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## Ethnic and Racial Minorities, the Indigent, the Elderly, and Eminent Domain: Assessing the Virginia Model of Reform

Jim Bailey

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# Ethnic and Racial Minorities, the Indigent, the Elderly, and Eminent Domain: Assessing the Virginia Model of Reform

By Jim Bailey\*

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### I. Introduction

The Fifth Amendment to the United States Constitution<sup>1</sup> provides: “Nor (shall a person) be deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use, without just compensation.”<sup>2</sup> Early in the country’s history, courts defined public use very narrowly and allowed for the Public Use Clause to be satisfied with takings that satisfied government purposes such as roads, schools, and forts.<sup>3</sup> In 1789, the Supreme Court started to marginally broaden that definition of public use.<sup>4</sup> More recently, the Court in three cases, *Berman v. Parker*,<sup>5</sup> *Hawaii Housing Authority v. Midkiff*,<sup>6</sup> and *Kelo v. City of New London*,<sup>7</sup> has dramatically expanded the types of takings that would satisfy the clause.<sup>8</sup> This trilogy of cases leaves states with the clear understanding that the Supreme Court will give strong deference to their determination of what constitutes a public use.<sup>9</sup>

One of the most unpopular Supreme Court decisions in history,<sup>10</sup> *Kelo* reignited a long dormant national interest in property rights.<sup>11</sup> In what

1. U.S. CONST. amend. V.

2. *See id.* (setting forth what is now known as the Public Use Clause).

3. *See Kelo v. City of New London*, 545 U.S. 469, 512 (2005) (Thomas, J., dissenting) (explaining that early takings were for uses that were unchallenged as to public use).

4. *See Calder v. Bull*, 3 U.S. 386, 388 (1789) (“[A] law that takes property from A and gives it to B: It is against all reason and justice, for a people to entrust a Legislature with such powers; and, therefore, it cannot be presumed that they have done it.” (emphasis deleted)).

5. *See Berman v. Parker*, 348 U.S. 26, 36 (1954) (ruling that private property could be taken for a public purpose with just compensation).

6. *See Hawaii Hous. Auth. v. Midkiff*, 467 U.S. 229, 245 (1984) (ruling that a Hawaii Land Reform Act of 1967 was constitutional as the condemnations of lessor’s property and the subsequent distribution of that property to lessees satisfies a public purpose).

7. *See Kelo*, 545 U.S. at 469 (ruling that the governmental taking of property from one private owner to another in furtherance of economic development constitutes a permissible public use under the Fifth Amendment).

8. *See id.* at 482 (stating that the Court’s jurisprudence has evolved over time with respect to public use).

9. *See Hawaii Hous. Auth.*, 467 U.S. at 240 (citing *Old Dominion Co. v. United States*, 269 U.S. 55, 66, 46 S.Ct. 39, 40, 70 L.Ed. 162 (1925)) (stating that great deference will be given to the legislature in determining public use) (citing *Old Dominion Co. v. United States*, 269 U.S. 55, 66 (1925)).

10. *See The Civil Rights Implications of Eminent Domain Abuse: Testimony Before the United States Commission on Civil Rights* (2011) (statement of Ilya Somin, Professor of

some scholars referred to as “a uniting of strange bedfellows,” traditionally unaligned groups such as the National Association for the Advancement of Colored People (NAACP), the American Association of Retired People (AARP), the Property Rights Foundation of America, and the American Farm Bureau all came together to oppose a further broadening of the Public Use Clause.<sup>12</sup> The brief of amici curiae submitted on behalf of the NAACP, the AARP, the Hispanic Alliance of Atlanta County, and the Southern Christian Leadership Conference noted that ethnic and racial minorities, the elderly, and the indigent have been disproportionately impacted by eminent domain, and the expansion of the Public Use Clause was particularly harmful to those least able to oppose such takings.<sup>13</sup> In his dissent in *Kelo*, Justice Thomas cited these arguments as reasons why the Public Use Clause should not be broadened, explaining that the *Kelo* decision would only exacerbate the harm these groups have already faced.<sup>14</sup>

Since *Kelo* was decided, forty-two states have passed legislation to provide varying levels of protection for property owners.<sup>15</sup> Many of the reform laws were passed in either 2006 or 2007, when public animosity to the *Kelo* decision was still at its peak.<sup>16</sup> Since that time, scholars have begun to criticize those laws as rushed attempts to appease public sentiment

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Law, George Mason University) (explaining that polls showed over 80 percent of the public opposed the Court’s decision) (on file with the WASH. & LEE J. CIVIL. RTS. & SOC. JUST.).

11. See RICHARD A. EPSTEIN, SUPREME NEGLECT: HOW TO REVIVE CONSTITUTIONAL PROTECTION FOR PRIVATE PROPERTY 3 (Geoffrey R. Stone ed., 2008) (demonstrating the decade long complacency with property rights had ended).

12. See Nick Gillespie, *Kelo Makes Strange Bedfellows, Part 234*, REASON, Jul. 1, 2005, <http://reason.com/blog/2005/07/01/kelo-makes-strange-bedfellows> (explaining the seemingly unlikely political alliances that were formed as a result of the publicity surrounding *Kelo v. City of New London*) (citing Carolyn Lochhead, *Foes in Congress Unite in Defense of Property*, SAN. FRAN. CHRON., Jul. 1, 2005, <http://www.sfgate.com/politics/article/Foes-in-Congress-unite-in-defense-of-property-2658728.php>) (on file with the WASH. & LEE J. CIVIL. RTS. & SOC. JUST.).

13. See *infra* note 29 and accompanying text (demonstrating the arguments made in the NAACP-AARP Amicus Brief arguing that the widening of the Public Use Clause has had a detrimental impact on those most affected by eminent domain).

14. See *Kelo v. City of New London*, 545 U.S. 469, 522 (2005) (Thomas, J. dissenting) (explaining the harm that the widening of the Public Use Clause has already had on minorities and the poor, and predicting that a future expansion of the clause would continue such harm).

15. See Somin, *supra* note 10 (explaining that forty-two states have enacted legislation protecting property rights after 2005).

16. See *id.* (noting that reform measures were passed soon after *Kelo* as a response to that decision).

that fail to provide meaningful change.<sup>17</sup> Of those states that have enacted reform, Virginia may be seen as a model of success.<sup>18</sup> In 2006 the Virginia General Assembly resisted comparatively weak, hasty legislation, choosing instead to pass more comprehensive reform in 2007.<sup>19</sup> On February 13, 2012, the Virginia General Assembly passed a constitutional amendment to protect both public use and just compensation and passed additional legislation allowing for access and business losses to be considered in determining just compensation.<sup>20</sup> These actions make Virginia the only state to defeat weak legislation, pass strong comprehensive reform, and then pass a second round of even stronger legislation accompanied by a constitutional amendment.<sup>21</sup>

Though Virginia has seen success in post-*Kelo* reform, this Note argues that Virginia does not offer the perfect model for other states that are considering future reform measures. While the results in Virginia may appear laudable, they are flawed in a critical area: Virginia did not include those citizens most affected by eminent domain in its reform process.<sup>22</sup> The groups that may have made the strongest historical arguments against the broadening of the Takings Clause in *Kelo* were inactive in the Virginia process.<sup>23</sup> The legislative leaders who represent those disproportionately

17. *See id.* (“Unfortunately, the majority of the new reform laws are likely to be ineffective, imposing few or no meaningful constraints on the use of eminent domain.”).

18. *See infra* notes 171–174 and accompanying text (explaining that Virginia was the only state to kill weak reactionary legislation in 2006, pass comprehensive reform in 2007, and then pass a constitutional amendment and additional reform legislation).

19. *See infra* notes 175–178 and accompanying text (noting that the legislation proposed by Delegate Terrie Suit in 2006 was much less comprehensive than the reform bill that became law in 2007).

20. *See* Constitutional Amendment: Taking or Damaging of Private Property for Public Use, S.J. Res. 3, 2012 Leg., 2012 Sess., 2d Reference (Va. 2012) (Floor: 02/13/12 Senate: Read Third Time and Agreed to by the Senate (23-Y 16-N), available at <http://leg1.state.va.us/cgi-bin/legp504.exe?121+vot+SV0393SJ0003+SJ0003> (last visited Sept. 9, 2012) (showing the constitutional amendment passed the Senate of Virginia on February 13, 2012)) (on file with the WASH. & LEE J. CIVIL RTS. & SOC. JUST.).

21. *See generally* Calvert G. Chipchase, Christian K. Adams & Kamaile A. Nichols, *A State-by-State Survey of Public Use Standards*, in *EMINENT DOMAIN: A HANDBOOK OF CONDEMNATION LAW* 153 (William Scheiderich et al. eds., 2011) (surveying all post-*Kelo* state action and showing that Virginia’s could be seen as the strongest state reform measures).

22. *See* discussion *infra* Part IV.C (explaining that in Virginia those most affected by the broadening of the Public Use Clause were not active in reform measures).

23. *See infra* note 248 and accompanying text (explaining that groups that commonly advocated for ethnic and racial minorities, the elderly, and the indigent, were absent from the

impacted, did not encourage or support reform.<sup>24</sup> This Note argues that for future eminent domain reform measures to be successful, legislative results cannot forsake those most disproportionately affected by eminent domain.<sup>25</sup>

Part II of this Note will examine the evolution of the Takings Clause of the Fifth Amendment. It will examine how the clause was first broadened as early as 1798 but was substantially changed in *Berman v. Parker*, *Hawaii Housing Authority v. Midkiff*, and *Kelo v. City of New London*. Part III will focus on the disproportionate impact eminent domain has had on racial and ethnic minorities, the indigent, and the elderly. This discussion will focus primarily on *Poletown Neighborhood Council v. City of Detroit* and the arguments outlined in the amicus brief submitted by the NAACP and AARP. Part IV will examine the post-*Kelo* legislative response. It will note why Virginia may appear to be a leader in eminent domain reform but will then discuss why the state's model is flawed. Part V will propose a stronger model for eminent domain reform and explain why a reuniting of "strange bedfellows" is beneficial to the reform process. Part VI concludes by supporting continued reform and advocating why the reform process should follow a more inclusive model than that seen in Virginia.

## II. The Evolution of the Public Use Clause

The argument presented in this Note is posited on the assumption that the need for post-*Kelo* reform cannot be fully appreciated without first understanding the history of the Takings Clause of the Fifth Amendment, which states: "Nor (shall a person) be deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use, without just compensation."<sup>26</sup> The Supreme Court has interpreted this language to mean that "the taking must be for a 'public use' and 'just compensation' must be paid to the owner."<sup>27</sup> From this section of the Fifth

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Virginia reform process).

24. See discussion *infra* Part IV.C (discussing how in Virginia many legislators who represent those most affected by a widening of the Public Use Clause did not support reform measures).

25. See discussion *infra* Part V (proposing a better model for eminent domain reform that includes those most affected by a widening of the Public Use Clause).

26. U.S. CONST. amend. V.

27. See *Brown v. Legal Found. of Wash.*, 538 U.S. 216, 231–32 (2003) (explaining the Court's interpretation of the Fifth Amendment).

Amendment, two critical questions arise: what constitutes a public use and how much compensation is necessary to be just?<sup>28</sup> How these questions are answered by both the judicial and legislative branches, affects all property owners and specifically those property owners who are members of racial or ethnic minorities, are elderly, or are economically underprivileged.<sup>29</sup>

### A. The Early Cases

As early as 1798, the Court started determining the boundaries of the public use doctrine.<sup>30</sup> Justice Chase wrote,

An ACT of the Legislature (for I cannot call it a law) contrary to the great first principles of the social compact, cannot be considered a rightful exercise of legislative authority . . . [A] law that takes property from A. and gives it to B: It is against all reason and justice, for a people to entrust a Legislature with SUCH powers; and, therefore, it cannot be presumed that they have done it.<sup>31</sup>

Since Justice Chase's statement, the Supreme Court has addressed the question of when and for what reason the state can take A's property and transfer it to B numerous times.<sup>32</sup>

Very early after the passage of the Bill of Rights, states used eminent domain for purposes such as public roads, railroads, and parks.<sup>33</sup> In the

28. See Mary Massaron Ross & Hilary Ann Ballentine, *Public Use and Public Purpose*, in EMINENT DOMAIN A HANDBOOK OF CONDEMNATION LAW 1 (William Scheiderich et al eds., 2011) (explaining that the broadness of the concept of the public use still continues to be a threshold issue in eminent domain law); see also Terry C. Frank, *Compensation*, in EMINENT DOMAIN A HANDBOOK OF CONDEMNATION LAW 17 (William Scheiderich et al eds., 2011) (explaining that the just compensation issue represents the second prong of the major ongoing legal question in eminent domain).

29. See Brief of National Association for the Advancement of Colored People et al. as Amici Curiae in Support of Petitioners, *Kelo v. City of New London*, 545 U.S. 469 (2005) (No. 04-108), 2004 WL 2811057 at 7 [hereinafter NAACP-AARP Amicus Brief] (stating that the burden of eminent domain has, and will, continue to fall disproportionately on racial or ethnic minorities, the elderly, and the economically underprivileged).

30. See *Calder v. Bull*, 3 U.S. 386, 388 (1789) (demonstrating the Court questioning the boundaries of the Public Use Clause).

31. *Id.*

32. See generally *Missouri Pacific R. Co. v. Nebraska*, 164 U.S. 403 (1896); *Fallbrook Irrigation Dist. v. Bradley*, 164 U.S. 112, 158, 164 (1896); *Strickley v. Highland Boy Gold Mining Co.*, 200 U.S. 527, 531 (1906); *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984); *Berman v. Parker*, 348 U.S. 26 (1954); *Hawaii Hous. Auth. v. Midkiff*, 467 U.S. 229 (1984) (demonstrating the Court's evolving jurisprudence on the public use question).

majority of these early takings cases, the public use requirement was not called into question.<sup>34</sup> The so-called “Mills Acts,” which were among the earliest examples of legislation authorizing a taking of private property for a private use with public benefit, could be seen as a starting point for the broadening of the public use requirement.<sup>35</sup> These early 19<sup>th</sup> century statutes stated that mill owners could dam a part of a river if they paid those upstream for the flooding damage.<sup>36</sup> In the mill cases, the Court first started weighing the value of one private property interest against another and found the taking of A’s property for B’s benefit was thought to provide value not only for B but for all.<sup>37</sup> Borrowing from the logic of these statutes, the Nevada Supreme Court in *Dayton Gold & Silver Mining Co. v. Seawell*<sup>38</sup> allowed for roads to be condemned for mining purposes; here too, as private property was taken for a private use with public economic benefit, the court found public use.<sup>39</sup> The court rationalized, “the object for which private property is to be taken must not only be of great public benefit and for the paramount interest of the community, but the necessity must exist for the exercise of eminent domain.”<sup>40</sup> Richard Epstein, the notable property rights scholar, explained in *Takings*, that these early cases work because two requirements are satisfied: necessity and division of the surplus.<sup>41</sup> The necessity principle states that forced exchanges are to be

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33. See *Kelo v. City of New London*, 545 U.S. 469, 512 (2005) (Thomas, J. dissenting) (explaining that early takings were for uses that were unchallenged as to public use).

