

**A WARNING TO STATES—ACCEPTING THIS INVITATION  
MAY BE HAZARDOUS TO YOUR HEALTH (SAFETY, AND  
PUBLIC WELFARE): AN ANALYSIS OF POST-KELO  
LEGISLATIVE ACTIVITY**

INTRODUCTION

On a warm, sunny morning in June 2005, Delaware hung up the phone, having had a long discussion with her old friend New Jersey about liquefied natural gas. She gazed through the large windows at the front of her house, through the shade of a large sycamore, and over the glossy green leaves of an American holly. Just then she noticed the postman driving away. “The mail is finally here,” she thought.

Delaware walked briskly down the driveway and threw open the small metal door of her old-fashioned, curbside mailbox. As usual, she found some bills, a check for highway improvements (though it was less than she expected), and information about keeping custody of her air force base. What she found, but had not expected, was an ornate silver envelope adorned with bright gold ribbons. In the upper-left-hand corner was the address of the most popular person in town, the United States Supreme Court.

Delaware untied the ribbon and let the invitation fall open. She saw that she was invited to a party at the Supreme Court’s exclusive country club. This was a true honor. Without so much as closing the mailbox or cashing her highway money, Delaware jumped in her car, sped to the store, bought new clothes and a bottle of very expensive wine as a gift, had her hair and makeup done, and returned home to wait. All this before noon. However, the party was not for several months, and no RSVP was due for weeks. But Delaware was excited. She was presented with an opportunity to impress. Not only would she accept the invitation, she would be the first person to arrive at the party and, if anybody arrived before her, she would make their heads turn. But perhaps she had rushed into things. Maybe she had not thought about what the dress code would be or even if the Supreme Court would want a bottle of wine as a gift.

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Perhaps this story is a little embellished. If so, it is only to impress a point. In June 2005, the United States did extend an invitation to all fifty states in the form of the last paragraph of *Kelo v. City of New London*.<sup>1</sup> In

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

*Kelo*, the Court decided that economic development could constitute a public use under the Fifth Amendment.<sup>2</sup> In the last paragraph of the decision, Justice Stevens declared that the Court's ruling about the extent of the Constitution's Public Use Clause might not be ideal for every state. Thus, every state was free to change their statutes or constitutions in order to offer more protections than *Kelo* required.<sup>3</sup> Following this invitation, the "reaction from states was swift and heated," with "virtually every statehouse across the country . . . advancing bills and constitutional amendments."<sup>4</sup> Delaware, however, was the very first state to respond.<sup>5</sup> Its response, though drastically different in content, was similar in quantum to the response described in the story above. The intricacies of this response are the subject of this Note.

Focusing on Delaware, this Note will argue that state legislatures have been given an open invitation to shape their public use framework, but their response must be measured and well-reasoned because the consequences of reactionary legislation may put a stranglehold on state and local governments trying to exercise eminent domain for unanimously accepted public uses. Part I will trace the most pertinent federal jurisprudence through *Kelo*. Part II will survey Delaware's public use jurisprudence. Part III will introduce the Delaware General Assembly's legislative response to *Kelo*. Part IV will serve as a warning to the states generally that many seemingly innocuous clauses in their responsive legislation could have substantial consequences if not carefully considered.

## I. FEDERAL CONSTITUTIONAL LIMITS ON PUBLIC USE

The Fifth Amendment of the United States Constitution, applied to the states through the Fourteenth Amendment,<sup>6</sup> establishes the minimum rights of property owners with respect to takings.<sup>7</sup> In order to analyze the efficacy of state legislation in response to *Kelo*, the jurisprudential building blocks of eminent domain must be understood. The first building block is the federal jurisprudence explaining the Fifth Amendment Public Use

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2. *Id.* at 490.

3. *Id.* at 489–90.

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

5. Telephone Interview with Representative Wayne Smith, House Majority Leader, Del. Gen. Assemb., in Wilmington, Del. (Aug. 15, 2005) [hereinafter Smith Interview].

6. *Chi. Burlington & Quincy R.R. Co. v. Chicago*, 166 U.S. 226, 233 (1897) (holding that the Takings Clause of the Fifth Amendment applies to the states through the Fourteenth Amendment).

7. U.S. CONST. amend. V. The Fifth Amendment provides, in relevant part, "nor shall private property be taken for public use, without just compensation." *Id.*

Clause and articulating the boundaries of state eminent domain power. The second block is state jurisprudence that sets forth a state's public use doctrine within the federal guidelines. This Part surveys the first block: a trilogy of Supreme Court cases that provides the framework of the federal public use doctrine.

#### A. Berman v. Parker

Samuel Berman owned a department store located at 712 Fourth Street, S.W. in Washington, D.C.<sup>8</sup> This property, unfortunately for Berman, was located in an area of the District known to the planning commission as Area B, so designated because in 1950 it became the subject of a massive redevelopment plan.<sup>9</sup> Area B was a statutorily designated slum area.<sup>10</sup> A study found that 64.3% of the structures in Area B were beyond repair, 57.8% of the buildings had no indoor toilets, 60.3% had no baths of any kind, nearly 30% had no electricity, and the list went on.<sup>11</sup> The redevelopment plan, which was designed to remedy these problems, had detailed provisions for various new land uses including new low-rent dwellings.<sup>12</sup> The acquisition of some properties within Area B, however, required the use of eminent domain.<sup>13</sup>

Berman's property was not blighted.<sup>14</sup> However, the property was within Area B, and the comprehensive nature of the redevelopment plan called for the razing of Berman's property.<sup>15</sup> Berman objected to the inclusion of his property in the plan.<sup>16</sup> He argued that since his property was neither residential nor blighted, the taking of his property by eminent domain was unconstitutional.<sup>17</sup> Berman further argued that, once acquired by the city, his property would be put to private use, thereby violating the public use requirement of the Fifth Amendment.<sup>18</sup>

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8. Berman v. Parker, 348 U.S. 26, 31 (1954).

9. *Id.* at 30.

10. *See id.* at 28 n.\* (defining substandard housing conditions as those that the district commissioners believe to be "detrimental to the safety, health, morals, or welfare of the inhabitants of the District of Columbia" (citing D.C. Code, § 5-702(r) (1951))).

11. *Id.* at 30.

12. *See id.* at 30-31 (noting that "at least one-third of [the dwellings] are to be low-rent housing with a maximum rental of \$17 per room per month").

13. *Id.* at 29.

14. *Id.* at 31.

15. *See id.* at 30 (describing "the judgment of the District's Director of Health [that] it was necessary to redevelop Area B").

16. *Id.* at 31.

17. *Id.*

18. *Id.*

Justice Douglas, writing for the majority of the Court, began with the assumption that “[i]t is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled.”<sup>19</sup> With this starting point in mind, the Court looked to the means that would be used to achieve this legitimate end.<sup>20</sup>

The means were three-fold. First, they involved the use of eminent domain; thus, the Court had to decide whether redevelopment constituted a public use.<sup>21</sup> Second, the project would involve a taking of a non-blighted structure, which in turn raised the question of whether taking a healthy building was an appropriate means to achieving redevelopment.<sup>22</sup> Third, the means involved the transfer of the property to a private enterprise; in this respect, the Court was confronted with the question of whether a private individual could be the beneficiary of a taking by eminent domain.<sup>23</sup>

In answering all three questions, the Court showed great deference to the legislature’s judgment.<sup>24</sup> The Court first determined that redevelopment was within the scope of public use.<sup>25</sup> Justice Douglas reasoned that because the goal of a healthy, clean, spacious, and well-balanced community is a legitimate goal, “the right to realize [that goal] through the exercise of eminent domain is clear.”<sup>26</sup> “[T]he power of eminent domain,” continued Justice Douglas, “is merely the means to an end.”<sup>27</sup> The practical implication of this holding is that any time a legislative goal is legitimate, the use of eminent domain will also be legitimate. With that, the Court established very broad and general guidelines for the use of eminent domain.

The Court, however, had yet to answer the remaining two questions. To decide whether a non-blighted structure could be razed, the Court turned to the legislative determination that a “piecemeal approach” would not lead to an effective redevelopment project.<sup>28</sup> In what would later prove to be especially important reasoning, the Court agreed with the legislature that

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19. *Id.* at 33.

20. *Id.*

21. *Id.*

22. *See id.* at 34 (reiterating appellant’s argument that their property cannot be taken because it is in good condition).

23. *Id.* at 33.

24. *Id.* at 32.

25. *See id.* at 33 (“If those who govern the District of Columbia decide that the Nation’s Capital should be beautiful as well as sanitary, there is nothing in the Fifth Amendment that stands in the way.”).

26. *Id.*

27. *Id.*

28. *Id.* at 34.

[t]he entire area needed redesigning so that a balanced, integrated plan could be developed for the region, including not only new homes but also schools, churches, parks, streets, and shopping centers. In this way it was hoped that the cycle of decay of the area could be controlled and the birth of future slums prevented.<sup>29</sup>

The Court decided the final question—the private ownership of the condemned land—using the very same reasoning that it applied to the other matters.<sup>30</sup> The objectives of community redevelopment and the prevention of future slums, reasoned the Court, are within the power of the legislature.<sup>31</sup> Thus, an objection to private involvement must fail because the Court “cannot say that public ownership is the sole method of promoting the public purposes of community redevelopment projects.”<sup>32</sup>

*Berman* represents the early stages of the Supreme Court’s public use doctrine by laying out important principles. The chief principle is that courts must show substantial deference to legislative determinations regarding the use of eminent domain.<sup>33</sup> Additionally, and perhaps more importantly for the purposes of this Note, the Court announced that land redevelopment is a sufficient public use for the exercise of eminent domain, that non-blighted structures can be taken by eminent domain for the purpose of comprehensive redevelopment, and that even when eminent domain will put land into the hands of private owners, it can still be a public use if it serves a legitimate legislative interest.<sup>34</sup>

#### B. Hawaii Housing Authority v. Midkiff

Because the Hawaiian Islands were settled by Polynesians rather than western Europeans, they have a much different property system than the rest of the United States.<sup>35</sup> The system began as a feudal one, controlled by one landowner who assigned parcels of his land to various subordinate parties.<sup>36</sup> This background created a unique problem on the Islands as they began to take on more Americanized traditions and, perhaps more

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29. *Id.* at 34–35.

30. *Id.* at 33–34.

31. *Id.* at 33.

32. *Id.* at 34.

33. *Id.* at 32.

34. *Id.* at 33–35.

35. *Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229, 232 (1984).

36. *Id.*

importantly, American laws. In the 1960s, 47% of all the land in the state of Hawaii was in the hands of only seventy-two private parties.<sup>37</sup> This remnant of feudalism skewed the “Americanizing” economy of Hawaii, and thus the legislature sought ways to diversify property ownership.<sup>38</sup>

In 1967, the legislature passed the Land Reform Act.<sup>39</sup> The purpose of the Act was to diversify land ownership by shifting title to land held in fee simple from the current holders to those who leased land.<sup>40</sup> In other words, if the lessee of a parcel requested, the state would acquire title to that parcel through eminent domain and then transfer ownership to the lessee.<sup>41</sup> The Act seemed to work until 1979, when Frank Midkiff refused to transfer his land for the price that was being offered and consequently filed suit, claiming that the Act was unconstitutional.<sup>42</sup>

Midkiff’s suit raised the question of whether the transfer of property from lessor to lessee in order to regulate “oligopoly and the evils associated with it” was a public use of land.<sup>43</sup> Justice O’Connor, for the unanimous Court, began her analysis of the Hawaii statute by reviewing the *Berman* decision.<sup>44</sup> *Berman*, she noted, defined the Fifth Amendment’s public use requirement to encompass any object that was within the state’s police power.<sup>45</sup> With this backdrop, the Court held that the “‘public use’ requirement is thus coterminous with the scope of the sovereign’s police powers.”<sup>46</sup> The Court then went on to reiterate that its role in reviewing a legislative determination is very limited.<sup>47</sup> “In short,” wrote Justice O’Connor, “the Court has made clear that it will not substitute its judgment for a legislature’s judgment as to what constitutes a public use ‘unless the use be palpably without reasonable foundation.’”<sup>48</sup> In *Midkiff*, the Court held that redistribution of fee simples was a “rational exercise of the eminent domain power,” and, therefore, the Act passed the limited scrutiny required by the Public Use Clause.<sup>49</sup>

In deciding *Midkiff*, the Court clarified an unanswered question from the *Berman* decision: whether the immediate transfer of condemned land to

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37. *Id.*

38. *Id.* at 232–33.

