

MUCH ADO ABOUT NOTHING: KELO V. CITY OF NEW LONDON, BABBITT V. SWEET HOME, AND OTHER TALES FROM THE SUPREME COURT

*Marcilynn A. Burke**

This issue is the twenty-first century equivalent of the Boston Tea Party: the government taking away the rights and liberties of property owners without giving them a voice. But this time it is not a monarch wearing robes in England we are fighting—it is five robed justices at the Supreme Court in Washington.

Connecticut Governor M. Jodi Rell (2005)¹

To many, the headlines about the Supreme Court's June 23 decision in *Kelo vs. City of New London*—"Court Authorizes Seizure of Homes"—must sound un-American.

But in upholding a city's right to take private property as part of an economic redevelopment plan, the court affirmed principles as old as the Constitution.

Professor David Barron²

It is ironic but true that fundamentalists, having gained a stunning series of victories in Republican-dominated courts over the past two decades, are now mounting an assault on the very idea of judicial independence and are seeking to produce a judiciary that operates as an arm of the political branches. Some activists are asking for radicals in robes.³

Professor Cass R. Sunstein

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1. Press Release, State of Connecticut, Statement of Governor Rell on Call for Legislative Hearings on Eminent Domain, (July 11, 2005), <http://www.ct.gov/governorrell/cwp/view.asp?A=1761&Q=296184>. Connecticut is the state where *Kelo* originated.

2. David Barron, *New London Case Not a Ruling to Condemn*, HARTFORD COURANT, June 26, 2005, at C1. Professor Barron is a law professor at Harvard Law School, and he specializes in local government law.

3. CASS R. SUNSTEIN, RADICALS IN ROBES: WHY EXTREME RIGHT-WING COURTS ARE WRONG FOR AMERICA 245 (2005).

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I. INTRODUCTION

In the summer of 2005, the United States Supreme Court decided the eminent domain case, *Kelo v. City of New London*,⁴ which reaffirmed the police power of municipalities to condemn private property and transfer it to another private party in furtherance of a redevelopment plan. In so doing, the Supreme Court followed its own precedents holding that the U.S. Constitution's Fifth Amendment does not prohibit a private-party-to-private-party transfer of property in this context. The Supreme Court also decided another land use case that term, *Lingle v. Chevron*,⁵ which went a long way in clarifying the Court's takings jurisprudence under the Fifth Amendment. Arguably *Lingle* is a much more important case jurisprudentially than *Kelo*, but much to my surprise, and perhaps to the surprise of many property law and land use law professors alike,⁶ the *Kelo* decision has drawn a remarkable amount of popular attention. A search of commercial electronic news databases revealed over one thousand documents referencing the case in the two months after it was decided.⁷ Many of those stories reported the dismay

4. 125 S. Ct. 2655 (2005).

5. 125 S. Ct. 2074 (2005). In *Lingle v. Chevron*, the Supreme Court explained that the question of whether regulation of private property "substantially advance[s] legitimate state interests" asked in *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980) and its progeny was an inappropriate test for determining whether a regulation effected a taking under the Fifth Amendment. 125 S. Ct. at 2077-78.

The lower courts in this case took that statement to its logical conclusion, and in so doing, revealed its imprecision. Today we correct course. We hold that the "substantially advances" formula is not a valid takings test, and indeed conclude that it has no proper place in our takings jurisprudence.

125 S. Ct. at 2087. Instead, the Court held that courts should consider the three factors of *Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978): the character of the regulation, the economic impact of the regulation on the property owner, and the extent to which the regulation interferes with the property owner's distinct investment-backed expectations. 125 S. Ct. at 2081-82 (citing *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978)). In addition to the significance of that clarification, the decision, though a defeat for private property advocates in the instant case, may in fact as one scholar suggests, aid those advocates by undercutting some of the precedents that support the government's exercise of police power. Benjamin Barros, *At Last, Some Clarity: The Potential Long-Term Impact of Lingle v. Chevron and the Separation of Takings and Substantive Due Process*, 69 ALB. L. REV. 343 (2005).

6. E.g., Audrey McFarlane, *Myths and Reality of Eminent Domain*, JURIST, Oct. 7, 2005 ("Although those well-versed in the law understand that the decision reaffirmed a 50+ year old federal constitutional standard of deferential view of the public purposes behind an exercise of eminent domain, the headlines and public reaction reflect a popular understanding that the Supreme Court expanded governmental powers to take properties even though *Berman v. Parker* (1954) did not stand only for blight removal."). Professor McFarlane teaches at the University of Baltimore School of Law and studies redevelopment and economic decision-making processes.

7. On August 24, 2005, two months after the decision, a search of documents specifically referring to *Kelo* since it was decided on June 23, 2005 revealed 1016 documents in Westlaw's ALLNEWS and 983 documents in Lexis News Most Recent Two Years database.

and outrage of U.S. citizens.⁸ One story even reported,

People from across the country are joining a campaign to seize Supreme Court Justice David H. Souter's farmhouse to build a luxury hotel, according to the man who suggested it after Souter joined the majority that sided with New London, Conn., in a decision favoring government seizure of private property.⁹

Indeed, the "Committee for the Preservation for Natural Rights"¹⁰ has gathered the necessary twenty-five signatures on a petition to place the issue on the ballot for the March 2006 election in Justice Souter's hometown of Weare, New Hampshire.¹¹ The group wants to name the home "Lost Liberty Hotel."¹²

Although the Court held that the U.S. Constitution does not prohibit state and local governments from exercising the power of eminent domain in this manner, Justice John Paul Stevens, writing for the Court opined, "We emphasize that nothing in our opinion precludes any State from placing further restrictions on its exercise of the takings power."¹³ And the states have answered the call. Legislators and other elected government officials on the federal,¹⁴ state,¹⁵ and local¹⁶ levels have

8. E.g., Michael McGough, *Top Court Won't Rehear Eminent Domain Case: 5-4 Verdict Upheld Conn. Land Taking*, PITT. POST-GAZETTE, Aug. 23, 2005, at A7 ("But few rulings have provoked such public outrage as the court's June 23 decision in *Kelo v. New London*."); Scott S. Greenberger, *Bill Seeks to Restrict Eminent Domain: Blighted Areas Could be Taken*, B. GLOBE, Aug. 9, 2005, at A1 ("a ruling that generated outrage across the political spectrum"); Maura Reynolds, *Lawmakers Move Against 'Eminent Domain' Ruling*, L.A. TIMES, July 1, 2005, at A15 ("The ruling in *Kelo v. City of New London* sparked outrage . . .").

9. Beverly Wang, *For Souter, Seizure Ruling May Hit Home*, WASH. POST, July 25, 2005, at A4. Despite the uproar, the Supreme Court denied the petition for rehearing two months after the initial decision. *Kelo v. City of New London*, 126 S.Ct. 24 (2005).

10. <http://www.natural-rights.org/index.htm> (last visited Jan. 21, 2006).

11. Associated Press, *Activists Seek to Evict Souter from Home*, Jan. 21, 2006, <http://www.foxnews.com/story/0,2933,182407,00.html>.

12. *Id.*

13. *Kelo v. City of New London*, 125 S. Ct. 2655, 2668 (2005).

14. E.g., Protection of Homes, Small Businesses, and Private Property Act of 2005, S. 1313, 109th Cong. (2005); Strengthening the Ownership of Private Property Act of 2005, H.R. 3405, 109th Cong. (2005).

15. E.g., The Eminent Domain Reform Act, 2005 NY A.B. 9043 (2005); Limitation on use of Eminent Domain for Private Parties or Economic Development Purposes, H.B. 12B, 2005 Legis., (Tx. 2005). Alabama was among the first states to take action after the decision. S.B. 68A, 2005 Leg., 1st Spec. Sess. (Ala. 2005) (enacted August 3, 2005).

16. E.g., A Resolution Urging the United States Congress and the Legislature of the State of Tennessee to Pass Legislation that Protects the Private Property of its Citizens from Unjust "Takings" under the Provisions of the Fifth Amendment of the United States Constitution, McMinn County, Tennessee, Constitution Party of Tennessee, <http://cpot.org/cpot/article.php?story=20050718200750797> (last visited July 18, 2005) (specifically referencing the *Kelo* decision and urging "the Congress of the United States and the Legislature of the State of Tennessee to pass legislation that will protect the fundamental ideal of private property ownership by prohibiting the seizure of private property for the

leapt into action, decrying the Supreme Court's ruling and vowing to rectify the harm that it may cause.