34. See *id.* (stating that with the early taking cases there was little debate over the public use).

35. See *id.* (stating the Mill Acts brought about early Court decisions regarding the taking of private property for public use).

36. See RICHARD A. EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 170–76* (Harvard University Press 1985) (explaining that with the Mill Acts, the owner of a mill could dam a waterway and compensate the owner of property that abuts the river if the property were to flood).

37. See *Kelo*, 545 U.S. at 512 (explaining that party acting as the taker was acting on behalf of the public, in that any member of the public could receive equally the benefit of the mill).

38. See *Dayton Gold & Silver Min. Co. v. Seawell*, 11 Nev. 394, 395 (1876) (ruling that a private mining road can satisfy the public use requirement).

39. See *id.* (finding a public value in a private mining road).

40. *Id.* at 411.

41. See EPSTEIN, *supra* note 36, at 173 (explaining the Court's logic in determining when a private taking constituted a public use).

limited to those cases where there is some situational necessity.<sup>42</sup> The division of surplus principle states that the value of the taking must be redistributed to all those in the community, including the owner who is the subject of the take.<sup>43</sup> Thus the benefit or value must be distributed to all including A, the original property owner.<sup>44</sup>

Another early case that demonstrates the Supreme Court's ability to weigh the respective value of two private properties in a takings issue is *Miller v. Schoene*.<sup>45</sup> There the state cut down ornamental cedar trees without compensating the owner because cedar trees were host to a harbored fungus, which could be dangerous to local apple trees.<sup>46</sup> In that case, for the first time, the Supreme Court blurred the state's police power with the public use, stating, "upon the destruction of one class of property in order to save another which, in the judgment of the legislature, is of greater value to the public."<sup>47</sup> From cases like these the idea of the comparison of values was born: the government can take A's property for B's purpose, if B provides greater good to the public.<sup>48</sup>

### B. *Berman v. Parker*

The modern debate about the boundaries of the Public Use Clause and whose role it is to define what types of takings constitute public use is at the center of the *Berman-Midkiff-Kelo* trilogy.<sup>49</sup> In *Berman v. Parker* the Court drastically widened the public use requirement, allowing it to be satisfied by a Washington D.C. plan for "comprehensive redevelopment" or urban renewal.<sup>50</sup> The plan did not target specific homes or businesses that were

42. *See id.* (explaining how in viewing a private taking for a public use, the Court determines what satisfies the necessity requirement).

43. *See id.* ("The basic theory of public use demands that in forced exchanges the surplus must be evenly divided.").

44. *See id.*

45. *See Miller v. Schoene*, 276 U.S. 272, 279 (1928) (showing that the Court weighed the value to the public of apple verses cedar trees).

46. *See id.*

47. *Id.*

48. *See EPSTEIN*, *supra* note 11 (stating that the Court commits a fundamental error when it becomes preoccupied with the value question).

49. *See id.* at 83 (explaining that in *Kelo* the broad language of *Berman* and *Midkiff* was used as the Court again tried to determine the boundaries of public use).

50. *See Berman v. Parker*, 348 U.S. 26, 33 (1954) (demonstrating a public use in urban

not well cared for; instead, the plan called for the taking of many houses and businesses that were in zones where there was vast blight and urban decay regardless of the condition of those specific properties.<sup>51</sup> The takings resulting from *Berman* ultimately displaced an entire ethnic community.<sup>52</sup>

In 1953, prior to the decision in *Berman*, a three-judge panel in *Scheider v. District of Columbia*<sup>53</sup> held that “private property could be taken to abate slum conditions, present or reasonably expected, even if the property thereafter was conveyed into private hands.”<sup>54</sup> But in *Scheider*, the District Court for the District of Columbia noted, “One man’s land cannot be seized by the Government and sold to another man merely in order that the purchaser may build upon it a better house or house which meets the Government’s idea of what is appropriate or well-designed.”<sup>55</sup> Mr. Berman, the losing plaintiff in the case, fell in between the two rules from *Scheider*; he was the owner of a non-blighted store, located in a blighted district.<sup>56</sup> Mr. Berman’s store was taken and immediately transferred to another private owner in its exact condition.<sup>57</sup> This was a further departure from a strict interpretation of the public use requirement, applying the Mills Act test, not only was the necessity of the taking questionable, but Mr. Berman received arguably no public value.<sup>58</sup> Even if the housing authority were to comprehensively revitalize the neighborhood, Mr. Berman received no value share for the direct transfer of his property.<sup>59</sup> The Supreme Court unanimously justified the public use by

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renewal).

51. *See id.* (showing that an individual property did not have to be blighted to fall within a blighted zone).

52. *See Kelo v. City of New London*, 545 U.S. 469, 522 (2005) (Thomas, J. dissenting) (“Over 97 percent of the individuals forcibly removed from their homes by the ‘slum-clearance’ project upheld by this Court in *Berman* were black.”).

53. *See Schneider v. Dist. of Columbia*, 117 F. Supp. 705 (D.D.C. 1953) (holding that a blight taking can satisfy the public use requirement).

54. *Id.*

55. *Id.*

56. *See EPSTEIN, supra* note 36, at 178–79 (stating Mr. Berman’s store itself was not blighted, but the store was located in a blighted zone).

57. *See id.* (explaining that *Berman* is an unusual case as the property was left in its original condition and transferred to another private owner).

58. *See id.* (explaining that Mr. Berman did not receive a portion of the shared value of the taking).

59. *See id.* (“But the situation is not improved when slum property is converted into public housing projects, where financial and other eligibility restrictions are imposed upon candidates for rental.”).

deciding that the taking fell under the police power.<sup>60</sup> The Court stated that the redevelopment plan was comprehensive, not targeting a specific property owner, and the conditions of the condemned properties, as a whole, were so poor that this police power was necessary for the public good.<sup>61</sup>

*Berman* clearly signaled the Supreme Court's willingness to defer the public use question to the legislature.<sup>62</sup> Setting out the Court's role in determining public use, *Berman* established that, "the role of the judiciary in determining whether that power being exercised is for public purpose is an extremely narrow one."<sup>63</sup> To satisfy the public use requirement, the Court simply read the text of the legislation:

Owing to technological and sociological changes, obsolete lay-out, and other factors, conditions existing in the District of Columbia with respect to substandard housing and blighted areas, including the use of buildings in alleys as dwellings for human habitation, are injurious to the public health, safety, morals, and welfare, and it is hereby declared to be the policy of the United States to protect and promote the welfare of the inhabitants of the seat of Government by eliminating all such injurious conditions by employing all means necessary and appropriate for the purpose.<sup>64</sup>

In giving almost complete deference to the legislature, the Supreme Court affirmed the legislative finding of public use, stating, "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."<sup>65</sup>

While the Court relegated to the legislature almost complete autonomy in finding and determining public use, it additionally conceded that the best public use could actually be for use by another private property owner.<sup>66</sup> The Court stated, "The public end may be well or better served through an

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60. See *Berman v. Parker*, 348 U.S. 26, 32 (1954) (stating that because of the mass blight produced unsafe conditions, the police power was necessary).

61. See *id.* (explaining the degree of the blighted property allowed for the police power).

62. See *id.* at 32 ("Subject to specific constitutional limitations, when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive.").

63. *Id.*

64. *Id.* at 28.

65. *Id.* at 33.

66. See *id.* at 34 (explaining that in addition to passing the public use question to the legislature, the Court clearly stated that public use could be found with a private owner).

agency of private enterprise than through a department of government—or so the Congress might conclude. We cannot say that public ownership is the sole method of promoting purposes of community redevelopment projects.”<sup>67</sup> Where there is a well-kept property or even a well-kept street or city block in a larger area deemed to be blighted, the Court stated that if the non-blighted owner “were permitted to resist these redevelopment programs on the ground that his particular property was not being used against the public interest, integrated plans for the redevelopment would suffer greatly.”<sup>68</sup> Lastly, in granting far more comparative value to the Just Compensation Clause than the Public Use Clause the Court states, “The rights of these property owners are satisfied when they receive that just compensation which the Fifth Amendment exacts as the price of the taking.”<sup>69</sup> Thus, the Court comes close to concluding that the Fifth Amendment right is protected almost exclusively by just compensation.<sup>70</sup>

Prior to *Berman* the Court allowed the legislature to use the police power to value uses comparatively.<sup>71</sup> After *Berman*, the Court yields almost complete deference to the legislature in determining the public use, allowing for a private to private taking if it is part of a larger redevelopment scheme, and permits non-blighted property to be taken if the taking is helpful to the larger redevelopment plan.<sup>72</sup>

### C. *Hawaii Housing Authority v. Midkiff*

The Supreme Court in *Berman* took these major steps in reshaping and broadening public use jurisprudence, only to broaden the Public Use Clause further in 1980 with *Hawaii Housing Authority v. Midkiff*.<sup>73</sup> In *Midkiff*

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67. *Id.*

68. *Id.* at 35.

69. *Id.* at 36.

70. *See id.* (explaining that the rights of property owners are protected when the owner receives just compensation).

71. *See Miller v. Schoene*, 276 U.S. 272, 279 (1928) (showing that the Court exercised the police power when using the Takings Clause by making a comparison of the value of two types of trees).

72. *See generally Berman v. Parker*, 348 U.S. 26 (1954).

73. *See Hawaii Hous. Auth. v. Midkiff*, 467 U.S. 229, 245 (1984) (stating that the Hawaii Land Reform Act of 1967 was constitutional as the condemnations of lessor’s property and the subsequent distribution of that property to lessees satisfies a public purpose).

local landowners questioned whether the Public Use Clause was violated by Hawaii's Land Reform Act of 1967.<sup>74</sup> This act created a "land condemnation scheme whereby title in real property was taken from lessors and transferred to lessees in order to reduce the concentration of land ownership."<sup>75</sup> In this system, the Hawaii Housing Authority could directly condemn the private property of the owner and transfer it to the lessee, without the lessee ever leaving the property.<sup>76</sup> In identifying the public purpose, the Court found that it was:

to reduce the perceived social and economic evils of a land oligopoly traceable to their [Hawaiian] monarchs. The land oligopoly has, according to the Hawaii Legislature, created artificial deterrents to the normal functioning of the State's residential land market and forced thousands of individual homeowners to lease, rather than buy, the land underneath their homes.<sup>77</sup>

In *Midkiff*, Justice O'Connor, writing for the Court, stated that such a use did not violate the public use requirement, which "is coterminous with the scope of the sovereign's police powers."<sup>78</sup> The Court, citing *Berman*, stated that the role the Court plays in reviewing a legislature's judgment about what constitutes a public use is "an extremely narrow one."<sup>79</sup> Deference should be given to the legislature's public use determination, "until it is shown to involve an impossibility."<sup>80</sup> The Court summarized its position of reviewing the Public Use Clause by stating that it "will not substitute its judgment for a legislature's judgment as to what constitutes 'public use' unless the use is palpably without reasonable foundation."<sup>81</sup> Answering any question of whether property must be used exclusively by the public, the Court stated, "The mere fact that property taken outright by

74. *See id.* (showing that the petitioners filed suit asking that the act be declared unconstitutional).

75. *See id.* at 233 (explaining that under the condemnation scheme real title for the property transfers from the owner who is the lessor).

76. *See id.* (noting that the lessee who receives title to the property never has to leave the occupied property).

77. *Id.* at 241-42.

78. *Id.* at 230.

79. *See id.* at 240 (1984) (stating the role the Court will take in determining whether public use has been satisfied) (citing *Berman v. Parker*, 348 U.S. 26, 32 (1954)).

80. *See id.* (stating that great deference will be given to the legislature in determining public use) (citing *Old Dominion Co. v. United States*, 269 U.S. 55, 66 (1925)).

81. *Id.* at 241 (citing *United States v. Gettysburg Electric R. Co.*, 160 U.S. 668, 680 (1896)).

eminent domain is transferred in the first instance to private beneficiaries does not condemn that taking as having only a private purpose.”<sup>82</sup> The Court ultimately held that the Act was allowable because it was “rationally related to a conceivable public purpose.”<sup>83</sup> In *Berman* the Court granted deference to the legislature to find public use in a massive redevelopment plan while private commercial property was taken and given to other private commercial users, declaring that its role in determining public use is extremely narrow.<sup>84</sup> In *Midkiff* the Court granted deference to the legislature to find public use in the need to control “a perceived economic oligopoly” owning too much property that was originally owned by the Kamehameha Hawaiian royal family.<sup>85</sup> These cases left a question for the Court in *Kelo* to answer: When, if ever, will a legislative determination of public use not be upheld?<sup>86</sup>

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

In *Kelo v. City of New London*, the Court was asked to decide if Susette Kelo and fourteen other landowners could be forced from their properties when the city of New London, Connecticut acting as the condemnor, found a public use in a comprehensive development plan that did not specify the future uses of the properties being acquired.<sup>87</sup>

The *Kelo* Court, following precedent set by *Berman* and *Midkiff*, upheld “longstanding deference to the legislature.”<sup>88</sup> In reaching its decision that the public use requirement was satisfied, the Supreme Court in *Kelo* first recognized that a pellucid shift had occurred in public use

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82. *Id.* at 243–44.

83. *Id.* at 241.

84. *See Berman v. Parker*, 348 U.S. 26, 32 (1954) (stating that the role of the judiciary will be very narrow in determining if a use deemed by the legislature to be a public use satisfies the requirement).

85. *See EPSTEIN, supra* note 36, at 82–3 (explaining how the majority of the Court found a public use in *Hawaii Hous. Auth. v. Midkiff*).

86. *See id.* (noting that *Berman* and *Hawaii Housing Authority* provide a backdrop for when comprehensive development satisfies the public use requirement).

87. *See Kelo v. City of New London*, 545 U.S. 469, 472 (2005) (stating the background behind the public use question in the case).