39. *Id.* at 233 (citing HAW. REV. STAT., ch. 516).

40. *Id.*

41. *Id.*

42. *Id.* at 234–35.

43. *Id.* at 242.

44. *Id.* at 239.

45. *Id.* at 240.

46. *Id.*

47. *Id.*

48. *Id.* at 241 (quoting *United States v. Gettysburg Elec. Ry. Co.*, 160 U.S. 668, 680 (1896)).

49. *Id.* at 243.

private ownership was a per se violation of the Public Use Clause.<sup>50</sup> *Berman* decided that private parties could, ultimately, benefit from the use of eminent domain as long as private developers were the tools for achieving the clearly public purpose of redevelopment.<sup>51</sup> However, in *Berman*, the land taken by eminent domain was first in the hands of the government and only later transferred to developers.<sup>52</sup> Justice O'Connor noted that the Ninth Circuit Court read this fact in *Berman* to indicate that government must "possess and use property at some point during a taking."<sup>53</sup> However, if this were a requirement imposed by *Berman*, the Hawaii Act would fail because it used eminent domain to facilitate a transfer from lessor to lessee; the land was never held or used by the government.<sup>54</sup>

The unanimous Court decided that government need not actually hold land in order to validate a public use.<sup>55</sup> It held that "[t]he mere fact that property taken outright by eminent domain is transferred in the first instance to private beneficiaries does not condemn that taking as having only a private purpose."<sup>56</sup> The only limit that the Court recognized was that the use of eminent domain could not be for a "purely private taking."<sup>57</sup> A "purely private taking" would be one that served no legitimate governmental purpose and would only benefit an identifiable, private individual.<sup>58</sup> The Court thus recognized that the strict view of the Public Use Clause—requiring actual use of the land, by the public—was not the law.<sup>59</sup> The Court affirmed that it had "long ago rejected any literal requirement that condemned property be put into use for the general public. "It is not essential that the entire community, nor even any considerable portion, . . . directly enjoy or participate in any improvement in order [for it] to constitute a public use."<sup>60</sup>

*Midkiff* advanced, but did not drastically alter, the Court's public use jurisprudence. Justice O'Connor affirmed the very minimal role of courts in second-guessing legislative determinations about the need for eminent

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50. *Id.* at 243–44.

51. *Berman v. Parker*, 348 U.S. 26, 33–34 (1954).

52. *Id.* at 30.

53. *See Midkiff*, 467 U.S. at 243 (noting that the Ninth Circuit "read our cases to stand for a much narrower proposition").

54. *Id.*

55. *Id.* at 243–44.

56. *Id.*

57. *Id.* at 245.

58. *Id.*

59. *Id.* at 244.

60. *Id.* (alteration in original) (quoting *Rindge Co. v. County of L.A.*, 262 U.S. 700, 707 (1923)).

domain.<sup>61</sup> The Court reaffirmed that private parties could be beneficiaries of takings by eminent domain.<sup>62</sup> Finally, *Midkiff* recognized that property could be taken from person *A* and transferred directly to person *B*, if the purpose of that transfer was to achieve a public purpose, if not a literal public use.<sup>63</sup>

### C. *Kelo v. City of New London*

In 1996, a major blow struck the residents of New London, Connecticut. The United States government closed its Naval Undersea Warfare Center, which employed over 1500 residents of a city with a population of less than 24,000.<sup>64</sup> This misfortune, however, was not the beginning of New London's economic downturn; it was a culmination of decades of recession.<sup>65</sup> The city's population had been steadily declining and the unemployment steadily rising.<sup>66</sup> By 1998, the population of New London was at its lowest since 1920, and the unemployment rate was twice that of Connecticut as a whole.<sup>67</sup> As a response to these economic conditions, state and local officials began a process of "economic revitalization."<sup>68</sup> The means employed to catalyze this growth were the subject of *Kelo*, of this Note, and of much public debate.

The city and state, to help spur economic development, utilized the New London Development Corporation (NLDC), a private, nonprofit redevelopment organization.<sup>69</sup> The primary focus of the NLDC was the redevelopment of the Fort Trumbull neighborhood, which had been the location of the Naval Undersea Warfare Center and was particularly suffering from the economic problems.<sup>70</sup> Using over \$15 million from the state, the NLDC undertook the creation of Fort Trumbull State Park and welcomed pharmaceutical giant Pfizer to the neighborhood.<sup>71</sup> Believing that this was the first step in the rebirth of New London, and that Pfizer would bring businesses back to the city, the NLDC was prepared to expand its efforts through a large-scale redevelopment plan centered around the

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61. *Id.* at 240.

62. *Id.* at 243–44.

63. *Id.*

64. *Kelo v. City of New London*, 545 U.S. 469, 473 (2005).

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.*



new Pfizer facility.<sup>72</sup>

With approval from the state and the city council, the NLDC was primed to act on its master plan.<sup>73</sup> The multi-part development plan, focused exclusively on the Fort Trumbull area, expanded over 115 private and thirty-two public acres.<sup>74</sup> The first part of the plan envisioned a waterfront hotel surrounded by a “small urban village” as well as a pedestrian walkway along the water connecting a series of commercial and recreational marinas.<sup>75</sup> The second part was planned for eighty residences and a U.S. Coast Guard Museum, to be linked by a walking path to the rest of the redeveloped area.<sup>76</sup> The third part, closest to the Pfizer facility, would contain 90,000 square feet of research and development office space, similar to the Pfizer offices.<sup>77</sup> The last major aspect of the plan was a small section next to the new state park, intended for parking or retail as support for the park or the nearby marina.<sup>78</sup> The remaining parts would be used for office, retail, or other commerce.<sup>79</sup> All in all, the entire comprehensive plan was expected to create over 1000 jobs, increase the tax base, revitalize the economy, create a more attractive city, and increase leisure and recreational opportunities.<sup>80</sup>

Within the proposed redevelopment area, nine landowners, owning fifteen total properties, were unwilling to sell their land to the NLDC for the redevelopment effort.<sup>81</sup> Four of the properties were in the research and development zone of the plan, and the remaining eleven were in the park or marina support zone.<sup>82</sup> None of the properties were “blighted or otherwise in poor condition; rather, they were condemned only because they happened to be located in the development area” and the owners were unwilling to sell.<sup>83</sup> The NLDC, using eminent domain powers that had been delegated to it by the city, initiated proceedings against the nine owners who were unwilling to sell their land.<sup>84</sup>

On the surface, the New London conflict appeared analogous to the *Berman* facts, where non-blighted structures were taken for a broader and

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72. *Id.*

73. *Id.* at 473–74.

74. *Id.* at 474.

75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.* at 472, 474–75.

81. *Id.* at 475.

82. *Id.*

83. *Id.*

84. *Id.*

comprehensive redevelopment plan.<sup>85</sup> However, New London was not combating slums. Rather, it was combating economic decline. The distinction between slum redevelopment and economically depressed redevelopment was enough to persuade the Supreme Court to tackle the case and to frame a significantly different legal question. The question presented to the Court was “whether a city’s decision to take property for the purpose of *economic development* satisfies the public use requirement of the Fifth Amendment.”<sup>86</sup>

Justice Stevens, writing for the Court, began by reaffirming that the state may not take property from *A* and give that property to *B*, for the sole purpose of benefiting person *B*; likewise, he noted that the “familiar example” of transferring property to a private party, such as a railroad company, has been long accepted as a public use.<sup>87</sup> The question, therefore, was whether redevelopment in New London was more analogous to the former or the latter.<sup>88</sup> “[T]he City’s development plan,” wrote Justice Stevens, “was not adopted ‘to benefit a particular class of identifiable individuals.’”<sup>89</sup> “On the other hand,” he continued,

this is not a case in which the City is planning to open the condemned land—at least not in its entirety—to use by the general public. Nor will the private lessees of the land in any sense be required to operate like common carriers, making their services available to all comers.<sup>90</sup>

Recognizing that the proposed takings in New London did not fit into any of these historical and categorical public use analyses, the Court considered whether the New London plan called for an entirely new analysis.<sup>91</sup> Though economic development was the legally significant purpose of the plan, the Court reasoned that there is “no principled way of distinguishing economic development from the other public purposes that [it has] recognized.”<sup>92</sup> *Midkiff* had permitted the use of eminent domain to break a

85. *Berman v. Parker*, 348 U.S. 26, 30 (1954).

86. *Kelo*, 545 U.S. at 477 (emphasis added) (internal quotation marks omitted).

87. *See id.* at 477 (noting that “[n]either of these propositions . . . determines the disposition of this case”).

88. *See id.* at 480 (“The disposition of this case therefore turns on the question whether the City’s development plan serves a ‘public purpose.’”).

89. *Id.* at 478 (quoting *Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229, 245 (1984)).

90. *Id.* at 478–79.

91. *See id.* at 483 (explaining that “our public use jurisprudence has wisely eschewed rigid formulas and intrusive scrutiny in favor of affording legislatures broad latitude in determining what public needs justify the use of the takings power”).

92. *Id.* at 484.

land oligopoly,<sup>93</sup> *Berman* permitted the use of eminent domain for slum redevelopment,<sup>94</sup> and in another case the Court accepted the public purpose of taking down barriers to entry into the pesticide market.<sup>95</sup> Of course, all three of the above noted purposes serve an economic function and contribute to economic development. Though the *Kelo* dissent argued a distinction between that case and the previous jurisprudence, it struggled to find a principled argument.<sup>96</sup>

Having announced that it would not create a new standard, the Court simply applied the public purpose analysis of *Berman* and *Midkiff*.<sup>97</sup> The Court held that the New London “plan unquestionably serves a public purpose.”<sup>98</sup> Because *Berman* and *Midkiff* gave exceptional deference to legislative determinations and aligned “public use” with the police power, the real question in *Kelo* became whether the overall plan for redevelopment was a legitimate use of the police power. That is, whether the plan served the public purpose of protecting the health, safety, or welfare of New London’s residents.<sup>99</sup> The Court acknowledged that New London and the NLDC had “carefully formulated an economic development plan,” and, because the City was due legislative deference, the

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93. *Midkiff*, 467 U.S. at 242.

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

95. *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1014–15 (1984); see also *Kelo*, 545 U.S. at 480–82 (discussing the same three cases and the public purposes they allowed).

96. *Kelo*, 545 U.S. at 494. Four justices dissented from the *Kelo* majority. Justice O’Connor authored the dissent, joined by Chief Justice Rehnquist and Justices Scalia and Thomas. The dissenters argued that a principled distinction could be made between *Kelo* and previous decisions because in the former, “a public use was realized when the harmful use [like a slum or a land oligopoly] was eliminated.” *Id.* at 500. The dissenters further noted that in the previous cases, “the extraordinary, precondemnation use of the targeted property inflicted an affirmative harm on society . . . and . . . the relevant legislative body had found that eliminating the existing property use was necessary to remedy the harm.” *Id.* By contrast, the dissent urged that the condemnation in *Kelo* was benefit conferring, that economic redevelopment only secondarily benefits the public by giving the city higher tax revenue rather than taking away a noxious use. *Id.* Interestingly, under its Fifth Amendment jurisprudence, the Supreme Court considered the harm–prevention versus benefit–conferring distinction to be unprincipled. *E.g.*, *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1024–26 (1992). In *Lucas*, Justice Scalia, writing for the majority, noted that “the distinction between ‘harm-preventing’ and ‘benefit-conferring’ regulation is often in the eye of the beholder.” *Id.* at 1024. As an example, the Court reasoned that imposing an environmental restriction on an individual’s land could be construed as “necessary in order to prevent his use of it from ‘harming’ . . . ecological resources; or, instead, in order to achieve the ‘benefits’ of an ecological preserve.” *Id.* Nonetheless, the *Kelo* dissenters, Justice Scalia included, saw fit to reassert that previously inappropriate distinction for the purposes of prohibiting the exercise of eminent domain for benefit–conferring legislation.