Joining in the chorus are conservative¹⁷ and libertarian¹⁸ public interest groups. For example, the Institute for Justice, the libertarian public interest law firm¹⁹ that represented the property owners in *Kelo*,²⁰ is urging citizens to organize grassroots efforts to stave off the alleged abuses of the power of eminent domain. The Institute has developed the "Hands off My Home" campaign.²¹ The campaign's aim is to convince state officials to refrain from using the power of eminent domain in furtherance of private development,²² and the Institute has invited citizens to join its Castle Coalition and the campaign.²³ Another libertarian group, the Cato Institute, is also playing a role in this movement, having filed an amicus brief in the case.²⁴ Its brief displays disdain for the idea that governmental officials are capable of

sole purpose of taking property from private party 'A' and giving it to private party 'B.' even with just compensation"); Mark Walker, *Review of County's Eminent Domain Policy Ordered*, NORTH COUNTY TIMES, July 27, 2005, http://www.nctimes.com/articles/2005/07/27/news/top_stories/21_55_377_26_05.txt ("Saying they want to guard against any abuses in the wake of a recent U.S. Supreme Court decision, San Diego County supervisors have ordered an immediate review of the county's eminent domain policies.").

17. E.g., Charles Hurt, *Property Decision Galvanizes the Right*, WASH. TIMES, July 19, 2005, at A1 ("Conservatives say last month's Supreme Court ruling that expanded the government's power of eminent domain is now Exhibit A for their case that the high court has abandoned the original meaning of the Constitution and is in desperate need of more conservative jurists."); Press Release, FreedomWorks/Citizens for a Sound Economy & Empower America, North Carolina FreedomWorks Initiates a Protect Our Property Campaign: Collecting Over 100,000 Signatures to Petition the North Carolina Legislature to Uphold Property Rights (Sept. 9, 2005), http://www.freedomworks.org/newsroom/press_template.php?press_id=1454.

18. E.g., Press Release, Libertarian Party of Tennessee, LPTN Condemns Supreme Court's Eminent Domain Ruling (June 24, 2005), <http://www.lptn.net/news/articles/96>; Samuel R. Staley, *Property Owners Have Few Rights Left*, SUN HERALD, June 29, 2005, at B2. Mr. Staley is the director of urban growth and land use policy at the libertarian public interest group, Reason Foundation. Reason Foundation, Experts by Name, <http://www.reason.org/expertsbyname.shtml> (last visited Sept. 13, 2005).

19. The Institute for Justice describes itself as follows: "As our nation's only libertarian public interest law firm, we pursue cutting-edge litigation in the courts of law and in the court of public opinion on behalf of individuals whose most basic rights are denied by the government—like the right to earn an honest living, private property rights, and the right to free speech, especially in the areas of commercial and Internet speech." Inst. for Justice, Who We Are, <http://www.ij.org/profile/index.html> (last visited Aug. 26, 2005).

20. 125 S. Ct. 2655, 2658 (2005).

21. Inst. for Justice, *Grassroots Groundswell Grows Against Eminent Domain Abuse* (July 12, 2005), http://www.ij.org/private_property/connecticut/7_12_05pr.html.

22. Castle Coalition, Hands Off My Home, <http://www.castlecoalition.org/HandsOffMyHome/> (last visited Aug. 26, 2005). The Castle Coalition is a "project" of the Institute of Justice. Castle Coalition Homepage, <http://www.castlecoalition.org/> (last visited Aug. 26, 2005).

23. See Inst. for Justice, *supra* note 21.

24. Brief of the Cato Institute as Amicus Curiae supporting Petitioners, at 19, *Kelo v. City of New London*, 125 S.Ct. 2655 (2005) (No. 04-108).

revitalizing economies, referring to officials as “flat-footed.”²⁵ As the Cato Institute argued,

There is no public-regarding reason why economic development has to proceed in blunderbuss fashion just because so-called experts have decreed it to be the policy de jour. There is no reason to give any deference to legislative and administrative bodies that act under systematically perverse incentives.²⁶

And liberals also have added their voice to this tragic Greek chorus,²⁷ noting that the use of eminent domain has historically decimated minority and low-income communities.²⁸

Washington Rep. Maxine Waters, a Los Angeles Democrat, warned Tuesday against using government’s power of eminent domain to redevelop New Orleans after Hurricane Katrina concentrated its devastation on largely poor African American neighborhoods.

“We have to watch the redevelopment in New Orleans for a lot of reasons, and one of them is to make sure that the shadow government of the rich and the powerful does not end up abusing eminent domain to take property that belongs to poor people in order to get them out of the city,” Waters said.²⁹

25. *Id.*

26. *Id.* at 22. But consider the case of Baltimore, Maryland’s Inner Harbor. According to the city solicitor, Ralph S. Tyler, “[w]ithout eminent domain, the Inner Harbor, which played an essential role in Baltimore’s success in building its tourist industry, could not have been redeveloped.” Terry Pristin, *Developers Can’t Imagine a World Without Eminent Domain*, N.Y. TIMES, Jan. 18, 2006, at C5.

27. Carolyn Lochhead, *Foes in Congress Unite in Defense of Property*, S.F. CHRON., July 1, 2005, at A1 (“Democrats and Republicans, conservatives and liberals are going to be organizing behind opposing the Supreme Court decision, [U.S. Representative Maxine] Waters said.”); Protection of Homes, Small Businesses, and Private Property Act of 2005, S. 1313, 109th Cong. (2005) (introduced by Senator John Cornyn (R-TX) and co-sponsored by Senators Barbara Boxer (D-CA) and Bill Nelson (D-FL), along with 29 other Republican Senators).

28. Carolyn Lochhead reported on the disproportionate impact of eminent domain on minority communities:

Since the 1950s, African American communities have been targeted for “urban renewal” projects so many times that the redevelopment efforts came to be known as “black removal,” said Hilary O. Shelton, director of the Washington office of the National Association for the Advancement of Colored People.

Minority and poor communities are affected more often by eminent domain and have less ability to fight back politically or legally, Shelton said. The recent Supreme Court decision “to allow the government or its designee to take property simply by asserting that it can put the property to a higher use will systematically sanction transfers from those with less resources to those with more,” Shelton said.

Carolyn Lochhead, *Lawmaker Cautions Against Eminent Domain in Rebuilding: Maxine Waters Sees Threat to Poor Blacks in New Orleans*, S.F. CHRON., Sept. 21, 2005, at A19. See also *Kelo v. City of New London*, 125 S.Ct. 2655, 2687 (2005) (Thomas, dissenting).

29. Lochhead, *supra* note 28.

Two banks have likewise entered the public debate, declaring that they would not make loans for development that involved the use of eminent domain to take private property to transfer it to other private entities. One of those banks, BB&T, is the ninth largest financial holding company in the country.³⁰ The chairman and chief executive officer of the bank described such a use of eminent domain power as “‘just plain wrong.’”³¹ Another officer of the bank explained, “‘We thought it was just timely to let people know how we feel,’ he said. ‘We are a very values-driven, principled organization.’”³² A much smaller bank in Missouri has also issued a statement that it will not lend money for projects involving such a use of the power of eminent domain. The chief operating officer explained, “‘The sanctity of private property ownership is one of the hallmarks of our individual rights as private citizens. Eminent domain should only be used for public projects, not to benefit private developers.’”³³

Noticeably absent from this public debate, with a few exceptions, are developers.³⁴ They have made a conscious decision to remain largely silent.³⁵ Though the use of eminent domain is critical to redevelopment projects, developers probably see no advantage to defending publicly the use of eminent domain in that context although—to be sure—they are letting their elected officials know their position.³⁶ At least one politician has asked for businesses to team with government to support the “responsible” use of eminent domain.³⁷ A representative of a land

30. Terry Pristin, *Bank to Deny Loans if Land Was Seized*, N.Y. TIMES, Jan. 26, 2006, at C5.

31. *Id.*

32. *Id.*

33. Inst. for Justice, *Montgomery Bank Won't Finance Eminent Domain Abuse: Second Bank Within Week to Reject Eminent Domain for Private Gain*, (Feb. 6, 2006), <http://www.ij.org/editorial/2ndbank-not-to-fund-ED.html>.

