Why Kelo Is Not Good News for Local Planners and Developers

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WHY KELO IS NOT GOOD NEWS FOR LOCAL PLANNERS AND DEVELOPERS

Daniel H. Cole*

INTRODUCTION

On June 23, 2005, the U.S. Supreme Court decided the case of *Kelo v. City of New London* and all hell broke loose.¹ The political controversy that erupted around *Kelo* took legal scholars by surprise. After all, the decision did not significantly alter eminent domain doctrine; the Court simply followed well-established precedents. But Justice O‘Connor’s hyperbolic dissent inflamed property rights advocates, media pundits, and state and federal legislators, who assailed *Kelo* as the death knell for private property rights.²

*Kelo*’s combination of relative legal insignificance and high political salience makes it an interesting case study in cross-institutional dynamics—how political, legal, and social forces combine and recombine to determine the content of our laws. In this case, we have a judicial decision that has generated a political controversy and is leading to legislative changes in the law. Those legislative changes will, in turn, affect future court decisions. Such cross-institutional effects are not particularly unusual. They are a distinguishing feature of landmark cases (think, for example, of *Brown v. Board of Education*³ or *Roe v. Wade*⁴). But *Kelo* is not a landmark case, Justice O‘Connor’s claims to the contrary notwithstanding. It neither creates a new legal rule nor significantly expands an old one. Relying entirely on precedent, it is a legally

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¹ 125 S. Ct. 2655 (2005).
² See infra Part II.

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conservative decision, which makes its political reception all the more surprising and interesting.

The primary purpose of this Article is to explore the aftermath of *Kelo*—particularly the strident media criticism of the Court and the political response to that criticism—as a socio-legal phenomenon, which is perhaps more important than the Supreme Court's ruling itself. By addressing the political and legislative aftermath of *Kelo*, we can understand why the Supreme Court's decision in the *Kelo* case ultimately is not good news for local planners and developers. Because of *Kelo* and its aftermath, local planners and developers are likely to find it significantly more difficult to engage in urban redevelopment throughout the United States.

This Article also has a secondary purpose, which is to place *Kelo* and its political reception within a larger comparative institutional context—a context I explore at length in another article, *Political Institutions, Judicial Review, and Private Property: A Comparative Institutional Analysis*. American jurists traditionally have assumed, often quite casually, that if the courts did not diligently protect private property rights, political institutions would quickly and thoroughly erode those rights. However, *Kelo* and its aftermath support the proposition that political bodies, as well as courts, protect private property rights. Indeed, those political bodies sometimes are substantially more protective of property rights than the courts.

Part I of this Article reviews the *Kelo* case in the context of previous Supreme Court rulings on eminent domain and public use. Part II explores the political controversy *Kelo* spawned and its legislative consequences, up to the end of January 2006. Based on those consequences, Part III explains how *Kelo* and its aftermath support positive political-economic theories concerning the political protection of private property rights. The Article concludes with predictions about *Kelo*'s legacy for private property owners, municipal planners, and developers.

I. THE KELO CASE

A. Background: Urban “Blight,” Redevelopment Plans, and Suzette Kelo’s Home

The City of New London, the second smallest municipality in the State of Connecticut, is situated on Long Island Sound at the mouth of the Thames River. Founded by John Winthrop and other settlers from the Massachusetts Colony in 1646, New London was at one time a center for the whaling industry. When New Londoners depleted the whale stocks, they turned to manufacturing. Before the Kelo case, the city’s greatest claim to fame may have been that Benedict Arnold’s troops burned it down in 1781.

Like many other old industrial cities in New England, New London has struggled economically in recent decades. According to the 2000 census, median household income in New London was $33,809, 20% below the national average. New London’s unemployment rate, at 7.6%, is nearly double the state-wide rate of Connecticut. As jobs have left New London, people have left with them. By the Kelo litigation in 2004, the population of New London had fallen to less than 24,000, the city’s smallest population since 1920, from a high of 34,182 in 1960. When New London’s economic base declined, the city deteriorated physically, a problem that is associated with “urban blight.” In 1990, the State of Connecticut officially designated New London a “distressed

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8. Brief of the Respondents, supra note 7, at 1.
9. ePodunk, supra note 6.
11. ePodunk, supra note 6.
Six years later, New London’s economic distress increased when the Navy closed its Naval Undersea Warfare Center (NUWC) on the Fort Trumbull peninsula (Figure 1), putting another 1,500 people out of work. It was in this historical and economic context that New London undertook to redevelop the City’s waterfront area near historic Fort Trumbull. In 1998, Pfizer Pharmaceuticals announced plans to build a $300 million research facility in the Fort Trumbull neighborhood.

Pfizer’s announcement gave impetus to New London’s efforts to redevelop the adjacent area. In April 1998, the New London City Council authorized the New London Redevelopment Corporation (NLDC), a private, non-profit corporation (with no independent

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15. Brief of the Respondents, supra note 7, at 1.
16. Id. at 2.
18. Id.
power of eminent domain), to plan and oversee redevelopment of the 
Fort Trumbull neighborhood. Initially created in 1978, the NLDC 
was reconstituted in 1997 specifically to assist the City of New 
London in planning for redevelopment of the 32-acre site formerly 
occupied by the NUWC.

After six public meetings, held between April and November of 
1998, and preparation of environmental impact and economic 
evaluations in accordance with Connecticut state law (both 
completed in 1998), NLDC staff issued a draft Fort Trumbull 
Municipal Development Plan ("the plan") in August 1999. The plan 
included retail, commercial, and residential properties; a waterfront 
hotel; conference center; marina; museum; and other public 
amenities. NLDC expected the plan to create between 1,736 and 
3,169 jobs and to generate as much as $1.25 million in tax revenues 
for the city. The NLDC Board formally adopted the plan on January 
18, 2000. The New London City Council approved the plan the 
same day and "authorized the NLDC to acquire the properties located 
in the plan area, by eminent domain if necessary." Funding for the 
project came primarily from the State of Connecticut, which 
contributed $78 million, although the City of New London 
contributed $4 million, and the federal government devoted $2 
million to the project.

Before redevelopment could begin, the NLDC had to assemble into 
a single parcel and purchase the entire 90-acre area of land. It 
acquired 98% of the land by voluntary agreement with prior 
owners. However, nine owners of 15 properties, comprising a total 
of only 1.54 acres of land, almost half of which were kept for

20. Id. at 3.
22. Brief of the Respondents, supra note 7, at 4-6.
23. Id. at 6, 7.
24. Id. at 8.
25. Id. at 9.
26. Id. At this point, the NLDC became, in the words of Justice Stevens, "the city's development 
investment or commercial purposes, refused to sell.\textsuperscript{29} Their holdout did not prevent the first stages of redevelopment from proceeding.\textsuperscript{30} By mid-2001, the NLDC had completed $12 million in infrastructure work, including street and sidewalk improvements, new water, sewer and utility lines, and extensive landscaping.\textsuperscript{31} In addition, the city and state made substantial improvements to the neighborhood’s wastewater treatment facility.\textsuperscript{32} Meanwhile, the NLDC engaged in months of unsuccessful negotiations with the nine property owners.\textsuperscript{33} Finally, in November 2000, the NLDC filed lawsuits to condemn the properties by eminent domain and placed $1.6 million into escrow as compensation.\textsuperscript{34} The nine property owners, including the eponymous Susette Kelo, sued to prevent the taking.\textsuperscript{35} Ms. Kelo had owned her home (Figure 2) since 1997.\textsuperscript{36} Another of the plaintiffs, Wilhelmina Dery, had lived in her house in the Fort Trumbull neighborhood since 1918, her entire life.\textsuperscript{37} The city did not allege that the properties at issue were “blighted or otherwise in poor condition.”\textsuperscript{38}
Figure 2. Susette Kelo’s home (in front of the Pfizer Pharmaceutical campus). Reprinted with permission from Tim Martin and THE DAY (New London, Conn.).

At trial, the plaintiffs argued that the public use requirement of the U.S. Constitution’s Fifth Amendment prohibited the City of New London from using its eminent domain power to transfer property from one private owner to another preferred private owner. After losing at trial and on appeal to the Connecticut Supreme Court, the plaintiffs petitioned the U.S. Supreme Court for certiorari, which the Court granted on September 28, 2004.

39. Id
40. Kelo v. City of New London, 843 A.2d 500 (Conn. 2004) There were three dissenters from the Connecticut Supreme Court’s ruling Id at 500
B. The Supreme Court Decision in Kelo

1. Justice Stevens's Majority Opinion

The Supreme Court heard oral arguments in Kelo on February 22, 2005 and decided the case on June 23, 2005. In a 5-4 decision, the Court ruled that the City of New London's exercise of eminent domain qualified as a valid public use under the Fifth Amendment to the Constitution. Writing for the majority, Justice Stevens based the Court's decision in Kelo almost entirely on previous Supreme Court decisions such as Berman v. Parker, Hawaii Housing Authority v. Midkiff, and Ruckelshaus v. Monsanto Co., as well as many state supreme court eminent domain decisions. Together, those cases clearly establish that "[p]romoting economic development is a traditional and long accepted function of government." Berman, for example, upheld a plan to redevelop a blighted part of Washington, D.C., which involved taking by eminent domain an unblighted department store. In Midkiff, the Court approved the taking of land from a small group of oligopolists in order to create a functional, modern land market. In Monsanto, the Court upheld federal pesticide legislation that permitted the taking of trade secrets upon compensation in order to eliminate barriers to entry in pesticide markets. Other Supreme Court decisions endorsed takings designed to promote mining and agriculture because of the perceived importance of those industries to the welfare of the states involved in those cases. Thus, in the majority's view, it was well-settled law

43. Id. at 2657, 2658.
44. 348 U.S. 26 (1954).
47. See Kelo, 125 S. Ct. 2655.
48. Id. at 2665.
50. See Midkiff, 467 U.S. 229.
51. See Monsanto, 467 U.S. 986.
52. See Strickley v. Highland Boy Gold Mining Co., 200 U.S. 527 (1906); Fallbrook Irrigation Dist. v. Bradley, 164 U.S. 112, 161-62 (1896). Numerous state supreme court rulings similarly upheld the use of eminent domain for economic development projects, such as railroads and canals. See, e.g., James Ely, Can the "Despotic Power" Be Tamed? Reconsidering the Public Use Limitation on Eminent
That the Public Use Clause did not require the land be "put into use for the general public."\textsuperscript{53} Of course, the government cannot simply take land from one private individual and give it to another preferred individual; there must be some reasonably substantial and specifiable public purpose to or public benefit from the taking.\textsuperscript{54} But as long as the political body exercising the power of eminent domain has articulated a reasoned determination that the taking is for a public purpose or is otherwise in the public interest, the Court will not second-guess that determination, but content itself with ensuring that just compensation is paid.\textsuperscript{55} As Justice Stevens explained in \textit{Kelo}, "[f]or 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 takings power."\textsuperscript{56}

In \textit{Kelo}, according to the majority, the City of New London was not simply favoring one private owner over another. "[T]here was no evidence of an illegitimate purpose in this case. . . . [T]he City's development plan was not adopted 'to benefit a particular class of identifiable individuals.'"\textsuperscript{57} The plan might turn out to benefit some private individuals over others, but that alone does not invalidate it under the Public Use Clause, which does not require public ownership and control.\textsuperscript{58} The City of New London had made a reasonable determination that redevelopment of the Fort Trumbull neighborhood would substantially benefit the public, and taking Susette Kelo's home and other properties in the neighborhood with compensation was necessary to effectuate the city's comprehensive
development plans. The Court would not substitute its judgment for that of the elected representatives of New London.