97. See *Kelo*, 545 U.S. at 485 (“Clearly, there is no basis for exempting economic development from our traditionally broad understanding of public purpose.”).

98. *Id.* at 484.

99. See *id.* at 480 (addressing the issue of “whether the City’s redevelopment plan serves a ‘public purpose’”).

Court accepted the City's assertion that the plan would provide benefits to the community, "including—but by no means limited to—new jobs and increased tax revenue."<sup>100</sup> Given that the City was "endeavoring to coordinate a variety of commercial, residential, and recreational uses of land, with the hope that they will form a whole greater than the sum of its parts" and because of the "comprehensive character of the plan, the thorough deliberation . . . and the limited scope of [the Court's] review," the New London plan had to be upheld.<sup>101</sup> The Supreme Court held that economic development was a public use for the purpose of the Fifth Amendment.<sup>102</sup>

The purpose of this Note, however, is not merely to analyze the legal reasoning of the *Kelo* opinion. The purpose of this Note is to analyze the response of state legislatures to an invitation extended by Justice Stevens in the final paragraph of the opinion. Justice Stevens "emphasize[d] that nothing in [the] 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."<sup>103</sup> Thus, states were invited to change their laws as they felt appropriate to react to the *Kelo* decision. Going even further, Justice Stevens offered suggestions for methods of change, noting that many states' rules "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."<sup>104</sup>

With that invitation in mind, especially considering the public outcry after the *Kelo* decision, there is no end to how states may shape their own law within the broad framework of the federal public use jurisdiction. As of winter 2006, more than thirty-six states have moved to accept the Court's invitation.<sup>105</sup> Their responses, though not yet finalized, represent a broad range of possibilities. Vermont seeks to prohibit the use of eminent domain for any project "solely or primarily" proposed for subsequent tax increases;<sup>106</sup> New Jersey is considering a measure that would prohibit the use of eminent domain on residential property that is not completely run

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100. *Id.* at 483.

101. *Id.* at 483, 484.

102. *Id.* at 484.

103. *Id.* at 489.

104. *Id.* (internal citation omitted).

105. Broder, *supra* note 4.

106. Kristen Fountain, *After Court Ruling, Lawmakers Debate Eminent Domain*, CONCORD MONITOR ONLINE, Feb. 19, 2006, available at <http://www.concordmonitor.com/apps/pbcs.dll/article?AID=/20060219/REPOSITORY/602190351/1003/BUSINESS>.

down; New York may remove the rights of eminent domain from non-elected bodies; Texas has already prohibited the use of eminent domain to benefit private parties (though they wrote in a specific exemption for the Dallas Cowboys); California has six proposed measures and five proposed constitutional amendments; and Ohio has already declared a moratorium on all governmental takings until 2007.<sup>107</sup> Considering the flood of activity, an analysis of Delaware's quick and rather uncomplicated responses should be very valuable to other jurisdictions in crafting their responses to *Kelo's* invitation.

## II. DELAWARE'S PUBLIC USE DOCTRINE

Look at Delaware's driver's license. Look at Delaware's official website.<sup>108</sup> If you are driving through Delaware on I-95, look at the "Welcome to Delaware" sign. Delaware is the "First State" and proud of it. So, it should be little surprise that Delaware was the first state to enact legislation in response to the Supreme Court's decision in *Kelo*.<sup>109</sup> The crux of this Note is the effect that such legislation will have on longstanding jurisprudence. Delaware has a rich and deeply-rooted public use doctrine arising out of its own constitutional requirement that no "person's property be taken or applied to public use without the consent of his or her representatives, and without compensation being made."<sup>110</sup> That doctrine is the focus of this Part, which will begin with a look at cases that recognize an allowance for some hybrid of public and private use and will then turn to a series of cases that recognize specific public uses.

### A. Public-Private Hybrid

The following cases lay out the complicated public-private hybrid use doctrine that has arisen in Delaware's eminent domain jurisprudence. These cases are not particularly significant for the public use that they recognize—roads, parking, or slum clearance—but for the amount of private benefit that they allow and the judicial reasoning that they demonstrate.

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107. Broder, *supra* note 4.

108. The Official Website for the First State, <http://www.delaware.com> (last visited Apr. 5, 2007).

109. Smith Interview, *supra* note 5.

110. DEL. CONST. art. I, § 8 (amended 1999).

1. *In re* Hickman

In 1847, the Delaware courts were faced with the case of George Hickman.<sup>111</sup> Though the antiquated format of this decision makes some of the facts unclear, it appears that Hickman had a home set off from the public road system.<sup>112</sup> Hickman sought to have a road built that would link his property to the public network.<sup>113</sup> However, at least part of the land needed for this private road was neither the property of Hickman nor the state, but rather the property of private landowners.<sup>114</sup> Thus, Hickman petitioned the state to acquire the necessary land for his road.<sup>115</sup>

The pertinent legal issue raised by Hickman's petition was whether the laying of privately requested roads was a sufficient public use for the purposes of exercising the state's power of eminent domain.<sup>116</sup> The court began by answering a simpler question: whether eminent domain may be used for the laying of purely public roads.<sup>117</sup> Though it seems obvious today, the *Hickman* court recounted that the use of eminent domain for the building of public roads "has been exercised . . . from the beginning, without question."<sup>118</sup> The question of private roads, however, was not as simple. The court held that land taken for private roads is, in fact "taken for a public use, though upon private petition."<sup>119</sup> It further explained that though a road may chiefly benefit a private party, roads built on private petition are nonetheless "branches of the public roads and open to the public," and the public may use the road "so far as is necessary for the common good."<sup>120</sup>

Ultimately, by holding that a road built primarily for the benefit of a private individual can still be considered a public use, the court introduced the reasoning that a paramount private interest does not doom a project if

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111. *In re* Hickman, 4 Del. (4 Harr.) 580 (1847).

112. *See id.* at 581 (discussing a petition for the building of a road to be linked to the public system). The court does not present any facts in this decision, which, in its entirety, is less than one page. *Id.* However, given that Mr. Hickman petitioned for the building of a private road coupled with the court's analysis of the benefits of that road, one might easily assume that Mr. Hickman was a private homeowner seeking access to the public road system. In any case, the facts, as set forth in this Note, are not clearly stated in the decision but are instead gleaned from the court's analysis.

113. *See id.* at 581 (discussing a petition for the building of a public road).

114. *See id.* at 580 (considering an objection to the use of eminent domain for the building of a road).

115. *Id.*

116. *See id.* at 581 (holding that it is within the legislature's power to use eminent domain to build roads that serve the public).

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.*

the project augments access to a recognized public use. The court, considering the benefit of the road, explained, “[i]t is a part of the system of public roads; essential to the enjoyment of those which are strictly public; for many neighborhoods as well as individuals would be deprived of the benefit of the public highway, but for outlets laid out on private petition.”<sup>121</sup> Thus the Delaware courts recognized roads as a public use of land and laid the foundation for a hybrid public-private use.

## 2. *Clendaniel v. Conrad*

Route 13 runs the entire length of Delaware, a major north-south route from Wilmington to Dover. This road, originally known as DuPont Boulevard, was proposed to the general assembly in March 1911 and built by Thomas Coleman du Pont shortly thereafter.<sup>122</sup> In order to construct the road, du Pont and his colleagues requested that the state authorize the purchase or condemnation of a strip of land no more than 200 feet wide running the length of the state.<sup>123</sup> Within this strip of land, du Pont foresaw a road, approximately thirty feet wide, road accessories, public utilities, as well as trees, grass, and shrubberies.<sup>124</sup>

After completion of a survey of the land on which the future Route 13 would run, Jehu H. Clendaniel discovered that the proposed highway would require the use of part of his land.<sup>125</sup> Clendaniel, however, was unwilling to sacrifice his land to the project.<sup>126</sup> Loath to redesign the route, du Pont asked that the state condemn the land so that his road could be built.<sup>127</sup> Clendaniel objected, asserting that du Pont and his colleagues would not be using the land for public use because only 30 feet of the 200 foot strip of condemned land would actually be used for a roadway; moreover, while the road itself would be owned by the state, du Pont and his colleagues would still own the 170 feet flanking the road.<sup>128</sup>

The court was faced with the question of whether property could be taken by eminent domain when it would be used for a road that was a recognized public use, but was also privately owned, in part, and only tangentially part of the conceded public use.<sup>129</sup> In working through this

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121. *Id.*

122. *Clendaniel v. Conrad*, 83 A. 1036, 1038 (Del. 1912).

123. *Id.*

124. *Id.*

125. *Id.* at 1039.

126. *Id.*

127. *Id.*

128. *Id.* at 1040.

129. *Id.* at 1038.

question, the court started by noting that the entire boulevard, road and accessories, were part of the same project, despite a variance in ownership.<sup>130</sup> The court recognized that because the land “contain[ed] a road for vehicular travel,” the accessories, such as “trees, walks and other parking features,” were all part of the general purpose of the project.<sup>131</sup>

With the understanding that they were only dealing with one project, the court was prepared to answer the question of whether that project was a sufficient public use. Without much consideration, the court held that “[t]here can be no doubt that every one of the features or elements of the boulevard contemplated by the statute, road, railway, telegraph and telephone lines, pipe lines, and the beautification of the land by walks, trees, etc., has been judicially decided to be a public use.”<sup>132</sup> However, the court made two additional statements that may have a great deal of applicability today.

First, in considering the extent of the state’s condemnation power, the court noted that eminent domain might be exercised “any time the *public welfare*, or the *public necessity*, in the judgment of the Legislature, should require it.”<sup>133</sup> By allowing for condemnation when the public welfare or necessity may require it, the court broadened the understanding of public use beyond a literal interpretation requiring the public to actually use the land. Second, the Supreme Court of Delaware wrestled with the same question that the United States Supreme Court toiled with in *Kelo*: whether anything that might convey a significant private benefit could be considered a public use.<sup>134</sup> On this point, the Delaware court held that “[a] certain person may ask for the enactment of legislation that would be beneficial to himself, and the Legislature may conclude that such legislation would be of general benefit and enact a general statute.”<sup>135</sup> Thus, in 1912, nearly 100 years prior to *Kelo*—where the United States Supreme Court announced that a single, “carefully formulated,” and “comprehensive” plan that will benefit the public, is an acceptable public use<sup>136</sup>—the Supreme Court of Delaware made essentially the same decision, stating that “a single scheme, one comprehensive plan of public improvement,” is an adequate public use for the purposes of exercising eminent domain.<sup>137</sup>

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130. *Id.* at 1042–43.

131. *Id.* at 1043.

132. *Id.* at 1046.

133. *Id.* at 1052 (emphasis added).

134. *Id.* at 1044; *Kelo v. City of New London*, 545 U.S. 469, 477–78 (2005).

135. *Clendaniel*, 83 A. at 1044.

136. *Kelo*, 545 U.S. at 483, 484.

137. *Clendaniel*, 83 A. at 1042.



### 3. *Wilmington Parking Authority v. Ranken*

*Wilmington Parking Authority v. Ranken*, like *Kelo* at the federal level, does not seem to represent a major doctrinal change in eminent domain jurisprudence.<sup>138</sup> Instead, *Ranken* articulates a new standard for balancing public use and private benefits already permitted under the law.<sup>139</sup>

In 1951, the Parking Authority Act was passed, delegating power to the Wilmington Parking Authority (WPA) to research, construct, and maintain off-street parking facilities, and to acquire the land necessary for such facilities.<sup>140</sup> As WPA's first project, it sought to construct a parking garage in the heart of Wilmington's business district.<sup>141</sup> The WPA determined that the project should be economically self-sustaining; thus, it intended to lease portions of the ground floor of the garage to private businesses that would then make lease payments to the WPA.<sup>142</sup>

The parcel on which the WPA planned to build consisted of four separate lots, three of which were bought on the open market.<sup>143</sup> The owners of the final lot, however, were unwilling to sell, thus making clear that, inevitably, the lot would need to be taken by eminent domain.<sup>144</sup>

The owners of the final lot, including Ranken, objected to the taking and claimed that the creation of off-street parking was not a public use and, even if it were a public use, the intention to lease space in the parking facility to private enterprises would override the public character of the project as a whole.<sup>145</sup> The court quickly dismissed the contention that public parking was not a public use, noting that "[s]ixty years ago no one would have suggested that the state-operated livery stable served a public purpose."<sup>146</sup> The court queried "[a]t the present day, who can doubt that the grave problems created by the automobile, including parking, are a fit subject for public concern?"<sup>147</sup> Deferring to the legislature, the court then concluded that parking is a "public use[] for which public money may be spent and private property may be acquired by the exercise of the power of

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138. *Wilmington Parking Auth. v. Ranken*, 105 A.2d 614, 622 (Del. 1954).

