo* reforms,⁶⁶ and joining the discussion are commentators, property rights advocates, attorneys, and politicians on the need to protect property owners from *Kelo*-type takings.⁶⁷ The literature ranges from warnings of the possible

62. David A. Dana, Colloquy, *The Law and Expressive Meaning of Condemning The Poor After Kelo*, 101 NW. U. L. REV. 365 (2007).

63. John D. Echeverria, *The Myth That Kelo Has Expanded the Scope of Eminent Domain*, GEO. ENVTL. L. & POL'Y INST. (July 20, 2005), http://www.law.georgetown.edu/gelpi/current_research/documents/KeloMyth.pdf.

64. Steven Seidenberg, *Where's the Revolution?*, 95 A.B.A. J. 50 (April 2009), available at http://www.abajournal.com/magazine/article/wheres_the_revolution. "Drastic Changes in land use law were predicted after the U.S. Supreme Court's *Kelo* ruling, but four years later, things don't look that different." *Id.*

65. Baldas, *supra* note 5.

66. The following are examples of pieces discussing post-*Kelo* reforms: DANA BERLINER, PUBLIC POWER, PRIVATE GAIN: A FIVE-YEAR, STATE-BY-STATE REPORT EXAMINING THE ABUSE OF EMINENT DOMAIN 52 (2003); DANA BERLINER, OPENING THE FLOODGATES: EMINENT DOMAIN ABUSE IN THE POST-KELO WORLD (2006); Errol E. Meidinger, *The "Public Uses" of Eminent Domain: History and Policy*, 11 ENVTL. L. 1 (1980); Wendell E. Pritchett, *The "Public Menace" of Blight: Urban Renewal and the Private Uses of Eminent Domain*, 21 YALE L. & POL'Y REV. 1 (2003); Ilya Somin, *The Limits of Backlash: Assessing the Political Response to Kelo*, 93 MINN. L. REV. 2100, 2136 (2009); Carrie Johnson, *Property Ruling Appalls Officials*, ST. PETERSBURG TIMES, June 25, 2005, at 1B; Les Christie, *Kelo's Revenge: Voters Restrict Eminent Domain*, CNNMONEY.COM, Nov. 8, 2006, http://money.cnn.com/2006/11/08/real_estate/kelos_revenge/ (reporting that 69% of Florida voters passed the amendment).

67. Baldas, *supra* note 5.

Legislators in Texas, Florida, Oklahoma, New Jersey and Michigan are mobilizing to support state constitutional amendments prohibiting eminent domain for private development. In California, which has some of the strictest proposed legislation, two bills would prohibit the exercise of eminent domain

abuses evolving from the *Kelo* decision to precautions on legislatures reacting too quickly.⁶⁸

States were cautioned not to act too quickly in their haste to ease constituents' concerns about *Kelo*.⁶⁹ For example, Patricia Salkin, an associate dean and director of the Government Law Center at Albany Law School, warned that "quick reactions [to *Kelo*] can lead to ineffective policy."⁷⁰ David Parkhurst, principal legislative counsel for the National League of Cities, expressed, "it's good that *Kelo* has brought eminent domain under the light of state examination. 'As a state-derived power, eminent domain is best handled at the state and local level.'"⁷¹ Another concern conveyed among those who took a neutral position on the eminent domain question "is that fast-enacted legislation will be overly restrictive."⁷²

Supporters of broad discretion in takings, such as Carolyn Coleman of the National League of Cities, maintain that "eminent domain is a valuable and constitutional economic development tool."⁷³ Many American communities have been redeveloped under the taking power of eminent

for private use under any circumstances, while lawmakers in Texas, Minnesota, Delaware and Connecticut would simply limit the use of eminent domain for private projects or tighten eminent domain procedures.

Id.; see also Seidenberg, *supra* note 64 (discussing the current debate amongst policymakers).

68. See Gary Boulard, *Eminent domain--for the greater good? The U.S. Supreme Court decision in Kelo v. New London has prompted states to look at their own eminent domain practices*, THE FREE LIBRARY BY FARLEX (January 1, 2006), <http://www.thefreelibrary.com/Eminent+domain--for+the+greater+good%3f+The+U.S.+Supreme+Court+decision...-a0140519588> (remarking upon the debates currently going on within state legislatures as to eminent domain powers); Elaine Misonzhnik, *Panel Calls for Caution on Eminent Domain*, THE FREE LIBRARY BY FARLEX (November 9, 2005), <http://www.thefreelibrary.com/Panel+calls+for+caution+on+eminent+domain.-a0139211453> (cautioning that changes may soon come to eminent domain legislation, and that therefore developers should be careful in assuming they now have a large advantage due to *Kelo*).

69. Francesca Jarosz, *Before You Grab That Property . . . States Take a Close Look at Eminent Domain*, BUS. L. TODAY, Jan.-Feb. 2007, at 5, available at <http://www.abanet.org/buslaw/bit/2007-01-02/jarosz.shtml>.

70. *Id.*

71. *Id.* at 4.

72. *Id.* at 5.

73. Elizabeth N. Brown, *States Fight to Limit Government's Powers to Take Your Home*, AARP BULLETIN, 2 (May 12, 2008), http://bulletin.aarp.org/yourworld/yourhome/articles/eminent_domain.html ("Public purchases of 'blighted' property-through eminent domain or the prospect that it will be invoked if homeowners refuse to sell-have been used successfully for decades to transform neighborhoods into needed infrastructure or revitalized zones.").

domain.⁷⁴ Social advocates stress that without this tool, economically distressed communities will perish.⁷⁵ Carla Main, a journalist and former editor of *The National Law Journal*, emphasizes that “[e]minent domain is an efficient and orderly way to clear large, contiguous parcels of land. It is the only way to deal with the problem of holdouts. There is nothing to be ashamed of in using eminent domain to improve communities.”⁷⁶

Despite these calls for circumspection, many state legislatures quickly passed statutes to ensure that nothing like *Kelo* would ever happen in their states.⁷⁷ Over 43 states⁷⁸ passed legislation either restricting local governments’ use of eminent domain for economic development or blight condemnation or redefining the term “blight.”⁷⁹ Other reforms included statutory or constitutional amendments.⁸⁰ However, in Florida the reaction

74. *Id.*

75. *Riviera Beach Eminent Domain Suit Dropped*, ABC 25 WPBF, May 10, 2007, <http://www.wpbf.com/news/13297070/detail.html> (discussing the suit); *see also* John Kramer & Lisa Knepper, *New Study Details Devastating Effects of Eminent Domain Abuse on African Americans*, CASTLE COALITION (Feb. 14, 2007), <http://www.freerepublic.com/focus/f-news/1786393/posts> (discussing the issue).

76. Carla T. Main, *How Eminent Domain Ran Amok*, REAL CLEAR POLITICS (Oct. 22, 2005), http://realclearpolitics.com/Commentary/com-10_21_05_CTM.html.

77. Echeverria, *supra* note 63.

78. Op-Ed, *Pfizer and Kelo’s Ghost Town*, WALL ST. J., Nov. 11, 2009, at A20, *available at* <http://online.wsj.com/article/SB10001424052748704402404574527513453636326.html>.

79. *Restricting Use of Eminent Domain for Economic Purposes*, HOUSE RES. ORG.: TEX. HOUSE OF REPRESENTATIVES, January 3, 2007, at 5-6, *available at* <http://www.hro.house.state.tx.us/interim/int79-6.pdf> (“Twenty-one [states] have restricted the use of eminent domain for purposes of economic development, increasing tax revenue, or transferring private property to a private entity. Ten states restrict the use of eminent domain to ‘blighted’ properties and place an emphasis on public health, safety, and welfare criteria when designating blighted properties. A number of others have: adopted more limited definitions of ‘public use’; required certain actions during the process of exercising eminent domain such as public notice, public hearings, and local government approval; required compensation at greater than fair market value; placed a moratorium on eminent domain for economic development; and established legislative committees to study the issue.”); John E. Kramer, *Special Interest Win, Property Owners Loses With Delaware Governor’s Veto of Eminent Domain Reform*, CASTLE COALITION (Jan. 28, 2008), http://castlecoalition.com/index.php?option=com_content&task=view&id=732; *see also* CASTLE COALITION, 50 STATE REPORT CARD: TRACKING EMINENT DOMAIN REFORM LEGISLATION SINCE *KELO* (June 2007), *available at* www.castlecoalition.org/pdf/publications/report_card/50_State_Report.pdf [hereinafter CASTLE COALITION] (developing a classification system to evaluate the effectiveness of post-*Kelo* legislation reform on a state by state basis. For example, five states received a passing grade of “A-”. They are Florida, Michigan, New Mexico, North Dakota, and South Dakota.).

80. *See* Seidenberg, *supra* note 64 (“Drastic Changes in land use law were predicted after the U.S. Supreme Court’s *Kelo* ruling, but four years later, things don’t look that different.”).

to *Kelo* was unwarranted.⁸¹ The Florida Constitution already afforded private property owners protection from *Kelo*-type takings for redevelopment and revitalization. The legislature nonetheless, in response to *Kelo*-type takings, amended the statutes governing eminent domain.