Finally, it is worth noting that Justice Stevens, in his majority opinion in *Kelo*, expressly recognized the important role that political and legislative bodies play in limiting the exercise of eminent domain:

> We emphasize that nothing in our opinion precludes any State from placing further restrictions on its exercise of the takings power. Indeed, many States already impose "public use" requirements that are stricter than the federal baseline. Some of these requirements have been established as a matter of state constitutional law, while others are expressed in state eminent domain statutes that carefully limit the grounds upon which takings may be exercised. As the submissions of the parties and their amici make clear, the necessity and wisdom of using eminent domain to promote economic development are certainly matters of legitimate public debate. This Court's authority, however, extends only to determining whether the City's proposed condemnations are for a "public use" within the meaning of the *Fifth Amendment to the Federal Constitution*.60

2. *Justice O'Connor's Dissent*

It would be an understatement to say that Justice O'Connor, joined in dissent by Chief Justice Rehnquist and Justices Scalia and Thomas, took a very different view of this case than did the majority. Whereas the majority was certain that the case did not involve a simple transfer of private property rights from one private owner to another, Justice O'Connor began her dissent by characterizing the taking as

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59. In his concurrence, Justice Kennedy emphasized both the trial court's inquiry into whether the plan was intended to benefit private parties or the public, and the factual finding that the primary motivation was public rather than private. *Kelo*, 125 S. Ct. at 2669-70 (Kennedy, J., concurring).

60. *Id.* at 2668 (emphasis added) (citations omitted). Parts II and III of this Article will elaborate on Justice Stevens's important, and somewhat prescient, point about how the political process provides additional protections for private property beyond those provided by the Fifth Amendment.
accomplishing that precise end.\textsuperscript{61} Whereas the majority was certain that its ruling ensured that substantial legal and political\textsuperscript{62} protections against unjustified takings remained, Justice O’Connor was equally certain that the Court’s ruling left all private property “vulnerable to being taken and transferred to another private owner, so long as it might be upgraded.”\textsuperscript{63} Whereas the majority was certain that its decision broke no new legal ground but simply applied well-settled rules of law to the facts of a new case, Justice O’Connor was equally certain that the case presented “an issue of first impression,” in which the Court had chosen to “abandon[ ] [a] long-held, basic limitation on government power.”\textsuperscript{64} Whereas the majority was certain that the Public Use Clause retained substantial import after its ruling, Justice O’Connor was equally certain that the Court’s ruling “effectively . . . delete[d] the words ‘for public use’ from the \textit{Takings Clause of the Fifth Amendment}.”\textsuperscript{65}

It was something of a surprise and a puzzle that Justice O’Connor dissented from the Court’s decision in \textit{Kelo}. Twenty years earlier, she had authored the majority decision in \textit{Midkiff}, which upheld, in very broad language, the State of Hawaii’s land-redistribution program.\textsuperscript{66} In \textit{Midkiff}, she seemed to favor judicial restraint and deference to legislative determinations of the public interest every bit as strongly as Justice Stevens did in \textit{Kelo}. She wrote that the Court’s role in eminent domain proceedings is “‘an extremely narrow’ one.”\textsuperscript{67} Indeed, she noted that, “where the exercise of the eminent domain power is rationally related to a conceivable public purpose, the Court has never held a compensated taking to be proscribed by the Public Use Clause.”\textsuperscript{68} To the contrary, “the Court has made clear that it will not substitute its judgment for a legislature’s judgment as to what

\textsuperscript{61.} \textit{Kelo}, 125 S. Ct. at 2671 (O’Connor, J., dissenting).

\textsuperscript{62.} See supra note 60 and accompanying text; see also infra Parts II, III.

\textsuperscript{63.} \textit{Kelo}, 125 S. Ct. at 2671 (O’Connor, J., dissenting); see also id. at 2677 (“Today nearly all real property is susceptible to condemnation on the Court’s theory.”).

\textsuperscript{64.} Id. at 2671, 2673.

\textsuperscript{65.} Id. at 2671 (emphasis added).


\textsuperscript{67.} Id. at 240.

\textsuperscript{68.} Id. at 241 (citing Berman v. Parker, 348 U.S. 26 (1954); Rindge Co. v. L.A. County, 262 U.S. 700 (1923); Block v. Hirsh, 256 U.S. 135 (1921)).
constitutes a public use 'unless the use be palpably without reasonable foundation.' 69

However, Justice O'Connor sought to distinguish her opinion in Midkiff from Kelo based on a difference that went largely unnoticed until she pointed it out in her Kelo dissent. In Midkiff, Justice O'Connor and the Court expressly found that Hawaii's pre-existing land oligopoly in effect constituted a public nuisance justifying regulation: "Regulating oligopoly and the evils associated with it is a classic exercise of a State's police powers." 70 By contrast, there was no allegation in Kelo that the properties at issue violated the state's police powers. Justice O'Connor's dissent argued that the lack of any finding that "precondemnation use of the targeted property inflicted affirmative harm on society" made Kelo a very different case from all previous Supreme Court eminent domain rulings. 71 Thus, Kelo was, in the dissenters' view, a case of first impression—the first case in which the Supreme Court had occasion to determine whether economic development, without any finding that pre-existing uses were socially harmful, constituted a valid public use justifying an eminent domain taking. 72 By validating the City of New London's taking in this case, the Court was "moving away from our decisions sanctioning the condemnation of harmful property use," and "significantly expand[ing] the meaning of public use." 73 In Justice O'Connor's opinion, judicial deference should not extend so far as to allow legislatures to transfer ownership from one group of private owners to another simply by averring some conceivable public benefit. Rather, the courts needed to "maintain[] a role . . . in ferreting out takings whose sole purpose is to bestow a benefit on the private transferee." 74

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70. Id. at 242 (citing Exxon Corp. v. Governor of Md., 437 U.S. 117 (1978); P.R. v. E. Sugar Assoc., 156 F.2d 316 (1st Cir. 1946), cert. denied, 329 U.S. 772 (1946); Block v. Hirsh, 256 U.S. 135 (1921)).
72. See id. at 2673.
73. Id. at 2675.
74. Id. Justice Thomas, in addition to signing onto Justice O'Connor's dissent, filed a dissent of his own. Id. at 2677-87. He would have gone even further than Justice O'Connor in limiting the power of eminent domain to cases where the government itself would own or control the property, even though
To avoid such a consequence, Justice O’Connor and the other
dissenters would have made the eminent domain power not
coterminous or coextensive with the police power, as the Court had
ruled in previous cases, but dependent on the existence of a police
power violation or public nuisance. The majority referred to this
proposed theory as “novel” and declined to adopt it because,
contrary to Justice O’Connor’s suggestion, it did not serve to
distinguish Kelo from previous Supreme Court rulings. Justice
Stevens noted:

There was nothing “harmful” about the nonblighted department
store at issue in Berman, . . . nothing “harmful” about the lands
at issue in the mining and agriculture cases [cited supra note 52],
. . . and certainly nothing “harmful” about the trade secrets
owned by the pesticide manufacturers in Monsanto. . . . In each
case, the public purpose we upheld depended on a private party’s
future use of the concededly nonharmful property that was
taken.  

Justice O’Connor’s dissent argued weakly that, in Berman, the
“blight resulting from extreme poverty” constituted the public
harm, but as Justice Stevens stated, the condemned department
store in Berman was no more socially harmful than Susette Kelo’s
home. Moreover, Justice Stevens pointed to language in Berman that
justified condemnation of an entire neighborhood in order to ensure
orderly development. Finally, if “blight resulting from extreme

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75. See Midkiff, 467 U.S. at 240.
76. Kelo, 125 S. Ct. at 2666 n.16.
77. Id. Justice Stevens stated the majority’s focus on the property’s future use was “faithful to the
text of the Takings Clause.” Id.
78. Id. at 2674.
79. Id. at 2665 n.13. This point implicitly recognizes that the assembly of relatively large, contiguous
parcels of land for development or redevelopment often involves high transaction costs that can obstruct
voluntary market conveyances. See, e.g., Thomas W. Merrill, The Economics of Public Use, 72
CORNELL L. REV. 61, 74-76 (1986) (discussing the problem of land assembly and its relation to eminent
domain).
poverty” is sufficient public harm to justify condemnation under the Public Use Clause, then it remains for Justice O’Connor to explain precisely how New London’s economic distress was legally insufficient to justify eminent domain compared to the blight in Washington, D.C. Her distinction between *Kelo* and *Berman* appears to rest on an extremely slender reed.\(^80\)

In addition, Justice O’Connor grossly overstates *Kelo*’s significance by concluding that the Court’s decision puts all private property at risk from eminent domain takings. Given the majority’s extensive reliance on precedent—warranted by *Kelo*’s factual similarity to *Berman* and the broad language of Justice O’Connor’s own majority opinion in *Midkiff*—it seems unfair to blame *Kelo* alone for the Public Use Clause’s demise. Professor Thomas Merrill, who has strongly criticized the Court’s public use jurisprudence,\(^81\) suggests that *Kelo* may actually mark the beginning of a retreat from the extreme judicial deference shown in *Midkiff*.\(^82\) In that earlier case, as well as in *Berman*, the Court adopted a minimum rationality test—the most deferential level of judicial review—for determining whether eminent domain takings conform to the Public Use Clause.\(^83\) The *Kelo* majority did not mention or invoke rationality review:

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\(^80\) In this respect, Justice Thomas’s willingness to simply overrule *Berman*, *Midkiff*, and dozens of other precedents extending all the way back to the mid-19th century seems more principled, if less practical. See *supra* note 74 and accompanying text. Prior to Justice O’Connor’s retirement, the Court aligned 8-1 against Justice Thomas’s literal, but not necessarily correct, reading of the Public Use Clause. In his testimony before Congress on the *Kelo* case, Professor Thomas Merrill explained why a literal reading of the Public Use Clause may not accord with the original intent of the drafters of the Fifth Amendment. The *Kelo Decision: Investigating Takings of Homes and Other Private Property: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. (2005) (statement of Prof. Thomas W. Merrill, Charles Keller Beekman Prof. of Law, Columbia Univ.), available at http://judiciary.senate.gov/print_testimony.cfm?id=1612&wit_id=4661 [hereinafter *Merrill Testimony*]. But, as long as the Court is not prepared to overrule *Berman* and dozens of other cases, those cases remain significant precedents upon which the majority in *Kelo* could legitimately rely, especially given the strong similarity of the facts in *Kelo* and *Berman*. For reasons articulated by Justice Stevens, Justice O’Connor’s proposed public harm-based approach to eminent domain does not adequately distinguish those two cases. See *supra* note 77 and accompanying text.

\(^81\) See *Merrill*, *supra* note 79.

\(^82\) *Merrill Testimony*, *supra* note 80.