34. See Pristin, *supra* note 26, at C5.

35. *Id.* (“[T]he Real Estate Roundtable, which represents the nation’s largest real estate companies, has refrained from officially opposing the federal bill”).

36. *Id.* (“the International Council of Shopping Centers, a trade group, had not put its lobbying muscle to work on the issue. But Herb L. Tyson, a lobbyist for the council, said he had privately urged lawmakers to preserve eminent domain for economic development.”).

37. For example, Richard L. Brodsky, a New York state assemblyman, makes this argument.

But Mr. Brodsky, a Democrat, says it is vital that municipalities retain the ability to make responsible use of eminent domain. And he is urging business interests to join with city officials in defending against what he calls a furious assault on eminent domain from property-rights advocates and extreme elements of the Republican Party.

“We’re at a point where the business community has not really gotten its act together,” Mr. Brodsky said in a recent telephone interview. “The Republican Party has decided to abandon its business base and cater to its right-wing reactive base.”

David Scharfenberg, *Yes, Towns Can Seize Land, But Aren't There Limits?*, N.Y. TIMES, Feb. 5, 2006, at § 14WC, 1.

use and real estate development organization, the Urban Land Institute, did however comment on BB&T's public position regarding the use of eminent domain in *Kelo*, saying that

[I]t was odd that a bank would not want to judge each case on its merits to see if the forced sale of property was justified.

"It's curious that a major financial institution would choose to be both judge and jury," she said. "Many projects that use eminent domain are very important for the entire community."³⁸

Despite the outrage and dismay at the decision, it was arguably quite conservative. The Court ruled that nothing in the U.S. Constitution barred the manner in which the City of New London exercised its police power. The issue was a matter of public policy, rather than constitutional law and, as such, was appropriate for the legislature to address, not the courts. Oddly enough, many of the *Kelo* critics are the same individuals who have criticized the federal judiciary for being activist.³⁹

As someone who has studied and written about the Fifth Amendment's prohibition against taking of private property for public use without just compensation, I am perplexed, dare I say stunned, by the attention this ruling has drawn. As I pondered why this decision had generated such a hail storm, I remembered a similar, though less widespread reaction to another Supreme Court decision that figured prominently in the delineation of private property rights: *Babbitt v. Sweet Home Chapter of Communities for a Greater Oregon*.⁴⁰ In that case, the Supreme Court upheld then Secretary of Interior Bruce Babbitt's regulatory interpretation that the Endangered Species Act prohibits both direct and *indirect* harm (which could include habitat modification) to endangered or threatened species, and that this

38. Pristin, *supra* note 30.

39. For example, many of the co-sponsors of the House bill, H.R. 3405, 109th Cong. (1st Sess. 2005), have criticized judges as being "activist." E.g., Maro Robbins, *Passing Judgment on Activist Judges*, SAN ANTONIO EXPRESS-NEWS, April 24, 2005, at 1A ("While judicial activism has existed from the founding of our nation, it seems to have reached a crisis," [Lamar S.] Smith [R-TX] told the audience. "Judges routinely overrule the will of the people, invent new 'rights' and ignore traditional morality."); Press Release, Rep. Randy Neugebauer, *Neugebauer Votes to Protect Pledge*, US FED. NEWS (Washington), Sept. 23, 2004 ("For too long activist judges have been legislating from the bench and short-circuiting the democratic process," Neugebauer said. "It is the duty of Congress to be a check on the other branches of government."); Editorial, *Can Usurping Justices be Curbed?*, CHATTANOOGA TIMES FREE PRESS, Apr. 7, 2004, at B7 ("Justly concerned about unbridled judicial activism, Rep. John J. Duncan Jr., R-Tenn., and many other representatives are proposing a bill to provide for dictatorial Supreme Court decisions to be reversed by two-thirds majority votes in both Houses of Congress, just as Congress can override a presidential veto by two-thirds votes.").

40. 515 U.S. 687 (1995).

prohibition extends to activities on private property.⁴¹ Respondents argued that the interpretation was too broad and that Congress intended to include only *direct* harm (and not habitat modification) in the prohibition.⁴² In that decision, just as in *Kelo*, one of the Justices in a concurring opinion suggested that although the Court found the exercise of governmental authority to be valid under the relevant law, the legislature could decide to narrow the scope of authority.⁴³

Although the popular media attention given to *Sweet Home* was insignificant compared to that given to *Kelo*,⁴⁴ the legislative responses have been strikingly similar. In response, at least in part, to *Sweet Home*, Congress introduced numerous measures to provide compensation to private landowners if implementation of the Endangered Species Act resulted in a diminution in the value of their land.⁴⁵ Though Congress was unsuccessful in passing such legislation, as many as twenty-four states have succeeded in doing so.⁴⁶ Some observers commented that though the decision was a victory for environmentalists, it may have lit the fire under private property rights advocates and those who wished to “gut” the Endangered Species Act.⁴⁷

41. *Id.*

42. *Id.* at 693.

43. *Id.* at 714.

44. A search of Westlaw’s ALLNEWS database for the two months following the decision revealed only 77 documents and a search of Lexis News, All (English Full Text) database revealed only 104 documents. Conservatives and libertarians seemed to have become more media savvy during the past decade. As the Landmark Legal Foundation boasts on its website, “Landmark has gained a reputation as one of the national media’s most respected and sought-after sources of expert commentary on constitutional and legal questions.” Landmark Legal Foundation, <http://www.landmarklegal.org> (last visited Sept. 4, 2005).

45. See e.g., S. 239, 104th Cong. (1995) (landowner entitled to compensation when “deprived of \$10,000, or 20 percent or more, of the fair market value of the affected portion of the property”); H.R. 790, 104th Cong. (1995) (entitled to compensation when “deprived of 50 percent or more of the fair market value, or the economically viable use of the affected portion of the property”).

46. See e.g., ARIZ. REV. STAT. ANN. §§ 41-1311 to -1313 (West 1999 & Supp. 2001); COLO. REV. STAT. ANN. §§ 29-20-201 to -205 (West 2001); DEL. CODE ANN. tit. 29, § 605 (1997); FLA. STAT. ANN. § 70.001 (West 1998); IDAHO CODE §§ 67-8001 to -8004 (Michie 1995); IND. CODE ANN. § 4-22-2-32 (West 1991 & Supp. 1998); KAN. STAT. ANN. §§ 77-701 to -711 (Supp. 2000); LA. REV. STAT. ANN. §§ 3:3609-3:3611 (West 2002); ME. REV. STAT. ANN. tit. 5, § 3341 (West 2001); MICH. COMP. LAWS ANN. §§ 24.421 to -425 (West 1999); MISS. CODE ANN. §§ 49-33-1 to -19 (Supp. 1996); MO. ANN. STAT. § 536.017 (West 1999); MONT. CODE ANN. § 2-10-101 to -105 (1997); NEV. REV. STAT. ANN. § 533.425 (Michie 1995); N.M. STAT. ANN. § 74-6-12 (Michie 2000); N.D. CENT. CODE § 28-32-09 (Supp. 1997); OR. REV. STAT. § 197.772 (1997); TENN. CODE ANN. §§ 12-1-201 to -206 (Supp. 1998); TEX. GOV’T CODE ANN. § 2007.001-.007 (Vernon 2000); UTAH CODE ANN. §§ 63-90-2 to -4 (2001); VA. CODE ANN. § 2.2-4007(H) (Michie 2005); WASH. REV. CODE ANN. § 36.70A.370 (West 2002); W. VA. CODE §§ 22-1A-1 to -6 (1998); WYO. STAT. ANN. § 9-5-301-305 (Michie 2001).

47. Christopher Hansen, *Species Law Upheld by High Court Ruling for Habitat Feeds the Call for Property Rights*, SEATTLE POST-INTELLIGENCER, June 30, 1995, at A1. See also Robert T. Nelson & Eric Pryne, *Ruling Seen Fueling Species-Act Fight*, SEATTLE TIMES, June 30, 1995, at B1.