Specifically, the legislature enacted sections 73.013–14, Florida Statutes. Section 73.013 restricts the ability of condemning authorities to transfer property acquired through eminent domain to private parties. Section 73.014 declares the elimination of nuisance, slum or blight conditions as a public purpose for which eminent domain may be used. Florida’s opinion of what constitutes a “public purpose” was more restrictive than what the federal courts have determined satisfied the “public use” requirement of the United States Constitution. Florida’s reaction—flatly banning economic development⁸² or blight condemnation⁸³—should not be hailed as the model alternative to *Kelo*-type takings. For instance, the Texas legislature’s response was to simply limit or eliminate the use of eminent domain as it relates to economic redevelopment, “unless economic development is secondary to the main objective of eliminating real blight.”⁸⁴ *Kelo* reaffirms that the government is not allowed to take property under the mere pretext of a public purpose when the main purpose is to bestow a private benefit, which translates into current legislations’ ban on pretextual takings.⁸⁵

81. The due process clause of the Florida Constitution provides that “[n]o person shall be deprived of life, liberty or property without due process of law” as worded in article I, section 9. In addition, article X sections 6 (a) and (b) of the Florida Constitution provides limitations on the power of the legislature to take property by eminent domain and requiring it to be prescribed by law.

82. FLA. STAT. § 163.335(7) (2006).

It is further found and declared that the prevention or elimination of a slum area or blighted area as defined in this part and the preservation or enhancement of the tax base are not public uses or purposes for which private property may be taken by eminent domain and do not satisfy the public purpose requirement of s. 6(a), Art. X of the State Constitution.

Id., available at http://archive.flsenate.gov/statutes/index.cfm?App_mode=Display_Statute&Search_String=&URL=Ch0163/SEC335.HTM&Title=->2006->Ch0163->Section%20335#0163.335.

83. FLA. STAT. § 73.014(2) (2006) (prohibiting the taking of private property “for the purpose of preventing or eliminating slum or blight conditions,” and therefore eliminating nuisance, slum, and blight prevention as valid public purposes for the taking of private property via eminent domain in Florida).

84. S.B. 7, 79th Leg., 2d Sess. (Tex. 2005), available at <http://www.legis.state.tx.us/tlodocs/792/billtext/html/SB00007F.htm>; see also Press Release, Office of the Governor Rick Perry, Gov. Perry Signs New Law Protecting Property Rights (Aug. 31, 2005), available at <http://governor.state.tx.us/news/press-release/3239> (announcing Governor Perry’s reasons for signing Senate Bill 7).

85. Somin, *supra* note 66, at 2136 (citing *Kelo v. City of New London*, 545 US 469, 478 (2005)).

It is important to look at the law in several states to achieve a comprehensive picture. In Alabama, the legislature enacted laws prohibiting the use of eminent domain to transfer property from its original owner to industrial, office, or residential developers, or retail corporations.⁸⁶ In Nevada, legislation restricts the use of eminent domain by prohibiting agencies from using it for economic redevelopment purposes, except where there is a finding of blight for each individual parcel within the redevelopment area.⁸⁷ Utah also prohibits local economic redevelopment agencies from acquiring property by eminent domain.⁸⁸ Colorado amended the public use definition to “not include the taking of private property for transfer to a private entity for the purpose of economic development or enhancement of tax revenue,” but still generally allows a taking solely for the purpose of furthering a public use.⁸⁹

In Iowa, legislation now requires a property-by-property assessment of blight designation; only when 75 percent of the properties are blighted can non-blighted properties be taken by eminent domain.⁹⁰ This seems like a fair rule, but it is easy to argue that a higher percentage requirement would be better. I suggest that Florida should have redefined blight and implemented a percentage designation like Iowa to determine when properties can be taken by eminent domain. However, it needs to be considered that some critics still find Iowa’s reform ineffective because the extensive definition of blight in Iowa’s legislation depends on “the definition of such terms as ‘deteriorated structures’ and ‘excessive and uncorrected deterioration of site.’”⁹¹ Since, as a practical matter, *Kelo* applies only where state legislatures subscribe to the same public use definition employed by the Connecticut legislature, states such as Florida, Kentucky, Maine, New Hampshire, and Tennessee, which more narrowly define the term, need not accept the broad finding of the *Kelo* Court.⁹² Instead, these states mandate that the public “directly” benefit from the taking.⁹³ This narrow test is difficult to administer, as noted by the *Kelo*

86. S.B. 68, 2005 Leg., Reg. Sess. (Ala. 2005), available at <http://www.legislature.state.al.us/Searchableinstruments/2005FS/Bills/SB68.htm>.

87. S.B. 326, 2005 Leg., 73d Sess. (Nev. 2005), available at http://www.leg.state.nv.us/73rd/bills/SB/SB326_EN.pdf.

88. S.B. 184, 2005 Leg., Gen. Sess. (Utah 2005), available at <http://www.le.state.ut.us/~2005/bills/sbillenr/sb0184.htm>.

89. CASTLE COALITION, *supra* note 79.

90. *Id.*

91. Somin, *supra* note 66, at 2130.

92. *Kelo v. City of New London*, 545 U.S. 469, 480 (2005) (“When the Court began applying the Fifth Amendment to the States at the close of the 19th century, it embraced the broader and more natural interpretation of public use as ‘public purpose.’” (citing *Fallbrook Irrigation Dist. v. Bradley*, 164 U.S. 112, 158–64 (1896))).

93. Elisabeth Sperow, *The Kelo Legacy: Political Accountability, Not Legislation, Is The Cure*, 38 MCGEORGE L. REV. 405, 420 (2007).

Court, as it is unclear what proportion of the population needs to have access to the property and at what price this is to be achieved.⁹⁴ The majority argued that the narrow use of the public test is “impractical given the diverse and always evolving needs of society.”⁹⁵ I opine that Florida’s response was hasty in comparison to other states’ approaches to legislative reform. Florida’s decision appears to be reactive as opposed to responsive.

IV. A CASE STUDY: ENTHUSIASM RUN AMOK IN FLORIDA

Florida is a case study in irony. Before *Kelo*, the state broadly supported the policy of taking private property for redeveloping localities that were struggling economically in order to improve the public welfare and increase the local tax base.⁹⁶ However, after *Kelo*, and reacting to the public outcry over takings of non-blighted properties for private economic development, the federal government passed the “Private Property Rights Protection Act of 2005.”⁹⁷ The bill’s sole purpose was to prevent a *Kelo*

94. *Kelo*, 545 U.S. at 479 (2005).

95. *Id.*

96. *Id.* at 472.

97. H.R. 4128, 109th Cong. (1st Sess. 2005), available at <http://www.nga.org/Files/pdf/HR4128.pdf>. The Private Property Rights Protection Act of 2005 (“PPRP”) prohibited the federal government from using the power of eminent domain to take private property for economic development. *Id.* The PPRP also provided for the withholding of federal economic development funds from state or local governments that do so. *Id.* Section Two of the PPRP prohibits any state or political subdivision from exercising its power of eminent domain for economic development if that state or political subdivision receives federal economic development funds during the fiscal year. *Id.* This section defines “economic development” as taking private property and conveying or leasing it to a private entity for commercial enterprise carried on for profit or to increase tax revenue, the tax base, employment, or general economic health. *Id.* The section also makes a state or political subdivision that violates such prohibition ineligible for any such funds for two fiscal years. *Id.* Further, it provides that such a state or political subdivision is not ineligible for such funds if it returns all real property that was improperly taken and replaces or repairs any property that was destroyed or damaged. *Id.* Section Three “[p]rohibits the federal government from exercising its power of eminent domain for economic development.” *Id.*; see also S. 1313, 109th Cong. (1st Sess. 2005), available at <http://www.nga.org/Files/pdf/S1313.pdf> (proposing “[t]o protect homes, small businesses, and other private property rights, by limiting the power of eminent domain”); H.R. 3135, 109th Cong. (1st Sess. 2005); available at <http://www.nga.org/Files/pdf/HR3135.pdf> (proposing “[t]o protect private property rights”); H.R. 3405, 109th Cong. (1st Sess. 2005), available at <http://www.nga.org/Files/pdf/HR3405.pdf> (proposing “[t]o prohibit the provision of Federal economic development assistance for any State or locality that uses the power of eminent domain power to obtain property for private commercial development or that fails to pay relocation costs to persons displaced by use of the power of eminent domain for economic development purposes”); *The Kelo Decision: Investigating Takings of Homes and Other Private Property: Hearing on H.R. 4128 Before the S. Comm. on the Judiciary*, (2005) (statement of Sen. John Cornyn), available at http://judiciary.senate.gov/hearings/testimony.cfm?id=1612&wit_id=4543 (discussing the

situation, taking private property for economic development, from occurring in the state or local government.⁹⁸ Florida is the only state to enact laws flatly rejecting condemnations based on “economic development” and “blight” rationales.⁹⁹ The Florida Constitution prohibits takings of private property unless the taking is for a designated “public purpose” and the property owner is paid full compensation.¹⁰⁰ Over the years, the definition of “public purpose” in Florida has been expanded through case law. For example, in *Peavy-Wilson Lumber Co. v. Brevard County*, the Florida Supreme Court held that the power of eminent domain should be limited to basic essentials like roads, schools, drainage projects, parks, and playgrounds.¹⁰¹ In 1975, the Florida Supreme Court held in *Baycol, Inc. v. Downtown Development Authority of Fort Lauderdale* that the “public interest must dominate the private gain” in order to acquire property for the exercise of eminent domain.¹⁰² Continuing this trend, in

importance of Fifth Amendment rights and providing protection from taking by eminent domain). Section Four of the PPRP created a new federal cause of action for any individual suffering injury as a result of a violation of the Act, with a provision that allowed a prevailing plaintiff to recover attorneys’ fees. *Id.*

98. H.R. 4128; S. 1313; H.R. 3135; H.R. 3405; *see also The Kelo Decision: Investigating Takings of Homes and Other Private Property: Hearing on H.R. 4128 Before the S. Comm. on the Judiciary, supra note 97.*

99. Dana, *supra* note 62, at 375. A blighted area is defined as “[a] declining area suffering from seriously decreasing property values and not likely to recover without some outside intervention. More than simply a market slip, a blighted area can be identified by deteriorating buildings, increased crime rates, and decreased occupancies.” *Blight Area*, THEFREEDICTIONARY.COM, <http://financial-dictionary.thefreedictionary.com/blighted+area> (last visited Feb. 16, 2011). Economic development is defined as efforts that seek to improve the economic well-being and quality of life for a community by creating and/or retaining jobs and supporting or growing incomes and the tax base. *Economic Development*, THEFREEDICTIONARY.COM, <http://encyclopedia.thefreedictionary.com/economic+development> (last visited Feb. 16, 2011).