\(^83\) *Id.*
[T]he decision suggests that courts should carefully review condemnations that result in a private transfer of property, or are not carried out in accordance with some planning exercise, in order to determine whether the government is taking property "under the mere pretext of a public purpose, when its actual purpose was to bestow a private benefit." Justice Kennedy's concurring opinion makes explicit that the Court's decision upholding the condemnation in Kelo "does not foreclose the possibility that a more stringent standard of review than that announced in Berman and Midkiff might be appropriate for a more narrowly drawn category of takings." 84

Justice Kennedy's concurrence in Kelo also referred to the trial court's factual findings that the purpose of New London's use of eminent domain was primarily public, rather than private. 85 Both Justice Kennedy and Justice Stevens noted that even the three dissenters from the Connecticut Supreme Court's ruling, who would have preferred heightened review under a clear and convincing evidence standard, agreed that the plan served a valid public use. 86 Justice O'Connor and the other Supreme Court dissenters did not dispute these factual findings but insisted that they were legally insignificant:

[T]here is nothing in the Court's rule or in Justice Kennedy's gloss on that rule to prohibit property transfers generated with less care, that are less comprehensive, that happen to result from less elaborate process, whose only projected advantage is the incidence of higher taxes, or that hope to transform an already prosperous city into an even more prosperous one. 87

This may be true, but as Professor Merrill has noted, "the facts are set forth in the opinion for all to read, and provide a basis for

84. Id. (quoting Kelo, 125 S. Ct. at 2661, 2670).
85. Kelo, 125 S. Ct. at 2670.
86. Id. at 2661, 2670.
87. Id. at 2676-77 (O'Connor, J., dissenting).
distinguishing Kelo if in the future the Court decides (on some theory not yet articulated) that creation of jobs or tax revenues without more is insufficient to constitute a public use." As in Justice Kennedy's concurrence, Professor Merrill believes that Kelo satisfied the public use requirement, even under a more rigorous judicial test designed to prevent the potential abuses which concerned the dissenters.

On one point Justice O'Connor undeniably was correct: to the extent that local governments exercise eminent domain for purposes of redevelopment, wealth tends to be redistributed from poor to rich. "The beneficiaries are likely to be those citizens with disproportionate influence and power in the political process, including large corporations and development firms. As for the victims, the government now has license to transfer property from those with fewer resources to those with more." But any implication that the government did not have such license to make transfers prior to Kelo is simply false. Moreover, as Professor Merrill noted in his congressional testimony on Kelo, prohibiting eminent domain for economic development purposes may not be preferable for poor and minority communities because the effect would simply be to transfer economic development, and any resulting jobs, away from the inner city to "greenfields" on the outskirts of town. It is difficult, indeed, to see how Justice O'Connor's preferred nuisance-based test for eminent domain takings would improve the situation of poor communities. More likely, as Professor Merrill points out, such a rule

88. Merrill Testimony, supra note 80.
91. Merrill Testimony, supra note 80.
would serve mainly to reassure middle-class landowners, whose properties are relatively safe from a strictly defined blight designation.\footnote{92. \textit{Id.}}

Finally, whether or not one agrees with the substance of Justice O'Connor's dissent in \textit{Kelo}, or with her nuisance-based approach to determining public use, there is no denying the political significance of her dissent. Intentionally or not, Justice O'Connor's hyperbolic mischaracterization of the Court's decision in \textit{Kelo}—that it "significantly expands the meaning of public use," so that no takings are realistically excluded by the Public Use Clause,\footnote{93. \textit{Kelo}, 125 S. Ct. at 2675.} and "all private property is now vulnerable to being taken and transferred to another private owner, so long as it might be upgraded"\footnote{94. \textit{Id.} at 2671.}—has been at least partly responsible for setting off the fierce and, according to Professor Merrill,\footnote{95. \textit{Merrill Testimony}, supra note 80 (stating that the Court's decision in \textit{Kelo} "is unique in modern annals of law in terms of the negative response it has evoked"). Other cases, like \textit{Roe v. Wade}, may have been more controversial and socially divisive, but Professor Merrill might be right that \textit{Kelo} is unique in the combined strength and uniformity of its negative reception.} unprecedented political attacks on \textit{Kelo} and the Court.

II. \textit{Kelo}’s Aftermath: From Political Controversy to Legislation and Practical Action

A. Political Controversy

Fueled by Justice O'Connor's combustive rhetoric, \textit{Kelo} quickly became a swear word among property rights advocates, the news media, and even legislators who presumably stood to gain as a class from the Court's continuing deference to political determinations of eminent domain. Property rights groups, such as the Institute for Justice (which litigated the \textit{Kelo} case on behalf of Susette Kelo and the other plaintiffs), the Heritage Foundation, the Claremont Institute, and Defenders of Property Rights, lost no time in trumpeting Justice O'Connor's declaration that \textit{Kelo} placed all private property in the
United States at risk of imminent government taking for economic redevelopment; they labeled *Kelo* a travesty of justice.\(^9\) The case also spawned new political coalitions, such as Minnesotans for Eminent Domain Reform,\(^7\) to fight government abuses of eminent domain.

The attacks on *Kelo* came not just from the right, but from all points on the political spectrum.\(^8\) According to an article in the National Review, U.S. Representative Maxine Waters of Los Angeles—reputedly one of the most liberal members of Congress—responded to *Kelo* by asserting that "[g]overnment should be in the

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\(^7\) See Institute for Justice, *Historic and Diverse Coalition Calls for Eminent Domain Reform in Minnesota*, Jan. 5, 2006, [http://www.ij.org/private_property/castle/mnedr/1_5_06pr.html](http://www.ij.org/private_property/castle/mnedr/1_5_06pr.html) (describing the post-*Kelo* creation of "[a]n historic coalition of civil rights groups, religious leaders, trade associations, concerned citizens, and officials from Minnesota's major political parties" to support legislation reforming that state's eminent domain laws).

\(^8\) Not all commentators on the right expressed outrage at the Court's ruling in *Kelo*. See, e.g., John Hinderaker, *Second Thoughts on Kelo: A Proper Understanding of Property Rights Suggests That the Kelo Decision Wasn't So Bad After All*, WEEKLY STANDARD, July 5, 2005, available at [http://www.weeklystandard.com/Content/Public/Articles/000/000/005/779f26bf.asp](http://www.weeklystandard.com/Content/Public/Articles/000/000/005/779f26bf.asp). The attacks from more extreme opponents of *Kelo* were, perhaps, the most entertaining, if misguided. A Los Angeles property rights activist, Logan Clements, also known as the "Hotel Souter Man," devised a plan to take Supreme Court Justice David Souter's home in New Hampshire by eminent domain and turn it into a hotel, as punishment for Justice Souter's vote with the majority in *Kelo*. See, e.g., Todd Morrison, "Hotel Souter" Man Visits Weare; Clements Meets with Locals, Leaves Presents for Justice, UNION LEADER (Manchester, N.H.), Aug. 21, 2005, at A3; Benjamin Weyl, Activist Tries a Grab for Jurist's Property; A Foe of the High Court's Eminent Domain Ruling Wants to Apply It to Seize David H. Souter's Home, L.A. TIMES, June 30, 2005, at A10. Unfortunately (or, perhaps, fortunately for Justice Souter), Mr. Clements's effort reflects a complete misunderstanding of the Supreme Court's ruling in *Kelo*. Any effort to take the land from one individual and give it to another, without any determination that the land was blighted or distressed, and not pursuant to any general plan for development or redevelopment, certainly would not constitute a public use under current Supreme Court precedent. See, e.g., *Kelo*, 125 S. Ct. at 2661 ("[t]he sovereign may not take the property of A for the sole purpose of transferring it to another private party B, even though A is paid just compensation."); id. at 2666-67 ("[t]he Court further argued that without a bright-line rule nothing would stop a city from transferring citizen A's property to citizen B for the sole reason that citizen B will put the property to a more productive use and thus pay more taxes. Such a one-to-one transfer of property, executed outside the confines of an integrated development plan, is not presented in this case . . . . [S]uch an unusual exercise of government power would certainly raise a suspicion that a private purpose was afoot.").
business of protecting private property. . . . Private property is precious in America.” Representative Waters, along with fellow liberal Democrat John Conyers, co-sponsored a bill with conservative Republican James Sensenbrenner to deny federal funding to state and local projects that would use eminent domain for economic development. The backlash against Kelo has been multi-partisan.

Articles and editorials appeared in newspapers and magazines around the country and abroad blasting the Court’s ruling, often adopting the dissent’s rhetoric entirely, while ignoring the precedential basis for the majority’s decision. London’s Economist, for example, erroneously claimed that Kelo was not a traditional eminent domain case but “something different,” which “massively expanded the government’s power of eminent domain.” A columnist in the St. Petersburg Times wrote that “[t]he U.S. Supreme Court has basically handed a big pile of crack cocaine to every state and local government . . . and said, ‘[t]ry not to get addicted.’” The Virginian-Pilot referred to the ruling in Kelo as a “landmark” that “goes further than before in allowing the government to invoke its eminent domain and to seize private property from unwilling sellers.” A reporter for the Boston Globe wrote that Kelo “eviscerat[ed] . . . the Public Use clause.” In a similar vein, an editor for The San Diego Union-Tribune wrote that “a bare majority of the court recklessly rewrote two centuries of eminent domain practice.” In an opinion editorial for The Virginian-Pilot, U.S.


100. See Mike Allen & Charles Babbington, House Votes to Undercut High Court on Property, WASH. POST, July 1, 2005, at A01; see also infra Part II.B.3.


Representative Thelma Drake claimed that the Court "recklessly expanded" the definition of "public use," and suggested that *Kelo* authorized "arbitrary land grabs." Each of these authors either failed to read the majority opinion in *Kelo*, failed to understand it, or chose to ignore it. Many other media articles and editorials similarly misconstrued the gist and legal significance of the Court's ruling in *Kelo*. Only a few media outlets seemed to get it right. Fewer still endorsed the ruling.

It is unclear whether the media reaction to *Kelo* led or followed public opposition to the Court's ruling. Opinion polls verify, however, that *Kelo* is a deeply unpopular ruling. According to a Mason-Dixon Polling and Research poll of Florida residents, 74% of democrats, 75% of republicans, and 72% of independents disagreed with the Supreme Court's ruling, and 89% of voters favored legislation to provide greater protection to private property owners against eminent domain takings. A similar poll of Connecticut

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107. This is not to argue that criticism of *Kelo* is unwarranted, but that many of *Kelo*'s critics have, intentionally or otherwise, mischaracterized the ruling.