88. *See id.* at 469 (stating that the Court will define public use broadly and will continue in its practice of granting deference to the legislature).

jurisprudence.<sup>89</sup> In noting that the Court now rejects any literal requirement for public use, Justice Stevens explained that the narrow “use by the public” definition has eroded over time.<sup>90</sup> He wrote, “Not only was the ‘use by the public’ test difficult to administer . . . but it proved to be impractical given the diverse and always evolving needs of society.”<sup>91</sup> Stevens found public purpose satisfied through the collective macro project, which both increased jobs and increased tax revenue.<sup>92</sup> Stressing the Court’s strong deference to the legislature, Stevens wrote, “For more than a century, 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 taking power.”<sup>93</sup>

Specifically addressing the question of whether the forcible transfer of a property from one private owner to another private owner constituted a public use, Stevens wrote, “Quite simply, the government’s pursuit of a public purpose will often benefit individual private parties.”<sup>94</sup> However, the Court did note some limit on a private-for-private taking, allowing only those takings which are part of a “carefully considered development plan.”<sup>95</sup> Novel to *Kelo*, the petitioners argued that for there to be a public use there should at least be a reasonable certainty that the public benefit would actually occur.<sup>96</sup> The Court rejected this requirement, in part because it would “represent a departure from precedent.”<sup>97</sup> The *Kelo* Court,

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89. *See id.* at 482 (stating that the Court’s jurisprudence has evolved overtime with respect to public use).

90. *See id.* at 480 (showing that prior to the Court’s ruling in *Strickley v. Highland Boy Gold Mining Co.*, a narrower standard for public use was used).

91. *See id.* at 469, 479 (explaining why the Court no longer uses the “use-by-the-public” test).

92. *See id.* at 469–70 (explaining that collectively an increase in tax revenue, job growth, and general economic rejuvenation will constitute a public use).

93. *Id.* at 483.

94. *Id.* at 485.

95. *See id.* at 478 (explaining that the City of New London’s plan satisfies the public use requirement because it is part of a carefully considered plan as compared to an individual private-for-private taking that is not part of a greater scheme).

96. *See id.* at 487 (“Alternatively, petitioners maintain that for takings of this kind we should require a ‘reasonable certainty’ that the expected public benefits will actually accrue.”).

97. *Id.*

closely following the *Berman* doctrine, chose to “decline to second-guess the wisdom and means the city has selected to effectuate its plan.”<sup>98</sup>

The *Kelo* decision left property owners vulnerable in any state where public use was not well defined, as the Court would uphold the taking of one’s private property for another private use, even if there were not a reasonable certainty that a public use would occur.<sup>99</sup> Theoretically, under this decision, as long as just compensation would be paid to A, A’s private property could be taken by the State and given to private property owner B, even though there would be no guarantee of public benefit in this transfer.<sup>100</sup>

### *III. Eminent Domain and its Impact on Ethnic and Racial Minorities, the Indigent, and the Elderly*

The relaxed reading of the Public Use Clause is problematic to all landowners, as it introduces major instability to concepts underlying basic property rights.<sup>101</sup> While the Supreme Court has allowed the State to determine what qualifies as a public use, history shows that ethnic and racial minorities, the elderly, and the poor are more often subjected to questionable takings.<sup>102</sup>

#### *A. Poletown Neighborhood Council v. City of Detroit*

*Poletown Neighborhood Council v. City of Detroit* infamously demonstrates the danger minority groups can face when the Court allows the state

98. *Id.* at 469–70.

99. *See supra* notes 69–98 and accompanying text (explaining how the ruling in *Kelo* could affect a property owner who lives in a state where reform measures were not passed).

100. *See supra* notes 69–98 and accompanying text (explaining how the ruling in *Kelo* could affect a property owner who lives in a state where reform measures were not passed).

101. *See* EPSTEIN, *supra* note 11, at 17 (stating that people are more likely to want to live in a society where they have secured understandings about their future liberties).

102. *See* MINDY THOMPSON FULLILOVE, EMINENT DOMAIN AND AFRICAN-AMERICANS: WHAT IS THE PRICE OF THE COMMONS 1–2 (stating that since slavery, African-Americans have always been threatened disproportionately with legalized takings); *see also* *The Civil Rights Implications of Eminent Domain Abuse: Hearings Before the U.S. Commission on Civil Rights* 5 (2011) (testimony of Ilya Somin, Assoc. Professor of Law, George Mason Univ.) (stating that as a result of historical political weakness, African-Americans have been the victims of blight and economic development takings).

to determine the boundaries of the public use requirement on an *ad hoc* basis.<sup>103</sup> *Poletown* is a case similar to *Berman* in that an entire ethnic community was displaced because of a taking with a questionable public use.<sup>104</sup> The case demonstrates perhaps the State's most offensive use of the power of eminent domain against an ethnic community.<sup>105</sup> *Poletown* was the name of a section of Detroit inhabited by a large, predominately Polish community.<sup>106</sup> In 1980 General Motors Corporation informed the city of Detroit that it was planning to relocate two of its Cadillac plants to Dallas, Texas.<sup>107</sup> Due to the threat of losing approximately 6,000 jobs, the Detroit Economic Development Corporation met with General Motors to inquire into specifically what type of parcel the industry would need in order to prevent this relocation.<sup>108</sup> Upon such identification, the taking was allowed, forcing the removal of hundreds of Polish families from their neighborhood and causing \$200 million in property to be transferred to the General Motors Corporation for only \$8 million.<sup>109</sup> To find public use, the Michigan Supreme Court in *Poletown* employed a balancing test, determining that "whatever the losses in subjective value to the private property owners in this cohesive economic neighborhood, they are offset by the benefits that accrue to the workers who continue in their jobs, the social benefits to other firms, the unemployment compensation that is not drawn

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103. See David K. Bowersox, *The Public Use Limitation in Eminent Domain: Poor Relation to the Constitution's "Poor Relation,"* in CURRENT CONDEMNATION LAW: TAKINGS, COMPENSATION, AND BENEFITS 255, 268–80 (Alan T. Ackerman & Darius W. Dynkowski eds., 2d ed. 2006) (stating that the Court found public use by deferring to the condemnor, citing the taking was for a public purpose).

104. See NAACP-AARP Amicus Brief, *supra* note 29 (stating that both the takings in *Poletown* and in *Berman* destroyed ethnic communities).

105. See *id.* (commenting specifically about the abuse of the Polish neighborhood in *Poletown*).

106. See *Poletown Neighborhood Council v. City of Detroit*, 304 N.W.2d 455, 470 (Mich. 1981) (stating that the community subject of the take was a thriving ethnic neighborhood).

107. See Thomas S. Ulen, *The Public Use of Private Property: A Dual-Constraint Theory of Efficient Governmental Taking*, in TAKING PROPERTY AND JUST COMPENSATION: LAW AND ECONOMIC PERSPECTIVES OF THE TAKINGS ISSUE 186 (Nicholas Mercuro ed. 1992) (showing the factual process by which Detroit found public use).

108. See *id.* (explaining the steps the City of Detroit and the Detroit Economic Development Corporation took to entice the General Motors Corporation to stay in the City of Detroit).

109. See *id.* (explaining the final package that the City of Detroit offered in order to persuade the General Motors Corporation not to leave Detroit).

out of the public fisc, [sic] and so on.”<sup>110</sup> In the taking, Detroit, aided by General Motors, defined the public value as a retention and increase of jobs to the city.<sup>111</sup> However, the landowners who lost their homes, their neighbors, and their community did not benefit proportionally in this value sharing.<sup>112</sup> *Poletown* is a direct example of what can and does happen when local elected officials are left as the final and only guardians of property rights.<sup>113</sup> Local leaders took private property from many private citizens, who collectively formed an ethnic neighborhood, and gave it to a major business, in what the leaders deemed as a comparatively better use of the property.<sup>114</sup> Because there was a loose legislative restriction on what constituted a public use, the Michigan Supreme Court found that this use, in which A asked the sovereign to take B’s property and redistribute to A, qualified.<sup>115</sup>

#### *B. An Empirical Analysis: Arguments for Those Most Affected*

*Poletown* and *Berman* are vivid examples of the disproportionate impact eminent domain may have on ethnic and racial minorities, the elderly, and the indigent,<sup>116</sup> but the takings of two neighborhoods do little to validate the claim of a disproportionate impact. The statistical reality is that between three and four million Americans have been forced from their homes by eminent domain since World War II.<sup>117</sup> The majority of those

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110. *See id.* at 187 (proposing a balancing test that the court used to find public use in this private-for-private taking).

111. *See Poletown*, 304 N.W.2d at 471 (explaining that retaining and adding jobs was important to economic growth and therefore satisfied the public use requirement).

112. *See Ulen, supra* note 107, at 186 (citing that the Poles in the neighborhood said that they would be unable to relocate to another area to form a similar type of community).

113. *See* Michael Rikon, *Bulldozers at Your Doorstep: The Debris of Kelo v. City of New London*, in *CURRENT CONDEMNATION LAW: TAKINGS, COMPENSATION, AND BENEFITS* 7 (Alan T. Ackerman & Darius W. Dynkowski eds., 2d ed.) (explaining how a broad reading of the Public Use Clause allowed the taking in *Poletown* to occur).

114. *See id.*

115. *See Poletown Neighborhood Council v. City of Detroit*, 304 N.W.2d 455, 460 (Mich. 1981) (“Such public benefit cannot be speculative or marginal but must be clear and significant if it is to be within the legitimate purpose as stated by the Legislature.”).

116. *See* NAACP-AARP Amicus Brief, *supra* note 29 (explaining that *Berman* and *Poletown* both demonstrate how eminent domain affects ethnic and racial minorities).

117. *See* Beito, *infra* note 145 (explaining the harm that eminent domain policies have had on ethnic and racial minorities since World War II).

whose property was taken were ethnic minorities.<sup>118</sup> In the years between 1949 and 1973 alone, by using eminent domain for the purposes of blight eradication or economic development, 2,532 projects were carried out in 992 cities that displaced one million people, two-thirds of them African-American.<sup>119</sup> At that period, African-Americans were five times more likely to be displaced than they should have been in their numbers (based upon their representation) in the population.<sup>120</sup> Takings in ethnic areas for the purpose of blight eradication was so prevalent, many dubbed it “Negro removal.”<sup>121</sup>

### C. *The Amicus Brief*

The *Kelo* case gave groups that had disproportionately suffered the burdens of eminent domain, a platform on which they could express their grievances and argue for the necessity of a narrow reading of the Public Use Clause.<sup>122</sup> It has been noted that, “Few protested the *Kelo* ruling more ardently than the NAACP.”<sup>123</sup> In its amicus brief in *Kelo*, the NAACP along with several other parties including the AARP, the Hispanic Alliance of Atlantic County, and the Southern Christian Leadership Conference, posited that ethnic and racial minorities, the elderly, and the indigent are not just affected more frequently, but also are affected to a greater degree by the eminent domain abuses.<sup>124</sup> The brief is important because it not only clearly states the position of both the NAACP and the AARP regarding the

118. *See id.*

119. *See* FULLILOVE, *supra* note 102, at 2 (citing the number of African-American properties taken between 1949 and 1973 as a result of a non-restrictive reading of the public use requirement and the Federal Housing Act of 1949).

120. *See id.* (stating the statistical disadvantage African-Americans faced with takings in the years the Federal Housing Act was in place).

121. *See* Beito, *infra* note 145 (“It was Berman that enabled the massive urban renewal condemnations of later decades, which many critics dubbed ‘Negro removal’ because they too tended to target African-Americans.”).

122. *See id.* (stating that ethnic and racial minority groups used the publicity of *Kelo* to express past injustices committed through the less restrictive reading of the public use requirement).

123. *See id.* (stating the lasting legal reality of *Kelo v. City of New London*).

124. *See* NAACP-AARP Amicus Brief, *supra* note 29, at \*12 (“The very circumstances that put minorities and the elderly at increased risk of being subjected to eminent domain power also leave those groups less able to deal with the consequences when such takings occur.”).

widening of the Public Use Clause, but it also masterfully notes the historical impact takings have had on these subject groups.<sup>125</sup>

After chastising the Connecticut Supreme Court's then broad interpretation of the Public Use Clause, calling it "meaningless,"<sup>126</sup> the brief explained the unfortunate history certain groups have had with eminent domain.<sup>127</sup> The NAACP explained that the government "had [been] operating through housing and the highway machine implemented policies to segregate and maintain the insulation of poor, minority, and otherwise outcast populations."<sup>128</sup> In Baltimore, of the 10,000 families that were displaced by such housing and road projects, ninety percent were African-American.<sup>129</sup> Approximately 1,600 African-Americans neighborhoods in total were destroyed by takings projects when the public use was not restrictively defined.<sup>130</sup>

Explaining how minorities have previously been impacted disproportionately, the brief noted a specific quotation that demonstrates the past mentality of certain condemnors:

We went through the black section between Minneapolis and St. Paul about four blocks wide and we took out the home of every black man in that city. And woman and child. In both those cities, practically. It ain't there anymore, is it? Nice neat black neighborhood, you know, with their churches and all and we gave them about \$6,000 a house and turned them loose on society.<sup>131</sup>

Evidencing the disproportionate impact of the widening of the public use, the brief further argued that whenever there are takings for economic development, those who live in neighborhoods with a high concentration of

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125. *See id. passim* (citing historical cases and statistics of how ethnic and racial minorities have a disproportionate number of takings).

126. *See id.* at 6 (explaining that if the public use requirement is fulfilled by the reorganization of any economic benefit, the requirement becomes meaningless).

127. *See id.* at 7–8 (citing how African-Americans and other racial minorities have had their homes and neighborhoods destroyed by abusive takings).

128. *Id.* at 8 (quoting Kevin Douglas Kuswa, *Suburbification, Segregation, and the Consolidation of the Highway Machine*, 3 J.L. Soc'y 31, 53 (2002)).

129. *See id.* (demonstrating that minority families in Baltimore suffered widespread and disproportionate takings abuse) (quoting BERNARD J. FRIEDEN & LYNNE B. SAGALYN, DOWNTOWN, INC.: HOW AMERICA REBUILDS CITIES 29 (1989)).

130. *See id.* (citing the total number of African-American neighborhoods destroyed by eminent domain) (citing MINDY THOMPSON FULLILOVE, ROOT SHOCK: HOW TEARING UP CITY NEIGHBORHOODS HURTS AMERICA, AND WHAT WE CAN DO ABOUT IT 17 (2004)).