100. FLA. CONST. art. X, § 6(a) (“No private property shall be taken except for a public purpose and with full compensation therefor paid to each owner secured by deposit in the registry of the court and available to the owner.”). Florida courts have determined that “full compensation” includes payment of the owner’s attorney’s fees and expert costs, so that he or she is “made whole” after the taking. *Jacksonville Expressway Auth. v. Henry G. DuPree Co.*, 108 So. 2d 289, 293 (Fla. 1958). *See also* U.S. v. Reynolds, 397 U.S. 14, 15-16 (1970) (“The Fifth Amendment provides that private property shall not be taken for public use without just compensation. And ‘just compensation’ means the full monetary equivalent of the property taken. The owner is to be put in the same position monetarily as he would have occupied if his property had not been taken. In enforcing the constitutional mandate, the Court at an early date adopted the concept of market value: the owner is entitled to the fair market value of the property at the time of the taking. But this basic measurement of compensation has been hedged with certain refinements developed over the years in the interest of effectuating the constitutional guarantee.”).

101. *Peavy-Wilson Lumber Co. v. Brevard Cnty.*, 159 Fla. 311, 318 (Fla. 1947).

102. 315 So. 2d 451, 456 (Fla. 1975).

the 1977 case of *Deseret Ranches of Florida, Inc. v. Bowman*, the Court upheld a state statute that allowed a private party to use eminent domain to obtain an easement of necessity over an adjacent property.¹⁰³ The Court concluded that the statute's purpose was predominantly public and any benefit to the private party was very minor compared to the public purpose.¹⁰⁴ Then, in 1988, the Court broadened the application of the public purpose doctrine even more in *Department of Transportation v. Fortune Federal Savings & Loan Ass'n*.¹⁰⁵ Here, the Court concluded that "[t]he term 'public purpose' does not mean simply that the land is used for a specific public function" such as building roads.¹⁰⁶ Public purpose includes various projects that benefit the state in a "tangible, foreseeable way."¹⁰⁷

Prior to *Kelo*, the Florida legislature did not expressly use the terminology "economic development" as a pretext for public purpose in eminent domain takings. However, the Florida Supreme Court addressed economic development in *Grubstein v. Urban Renewal Agency of Tampa*, where it acknowledged that mere economic redevelopment could not justify the use of eminent domain and proposed a stricter standard.¹⁰⁸ An opinion by Justice Hobson eloquently concurs that "[t]he predominance of esthetic considerations—cloaked in the guise of general welfare"—was unconstitutional.¹⁰⁹ The Court said that a "public benefit" is not synonymous with "public purpose."¹¹⁰ Although the public might incidentally benefit from a redevelopment plan, there must be some "reasonable necessity" for the exercise of the power of eminent domain.¹¹¹ What remained undecided was whether economic development was equivalent to public benefit, or fell somewhere along the spectrum towards public purpose. The Florida Legislature decided to act.

In reaction to *Kelo*, the Florida Legislature passed House Bill 1567 to apply to all eminent domain petitions filed after its effective date of May

103. 349 So. 2d 155 (Fla. 1977).

104. *Id.* at 156.

105. *Dep't of Transp. v. Fortune Fed. Sav. & Loan Ass'n*, 532 So. 2d 1267 (Fla. 1988).

106. *Id.* at 1270.

107. *Id.*

108. 115 So. 2d 745, 751 (Fla. 1959) (holding valid provisions that allow the clearance and private redevelopment of "slum areas" where the redevelopment relates directly to the public's health, safety, and welfare); *see also* *Baycol, Inc. v. Downtown Dev. Auth. of Fort Lauderdale*, 315 So. 2d 451, 455 (Fla. 1975) (noting that *Grubstein* validated "condemnation of blighted or slum areas for public housing as a public purpose . . . based upon proof that the area involved had become infested with crime and disease affecting the public health and welfare, which, of course, is a proper public purpose . . .").

109. *Grubstein*, 115 So. 2d at 752 (Hobson, J., concurring specially).

110. *Id.* at 751.

111. *Id.*

11, 2006.¹¹² The new law amended Florida's eminent domain statute, Chapter 73, Florida Statutes, by creating a new section prohibiting "the transfer of property taken by use of eminent domain to a private person or entity or a natural person."¹¹³ Under the new law, the exercise of eminent domain may only be used if it falls within the exception,¹¹⁴ which primarily relates to governmental-type functions, such as common-carrier services or systems, public infrastructure, public or private utilities for electrical service, storm water or telephone services, along with several others.¹¹⁵ Chapter 73 also restricts takings for blight condemnation.¹¹⁶

A. Pre-Kelo Eminent Domain and Community Redevelopment in Florida

Prior to *Kelo*, Florida's eminent domain statutes had a significant impact on the development of its local communities.¹¹⁷ The Florida Constitution and Florida Statutes did not explicitly prohibit the taking of private property for the purpose of economic development, and the Florida Supreme Court had not specifically ruled on using eminent domain to take

112. H.B. 1567, 2006 Leg., Reg. Sess. (Fla. 2006); *see also* H.J. Res. 1569, 2006 Leg., Reg. Sess. (Fla. 2006) (proposing an amendment to the state Constitution to prohibit the transfer of private property taken by eminent domain to a natural person or private entity; provides that the Legislature may permit exceptions allowing the transfer of such private property by general law passed by a three-fifths vote of the membership of each house).

113. FLA. STAT. §73.013(1) (2006).

114. FLA. STAT. § 73.013 (2006).

115. H.B. 1567, 2006 Leg., Reg. Sess. (Fla. 2006); *see also* H.J. Res. 1569, 2006 Leg., Reg. Sess. (Fla. 2006) (addressing governmental exceptions to eminent domain).

116.

73.014 Taking property to eliminate nuisance, slum, or blight conditions prohibited.—

(1) Notwithstanding any other provision of law, including any charter provision, ordinance, statute, or special law, the state, any political subdivision as defined in s. 1.01(8), or any other entity to which the power of eminent domain is delegated may not exercise the power of eminent domain to take private property for the purpose of abating or eliminating a public nuisance. Notwithstanding any other provision of law, including any charter provision, ordinance, statute, or special law, abating or eliminating a public nuisance is not a valid public purpose or use for which private property may be taken by eminent domain and does not satisfy the public purpose requirement of s. 6(a), Art. X of the State Constitution. This subsection does not diminish the power of counties or municipalities to adopt or enforce county or municipal ordinances related to code enforcement or the elimination of public nuisances to the extent such ordinances do not authorize the taking of private property by eminent domain.

Fla. H.B. 1567(2).

117. *See generally* Community Redevelopment Act of 1969, FLA. STAT. §§ 163.330-163.463 (1969) (providing means by which slum and blighted areas can be revitalized).

land from a private citizen and then transferring it to another private citizen or entity.¹¹⁸ Before *Kelo*, redevelopment efforts in some states that struggled economically were generally supported through taking property in order to improve public welfare and to increase the local tax base.¹¹⁹ Prior to 2006, a valid taking in Florida required the condemning authority to:

- (1) Possess [the] authority to exercise . . . eminent domain;
- (2) Demonstrate that a taking of private property is pursued for a valid public purpose and that all statutory requirements have been fulfilled;
- (3) Offer evidence showing that the [under]taking is reasonabl[y], [if not] absolutely, necessary to accomplish the public purpose of the taking; and
- (4) Pay the property owner full compensation as determined by a [twelve]-member jury.¹²⁰

These elements did not directly prohibit the taking of private property for economic development purposes.¹²¹ Consequently, since the Florida Constitution did not expressly authorize takings for economic development purposes, the Community Redevelopment Act of 1969¹²² granted broad “home rule”¹²³ authority to cities and counties, including the authority to exercise the power of eminent domain for any municipal or county purpose.¹²⁴ For example, the City of Tampa used the power of eminent domain to acquire land to build parking garages in Ybor City.¹²⁵ The City of St. Petersburg exercised eminent domain to amass six blighted acres and

118. FLA. H.R. STAFF ANALYSIS, HB 1567 EMINENT DOMAIN (2006), available at <http://www.myfloridahouse.gov/sections/Documents/loaddoc.aspx?FileName=h1567b.JC.doc&DocumentType=Analysis&BillNumber=1567&Session=2006>.