139. *Id.*

140. *Id.* at 618; Parking Authority Law, 48 Del. Laws 1015 (1951).

141. *Ranken*, 105 A.2d at 618.

142. *See id.* The parking garage was to be financed using revenue bonds. The court noted the WPA's finding that a facility dedicated solely to parking would only provide a return on investment of 4.15%, while a return of 8.5% was required to market the bonds. *Id.* As a result, the WPA turned to leasing to make up the difference. *Id.*

143. *Id.*

144. *Id.*

145. *Id.* at 619, 621.

146. *Id.* at 619.

147. *Id.*

eminent domain.”<sup>148</sup> The court also noted “the breadth of the concept of public purpose has increased and is increasing, but it requires an extreme case for a court to say that it ‘ought to be diminished.’”<sup>149</sup>

The court discussed further a resolution to the second question: whether a parking facility that serves a public use can also benefit private interests.<sup>150</sup> Ranken objected that nearly 40% of the project would be devoted to commercial use and that the project thus had “a dual character—a merger of public and private uses that cannot be separated and for which the State may not condemn private property.”<sup>151</sup> After much discussion of precedent from other jurisdictions, the court arrived at a standard of review for determining the acceptable relationship between public use and private benefits.<sup>152</sup> The test was constructed such that “the reviewing court must be satisfied that the underlying purpose—the motivating desire—of the public authority is the benefit to the general public. If a self-styled public project is so designed that in fact private interests are the chief beneficiaries, a remedy is available.”<sup>153</sup> Thus, the court concluded that “[c]ommercial leasing of public property, in itself, is not necessarily unconstitutional,”<sup>154</sup> and that since “the purpose of the project as a whole [was] a public one,” the use of eminent domain was valid.<sup>155</sup> With that holding, public parking became a recognized public use and the holdings of *Hickman* and *Clendaniel* were reiterated: a public use may result in private benefits if the project, on balance, is for the public use.

#### 4. *Randolph v. Wilmington Housing Authority*

*Randolph v. Wilmington Housing Authority* represents the first major application of Ranken’s primary purpose test.<sup>156</sup> Mrs. Randolph owned property in an area of Wilmington that had been declared a “slum area” and was slated for acquisition and redevelopment.<sup>157</sup> The “slum area” was 38.2 acres over 21.5 city blocks and contained 638 structures, of which 606 were

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148. *Id.* at 619–20 (quoting 22 Del. C. § 501 (1953)).

149. *Id.* at 627.

150. *Id.* at 622.

151. *Id.* at 621.

152. *Id.* at 626.

153. *Id.*

154. *Id.*

155. *Id.* at 630. Ultimately, the Ranken court held that some aspects of the project were invalid, not because of any constitutional issues, but because the negotiation and bidding procedures did not comport with the statutory guidelines. *Id.* at 635.

156. *Randolph v. Wilmington Hous. Auth.*, 139 A.2d 476, 483 (Del. 1958).

157. *Id.* at 479–80.

residential properties containing 970 total dwelling units.<sup>158</sup> Of all the structures in the area, 97% were “dilapidat[ed] or deteriorat[ed],” 55% had “substandard alterations,” 99% had “inadequate original construction,” 97% were “improperly maintained,” and 77.3% were in violation of the fire code.<sup>159</sup> Miraculously, and very similarly to *Berman*, Randolph’s property had none of these problems and was considered a “safe and sound structure,” but was still slated for acquisition because of its location within the slum area.<sup>160</sup> Moreover, the ultimate plan for redevelopment of the slum area was to sell the acquired property rights to private developers for redevelopment.<sup>161</sup> Needless to say, Randolph objected to the acquisition and razing of her property.<sup>162</sup> Three pertinent legal questions arose from Randolph’s objection.

The first question was whether the clearance and redevelopment of a slum area was a valid public purpose.<sup>163</sup> Randolph argued that slum clearance was not a public use of her land since that goal could be accomplished by the exercise of the police powers or the innovation of private enterprise.<sup>164</sup> The court (in a less than convincing manner) noted simply that “to date, neither the exercise of the police power nor the operation of private enterprise has abolished the slum.”<sup>165</sup> The court then augmented its reasoning by noting that the legislature had determined that slum clearance was a public use of land, and, because no other method had yet worked, the court could not say that the legislative judgment was wrong.<sup>166</sup> Thus, slum clearance became a legislatively and judicially recognized public use in Delaware.

The second question was whether the condemnation of a non blighted building was valid when the acquisition of that building was part of a larger slum clearance project.<sup>167</sup> The court found no problem in condemning a sound structure as part of a slum clearance.<sup>168</sup> It reasoned that a slum is a legislatively determined area where the preponderance of buildings is

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158. *Id.* at 479.

159. *Id.*

160. *Id.* at 480. *See generally* *Berman v. Parker*, 348 U.S. 26, 34–35 (1954) (considering the validity of the use of eminent domain powers for the taking of a non-blighted structure that sat in a larger area with significant blight problems).

161. *Randolph*, 139 A.2d at 479.

162. *Id.* at 480.

163. *Id.* at 481.

164. *Id.*

165. *Id.* at 482.

166. *Id.*

167. *Id.* at 484.

168. *Id.*

substandard.<sup>169</sup> The fact that an individual building in a slum area was not contributing to the slum did not undo the condition of the general area.<sup>170</sup> The court very aptly recognized that “hardship may always exist when the power of eminent domain is exercised,” but this could not undo the fact that the taking, even of a non-blighted structure, was still for a public use.<sup>171</sup>

The third question with which the court dealt with recalled the *Ranken* primary purpose test.<sup>172</sup> Randolph urged that even if the clearance was for a public use, the redevelopment could not be considered a public use because the land, taken by eminent domain, would be immediately sold to private developers.<sup>173</sup> The court framed the question this way: “is slum clearance or redevelopment the primary purpose?”<sup>174</sup> The court again deferred to the legislative finding that slums were the evil that the legislature sought to cure, and the court reasoned that without subsequent redevelopment, the slum clearance would accomplish very little.<sup>175</sup> Presumably, the court took for granted that the redevelopment could not be done without the involvement of private developers.

The most important thing to note may be the way in which the Delaware Supreme Court framed this third question. The court began with the primary purpose test but did not balance the public purpose with the private benefit, as it had in *Ranken*.<sup>176</sup> Rather, the court balanced the public purpose of slum clearance with the redevelopment phase of the project, and asked whether slum clearance or redevelopment was the primary purpose.<sup>177</sup> In so doing, the court seemed to have presupposed that redevelopment, on its own, could not be a public use.<sup>178</sup> That is to say, the use of eminent domain may not be acceptable for a project that is simply redevelopment. There must be a prevailing public use, such as slum clearance. Since this assertion is not explicit, the reasoning is also not explicit. However, the court appears to have simply looked to Randolph’s argument—that the redevelopment would transfer the property to private interests—and assumed that redevelopment could never be accomplished without a correlative benefit to private developers.<sup>179</sup>

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169. *Id.*

170. *Id.*

171. *Id.*

172. *Id.* at 481; *Wilmington Parking Auth. v. Ranken*, 105 A.2d 614, 626 (Del. 1954).

173. *Randolph*, 139 A.2d at 481.

174. *Id.* at 483.

175. *Id.*

176. *Id.*; *Ranken*, 105 A.2d at 626.

177. *Randolph*, 139 A.2d at 483.

178. *See id.* (reasoning that redevelopment is a valid undertaking only because it “follows as a necessary consequence” of slum clearance).

179. *See id.* (agreeing with Mrs. Randolph that “the State may not constitutionally condemn

## 5. Libby's Case

Libby's is a small, diner-like, Greek restaurant in the center of Wilmington's business district. Libby's is the type of restaurant where businessmen and blue-collar workers rub shoulders over Greek salad or breakfast (served all day), and where many of the lawyers who litigated the cases discussed in this Note regularly ate their lunches. When one enters through the front door of Libby's there is a coat rack, an umbrella stand, and a counter with a cash register. Immediately above the cash register is an enlargement of a front page from the local daily paper. Below the headline is a picture of Libby with a huge smile on her face and her hands thrown in the air. The day before that paper was published, the Delaware Supreme Court had determined that Libby's restaurant would not be turned into a parking lot.<sup>180</sup>

The City of Wilmington delegated some of its condemnation powers to the WPA, which, as noted earlier, was charged with fulfilling the city's parking needs.<sup>181</sup> In 1986, the WPA proposed a seven-story parking garage, with 950 parking spaces, which was to cover the entire block bound by Tatnall, Eighth, Girard, and Tillman Streets—the same block on which Libby's was located.<sup>182</sup> However, like *Ranken*, the project was not to be entirely dedicated to public parking.<sup>183</sup> The Wilmington News Journal, the preeminent Delaware newspaper, was to be the recipient of the ground level rights in the property, and the WPA would retain only rights in the floors above the News Journal's property.<sup>184</sup> The purpose of this arrangement was two fold. First, providing a convenient downtown location for the News Journal was an incentive to induce the paper to keep its facilities within the city limits.<sup>185</sup> Second, the purchase price that the News Journal was to pay to the WPA was needed to make the project economically

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private property if the primary purpose of the condemnation is the transfer of the property to private use").

180. *Wilmington Parking Auth. v. 227 W. 8th St.*, 516 A.2d 483, 483 (Del. 1986). The entirety of Libby's Case was dealt with in three decisions: a decision by the trial court, an order by the Delaware Supreme Court, and an opinion by the Delaware Supreme Court. The above-cited authority is the Order of the Supreme Court, which was issued five months before the opinion supporting that order was issued. *Id.*; see also *Wilmington Parking Auth. v. 227 W. 8th St.*, 521 A.2d 227, 230 (Del. 1986) [hereinafter *Libby Opinion*] (stating that the Wilmington Parking Authority did not "act within its statutorily limited purpose of providing for needed public parking").

181. *Wilmington Parking Auth. v. 227 W. 8th St.*, No. 265, 1986 WL 10505, at \*1 (Del. Super. Ct. Aug. 11, 1986) [hereinafter *Libby Trial*]; *Parking Authority Law*, 48 Del. Laws 1015 (1951).

182. *Libby Trial*, 1986 WL 10505, at \*6.

183. *Id.*

184. *Id.*

185. *Id.*

feasible for the city.<sup>186</sup>

It is probably obvious at this point that not every property owner on the soon-to-be-a-parking-garage block was willing to sell. In particular, Theodore and Labrini (a/k/a Libby) Hantzandeu, the owners of Libby's, wanted to keep their restaurant.<sup>187</sup> The WPA moved for immediate possession of Libby's by eminent domain.<sup>188</sup> Libby and her husband opposed the WPA's attempt to condemn their land, arguing that the condemnation was not primarily for the public benefit, but rather, was for the primary benefit of the News Journal, a private corporation.<sup>189</sup>

Two separate legal questions arose out of Libby's opposition to the condemnation. The first question was whether the building of a garage that would belong, in large part, to a private enterprise, was a valid public use.<sup>190</sup> This first question was easily answered. The Delaware Supreme Court, relying on *Ranken* and *Randolph*, held that if the primary benefit of the project was parking, "the fact that a parking facility will have multiple purposes does not in and of itself render the proposed taking one for private rather than public purposes."<sup>191</sup> However, the court reasoned that the primary purpose analysis was a factual analysis and, therefore, relied on the trial court's finding that the primary purpose was not to benefit the public through parking, but rather to benefit the public through the economic benefits of retaining the News Journal as a corporate citizen.<sup>192</sup> This finding was based in large part on the fact that the WPA had not even considered the present location for a garage until the city suggested that the WPA engage the News Journal in a joint venture.<sup>193</sup> The court, however, did not decide the case on this issue alone.