131. *Id.* at 8.

racial and ethnic minorities and the elderly will be disproportionately affected.<sup>132</sup> Further, the brief discussed New Jersey cases, where forty percent of the city's Latino community lived in a zone targeted for economic development.<sup>133</sup> In Mt. Holly Township, New Jersey, "officials have targeted for economic redevelopment a neighborhood in which the percentage of African-American residents (44%) is twice that of the entire Township and nearly triple that of Burlington County, and in which the percentage of Hispanic residents (22%) is more than double that of all Mt. Holly Township, and more than five times that of the county."<sup>134</sup>

Both the NAACP in its amicus brief and Professor Somin, a property rights scholar who focuses on eminent domain reform, posited that these groups suffer disproportionately because they have historically lacked a strong political voice.<sup>135</sup> Even with a taking under a narrowly defined public use requirement, when there is a large condemnation project, the condemnor searching for property is economically incentivized to take the cheapest property possible that would still allow for the goals of the project.<sup>136</sup> When the property owner who lives in a poorer ethnic neighborhood does become subject to a taking, the odds are stacked against that person.<sup>137</sup> They have fewer resources with which to lobby their case, they are often less politically connected, and have less access to justice.<sup>138</sup>

132. *See id.* at 9 (explaining that even without nefarious motives on the part of the condemnor, those who live in neighborhoods with high concentrations of ethnic and racial minorities will suffer disproportionately more eminent domain abuse) (citing Dana Berliner, *Condemnations for Private Parties Destroy Black Neighborhoods and Out with the Old: Elderly Residents are Prime Targets for Eminent Domain Abuses*, in PUBLIC POWER, PRIVATE GAIN: A FIVE-YEAR, STATE BY STATE REPORT EXAMINING THE ABUSE OF EMINENT DOMAIN 102, 185 (2003)).

133. *See id.* at 10 (explaining how condemnors near Atlantic City, New Jersey are planning a condemnation project that affects forty percent of the locality's Latino community).

134. *Id.*

135. *See id.* at 22 ("Allowing 'public use' to include 'economic development' renders the eminent domain power open to abuse to the particular disadvantage of those, such as amici, who lack economic or political power."); *see also The Civil Rights Implications of Eminent Domain Abuse: Hearings Before the U.S. Commission on Civil Rights* 5 (2011) (testimony of Ilya Somin, Assoc. Professor of Law, George Mason Univ.) (explaining that ethnic and racial minority groups have been victimized, sometimes by racial prejudice and sometimes by relative political weakness).

136. *See id.* at 14 (explaining how it is in the government's interest to take lower cost housing).

137. *See NAACP-AARP Amicus Brief, supra* note 29, at \*28 (explaining how the poorer property owner in an ethnic area is given less of a voice in the decision making

NAACP and AARP's disproportionate impact argument in their Amicus Brief did not go unnoticed by Justice Thomas.<sup>139</sup> In his dissent in *Kelo*, after tracing the evolution of the Takings Clause, he devoted an entire section of his opinion to noting the disproportionate impact that eminent domain has had on certain groups.<sup>140</sup> Justice Thomas reminded the Court that minority communities have been targeted by eminent domain, as he cited statistics concerning urban renewal and blight takings. Finally, he reminded the Court that over 97% of those forcibly removed in *Berman* were African-American.<sup>141</sup> With respect to the harm of the *Kelo* decision on those already disproportionately impacted, he wrote "Regrettably, the predictable consequence of the Court's decision will be to exacerbate these effects."<sup>142</sup>

#### IV. The Post-Kelo Legislative Response

In *Berman*, *Midkiff*, and *Kelo*, the Court has stated that it is the duty of the legislature to determine what constitutes public use, and the judiciary will have a very narrow role in reviewing that determination.<sup>143</sup> Due to the public interest generated in the wake of *Kelo*, most states have responded by passing legislation, attempting to better define "public use."<sup>144</sup>

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process).

138. See Stephen Wexler, *Practicing Law for Poor People*, 79 YALE L.J. 1049, 1049 (1970) (discussing that the legal problems the indigent face are different than legal problems for the more affluent because the poorer person does not have the financial means to advocate his position).

139. See *Kelo v. City of New London*, 545 U.S. 469, 522 (2005) (Thomas, J., dissenting) (explaining the harm that the widening of the Public Use Clause has already had on minorities and the poor, and predicting that a future expansion of the clause would continue such harm).

140. See *id.* (showing the disproportionate impact that Justice Thomas wrote about in the *Kelo* dissent).

141. See *id.* (stating the disproportionate impact the *Berman* taking had on minorities).

142. See *id.* (demonstrating Justice Thomas's assumptions about the future disproportionality of takings).

143. See *id.* at 500 (stating that the role of the judiciary will be very narrow in determining if a use deemed by the legislature to be a public use satisfies the requirement (citing *Hawaii Hous. Auth. v. Midkiff*, 467 U.S. 229, 240 (1984)) (quoting *Berman v. Parker*, 348 U.S. 26, 32 (1954))).

144. See EPSTEIN, *supra* note 11, at 3 (explaining that the majority of states have enacted constitutional or statutory reforms to better define the limits of the public use requirement).

*A. The Rush to Reform: Revisited*

From 2005 to 2008, forty-two states enacted new laws that limit the power of eminent domain.<sup>145</sup> However, this response, seemingly positive for the groups disproportionately affected, has drawn criticism for being drafted in a rushed fashion in effort to quiet public outrage stemming from *Kelo*.<sup>146</sup> Scholars who have studied the 2006 and 2007 reform laws argue that they are “ineffective, imposing few or no meaningful constraints on the use of eminent domain.”<sup>147</sup> Professor Somin, who has testified to Congress about these measures, notes of the states that have enacted them, “Many of them forbid takings that transfer property to private parties for ‘economic development,’ but allow virtually identical condemnations to continue under other names.”<sup>148</sup> For example, numerous states continue to allow “blight” condemnations under definitions of blight so broad that virtually any area qualifies.<sup>149</sup> As a result, their benefit to the groups that have been disproportionately impacted is not as strong as it may have been perceived.<sup>150</sup> For example, nineteen states have outlawed takings for solely for economic development but have allowed takings for blight, with blight being so poorly defined that almost any property would qualify.<sup>151</sup> Professor Somin cites California and Texas as examples of states that passed flawed post-*Kelo* measures.<sup>152</sup>

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145. See David T. Beito & Ilya Somin, Op-Ed., *Battle over Eminent Domain is Another Civil Rights Issue*, KANSAS CITY STAR, Apr. 27, 2008, [http://www.cato.org/pub\\_display.php?pubid=9361](http://www.cato.org/pub_display.php?pubid=9361) (last visited Sept. 9, 2012) (explaining that since the *Kelo* decision, all but eight states have enacted some type of eminent domain reform) (on file with WASH. & LEE J. CIVIL RTS. & SOC. JUST.).

146. See Somin, *supra* note 10 (“Unfortunately, the majority of the new reform laws are likely to be inefficient, imposing few or no meaningful constraints on the use of eminent domain.”).

147. See *id.* (stating that a large percentage of the 2006 and 2007 post-*Kelo* eminent domain reform is ineffective).

148. *Id.*

149. See *id.* (stating that blight statutes are meaningless in some states because they can refer to blighted zones).

150. See *id.* (stating that the promised benefit of reform measures was not actually realized once the measures were passed).

151. See Beito, *supra* note 145 (explaining that there is little impact with reform that better defines taking for economic development when the same property can be taken under the guide of alleviating blight).

152. See Somin, *supra* note 10 (citing examples of states that proposed remedial reform that proved to be uncomprehensive).

California is an example of a state that acted quickly to pass post-*Kelo* reform, of little actual value.<sup>153</sup> The California Court of Appeals in *Redevelopment Agency v. Hayes*<sup>154</sup> explained that the public use clause was originally narrowly restricted, but was later broadened to include ‘public purpose.’ The Court of Appeals stated, “The idea now is that the taking of the property itself, as distinguished from the subsequent use of that property, may be required in the public interest.”<sup>155</sup> While the California state court appears to use jurisprudence similar to that which the United States Supreme Court used in the *Berman-Midkiff-Kelo* trilogy, the legislature sought to narrow public use in 2008 with Proposition 99, which was intended to prohibit private residential takings for a private use.<sup>156</sup> However the actual text of the amendment states,

(b) The State and local governments are prohibited from acquiring by eminent domain an owner-occupied residence for the purpose of conveying it to a private person.<sup>157</sup>

(c) Subdivision (b) of this section does not apply when State or local government exercises the power of eminent domain for the purpose of protecting public health and safety; preventing serious, repeated criminal activity; responding to an emergency; or remedying environmental contamination that poses a threat to public health and safety.<sup>158</sup>

(d) Subdivision (b) of this section does not apply when State or local government exercises the power of eminent domain for the purpose of acquiring private property for a public work or improvement.<sup>159</sup>

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153. *See id.*

154. *Redevelopment Agency v. Hayes*, 266 P.2d 105, 114 (Cal. Ct. App. 1954) (citing *Schneider v. Dist. of Columbia*, 117 F. Supp. 705 (D.D.C. 1953)).

155. *See* CALVERT G. CHIPCHASE, ET AL., STATE-BY-STATE SURVEY OF PUBLIC USE STANDARDS IN EMINENT DOMAIN: A HANDBOOK OF CONDEMNATION LAW 153, 157 (citing *Schneider v. Dist. of Columbia*, 117 F. Supp. 705 (D.D.C. 1953)) (explaining how the California state courts interpreted the public use requirement before post-*Kelo* legislative reform) (quoting *Redevelopment Agency v. Hayes*, 266 P.2d 105, 114 (Cal. Ct. App. 1954)).

156. *See id.* (explaining that Proposition 99 was California’s post-*Kelo* public use reform measure).

157. CAL. CONST. art. I, § 19, cl. b.

158. *Id.* at cl. c.

159. *Id.* at cl. d.

The amendment is particularly weak in redefining public use, as it essentially only limits private residential takings for a private use, when the state or locality is not acting with the goal of public improvement.<sup>160</sup> Put another way, the amendment could read: a private-to-private residential taking cannot occur when there is absolutely no public purpose.<sup>161</sup> Under this legislation, blight takings are still acceptable as are any takings where there is purported public improvement.<sup>162</sup> This type of “reform legislation” offers almost no benefit to those groups who are disproportionately affected by eminent domain.<sup>163</sup>

Texas is another example of a state that rushed post-*Kelo* reform.<sup>164</sup> The Texas state constitution holds that “[n]o person’s property shall be taken, damaged or destroyed for or applied to public use without adequate compensation.”<sup>165</sup> To better define the public use term, just weeks after the *Kelo* decision was announced, the legislature enacted Chapter Number 2005-1 into law. The law purportedly protects taking of private property stating:

b) A governmental or private entity may not take private property through the use of eminent domain if the taking: (1) confers a private benefit on a particular private party through the use of the property; (2) is for a public use that is merely a pretext to confer a private benefit on a particular private party; or (3) is for economic development purposes, unless the economic development is a secondary purpose resulting from municipal community development or municipal urban renewal activities to eliminate an existing affirmative harm on society from slum or blighted areas.<sup>166</sup>

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160. *See id.* (“[T]his section does not apply when State or local government exercises the power of eminent domain for the purpose of acquiring private property for a public work or improvement.”).

161. *Id.*

162. *See, e.g.,* Beito, *supra* note 145 (explaining that in many states that enacted post-*Kelo* reform restricting takings for economic development, often times the same property can be taken under the guise of alleviating blight).

163. *See* Somin, *supra* note 10 (“Unfortunately, the majority of the new reform laws are likely to be ineffective, imposing few or no meaningful constraints on the use of eminent domain.”).

164. *See id.* (citing examples of proposed state remedial reform that did not prove to be comprehensive).

165. TEX. CONST. art. I, § 17.

166. TEX. GOV’T CODE ANN. § 2206.001.

Absent from the Texas post-*Kelo* reform statute is language limiting the taking to only that property required for the project.<sup>167</sup> Therefore, the Texas law would allow a condemnor to condemn a large parcel for a road and then transfer any access property not used for the road to a private owner.<sup>168</sup> Texas may have thought itself to be progressive in protecting property rights. However, as the act allows for property to be transferred to a private party for an economic use, the reform is comparatively weak.<sup>169</sup>

### *B. Virginia – A Seemingly Successful Model*

Compared with the legislative reforms of states like California and Texas, Virginia's reform laws are comprehensive.<sup>170</sup> In 2006, the Virginia General Assembly narrowly thwarted an attempt at comparatively weak reactionary legislation similar to that enacted by Texas.<sup>171</sup> In 2007, the General Assembly passed a bill that defined public use, specifying that an increased tax basis or economic development were not to be considered in making such a determination.<sup>172</sup> On February 14, 2012, both houses of the Virginia General Assembly passed additional legislation that allowed for lost access and lost business profits that stem from an eminent domain taking to be compensable.<sup>173</sup> Just one day earlier, February 13, 2012, both houses passed an amendment to the Virginia Constitution that states that

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167. *See id.* (showing that there is no language in the reform law that limits a taking to only that amount of property that is necessary for a project).

168. *See id.* (explaining how the Texas reform law still allows for abusive takings).

169. *See generally* CALVERT G. CHIPCHASE, ET AL., A STATE-BY-STATE SURVEY OF PUBLIC USE STANDARDS IN EMINENT DOMAIN: A HANDBOOK OF CONDEMNATION LAW 153 (surveying all post-*Kelo* state action and showing that Texas could be seen as comparatively weak in its reform measures).

170. *Compare supra* notes 154–156, 162, and accompanying text (explaining the reforms law enacted in Texas and California), *with infra* notes 172–192 and accompanying text (explaining the comprehensiveness of Virginia's reform laws).

171. *See* H.R. 94, 504th Gen. Assemb., Reg. Sess. (Va. 2005), *available at* <http://leg1.state.va.us/cgi-bin/legp504.exe?ses=061&typ=bil&val=hb94> (showing that the original language of the first reform bill was defeated in the House of Delegates).

172. *See* H.R. 2954, 504th Gen. Assemb., Reg. Sess. (Va. 2007), *available at* <http://leg1.state.va.us/cgi-bin/legp504.exe?071+sum+HB2954> (showing that stronger reform was passed in 2007).