Despite that flurry of state legislative activity, it is unclear that municipalities and state governments are doing business any differently than they did before the post-*Sweet Home* legislation was enacted.⁴⁸ The fact that nothing much appears to have changed after the state takings legislation spurred my musings about what effect any new legislation concerning the exercise of the power of eminent domain would have. Will this legislative activity cause governments to do business differently? The skeptic in me thinks not.

So if I am correct, why are public interest groups, the press, and legislatures expending so much effort in this exercise of futility? Perhaps the press is trying to capitalize upon the seemingly growing sentiment that government regulation is trampling over the rights of its citizens. Or perhaps politicians readily recognize the opportunity to grandstand and produce sound-bites that are pleasing to their constituents' ears. As one columnist suggested, legislators can divert public attention away from scandal by implementing the "devil theory of politics" attacking something that liberals and conservatives alike can agree is an evil: eminent domain.⁴⁹ But perhaps something more is at work.

That possibility of something more afoot is troubling. Although the legislative actions may possibly have no practical effect, they do symbolize an ideological paradigm shift. This shift is worthy of our attention. And the fact that liberals and conservatives have joined forces does not provide much comfort.⁵⁰

This Article evaluates possible motives and legal and political ramifications of this movement to curtail governments' power to

48. See Stacey C. White, *State Property Rights Laws: Recent Impacts and Future Implications*, LAND USE L. & ZONING DIG., at 3 (July 2000). See *infra* Part III.C.2. discussing the Texas legislation and *Bragg v. Edwards Aquifer Authority*, 71 S.W.3d 729 (Tex. 2002) and the Florida legislation. Cf. David A. Thomas *The Illusory Restraints and Empty Promises of New Property Protection Laws*, 28 URB. LAW. 223, 256 (1996) ("Apparently legislators are hoping to placate property owners without risking compensation provisions that get out of control. Whether the illusory restraints of most recent private property protection legislation accomplish that remains to be seen.").

49. Under this theory, a successful political theory, party or candidate must set up a position in opposition to evil and cry it from the rooftops. . . . Tennessee's legislature, reeling under the escalating ethics scandals of the past two months and eager to change the subject, has found the perfect devil. It's a devil both the left and right can rail against.

It's called eminent domain

Larry Daughtrey, *Eminent Domain Even Has the Legislature Grouching About Greed*, July 31, 2005, <http://www.tennessean.com/apps/pbcs.dll/article?AID=/20050731/COLUMNIST0105/507310372/1099>.

50. "In Congress, liberals like Representative Maxine Waters, Democrat of California, have joined conservatives like Representative Tom DeLay of Texas, the House majority leader, in criticizing the ruling." Timothy Egan, *Ruling Sets off Tug of War Over Private Property*, N.Y. Times, July 30, 2005, at A1. See also Carolyn Lochhead, *Foes in Congress Unite in Defense of Property*, S.F. Chron., July 1, 2005, at A1.

regulate private property. This Article differs from the myriad of articles written about the propriety of the Supreme Court's jurisprudence in the area. It does not address whether reform in this area of the law is appropriate.⁵¹ Instead, this Article will analyze the political reactions, proposed legislation, and rhetoric of reform. In evaluating the possibilities, this Article will highlight an illuminating comparison between *Kelo* and *Sweet Home* and the reactions thereto.

Part II of this Article will review briefly the case of *Sweet Home* and the state and federal legislative reactions to it. It will also analyze the impact of the legislation that was enacted in response to *Sweet Home* almost a decade ago. Part III of the Article will review the *Kelo* decision and the colossal overreactions in the media and legislatures across the country. Part IV posits that, perhaps inspired by the "Constitution in Exile" movement, these legislative actions are attempts to return the country to the *Lochner*⁵² era when the Supreme Court viewed any government's attempt to interfere with economic liberties as a presumptively invalid exercise of the police power. Part V argues that the Constitution in Exile movement simply desires to substitute one type of judicial activism with another to achieve its political agenda. As this movement gains momentum, Part VI emphasizes the importance of telling a counter story (or stories) to reject that movement. Part VII concludes with a cautionary word.

II. THE ENDANGERED SPECIES ACT AND *BABBITT V. SWEET HOME* CHAPTER OF HOMES FOR A GREATER OREGON

This Section first provides a brief summary of the case, *Babbitt v. Sweet Home Chapter of Communities for a Greater Oregon*. Then it examines the legislation that was proposed to address the harm allegedly caused by the Secretary of Interior's interpretation of the Endangered Species Act and the Supreme Court's decision upholding it. Finally, this Section will analyze the impact of the legislation that was actually enacted.

51. Some lawmakers and public officials, however, are trying to carve out a moderate position, saying that reform is needed to address legitimate grievances. "What you're seeing is a coherent attack by the right on the power of eminent domain," said Richard L. Brodsky, a New York State assemblyman . . . "It does no one any good to pretend that things aren't going to change. If we take that view, we're going to see the extreme position triumph." Pristin, *supra* note 26.

52. *Lochner v. New York*, 198 U.S. 45 (1905). In this case, the Court examined the liberty to contract as protected by the Fourteenth Amendment and the limitation of the state's police power, finding that the statute at issue was an arbitrary, invalid interference with that liberty interest.

A. The Case: Babbitt v. Sweet Home Chapter of Communities for a Greater Oregon

Babbitt v. Sweet Home Chapter of Communities for a Greater Oregon pitted Respondents, who described themselves as “small landowners, logging companies, and families dependent on the forest products industries in the Pacific Northwest and in the Southeast, and organizations that represent their interests” against the Secretary of Interior’s interpretation of the Endangered Species Act’s prohibition against the taking of an endangered species.⁵³ Section 9 of the Endangered Species Act (ESA) makes it unlawful for any person to “take any [endangered] species within the United States or the territorial sea of the United States.”⁵⁴ The statute defines “take” as “harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.”⁵⁵ In the implementing regulations, the Secretary of Interior defines “harm” as “an act which actually kills or injures wildlife. Such [an] act *may* include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering.”⁵⁶

In a facial challenge, Respondents, Sweet Home, argued that the Secretary’s statutory interpretation of the term “harm” exceeded congressional intent and rendered any enforcement of the Secretary’s interpretation a taking of private property, compensable under the Fifth Amendment of the U.S. Constitution. They argued that the prohibition against habitat modification harmed them.⁵⁷ It was invalid on its face, according to Respondents, because Congress intended to prohibit only “direct” harm and not “indirect” harm.⁵⁸ Respondents also argued that the only means for the Secretary to regulate private property was to acquire that property under the provisions of § 5 of the Act.⁵⁹

The U.S. Supreme Court upheld the Secretary’s interpretation of the ESA, however, finding “that the Secretary reasonably construed the

53. *Babbitt v. Sweet Home Chapter of Communities for a Greater Oregon*, 515 U.S. 687, 692 (1995).

54. 16 U.S.C. § 1538(a)(1)(B) (2006).

55. 16 U.S.C. § 1532(19) (2006).

56. 50 C.F.R. § 17.3 (2006) (emphasis added).

57. *Babbitt v. Sweet Home Chapter of Communities for a Greater Oregon*, 515 U.S. 687, 692 (1995). Though not stated directly in the decision, Respondents alleged an economic harm because the regulation conceivably could have prevented them from engaging in their chosen forest-related industries.

58. *Id.*

59. *Id.* at 693.

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intent of Congress when he defined ‘harm’ to include ‘significant habitat modification or degradation that actually kills or injures wildlife.’”⁶⁰ In reviewing the *Sweet Home* decision, one legal commentator remarked that the “bloc” of Justices Stephen G. Breyer, Ruth Bader Ginsburg, John Paul Stevens, and David H. Souter might be labeled more appropriately “conservative” rather than “liberal” in this case because “it is this group of Justices who now argue on behalf of that onetime conservative shibboleth, judicial restraint.”⁶¹ Rather than substitute its own judgment, the Supreme Court deferred to the Secretary’s expertise and discretion.⁶²

*B. Proposed Legislative Solutions for the
Endangered Species Act and Takings*

Justice Sandra Day O’Connor wrote in her concurrence in *Sweet Home* that “Congress may, of course, see fit to revisit this issue.”⁶³ And indeed it did. Many legislative proposals on both the federal and state levels sought to address the problems presented by regulation of private property under the Endangered Species Act. In essence, according to the reformers, the Secretary of Interior had struck the wrong balance between protecting endangered and threatened species and protecting private property rights. Below this Article examines a number of the proposals offered to correct that imbalance.