119. See DARREN SPRINGER, NGA CTR. FOR BEST PRACTICES, STATE POLICY AND THE EXERCISE OF THE POWER OF EMINENT DOMAIN, available at <http://www.nga.org/Files/pdf/05StatePolicyEminent.pdf> (discussing the changes various states made to their standards for eminent domain after the *Kelo* decision).

120. FLA. H.R. STAFF ANALYSIS, *supra* note 118, at 5.

121. FLA. STAT. §§ 163.330-163.463 (2006).

122. *Id.*

123. See *id.* ch. 125 (relating to counties); *id.* ch. 166 (relating to municipalities); see also *id.* ch. 163, pt. III (describing the purpose of “home rule” authority as providing local government with self-governance to ensure that local issues and problems are handled at the level of government closest to the citizens that they represent).

124. See *id.* ch. 125 (relating to counties); *id.* ch. 166 (relating to municipalities).

125. Carrie Weimar, *Crimping Eminent Domain*, ST. PETERSBURG TIMES, Nov. 13, 2006, at 1B, available at http://www.sptimes.com/2006/11/13/Tampabay/Crimping_emanent_doma.shtml.

created BayWalk, a vibrant downtown shopping and entertainment area.¹²⁶ Cities like Jacksonville and Tampa have significant redevelopment plans, which have led to growth over the past few decades.¹²⁷ The use of eminent domain in these cases can be characterized as public purpose because the city redeveloped land for the use of all citizens and visitors.

Nevertheless, many of the critics argue that eminent domain is a “root of all evils” because the power of eminent domain was abused at times throughout history.¹²⁸ One such example occurred when the City of Daytona Beach relied on a 24-year old blight finding to justify condemning the bustling boardwalk businesses to enable a major facelift along the beachside.¹²⁹ In the five-year period of 1998–2002, “there were more than 10,000 actual and threatened condemnations for the benefit of private parties around the nation.”¹³⁰ Florida municipalities were responsible for more than one-fifth of that total.¹³¹ It is apparent that Florida was replete

126. *Id.*

127. See *CRA Basics*, FLA. REDEVELOPMENT ASS'N, <http://redevelopment.net/technical-assistance/q-a-for-cras/> (last visited Feb. 2, 2011) (“The designation is used by Florida cities of all sizes, from Jacksonville and Tampa to Madison and Apalachicola. Many familiar locations, such as Church Street in Orlando, Ybor City in Tampa and the beachfront in Ft. Lauderdale are successful examples of Community Redevelopment Areas.”).

128. Carla T. Main, *How Eminent Domain Ran Amok*, POL'Y REV., Oct.-Nov. 2005, available at <http://www.hoover.org/publications/policy-review/article/7292>; see also *Poletown Neighborhood Council v. City of Detroit*, 304 N.W.2d 455 (Mich. 1981) (demonstrating effects of eminent domain); Elizabeth Nolan Brown, *States Fight to Limit Government's Powers to Take Your Home*, AARP BULLETIN, May 12, 2008, http://www.aarp.org/politics-society/government-elections/info-04-2009/eminent_domain.html (demonstrating examples of unpopular government usage of eminent domain); U.S. GOV'T ACCOUNTABILITY OFFICE GAO-07-28, EMINENT DOMAIN 30-31 (2006), available at www.gao.gov/cgi-bin/getrpt?GAO-07-28 (describing negative effects of eminent domain).

129. In 2005, a Circuit Court Judge upheld the condemnations of three Floridian properties, in Daytona Beach, as part of a project to replace one set of boardwalk businesses for another. *City of Daytona Beach v. Mathas*, No. 2004-31846-CICI (Fla. Cir. Ct. Aug. 19, 2005). Maybe a 24 year-old blight finding should be revised before any action is taken. See Ludmilla Lelis, *Daytona Businesses Must Sell Property*, Orlando Sentinel, Aug. 20, 2005, at A1; Ludmilla Lelis, *Joyland Owners Settle with Daytona*, Orlando Sentinel, Nov. 2, 2004, at B3.

130. *Supreme Court's Kelo Decision and Potential Congressional Responses: Hearing before the Subcomm. on the Constitution of the Comm. on the Judiciary H.R.*, 109th Cong. 109-60 at 25 (Sept. 22, 2005), available at http://commdocs.house.gov/committees/judiciary/hju23573.000/hju23573_0.HTM.

131. See *Protecting Kelo's Victims in Riviera Beach, Florida: City Seeks to Use Eminent Domain to Replace Lower-Income & Minority Residents with Wealthier Ones*, INSTITUTE FOR JUSTICE, <http://www.ij.org/component/content/article/37-privatepropertyrights/965-riviera-beach-florida-eminent-domain-background> (last visited Mar. 4, 2011). This article cites DANA BERLINER, PUBLIC POWER, PRIVATE GAIN: A FIVE-YEAR, STATE-BY-STATE REPORT EXAMINING THE ABUSE OF EMINENT DOMAIN 2, 52 (2003) available at http://www.castlecoalition.org/pdf/report/ED_report.pdf (noting 2,122 threatened and filed

with *Kelo*-type policy takings, but those policies remained untested in courts. As a result, Florida became among the worst abusers of eminent domain in the nation.¹³²

Notwithstanding what critics have stated, using eminent domain to cure blight, on its face, is not an abuse of power. Economic development has been considered a factor in the public context because the legislature determined it to be a public purpose for which municipalities and counties may expend public funds.¹³³ Since the legislature declared economic development as a public purpose for spending public funds, economic development could conceivably have been considered a public purpose in the context of the exercise of eminent domain power.¹³⁴

Professor David Dana points out that, “[a]ll or virtually all condemnations designated as blight condemnations could be characterized as economic development condemnations, inasmuch as the end goal of blight removal is economic redevelopment”¹³⁵ The author’s concern is not with Florida critically evaluating each economic proposal, but rather the summary fashion in which this legislation mandates rejection of all proposals involving private development or use. Indeed, under this legislation, property that has been previously condemned and taken by the state could not be transferred to a private citizen for economic development—even if the city has vacated the property—unless authorized by general law and passed by three-fifths vote of each house of the legislature. Needless to say, obtaining such approval from the legislature could delay projects to the point of dissuading developers from pursuing them.

In the wake of *Kelo*, the Florida Legislature echoed Justice O’Connor’s fear and amended the state’s eminent domain law by enacting new provisions prohibiting the transfer to private parties of property taken through eminent domain and eliminating the use of the power of eminent domain to resolve cases of public nuisance, slum, or blight conditions.¹³⁶

condemnations for private benefit between 1998 and 2002).

132. *Gearing Up for Battle*, CASTLE COALITION, http://www.castlecoalition.org/index.php?option=com_content&task=view&id=137&Itemid=165 (last visited Mar. 3, 2011).

133. FLA. H.R. STAFF ANALYSIS, H.B. 1567, EMINENT DOMAIN 9–10 (2006), available at <http://www.myfloridahouse.gov/sections/Documents/loaddoc.aspx?FileName=h1567b.JC.doc&DocumentType=Analysis&BillNumber=1567&Session=2006>.

134. *Id.*

135. Dana, *supra* note 62, at 369.

136. FLA. STAT. § 70.013 (2006); see also H.R.J. Res. 1569, 2006 Leg., Reg. Sess. (Fla 2006) (amending Florida Constitution by requiring “[p]rivate property taken by eminent domain pursuant to a petition to initiate condemnation proceedings filed on or after January 2, 2007, may not be conveyed to a natural person or private entity except as provided by general law passed by a three-fifths vote of the membership of each house of the Legislature.”).

The new laws impact both substantive and procedural elements of Florida eminent domain law.¹³⁷

The key substantive and procedural component of section 73.013, Florida Statutes, is that condemning authorities cannot take private property unless it falls under one of the specific exceptions.¹³⁸ After a condemning authority holds title for ten years, it may, after issuing a notice and allowing competitive bidding to take place, transfer the property to a private entity.¹³⁹ If certain requirements are met, the property can be transferred in less than ten years.¹⁴⁰

Further, Florida state legislators designed section 73.013 to limit condemning authorities' exercise of eminent domain¹⁴¹ by placing specific limitations on taking property and transferring it to private entities.¹⁴² The rule further designates exceptions pursuant to which private property can be taken and given to a private entity.¹⁴³ The exceptions restrict local

137. Substantive components are those that determine rights and obligations, while procedural components cover rules for governing the process for determining the rights.

138. 2006-11 Fla. Laws 3 (stating in F.S. § 73.014 that “[t]aking property to eliminate nuisance, slum or blight conditions [is] prohibited”). Some of the exceptions include: public carriers/systems, roads, public or private utilities (for specific listed purposes, i.e. wastewater services), and providing public infrastructure.

139. FLA. STAT. § 73.013(2)(a) (providing that if after at least ten years have elapsed since the condemning authority acquired the property, then the property may be subsequently transferred to another natural person or private entity without restriction provided public notice and competitive bidding took place).