109. See, e.g., Editorial, *Eminent Latitude*, WASH. POST, June 24, 2005, at A30 (criticizing the ruling as unjust but recognizing that it was legally correct); Op-Ed, *Ruling Leaves Door Open to Abuse*, USA TODAY, June 24, 2005, at 14A (criticizing the ruling but understanding that the majority's decision was "rooted in high-court precedents over the past 50 years").


residents found that eight in ten followed the *Kelo* case closely and disagreed with the Supreme Court's ruling.\textsuperscript{112} That same poll found that a majority of Connecticut residents (61\%) do not believe governments should use eminent domain for historically non-controversial uses such as taking property to build roads or schools.\textsuperscript{113} A New Jersey survey asked not whether citizens agreed or disagreed with the Court's decision in *Kelo*, but whether they thought governments in their state overused eminent domain.\textsuperscript{114} A plurality of 37\% thought governments used eminent domain too much; 24\% thought governments used it about enough; 11\% thought governments under-used eminent domain; and 28\% said they did not know.\textsuperscript{115} A Zogby poll conducted for the National Farm Bureau found that Americans believe, by two to one, that governments should not use eminent domain except for roads or utilities; 83\% believe that governments should not use eminent domain to promote private economic development.\textsuperscript{116} Another national poll, conducted by NBC News and the *Wall Street Journal*, found that property rights protection has become the most important domestic legal issue for Americans, ahead of other issues such as parental notification of abortions for minors, the right to die, and medical marijuana use.\textsuperscript{117}

However, the NBC/*Wall Street Journal* poll did not ask for respondents' opinions on the *Kelo* decision or whether someone

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\textsuperscript{112} See Connecticut Voters Say 11-1 Stop Eminent Domain, Quinnipiac Poll Finds; Saving Groton Sub Base is High Priority, *QU Daily* (Quinnipiac Univ., Hamden, Conn.), July 28, 2005, http://www.quinnipiac.edu/x11385.xml?ReleaseID=821. The poll of 1,067 registered Connecticut voters was conducted from July 19-25, 2005 and has a margin of error of +/- 3\%. *Id.*

\textsuperscript{113} *Id.*

\textsuperscript{114} MONMOUTH UNIV./GANNETT N.J. POLL, THE POWER OF EMINENT DOMAIN: ACCEPTABLE USES ARE FEW SAY GARDEN STATE RESIDENTS 5 (2005), available at http://www.monmouth.edu/polling (follow "Poll Reports" hyperlink; then "The Power of Eminent Domain" hyperlink). This was a poll of 800 adult New Jersey residents, conducted from September 21-26, 2005, with an error rate (at 95\% confidence level) of +/- 3.5\%. *Id.* at 8.

\textsuperscript{115} *Id.* at 5.

\textsuperscript{116} See American Farm Bureau, FB Survey: Americans Oppose Eminent Domain, Jan. 9, 2006, http://www.fb.org/news/nr/nr2006/nr0109a.html. This was a telephone survey of 1,076 adults conducted between October 29 and November 2, 2005, with a margin of error of +/- 3\%. *Id.*

\textsuperscript{117} See PETER HART & WILLIAM D. McINTURFF, NBC NEWS/WALL STREET JOURNAL SURVEY 15 (2005), http://www.castlecoalition.org/pdf/WSJ-NBC-Poll-7_15_05.pdf. Surveyors conducted telephone interviews with 1,009 adults from July 8-11, 2005. The poll has a margin of error of +/- 3.1\%. *Id.* at 1.
should curtail eminent domain use. At least one, non-scientific national poll by CNN found that a majority of Americans believe that the power of eminent domain should be abolished entirely.

However much weight one assigns to these various public opinion polls, *Kelo* is plainly unpopular. One is hard-pressed to find much support for the Supreme Court’s ruling anywhere, except among local government groups, such as the National League of Cities, city planners, and developers. Opponents of eminent domain have overwhelmed those supporters. The agitation of property rights activists, media criticism, and poor public opinion of *Kelo* have led to a political backlash, as federal, state, and even local legislative bodies have taken steps to limit eminent domain.

**B. Constitutional, Judicial, and Legislative Efforts to Limit Eminent Domain**

Since the Supreme Court decided *Kelo*, Congress, 38 state legislatures, and even a few local governments have considered legislation to restrict eminent domain. Even before *Kelo*, however, several states limited the power of eminent domain by constitutional amendment, judicial decision, or legislation.

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118. See id.
121. *Kelo* has spawned a cottage industry among property law scholars. This article is one of probably dozens that scholars have or will publish about the case in this year alone.
123. Under the U.S. federal system, the rights embodied in the federal Constitution constitute a floor. Congress may enact ordinary legislation that provides greater, but not less, protection than the Constitution affords. Likewise, the states, through their own constitutions or statutes, may provide greater, but not less, protection for civil rights, including property rights, than the federal Constitution guarantees. See, e.g., David Schuman, *A Failed Critique of State Constitutionalism*, 91 MICH. L. REV. 274, 279 (1992) ("States remain free . . . to add to the national values given voice in the U.S. Constitution, which constitute a core, an irreducible minimum.").
1. State Limitations on Eminent Domain Before Kelo

Many existing state constitutions, as interpreted by state supreme courts, would not have permitted the City of New London to take Susette Kelo's land. Below are several examples of state court cases interpreting state constitutions to impose substantial limits on eminent domain.

- In South Carolina, the state supreme court ruled in 1978 that the state constitution prohibits condemnation for purposes of economic development. In *Karesh v. City Council*, the court ruled that a city could not use eminent domain to lease land to a private corporation for parking and convention space because the project primarily benefited the private owner, with no assurance that the public would enjoy use of the facilities. The court held that "[m]ere benefit to the public or permission by the owner for use of the property by the public are not enough to constitute a public use."  

- Arkansas's constitution and legislative grants of eminent domain authority to cities do not permit condemnations for economic development. In the 1967 case of *City of Little Rock v. Raines*, the Arkansas Supreme Court ruled that the city's power of eminent domain did not extend to taking agricultural lands for the purpose of creating an industrial development, even if that development was "related" to a port facility. The Arkansas legislature strictly limited its grant of eminent domain power to municipalities to the purposes of ports, harbors, river-rail and barge terminals, and related structures; industrial sites or parks were "not even remotely suggested" as acceptable public uses. The court concluded by noting that "[i]f the people of Arkansas desire to confer the power on municipalities to acquire private property by eminent domain for industrial development, they

125. *Id.*
126. *Id.* at 345 (citing Tuomey Hosp. v. City of Sumter, 134 S.E.2d 744, 747 (S.C. 1964)).
should do so in clear and unmistakeable language in view of the provisions of our constitution.”

- In 1957, the Maine Supreme Court ruled that the state’s constitution does not permit a grant or use of eminent domain for purposes of industrial development to raise tax revenues.

- Raising tax revenues is not a sufficient public use to validate eminent domain under the State of Washington’s constitution. Article I, section 16 of that constitution provides that “[p]rivate property shall not be taken for private use, except for private ways of necessity, and for drains, flumes, or ditches on or across the lands of others for agricultural, domestic, or sanitary purposes.” In 1981, the Supreme Court of Washington ruled that a proposed city plan to use eminent domain to acquire land to rebuild the downtown area into a public space, shopping center, art museum, and parking lot violated the state’s constitution because only a portion of the project would be put to a truly public use. The court noted that “[i]f a private use is combined with a public use in such a way that the two cannot be separated, the right of eminent domain cannot be invoked.” The court did not, however, completely rule out the use of eminent domain for “urban renewal” projects.

- Kentucky’s constitution is more restrictive than most regarding the power of eminent domain. Indeed, according to a state attorney general’s opinion, the constitution does not even permit oil and gas companies, which in most states have the power of eminent domain, to condemn private lands for running pipelines. In the 1979 case of City of Owensboro v. McCormick, the Kentucky Supreme Court held that the city’s

129. Raines, 411 S.W.2d at 494-95.
130. Opinion of the Justices, 131 A.2d 904, 906-08 (Me. 1957).
131. WASH. CONST. art. I, § 16.
133. Id. at 556 (citing State ex rel. Puget Sound Power & Light Co. v. Superior Court, 233 P. 651 (Wash. 1925)).
134. Id. at 555 (citing Miller v. Tacoma, 378 P.2d 464 (Wash. 1963)).
taking of agricultural property for the purpose of private commercial development violated the Public Use Clause of the state constitution. The court wrote that "[n]aked and unconditional governmental power to compel a citizen to surrender his productive and attractive property to another citizen who will use it predominantly for his own private profit just because such alternative private use is thought to be preferable in the subjective notion of governmental authorities is repugnant to our constitutional protections . . . ."  

- New Hampshire’s Eminent Domain Procedure Act seems to provide an expansive power of eminent domain, not restricted to public uses, but allowing condemnation for “public purposes, and net-public benefit.” Nevertheless, the New Hampshire Supreme Court, in the 1985 case of Merrill v. City of Manchester, invalidated a condemnation for an industrial park development because it found such a use would only incidentally benefit the public.  

- The Illinois Supreme Court, in 2002, refused to allow the Southwestern Illinois Development Authority—a municipal corporation created by the Illinois General Assembly to promote economic development—to transfer private property to an adjacent, privately-owned motorsport racetrack. The court held that any public benefit from the condemnation was purely incidental; the primary beneficiary plainly was the racetrack. But the court distinguished this case from others involving “slums and blighted areas,” where it would allow eminent domain even if the subsequent use of the property was primarily private.  

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137. Id. at 5.
141. Id. at 19-20.
142. Id. at 9.
In 2004, Michigan’s Supreme Court ruled in *County of Wayne v. Hathcock* that economic development does not, generally speaking, constitute a valid public use under the state’s constitution. Economic development may constitute a valid public use in Michigan, but only where it possesses one of three characteristics: (1) "public necessity of the extreme sort," for example, where the very existence of some publicly valuable enterprise, such as "highways, railroads, canals, and other instrumentalities of commerce," depends on the condemnation; (2) the private entity that benefits from the taking "remains accountable to the public in its use of the property," for example, cases involving regulated utilities; or (3) the land subject to condemnation is of "public concern" because of its use or condition, for example, slums and blighted areas that are condemned not in view of some future use to which they might be put, but because of their presently poor condition. In *Hathcock*, the court found that the proposed economic development project met none of these conditions and ruled that the project violated the public use requirement for eminent domain, even though the court found substantial evidence that the public would in fact benefit from the project. In reaching this decision, the court took occasion to expressly overrule its own infamous *Poletown* decision of 1981, which authorized the City of Detroit to condemn an entire lower-middle class neighborhood, including hundreds of homes, businesses, churches, hospitals, and schools, so that General Motors could build a new Cadillac plant and adjacent parking lots.

The various state limitations on eminent domain discussed above differ in scope and effect. In some states, such as Arkansas and Michigan, it seems likely the states would have decided the *Kelo* case in favor of the plaintiffs. In the Washington, New London might have argued successfully that the Fort Trumbull Municipal Development

144. Id. at 781-83.
145. Id. at 778, 781.
Plan fell within the urban renewal exception as interpreted in *In re Seattle.* In any case, these various state court rulings on eminent domain serve as reminders that even before *Kelo* the Supreme Court and the federal Constitution were not the only, and not necessarily the most important, sources of property rights protection in the United States.

Nevertheless, there is reason to wonder about the sufficiency of existing protections against the perceived abuse of eminent domain. Precious little empirical information exists about the use or abuse of eminent domain throughout the United States, but in 2003, Dana Berliner of the advocacy group Institute for Justice published a “five-year, state-by-state report examining the abuse of eminent domain.” That study reported a total of more than 10,000 cases filed or threatened eminent domain takings between 1998 and 2002, including in states that appear to limit or prohibit such takings for economic development. As Professor Vicky Been pointed out in a presentation at the 2006 Annual Meeting of the Association of American Law Schools, it is difficult to tell whether that number is too high, too low, or just right. Samuel R. Staley and John P. Blair have pointed out the following:

States vary significantly in their willingness to use eminent domain. . . . North Carolina cities, for example, have the power to use eminent domain but generally refrain from using it. On the other extreme, Florida has threatened 2,055 properties with condemnation for eight redevelopment projects.