1. Federal Legislative Approaches

Partly in reaction to *Sweet Home*, Congress proposed numerous bills to protect private property from regulation under the Endangered Species Act. For example, then Resources Committee Chairman Representative Don Young (R-AK) and Representative Richard Pombo (R-CA), and others circulated a letter announcing that they would introduce legislation to reverse the Supreme Court’s decision in *Sweet Home*. “‘This Supreme Court case must be reversed and only Congress has the power to stop the confiscation of private property,’ the letter says. ‘We will be calling on you to help us reverse this terrible injustice.’”⁶⁴ The proposed legislation sported such short titles as the

60. *Id.* at 708.

61. Linda Greenhouse, *The Nation: Gavel Rousers; Farewell to the Old Order in the Court*, N.Y. TIMES, July 2, 1995, at § 4, 1.

62. *See Babbitt*, 515 U.S. at 708.

63. *Id.* at 714.

64. *House GOP to Introduce Bill*, E&P ENV’T., Aug. 4, 1995.

Omnibus Property Rights Act of 1995,⁶⁵ the Private Property Owners' Bill of Rights,⁶⁶ the Landowners Equal Treatment Act,⁶⁷ and the Life, Liberty, and Property Protection Act.⁶⁸ The cornerstone of much of this proposed legislation was that the federal government would provide compensation to private property owners if regulation under the ESA resulted in a specified percentage of diminution in the value of their land.⁶⁹ Congress, however, enacted none of this proposed legislation.

Though unsuccessful in passing legislation at that time, conservative and libertarian members of Congress did succeed in propagating their ideology of limited government espoused by the Constitution in Exile movement discussed in Part IV of this Article. Professor Jeffrey Rosen believes that

[b]y 1995, the Constitution in Exile movement had reached what appeared to be a turning point. The Republicans had recently taken over both houses of Congress after pledging, in their Contract With America, to rein in the federal government. And the Supreme Court, by rediscovering limits on Congress's power in [*United States v.*] *Lopez*, seemed to be answering the call.⁷⁰

This trend continues within Congress through Representative Pombo, now chairman of the Committee on Resources, who, undaunted by a decade of dead bills, has reinitiated his campaign for compensation.

In the 109th Congress, Representative Pombo introduced the proposed "Threatened and Endangered Species Recovery Act of 2005."⁷¹ The bill provides that if a private property owner's proposed land use would violate the ESA's § 9 prohibition against taking a listed species, the owner may request "financial conservation aid" from the Secretary of the Interior.⁷² The Secretary must grant such aid "in an amount no less than the fair market value of the use that was proposed by the property owner"⁷³ if the following four conditions are met:

65. S. 605, 104th Cong. (1995).

66. S. 953, 105th Cong. (1997).

67. H. R. 1142, 106th Cong. (1999)

68. H.R. 5709, 107th Cong. (2002).

69. See, e.g., H.R. 472, 107th Cong. (2001) (entitled to compensation or to be bought out for diminution of value of 25% or more); H.R. 495, 106th Cong. (1999) (entitled to compensation for diminution of value of 50% or more); H.R. 4335, 105th Cong. (1998) (entitled to compensation when value of any portion of land is reduced by 50% or more); S. 781, 105th Cong. (1997) (entitled to compensation if there is a temporary or permanent diminution in property value greater than 33%); S. 239, 104th Cong. (1995) (entitled to compensation when "deprived of \$10,000, or 20 percent or more of the fair market value of the affected portion of the property").

70. Jeffrey Rosen, *The Unregulated Offensive*, N.Y. TIMES, Apr. 17, 2005, at § 6, 42 (Magazine).

71. H.R. 3824, 109th Cong. (2005).

72. H.R. 3824, § 13.

73. H.R. 3824, § 13(d)(2).

First, the owner must request such aid within 180 days of the Secretary's informing the owner that the proposed land use would not comply with § 9.⁷⁴ Second, the owner must have foregone the proposed use.⁷⁵ Third, that use must have been otherwise legal under state and local law.⁷⁶ Finally, the landowner must demonstrate that the owner has "the means to undertake the proposed use."⁷⁷

Environmental public interest groups uniformly opposed this bill,⁷⁸ but the U.S. House of Representatives passed it by a vote of 229 to 193 on September 29, 2005.⁷⁹ The U.S. Senate received the bill the following day and referred it to the Senate's Committee on Environment and Public Works.⁸⁰

In hopes of a consensus emerging to amend the ESA, Senator Lincoln Chafee (R-RI), chair of the Fisheries, Wildlife and Water Subcommittee, asked the Keystone Center, a mediation group specializing in public policy issues, to convene a working group to address, inter alia, the issue of habitat.⁸¹ Senator James Inhofe (R-OK), chair of the Committee on Environment and Public Works, announced his plans to work with fellow Senators to present a bi-partisan bill by the end of March.⁸² Stay tuned.

2. State Legislative Approaches

Though Congress thus far has been unsuccessful in passing any substantive amendments to the Endangered Species Act,⁸³ many states

74. H.R. 3824, § 13.

75. H.R. 3824, § 13.

76. H.R. 3824, § 13.

77. H.R. 3824, § 13(d)(2)(C).

78. E.g., Johanna Neuman & Janet Wilson, *U.S. House Votes to Revamp Endangered Species Act*, L.A. TIMES, Sept. 30, 2005, at 15; *Hostility Toward Key Provision of Pombo ESA Reform Bill Shows Environmentalists Not Committed to Public Right to Know*, U.S. NEWswire, Sept. 21, 2005.

79. Final Votes Result Count for Roll Call 506 (Sept. 29, 2005), <http://clerk.house.gov/evs/2005/roll506.xml>.

80. All Congressional Actions (Sept. 30, 2005), <http://thomas.loc.gov/cgi-bin/bdquery/z?d109:HR03824:@@S>.

81. Allison A. Freeman, *Effort to Rewrite Species Law Faces Tough Slog in Senate*, GREENWIRE (May 25, 2005), <http://www.eenews.net/Greenwire/2005/05/25/archive/19/?terms=keystone%20endangered%20species%20act%20chafee>.

82. Allison A. Freeman, *Key Senator Vows ESA Rewrite Despite Discord on Habitat*, GREENWIRE (Feb. 22, 2006), <http://www.eenews.net/Greenwire/2006/02/22/archive/16/?terms=keystone%20endangered%20species%20act%20chafee>.

83. Congress passed a moratorium, to endure until reauthorization of the Act, on the listing of endangered or threatened species and the designation of critical habitat. Emergency Supplemental Appropriations and Rescissions for the Department of Defense to Preserve and Enhance Military Readiness Act of 1995, Pub. L. No. 104-6, ch. 4, 109 Stat. 73, 86 (1995) (rescinding funds from Interior

were successful in enacting legislation that appears to limit regulation of private property that diminished the property's value. For example, Texas enacted the Private Real Property Rights Preservation Act,⁸⁴ Florida enacted the Bert J. Harris, Jr., Private Property Rights Protection Act,⁸⁵ and Wyoming enacted the Wyoming Regulatory Takings Act.⁸⁶ In 2004, the voters in Oregon approved a remarkable initiative, Ballot Measure 37, which provides for compensation whenever any land use regulation diminishes the value of private property. If the regulating entity does not want to compensate the landowner, it must waive enforcement of the regulation with respect to that property.⁸⁷

In all, approximately twenty-four states enacted some legislation⁸⁸ ostensibly designed to curb regulation of private property for the sake of endangered species. This next section will review the impacts of that legislation, with emphasis on the laws in Florida and Texas.