The second question was dispositive: whether, if the public were the primary beneficiary of the project, the WPA had the statutory authority to condemn property for any public benefit other than parking.<sup>194</sup> The Delaware Supreme Court stated, "[a]lthough we examine the primary purpose rule as it developed in the constitutional context, we apply it here to determine whether the WPA's proposed condemnation was invalid as beyond its statutory purpose, i.e., to provide public parking."<sup>195</sup> The court

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186. *Id.*

187. *Id.* at \*1.

188. *Id.*

189. *Id.*

190. *Libby Opinion*, 521 A.2d 227, 231 (Del. 1986).

191. *Id.* at 234.

192. *Id.* at 233-34; *Libby Trial*, 1986 WL 10505 at \*1, \*7.

193. *Libby Trial*, 1986 WL 10505 at \*7.

194. *Libby Opinion*, 521 A.2d at 231.

195. *Id.*

proceeded to look to the statute creating the WPA and authorizing the Authority to exercise eminent domain.<sup>196</sup> With that statutory authority in mind, the court held that although the primary purpose of the exercise benefited the public, that benefit was not related to parking and was, therefore, outside of the statutory authority of the WPA.<sup>197</sup> The court, therefore, applied the primary purpose test only as a threshold step to determine if the revealed purpose was one that the WPA was statutorily authorized to create.

Libby's Case presents an example of an invalid exercise of eminent domain because the public benefit was only incidental to a private benefit. However, the court's holding—that the plan was invalid due to the WPA having exceeded its authority to condemn land for parking projects—is explicitly limited, thus reducing the significance of the case.<sup>198</sup> Thus, two questions remain. The first is whether the project in Libby's Case would have been approved had a body with greater eminent domain powers been in charge. The second question is still “What can I get for ya' hun?”

### B. Public Uses Without Substantial Private Benefits

Unlike the foregoing cases, where the judicial reasoning is more important than the public purpose considered, the following cases simply announce, or affirm, specific public uses. The opposition in the following cases did not arise because any public use might have been vitiated by a private benefit. The opposition arose because parties felt that the takings were not a public use per se.

#### 1. *Piekarski v. State*

*Piekarski v. State* announced that prevention of beach erosion is a public use.<sup>199</sup> The state had entrusted the Department of Natural Resources and Environmental Control (DNREC) with, among other things, the protection and enhancement of Delaware's beaches.<sup>200</sup> In this particular case, Bowers Beach was experiencing significant erosion, and DNREC sought easements from all fifty-nine landowners along the beach in order to place beach fill on their land.<sup>201</sup> Fifty-two of the fifty-nine owners

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196. *Id.* at 233.

197. *Id.*

198. *Id.* at 234 (stating that “the primary objective must be parking”).

199. *Piekarski v. State*, 373 A.2d 209, 209 (Del. 1977).

200. *Id.*

201. *Id.*

voluntarily granted rights to DNREC, but the remaining seven refused.<sup>202</sup> Given that the holdout properties were in the middle of the beach, the project could not go forward without their involvement.<sup>203</sup> Thus, DNREC sought to obtain the easements through eminent domain.<sup>204</sup>

The Piekarskis and the other defendants asserted that erosion prevention was not a public use and could not support the use of eminent domain.<sup>205</sup> The court considered that the project was suggested to DNREC by residents of Bowers Beach rather than a formulation of the agency itself, that foundations of many of the houses were in jeopardy, and that the project would be ineffective without access to the defendants' land.<sup>206</sup> With all this in mind, the court simply held that erosion control is a public use of land.<sup>207</sup>

## 2. *New Castle County School District v. State*

The overarching question presented in *New Castle County School District v. State* was one of a complicated chain of title that meandered among public and private hands between 1937 and 1980.<sup>208</sup> Ultimately, the state sought to purchase the property in question from the school board in order to turn it into a public park.<sup>209</sup> The state, by statute, set a nominal purchase price of one dollar.<sup>210</sup> The school district challenged the purchase, not on public use grounds, but rather on the state of the title.<sup>211</sup> However, before moving to the paramount question presented, the court needed to ensure that the purpose for which the state would be expending public funds was, in fact, a public use.<sup>212</sup> The court announced that there is "no question" that building a park is a public purpose.<sup>213</sup>

## 3. *Cannon v. State*

*Cannon v. State* announced that indirect public uses can support the

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202. *Id.*

203. *Id.*

204. *Id.*

205. *Id.* at 210.

206. *Id.*

207. *Id.*

208. *New Castle County Sch. Dist. v. State*, 424 A.2d 15, 16–17 (Del. 1980).

209. *Id.* at 17.

210. *Id.* at 16.

211. *Id.* at 17.

212. *Id.*

213. *Id.*



exercise of eminent domain.<sup>214</sup> An important question that *Cannon* left open, however, was whether eminent domain may be exercised in order to acquire land for environmental protection.

The Delaware Department of Transportation (DelDOT) intended to implement a plan that would alter the path of Route 54.<sup>215</sup> In the course of this alteration, a certain amount of federally designated wetlands would need to be filled.<sup>216</sup> Federal law, however, mandates that no project may result in a net loss of wetlands.<sup>217</sup> Thus, when DelDOT filled wetlands, they would have to mitigate by creating new wetland areas.<sup>218</sup> Unfortunately for Everett and Allie Cannon, their coastal farm was selected not only as part of the route over which the road would run, but also as the land to be used for the wetlands mitigation.<sup>219</sup>

The Cannons did not object to the use of their land for the purposes of road construction, but they asserted that wetlands mitigation did not serve a sufficient public purpose.<sup>220</sup> The court did not focus on the public value of wetlands mitigation in and of itself; rather, it focused on the consequences of prohibiting condemnation for wetlands mitigation.<sup>221</sup> The court reasoned that if the mitigation could not proceed, then the federal authorities would not permit the redirection of the road because it would result in a net loss of wetlands.<sup>222</sup> Thus, the court recognized that environmental mitigation constitutes a public use “if necessary to advance the underlying purpose of construction and maintenance of the State’s roadways.”<sup>223</sup> One might assume that this reasoning would also apply to other public uses recognized by the legislature and the courts. However, the implication might be that environmental protection, on its own, is not a public use.

### C. Delaware’s Law in Light of Kelo

Delaware’s public use jurisprudence seems to be stricter and less deferential than the federal jurisprudence. Thus, the *Kelo* decision seems unlikely to have much of a direct effect on the application of eminent

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214. *Cannon v. State*, 807 A.2d 556, 559 (Del. 2002).

215. *Id.* at 558.

216. *Id.*

217. *Id.* (citing Clean Water Act, 33 U.S.C. § 1344); *see also* 33 C.F.R. § 320.4(r) (2006) (outlining wetlands mitigation policy that applies to the Corps of Engineers).

218. *Cannon*, 807 A.2d at 558.

219. *Id.*

220. *Id.*

221. *Id.* at 560.

222. *Id.* at 559.

223. *Id.*

domain in Delaware. In the most basic sense, *Kelo* held that economic development is a public use.<sup>224</sup> This will have the minimal effect on every state of extending the breadth of the federal baseline such that any state could now choose to extend their public use requirements.<sup>225</sup> However, in Delaware, *Ranken*,<sup>226</sup> *Randolph*,<sup>227</sup> and *Libby's Case*<sup>228</sup> already announced limits that are tighter than the federal baseline.

*Ranken* created the “primary purpose” threshold for determining whether a project had a sufficient public use.<sup>229</sup> In so holding, the court placed the burden on the government to show that the primary purpose was a public one.<sup>230</sup> This added burden on the government is a safeguard that is not offered by the highly deferential federal jurisprudence.<sup>231</sup> Moreover, *Libby's Case* is a clear demonstration of the high scrutiny that the Delaware Supreme Court will apply to the government's proffered public use. There, the court looked to timing of the project, communications with the alleged private beneficiary, studies done by the condemning authority, other tangential actions of the condemning authority, and the design of the project, but gave no indication that future inquiries would be limited to these factors.<sup>232</sup>

Whether *Kelo* could have happened in Delaware, or any state considering responsive legislation, should be carefully considered by state legislators. Otherwise, the nature and scope of their legislation will not be responsive to the specifics of *Kelo* or the needs of constituents, but rather the legislation will be responsive only to superficial political puffery.

Given the state of Delaware's law, *Kelo* seemingly could not have happened there. In *Kelo*, had the Supreme Court applied the same scrutiny that the Delaware courts applied in *Libby's Case*, there is a high likelihood that it would have determined that the primary purpose of the plan was to benefit Pfizer. Though Pfizer relocated to Fort Trumbull before New London attempted to exercise eminent domain, clearly one of the major purposes of the economic redevelopment project was to provide a richer cultural and economic base for the new facility.<sup>233</sup> The development plan

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224. *Kelo v. City of New London*, 545 U.S. 469, 484 (2005).

225. *Id.* at 489.

226. *Wilmington Parking Auth. v. Ranken*, 105 A.2d 614, 626 (Del. 1954).

227. *Randolph v. Wilmington Hous. Auth.*, 139 A.2d 476, 483 (Del. 1958).

228. *Libby Opinion*, 521 A.2d 227, 234 (Del. 1986).

229. *Ranken*, 105 A.2d at 626.

230. *Id.*

231. *See Kelo v. City of New London*, 545 U.S. 469, 483 (2005) (noting that “broad latitude” is given to legislatures “in determining what public needs justify the use of the takings power”).

232. *Libby Opinion*, 521 A.2d at 230, 233.

233. *Kelo*, 545 U.S. at 474–75.

at issue in *Kelo* was approved only two months after Pfizer announced that it would move to the neighborhood.<sup>234</sup> The plan was even billed as a way to “complement the facility that Pfizer was planning to build.”<sup>235</sup>

Moreover, *Kelo* should have little impact on Delaware because *Randolph* has already hinted that economic development cannot, on its own, stand as a public purpose.<sup>236</sup> Recall that in *Randolph*, the court balanced two purposes—slum clearance and redevelopment—in determining the real primary purpose of the government action.<sup>237</sup> The court held that slum clearance was the primary purpose and that redevelopment was only a necessary follow-up to that purpose.<sup>238</sup> The clear implication of this construction is that redevelopment is not a valid public purpose because, had redevelopment been the victor in the primary purpose face-off, the court would have invalidated the project.<sup>239</sup> *Kelo* dealt with nothing more than a development project. So, it seems likely that had that fact pattern been tried in the Delaware courts, the opposite outcome would have been reached.

Delaware’s public use doctrine is more limited than the federal doctrine, thus, *Kelo* will have little impact on the state. Nonetheless, the general assembly has decided to act in response to the decision, and the results of their reaction may be much further reaching than *Kelo* alone ever could have been.

### III. ACCEPTING THE INVITATION: A LEGISLATIVE RESPONSE TO *KELO*

*Kelo* will not fade into constitutional history without having aroused lawmakers throughout the country. The question is whether this arousal will produce a substantial and functional change in the law, whether it will produce weak and ineffective legislation, or whether it will so stimulate the ire of reactionary lawmakers that its product will be overbearing and short lived. Common sense suggests the latter.

As previously noted, approximately three dozen states have begun to craft legislation in response to *Kelo*.<sup>240</sup> The federal government has introduced measures of its own.<sup>241</sup> Pennsylvania, Delaware’s neighbor to

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234. *Id.* at 495 (O’Connor, J., dissenting).

235. *Id.* (quoting Application to Petition for Writ of Certiorari at 5, *Kelo*, 545 U.S. 469 (2005)).

236. *Randolph v. Wilmington Hous. Auth.*, 139 A.2d 476, 483 (Del. 1958).

237. *Id.*

238. *Id.*

239. *See id.* (finding that the project was valid because redevelopment was only a secondary purpose).

240. Broder, *supra* note 4.

241. *House Bill Counters Eminent Domain Ruling*, Nov. 4, 2005,

the north, has introduced thirty-three eminent domain bills since the decision was handed down.<sup>242</sup> Delaware has only introduced three measures.<sup>243</sup> There is no indication that Delaware's activity is particularly notable when considered in light of legislation in thirty-six other states, including a neighbor that has eleven times more activity. But Delaware was the first state to respond to *Kelo*.<sup>244</sup> Thus, the three measures in the Delaware General Assembly should serve as good examples of what other states might enact, what other states might avoid, and what other states might emulate. The ultimate fate of these bills is not important for the purposes of this Note. Instead, these measures, taken together, should be viewed as a clearinghouse of terms, clauses, and ideas that other states may look to for guidance, both good and bad, in crafting legislation in response *Kelo*.