140. FLA. STAT. § 73.013(2)(f)(1) (providing that: (1) the condemning authority or governmental entity holding title to the property documents that the property is no longer needed for the use or purpose for which it was acquired by the condemning authority or for which it was transferred to the current titleholder; and (2) the owner from whom the property was taken by eminent domain is given the opportunity to repurchase the property at the price that he or she received from the condemning authority). These two provisions explain that if the property is no longer needed for the use taken then the previous owner can repurchase the property at the price s/he received. What about the cost to fix it up?

141. 2006-11 Fla. Laws 2 (stating in F.S. § 73.013 that “[c]onveyance of property taken by eminent domain; preservation of government entity communications services eminent domain limitation; exception to restrictions on power of eminent domain. —

- (1) Notwithstanding any other provision of law, including any charter provision, ordinance, statute, or special law, if the state, any political subdivision as defined in s. 1.01(8), or any other entity to which the power of eminent domain is delegated files a petition of condemnation on or after the effective date of this section regarding a parcel of real property in this state, ownership or control of property acquired pursuant to such petition may not be conveyed by the condemning authority or any other entity to a natural person or private entity, by lease or otherwise, except that ownership or control of property acquired pursuant to such petition may be conveyed, by lease or otherwise, to a natural person or private entity.).

142. *Id.*

143. 2006-11 Fla. Laws 2-3 (stating in F.S. § 73.013(1)(a)-(h) [Exceptions]:

-
- a) For use in providing common carrier services or systems;
- b) (1) For use as a road or other right-of-way or means that is open to the public for transportation, whether at no charge or by toll;
- (2) For use in the provision of transportation-related services, business opportunities, and products pursuant to s. 338.234, on a toll road.
- c) That is a public or private utility for use in providing electricity services or systems, natural or manufactured gas services or systems, water and wastewater services or systems, storm water or runoff services or systems, sewer services or systems, pipeline facilities, telephone services or systems, or similar services or systems;
- d) For use in providing public infrastructure;
- e) That occupies, pursuant to a lease, an incidental part of a public property or a public facility for the purpose of providing goods or services to the public;
- f) Without restriction, after public notice and competitive bidding unless otherwise provided by general law, if less than 10 years have elapsed since the condemning authority acquired title to the property and the following conditions are met:
1. The condemning authority or governmental entity holding title to the property documents that the property is no longer needed for the use or purpose for which it was acquired by the condemning authority or for which it was transferred to the current titleholder; and
 2. The owner from whom the property was taken by eminent domain is given the opportunity to repurchase the property at the price that he or she received from the condemning authority;
- g) After public notice and competitive bidding unless otherwise provide by general law, if the property was owned and controlled by the condemning authority or a governmental entity for at least 10 years after the condemning authority acquired title to the property or
- In accordance with subsection (2)
- h) (2) (a) If ownership of property is conveyed to a natural person or private entity pursuant to paragraph (1) (a), paragraph (1) (b), paragraph (1) (c), paragraph (1) (d), or paragraph (1) (e), and at least 10 years have elapsed since the condemning authority acquired title to the property, the property may subsequently be transferred, after public notice and competitive bidding, unless otherwise provided by general law, to another natural person or private entity without restriction.
- (b) If ownership of property is conveyed to a natural person or private entity pursuant to paragraph (1) (a), paragraph (1) (b), paragraph (1) (c), paragraph (1) (d), or paragraph (1) (e), and less than 10 years have elapsed since the condemning authority acquired title to the property, the property may be transferred, after public notice and competitive bidding unless otherwise provided by general law, to another natural person or private entity without restriction, if the following conditions are met:
- 1) The current titleholder documents that the property is no longer needed for the use or purpose for which the property was transferred to the current titleholder; and
 - 2) The owner from whom the property was taken by eminent domain is

governments to utilizing the taking power of eminent domain to traditionally public use purposes such as roads, utilities, or government infrastructure.¹⁴⁴ However, the exceptions do not explicitly affect the government's eminent domain powers provided under section 358.81(2)(j), Florida Statutes, governing railroads and other public utilities.¹⁴⁵

On the other hand, section 73.014 prohibits taking private property to prevent or eliminate public nuisance, slum, or blight conditions¹⁴⁶ by specifically stating that nuisance, slum, and blight conditions do not satisfy the public purpose standard and may not be used by a condemning authority as a basis for eminent domain.¹⁴⁷ However, the statute that provides power to counties or municipalities to adopt or enforce county or municipal ordinances related to code enforcement for the elimination of public nuisance has not been diminished to the extent such ordinances do

given the opportunity to repurchase the property at the price that he or she received from the condemning authority.

3)This section does not affect the limitation on a government entity's power of eminent domain contained in s. 350.81 (2)(j).

4)The power of eminent domain shall be restricted as provided in this chapter and chapters 127, 163, and 166, except when the owner of a property relinquishes the property and concedes to the taking of the property in order to retain the ability to reinvest the proceeds of the sale of the property in replacement property under s. 1033 of the Internal Revenue Code. These exceptions ensure that eminent domain is still available for certain specified uses that the legislature has determined to be of such importance that eminent domain proceedings can be considered.)

144. FLA. STAT. § 70.013.

145. *Id.*

146. FLA. STAT. § 73.014 (prohibiting the taking of property to eliminate nuisance, slum or blight conditions).

147. 2006-11 Fla. Laws 3-4 (stating at F.S. § 73.014(1) that “[n]otwithstanding any other provision of law, including any charter provision, ordinance, statute, or special law, the state, any political subdivision as defined in s. 1.01(8), or any other entity to which the power of eminent domain is delegated may not exercise the power of eminent domain to take private property for the purpose of abating or eliminating a public nuisance. Notwithstanding any other provision of law, including any charter provision, ordinance, statute, or special law, abating or eliminating a public nuisance is not a valid public purpose or use for which private property may be taken by eminent domain and does not satisfy the public purpose requirement of s. 6(a), Art. X of the State Constitution. This subsection does not diminish the power of counties or municipalities to adopt or enforce county or municipal ordinances related to code enforcement or the elimination of public nuisances to the extent such ordinances do not authorize the taking of private property by eminent domain.”) This statute appears to make it so that nuisance, blight or slum cannot be the express purposes of taking a property. but I question whether or not this is so if the condemning authority finds some other public purpose to go along with the nuisance, blight or slum conditions to justify a taking.

not authorize the taking of property through eminent domain.¹⁴⁸ The new sections, along with statutory notice provisions, combine to ostensibly provide more property owners with additional protection from transfers of private property to entities, and have eliminated some of the fears that citizens held post *Kelo* lest the statutory revisions be deemed insufficient.

Florida legislators further created a political and substantive safeguard. In addition to statutory revisions, the State House of Representatives proposed Constitutional Amendment Eight, which prohibited private property taken by eminent domain from being transferred to a person or private entity except with a three-fifths vote of the Legislature.¹⁴⁹ The voters made their voices heard when sixty-nine percent of voters approved the Amendment in the November 2006 election.¹⁵⁰ This amendment changed article X, section 6, of the Florida Constitution by adding subsection (c) as follows:

(c) Private property taken by eminent domain pursuant to a petition to initiate condemnation proceedings filed on or after January 2, 2007, may not be conveyed to a natural person or private entity except as provided by general law passed by a three-fifths vote of the membership of each house of the Legislature.¹⁵¹

Reading the eminent domain statutes and amended Florida Constitution together, there are two requirements which must be met before property taken by eminent domain can be conveyed to a private citizen or

148. NAT'L ASS'N OF INDUS. AND OFFICE PROPS. (NAIOP), EMINENT DOMAIN UPDATE 5 (Sept. 18, 2006), available at <http://www.naiop.org/governmentaffairs/issues/resources/eminentdomainupdate091806.pdf>. NAIOP is the nation's leading trade association for developers, owners, investors, asset managers and other professionals in industrial, office and mixed-use commercial real estate. *Id.* Founded in 1967, NAIOP comprises 13,000+ members in 50 North American chapters. See also Paul D. Bain, 1999 amendments to Florida's Eminent Domain Statutes, 73 FLA. BAR J. 68 (1999), available at <http://www.floridabar.org/DIVCOM/JN/JNJournal01.nsf/76d28aa8f2ee03e185256aa9005d8d9a/1a5bcd7ceb307ec285256adb005d62a6?OpenDocument> (discussing the Florida legislature's intent to impact litigation in eminent domain with the 1999 amendments).

149. H.R.J. Res. 1569, 2006 Leg., Reg. Sess. (Fla. 2006).

150. Weimar, *supra* note 125.

151. FLA. CONST. art. X, § 6.

(a) No private property shall be taken except for a public purpose and with full compensation therefore paid to each owner or secured by deposit in the registry of the court and available to the owner.

(b) Provision may be made by law for the taking of easements, by like proceedings, for the drainage of the land of one person over or through the land of another.