173. *See* S. 437, 504th Gen. Assemb., Reg. Sess. (Va. 2012), *available at* <http://leg1.state.va.us/cgi-bin/legp504.exe?ses=121&typ=bil&val=sb437> (showing that the General Assembly passed a bill to make lost access and business losses compensable).

property rights are fundamental, protects just compensation, and further defines public use.<sup>174</sup>

Virginia, like many other states, was quick to act to remedy the *Kelo* decision.<sup>175</sup> On December 19, 2005, less than six months after the Supreme Court ruled in *Kelo*, Virginia Delegate Terrie Suit pre-filed House Bill 94.<sup>176</sup> The bill was Virginia's first attempt at eminent domain reform.<sup>177</sup> The bill stated, "Public uses shall not include the taking or damage [sic] of private property through the exercise of the power of eminent domain if the primary purpose is the enhancement of tax revenues."<sup>178</sup> It also allowed that if property is taken for "eminent domain for public uses and is not for the primary purpose of enhancement of tax revenues," the property could then be conveyed to certain private persons or entities.<sup>179</sup> Following a contentious floor debate, Delegate Johnny Joannou offered an amendment, which struck the previous Suite language from the bill.<sup>180</sup> Joannou argued

174. See SJ 3 Constitutional Amendment; Taking or Damaging to Private Property for Public Use (Second Reference). Floor: 02/13/12 Senate: Read Third Time and Agreed to by the Senate (23-Y 16-N), <http://leg1.state.va.us/cgi-bin/legp504.exe?121+vot+SV0393SJ0003+SJ0003> (last visited Sept. 9, 2012) (showing the constitutional amendment passed the Senate of Virginia on Sept. 9, 2012). See also HJ 3 Constitutional Amendment; Taking or Damaging to Private Property for Public Use (Second Reference). Floor: 02/13/12 House: Vote: Adoption (80-Y 18-N) <http://leg1.state.va.us/cgi-bin/legp504.exe?121+vot+HV0666+HJ0003> (last visited Sept. 9, 2012) (showing the constitutional amendment passed the Virginia House of Delegates February 13, 2012.); see also HB1035 Eminent Domain: Definition of Lost Access and Lost Profits, Determining Compensation. Floor: 02/14/12: House: Vote: Passage (77-Y 22-N) <http://leg1.state.va.us/cgi-bin/legp504.exe?121+vot+HV0780+HB1035> (last visited Sept. 9, 2012) (showing the lost access and lost profits bill passed the House of Delegates on February 14, 2012); see also SB 437 Eminent Domain; Definitions of Lost Access and Lost Profits, Determining Compensation. Floor: 02/14/12 Senate: Read Third Time and Passed Senate (23-Y, 17-N) <http://leg1.state.va.us/cgi-bin/legp504.exe?121+vot+SV0408SB0437+SB0437> (last visited Sept. 9, 2012) (showing the lost access and lost profits bill passed the Senate of Virginia on February 14, 2012) (on file with WASH. & LEE J. CIVIL RTS. & SOC. JUST.).

175. See H.B. 94 Eminent Domain; Definition of Public Uses. Terrie L. Suit, <http://leg1.state.va.us/cgi-bin/legp504.exe?ses=061&typ=bil&val=hb94>, (last visited Sept. 9, 2012) (showing that Virginia quickly responded to the *Kelo* decision by enacting reform legislation) (on file with WASH. & LEE J. CIVIL RTS. & SOC. JUST.).

176. See *id.* (showing Delegate Terrie Suit prefiled H.B. 94 on Dec. 19, 2005).

177. See *id.* (showing the date of the proposed bill for the 2006 session, which would be first session after *Kelo*).

178. H.B. 94, 504th Gen. Assemb., Reg. Sess. (Va. 2006), available at <http://leg1.state.va.us/cgi-bin/legp504.exe?061+ful+HB94EH1>.

179. *Id.*

180. See *Kelo* Protection: A Choice of "Two Paths" (Google Video 2006) <http://video.google.com/videoplay?docid=-3237745645661904619> (last visited Sept. 9, 2012)

that the “primary purpose” language left far too much room to the condemnors to condemn a property for one use and then allow the remainder of the property to be turned over to a private interest for a private use.<sup>181</sup> Delegate Joannou’s proposed amendment stated,

In determining whether a use constitutes a public use, public benefits or potential public benefits including economic development or private development, an increase in the tax base, tax revenues, employment or general economic health and welfare shall not be considered.<sup>182</sup>

Jeremy Hopkins, who exclusively practices eminent domain law in Virginia, noted in *The Real Story of Eminent Domain in Virginia* that, at the time, Delegate Joannou’s “proposed bill represents one of the greatest attempts at eminent domain reform in Virginia history.”<sup>183</sup> Though Joannou’s amendment passed 50-47, the bill ultimately failed in conference committee.<sup>184</sup> However, the passage of Joannou’s amendment set Virginia apart as a state that did not erroneously rush to pass a flawed reform measure.<sup>185</sup>

In 2006, Virginia successfully attempted to derail a weak reform bill, which would have allowed a condemnor, following certain stipulations, to take private property and later transfer it to a different private owner.<sup>186</sup> In 2007, Virginia stuck with the language of the 2006 Joannou Amendment, and passed comprehensive reform measures.<sup>187</sup> House Bill 2954 was

(showing the debate over the H.B. 94 and Delegate Joannou’s amendment) (on file with WASH. & LEE J. CIVIL RTS. & SOC. JUST.).

181. *See id.* (demonstrating that the majority of the House of Delegates found the “primary purpose” language to be too broad).

182. *See* H.B. 94: Amendments Proposed by the House: Del. Joannou <http://leg1.state.va.us/cgi-bin/legp504.exe?061+amd+HB94AH> (last visited Sept. 9, 2012) (stating Delegate Joannou’s proposed floor amendment that would have considerably strengthen H.B. 94) (on file with WASH. & LEE J. CIVIL RTS. & SOC. JUST.).

183. JEREMY P. HOPKINS, VIRGINIA INSTITUTE FOR PUBLIC POLICY, *THE REAL STORY OF EMINENT DOMAIN IN VIRGINIA: THE RISE, FALL, AND UNDETERMINED FUTURE OF PROPERTY RIGHTS IN THE COMMONWEALTH* 62 (2006).

184. *See* H.B. 94, 504th Gen. Assemb., Reg. Sess. (Va. 2006), *available at* <http://leg1.state.va.us/cgi-bin/legp504.exe?ses=061&typ=bil&val=hb94> (showing that after Joannou’s language was added on the House floor, the bill later died in conference committee).

185. *See supra* notes 148–150 and accompanying text (showing that Virginia was not a state cited by Professor Somin for rushing eminent domain reform).

186. *See supra* notes 176–184 and accompanying text (explaining that through the Joannou amendment, Virginia opted against weak reform measures).

187. *See* H.B. 2954, 504th Gen. Assemb., Reg. Sess. (Va. 2007) (enacted), *available at*

offered in 2007 by Delegate Rob Bell.<sup>188</sup> The bill defined public use to include “only the acquisition of property where:

- (i) the property is taken for the possession, ownership, occupation, and enjoyment of property by the public or a public corporation;
- (ii) the property is taken for construction, maintenance, or operation of public facilities by public corporations or by private entities provided that there is a written agreement with a public corporation providing for use of the facility by the public;
- (iii) the property is taken for the creation or functioning of any public service corporation, public service company, or railroad;
- (iv) the property is taken for the provision of any authorized utility service by a government utility corporation;
- (v) the property is taken for the elimination of blight provided that the property itself is a blighted property; or
- (vi) the property taken is in a redevelopment or conservation area and is abandoned or the acquisition is needed to clear title where one of the owners agrees to such acquisition or the acquisition is by agreement of all the owners.”<sup>189</sup>

Therefore, under this bill, not only was public use specifically defined, but blight takings were to be limited to only those properties that were actually blighted.<sup>190</sup> It also specifically identified what constitutes public facilities, citing fifteen very definitive categories, such as “transportation facilities including highways, roads, streets, and bridges, traffic signals, relates easements and rights-of-way, mass transit, ports, and any components of federal, state, or local transportation facilities.”<sup>191</sup> The bill

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<http://leg1.state.va.us/cgi-bin/legp504.exe?071+sum+HB2954> (showing the legislative history of H.B. 2954).

188. *See id.* (showing that Delegate Rob Bell was the chief patron of the legislation).

189. *Id.*

190. *See id.* (stating that the bill defined public use and limited blight takings).

191. *Id.*

additionally provided that no more private property than was needed for a particular project could be taken.<sup>192</sup>

The strength of the 2007 legislation led to legislative complacency in Virginia, where from 2007 to 2011, no major pieces of legislation redefined public use.<sup>193</sup> However, since 2007, there had been seven constitutional amendments proposed to ensure that the public use language passed that year would not be changed.<sup>194</sup> On February 13, 2012, both houses of the Virginia General Assembly passed a constitutional amendment protecting public use and just compensation.<sup>195</sup> Proclaiming that the private property

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192. *See id.* (stating that the bill limited the taking to only that property that would be used in the project).

193. *See generally* Virginia Gen. Assembly: Legislative Info. Sys. <http://leg1.state.va.us/cgi-bin/legp504.exe?121+men+BIL> (last visited Sept. 9, 2012) (showing that between 2007 and 2011, there were not any public use bills offered in the Virginia General Assembly) (on file with WASH. & LEE J. CIVIL RTS. & SOC. JUST.).

194. *See* HJ 62 Constitutional Amendment; Exercise of Eminent Domain Powers (First Reference) <http://leg1.state.va.us/cgi-bin/legp504.exe?061+sum+HJ62>, (last visited Sept. 9, 2012) (showing an eminent domain amendment was offered in 2006 by Delegate Ward Armstrong); HJ 126 Constitutional Amendment; Exercise of Eminent Domain Powers (First Reference). <http://leg1.state.va.us/cgi-bin/legp504.exe?061+sum+HJ126>, (last visited Sept. 7, 2012) (showing an eminent domain amendment was offered in 2006 by Delegate Melanie Rapp); SJ 121 Constitutional Amendment; Exercise of Eminent Domain Powers (First Reference) <http://leg1.state.va.us/cgi-bin/legp504.exe?061+sum+SJ121>, (last visited Sept. 9, 2012) (showing an eminent domain amendment was offered in 2006 by Senator Stephen Martin); SJ 139 Constitutional Amendment; Exercise of Eminent Domain Powers (First Reference) <http://leg1.state.va.us/cgi-bin/legp504.exe?061+sum+SJ139>, (last visited Sept. 9, 2012) (showing an eminent domain amendment was offered in 2006 by Senator Ken Cuccinelli); HJ 579 62 Constitutional Amendment; Exercise of Eminent Domain Powers (First Reference) <http://leg1.state.va.us/cgi-bin/legp504.exe?071+sum+HJ579>, (last visited Sept. 9, 2012) (showing an eminent domain amendment was offered in 2006 by Delegate Chris Peace); HJ 714 Constitutional Amendment; Exercise of Eminent Domain Powers (First Reference) (<http://leg1.state.va.us/cgi-bin/legp504.exe?071+sum+HJ714>, (last visited Sept. 9, 2012) (showing an eminent domain amendment was offered in 2006 by Delegate Melanie Rapp); HJ 722 Constitutional Amendment; Exercise of Eminent Domain Powers (First Reference) <http://leg1.state.va.us/cgi-bin/legp504.exe?071+sum+HJ722>, (last visited Sept. 9, 2012) (showing an eminent domain amendment was offered in 2007 by Delegate Johnny Joannou); HJ 723 Constitutional Amendment; Exercise of Eminent Domain Powers (First Reference) (<http://leg1.state.va.us/cgi-bin/legp504.exe?071+sum+HJ723>, (last visited Sept. 9, 2012) (showing an eminent domain amendment was offered in 2007 by Delegate Rob Bell) (on file with WASH. & LEE J. CIVIL RTS. & SOC. JUST.).

195. *See* SJ 3 Constitutional Amendment; Taking or Damaging to Private Property for Public Use (Second Reference), Floor: 02/13/12 Senate: Read Third Time and Agreed to by the Senate (23-Y 16-N), <http://leg1.state.va.us/cgi-bin/legp504.exe?121+vot+SV0393SJ0003+SJ0003> (last visited Sept. 9, 2012) (showing the constitutional amendment passed the Senate of Virginia on February 13, 2012). *See also* HJ 3 Constitutional Amendment; Taking or Damaging to Private Property for Public Use (Second Reference). Floor: 02/13/12

right is fundamental, the amendment states the just compensation “shall be no less than the value of the property taken, loss of profits and lost access, and damages to the residue caused by the taking.”<sup>196</sup> Regarding public use, the amendment states that “a taking or damaging of private property is not for public use if the primary use is for private gain, private benefit, private enterprise, increasing jobs, increasing tax revenue, or economic development, except for the elimination of a public nuisance existing on the property.”<sup>197</sup> The condemnor bears the burden of proving that the use is public, without a presumption that it is.<sup>198</sup> With this language the Virginia General Assembly ensured Virginia would never see a *Kelo*-style taking.<sup>199</sup>

On the day after the amendment was passed, both houses also passed legislation to define both lost access and lost profits.<sup>200</sup> The loss of access language does not “create any new right or remedy or diminish any existing right or remedy other than to allow the body determining just compensation to consider a change in access in awarding just compensation.”<sup>201</sup> While loss of access was previously compensable, lost profits had not been.<sup>202</sup> The bill’s language allows for lost profits, using generally accepted business principles “for a period not to exceed three years from the date of

House: Vote: Adoption (80-Y 18-N) <http://leg1.state.va.us/cgi-bin/legp504.exe?121+vot+HV0666+HJ0003> (last visited Feb. 29, 2012) (showing the constitutional amendment passed the Virginia House of Delegates February 13, 2012) (on file with WASH. & LEE J. CIVIL RTS. & SOC. JUST.).

196. S.J. 3, 504th Gen. Assemb., Reg. Sess. (Va. 2012), *available at* <http://leg1.state.va.us/cgi-bin/legp504.exe?121+sum+SJ3>.

197. *Id.*

198. *See id.* (explaining that the amendment puts the public use presumption on the condemnor).

199. *See id.* (showing that the amendment does not allow for a private-for-private taking for economic use).