These variations are important. While highly urbanized states such as Florida, Pennsylvania, Ohio, and New Jersey appear to use eminent domain extensively, other states with many large urban areas such as New York, North Carolina, and Texas are

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147. *See supra* notes 132-34 and accompanying text.
149. *Id.* at 2.
150. I am grateful to Professor Been for providing me with the notes for her presentation.
much less active. Even California, while one of the most active users of eminent domain, invokes the process less often than Florida and Pennsylvania. 151

Moreover, we still do not know how governments are using eminent domain, 152 the costs and benefits of using eminent domain for economic development, and the likely effects of various reform proposals. Nevertheless, the sheer number of estimated eminent domain takings and threats of takings creates a perception of abuse, which Kelo magnified. However much we do or do not know about the use or abuse of eminent domain and the costs or benefits of limiting governmental authority to take land for economic development, the fact remains that the perceived crisis of eminent domain has led to a political and legislative backlash.

2. State Legislative Responses to Kelo

Since Kelo, a majority of states, including some that already substantially restricted eminent domain before Kelo, have enacted, considered, or are presently considering legislative or constitutional measures to further restrict eminent domain. Some of these enactments or proposals are of faux reforms, as Timothy Sandefur has pointed out, which pretend to provide more protection against eminent domain but, in reality, merely restate existing law. 153 But a few of the enactments or proposals are quite significant.

Consider the four states that have actually enacted post-Kelo eminent domain reform, discussed below in chronological order of adoption.


152. Professor Merrill has opined that the number of large-scale redevelopment projects, such as the Fort Trumbull Project in New London, “is relatively small and concentrated in large congested cities like New York, Boston or Baltimore.” Paul Nowell, Regional Bank to Refuse Loans in Eminent Domain Projects, Jan. 26, 2006, http://www.law.com/jsp/law/LawArticleFriendly.jsp?id=1138183513209.

153. Sandefur, supra note 14, at 17, 20, 22, 45.
• Alabama was the first state to act after *Kelo*. On August 3, 2005, Governor Bob Riley signed legislation unanimously enacted in direct response to the Supreme Court’s ruling. The statement of legislative intent provides the following:

In light of the decision and certain opinions recently announced by the United States Supreme Court interpreting the extent of the power of government to take property for public use as described in the Fifth Amendment to the United States Constitution and providing that individual states may restrict the exercise of that power, the Legislature intends in enacting this act to ensure that governmental bodies in Alabama vested with all or any part of the power of eminent domain may not . . . use the power to take the private property of any person for the private use of another, as opposed to the use thereof by the public generally, except as and in the limited circumstances set out in this act.

The second section of Alabama’s statute contained additional strong language prohibiting the state and its subdivisions and agencies from condemning land “for the purpose of nongovernmental retail, office, commercial, residential, or industrial development or use . . . .” Had the Alabama legislature left it at that, the statute would have constituted a strong limitation on eminent domain, prohibiting governments from taking land for a public purpose or a public benefit; the statute would have restricted eminent domain to cases involving actual public use of the land. However, the legislature added a crucial exception that, in effect, gutted the rule:

[T]he foregoing provisions of this subsection shall not apply to the exercise of the powers of eminent domain by any county, municipality, housing authority, or other public entity based

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155. *Id.*
156. 2005 Ala. Laws 313 (1st Spec. Sess.).
upon a finding of blight in an area covered by any redevelopment plan or urban renewal plan pursuant to Chapters 2 and 3 of Title 24, Code of Alabama 1975.\textsuperscript{158}

This exception effectively swallowed the rule, because chapters 2 and 3 of title 24 permit condemnation for urban renewal upon a finding of economic blight or even to "prevent the spread of blight or deterioration."\textsuperscript{159}

As a result of this single exception, the power of eminent domain in Alabama is barely diminished. Alabama cities and their agencies can continue to take private property for economic development, so long as they can reasonably argue that the taking is necessary to cure or prevent blight or deterioration. As Timothy Sandefur has explained that

\[\text{[t]he new law simply reiterates that the state may condemn property only after it has followed the relatively simple procedure of declaring the area blighted and preparing a redevelopment plan . . . . All that the Alabama reform measure seems to do is to prohibit direct transfers of property from A to B for B's benefit alone; the state is now required to declare, with some minimal plausibility, that the transfer will benefit society in some general way.}\textsuperscript{160}

- Delaware Governor Ruth Ann Minner signed that state's eminent domain reform statute into law on July 21, 2005.\textsuperscript{161} This brief statute does not restrict what counts as a public use for purposes

\begin{itemize}
  \item \textsuperscript{158} Id.
  \item \textsuperscript{159} Id. § 24-3-2(c)(2). The 2005 statute also provides for uncontroversial exceptions such as road-building, public parks, and utility lines, which the Act probably would have permitted, even if not specifically excepted. See id. § 18-1B-2(a).
  \item \textsuperscript{160} Sandefur, \textit{supra} note 14, at 20.
\end{itemize}
of eminent domain, but it does impose potentially costly procedural requirements on governments and their agencies prior to exercising eminent domain and requires the government to pay the attorneys' fees of condemnees. The new procedural requirements include six months' advance notice prior to the commencement of condemnation proceedings, a public hearing prior to condemnation, and publication of a report detailing the purpose of the taking. These procedural requirements increase the implicit cost of using eminent domain by creating a greater opportunity for public involvement and political opposition. No one should underestimate the potential importance of this opportunity. Political processes can and do significantly affect even legally valid eminent domain proceedings.

- On September 1, 2005, Texas Governor Rick Perry signed into law Senate Bill 7, which amended that state's system of eminent domain in some significant and insignificant ways. Among its less significant aspects, the Act prohibits the use of eminent domain when the claimed public use is "merely a pretext to confer a private benefit on a particular private party." United States Supreme Court rulings, including Kelo, already prohibit such pretexts. More significantly, the Texas statute prohibits eminent domain takings "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 . . . ." Although this

164. Id. § 9503.
165. See infra notes 225-32 and accompanying text (discussing how political pressures in the wake of Kelo have stalled the Fort Trumbull Municipal Development Plan). But see Sandefur, supra note 14, at 26 (noting that "private property rights cannot be entrusted to the political process entirely," and criticizing the Delaware statute for not providing additional legal safeguards against abuse of eminent domain).
168. See supra notes 53, 56 and accompanying text.
169. § 2206.001(b)(3) (emphasis added).
section resembles the exception in the Alabama statute, it arguably retains a greater limitation on eminent domain because, in accordance with Justice O'Connor's dissent in *Kelo*, it requires a finding that existing uses are causing affirmative harm. Thus, it goes beyond federal constitutional law, which does not restrict the eminent domain power to nuisance-like cases. Moreover, the Texas statute specifies that courts are not to defer to government determinations that existing uses are creating affirmative harm or that the taking in other respects constitutes a valid public use. Consequently, Texas law provides for more intensive judicial review of eminent domain takings.

- On November 16, 2005, Ohio Governor Bob Taft signed into law S.B. 167, which imposed a limited moratorium on the use of eminent domain:

> Notwithstanding any provision of the Revised Code to the contrary, until December 31, 2006, no public body shall use eminent domain to take, without the consent of the owner, private property that is not within a blighted area, as determined by the public body, when the primary purpose for the taking is economic development that will ultimately result in ownership of that property being vested in another private person.

Section 8 of the statute declares that this moratorium is an emergency measure necessitated by the Supreme Court's decision in *Kelo*. The purpose of the moratorium is to give the state time to consider further legislative remedies for abuses of eminent domain. One might approve of Ohio's desire to avoid knee-jerk reactions to *Kelo* by taking time to deliberate before imposing

170. *See supra* notes 70-72 and accompanying text.
171. The majority in *Kelo* expressly declined to adopt such a limitation. *See supra* note 76 and accompanying text. *But see* Sandefur, *supra* note 14, at 22 (arguing that section 2206.001(b)(3) does not significantly alter existing law).
172. § 2206.001(b)(3).
174. *Id.* § 2(A).
175. *Id.* § 8.
176. *Id.*
substantive reforms to its eminent domain law. However, it seems fairly clear that Ohio’s moratorium is little more than a political smokescreen, designed to create the impression of outrage without actually doing anything significant about the law. For one thing, the moratorium only applies to a small fraction of eminent domain actions: those where the government condemns unblighted land for private economic development.\textsuperscript{177} Importantly, given the stated purpose of the Ohio legislation, this moratorium might not have prevented the City of New London from taking Susette Kelo’s home, because her home arguably was in a blighted area as the Ohio Code defines that term in section 303.26 and in court rulings.\textsuperscript{178} Consequently, as a reporter for the \textit{Cincinnati Enquirer} noted, no one expected the moratorium to have much of an impact on development projects.\textsuperscript{179}

Beyond the four states that have actually enacted legislation in response to \textit{Kelo}, at least 18 other states—Arkansas,\textsuperscript{180} California,\textsuperscript{181} Florida,\textsuperscript{182} Illinois,\textsuperscript{183} Kentucky,\textsuperscript{184} Maine,\textsuperscript{185} Massachusetts,\textsuperscript{186}

\begin{footnotesize}
\begin{enumerate}
\item[177.] \textit{Id.} § 2(B)(1).
\item[178.] \textit{See} \textit{OHIO REV. CODE ANN.} § 303.26(E) (West 2005). Blighted area means an area within a county but outside the corporate limits of any municipality, which area by reason of the presence of a substantial number of slum, deteriorated, or deteriorating structures, predominance of defective or inadequate street layout, faulty lot layout in relation to size, adequacy, accessibility, or usefulness, unsanitary or unsafe conditions, deterioration of site or other improvements, diversity of ownership, tax or special assessment delinquency exceeding the fair value of the land, defective or unusual conditions to title, or the existence of conditions which endanger life or property by fire and other causes, or any combination of such factors, substantially impairs or arrests the sound growth of a county, retards the provision of housing accommodations, or constitutes an economic or social liability and is a menace to the public health, safety, morals, or welfare in its present condition and use. \textit{Id.} The Ohio moratorium statute expressly provides that “[b]lighted area . . . also includes an area in a municipal corporation.” S.B. 167 § 1(A), 126th Gen Assem., Reg. Sess. (Ohio 2005). In \textit{City of Norwood v. Homey}, the court ruled that “blighted” includes areas that are “deteriorating,” as well as those that are actually unsafe. 830 N.E.2d 381, 388 (Ohio Ct. App. 2005).
\item[182.] S.J. Res. 20, 108th Leg., Reg. Sess. (Fla. 2006).
\end{enumerate}
\end{footnotesize}
Michigan, Minnesota, Nevada, New Jersey, New York, Oregon, Pennsylvania, Rhode Island, South Carolina, Virginia, and Wisconsin—are actively considering legislative proposals as of February 2006. At least nine other states—Alaska, Georgia, Indiana, Maryland, Mississippi, Missouri, Oklahoma, Tennessee, and West Virginia—have either announced intentions to enact legislation, are currently drafting legislation, or have appointed panels or task forces to study the problem and make legislative recommendations. Interestingly, the State of Connecticut, where Kelo arose, has already rejected legislation that would have imposed limits on the use of eminent domain for private development or redevelopment projects.