Id.

entity. First, ten years must pass from when the taking occurs,¹⁵² and second, three-fifths of both legislative houses must approve the transfer.¹⁵³ The requirement of this three-fifths vote is more symbolic than it is a real obstacle to preventing elected officials from taking private property via eminent domain and handing it over to private developers.¹⁵⁴ As Professor Dana stated, “[o]nly Florida has opted for the across-the-board approach that Justice Thomas advocated for in his *Kelo* dissent, and in so doing, Florida has out-done even the proposals of ideologically charged property rights advocacy groups such as the Castle Coalition.”¹⁵⁵

Is this the proverbial “throwing the baby out with the bathwater,” or a well thought-out, empirical statute with which to uphold the rights of the people? Is this a protective law against the tyranny of government or a big corporate political smoke screen? Has the law been revised in such a way as to destroy its own objective? By analogy, one way to prevent auto accidents is to flatly ban driving. Few would argue that this would not eliminate auto accidents, however, the question would be, at what social cost? That is the question presented by the Florida Legislation—sure, it will protect homeowners from having their property taken for use by private developers, but at what social cost? Where is the cost benefit analysis? Should this be handled on a case by case basis and without the burdensome process of additional legislative action? As we will see in the next section, the restraints Florida adopted can cripple desperate government entities in their quest to revitalize their communities.

V. UNINTENDED CONSEQUENCES: IMPACT OF FLORIDA’S REACTION TO *KELO*

In the rush to enact laws narrowing the allowable purposes for eminent domain proceedings, Florida’s lawmakers may have overlooked the negative impact on counties, towns, and municipalities which rely on lawful takings to modernize their urban areas, attract financing and industries, and increase tax bases. Florida’s all out ban on both economic and blight condemnation was a hasty legislative reaction to *Kelo*.¹⁵⁶ The statutory amendments cured the pernicious act of governmental takings of

152. FLA. STAT. § 73.013(2)(a) (2006).

153. FLA. CONST. art. X, § 6(c).

154. *Id.* Three-fifths is the equivalent of sixty percent as opposed to fifty percent. *Id.*

155. Dana, *supra* note 62, at 375–76. The Castle Coalition is a grassroots organization founded in March 2002 as a project of the Institute for Justice (IJ), a public-interest law firm in Washington, D.C. CASTLE COALITION, <http://www.castlecoalition.org> (last visited Jan. 30, 2011). The organization helps teach business owners and homeowners how to fight eminent domain cases. *Id.*

156. See FLA. STAT. § 73.014 (2006) (“[t]aking property to eliminate nuisance, slum or blight conditions prohibited”).

private property from one citizen and conveying it to another who promises to make “better use” of the property. While laudable on its face, this flat prohibition eliminates a legitimate tool of municipalities to better serve all residents, albeit at the expense of a few affected homeowners. In this regard, the result is similar to takings for the public good that inconvenience private property owners for traditional purposes such as schools, libraries, railroads, roads, utility easements, and so forth.¹⁵⁷ The legislature needs to balance the ability of counties and municipalities to attract new developments and overcome blight, while retaining appropriate safeguards to protect against abuse.¹⁵⁸

Prior to *Kelo*, local redevelopment efforts in Florida were governed by and should have been aligned with the Community Redevelopment Act of 1969, codified under Chapter 163, Part III, Florida Statutes.¹⁵⁹ When the Florida Legislature adopted the Act, it stated its intent as follows:

[T]here exist in counties and municipalities of the state slum and blighted areas which constitute a serious and growing menace, injurious to the public health, safety, morals, and welfare of the residents of the state; that the existence of such areas . . . constitutes an economic and social liability imposing onerous burdens which decrease the tax base and reduce tax revenues, substantially impairs or arrests sound growth . . . aggravates traffic problems, and substantially hampers the elimination of traffic hazards and the improvement of traffic facilities; and that the prevention and elimination of slums and blight is a matter of state policy and state concern¹⁶⁰

The Act permitted economic development by public entities in order to eliminate or prevent “slums” or “blight.”¹⁶¹ Each local government (county or municipality) could establish a Community Redevelopment Agency (“CRA”) to exercise the community redevelopment authority after a “finding of necessity,”¹⁶² and a further finding of the “need for a CRA to

157. See SPRINGER, 119, at 9 (advising that “broad prohibitions” on eminent domain “could preclude communities from revitalizing, creating jobs, and condemning blighted properties”).

158. See Romy Varghese, *Harrisburg Seeks ‘Least Worst’ Path*, WALL ST. J. (Apr. 28, 2010), <http://online.wsj.com/article/SB10001424052748704471204575210102200492256.html> (illustrating the struggles of municipalities attempting to restructure under the bankruptcy code).

159. See Community Redevelopment Act of 1969, FLA. STAT. §§ 163.330-163.463 (2006) (providing for community redevelopment agencies to minimize slums and blight).

160. FLA. STAT. § 163.335(1) (2006).

161. FLA. STAT. § 163.340 (2006).

162. FLA. STAT. § 163.355 (2006).

carry out community redevelopment.”¹⁶³ The condition in targeted areas must be either a “slum”¹⁶⁴ or “blight”¹⁶⁵ in order for local government to

163. FLA. H.R. STAFF ANALYSIS, H.B. 1583, COMMUNITY REDEVELOPMENT 2 (2006), *available at* <http://www.myfloridahouse.gov/SEctions/Documents/loadoc.aspx?FileName=h1583a.LG.C.doc&DocumentType=Analysis&BillNumber=1583&Session=2006>; *see also* FLA. STAT. § 163.370(2)(c) (2006) (giving counties and municipalities the necessary powers “to undertake and carry out community development and related activities”).

164. FLA. STAT. § 163.340(7) (2006) (“‘Slum area’ means an area having physical or economic conditions conducive to disease, infant mortality, juvenile delinquency, poverty, or crime because there is a predominance of buildings or improvements, whether residential or nonresidential, which are impaired by reason of dilapidation, deterioration, age, or obsolescence, and exhibiting one or more of the following factors:

- (a) Inadequate provision for ventilation, light, air, sanitation, or open spaces;
- (b) High density of population, compared to the population density of adjacent areas within the county or municipality; and overcrowding, as indicated by government-maintained statistics or other studies and the requirements of the Florida Building Code; or
- (c) The existence of conditions that endanger life or property by fire or other causes”).

165. FLA. STAT. § 163.340(8) (2006) (“‘Blighted area’ means an area in which there are a substantial number of deteriorated, or deteriorating structures, in which conditions, as indicated by government-maintained statistics or other studies, are leading to economic distress or endanger life or property, and in which two or more of the factors are present:

- (a) Predominance of defective or inadequate street layout, parking facilities, roadways, bridge, or public transportation facilities;
- (b) Aggregate assessed values of real property in the area of ad valorem tax purposes have failed to show any appreciable increase over the 5 years prior to the finding of such conditions;
- (c) Faulty lot layout in relation to size, adequacy, accessibility, or usefulness;
- (d) unsanitary or unsafe conditions;
- (e) Deterioration of site or other improvements;
- (f) Inadequate and outdated building density patterns;
- (g) Falling lease rates per square foot of office, commercial, or industrial space compared to the remainder of the county or municipality;
- (h) Tax or special assessment delinquency exceeding the fair value of the land;
- (i) Residential and commercial vacancy rates higher in the area than in the remainder of the county or municipality;
- (j) Incidence of crime in the area higher than in the remainder of the county or municipality;
- (k) Fire and emergency medical service calls to the area proportionately higher than in the remainder of the county or municipality;
- (l) A greater number of violations of the Florida Building Code in the area than the number of violations recorded in the remainder of the county or municipality;
- (m) Diversity of ownership or defective or unusual conditions of title which

exercise the power of eminent domain.

The CRA executed the community redevelopment plan proposed by a county's or municipality's governing body, which sometimes consisted of only five members.¹⁶⁶ The redevelopment plan must have been in harmony with the local government's comprehensive plan before the municipality could adopt and follow it.¹⁶⁷ Once the redevelopment plan was adopted, the counties, municipalities, and redevelopment agencies had the power of eminent domain to effectuate the purpose of the CRA.¹⁶⁸ Therefore, local governments could have "acquire[d] by condemnation any interest in real property, including a fee simple title thereto, which it deem[ed] necessary for, or in connection with, community redevelopment and related activities under this part."¹⁶⁹ Under section 163.340(8), Florida Statutes, an area can be considered blighted, and subject to condemnation and private redevelopment, if it meets only two of the fourteen criteria.¹⁷⁰

Post-*Kelo* statutes, with their new bright-line rules and limited exceptions, drastically reduce local governments' flexibility in meeting the goals of the Community Redevelopment Act.¹⁷¹ The Community Redevelopment Act was amended to remove the power of eminent domain

prevent the free alienability of land within the deteriorated or hazardous area; or
 (n) Governmentally owned property with adverse environmental conditions caused by a public or private entity. However the term "blighted area" also means any area in which at least one of the factors identified in paragraphs (a) through (n) are present and all taxing authorities subject to s. 163.387 (2) (a) agree, either by interlocal agreement or agreements with the agency or by resolution, that the area is blighted. Such agreement or resolution shall only determine that the area is blighted. For purposes of qualifying for the tax credits authorized in chapter 220, "blighted area" means an area as defined in this subsection").

166. See FLA. STAT. § 163.356 (2006) (resolving that the board of a CRA shall have no fewer than five and no more than nine members).

167. See generally FLA. STAT. §§ 163.3167, .3184, .3187, .3189, .3191, .3194 (2006) (describing the guidelines and procedures for adopting, amending, and evaluating comprehensive plans).