#### A. Senate Bill 217

Five days after the Supreme Court ruled on *Kelo*, the Delaware General Assembly had already introduced a bill in response.<sup>245</sup> Delaware Senate Bill (S.B.) 217 amended title 29 of the Delaware Code, which deals broadly with state government.<sup>246</sup> The purpose of the Bill was to “address[] various abuses and uncertainties relating to the exercise of the State’s power of eminent domain and the protection of private property rights.”<sup>247</sup>

The first section of S.B. 217 imposes specific use limits and procedural limits on the state’s eminent domain power. It requires that “the acquisition of real property through the exercise of eminent domain by any agency

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<http://www.foxnews.com/story/0,2933,174495,00.html> (last visited Apr. 5, 2007).

242. Sam Spatter, *33 Eminent Domain Bills Crafted*, PITTSBURGH TRIBUNE-REVIEW, Sept. 24 2005, available at [http://pittsburghlive.com/x/tribune-review/business/s\\_377382.html](http://pittsburghlive.com/x/tribune-review/business/s_377382.html).

243. S.B. 217, 143d Gen. Assemb., 1st Sess. (Del. 2005); S.B. 221, 143d Gen. Assemb., 1st Sess. (Del. 2005); H.R. Con. Res. 38, 143d Gen. Assemb., Spec. Sess. (Del. 2005); H.R. Res. 44, 143d Gen. Assemb., 1st Sess. (Del. 2005). Delaware House Concurrent Resolution 38 and Delaware House Resolution 44 are identical resolutions enacted separately for procedural purposes and, therefore, act as one resolution. Telephone Interview with Bernard Brady, Secretary of the Senate, Del. Gen. Assemb., in Dover, Del. (Aug. 15, 2005).

244. Smith Interview, *supra* note 5.

245. See State of Delaware: The Official Website for the First State, An Act to Amend Title 29 of the Delaware Code Relating to Real Property Acquisition and the Exercise of Eminent Domain, <http://www.legis.state.de.us/LIS/LIS143.NSF/vwlegislation/SB+217?opendocument> (last visited Jan. 26, 2007) [hereinafter Leg. Synopsis of S.B. 217] (noting that S.B. 217 was introduced on June 28, 2005).

246. S.B. 217. See generally DEL. CODE ANN. tit. 29 (2003) (governing the general assembly, constitutional offices, administrative agencies, public officers and employees, state planning and property acquisition and other aspects of state government).

247. Leg. Synopsis of S.B. 217, *supra* note 245.

shall be undertaken, and the property used, only for the purposes of a recognized public use.”<sup>248</sup> It then outlines the procedural requirements associated with the new limit, mandating that the “recognized public use” be publicly explained “at least [six] months in advance of the institution of condemnation proceedings: (i) in a certified planning document, (ii) at a public hearing held specifically to address the acquisition, or (iii) in a published report of the acquiring agency.”<sup>249</sup>

S.B. 217’s second section addresses the cost of condemnation proceedings.<sup>250</sup> Title 29, section 9503 of the Delaware Code awards attorney’s fees as well as appraisal and engineering fees to a landowner if a condemnation proceeding against their property fails.<sup>251</sup> Under that formulation, the amount of fees to be paid is determined by “the opinion of the [condemning] agency.”<sup>252</sup> S.B. 217 simply replaces the word “agency” with the word “court,” thereby allowing the courts to determine costs.<sup>253</sup> Presumably, this measure will limit frivolous condemnation proceedings by increasing the likelihood that higher costs will be assessed against the agency.

When S.B. 217 was introduced, its sponsor, Senator Robert L. Venables, offered a credible defense of the measure.<sup>254</sup> The Senator first noted that it “was not a complete knee [jerk] reaction” because it had actually been drafted and originally introduced before *Kelo* was handed down.<sup>255</sup> However, he felt the reintroduction of the bill was called for because *Kelo* had diminished the importance of private property rights.<sup>256</sup> Senator Venables thought that this whittling away of property rights should not stand because “private property rights is [sic] as important as freedom of speech . . . . Private property rights is [sic] something that made this country great,” and “the Founding Fathers, when they put the clause for eminent domain in the Constitution were thinking about roads and buildings that benefit all the citizens.”<sup>257</sup> The Senator insisted that “more tax”—the benefit allowed by *Kelo*—is not a benefit to all citizens.<sup>258</sup>

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248. S.B. 217.

249. *Id.*

250. *Id.*

251. DEL. CODE ANN. tit. 29, § 9503 (2003).

252. *Id.*

253. S.B. 217.

254. Audio tape: Senate Debate on S.B. 217, 143d Gen. Assemb., 1st Sess. (June 29, 2005) [hereinafter S.B. 217 Senate Debate] (statement of Senator Robert L. Venables) (on file with author and available from the Delaware General Assembly).

255. *Id.*

256. *Id.*

257. *Id.*

258. *Id.*

Senator Venables's comments seemed to please the other senators. However, the language of the bill itself did raise some questions.<sup>259</sup> Senator Steven H. Amick questioned what exactly a "recognized public use" was and whether that wording was too broad or unclear.<sup>260</sup> In response, though not very responsive to the concern, Senator John C. Still sought to explain the intent of the bill for any court (or perhaps law student) that might be listening to the debate for guidance on how to interpret the measure.<sup>261</sup> The purpose, explained Senator Still, was to prevent commercial enterprises from taking private homes.<sup>262</sup> The Senator asserted that the only intent of the bill was to prevent commercial uses of eminent domain and nothing else.<sup>263</sup> "That's what I took" from S.B. 217, announced Senator Still.<sup>264</sup>

To augment Senator Still's comments, Senator Harris B. McDowell noted that S.B. 221 was a companion bill to S.B. 217 and should further explain the intent of the general assembly.<sup>265</sup> Senator Venables rose again to reiterate that the only intention of S.B. 217 was to deal with "private to private" condemnation, "like *Kelo*."<sup>266</sup> Though not many questions were answered, the debate was closed after Senator Venables's last comments, and the Bill passed unanimously.<sup>267</sup>

Only one representative spoke when S.B. 217 unanimously passed the House of Representatives.<sup>268</sup> Representative Wayne A. Smith, sponsor of Delaware House Concurrent Resolution 38, affirmed that there would be a further response despite S.B. 217, because many people were "deeply concerned" about the consequences.<sup>269</sup> That assurance was enough to garner the votes of all forty-one representatives in favor of S.B. 217.<sup>270</sup>

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259. *See id.* (statement of Senator Steven H. Amick) (applauding the bill's intent and asking for explanations of certain phrases).

260. *Id.*

261. *Id.* (statement of Senator John C. Still).

262. *Id.*

263. *Id.*

264. *Id.*

265. *Id.* (statement of Senator Harris B. McDowell). Strangely, the Senator also admitted that he had not read *Kelo*, raising the question of how many of the Senators had, in fact, read the opinion. *Id.*

266. *Id.* (statement of Senator Venables). Senator Venables's comments about the meaning of *Kelo* seem to indicate that he too had yet to read the decision, which would have demonstrated that *Kelo* was not announcing a principle that allowed condemnation for purely private benefits. *Kelo v. City of New London*, 545 U.S. 469, 477 (2005).

267. S.B. 217 Senate Debate, *supra* note 254.

268. Audio tape: House of Representatives Debate on S.B. 217, 143d Gen. Assemb., 1st Sess. (June 30, 2005) (statement of Representative Wayne A. Smith) (on file with author and available from the Delaware General Assembly).

269. *Id.*

270. *Id.*

Having passed the House and Senate unanimously, S.B. 217 was signed by the Governor and became law on July 21, 2005.<sup>271</sup>

### B. Senate Bill 221

Delaware Senate Bill 221 was brought to the floor on the same day as S.B. 217.<sup>272</sup> S.B. 221 would amend, *inter alia*, title 10, section 6105(b) of the Delaware Code.<sup>273</sup> The stated purpose of the bill is to “prohibit[] the condemnation of private property where no specific public use is to be made to the property,” thus complementing S.B. 217 by governing the courts similarly to the way S.B. 217 governs agencies.<sup>274</sup>

The first section of S.B. 221 heightens the requirements for complaints in condemnation proceedings.<sup>275</sup> The language of title 10, section 6105(b) of the Delaware Code mandates:

a short and plain statement of the authority for the taking, the use for which the property is to be taken, a description of the property sufficient for its identification, the interest to be acquired, and, as to each separate piece of property, a designation of the defendants who have been joined as owners thereof or of some interest therein.<sup>276</sup>

S.B. 221 would simply add the words “a specific and detailed statement of the public” just before the words “use for which the property is to be taken.”<sup>277</sup> Thus, the new clause of section 6105(b) would read “a specific and detailed statement of the public use for which the property is to be taken.”<sup>278</sup>

The second section of S.B. 221 instructs a court to dismiss any complaint that does not contain the statement required by section one, and it seeks to define what public uses are “sufficient” for the exercise of eminent

271. Leg. Synopsis of S.B. 217, *supra* note 245.

272. State of Delaware: The Official Website for the First State, An Act to Amend Title 10 of the Delaware Code Relating to Condemnation Proceedings, <http://www.legis.state.de.us/LIS/LIS143.NSF/vwlegislation/SB+221?opendocument> (last visited Apr. 5, 2007) [hereinafter Leg. Synopsis of S.B. 221].

273. S.B. 221, 143d Gen. Assemb., 1st Sess. (Del. 2005); *see also* DEL. CODE ANN. tit. 10, § 6105(b) (1999).

274. Leg. Synopsis of S.B. 221, *supra* note 272; *see also* S.B. 217, 143d Gen. Assemb., 1st Sess. (Del. 2005) (limiting the activity of state agencies with respect to condemnation proceedings).

275. S.B. 221 (proposing to amend § 6105(b)).

276. DEL. CODE ANN. tit. 10, § 6105(b) (1999).

277. S.B. 221.

278. *Id.*

domain.<sup>279</sup> The bill explicitly states that a “general public purpose” does not warrant a taking.<sup>280</sup> Moreover, the bill directs that “[t]here must be a showing that a specific public use will be made with the taken property and that the members of the general public, including those from whom the property is being taken, will realize an immediate and direct benefit from such taking.”<sup>281</sup> It then goes on to enumerate some public uses that will be satisfactory, including “the construction or maintenance of public buildings, roads, schools, hospitals, railroads, reservoirs and/or utilities.”<sup>282</sup> S.B. 221 next notes that public use “may not include revenue generation, economic development, or the re-development of currently occupied residences and may not result in the displacement of the residents of the property.”<sup>283</sup>

The original S.B. 221 was amended twice before it passed in the Senate.<sup>284</sup> The first amendment added parks to the list of enumerated public uses.<sup>285</sup> The second amendment removed “redevelopment of currently occupied residences and may not result in the displacement of the residents of the property”, from the list of specifically forbidden uses.<sup>286</sup>

Senator David B. McBride opened debate on S.B. 221.<sup>287</sup> Unlike S.B. 217, Senator McBride noted that S.B. 221 was a “direct response” to *Kelo*.<sup>288</sup> The intent, he announced, was to protect private property from business interests.<sup>289</sup> The Senator, however, expected that S.B. 221 would achieve this goal without drastically changing the law, but rather by clarifying and strengthening existing law.<sup>290</sup>

Echoing his thoughtful question about S.B. 217, Senator Amick jumped right to the substance of the Bill and asked Senator McBride to explain what “immediate and direct benefit” meant and what would result from the requirement that “those from whom the property is being taken” must benefit from the condemnation.<sup>291</sup> Legislative Counsel Tim Willard came to the floor to help answer questions about the Bill’s specific

279. *Id.*

280. *Id.*

281. *Id.*

282. *Id.*

283. *Id.*

284. S. Amend. 1 to S.B. 221, 143d Gen. Assemb., 1st Sess. (Del. 2005); S. Amend. 2 to S.B. 221, 143d Gen. Assemb., 1st Sess. (Del. 2005).