Some new legislative proposals seem designed to create an impression of reform without really making any significant changes in the law or practice of eminent domain. For example, a proposed amendment to California’s state constitution (one of four legislative proposals currently being considered in that state) provides that “public use does not include the taking of owner-occupied residential property for private use.” If adopted, this amendment would not change existing law in any significant way. As the Supreme Court...
reaffirmed in Kelo, current eminent domain doctrine does not allow the taking of private property for private use. Proposed legislation in Kentucky also would not change state law in any way; it merely urges Congress to pass federal legislation to restrict state and local governments from using eminent domain for purposes of economic development.

Legislative proposals in several states, however, would substantially reform eminent domain, making it more difficult for municipalities to take private land for purposes of economic development. Here are just three examples:

- In Illinois, House Bill 4091 would restrict eminent domain to “qualified public use[s],” which the bill expressly defines to exclude

  eminent domain to acquire property for private ownership or control, including for economic development, unless acquisition of property for private ownership or control is (i) for a public purpose and (ii) specifically and expressly authorized by law enacted by the General Assembly on, before, or after the effective date of this amendatory Act...

- It might not be difficult for local planners to meet condition (i), but condition (ii) would seem to require affirmative legislative permission before any eminent domain takings, other than those for actual public use, could proceed.

- Senate Bill 2739, currently before the New Jersey legislature, simply provides, without exception, that “no property that is legally occupied as residential property and maintained in accordance with applicable housing codes and standards shall be subject to condemnation.” Part 4 of the bill reiterates that

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201. See supra note 53 and accompanying text.
202. See B. Res. 134, § 1, 2006 Leg., Reg. Sess. (Ky. 2006). Whether Congress has such authority is questionable. See infra note 212 and accompanying text.
governments cannot condemn such properties even pursuant to duly adopted redevelopment plans.\(^{205}\)

- The Pennsylvania House of Representatives, on November 1, 2005, passed House Bill 2054, which, like the Texas statute discussed earlier,\(^{206}\) would limit the use of eminent domain to blighted properties, while defining "blight" narrowly to include only properties that are vacant, unimproved, or actually pose a threat to public health or safety.\(^{207}\) Moreover, the Pennsylvania legislation prohibits the use of eminent domain "to take private property in order to use it for private commercial enterprise."\(^{208}\) The bill provides limited exceptions, however, for incidental private uses, such as newsstands or gift shops in government buildings.\(^{209}\)

These bills, if enacted, could impose real and substantial limitations on the power of eminent domain. The Pennsylvania and Illinois bills would limit eminent domain far more substantially than would the dissenters from *Kelo* (excepting Justice Thomas). As we have seen, Justice O'Connor's dissent would merely limit the use of eminent domain for purposes of redevelopment to cases where the government can show that the existing use is harmful (e.g., a nuisance).\(^{210}\) That is basically what New Jersey's Senate Bill 2739 would accomplish, albeit with a more precise definition of what constitutes a harmful use. The Illinois and Pennsylvania legislation would go farther. Illinois House Bill 4091 would require affirmative legislation to approve any future use of eminent domain for economic development purposes. Pennsylvania House Bill 2054 would basically limit the use of eminent domain to cases involving actual public use of the property to be taken. Of course, we do not know

\(^{205}\) *Id.* at 8, 9.

\(^{206}\) See *supra* notes 166-72 and accompanying text.


\(^{208}\) *Id.* § 204(a).

\(^{209}\) *Id.* § 204(b).

\(^{210}\) See *supra* notes 70-74 and accompanying text.
whether these legislatures will enact any of these legislative proposals.

3. Kelo in Congress

Although local governments are the primary users of eminent domain, state and local economic development projects often receive federal funding. Thus, Kelo has political implications for the federal government, state, and local governments. Claiming that their constituents are outraged by Kelo, members of the House and Senate from both political parties have taken potshots at the Court and proposed federal restrictions on eminent domain. The Kelo controversy even found its way into the Senate hearings for Supreme Court nominees John Roberts (now Chief Justice Roberts) and Samuel Alito (now Associate Justice Alito).211 The scope of Congress’s constitutional authority to restrict states’ eminent domain power is uncertain.212 However, there is no question that Congress can choose to curtail federal funding for state and local development projects if it chooses. On November 3, 2005, the House of Representatives voted overwhelmingly (376-38) to pass House Resolution 4128, the Private Property Rights Protection Act of 2005.213 The bill would prohibit states and their political subdivisions from using eminent domain for economic development in any fiscal year in which they receive federal economic development funding.214 Any state found to have violated this prohibition would be ineligible for federal economic development funds for two fiscal years, and the


state would have to return any federal funds already received.\textsuperscript{215} The bill would also prohibit the federal government and its agencies from using eminent domain for economic development purposes.\textsuperscript{216} That provision has little significance, however, because the federal government rarely uses eminent domain for any purpose, let alone economic development.\textsuperscript{217} A companion bill in the Senate is currently before the Committee on the Judiciary.\textsuperscript{218} If House Resolution 4128 becomes law, there is little doubt that it would have a significant—perhaps dramatic—effect on the rate of eminent domain takings and economic development and redevelopment projects.\textsuperscript{219}

4. Local Governments (and Developers and Lenders) Restrain Themselves After Kelo

Although state and federal legislative responses to \textit{Kelo} might be understandable, perhaps even predictable, it is quite surprising to find that a few local governments have responded to \textit{Kelo} by preventing themselves, through municipal ordinances, from using eminent domain for economic development. After all, it is local governments that most often use and supposedly abuse eminent domain. If those governments want to prevent the use of eminent domain for economic development, all they have to do is stop employing it as a tool. But in the wake of \textit{Kelo}, some municipalities have decided to make a point of legally preventing themselves from exercising eminent domain.

On August 22, 2005, the Town Council of Wethersfield, Connecticut voted unanimously to limit its own use of eminent domain.\textsuperscript{220} Chapter 12 of the Wethersfield code of ordinances now

\begin{itemize}
\item \textsuperscript{215} \textit{Id.}
\item \textsuperscript{216} \textit{Id.} § 3.
\item \textsuperscript{217} \textit{But see} Berman v. Parker, 348 U.S. 26 (1954) (constituting an exceptional case of federal eminent domain, as the case arose in the federal city of Washington, D.C.).
\item \textsuperscript{218} \textit{See} Private Property Rights Protection Act of 2005, H.R. 4128, 109th Cong. (1st Sess. 2005) (as referred to S. Comm.).
\item \textsuperscript{219} \textit{Cf.} Sandefur, supra note 14, at 35.
\end{itemize}
reads: "no owner-occupied residential real property consisting of four or fewer dwelling units may be acquired by eminent domain for economic development purposes pursuant to General Statutes 8-128 to 8-133 inclusive, if the resulting project will be privately owned or controlled." The Board of Aldermen of Woodfin, North Carolina (population 3,162) passed a resolution on August 16, 2005 opposing the Supreme Court’s decision in the Kelo case, resolving not to use eminent domain “outside of a true ‘public use’ context.” Obviously, Woodfin’s resolution is less self-restrictive than the ordinance passed in Wethersfield, Connecticut.

The oddest post-Kelo measure enacted by a municipality comes from South Kingstown, Rhode Island. On September 12, 2005, the Town Council of South Kingstown unanimously agreed to adopt a resolution asking Rhode Island legislators to pass a state law to prevent local governments from taking land for economic development. Apparently, the town council did not trust itself to exercise self-restraint in the use of eminent domain; it asked the state to help restrain it from doing what all the members of the council agreed it should not do. Or perhaps the town council was rationally concerned with regulatory competition among all Rhode Island towns. If Kingstown restricted eminent domain but other, similar-sized towns did not, those towns might gain from additional economic development opportunities at Kingstown’s expense.

No doubt, the number of cities and towns that have imposed legal limitations on their own use of eminent domain is so small as to be insignificant. But even in the vast majority of cities—large and small—that have not officially responded to Kelo, the backlash from the Supreme Court’s decision is clearly having a chilling effect on the use of eminent domain. Nowhere is this more evident than in the City of New London. As of the end of February 2006, the City of New

221. Id.
223. Leslie Boyd, Woodfin Decides to Restrict Eminent Domain, ASHEVILLE CITIZEN-TIMES, Aug. 17, 2005, at 1B.
London has not evicted Susette Kelo from her home, nor any of the other plaintiffs in the case from their homes or businesses.225 Some believe the city will never evict them. According to the New York Times, New London and the State of Connecticut have grown so "wary of public disapproval," that they have "halted plans to evict the remaining residents."226 Even though the plaintiffs lost the eight-year legal battle, the New York Times asserts that they gained a tremendous amount of political leverage.227 Indeed, one of the plaintiffs, Bill Von Winkle, is so confident the city will not evict him that he recently put a new roof on the legally condemned three-building apartment complex he owns.228 The New York Times also reports that renters are moving into, not out of, those buildings.229

Meanwhile, the private investors in the Fort Trumbull project have become "concerned about building on land that some people consider a symbol of property rights."230 The president of Corcoran Jennison, the private development firm hired as general contractor for the project by the NLDC, announced that any further development of the Fort Trumbull area will take place "away from the area where the holdouts remain."231 Most recently, the City of New London hired a mediator to seek a compromise with the remaining residents of Fort Trumbull.232 In short, the city is acting as if it did not win the Kelo case.

A thousand miles away from New London, in St. Louis, Missouri, the same chilling effect has stalled a redevelopment project that involved the replacement of homes, some of which the city condemned by eminent domain, with a shopping center.233 The

226. Id.
227. Id.
228. Id.
229. Id.
230. Id. Concern with property rights is not the only reason the plan has stalled; there have also been contract disputes and financial problems. See Yardley, supra note 225.
231. Id.
backlash against Kelo killed that project and one other in the St. Louis area. According to a report in the *St. Louis Post-Dispatch*, "[a]cross St. Louis and the nation, the court’s controversial June 23 [Kelo] decision initially was viewed as a win for developers and cities—and a crushing blow for small property owners. So far, it hasn’t worked out that way." According to Maplewood, Missouri City Manager Martin Corcoran, after Kelo, eminent domain suddenly became harder to use. And it is not just Missouri city officials who are "listening to what people are saying." Florissant, Missouri Mayor Robert Lowery adds that developers too “are worried about the adverse publicity.” So are commercial lenders. On January 25, 2006, BB&T, the country’s ninth largest financial holdings company with $109.2 billion in assets, announced that it would no longer finance development projects involving lands taken from private citizens by eminent domain. Banks naturally would be reluctant to invest in politically controversial projects that well-funded property rights advocates could tie up for years in litigation.