200. *See* HB1035 Eminent Domain: Definition of Lost Access and Lost Profits, Determining Compensation. Floor: 02/14/12: House: Vote: Passage (77-Y 22-N) <http://leg1.state.va.us/cgi-bin/legp504.exe?121+vot+HV0780+HB1035> (last visited Sept. 9, 2012) (showing the lost access and lost profits bill passed the House of Delegates on February 14, 2012) (on file with WASH. & LEE J. CIVIL RTS. & SOC. JUST.); *see also* SB 437 Eminent Domain; Definitions of Lost Access and Lost Profits, Determining Compensation. Floor: 02/14/12 Senate: Read Third Time and Passed Senate (23-Y, 17-N) <http://leg1.state.va.us/cgi-bin/legp504.exe?121+vot+SV0408SB0437+SB0437> (last visited Sept. 9, 2012) (showing the lost access and lost profits bill passed the Senate of Virginia on February 14, 2012) (on file with WASH. & LEE J. CIVIL RTS. & SOC. JUST.).

201. H.B. 1035, 504th Gen. Assemb., Reg. Sess. (Va. 2012), *available at* <http://leg1.state.va.us/cgi-bin/legp504.exe?121+sum+HB1035>.

202. *See id.* (showing that business losses are added in the bill, as new language).

the valuation is suffered.”<sup>203</sup> This loss of business profits is a step forward for Virginia in determining just compensation.<sup>204</sup>

While many states passed rushed or hasty reform following *Kelo*, Virginia took four very calculated legislative steps to define public use and protect just compensation.<sup>205</sup> No other state rejected weak reform in 2006, passed comprehensive reform defining public use in 2007, passed a constitutional amendment protecting both public use and just compensation, and then passed legislation providing for both lost access and lost profits.<sup>206</sup> For these reasons, Virginia could easily be seen as a perfect model for post-*Kelo* reform.<sup>207</sup>

Reform in Virginia is notable for other reasons besides its result.<sup>208</sup> The Virginia Constitution states that an amendment must pass two consecutively elected bodies of the General Assembly before it is to be placed on the ballot.<sup>209</sup> In 2011, the General Assembly passed the amendment with a Republican-controlled House of Delegates and Democratic-controlled State Senate.<sup>210</sup> In 2012, when it passed for the second time, the Republicans had a majority in both bodies.<sup>211</sup> Also of note, in 2011, the chief sponsor of the amendment in the Republican

203. *Id.*

204. *See id.* (noting that previously in Virginia business losses were not compensable in eminent domain).

205. *See* discussion *infra* Part IV.B (stating the reform process in Virginia from 2007–12).

206. *See* Chipchase, *supra* note 21, at 179–80 (showing that Virginia was the only state to complete these four separate legislation actions).

207. *See id.* (showing that no other state has Virginia’s four-step approach to reform).

208. *See* discussion *infra* Part IV.B (stating the reasons why Virginia reform efforts are laudable).

209. *See* Va Const. art XII, § 1 (“Any amendment . . . to this Constitution may be proposed in the Senate or House of Delegates, and if the same shall be agreed to by a majority of the members elected to each of the two houses, such proposed amendment or amendments shall be . . . referred to the General Assembly . . .”).

210. *See* Peter Rousselot, *Why Virginia Democrats Lost the State Senate*, HUFFINGTON POST, Nov. 9, 2011, [www.huffingtonpost.com/peter-rousselot/2001-virginia-elections\\_b\\_1083901.html](http://www.huffingtonpost.com/peter-rousselot/2001-virginia-elections_b_1083901.html) (last visited Sept. 9, 2012) (stating that democrats lost control of the state senate in late 2011) (on file with WASH. & LEE J. CIVIL RTS. & SOC. JUST.).

211. *See* Anita Kumar, *Republicans Take Control of Va. Senate*, WASH. POST, Jan. 11, 2012, [http://www.washingtonpost.com/blogs/virginia-politics/post/republicans-take-control-of-va-senate/2012/01/11/g1QAp4JVrP\\_blog.html](http://www.washingtonpost.com/blogs/virginia-politics/post/republicans-take-control-of-va-senate/2012/01/11/g1QAp4JVrP_blog.html) (last visited Sept. 9, 2012) (stating that the Republicans controlled the Senate of Virginia in 2012).

controlled House of Delegates was a Democrat and the chief sponsor of the amendment in the Democratic controlled Senate was a Republican.<sup>212</sup>

There was an argument of necessity made against the amendment, as some legislators questioned its value when the 2007 legislation seemed exhaustive.<sup>213</sup> The bill's sponsor, Delegate Rob Bell, answered by stating that the goal of the legislation, "is to put [the amendment] into the constitution so that it can't be tinkered with."<sup>214</sup> The opponents of the amendment claimed that the amendment would raise just compensation and the increase would directly lead to infrastructure costs increasing.<sup>215</sup> Thus, taxpayers would have to pay more while they would receive less, due to the restrictions on what can be taken under a public use.<sup>216</sup> The Virginia Municipal League, the group representing Virginia localities, claimed that restricting public use to uses that did not include "increasing jobs, increasing tax revenue or economic development" would allow the "fair market standard to be voided, and the landowner to dictate the price of the property."<sup>217</sup> One member of the Virginia House of Delegates even commented, "It's going to be a lawyer's bonanza if it passes, as I expect it

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212. See H.J. 693 Constitutional Amendment; Taking or Damaging of Private Property for Public Use (First Reference), Johnny S. Joannou <http://leg1.state.va.us/cgi-bin/legp504.exe?111+sum+HJ693> (last visited Sept. 9, 2012) (showing the 2011 version of the amendment was offered in the House of Delegates by a Democrat) (on file with WASH. & LEE J. CIVIL RTS. & SOC. JUST.); See also S.J. 307 Constitutional Amendment; Taking or Damaging of Private Property for Public Use (First Reference): Mark Obenshain <http://leg1.state.va.us/cgi-bin/legp504.exe?111+sum+SJ307> (last visited Sept. 9, 2012) (showing the 2011 version of the amendment was offered in the Senate of Virginia by a Republican) (on file with WASH. & LEE J. CIVIL RTS. & SOC. JUST.).

213. See *infra* notes 287–92 and accompanying text (stating the objections to reform in Virginia).

214. See David Sherfinski, *Local Resistance Building on Virginia's Eminent Domain Change*, WASH. TIMES, Nov. 24, 2011, <http://www.washingtontimes.com/news/2011/nov/24/local-resistance-building-on-virginias-emin-dom/?page=all> (last visited Sept. 9, 2012) (stating Delegate Rob Bell's, the Amendment's sponsor, reasons for drafting and submitting the legislation) (on file with WASH. & LEE J. CIVIL RTS. & SOC. JUST.).

215. See Theis, *infra* note 241 ("They also say that the new compensation rules will increase the cost of infrastructure projects.").

216. See *id.* (stating the argument made by the opponents of the reform legislation that the reform will ultimately harm tax payers).

217. See Sherfinski, *supra* note 214 (showing that the Virginia Municipal League is making the argument that restricting the public use standard back to how it was interpreted pre-Berman would somehow void the fair market standard).

will.”<sup>218</sup> Overcoming these arguments, the amendment and its companion bill passed both houses.<sup>219</sup>

### C. The Hidden Weaknesses of the Virginia Model

While the strength of the Virginia model is its comparative thoroughness, compared to other states’ legislation, its weakness is in the manner in which the reform was passed.<sup>220</sup> Missing from the Virginia reform process was the support of those legislators who represent those most affected by eminent domain.<sup>221</sup> Also conspicuously absent from the process was the grassroots support of the groups that made the opposition to *Kelo* so noteworthy.<sup>222</sup> In Virginia, *Kelo*’s “strange bedfellows” never united.<sup>223</sup>

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218. See Scott McCaffrey, *County Officials, Legislators Brace for Battle on Eminent-Domain Amendment*, SUN GAZETTE, Jan. 4, 2012, [http://www.sungazette.net/arlington/news/county-officials-legislators-brace-for-battle-on-eminent-domain-amendment/article\\_bb5bd992-36d1-11e1-a57c-001871e3ce6c.html](http://www.sungazette.net/arlington/news/county-officials-legislators-brace-for-battle-on-eminent-domain-amendment/article_bb5bd992-36d1-11e1-a57c-001871e3ce6c.html), (last visited Sept. 9, 2012) (stating Delegate Bob Brink’s claim that passage of the eminent domain amendment would dramatically increase property rights litigation) (on file with WASH. & LEE J. CIVIL RTS. & SOC. JUST.).

219. See SJ 3 Constitutional Amendment; Taking or Damaging to Private Property for Public Use (Second Reference). Floor: 02/13/12 Senate: Read Third Time and Agreed to by the Senate (23-Y 16-N), <http://leg1.state.va.us/cgi-bin/legp504.exe?121+vot+SV0393SJ0003+SJ0003> (last visited Sept. 9, 2012) (showing the constitutional amendment passed the Senate of Virginia on February 13, 2012); see also HJ 3 Constitutional Amendment; Taking or Damaging to Private Property for Public Use (Second Reference). Floor: 02/13/12 House: Vote: Adoption (80-Y 18-N) <http://leg1.state.va.us/cgi-bin/legp504.exe?121+vot+HV0666+HJ0003> (last visited Sept. 9, 2012) (showing the constitutional amendment passed the Virginia House of Delegates February 13, 2012.); see also HB1035 Eminent Domain: Definition of Lost Access and Lost Profits, Determining Compensation. Floor: 02/14/12: House: Vote: Passage (77-Y 22-N) <http://leg1.state.va.us/cgi-bin/legp504.exe?121+vot+HV0780+HB1035> (last visited Sept. 7, 2012) (showing the lost access and lost profits bill passed the House of Delegates on February 14, 2012); see also SB 437 Eminent Domain: Definitions of Lost Access and Lost Profits, Determining Compensation. Floor: 02/14/12 Senate: Read Third Time and Passed Senate (23-Y, 17-N) <http://leg1.state.va.us/cgi-bin/legp504.exe?121+vot+SV0408SB0437+SB0437> (last visited Sept. 9, 2012) (showing the lost access and lost profits bill passed the Senate of Virginia on February 14, 2012) (on file with WASH. & LEE J. CIVIL RTS. & SOC. JUST.).

220. See *infra* notes 241–42 and accompanying text (explaining the success of the legislative weaknesses of reform in Virginia).

221. See *infra* notes 225–38 and accompanying text (stating that no members who represent minority-majority districts patroned reform and showing that many of these members opposed reform measures).

222. See discussion, *infra* Part III.C (discussing the arguments made by the NAACP and the AARP in support of the petitioner’s motion in *Kelo*).

223. See discussion, *infra* Part III.C (stating that in the Virginia reform process, the

From 2006 through 2012, legislators representing minority communities rarely supported reform measures.<sup>224</sup> In 2006, when Delegate Joannou's amendment was offered to strengthen the otherwise weak attempt at post-*Kelo* reform, of the eleven African-Americans in the House of Delegates that session, seven voted against it.<sup>225</sup> The Bill was then adopted in the House by a vote of 51-45 with eight of the nine voting African-American Delegates voting against eminent domain reform.<sup>226</sup>

The following year House Bill 2954, like the 2006 bill, did not have a single African-American co-patron.<sup>227</sup> The bill passed the House of Delegates 87-11; of the eleven members voting not to support reform, five were African-Americans who represented minority majority districts.<sup>228</sup> When the bill reached the Senate, there was an amendment to lessen the restrictions for a blight taking proposed by the House of Delegates.<sup>229</sup> This amendment was agreed to 18-17, with all four African-American members who represented minority-majority districts agreeing to it.<sup>230</sup>

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political left never supported the efforts of those offering the legislation).

224. See *infra* notes 225–38 and accompanying text (showing that none of the post-*Kelo* reform measures were strongly supported by the minority-majority members of the Virginia General Assembly).

225. See H.B. 94, 2006 Gen. Assemb., Reg. Sess. (Va. 2006), <http://leg1.state.va.us/cgi-bin/legp504.exe?061+vot+HV2933+HB0094> (last visited Jan. 5, 2012) (showing that of the eleven African-American members in the Virginia House of Delegates in 2006, Delegates BaCote, Dance, Howell, A.T., Jones, D.C., McClellan, McEachin, and Melvin voted against Delegate Jouannou's more restrictive public use amendment) (on file with WASH. & LEE J. CIVIL RTS. & SOC. JUST.).

226. See *id.*, <http://leg1.state.va.us/cgi-bin/legp504.exe?061+vot+HV2933+HB0094> (last visited Sept. 9, 2012) (showing nine of the eleven African-American members in the Virginia House of Delegates in 2006 voted against eminent domain reform) (on file with WASH. & LEE J. CIVIL RTS. & SOC. JUST.).

227. See H.B. 2954, 2007 Gen. Assemb., Reg. Sess. (Va. 2007), <http://leg1.state.va.us/cgi-bin/legp504.exe?071+mbr+HB2954> (last visited Sept. 9, 2012) (demonstrating that of the sixteen co-patrons, none were African-American) (on file with WASH. & LEE J. CIVIL RTS. & SOC. JUST.).

228. See *id.* (showing that of the ten votes against the eminent domain reform bill, African-American Delegates BaCote, McClellan, Melvin, Spruill, and Ward voted or intended to vote against it).

229. See *id.* (showing an amendment proposed by Sen. Williams to lessen the blight language of the original bill).

230. See *id.* (showing state senators Lambert, Lucas, Marsh, and Miller all voting for the amendment lessening the restrictions on a blight taking).

In 2011, Virginia first proposed a constitutional amendment to ensure the definition of public use could not be changed in the future.<sup>231</sup> The amendment passed the House of Delegates 18-8.<sup>232</sup> Of the votes cast against the reform amendment, four were from African-Americans and five were from those who represented minority majority districts.<sup>233</sup> The amendment then passed the Senate of Virginia 31-8, where no African-Americans supported the bill, with five of the eight negative votes coming from African-Americans.<sup>234</sup>

Pursuant to the Virginia Constitution, the constitutional amendment that passed the General Assembly in 2011 had to pass both bodies, in its identical form again in 2012.<sup>235</sup> In 2012 as in 2011, the amendment did not receive a single African-American co-patron in either body.<sup>236</sup> It was then opposed by every African-American member of the State Senate.<sup>237</sup> In the House of Delegates in 2012, of the eighteen votes against the amendment,

231. H.J. 693, 2011 Gen. Assemb., Reg. Sess. (Va. 2011).

232. See H.J. 2011 Gen. Assemb., Reg. Sess. (Va. 2011), <http://leg1.state.va.us/cgi-bin/legp504.exe?111+vot+SV0614HJ0693+HJ0693> (last visited Sept. 9, 2012) (showing the vote count for the second passage of H.J. 693) (on file with WASH. & LEE J. CIVIL RTS. & SOC. JUST.).