168. See FLA. STAT. § 163.375 (1999) (repealed 2006) (defining the exercise of the power of eminent domain).

169. FLA. STAT. § 163.375(1)-(3); see generally FLA. STAT. §§ 163.358 (2006) (defining powers of local governments in effecting community redevelopment and related activities), § 73-74 (West Supp. 2009) (describing eminent domain and proceedings supplemental to eminent domain), § 127.01-.02 (2000) (limiting the rights of counties to exercise eminent domain).

170. See FLA. STAT. § 163.340(8) (2006) (defining "blighted area" by listing factors such as "inadequate and outdated building density patterns," a "predominance of defective or inadequate street layout," an "incidence of crime in the area higher than in the remainder of the county or municipality," and falling lease rates per square foot of office, commercial, or industrial space compared to the remainder of the county or municipality).

171. FLA. STAT. § 163.370 (2006) (deleting authority to delegate the power of eminent domain to a community redevelopment agency).

from the community redevelopment agencies.¹⁷² However, governments can still transfer condemned land to a natural person or private entity, but only after holding the property for a period of “at least ten years [after] . . . acquir[ing] title.”¹⁷³ Most significantly, the new law makes it clear that local governments may only utilize the taking power in the context of uses which have been held to be traditionally valid public purposes in prior exercises of eminent domain or takings. The amendments to Chapter 73 expressly state that the “[taking of] private property for . . . eliminating a public nuisance. . . . slum, or blight condition[] . . . does not satisfy the public-purpose requirement of s[ection] 6(a), Art. X of the State Constitution.”¹⁷⁴

As explained above, prior to *Kelo*, Florida law simply required that there be a valid public purpose in order to exercise eminent domain over private property. The 2006 amended legislation added a specific exclusion for slum eradication as a basis for condemning property through eminent domain, and further added safeguards to prevent municipalities from using eminent domain to take property and transfer it to private developers for economic improvements¹⁷⁵ or blight remediation.¹⁷⁶

The purpose of governmental regulation may be to correct a problem. However, legislative bodies often fail to consider the law of unintended consequences, which is the principle that for every law or policy that is implemented with a set of objectives or goals in mind, there are always one or more unintended consequences that will stem from that law or policy.¹⁷⁷

172. See FLA. STAT. § 163.358(6) (2006) (reserving the power of eminent domain to the governing body of the county or municipality); see also H.B. 1567, 2006 Leg. § 9 (Fla. 2006) (amending § 163.368).

173. FLA. STAT. § 73.013 (West Supp. 2009); see also H.B. 1567, 2006 Leg. (Fla. 2006) (amending Florida state codes regarding eminent domain); H.R.J. Res. 1569, 2006 Leg. (Fla. 2006) (amending the Florida State Constitution prohibiting transfer of property taken by eminent domain to a natural person or private entity, with exceptions to be enacted by legislature).

174. H.B. 1567 § 1, 2006 Leg., Gen. Sess. (Fla. 2006); see also David Parkhurst, *Senate Passes Eminent Domain Amendment*, NAT'L LEAGUE OF CITIES (Oct. 24, 2005), http://www.nlc.org/Newsroom/Nation_s_Cities_Weekly_v2/Weekly_NCW/2005_v2/10_v3/24_v6/6787.aspx (reporting in 2006 that the U.S. Senate adopted an amendment to an appropriation bill permitting states and cities to use federal funds for projects using eminent domain for a public use).

175. See FLA. STAT. § 163.335(7) (2006).

176. *Id.*; see also FLA. STAT. § 73.014(2) (West Supp. 2009) (prohibiting the taking of private property “for the purpose of preventing or eliminating slum or blight conditions” and thus acknowledging that slum and blight are no longer recognized as valid public purposes for the taking of private property in Florida).

177. See Rob Norton, *Unintended Consequences*, THE CONCISE ENCYCLOPEDIA OF ECONOMICS, <http://www.econlib.org/library/Enc/UnintendedConsequences.html> (last visited February 3, 2011) (providing a definition and discussion of the concept of “unintended consequences”); see also Richard J. Grant, *Government Interference Led to Financial*

While the Florida Legislature quickly enacted laws to correct a perceived problem, namely *Kelo*-type takings, it neglected to consider that its legislation could have side effects that overshadow the benefits.¹⁷⁸

A. *Impact on Credit Markets and Financing*

One such side effect, for example, is the possible impact on a local government's ability to attract or maintain standing in the credit markets. Limiting eminent domain powers may have negative credit implications for local government.¹⁷⁹ A special report released by Fitch Ratings¹⁸⁰ expressed concerns that "if eminent domain powers are restricted to a significant degree, municipal credit quality could be restrained or negatively affected. . . . By impairing a state or local government's efforts towards economic development, such legislation, if enacted, may limit opportunities for credit quality improvement and rating upgrades."¹⁸¹ The report further indicates, "restrictive legislation has the potential to contribute to a diminution of credit quality over a longer term, in that, the proposed laws limit a state or local government's ability to respond to economic blight or weakened conditions."¹⁸² Specifically, "the impact of restrictive legislation mostly will affect development-reliant credit types, such as tax allocation bonds, special assessment debt and [structured] obligations . . . , and, [in the long run,] impact both development-related debt and broader-based securities issued by the municipality, such as

Crisis, RICHARDJGRANT.COM BLOG, Jan. 10, 2010, 3:28 PM, <http://richardgrant.blogspot.com/2010/01/government-interference-led-to.html> ("A government regulatory action that directly contributed to the recent financial crisis was the Community Reinvestment Act. This act created an arbitrary, race-based standard for judging banks' lending practices. As a result, banks could be sued for discrimination if they did not lend to minorities in numbers that the regulatory authorities determined to be sufficient. . . . [The lowering of bank lending standards led to the growth of the subprime market,] as did the risk for default.").

178. See generally Grant, *supra* note 177 (describing various instances of government financial regulations producing unintended consequences).

179. *Fitch: Eminent Domain Restrictions Affect on Muni Credit Quality*, THE FREE LIBRARY BY FARLEX, <http://www.thefreelibrary.com/Fitch%3a+Eminent+Domain+Restrictions+Affect+on+Muni+Credit+Quality.-a0142626776> (last visited Sept. 30, 2010).

180. Fitch Ratings is a leading global credit rating agency committed to providing the world's credit markets with independent, timely and prospective credit opinions. Built on a foundation of organic growth and strategic acquisitions, Fitch Ratings has grown rapidly during the past decade gaining market presence throughout the world and across all fixed income markets. See *Overview*, FITCH RATINGS, <http://www.fitchratings.com/jsp/creditdesk/AboutFitch.faces?context=1&detail=1> (last visited February 15, 2011).

181. *Fitch: Eminent Domain Restrictions Affect on Muni Credit Quality*, *supra* note 179.

182. *Id.*

general obligation bonds, lease obligations, and utility revenue bonds.”¹⁸³

From an economic standpoint, local government is faced with many decisions on how to best meet the economic environment of its citizens and the community. Prior to *Kelo*, a CRA could declare an area or a neighborhood to be slum or blighted and exercise the power of eminent domain to clear the property.¹⁸⁴ The seized property would be marshaled into an economically advantageous tract and offered to a private developer to redevelop in accordance with a CRA adopted redevelopment plan.¹⁸⁵ The private developer was rewarded by gaining the value of the increased tax base as security for a municipal bond, which would underwrite the infrastructure cost of a new private development and by obtaining an assembled tract at a price below what it would have cost as individual parcels.¹⁸⁶ Under the CRA, it was foreseeable that a developer would not need to invest in the infrastructure because these costs may already have been paid for by bond funds procured by the area’s projected increase in taxable value.¹⁸⁷

States, counties, and municipalities may issue municipal bonds to finance the necessary infrastructure to develop or redevelop localities and to finance general public-purpose projects such as roads, bridges, utilities, and airports.¹⁸⁸ As a result, the cost will be spread over a fixed period of years until the bonds mature and the costs are shared by all those who benefit from the development or redevelopment of the project.¹⁸⁹ Therefore, haste on the part of Florida lawmakers in enacting legislation to correct one problem—the prevention of *Kelo*-type takings—may have created unintended consequences that increase the economic cost for

183. *Id.*

184. FLA STAT. § 163.340(8) (2006).

185. S. William Moore, “Blight” as a Means of Justifying Condemnation for Economic Redevelopment in Florida, 35 STETSON L. REV. 443, 444-45 (2006).

186. *Id.* at 445.

187. *See generally id.* at 446, 451, 457. In Tax Increment Financing (“TIF”), when the property tax value in the redevelopment area rises above property values in the base year the redevelopment area was created, increment revenues are generated by applying the current millage rate levied by taxing authority in the area to the increase in value. That increase value or increment revenue is deposited in a CRA trust fund. These revenues are used to service bonds issued to finance redevelopment project. Instead of taking the blighted property through eminent domain, this is another method of funding used for redeveloping blighted areas under the CRA. However, CRAs are not typically overseen by the state since all the monies used in financing CRA activities are locally generated. *See also* FLA. REDEVELOPMENT ASS’N (Oct. 31, 2008), <http://www.redevelopment.net/crafq.aspx> (FRA is a non-profit organization assisting those in Florida revitalization efforts).