5. **But Will the Kelo “Backlash” Last?**

No one knows whether the post-Kelo “chilling effect” on the use of eminent domain for economic development and redevelopment is a permanent condition or a temporary interruption to the usual business of takings. Some property rights advocates fear that eminent domain reform is already losing steam. The Heritage Foundation’s Ronald D. Utt believes:

234. *Id.*
235. *Id.*
236. *Id.*
237. *Id.*
238. *Id.*
Despite the widespread concern that swept the country following the *Kelo* decision, state and federal elected officials have done little to strengthen the protection of property rights. With the exceptions of the House bill and new laws in Alabama and Texas, property rights initiatives in other states and in the U.S. Senate have been bogged down in legislative committees, in large part due to opposition from mayors, developers, and economic development officials who stand to see their power diminished. To date, President Bush has been silent on the issue, despite its popular appeal and property rights’ status as a basic principle of individual freedom.240

A more sober appraisal would suggest, however, that the *Kelo* backlash has been remarkably productive in the short period of time since the Supreme Court issued its ruling in June of 2005. In less than a year, four states have enacted laws of various significance in response to *Kelo*.241 Congress has passed legislation in one house that is currently pending in the other.242 Dozens of other states have drafted legislation that it is currently under consideration; and in a majority of the remaining states, legislation currently is being drafted or planned.243 Meanwhile, as Timothy Sandefur has noted, “most state legislatures have been out of session since the backlash began.”244 Given the general inertia of most legislative processes, eminent domain reform has been a great success so far. However, whether the *Kelo* backlash will maintain its steam over the long run is anyone’s guess.

240. Utt, *supra* note 96. Dr. Utt seems somewhat perplexed by President Bush’s silence on *Kelo*, but he should not be. The entire eminent domain issue is discomfiting to the President. When he owned the Texas Rangers baseball team, George W. Bush was given the power of eminent domain to condemn land to build a new, privately-owned stadium, which greatly increased the net value of his franchise. *See*, e.g., Dave McNeely, *Bush Can Expect Past Questions To Be Raised Again*, AUSTIN AM.-STATESMAN, Aug. 29, 1998, at A13.


242. *Id.*

243. *See supra* notes 180-98 and accompanying text.

244. Sandefur, *supra* note 14, at 17.
III. EMINENT DOMAIN IN THE POLITICAL-ECONOMIC CONTEXT: HOW AND WHY POLITICIANS (AND NOT JUST JUDGES) PROTECT PRIVATE PROPERTY RIGHTS

A. Judicial Distrust of Political Institutions

Since America’s founding, native jurists have commonly assumed that judicial protection is absolutely crucial to the perpetuation of private property, an institution that is fundamental to both individual liberty and economic development. The likes of Justices Holmes, Scalia, and most recently, O’Connor have argued that, in the absence of zealous judicial oversight, even well-meaning political bodies would slowly (or even quickly) erode private property, until it disappeared entirely.

According to the legal historian James Ely, James Madison drafted the Takings Clause out of concern that property owners might become a “vulnerable minority,” whose rights the majority could abuse. By inserting a Takings Clause into the Constitution, Madison hoped to increase political respect for private property rights. He also hoped that “[i]ndependent tribunals of justice...[would] consider themselves in a peculiar manner the guardians of those rights...they will naturally be led to resist every encroachment upon rights expressly stipulated for in the Constitution by the declaration of rights.”

Like Madison, Justice Oliver Wendell Holmes was concerned about the majoritarian abuse of property rights. In his famous 1922 opinion in Pennsylvania Coal Co. v. Mahon, Holmes wrote that when the Constitution’s “seemingly absolute protection” of private

245. See Cole, supra note 5. Parts of this section are adapted from arguments laid out in greater detail in that article.
246. Id. at 1.
247. See Cole, supra note 5; supra Part II.B.2.
249. Cole, supra note 5.
251. Cole, supra note 5.
property "is found to be qualified by the police power, the natural tendency of human nature is to extend the qualification more and more until at last private property disappears."\textsuperscript{252} To avoid that unacceptable outcome, Holmes introduced the regulatory takings doctrine (although he did not call it that) into U.S. Supreme Court jurisprudence.\textsuperscript{253}

Seventy years later, Justice Antonin Scalia reiterated in \textit{Lucas v. South Carolina Coastal Council} Holmes's concern about political incursions on private property.\textsuperscript{254} Scalia doubted that legislatures would sincerely distinguish between compensable eminent domain takings and noncompensable police power regulations.\textsuperscript{255} Legislative bodies, he opined, will always seek to impose burdens on discrete private landowners and avoid paying compensation whenever they can get away with it.\textsuperscript{256} "Since . . . a [police power] justification can be formulated in practically every case, this amounts to a test of whether the legislature has a stupid staff."\textsuperscript{257}

Significantly, in \textit{Kelo}, Justice Sandra Day O'Connor quoted from Justice Scalia's \textit{Lucas} opinion, but in a different context.\textsuperscript{258} In \textit{Lucas}, Scalia was concerned about the choice between eminent domain and the police power and the effect that choice has on just compensation. \textit{Kelo} was not a case where the government was seeking to avoid paying compensation by couching its action in police power terms. Rather, Justice O'Connor quoted Scalia's reference to "stupid staffers" in arguing against Justice Kennedy's "undisclosed test" to determine whether the economic benefit from an eminent domain taking is primarily, or only incidentally, public.\textsuperscript{259} In other words, Justice O'Connor does not trust public bodies to determine whether a taking by eminent domain is truly for public use. They will always claim a legitimate public use, she suggests; consequently, the courts

\begin{itemize}
\item \textsuperscript{252} Pa. Coal Co. v. Mahon, 260 U.S. 393, 415 (1922).
\item \textsuperscript{253} Cole, \textit{supra} note 5.
\item \textsuperscript{255} \textit{Id. at} 1026.
\item \textsuperscript{256} \textit{Id.}
\item \textsuperscript{257} \textit{Id. at} 1025 n.12.
\item \textsuperscript{258} \textit{Kelo v. City of New London}, 125 S. Ct. 2655, 2675 (2005).
\item \textsuperscript{259} \textit{Id.}
\end{itemize}
must rigorously enforce the Public Use Clause. This is a principled position, but like Justice Scalia's opinion in *Lucas* and Justice Holmes's opinion in *Pennsylvania Coal*, it underestimates the extent to which the political process itself can, and does, protect private property rights.

B. Political Protection of Private Property

Imagine private property in a country without a Takings Clause, without a Public Use Clause, without a Just Compensation Clause, without any constitutional judicial review of legislation affecting property rights. In such a country, would the institution of private property survive? Many, if not most, American jurists would predict, as Justice Holmes did, that it would not. However, Justice Holmes and most other American jurists have considered the question only in the abstract, without assessing the available evidence. In fact, we do not need to imagine a country without constitutional judicial review of legislation, without a Takings Clause, Public Use Clause, or Just Compensation Clause; we need only look to the history of the United Kingdom, where for more than 300 years (since the constitutional settlement following the Glorious Revolution of 1688-89), property rights have existed without any of the constitutional and judicial institutions we take for granted in the United States.260

In the United Kingdom, Parliament possesses plenary authority over property rights, to take property from anyone for public or private use, with or without compensation.261 If Parliament expressly chooses to take property from one private owner, $X$, and transfer it to another private owner, $Y$, without compensating $X$, the courts have no legal authority either to prevent it or to require compensation.262 Even

261. Id.
262. See Cole, *supra* note 5. That article presents a thorough historical and theoretical treatment of the respective roles of Parliament and the courts relating to property rights. In the United States, this legislative action would violate both the Public Use Clause (after *Kelo*) and the Just Compensation Clause.
after the enactment of the 1998 Human Rights Act, parliamentary sovereignty remains intact; the courts cannot overturn legislation. Needless to say, private property still exists in the United Kingdom. Indeed, the institution of private property is virtually as well protected there as here because Parliament itself protects property rights with self-imposed rules that resemble, to a great extent, existing Supreme Court doctrines under the Takings Clause. For example, when Parliament takes title to property by eminent domain, it virtually always pays compensation, even though it is not constitutionally required to do so. However, when Parliament regulates property pursuant to its police powers, it provides compensation only in exceptional circumstances. One such exceptional circumstance arises when a government denies planning permission to develop land, leaving the landowner without any reasonably beneficial use. In such cases, under the 1947 Town and Country Planning Act (as amended), the landowner can force compulsory purchase by the government. Thus, had the American case of Lucas v. South Carolina Coastal Commission arisen in the United Kingdom, it would have come out exactly the same way. The only difference is that in the United Kingdom, Parliament created the doctrine of compulsory purchase by ordinary legislation, and in the United States, inverse condemnation developed out of

263. See Human Rights Act, 1998, c. 42 (Eng.).
264. See Cole, supra note 5. The courts can declare that a piece of legislation violates the Human Rights Act, but it is up to Parliament to repeal the offending law. Moreover, Parliament can always legislate exceptions to the Human Rights Act, which might be repealed in whole at any time. Id.
265. Id.
266. Id.
267. Id.
268. Id.
270. Cole, supra note 5. The planning law scholar and current President and Provost of University College London, Malcolm Grant, adds that under the United Kingdom’s Town and Country Planning Act, as interpreted in Pyx Granite v. Minister of Hous. & Local Gov’t, [1958] 1 Q.B. 554, rev’d on other grounds, [1960] A.C. 260, the American case of Dolan v. City of Tigard, 512 U.S. 374 (1994), would have been resolved in favor of Mrs. Dolan. Malcolm Grant, If Tigard Were an English City: Exactions Law in England Following the Tesco Case, in Takings: Land-Development Conditions and Regulatory Takings After Dolan and Lucas 332, 350 (David L. Callies ed., 1996). Specifically, Professor Grant notes that British planners could not have imposed on Mrs. Dolan what the City of Tigard sought to impose on her development. Id.
constitutional protections for private property, as interpreted and enforced by the courts. But why would Parliament refrain from taking property without compensation, and why would it create legal rights of compulsory purchase, in the absence of constitutional requirements enforced by the courts? Do they simply have "stupid staffers," as Justices Scalia and O'Connor might have suggested?

Additional empirical support for the proposition that political institutions substantially protect property rights comes from the United States itself, where Congress and various state legislatures have proven to be quite solicitous of vested property interests. According to a 1995 Congressional Research Service Report, Congress has long endeavored to avoid unsettling the economic expectations of property owners when it enacts regulatory statutes. Many statutes include grandfather clauses to protect vested rights. More generally, the 1970 Uniform Relocation Act requires that Congress design federal programs (or federally funded state programs) to minimize displacement of property owners. In cases where federal programs cannot avoid taking property, the Act provides for additional compensation, beyond what is constitutionally required, for incidental losses such as moving expenses and re-establishment of displaced businesses.