233. See *id.* (showing that of those members who voted against the bill Delegates Dance, Herring, McClellan, and James are African, and Morrissey represents a minority majority district).

234. See H.J. 693, 2011 Gen. Assemb., Reg. Sess. (Va. 2011), <http://leg1.state.va.us/cgi-bin/legp504.exe?111+vot+SV0614HJ0693+HJ0693>, (last visited Sept. 9, 2012) (showing state senators Locke, Lucas, Marsh, McEachin, and Miller, all five African-American members of the Senate of Virginia voting against reform).

235. See VA CONST. art XII, §1 (“Any amendment or amendments to this Constitution may be proposed in the Senate or House of Delegates, and if the same shall be agreed to by a majority of the members elected to each of the two houses, such proposed amendment or amendments shall be entered on their journals, the name of each member and how he voted to be recorded, and referred to the General Assembly at its first regular session held after the next general election of members of the House of Delegates.”).

236. See S.J. Res. 3, 2012 Gen. Assemb., Reg. Sess. (Va. 2012), <http://leg1.state.va.us/cgi-bin/legp504.exe?121+mbr+SJ3> (last visited Sept. 9, 2012) (showing there were not any African-American co-patrons) (on file with WASH. & LEE J. CIVIL RTS. & SOC. JUST.); see also Constitutional amendment; H.J. Res. 3, 2012 Gen. Assemb., Reg. Sess. (Va. 2012), <http://leg1.state.va.us/cgi-bin/legp504.exe?121+mbr+HJ3> (last visited Sept. 9, 2012) (showing there were not any African-American co-patrons) (on file with WASH. & LEE J. CIVIL RTS. & SOC. JUST.).

237. See *id.* (showing Senators Locke, Lucas, March, McEachin and Miller all voting against the measure).

one-third came from members who represent minority-majority constituencies.<sup>238</sup>

Like the amendment, the bill defining lost access and business losses did not receive a single African-American co-patron or a single African-American vote in the Senate of Virginia. In the House of Delegates, of the twenty-two votes against the bill, eight came from members who represent minority-majority districts.<sup>239</sup>

Virginia's constitutional amendment received both support and opposition from well-funded lobbying efforts.<sup>240</sup> The Virginia Municipal League lobbied the General Assembly against the amendment arguing that it was too far reaching and that it would increase the costs of infrastructure improvements.<sup>241</sup> Conversely, the Virginia Farm Bureau made the eminent domain amendment a top priority on its legislative agenda.<sup>242</sup> The group organized grassroots support for the measure and lobbied professionally for its passage.<sup>243</sup> While groups like the Farm Bureau and the Virginia Property Rights Coalition actively supported reform, advocacy groups like the NAACP and the AARP did not participate in the discussion.<sup>244</sup> Neither of these groups, which traditionally lobby the Virginia General Assembly,

238. See H.J. Res. 3, 2012 Gen. Assemb., Reg. Sess. (Va. 2012), <http://leg1.state.va.us/cgi-bin/legp504.exe?121+vot+HV0666+HJ0003> (last visited Sept. 9, 2012) (showing one-third of African-American Delegates in the House of Delegates opposing the measure) (on file with WASH. & LEE J. CIVIL RTS. & SOC. JUST.).

239. *Id.*

240. See *infra* note 241 (showing that both the Virginia Farm Bureau and the Virginia Municipal League both lobbied the Virginia General Assembly regarding eminent domain reform).

241. See Michael Theis, *Eminent Domain Changes Spook Cities*, THE FREDERICKSBURG PATCH, Nov. 28, 2011, <http://fredericksburg.patch.com/articles/eminent-domain-changes-spook-cities> (last visited Sept. 9, 2012) ("The Virginia Municipal League, which lobbies on behalf of Virginia's 38 independent cities, say the proposed amendment is unnecessary and could lead to frivolous lawsuits and more costly public improvements.") (on file with WASH. & LEE J. CIVIL RTS. & SOC. JUST.).

242. See *Eminent Domain Constitutional Amendment Passes in Senate, House*, VIRGINIA FARMS BUREAU, [http://vafarmbureau.org/NewsVideo/NewsHeadlines/tabid/347/articleType/ArticleView/articleId/688/Eminent\\_domain\\_constitutional\\_amendment\\_passes\\_in\\_Senate\\_House.aspx](http://vafarmbureau.org/NewsVideo/NewsHeadlines/tabid/347/articleType/ArticleView/articleId/688/Eminent_domain_constitutional_amendment_passes_in_Senate_House.aspx) (visited Sept. 9, 2012) (explaining that the eminent domain amendment was a top priority of the Virginia Farm Bureau in 2012) (on file with WASH. & LEE J. CIVIL RTS. & SOC. JUST.).

243. See *id.* (stating how the Virginia Farm Bureau was supporting the reform measure).

244. See *infra* note 248 and accompanying text (showing that the NAACP and AARP were silent on reform measures).

organized grassroots support or employed professional lobbyists to advocate for reform.<sup>245</sup> On its website, the Virginia chapter of the AARP lists its legislative priorities for each session of the General Assembly.<sup>246</sup> The 2012 list did not include any references to eminent domain reform.<sup>247</sup> A sponsor of the amendment, Delegate Rob Bell, stated that the groups that traditionally support the interest of ethnic and racial minorities, the elderly, or the indigent were silent on the reform measures.<sup>248</sup>

#### *V. Proposing a Stronger, More Inclusive Model*

This Note asserts that while Virginia has seemingly been successful in its post-*Kelo* eminent domain reform measures, the state's legislative actions exhibit a flawed model.<sup>249</sup> In furthering its assertion that Virginia's model for reform should be improved upon, this Note proposes that for reform that is inclusive, understandable, and accessible, those who are advocating for it must encourage involvement among those who have been most affected.<sup>250</sup> Reform is not successful because it simply becomes law; to be successful reform must include those most affected and be responsive to their needs.<sup>251</sup> Those advancing reform in states contemplating post-*Kelo* legislative actions would be well advised to solicit the advocacy and

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245. *See id.* (showing that these groups took no efforts to lobby the General Assembly for the eminent domain amendment).

246. *See AARP Is Fighting for You at the Virginia General Assembly*, AARP, <http://www.aarp.org/politics-society/advocacy/info-01-2012/fighting-for-you-val788.html> (last visited Sept. 9, 2012) (showing AARP's legislative priorities for 2012).

247. *See id.* (showing that the eminent domain amendment is not listed as a priority for the AARP in 2012).

248. *See* Telephone Interview with Delegate Robert Bell, Member, Virginia House of Delegates (Feb. 18, 2012) (on file with the WASH. & LEE J. CIVIL RTS. & SOC. JUST.) (explaining that the AARP, the NAACP, and other groups that regularly advocate for the interests of ethnic and racial minorities, the elderly, and the indigent did not lobby or advocate for any of the Virginia eminent domain measures).

249. *See* discussion *supra* Part IV.C (discussing the flaws in the Virginia model for eminent domain reform).

250. *See infra* notes 268–98 and accompanying text (discussing proposals to better eminent domain reform).

251. *See* discussion *supra* Part IV.C (discussing that reform in Virginia included measures that were not specific to those most affected).

political support of those most statistically affected by eminent domain before passing remedial measures.<sup>252</sup>

There are several reasons why the support of these disproportionately affected groups matter. First, those proposing reform may need the votes of those representing the disproportionately affected, in order to have the majorities necessary for the bills to be enacted.<sup>253</sup> In Virginia, the Republicans who supported reform were able to garner enough votes from certain Democrats to pass the 2007 and 2012 bills and the pass the 2011-12 amendment.<sup>254</sup> However, in 2012, the amendment barely passed the Senate, 23-17.<sup>255</sup> While Virginia had the votes necessary to push the amendment against the will of members representing disproportionately affected groups, other states may not have a similar luxury, and support from these key groups may be critical to get reform measures passed.<sup>256</sup>

Second, the uniting of diverse political interests in support of eminent domain draws attention to property rights.<sup>257</sup> This increase in attention leads to greater advocacy. The *Kelo* controversy spurred support from both the political right and left.<sup>258</sup> In part, it was this uniting of the constitutionalists with the minority interests that attracted so much attention to *Kelo*.<sup>259</sup> When seemingly diverse interests aligned, more people became interested in property rights, a topic that, prior to *Kelo*, was previously

252. See discussion *supra* Part III.B (stating that statistically ethnic and racial minorities, the elderly, and the indigent have historically been most adversely affected by the broadening of the Public Use Clause).

253. See *supra* notes 235–37 accompanying text (explaining that the amendment nearly failed in the Senate of Virginia in 2012).

254. See discussion *supra* Part IV.C (noting that in both 2011 and 2012 the majority of support for the amendment came from Republicans in both houses and that the bills were primarily patroned and co-patroned by Republicans).

255. See *supra* notes 235–37 and accompanying text (showing that in 2012 the amendment barely passed the Senate of Virginia).

256. See *2010 Post-Election Control of Legislatures*, NATIONAL CONFERENCE OF STATE LEGISLATURES, <http://www.ncsl.org/legislatures-elections/elections/2010-postelection-control-of-legislatures.aspx> (last visited Sept. 9, 2012) (showing those states in which the legislatures are controlled by Republicans, Democrats, and those states where legislative control is split) (on file with WASH. & LEE J. CIVIL RTS. & SOC. JUST.).

257. See EPSTEIN, *supra* note 11 and accompanying text (stating that the uniting of strange bedfellows brought attention to *Kelo*).

258. See *supra* note 12 and accompanying text (showing those groups that supported the Petitioner in *Kelo*).

259. See Gillespie, *supra* note 12 (explaining the seemingly unlikely political alliances that were formed as a result of the publicity surrounding *Kelo v. City of New London* generated more publicity for the case).

politically stagnant.<sup>260</sup> In Virginia, the amendment attracted media attention as the interests of groups such as the Virginia Farm Bureau were at odds with interests such as those of the Virginia Municipal League.<sup>261</sup> States contemplating future reform should not just focus on gaining the support of conservative groups, but should also acquire support from groups that commonly represent the needs of ethnic and racial minorities, the elderly, and the indigent such as the AARP and the NAACP. The fusion of these diverse groups will naturally draw more attention and support to property rights issues.<sup>262</sup>

Third, by including those most affected in process, those advocating reform greatly increase the strength of their lobbying ability. In Virginia there was not any professional lobbying for eminent domain reform on behalf of ethnic and racial minorities, the elderly, and the indigent.<sup>263</sup> Advocacy groups like the Farm Bureau lobbied for the constitutional amendment, but their political voice would have been stronger had they been joined by groups representing those who have been most affected by eminent domain.<sup>264</sup> Strong lobbying also reminds legislators that, even after *Kelo*, the public still cares about the property rights.<sup>265</sup> In Virginia some legislators who represented minority-majority districts felt that eminent domain reform was not an issue of importance to their constituencies.<sup>266</sup> This problem could be remedied if those who have been most affected effectively lobby their legislators. In the future, states considering reform should recognize that including those most affected in the reform process greatly strengthens the lobbying effort.

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260. See EPSTEIN, *supra* note 11 at 3 (demonstrating the decade long complacency with property rights had ended).

261. See Theis, *supra* note 241 (demonstrating that lobbying efforts supporting and opposing reform and the media attention resulting from those efforts).

262. See Gillespie, *supra* note 12 and accompanying text (demonstrating that the uniting of diverse groups draws attention to reform).

263. See *supra* note 248 and accompanying text (stating amendment patron Rob Bell noting that those who commonly lobby for concerns of ethnic and racial minorities, the elderly, and the indigent were not active in the reform process).

264. See *infra* note 274 and accompanying text (stating the support of the Virginia Farm Bureau in lobbying for the amendment in Virginia).

265. See *infra* note 291 and accompanying text (stating that Virginia Delegate Lionell Spruill Sr. thinks that most of his constituents feel as though eminent domain takings are no longer a major race issue that constituents are concerned with).

266. See *id.* (stating that Virginia Delegate Lionell Spruill Sr. felt as though eminent domain reform was not a major issue for his constituents).

Fourth, the inclusion of those most affected by eminent domain in the legislative process could make the reform laws more effective. Virginia passed legislation in 2012 to allow for lost access and business losses to be compensable as parts of just compensation.<sup>267</sup> While the lost access issue may be of importance for those most affected by the broadening of the Public Use Clause, it is doubtful that lost business uses are particularly meaningful. There are issues and remedies that could be of importance to those most affected that were not considered in Virginia because those most affected were not active in the reform process.<sup>268</sup> Once those who are most affected, are participating in the reform process, they can easily share their ideas on how to protect both public use and just compensation.

#### A. Education

This Note proposes that education is the first step in successfully reuniting *Kelo's* strange bedfellows. In building a broad cross-section of support for eminent domain reform, this Note offers that a few key realities must be addressed. Compared to many issues that are lobbied for on the state level by ethnic and racial minorities, the elderly, and the indigent, eminent domain reform could be seen as esoteric or recondite.<sup>269</sup> In explaining how complex the concept of property is, property law scholar Richard Pipes wrote, “discussions of property from the time of Plato and Aristotle to the present have revolved around four principle themes: its relation to politics, ethics, economics, and psychology.”<sup>270</sup> Even at a base level property rights are opaque.<sup>271</sup> With property rights reform, there is both mass general ignorance and mass confusion.<sup>272</sup> Recent survey data to

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267. See *supra* note 200 and accompanying text (showing that in 2012 Virginia passed laws to allow for business losses and lost access to be compensable under just compensation).

268. See discussion *infra* Part III.C (discussing how the issues of those most affected were not communicated in the Virginia reform process).

269. See *infra* note 270 and accompanying text (stating that concepts are property rights are conceptually difficult to grasp).

270. See RICHARD PIPES, PROPERTY AND FREEDOM 4 (Vintage Books 1st ed. 2000) (stating that there are traditionally four themes in viewing property rights).

271. See *id.* (showing that the conceptualization of property rights involves understanding of various academic disciplines).