188. *See also* TALBOT D’ALEMBERTE, THE FLORIDA STATE CONSTITUTION: A REFERENCE GUIDE 109-11 (1991) (commenting on art. VII, §§ 10 and 11 of the Florida Constitution regarding proper uses for proceeds from extension of government credit).

189. *Id.*

private developers redeveloping blighted communities. For example, in light of our economic crisis, the market price for municipal bonds may vary with the changes in interest rates. An increase in the interest rate may lead to lower bond prices, and the bonds may be at risk if they are not held to maturity.¹⁹⁰ This may discourage potential bond purchasers due to fear of loss or failure to pay back the money borrowed.¹⁹¹ Similarly, the private developers may not get the benefit of the municipal bond to underwrite the cost of the infrastructure and funding redevelopment plans.¹⁹²

B. Impact on Legitimate Efforts to Eradicate Blight

In addition, did the Legislature consider the cost to local government of resorting to alternative means to clean up or eliminate blighted areas? Since the Act's "blighted area" test was eliminated as a basis for local governments to take private property through eminent domain,¹⁹³ blight condemnation is no longer considered a valid public purpose or use for which property may be taken.¹⁹⁴ Municipalities and counties now have to resort to adopting or enforcing local ordinances related to code enforcement for the elimination of public nuisance, provided the ordinance does not authorize the taking of private property by eminent domain.¹⁹⁵ This can lead to increased expenses due to enforcement action and may never result in a permanent solution if the property owner is simply unable to afford eliminating the condition.

With the implementation of Chapter 73, "local government will no longer be able to delegate their condemnation powers to community redevelopment agencies, and CRAs will only be able to acquire property for redevelopment through voluntary methods."¹⁹⁶ Therefore, property

190. *Fitch: Eminent Domain Restrictions Affect on Muni Credit Quality*, *supra* note 182.

191. *Id.*

192. Moore, *supra* note 185, at 452.

193. See Mark Bentley, *Hurricane Kelo Hits Florida*, FLORIDAEMINENTDOMAIN.COM, http://www.floridaeminentdomain.com/images/Article-Hurricane_Kelo_Hits_Florida.pdf (2007) (describing amendment of Florida statutes to remove blight as an acceptable reason for public takings); see also FLA. STAT. §73.014 (stating that the power of eminent domain may not be exercised to take private property for the purpose of abating or eliminating a public nuisance).

194. FLA. CONST. art. X, § 6(a).

195. FLA. STAT. § 73.014 (2006).

196. Mark Riso & Mandy Hagan, *Eminent Domain Update*, NAT'L ASS'N. INDUS. & OFFICE PROPS., at 5 (Sept. 16, 2006), <http://www.naiop.org/governmentaffairs/issues/resources/eminentdomainupdate091806.pdf>. NAIOP is the nation's leading trade association for developers, owners, investors, asset managers and other professionals in industrial, office and mixed-use commercial real estate. Founded in 1967, NAIOP comprises over 13,000 members in fifty North American chapters. *Id.*; see also Paul D. Bain, *1999 Amendments to Florida's Eminent Domain*

acquired by the CRA is now subject to a ten-year holding period, during which time the transfer of the property to a natural person or private entity is prohibited.¹⁹⁷ The impact of this timetable, especially as it relates to holding cost and opportunity cost, is that cities may miss out on an opportunity to attract new business ventures that are ready, willing, and able to begin construction. Only under certain limited conditions, and after public notice and competitive bidding, may condemned property be transferred before the statutory ten years have elapsed, without restrictions.¹⁹⁸ If a city takes property by eminent domain and immediately transfers it to a private party, the city may collect revenue during the ten years it would otherwise be required to “hold” the taken property, which could, depending on the property, be a significant amount of revenue. How much opportunity cost does the waiting period create? The chance to redevelop at a lower-than-normal cost may be lost while waiting for the mandated time period to elapse.

In addition to the ten-year waiting period, local governments must address article X, § 6(c), which prohibits the transfer of ownership or control of private property taken by eminent domain to any natural person or private entity unless authorized by general law passed by three-fifths vote of each house of the Legislature.¹⁹⁹ This requirement will result in significant additional cost to the political subdivision in the form of attorneys’ fees, lobbying expenses, and time, as the House and Senate meet for only a sixty-day period each year. In difficult economic times, and dealing with the declining tax bases that always accompany blighted areas, the combined restrictions impose what may amount to an unreasonable

Statutes, 73 FLA. BAR J. 10, 68 (1999) available at <http://www.floridabar.org/DIVCOM/JN/JNJournal01.nsf/76d28aa8f2ee03e185256aa9005d8d9a/1a5bcd7ceb307ec285256adb005d62a6?OpenDocument> (stating that new amendments to Florida’s eminent domain laws require pre-suit negotiations in eminent domain litigations).

197. FLA. STAT. § 73.013(1)(f) (2006).

198. FLA. STAT. § 73.013(2)(b) (2006).

If ownership of property is conveyed to a natural person or private entity . . . and less than 10 years have elapsed since the condemning authority acquired title to the property, the property may be transferred, after public notice and competitive bidding unless otherwise provided by general law, to another natural person or private entity without restriction, if the following conditions are met: 1. The current titleholder documents that the property is no longer needed for the use or purpose for which the property was transferred to the current titleholder; and 2. The owner from whom the property was taken by eminent domain is given the opportunity to repurchase the property at the price that he or she received from the condemning authority.

Id.

199. FLA. CONST. art. X, § 6(c).

burden on local governments faced with troubled communities.²⁰⁰

VI. BRINGING IN THE SHEEP: A SOLUTION FOR GROWN AND REDEVELOPMENT

The author's concern is not with Florida's critical evaluation of each economic proposal, but with the summary fashion by which this Legislation mandates rejection of *all* proposals involving private development or use. Indeed, under this legislation, property previously condemned and taken by the state could not be transferred to a private citizen for economic development, even if the city has vacated the property, unless the Legislature authorizes a general law passed by three-fifths vote of each house. Needless to say, obtaining such approval from the Legislature could delay projects to the point of dissuading developers from pursuing them. The key is to balance the needs of local communities with the desire to uphold private property rights. Partnerships between local governments and private developers have proven to be the most successful method of redevelopment.²⁰¹ Therefore, I recommend that sections 73.013 and 73.014, Florida Statutes, and article X, § 6(c) of the Florida Constitution, be amended to address the unintended consequences created by the Legislature in attempting to rectify the effects of *Kelo*. The problem created by the restrictive legislation could destroy the ability of municipalities to attract new industry and generate revenue.

The first step that Florida's lawmakers should take is to amend the eminent domain statute to allow partnerships between local government and private developers. The legislative response to *Kelo* was a craven political reaction designed to quell constituent concerns rather than a reasoned practical solution that serves the best interest of Floridians. The term "public purpose" has as many definitions as "affirmative action." Just as affirmative action is viewed by some as code for quotas and hiring of incompetents to fulfill quotas, post-*Kelo* public purpose is viewed as a code for the government taking the property of one private citizen to give to another private party who promises to make better use of the property. In both cases, the concerns are unfounded mischaracterizations of the terms. Yet politicians know that voters cast their ballots based on their perceptions of the information even if their perceptions are inaccurate or misleading. Sections 73.013 and 73.014, Florida Statutes, are overly restrictive, as is article X, section 6(c) of the Florida Constitution. An analysis of the facts

200. See FLA. STAT. § 73.013 (2006) (creating additional hurdles for local governments in the transfer of properties acquired under eminent domain).

201. Francesca Jarosz, *Before You Grab That Property . . . States Take A Close Look at Eminent Domain*, BUS. L. TODAY, Jan.-Feb. 2007, available at <http://www.abanet.org/buslaw/blt/2007-01-02/jarosz.shtml>.

in *Kelo* shows that the property in question was first condemned because it was viewed as a depressed municipality. This part of the decision is generally not in dispute. Indeed, if the designation of the property as depressed was an error, the Court would have sustained the finding or remanded for a redetermination. The critical issue in *Kelo* is whether the condemning authority was authorized to turn the property over to private developers.²⁰²

To ensure that struggling local governments have all the tools they need to fight economic decline in their communities, I propose to repeal the blanket restriction on transferring property taken by eminent domain to private developers and to replace it with a provision that provides protection for the citizen if the economic benefits are not forthcoming after a reasonable time. For instance, the Act should provide for returning the property to the state if, after five years, the projected economic benefits to the municipality have not occurred. Many of the negative impacts explored in Section IV above can be overcome by providing local governments the authority to partner with private developers in implementing a plan in accordance with a carefully legislated CRA.

The law should also contain provisions to prevent abuse. I suggest establishing a state administrative agency of economic development with powers to promulgate rules, regulations, and guidelines for approving partnerships between local government and private developers when eminent domain is one of the tools employed. Such rules and regulations should be adopted pursuant to the Florida Administrative Procedures Act, with public participation through notice and comment. This would remove decisions from politicians, whose goal is re-election rather than the best interest of the state, and place the decision with an administrative agency that is somewhat insulated from political pressure.

The solution described above offers a compromise between pre- and post-*Kelo* extremes. It would return to local governments their most valuable tool for redevelopment while not encouraging overzealous takings in the quest to alleviate blight and ensure vibrant local communities for years to come.

202. See *Kelo v. City of New London*, 545 U.S. 469 (2005) (challenging city's exercise of eminent domain power on grounds that takings were not for public use).