C. Impacts of Property Rights and Takings Legislation

Scholars have conducted some preliminary empirical analysis to determine whether the states' property rights and takings legislation has had any impact on how state and local governments conduct business.⁸⁹ The studies thus far generally have found that these laws have affected private property rights and the activities of state and local authorities only minimally.⁹⁰ A review of The Private Real Property Preservation

for listing species and designating critical habitat). However, the omnibus appropriations act of 1996 gave the President the authority to suspend the moratorium, Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. 104-34, 110 Stat. 1321-159 to -160 (1996), and former President Bill Clinton suspended the moratorium upon signing the bill into law on April 26, 1996. Robert Dodge, *Clinton Signs Budget Measure, Calls Bill Something We Can All Be Proud Of*, DALLAS MORNING NEWS, Apr. 27, 1996, at 3A.

84. TEX. GOV'T CODE ANN. § 2007.001 (Vernon 2000).

85. FLA. STAT. ANN. § 70.001 (West 1998). Bert J. Harris, Jr. was a former state representative, "[k]nown as a champion of private property rights in Florida." 1999 Hall of Fame Inductees, at <http://www.flaghalloffame.com/1999.html> (last visited Aug. 24, 2005).

86. WYO. STAT. ANN. § 9-5-301 (Michie 2001).

87. 2005 OR. LAWS, ch. 1.

88. See *supra* note 46.

89. Harvey M. Jacobs, *The Impact of State Property Rights Laws: Those Laws and My Land* (Mar. 1998), <http://www.planning.org/PEL/commentary/propertyrights.htm> (citing studies in Arizona, Florida, Kansas, Maine, Mississippi, Montana, and Wisconsin); Nicole S. Sayfie & Ronald L. Weaver, *1991 Update on the Bert J. Harris Private Property Rights Protection*, FLA. B. J., Mar. 1999, at 49, available at <http://www.floridabar.org/DIVCOM/JN/JNJournal01.nsf/0/e42a89c79174b90f85256adb005d6249?OpenDocument>.

90. Compare Fishkind & Associates, *The Economic Impact of the Bert J. Harris, Jr., Private Property Rights Protection Act and the Proposed Property Rights Amendment iii* (May 17, 1999) (unpublished manuscript on file with author) ("For the most part it is business as usual, albeit with much more care taken.") and HARVEY M. JACOBS, *STATE PROPERTY RIGHTS LAWS: THE IMPACTS OF THOSE*

Act in Texas and the Bert J. Harris, Jr. Private Property Rights Protection Act in Florida (the “Harris Act”) led one researcher to conclude:

From this analysis, it seems clear the impacts of state takings law in Florida and Texas are less drastic than many critics had feared. The courts have not been bogged down with excessive numbers of claims. Government entities have not gone bankrupt compensating property owners. And although these government entities report taking a closer look at the impacts of their actions on private property, evidence that the laws have chilled their regulatory actions is scant at best.⁹¹

For example, in Florida between 1995—when the law was passed—and 2000, there were fifty-two claims made for compensation.⁹² During that time, no compensation was paid to landowners.⁹³ Moreover, interviews of the municipal employees involved in some of those fifty-two claims have indicated that the Harris Act has not dissuaded municipalities from pursuing their land use planning efforts.⁹⁴

Similarly, in the decade since Texas passed the Private Real Property Rights Preservation Act (the Act), there were no reported cases in which a landowner received compensation for a taking.⁹⁵ Perhaps the most significant case involving the Act was a suit against the Edwards

LAWSON MY LAND 19 (1999) (finding that Kansas’ Private Property Protection Act has had little substantive impact) with Richard G. RuBino, *The Chilling Effect of Florida’s Private Property Rights Protection Acts on Growth Management and Environmental Regulation* 25 (June 1997) (unpublished manuscript on file with author) (“The Harris Act has had a chilling effect, and growth management and environmental activities have certainly slowed or become cautiously applied.”) and Kirk Emerson & Charles R. Wise, *Statutory Approaches to Regulatory Takings: State Property Rights Legislation Issues and Implications for Public Administration*, 57 PUB. ADMIN. REV. 411, 420 (1997) (“[T]hese statutes may serve to make regulators even more risk averse and cause underregulation.”).

91. Stacey S. White, *State Property Rights Laws: Recent Impacts and Future Implications*, LAND USE L. & ZONING DIG., July 2000, at 3, 8. *Contra* Richard G. RuBino, *The Chilling Effect of Florida’s Private Property Rights Protection Acts on Growth Management and Environmental Regulation* 25 (June 1997) (unpublished manuscript on file with author).

92. *See* White, *supra* note 91, at 3, 5.

93. Stacey S. White, *State Property Rights Laws: Recent Impacts and Future Implications*, LAND USE L. & ZONING DIG., July 2000, at 3, 6.

94. *Id.* at 3, 7–8. *Cf.* Jacobs, *supra* note 89 (concluding upon a review of the private property law in Arizona that the law had discouraged the development of new land use regulation.)

95. There are eleven reported decisions as of September 4, 2005 that cite the Private Real Property Rights Preservation Act. Of those eleven, only one involved a claim of a taking, ultimately disposed of by a summary judgment motion against the landowner. *Sw. Property Trust, Inc. v. Dallas County Flood Control District No. 1*, 136 S.W.3d 1 (Tex. 2001). Two decisions involved one case and controversy over a claim that the government agency failed to complete the required Takings Impact Analysis (TIA). The Texas Supreme Court ruled that the Edwards Aquifer Authority was exempt from the requirement to complete a TIA. *Bragg v. Edwards Aquifer Authority*, 71 S.W.3d 729 (Tex. 2002); *Edwards Aquifer Authority v. Bragg*, 21 S.W.3d 375 (Tex. 2000).

Aquifer Authority.⁹⁶ In *Bragg v. Edwards Aquifer Authority*,⁹⁷ the property owners contended that the Edwards Aquifer Authority (the Authority) had failed to complete the required "Takings Impact Assessment."⁹⁸ The Supreme Court of Texas found for the Authority, holding that it was exempt from this requirement when issuing permit rules.⁹⁹ The Authority was exempt under the provision that excludes actions of a political subdivision taken under its "statutory authority to prevent waste or protect rights of owners of interest in groundwater."¹⁰⁰ One of the Authority's attorneys in the matter has argued that the Texas Supreme Court "handed . . . a resounding defeat to the property rights proponents."¹⁰¹ But he argues that the "real significance" of the decision is that the Authority is "exempt from a suit to determine whether a taking has occurred" under the Act.¹⁰² Additionally counsel for the Authority believes that the ruling arguably "implies that actions of Chapter 36 groundwater conservation districts are generally exempt" from the Act.¹⁰³

Moreover, the San Antonio, Texas Court of Appeals found the Authority to be exempt under another provision of the Act that exempts actions that are "reasonably taken to fulfill an obligation mandated by state law."¹⁰⁴ The Texas Supreme Court did not discuss the reasoning of the Court of Appeals, but reached the same conclusion "for different reasons than those the court of appeals expressed."¹⁰⁵ Accordingly, counsel for the Authority concluded that the Court of Appeals' rationale is still valid.¹⁰⁶

An analysis of the Act by the Texas Comptroller of Public Accounts similarly indicates that the initial impact has been negligible. Only four

96. The Texas legislature established the Edwards Aquifer Authority "[t]o sustain these diverse interests and that natural resource, a special regional management district is required for the effective control of the resource to protect terrestrial and aquatic life, domestic and municipal water supplies, the operation of existing industries, and the economic development of the state." Edwards Aquifer Authority Act, 73rd Leg., Reg. Sess., TEX. GEN. LAWS 2350, §§ 101-02 (1993).

97. 71 S.W.3d 729 (Tex. 2002).

98. *Id.* at 730.

99. *Id.*

100. *Id.* (citing TEX. GOV'T CODE ANN. § 2007.003(b)(11)(C) (Vernon 2000)).

101. Andrew S. "Drew" Miller, *The Texas Private Real Property Rights Preservation Act After Seven Years: Unfulfilled Dreams and Unrealized Fears*, 33 ST. B. TEX. ENVTL. L. J. 5, 5 (2002).

102. *Id.*

103. *Id.* at 13.

104. *Edwards Aquifer Auth. v. Bragg*, 21 S.W.3d 375, 379-80 (Tex. App. 2000) (citing TEX. GOV'T CODE ANN. § 2007.003(b)(4) (Vernon 2000)).

105. *Bragg v. Edwards Aquifer Auth.*, 71 S.W.3d 729, 730 (Tex. 2002).