American states, too, have sought to protect property rights through legislation. During the 1990s, for example, virtually every state in the country considered enacting takings legislation. Most bills were rejected, but 21 states adopted some type of takings statute. The predominant type merely required the Attorney General or

271. Cole, supra note 5.
273. Id. Of course, such grandfather clauses may be inspired by the existence of the Takings Clause. That is to say, legislation may seek to avoid interfering with vested property rights simply to avoid liability for compensable takings. The key, and unanswerable, question is whether Congress would be as solicitous of vested property rights were it not legislating in the shadow of the Fifth Amendment.
275. § 4622. Even though it only applies in a narrow set of circumstances and may now be out of date in terms of its coverage and benefits, this statute still provides greater protection for covered property interests than the Constitution requires.
276. Cole, supra note 5.
relevant state agency to review proposed regulations for their impact on property rights. But five states—Florida, Louisiana, Mississippi, Texas, and Oregon—adopted takings compensation statutes, which purported to provide more compensation for regulatory takings than required under existing Supreme Court doctrine. For example, the Florida statute provides that the government has to pay compensation whenever some regulation "inordinately burden[s]" use of private property. A landowner is inordinately burdened if she is "permanently unable to attain the reasonable, investment-backed expectations for the . . . property," or if she "bears permanently a disproportionate share of a burden imposed for the good of the public, which in fairness should be borne by the public at large." This language tracks Supreme Court precedents, but the framers of Florida's statute expressly contemplated that the state statute should apply more liberally. In Texas, the 1995 Private Real Property Rights Preservation Act defines a taking to include any state government action (other than regulations of common-law nuisances and "grave and immediate threat[s] to life or property") that reduces the value of property by 25% or more. When such a taking occurs, the state has the choice of either rescinding the regulation or paying compensation. Under Oregon's Measure 37, adopted by public referendum in 2004, the

281. STATE OF OREGON 2004 GENERAL ELECTION VOTERS' PAMPHLET Measure 37, at 103 (2004), available at http://www.sos.state.or.us/elections/nov22004/guide/meas/m37_text.html. [hereinafter Measure 37].
283. Id. § 70.001(3)(e).
284. See Pa. Cent. Transp. Co. v. City of New York, 438 U.S. 104, 124 (1978) (noting the significance, in takings claims, of "the extent to which the regulation has interfered with distinct investment-backed expectations"); Armstrong v. United States, 364 U.S. 40, 49 (1960) (noting that the "Fifth Amendment's guarantee . . . [is] designed to bar Government from forcing some people alone to bear burdens which, in all fairness and justice, should be borne by the public as a whole").
285. See § 70.001(9) (providing that statutory causes of action might exist for "governmental actions that may not rise to the level of a taking under the State Constitution or the United States Constitution").
287. Id. § 2007.002(5).
288. Id. §§ 2007.023(b)-.024(c).
state has to either pay compensation or exempt private properties from (non-nuisance based) land-use regulations, whenever those regulations reduce the value of private property by any amount.289

Most states also have relocation assistance laws that typically provide greater financial assistance than the U.S. Constitution mandates when governments take properties by eminent domain.290 Under some of these laws, residential tenants may actually benefit most. According to a federal study of forced relocations, "[a]ll but one of the tenants surveyed reported that they were able to 'significantly upgrade' their housing as a result of the assistance, and a substantial majority of tenants reported that they were fully reimbursed for all of the costs associated with the relocation."291 Residential renters certainly are not a politically powerful group, yet the political process seems to have protected their property interests substantially.

The various state takings laws and relocation assistance statutes discussed above provide further evidence that both political bodies and courts protect private property rights. Indeed, legislatively imposed limitations are potentially stronger and farther reaching than existing constitutional constraints.

Aside from legislative measures, the political process itself substantially protects private property rights. In the last section, we saw that the political backlash against Kelo discouraged local politicians (who are, of course, subject to electoral replacement), developers, and commercial lenders from engaging in politically sensitive development and redevelopment projects. Kelo's strong national resonance might (or might not) be unique, but politicians, developers, and commercial lenders are always averse to bad publicity. Meanwhile, political controversy is a more or less constant feature of major development and redevelopment projects.


291. Id. at 29 (citing U.S. DEP'T OF TRANSP., RELOCATION RETROSPECTIVE STUDY app. (1996)).
Consider, for example, Professor Nicole Stelle Garnett's study of the use of eminent domain in the construction of Chicago's expressways during the 1940s.\footnote{292} She notes that "expressway routes were altered at least three . . . times to preserve the geographic integrity of parish boundaries,"\footnote{293} and several churches in the path of the Dan Ryan and Kennedy expressways were saved.\footnote{294} Why did the Chicago churches and parishes succeed in avoiding condemnation? Professor Garnett offers two reasons: (1) at the time the State of Illinois built the expressways, priests were prominent local leaders, and Roman Catholics comprised a majority of Chicago's voters; and (2) people are emotionally attached to their churches (i.e., churches have high subjective value) and they are willing to fight intensely to preserve them, which raises the costs of condemnation.\footnote{295} Garnett believes that relatively high-valued properties generally are well protected in the political process, especially if the owners are able and willing to fight to save them.\footnote{296} However, "[t]akers may be least concerned with avoiding the subjective losses of those political outsiders, including racial minorities and the poor, who are not attached to cohesive communities."\footnote{297} Thus, the entire class of property owners does not constitute a vulnerable minority, subject to a high risk of expropriation and under-compensation. Only a subset of that class—those with little political clout who own low-valued properties—is highly vulnerable. Even that subset, however, may effectively fight for its property rights in the political process if it constitutes a cohesive community capable of engaging in collective

\begin{itemize}
\item \footnote{292} See Garnett, supra note 89.
\item \footnote{293} Id. at 17 (citing STEVEN M. AVELLA, THIS CONFIDENT CHURCH 217 (1992)).
\item \footnote{294} Id. at 16-18.
\item \footnote{295} See id. at 17, 19. Emotional attachment to churches was not enough to help residents of Poletown in Detroit when, in the late 1970s, the City decided to take their entire neighborhood, including its churches, so that General Motors could construct a new Cadillac production plant. See Poletown Neighborhood Council v. City of Detroit, 304 N.W.2d 455 (Mich. 1981). In that case, however, the archdiocese of Detroit sold them to the City for demolition, ending any possibility of collective action to save them. Conflicting interests between the church authorities and the parishioners obstructed the community's efforts to save its churches. Garnett, supra note 89, at 22-23.
\item \footnote{296} Garnett, supra note 89, at 22.
\item \footnote{297} Id. at 24.
\end{itemize}
action, like the church parishes on Chicago's south side during expressway construction.

Judge Richard Posner agrees that private property owners are generally quite capable of protecting their interests in political and legislative processes. In his recent foreword to the annual Supreme Court issue of the Harvard Law Review, Judge Posner wrote:

Property owners and the advocates of property rights are not some helpless, marginalized minority. They have plenty of political muscle, which they are free to use, since there is no constitutional impediment to the government's declining to exercise the full range of powers that the Constitution, as interpreted by the Supreme Court, allows it.

In Judge Posner's view, "the strong adverse public and legislative reactions to the Kelo decision are evidence of its pragmatic soundness."

The economist William Fischel has provided a more elaborate model of the political protection of private property. Like Posner, he believes that private property owners generally are quite capable of protecting their interests in political processes; they are not a vulnerable minority, likely to be harmed by majoritarian excesses. In Fischel's view, property owners constitute an economic interest group, capable of forming alliances "to protect themselves from short-sighted populism." This claim is consistent with economic theories of collective action, which posit that discrete interest groups can coalesce around an issue of great importance to the group and exert disproportionate influence on the political process, compared to larger, more diffuse groups, including the general public. Fischel

299. Id. at 98.
300. Id.
302. Id.
repudiates the general judicial distrust of legislatures, finding that in many circumstances, especially in larger jurisdictions, "political action, which is often disparaged as rent-seeking, is sufficient to protect property without the help of judges."\textsuperscript{304} By contrast, in smaller jurisdictions, such as cities, voting majorities may jeopardize the property rights of disfavored minorities, such as developers who want to build low-income housing in otherwise affluent areas.\textsuperscript{305} In Fischel's model, judicial review is most important to police property rights at lower levels of government, where the risk of majoritarian bias is the highest.\textsuperscript{306} At higher levels of government, however, Fischel doubts the ability of judges to do a better job of protecting private property rights than the political process itself.\textsuperscript{307}

Interestingly, \textit{Kelo} does not conform to Fischel's presumption that majoritarian bias is a key problem for property rights in smaller jurisdictions.\textsuperscript{308} \textit{Kelo} was not a typical zoning case, where a local voting majority used its political muscle to keep out unwanted development. To the contrary, \textit{Kelo} has been portrayed as a case involving minoritarian bias, as well-heeled private developers supposedly influenced local officials to act on behalf of their private interest, while proclaiming some ostensible public purpose or benefit.\textsuperscript{309} At least one commentator has suggested, without noticing

\footnotesize
\textsuperscript{304} Fischel, supra note 301, at 324.
\textsuperscript{305} Id.
\textsuperscript{306} Fischel's normative model tracks the situation in the United Kingdom, which provides for no constitutional judicial review of national legislation but substantial statutory judicial review of lower government decision-making to ensure it conforms to parliamentary intent. See Cole, supra note 5.
\textsuperscript{308} To be fair, Fischel's model is arguably inapplicable to cases like \textit{Kelo} involving eminent domain. Fischel developed his model as part of a theory of regulatory takings law, which endeavors to determine when to pay compensation for purported police power regulations.
the incoherence, that the problem of eminent domain, represented by *Kelo*, involves both majoritarian and minoritarian biases.\(^{310}\)

Once again, however, it is worth noting that Mrs. Kelo and the other plaintiffs are still in their homes and businesses in the Fort Trumbull neighborhood, more than six months after the Supreme Court upheld the eminent domain actions against them.\(^{311}\) It is not at all clear that minoritarian bias won the war in New London.\(^{312}\)

**CONCLUSION: MUNICIPAL DEVELOPMENT AND REDEVELOPMENT IN THE WAKE OF *Kelo*\(^{313}\)**

*Kelo* is far more important for its political salience than its legal holding. In the Supreme Court, Justice Stevens spoke for the majority, but in the country at large, Justice O'Connor's dissent spoke for many, if not most, American citizens who are concerned that local politicians are entering into unholy alliances to take land from powerless property owners to transfer it to private developers. Ironically, the political and legislative backlash against *Kelo* demonstrates that Justice O'Connor's dissent was, at least to some extent, misguided. Private property is not an endangered species in the United States. Ordinary property owners appear to be more influential than Justice O'Connor believed they could be. Indeed, any local politician who now ignores the interests of ordinary property owners when designing urban development and redevelopment plans is likely to be surprised at the next election.

Regardless of the Court's holding, *Kelo* is not good news for city officials and local developers because the political backlash that followed the decision has made municipal development and redevelopment substantially more difficult to accomplish, even where it might be warranted. As we saw in Part II, several states have

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\(^{310}\) See Sandefur, *supra* note 14, at 36 (referring to "legislative majorities" exercising power to redistribute resources from legislative minorities to themselves); *id.* at 39 (referring to the threat to eminent domain reform by discrete interest groups that engage in government capture).

\(^{311}\) See Yardley, *supra* note 225.

\(^{312}\) Nor is it clear that the plaintiffs in *Kelo* represent the majority interest in New London. According to published reports, other residents are complaining about the plaintiffs' holding up a socially desirable redevelopment project and raising questions about their motives. See, e.g., *id.*
enacted, or are in the process of enacting, new laws that will make it more difficult and, therefore, more costly for such projects to proceed. In at least some cases, these new legal requirements are likely to constitute more of a burden than any rule the dissenters in *Kelo* (other than Justice Thomas) ever would have applied. And *Kelo*'s practical political impacts will likely be even more significant than any new legislative restrictions. Increasingly, negative publicity and political controversy are forcing governments and other players in municipal development and redevelopment to reconsider large-scale projects which require the use of eminent domain. At least for the near term, the number of such projects will likely dwindle, not in spite of, but because of the Supreme Court's decision in *Kelo*. 