285. S.B. 221 Amend. 1.

286. S.B. 221 Amend. 2.

287. Audio tape: Senate Debate on S.B. 221, 143d Gen. Assemb. (June 29, 2005) [hereinafter S.B. 221 Debate] (on file with author and available from the Delaware General Assembly).

288. *Id.* (statement of Senator David B. McBride).

289. *Id.*

290. *Id.*

291. *Id.* (statement of Senator Amick).



language.<sup>292</sup> Willard avoided the first question but answered that the individual from whom the property is being taken must benefit “as a member of the public.”<sup>293</sup> Senator Amick then questioned whether everybody must benefit equally from the taking.<sup>294</sup> The intent of the language, explained Willard, is only to demonstrate that the owner should be considered—equality is not required.<sup>295</sup>

When Senator McDowell took the floor, his question addressed what was left out of the bill.<sup>296</sup> The Senator questioned how the measure would change the law with regard to slum clearance and, if slum clearance would still be an approved public use, how the bill would assure a fair definition of “blight.”<sup>297</sup> Most importantly, thought the Senator, was a measure to prevent a town from defining “blight” as any home that does not have a “two-car garage, central air, and three bedrooms.”<sup>298</sup> Senator McDowell explained that his concern with *Kelo* was the Court’s overbroad definition of “blight.”<sup>299</sup> That is to say, Senator McDowell (demonstrating some unfamiliarity with the case) believed that the project in *Kelo* was permitted on grounds that the homes being condemned were blighted or otherwise property of “slum landlords.”<sup>300</sup> However, his misunderstanding was never cleared up and his question was never answered.<sup>301</sup> Instead, the debate turned quickly to two pending amendments, both of which were approved, and then to a vote on the amended Bill, which, of course, was also approved, twenty-one to zero.<sup>302</sup> Following its unanimous approval, S.B. 221 was moved to the House, but has yet to see action in that chamber.<sup>303</sup>

### C. House Concurrent Resolution 38

The third measure taken by the general assembly in response to *Kelo* is just the beginning of more legislation. Delaware House Concurrent Resolution (H.C.R.) 38 has the intention of propagating even more post-*Kelo* legislation by creating a task force that will review the Supreme Court’s decision in that case and recommend altering Delaware’s public use

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292. *Id.*

293. *Id.* (statement of Legislative Counsel Tim Willard).

294. *Id.* (statement of Senator Amick).

295. *Id.* (statement of Legislative Counsel Tim Willard).

296. *Id.* (statement of Senator McDowell).

297. *Id.*

298. *Id.*

299. *Id.*

300. *Id.*

301. *Id.*

302. *Id.*

303. Smith Interview, *supra* note 5.

law.<sup>304</sup>

The Resolution first construes the *Kelo* decision as one that allows government to “take one person’s private property for ‘public benefit’ in the name of overall economic development.”<sup>305</sup> Then the Resolution, apparently in direct contradiction to the Supreme Court, states that the United States Constitution permits takings only for “public use,” and not for “public benefit.”<sup>306</sup> Next, the Resolution asserts, “historically, eminent domain has been used by government to take land to build government facilities, such as forts, or to construct infrastructure, such as highways which are open to all.”<sup>307</sup> The Resolution then reaches a conclusion that *Kelo* “greatly increases the potential for eminent domain abuse,” and specifies possible dangers such as taking “a person’s private home or business so that a larger business can make more money off that land and pay more taxes as a result.”<sup>308</sup> The possibility of using eminent domain to increase the tax base, continues H.C.R. 38, “is the broadest and most dangerous expansion of eminent domain,” and *Kelo* removes “the Constitution’s protections [against such a dangerous expansion] out of existence.”<sup>309</sup>

Given all the concerns stated in the Resolution, it concludes that the general assembly must “protect the private land holdings of Delawareans from government takings for the speculative real estate ventures of private developers.”<sup>310</sup> To achieve that end, a task force was created “to examine and draft appropriate State law that would restrict eminent domain to bona fide public usage.”<sup>311</sup>

As for debate on the Resolution, H.C.R. 38 and its companion, Delaware House Resolution 44, were introduced as resolutions to study the decision in *Kelo*.<sup>312</sup> No other information was given regarding either measure; no one spoke on either Resolution and both were passed by voice vote.<sup>313</sup>

As might be expected, the House and Senate both passed H.C.R. 38

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304. H.R. Con. Res. 38, 143d Gen. Assemb., Spec. Sess. (Del. 2005).

305. *Id.*

306. *Id.*

307. *Id.*

308. *Id.*

309. *Id.*

310. *Id.*

311. *Id.*

312. Audio tape: House Debate on H.R. Con. Res. 38, 143d Gen. Assemb., Spec. Sess. (June 30, 2005) [hereinafter H.C.R. 38 House Debate] (on file with author and available from the Delaware General Assembly).

313. *Id.*

unanimously.<sup>314</sup>

IV. A WARNING TO STATES: ACCEPTING THIS INVITATION MAY BE  
HAZARDOUS TO YOUR HEALTH (SAFETY AND PUBLIC WELFARE)

Delaware's post-*Kelo* legislation presents several interesting examples of language limiting a state's exercise of eminent domain. This legislation also presents serious questions about how the language will be interpreted and how it will affect Delaware's public use case law. If the language of any legislation is not carefully considered—especially when that legislation is intended to change a complicated body of the common law—it may have consequences well beyond the scope intended by the legislature. This Part presents the most potent language in Delaware's legislation and then offers analysis and remaining questions about that language by looking to the federal and state jurisprudence on which the legislation, if enacted, would rest. Ultimately, this Part will demonstrate that proposed measures may prove to be, at best, unnecessary to undo the effects of *Kelo* and, at worst, an inadvertent unraveling of a century of case law interpreting the public use clause of Delaware's Constitution.

A. “Recognized public use”

The insistence that property be taken “only for the purposes of a recognized public use” begs the question: What is a “recognized public use?” If case law is not the basis for this analysis, must a court look to legislatively enumerated uses? If case law is the touchstone for determining recognized public uses, should the state courts look only to its own law or also to federal law?

For the Delaware legislature to list each and every public use that it saw as acceptable in a post-*Kelo* universe would be impractical. If it tried, it would fail. No legislature could foresee every use that might be necessary and acceptable. Such an effort could bring the activity of state governments to a near standstill. Relying on case law for recognized public uses will not create such drastic problems, but nonetheless may present unintended consequences.

Federal courts have approved condemnation for any use that is within the police power.<sup>315</sup> Of course, the purpose of post-*Kelo* legislation is to

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314. Audio tape: Senate Debate on H.R. Con. Res. 38, 143d Gen. Assemb., Spec. Sess. (June 29, 2005) (on file with author and available from the Delaware General Assembly); H.C.R. 38 House Debate, *supra* note 312.

315. *Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229, 240 (1984).

counteract the federal jurisprudence. Therefore, one might assume that federal law is not the place to look for “recognized public use.” Roads, parking, slum clearance, prevention of beach erosion, and public parks have all been specifically recognized by Delaware courts, for example.<sup>316</sup> If, however, condemnation is limited to one of these “recognized public use[s],” growth of the law will stop because condemnation for any other use will be prohibited. The courts would never be permitted to advance the law, contrary to the Delaware Supreme Court’s assessment that “the breadth of the concept of public purpose has increased and is increasing, but it requires an extreme case for a *court* to say that it ‘ought to be diminished.’”<sup>317</sup> Here, a *legislature* has said that it ought to be diminished.

There is no indication that the legislature intended to stop the growth of the public use doctrine (as such an intention would be unwise), but only to undo the effects of *Kelo*. Unfortunately, this language may accomplish the former. No new uses can arise when a “recognized public use” is required.

#### B. “Immediate and direct benefit”

To be effective, language requiring that the public “realize an immediate and direct benefit” from the exercise of eminent domain must, at least, give an indication of how to define “immediate” or “direct.”<sup>318</sup>

If “immediate” and “direct” are to be read in their most literal sense, the government’s ability to condemn property will be constrained beyond the most basic expectations of takings for government buildings, schools, reservoirs, and other uniformly accepted public uses. Arguably, for example, taking land for a school does not provide a direct or an immediate benefit. First, it must be clear that education alone is only a private benefit to an individual. Education only provides a public benefit if the student is able to enter the community at large and make use of what the school has taught. Thus, the direct benefit of building a school is private edification. The public benefit, whether it is an educated work force, educated voters, or other public benefits from an educated community, is only an indirect benefit. Moreover, that benefit cannot arise until long after private land has been taken, a school has been constructed, and the pupils graduate. Undoubtedly, this is not an immediate benefit.

The same logic applies to: (1) government buildings, where a government agency will only provide services to limited segments of the population but the services provided will indirectly create a more efficient

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316. *See supra* Part II.

317. *Wilmington Parking Auth. v. Ranken*, 105 A.2d 614, 627 (Del. 1954) (emphasis added).

318. S.B. 221, 143d Gen. Assemb., 1st Sess. (Del. 2005).

society; (2) roads, where the new road will only directly benefit those who choose to drive it, but the indirect benefit of reduced traffic will benefit the public at large; (3) reservoirs, where the increased water supply will not be immediate because it will only be a benefit if there is a drought, and the benefit will only directly apply to those who use the water source; and (4) wetland mitigation, which is a direct environmental benefit, but is approved because of its indirect benefit—its necessity for the building of roads.<sup>319</sup>

If the words “immediate” and “direct” are meant only to prevent more attenuated uses such as those proffered in *Kelo*, they will still unduly limit accepted uses of the eminent domain power. Economic development, the legislature correctly assumes, is a risk.<sup>320</sup> Building new business will not guarantee an increased tax base, and even if it did, the benefit would not be achieved for many years after the actual property acquisition took place. If this is all that a legislature seeks to prevent, the language is too broad. Slum clearance, for example, as opposed to economic development, does not rely on market forces to proceed. Structures are taken down by a government mandate and the slum clearance project is complete. However, the benefit of slum clearance, healthier and safer neighborhoods, will take as long to come to fruition as the benefits of economic development because, ultimately, it relies on the same forces of the marketplace. Profitable businesses, high rates of employment, and other benefits of economic development cannot be mandated, like the clearance of buildings, by government decree.

The extent of the harm that the words “immediate and direct” may cause is drastic. Aside from the aforementioned specific problems, an “immediate and direct” clause may prevent a state from acquiring land for any environmental protection. Environmental harms such as habitat loss or wetland degradation rarely happen quickly. Thus, any attempt by a state to condemn land for the purposes of environmental protection will show no immediate benefits. Likewise, the benefits of healthy ecosystems are quintessentially indirect. Human health and well-being depend on a healthy environment, but the specific species being protected are the only direct beneficiaries. Additionally, there is no indication in the legislation that the new “safeguards” exempt takings of less than fee simple. That is to say, even if a state sought only to gain an easement on certain land, the benefits of that taking would need to be “immediate and direct.”

Given the possible implication of this language—even beyond the

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319. *Cannon v. State*, 807 A.2d 556, 559 (Del. 2002).

320. See S.B. 217 Senate Debate, *supra* note 254 (statement of Senator Venables) (explaining that *Kelo* does not present a direct public use like roads or buildings).

aforementioned examples—one can only hope that legislatures will not use such a clause without definition, or at least, that courts will not strictly interpret an “immediate and direct benefit” clause.

C. *“Including those from whom the property is being taken”*

Legislative insistence that benefits go to the “general public,” which “includ[es] those from whom the property is being taken,” raises questions about the role that a property owner plays in an eminent domain proceeding. As Senator Amick queried, “if an owner says ‘I don’t get a benefit from this condemnation, you are taking my home,’ would that quash the exercise of eminent domain?”<sup>321</sup> Legislative Counsel Tim Willard did concede, speaking only for the Delaware bill, of course, that the language should not be interpreted to give the property owner veto power over the taking.<sup>322</sup> Rather, it was added to emphasize that the public and the owner, as a member of the public, should benefit.<sup>323</sup>

Nonetheless, language directing a court’s attention directly to the property owner may insert the owner’s interests into a proceeding to a greater extent than the drafters of a piece of legislation intended, and certainly more than is practicable. If the owner must benefit, even as a member of the public, must a court take evidence on the costs and the benefits to the owner before a condemnation can be approved? A similar question is whether any benefit to the owner would be sufficient or whether the costs to the owner would need to be considered before determining whether the owner received an overall benefit. Surely, if a cost-benefit analysis were conducted, most, if not all, owners of condemned land would suffer more than they would benefit. Finally, legislation should make clear that the owner’s interests may be considered but an owner’s subjective interests cannot be determinative. Needless to say, any acquisition that would be approved by the property owner would not be an exercise of eminent domain at all, but a transaction on the open market.