106. Andrew S. "Drew" Miller, *The Texas Private Real Property Rights Preservation Act After Seven Years: Unfulfilled Dreams and Unrealized Fears*, 33 ST. B. TEX. ENVTL. L. J. 5, 13 (2002).

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out of the 131 state agencies that the Comptroller surveyed prepared Taking Impact Assessments (TIA) in the first year, and those agencies reported that only one property owner responded to a TIA.¹⁰⁷

In sum, the practical impact of these laws does not appear to be significant. However, they are important nonetheless because of what they represent. Part VI of this Article explores why the ideological consequences of this kind of legislation are grave.

III. EMINENT DOMAIN AND *KELO V. CITY OF NEW LONDON*

This part of the Article will briefly outline the case of *Kelo v. New London* and discuss how eminent domain functions in the real world. Next, the Article will analyze the proposed federal and state legislation introduced to address the alleged abuses of the power of eminent domain. Finally, drawing upon experience from the reactions to *Sweet Home*, the Article will attempt to gauge the effects of the newly enacted eminent domain legislation.

A. *The Case: Kelo v. City of New London*

In *Kelo*, the Supreme Court displayed similar deference to that displayed in *Sweet Home*. The state of Connecticut activated the New London Development Corporation (NLDC) in January 1998 and appropriated over \$15 million to the assist NLDC in its planning efforts and to create the Fort Trumbull State Park.¹⁰⁸ In February 1998, Pfizer, a pharmaceutical company, announced that it planned to build a research facility in that same area.¹⁰⁹ The redeveloped area, in addition to Pfizer's facilities, was to include restaurants, retail shops, marinas, residences, a state park, and a riverwalk.¹¹⁰

Though the uproar created by this case suggests that the city was taking private property to give to Pfizer, none of Petitioners' property was being taken for this purpose. Some of Petitioners' property was part of a parcel designated for research and development office space adjacent to Pfizer's facility.¹¹¹ The rest of the property at issue was going to be used "either to support the adjacent state park, by providing parking or retail services for visitors, or to support the nearby

107. *E.g.*, JOHN SHARP, TEXAS COMPTROLLER OF PUBLIC ACCOUNTS, REPORT ON THE PRIVATE REAL PROPERTY PRESERVATION ACT, (SENATE BILL 14) 1, 6 (1997).

108. *Kelo v. City of New London*, 125 S. Ct. 2655, 2659 (2005).

109. *Id.*

110. *Id.*

111. *Id.* at 2659–60.

marina.”¹¹²

Importantly, no allegations that the area was blighted arose,¹¹³ unlike many uses of eminent domain where local governments move forward with an economic redevelopment plan.¹¹⁴ However, a state agency designated the City of New London a “distressed municipality” in 1990.¹¹⁵ By 1998, after closure of a military facility in 1996, the City’s unemployment rate was almost double that of the state of Connecticut, and its population was less than 24,000 residents—the lowest it had been since 1920.¹¹⁶

The named Petitioner, Susette Kelo, made a sympathetic victim of eminent domain. She had owned property since 1997 in the area for which the NLDC approved a development plan.¹¹⁷ Over the years, Ms. Kelo made substantial improvements to her property, “which she prizes for its water view.”¹¹⁸ Another petitioner was born in a house in the area in 1918 and had lived there her entire life—along with her husband for the past 60 years.¹¹⁹

Petitioners objected to the condemnation of their properties because the City intended to transfer the land to another private party and in their estimation, the transfer would not result in a “public use” as required by the Fifth Amendment.¹²⁰ However, the Supreme Court has consistently resisted the argument that the “public use” requirement be read narrowly to encompass only uses by the general public.¹²¹ Instead, the Court has “embraced the broader and more natural interpretation of public use as ‘public purpose,’”¹²² explaining that “[w]ithout exception, our cases have defined that concept broadly, reflecting our longstanding policy of deference to legislative judgments in this field.”¹²³ Thus, according to

112. *Id.* at 2659. Petitioners’ property was located in parcels 3 and 4A. *Kelo v. City of New London*, 125 S. Ct. 2655, 2660 (2005). The property to be used in support of other activities was parcel 4A. *Id.*

113. *Id.*

114. *E.g.*, *Berman v. Parker*, 348 U.S. 26 (1954) (upholding redevelopment plan targeting blighted area in Washington, D.C.); *Thornton Dev. Auth. v. Upah*, 640 F. Supp. 1071 (D. Colo. 1986) (upholding condemnation proceedings after a finding of blight despite city’s desire to transfer property to private developer); *Rabinoff v. District Court of Denver*, 360 P.2d 114 (Colo. 1961) (finding a plan calling for the condemnation of property and subsequent transfer to private persons constitutional and for a public purpose since it involved a plan of urban renewal and rehabilitation).

115. *Kelo*, 125 S. Ct. at 2658.

116. *Id.*

117. *See id.*

118. *Id.*

119. *See id.*

120. *See id.*

121. *See id.* at 2655.

122. *Id.* at 2662.

123. *Id.* at 2663.

the Court, the question presented was whether the City's development plan served a "public purpose."¹²⁴ Though the City was not battling blight, the Court deferred to the City's findings that the area required economic development and upheld the exercise of the city's police power.¹²⁵ That the Court honored the doctrine of stare decisis was quite unremarkable.

Perhaps the only surprising part of the decision was Justice Sandra Day O'Connor's scathing dissent, given her authorship of the Court's opinion in *Hawaii Housing Authority v. Midkiff*.¹²⁶ In that case the Court upheld Hawaii's Land Reform Act of 1967 which allowed the state to condemn private residential property and convey it to private parties in order to break up the land oligopoly that existed in Hawaii.¹²⁷ Justice O'Connor attempted to distinguish *Midkiff* and *Berman v. Parker*.¹²⁸ by categorizing them as harm-preventing actions.¹²⁹ In *Midkiff* the harm was oligopoly, and in *Berman* the harm was blight.¹³⁰ She explains that "[t]here is a sense in which this troubling result follows from errant language in *Berman* and *Midkiff*."¹³¹ According to Justice O'Connor, some of the language in those cases was unnecessary to resolve the cases and controversies at hand and may have led to the improper conclusion in her view that "[t]he 'public use' requirement is coterminous with the scope of a sovereign's police powers."¹³²

In refusing to interfere with the City's judgment, the Court, however, explicitly reminded the states of their potentially more expansive role in the protection of private property rights. In essence, the Court said to the states that this decision was a matter of policy and that in addressing this policy question, legislatures should consider their constituents' outrage as a part of the democratic process. Such consideration is not within the purview of the courts.

The next section of the Article analyzes the federal and state legislative responses to popular outrage. Undoubtedly, this outrage is

124. *See id.*

125. *See id.* at 2665. Though the city won the case, the city council has approved a proposal to allow Petitioners to remain in the area by moving their houses to a cluster on one block. "[T]he enduring political opposition, as well as the election of two council members in November who felt the city needed a different approach, had overwhelmed the fact that the city had won in court." William Yardley, *Compromise in Connecticut Property Seizure Case*, N.Y. TIMES, Feb. 8, 2006 at B5.

126. 467 U.S. 229 (1984).

127. *See id.*

128. 348 U.S. 26 (1954).

129. *See Kelo*, 125 S.Ct. at 2674.

130. *See id.*

131. *Id.* at 2675.

132. *Id.* (quoting *Hawaii Housing Auth. v. Midkiff*, 476 U.S. 229, 240 (1984)).

understandable in the context of this debate given the iconic nature of homeownership as a part of the American Dream. As U.S. Representative Maxine Waters (D-CA) provocatively remarked, “It’s like undermining motherhood and apple pie. I mean, people’s homes and their land—it’s very important, and it should be protected by government, not taken for somebody else’s private use.”¹³³ And the outrage arises even though the risk that a property owner will offal victim to the power of eminent domain is negligible. Perhaps, even though the risk is small, the potential harm could be so devastating that the possibility engenders fear and rage. Though the fear and outrage are comprehensible, the analysis below will suggest that these emotional responses could be leading to outrageous and irrational results.