272. See Somin, *supra* note 10 (“The ineffectiveness of post-*Kelo* reforms is part caused by public ignorance.”).

show that “only 13% of Americans know whether their state has enacted a post-*Kelo* eminent domain reform law and whether that law is likely to be effective or not.”<sup>273</sup>

This situation, in which people are historically affected by an issue that is not understood, invites education. There are very concrete simple solutions to remedy these situations of ignorance and confusion. Those interested in reform should speak at local meetings and meet with decision makers of the groups most statistically affected, prior to the measures coming before the legislatures. They should also share with those individuals and groups the arguments made in the amicus brief by the NAACP and AARP in 2005. The section of the Justice Thomas’s dissent addressing these issues should be disseminated. In addition, those interested in reform should find abusive takings cases within the state in which they are advocating reform and have the victims of those takings speak with these advocacy groups. Former Virginia State Senator, now Attorney General, Ken Cuccinelli, a major advocate of post-*Kelo* reform, successfully met the Farm Bureau to educate its members on the eminent domain issues and how they could lobby for reform in Virginia.<sup>274</sup> In the future this type of action needs to be taken with those most affected as well.

### *B. Lobbying Efforts*

Having a strong lobby for reform is not only a benefit of the fusion of *Kelo*’s bedfellows, it also a step in further uniting diverse political entities. When those interested in eminent domain reform think about the state legislative process, it must be remembered that eminent domain is one of many diverse issues that must be addressed and voted on in a very short amount of time. Since eminent domain is not addressed every year, it is a mistake to assume legislators comprehensively understand the issue. Often state legislative sessions are truncated.<sup>275</sup> In Virginia, in odd years the

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273. *See id.* (explaining that large majorities of people surveyed do not know if their state has passed post-*Kelo* reform).

274. *See Virginia Growers Continue to Push for Eminent Domain Reform*, SOUTHEAST FARM PRESS, Feb. 2, 2012, <http://southeastfarmpress.com/government/virginia-growers-continue-push-eminent-domain-reform> (last visited Sept. 9, 2012) (demonstrating Attorney General Ken Cuccinelli encouraging the Farm Bureau to lobby for eminent domain reform in Virginia) (on file with WASH. & LEE J. CIVIL RTS. & SOC. JUST.).

275. *See* VA. CONST. art. IV, § 6 (stating that the legislative sessions may be truncated). The Virginia Constitution states:

session lasts for only thirty days, in even years, when the General Assembly is tasked with proposing a state budget, the session lasts for 60 days.<sup>276</sup> In the 2012 Virginia General Assembly session there were 2,698 pieces of legislation offered that each house considered in 60 days or roughly 45 bills per day.<sup>277</sup> Given the number of bills that come before the legislature and the complexity of many of these bills, members do not have the time to grasp the complexities of all these issues.<sup>278</sup> Therefore, arguments on behalf of reform should be made on behalf of those most affected before the session starts so that members can encourage other members to support such reform. Once the session starts, lobbying groups should regularly try to inform members that reform is an important issue given the history of eminent domain. As Attorney General Cuccinelli recommended to the Farm Bureau,<sup>279</sup> once the session has started, those supporting reform should lobby at the state house. In encouraging advocacy in Virginia, Cuccinelli stated that, “There is no substitute to being present . . . e-mails don’t compare to a good, solid handshake.”<sup>280</sup> These are simplistic steps at encouraging inclusive comprehensive reform, but these actions were not taken in Virginia by those most statistically affected.<sup>281</sup>

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Except as herein provided for reconvened sessions, no regular session of the General Assembly convened in an even-numbered year shall continue longer than sixty days; no regular session of the General Assembly convened in an odd-numbered year shall continue longer than thirty days; but with the concurrence of two-thirds of the members elected to each house, any regular session may be extended for a period not exceeding thirty days.

*Id.*

276. *See id.* (stating the number of days in a session of the Virginia General Assembly).

277. *See generally* Virginia General Assembly: Legislative Information System, <http://leg1.state.va.us/cgi-bin/legp504.exe?121+men+BIL> (last visited Sept. 9, 2012) (showing that in the 2012 session of the Virginia General Assembly 2,698 pieces of legislation were offered) (on file with WASH. & LEE J. CIVIL RTS. & SOC. JUST.).

278. *See id.* (showing the number of bills taken up by either body on a given day).

279. *See supra* note 274 and accompanying text (showing Attorney General Cuccinelli instructing the Farm Bureau on how to lobby in Virginia).

280. *See id.* (showing Cuccinelli not just encouraging the group but instructing them on how to advocate).

281. *See discussion infra* Part III.C (discussing how those who are most affected by the broadening of the Public Use Clause did not participate in reform in Virginia).

*C. Co-Patrons*

Another way to build broad support would be to have major eminent domain bills offered by diverse sponsors. In Virginia, in 2012, the amendment was carried by conservative State Senator Mark Obenshain in the Senate and conservative Delegate Rob Bell in the House of Delegates.<sup>282</sup> By contrast, on February 28, 2012, the House of Representatives again proved the power of “strange bedfellows” aligning as that body passed an eminent domain measure that was sponsored by an African-American Democrat, Maxine Waters, and a white Republican, Jim Sensenbrenner.<sup>283</sup> Representative Sensenbrenner stated, “This is a Sensenbrenner-Waters bill. You will never see another Sensenbrenner-Waters bill, and that is probably one of the best reasons to vote in favor of it.”<sup>284</sup> True to the strength of the “strange bedfellows” idea, Representative Waters stated that she supported the measure because she thought it would be beneficial to the poor and to those most affected by the *Kelo* decision.<sup>285</sup> Similar to the reasons given by the NAACP for opposing a widening of the Public Use Clause, Representative Waters added, “The government now has license to transfer property from those with fewer resources to those with more. The founders cannot have intended this perverse result.”<sup>286</sup> Excluding the fact that Virginia voted on its amendment February 13, 2012 and the House of Representatives acted on its legislation February 28, 2012, the House provided an example of “strange bedfellows” uniting that Virginia should have followed.<sup>287</sup>

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282. See S.J. 3, 2012 Gen. Assemb., Reg. Sess. (Va. 2012), <http://leg1.state.va.us/cgi-bin/legp504.exe?121+vot+SV0393SJ0003+SJ0003> (last visited Sept. 9, 2012) (showing Senator Mark Obenshain as the patron of the Senate version of the amendment) (on file with WASH. & LEE J. CIVIL RTS. & SOC. JUST.); H.J. 3, 2012 Gen. Assemb., Reg. Sess. (Va. 2011), <http://leg1.state.va.us/cgi-bin/legp504.exe?121+vot+HV0666+HJ0003> (last visited Sept. 9, 2012) (showing Delegate Robert Bell as the patron of the House version of the amendment) (on file with WASH. & LEE J. CIVIL RTS. & SOC. JUST.).

283. See Pete Kasperowicz, *House Votes to Overturn Supreme Court Decision on Eminent Domain*, THE HILL'S FLOOR ACTION BLOG, Feb. 28, 2012, <http://thehill.com/blogs/floor-action/house/213129-house-votes-to-overturn-supreme-court-property-rights-decision> (last visited Sept. 9, 2012) (showing that the United States House of Representatives passed a reform bill that was sponsored by a African-American Democrat and a white Republican) (on file with WASH. & LEE J. CIVIL RTS. & SOC. JUST.).

284. See *id.* (showing the value of diverse political interests working together for eminent domain reform).

285. See *id.* (stating the reasons why Rep. Waters supported eminent domain reform).

286. See *id.* (showing Representative Waters identifying those concerns previously

*D. Reviving the 2005 Arguments*

Strong reforms include being able to understand and respond to the opposition's arguments. This Note has explained that those most affected by reform were active in expressing opposition to *Kelo*. The question becomes: Why were these groups opposed to reform in Virginia? There are a few possible answers to this question. First, there is the pragmatic answer, which was often written about in Virginia newspapers.<sup>288</sup> The argument is that eminent domain reform is harmful to the localities.<sup>289</sup> It raises the costs of projects, it burdens the locality's ability to grow economically, and it hampers the town's desire to eradicate unsightly blight.<sup>290</sup> These issues are of specific importance to African-American legislators representing minority-majority communities, because they often represent urban areas.<sup>291</sup> Additionally, while it is clear that takings had a regrettable negative impact on African-Americans, some African-American legislators believe that the era of takings based on racial discrimination has passed.<sup>292</sup> Anecdotally, African-American leaders may not feel that the racial threat is still prevalent, regardless of statistics or the language of the NAACP dissent in *Kelo*.<sup>293</sup>

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identified by the NAACP-AARP brief as reasons for supporting reform).

287. See discussion *infra* Part IV.C (showing that in Virginia there was never an alignment of the political forces as there was in the United States House of Representatives).

288. See Michael Theis, *Eminent Domain Changes Spook Cities*, THE FREDERICKSBURG PATCH, Nov. 28, 2011, <http://fredericksburg.patch.com/articles/eminent-domain-changes-spook-cities> (last visited Sept. 9, 2012) (demonstrating the arguments made by groups such as the Virginia Municipal League that eminent domain reform could be infrastructure improvements more costly for localities) (on file with WASH. & LEE J. CIVIL RTS. & SOC. JUST.).

289. See *id.* ("The Virginia Municipal League, which lobbies on behalf of Virginia's 38 independent cities, say the proposed amendment is unnecessary and could lead to frivolous lawsuits and more costly public improvements.").

290. See *id.* (stating the arguments against eminent domain reform).

291. See *Commonwealth of Virginia Division of Legislative Services*, REDISTRICTING 2010, <http://redistricting.dls.virginia.gov/2010/> (last visited Sept. 9, 2012) (showing that the majority of minority-majority districts in the Virginia encompass urban areas) (on file with WASH. & LEE J. CIVIL RTS. & SOC. JUST.).

292. See Telephone Interview with Delegate Lionell Spruill Sr., Member, Virginia House of Delegates (Jan. 5, 2012) (on file with the on file with the WASH. & LEE J. CIVIL RTS. & SOC. JUST.) (stating that racial takings are no longer considered to be the issue they once were).

293. See *id.* (stating that Delegate Lionell Spruill Sr. does not think that Virginia is still in a period where there are massive race-based takings).

These theoretical explanations for why reform was not advocated for in Virginia by those most affected fail to address the reality that the arguments made in the amicus brief simply were not offered during the reform process in Virginia.<sup>294</sup> The amicus brief provides a structural roadmap for advancing arguments that should be addressed in the future by states considering reform.<sup>295</sup> The amicus brief and Justice Thomas's dissent both make clear that: 1) A broad reading of the Public Use Clause disproportionately affects ethnic and racial minorities, the elderly, and the indigent and 2) When a taking affects a member of one of those groups the degree of impact from the taking is greater.<sup>296</sup> In the future, those proposing eminent domain reform should rely on the arguments made in the NAACP Brief and the arguments made by Justice Thomas to counter any opposition.

#### *E. New Proposals*

In order for reform to be exhaustive, a variety of interests must be addressed. In the future, when states consider eminent domain reform, this Note argues that it would be most effective to hear the concerns of those most affected. The concerns of those disproportionately impacted may be vastly different from those proposing reform legislation.<sup>297</sup> In the second round of reform in Virginia, the state took steps to make access and business losses compensable.<sup>298</sup> While access losses may be beneficial to members of disproportionately affected groups, it is doubtful that the compensability of future business losses will have a significant impact. This Note does not argue against making business losses compensable, it simply

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294. See discussion *supra* Part IV.C (stating that those who traditionally represent the interests of minorities, the indigent, and the elderly were not part of the reform process in Virginia).

295. See discussion *supra* Part III.C (showing the NAACP Amicus Brief outlines the harms the widening of the Public Use Clause has had on ethnic and racial minorities, the indigent, and the elderly).

296. See discussion *supra* Part III.C (showing the harm and degree the widening of the Public Clause has on those most affected); see *supra* note 138 and accompanying text (stating how Justice Thomas assumes an increasing in the widening of the Public Use Clause will have a detrimental effect on those already most affected by eminent domain).

297. See *supra* note 19 and accompanying text (showing that in 2012 Virginia proposed legislation to allow for future business losses to be compensable).

298. See *id.* (showing that in 2012 Virginia proposed legislation to allow for lost access and business losses to be considered for just compensation).

points out that these are losses that are not of particular relevance to those most affected.

If a state were to engage in reform and would include those most affected, in addition to the compensability of these losses, a state could entertain the issue of allowing for attorney's fees to be compensable in eminent domain litigation. The provision for attorney's fees would have a direct impact on these vulnerable groups, because without them, a just compensation award is not truly just, as attorney's fees must be subtracted from whatever the jury determines as the value of the property. If the party subject to the take hires a lawyer on a one-third contingency fee, his actual gross award will be inevitably less than what is just. However, if the party subject to the take does not retain an attorney, they could be left with an offer far less than just compensation minus attorney's fees.

Where there are only so many eminent domain lawyers in an area, there is a certain level of economy in the cases they take.<sup>299</sup> Where property values are lower, the attorney has less of an incentive for taking the case. These are the type of problems that could be raised if those most historically affected by takings were involved in the solution process. The issue is not *per se* whether Virginia should have included business takings and should be discussed in reform. The fact that Virginia passed reform without even considering such ideas proves that the Virginia model is flawed. Takings issues had affected certain groups more than others for specific reasons. Therefore, those most subject to takings should be instrumental in the reform decisions.

## VI. Conclusion

After the *Berman-Midkiff-Kelo* trilogy whittled away the Fifth Amendment Public Use Clause to what Justice Thomas called a "virtual nullity,"<sup>300</sup> Virginia and forty-one other states then passed various forms of state eminent domain reform.<sup>301</sup> The legislative action in Virginia is

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299. See generally OWNERS' COUNSEL OF AMERICA, <http://www.ownerscounsel.com/> (last visited Sept. 9, 2012) (showing the number of attorneys who exclusively practice eminent domain law in certain states).

300. See *Kelo v. City of New London, Conn.*, 545 U.S. 469, 506 (2005) ("Today's decision is simply the latest in a string of our cases construing the Public Use Clause to be a virtual nullity, without the slightest nod to its original meaning.").

301. See Somin, *supra* note 10 (explaining that forty-two states have enacted legislation protecting property rights after 2005).

laudable as the state distinguished itself as the only state to resist comparatively weak reactionary reform, pass strong comprehensive reform, and then pass both a constitutional amendment protecting eminent domain and additional legislation that better ensured just compensation.<sup>302</sup> With all of its success, Virginia missed a golden opportunity to include those who have been most impacted by eminent domain in its reform measures.<sup>303</sup> In the future states should not follow the Virginia model, but instead, should unite the “strange bedfellows” that were brought together by *Kelo*. In order for future state action to be truly successful, the legislative reform process cannot forsake the voices of those most affected.

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302. See discussion *supra* Part IV.B (discussing Virginia’s comparative legislative successes).

303. See discussion *supra* Part IV.C (discussing weaknesses in the Virginia model).