Another complication of the “including those from whom the property is being taken” clause is its relationship to the public use clauses of the federal and state constitutions. Even if costs to a property owner outweigh the benefits to that owner, that individual’s interests cannot change the constitutional character of the condemnation. If the purpose is otherwise a public use, the cost to a homeowner cannot change the benefit that the public is receiving. For example, if eminent domain is used to secure land

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321. S.B. 221 Debate, *supra* note 287 (statement of Senator Amick).

322. *Id.* (statement of Legislative Counsel Tim Willard).

323. *Id.*

for a road, the road will be a public use, open to all and benefiting society at large, even if the individual from whom the land was taken will ultimately suffer as a result of the transaction.

In Delaware, legislative debate on S.B. 221 clearly identified the purpose of the “including those from whom the property is being taken” clause.<sup>324</sup> Nonetheless, the context of the language could lead to misapplication of the clause by a court that did not delve into the legislative history or a judge insisting on a strict construction of the language.

*D. “May not include . . . the re-development of currently occupied residences and may not result in the displacement of the residents of the property.”*

Prohibiting eminent domain if the taking would “re-develop[] . . . currently occupied residences” or “result in the displacement of the residents of the property”<sup>325</sup> is an extreme measure. These clauses need little discussion because it is painfully obvious how inhibiting these requirements would be and because this language was removed from the Delaware bill,<sup>326</sup> though the possibility of this language arising in another state is far from remote. Whether a state intended to build a hospital, a sports stadium, or a new home for the governor’s top campaign contributor, eminent domain could not be exercised unless the property taken was vacant or the inhabitants of the property were allowed to remain on the land when the project was completed. Thus, a conservation easement, taking less than fee simple, would be acceptable, but the building of a reservoir would not, unless that reservoir came with a houseboat for the residents of the property or, if the reservoir were built, for example, in an abandoned industrial park, which is probably not an ideal place to store millions of gallons of public drinking water.

*E. “Public use may include . . .”*

“[P]ublic use may include the construction or maintenance of public buildings, roads, schools, hospitals, railroads, reservoirs, and/or utilities.”<sup>327</sup> This language clearly indicates that other public uses may exist. When taken with the measure’s earlier language, the other public uses clearly must: (1) be a recognized public use; (2) be explained in a detailed

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324. *Id.* (statement of Senator McBride).

325. S.B. 221, 143d Gen. Assemb., 1st Sess. (Del. 2005).

326. S. Amend. 2 to S.B. 221, 143d Gen. Assemb., 1st Sess. (Del. 2005).

327. S.B. 221.

statement; (3) serve the general public, “including those from whom the property is being taken;” and (4) provide an “immediate and direct benefit.”<sup>328</sup> The question, however, is whether the state must show that this criterion is met when the proposed use is enumerated.

If permissible public uses are enumerated, there should be a presumption that those uses meet the criteria provided by the legislature. When a judge in a condemnation proceeding is presented with a statement of public use announcing that property is to be taken for a public school, a state might cite a bill similar to S.B. 221, and the judge may summarily decide that because the bill explicitly declares schools to be a public use, the condemnation may proceed.

If a hearing were held on the school project, however, the court might follow the line of reasoning presented in Part IV.B. The court might then determine that the school does not provide an immediate or a direct benefit. Yet, “school[]” is specifically enumerated in the language of the bill.<sup>329</sup> The question becomes whether the inclusion of schools, because they are listed but do not strictly meet the requirements, would force a less restrictive interpretation of the “immediate and direct benefit” language. The probable answer is that the conflicting character of “schools” would change the plain meaning of “immediate and direct benefit” because interpreting language will always be something of a guessing game, but the language, “public use may include the construction or maintenance of . . . schools,” leaves little room for misunderstanding.<sup>330</sup>

*F. “Public use . . . may not include . . .”*

Explicitly prohibiting public uses may also create more problems than it will solve. Take for example, a prohibition on “revenue generation” and “economic development.”<sup>331</sup> Both are clearly enumerated in Delaware (as they probably would be in any state) to shut out any *Kelo*-type projects.<sup>332</sup> This clause raises two issues. First, what constitutes “economic development”? Second, if a proposed project met all of the requirements of the new bills, and all the requirements of the case law, but also served an economic purpose or generated tax revenue, would it be approved?

Revenue generation, understood in light of *Kelo*, is simply increasing

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328. *Id.*

329. *Id.*

330. *See id.* (requiring that a public use allow “members of the general public . . . [to] realize an immediate and direct benefit”).

331. *Id.*

332. *See Kelo v. City of New London*, 545 U.S. 469, 477 (2005) (posing the legal issue as whether economic development is a legitimate public use).



the tax base.<sup>333</sup> Economic development, however, is not as easily defined. The redevelopment effort in *Kelo* was economic development according to the United States Supreme Court, but it is only one example.<sup>334</sup> What else constitutes economic development for the purposes of post-*Kelo* legislation? State legislatures should provide a clear statutory definition. In Delaware, for example, S.B. 221 gives no definition.<sup>335</sup> Likewise, the Delaware Code provides no definition of “economic development” besides a newly added provision in an irrelevant subchapter dealing with charitable business activities.<sup>336</sup> Certainly, the general assembly would not have based S.B. 221 off of this obscure reference without indicating as much. Furthermore, this definition is in a title wholly unrelated to redevelopment, land use, or eminent domain, so a court would be unlikely to search there for direction on how to interpret S.B. 221. Clearly a project such as the New London redevelopment plan would be unacceptable economic development under any *Kelo*-responsive legislation. But perhaps the building of an office for the state agency known as the Delaware Economic Development Office would be acceptable. Without a clear definition of “economic development,” state courts will be faced with the difficult task of developing coherent jurisprudence without coherent guidance from state legislatures.

If, for example, the state seeks to implement a *Randolph*-type slum-clearance project that will raze a particular area and then allow for redevelopment that will be safer for the community, will the subsequent redevelopment constitute “economic development”?<sup>337</sup> If the state seeks to build another school, the educated graduates will help the economy, will earn higher incomes, and, therefore, pay higher taxes. Will this economic development and revenue generation prohibit the use of eminent domain for school construction?

A prohibition on economic development or revenue generation might bar a host of uses that are otherwise acceptable under the new bills. *Randolph* saw corollary economic development as a necessary afterthought to slum clearance, which served the public health and welfare.<sup>338</sup> *Ranken* permitted revenue-generating tactics that supported a parking project,

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333. *Id.* at 472.

334. *Id.* at 484 (“[T]he City has invoked a state statute that specifically authorizes the use of eminent domain to promote economic development.”).

335. S.B. 221.

336. DEL. CODE ANN. tit. 30, § 2002 (2004).

337. *See generally* *Randolph v. Wilmington Hous. Auth.*, 139 A.2d 476 (Del. 1958) (mandating slum clearance be followed by a redevelopment effort).

338. *Id.* at 483.

which, on its own, constituted a public use.<sup>339</sup> Both of these projects would probably be prohibited because they “include revenue generation [or] economic development.”<sup>340</sup> The language of S.B. 221 clearly prohibits revenue generation or economic redevelopment as a primary public use.<sup>341</sup> There is no indication, however, that revenue generation may be acceptable as a secondary purpose, and in fact, the language “may not include” supports the idea that even as a secondary purpose, if revenue generation of economic development is *included* in a plan, the plan cannot be a public use.<sup>342</sup> Any state legislation should clearly define the relationship of “revenue generation” and “economic development” to the proposed public project.

Without clear legislative explanation, this type of language prohibits the efficient operation of state government. By prohibiting any public project that may involve economic development or revenue generation, this language will shift the burden for many state projects from private beneficiaries to taxpayers by prohibiting an agency from generating non-tax income to support a public project. In an effort to directly attack *Kelo*-type activity, this language will undeservedly prohibit uses that the legislators who supported the bill would have approved of but simply overlooked in their post-*Kelo* haste.

#### CONCLUSION

In one sense, it was very polite of Delaware to respond so quickly to the Supreme Court’s invitation. Delaware is certainly taking the Court’s suggestion and trying to revert its public use doctrine to a time before *Kelo*. In another sense, the Delaware General Assembly might be a bit overzealous. The acceptance will not only take the jurisprudence back to a point before *Kelo*, but to somewhere near the point it was almost a century ago—in 1912—when *Clendaniel* was decided.<sup>343</sup> This is an obvious consequence of reactive legislation crafted with a political, rather than legal, goal in mind. In this way, Delaware’s measures generally demonstrate problems that might arise in other states if their lawmakers do not take more care.

Another problem with the general assembly’s over-enthusiastic

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339. *Wilmington Parking Auth. v. Ranken*, 105 A.2d 614, 630 (Del. 1954).

340. S.B. 221.

341. *Id.*

342. *Cf. id.* (noting that a public use “may not include revenue generation” or “economic development”).

343. *See Clendaniel v. Conrad*, 83 A. 1036, 1044 (Del. 1912) (holding that a private benefit of revenue generation could not spoil a project that otherwise produced a public benefit).

response will be the redundancy of the outcome. Delaware, it seems, was throwing its own party long before the United States Supreme Court decided to throw a bigger one. Delaware courts interpreted the Delaware Constitution to prohibit the kind of takings that were permitted by *Kelo* when the *Randolph* court implied that economic redevelopment, on its own, was not an acceptable public use, and when the court in *Libby's Case* intensely scrutinized the government's motives.<sup>344</sup> Of course, it would be a social (read: political) *faux pas* to reject such a prestigious invitation. So, even though there were still drinks to be had, the general assembly left Delaware's party and headed over to the Supreme Court's, which might turn out to be a bore. Other states should not make the same mistake.

Notably, with regard to the post-*Kelo* uproar, "[t]he issue is not whether governments can condemn private property to build a public amenity like a road, a school or a sewage treatment plant."<sup>345</sup> Certainly, this was not the issue in Delaware either, but as has been demonstrated in this Note, careless legislation may make it a problem. Delaware lawmakers, "in their zeal to protect homeowners and small businesses, [will] handcuff local governments" not only from prohibiting *Kelo*-type development but also from carrying out basic government projects that, until now, have rarely been in question.<sup>346</sup>

Delaware is a perfect example and caution. Professor Echeverria, director of the Georgetown Environmental Law and Policy Institute, has admonished that "many states are on the verge of seriously overreacting to the *Kelo* decision."<sup>347</sup> Professor Echeverria continues: "The danger is that some legislators are going to attempt to destroy what is a significant and sometimes painful but essential power."<sup>348</sup> Delaware's experience indicates that legislators are not "attempting" to destroy this power but are inadvertently "handcuffing" state and local governments. Delaware is a clear example that states must first look to their own eminent domain jurisprudence and determine whether it needs to be changed. Only then can states decide if a legislative fix is necessary. Finally, in crafting a legislative response, words must be carefully chosen so that they effect only the desired changes.

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344. See *Randolph v. Wilmington Hous. Auth.* 139 A.2d 476, 483 (Del. 1958) (approving a redevelopment plan only because the primary purpose was slum clearance); see also *Libby Opinion*, 521 A.2d 227, 229–31 (Del. 1986) (scrutinizing the motives behind the Wilmington Parking Authority's planned parking project).

345. Broder, *supra* note 4.

346. *Id.*

347. *Id.* (italics added).

348. *Id.*

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Meanwhile, down the street, Delaware's neighbor watched her with embarrassment. "Why doesn't she look at the invitation closely, see why the party is being held and what is expected of her?" Her neighbor could not believe the haste with which Delaware was operating. Though the neighbor knew that Delaware might be wasting time and money, at least her mistakes could be carefully watched and learned from so that they would not be made again.

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