*B. Proposed Legislative Solutions for
Economic Development and Eminent Domain*

Conservative and libertarian groups have urged federal and state legislatures to respond to *Kelo* to limit the power to exercise eminent domain and have solicited grassroots support in these efforts. For example, the libertarian group Institute for Justice has issued the following rallying cry:

“Now is the time for Americans to demand their state and local lawmakers protect homes and small businesses from eminent domain for private profit,” said Institute for Justice Senior Attorney Dana Berliner. “Rarely does a single issue generate such universal outrage. Americans understand that the U.S. Supreme Court has declared open season on home and small business owners.”¹³⁴

Similarly, the conservative group North Carolina FreedomWorks is circulating a petition to present to the North Carolina General Assembly urging it to take some action in response to *Kelo*.¹³⁵ As the director of that organization explained, “North Carolina FreedomWorks is leading the fight to restore property rights by educating North Carolinians about this critical issue and encouraging legislative action.”¹³⁶

133. Lochhead, *supra* note 27.

134. See Inst. for Justice, *supra* note 21.

135. Press Release, FreedomWorks: Citizens for a Sound Economy & Empower America, North Carolina FreedomWorks Initiates a Protect Our Property Campaign: Collecting Over 100,000 Signatures to Petition the North Carolina Legislature to Uphold Property Rights (Sept. 9, 2005), http://www.freedomworks.org/newsroom/press_template.php?press_id=1454.

136. *Id.*

1. What We Know About Eminent Domain

Notwithstanding this inflammatory rhetoric about government officials gone wild, there is primarily only anecdotal evidence of abuses of the power of eminent domain. The Institute of Justice, which represented Susette Kelo, and one of its senior attorneys, Dana Berliner, prepared a report in April 2003 about eminent domain.¹³⁷ The report describes itself as “[t]he first report ever to document and quantify the uses and threats of eminent domain for private parties.”¹³⁸ Below this Article examines the report’s evidence of alleged abuse. It also examines the notion that private property owners are not receiving “just compensation” as required by the Fifth Amendment of the U.S. Constitution.

a. Evidence of Abuse?

Over a five-year period, Dana Berliner found over 10,000 cases of “filed or threatened condemnations for private parties.”¹³⁹ Of those 10,000 cases, approximately 3,700 were filed cases and approximately 6,500 were cases in which condemnation was “threatened.”¹⁴⁰ The “threatened” numbers represent properties that a governmental entity indicated that it might condemn, whether through “authorizations of condemnation, verbal or written *threats* to condemn and redevelopment plans that call for removing someone’s property.”¹⁴¹ According to the report, these cases have been combined because in each instance “the reasonable person would have reason to fear.”¹⁴²

The report may be of limited value, however, for several reasons. It purportedly draws upon newspaper articles and court filings to generate its data.¹⁴³ However, all of the individual figures for the states surveyed from which the total numbers are derived were compiled *solely* from news sources.¹⁴⁴ The report suggests that because the news media was the source, these numbers may be underreporting the cases of abuse.¹⁴⁵

137. Dana Berliner, *Public Power, Private Gain*, CASTLE COALITION, Apr. 2003, http://www.castlecoalition.org/pdf/report/ed_report.pdf.

138. *Id.* at 1.

139. *Id.* at 2.

140. *See id.* at 3.

141. *Id.* at 8 (emphasis added).

142. *Id.* Note that this conclusion about the reasonableness of the perception of a threat is presented without any support.

143. *See id.* at 9.

144. *E.g., id.* at 10 (“These numbers were compiled from news sources”).

145. *E.g., id.* (“Many cases go unreported, and news reports often do not specify the number of

Yet it is just as likely that the “abusive” cases are precisely the ones that capture the media’s attention.

Moreover, it is unclear that news sources will provide enough information to determine if the exercise of the power of eminent domain was in fact abusive. For example, the report cites the case of Riviera Beach, Florida, as an abuse of the power of eminent domain.¹⁴⁶ Riviera Beach’s city council approved a redevelopment plan expected to cost \$1.25 billion to condemn blighted areas on the waterfront. “The city promises the project will raise property values in the area from \$155 million to \$900 million, create 6,500 new jobs and bring in \$3 million a year in sales taxes.”¹⁴⁷ Though a few residents and businesses vowed to fight the plan, most appeared willing to sell their property for the “right” price.¹⁴⁸ One holdout resident reported selling her house for more than three times its fair market value.¹⁴⁹ And the displaced property owners also received funds for relocation expenses.¹⁵⁰ One might still think that the use of the power in this instance was abusive, but additional facts could lead to a vastly different conclusion.

Furthermore, with respect to the actual eminent domain proceedings, it would be illuminating to know how many of those cases resulted because the property owner opted not to agree to a voluntary sale to take advantage of a tax gain deferral under § 1033 of the Internal Revenue Code.¹⁵¹ For example, if the property owner used the proceeds from the eminent domain proceeding to purchase property similar to that which was condemned, no gain for federal income tax purposes would be recognized.¹⁵² Moreover, the basis in the replacement property would be adjusted to eliminate any tax consequences as a result of the involuntary sale.¹⁵³ State income tax codes have similar provisions.¹⁵⁴

properties against which condemnations were filed or threatened.”)

146. *See id.* at 55–57.

147. Scott McCabe, *Residents Vow to Fight Riviera Plan*, PALM BEACH POST, Dec. 17, 2001, at 1B.

148. Stephen Deere, *Prices Right for Reluctant Waterfront Sellers*, SUN-SENTINEL, Jan. 28, 2006, at 1A; Scott McCabe, *Residents Vow to Fight Riviera Plan*, PALM BEACH POST, Dec. 17, 2001, at 1B.

149. William Cooper, Jr., *Riviera Holdout Sells House to Developer*, PALM BEACH POST, Jan. 28, 2006, at 1B.

150. Riviera Beach Community Redevelopment Agency, *Residential Relocation*, <http://www.rbcra.org/upload/Residential%20Relocation.pdf> (last visited Feb. 1, 2006); Riviera Beach Community Redevelopment Agency, *Relocation Assistance: Businesses and Nonprofit Organizations*, <http://www.rbcra.org/upload/Business%20Relocation.pdf> (last visited Feb. 1, 2006).

151. 26 U.S.C. § 1033 (2006).

152. 26 U.S.C. § 1033(a)(1) (2006).

153. 26 U.S.C. § 1033(b)(1) (2006).

154. *E.g.*, ALA. CODE §§ 40-18-6, 40-18-8 (2005); CAL. REV. & TAX CODE § 24943 (2006); MISS. CODE ANN. § 27-7-9 (2005); N.Y. TAX LAW § 2032A (2005).

Without a disaggregation of those different circumstances, the data could lead to an unsound conclusion about the use and abuse of eminent domain.

Among other factors that may make the report marginally useful is the manner in which the report aggregates the data regarding “filed” condemnations. That figure includes instances in which the government condemned the property, settled the case, or lost to the property owner.¹⁵⁵ The report justifies this aggregation by arguing that regardless of the ultimate outcome, it still represents an abuse of power.¹⁵⁶ However, federal and state law penalizes the condemning authority if it abandons the proceeding or loses to the property owner,¹⁵⁷ presumably thereby creating some incentive for judicious use of the process. If either of those conditions occurs in the context of a federally funded or assisted project, the condemning authority must pay the property owner “for his reasonable costs, disbursements, and expenses” incurred because of the proceedings.¹⁵⁸ Moreover, the report acknowledges that in many instances, the research did not reveal the ultimate outcome of the case¹⁵⁹ so it may be very difficult to determine if the use of eminent domain was abusive in any given case.

b. Just Compensation?

Perhaps part of the outrage engendered by *Kelo* stems from the belief that payment of fair market value for a private residence is not “just compensation.” As Professor Margaret Radin explains, payment of fair market value for private property may not be “just compensation” because of the personal connection one may have to one’s property, particularly one’s home.¹⁶⁰ Professor Thomas Merrill expresses a similar sentiment about the inadequacy of fair market value in a condemnation of one’s home. Through condemnation, the landowners may suffer “subjective losses” that would not be accounted for in the fair

155. See Berliner, *supra* note 137, at 8.

156. *Id.*

157. See Uniform Relocation Assistance & Real Property Acquisition Policies Act of 1970, 42 U.S.C. § 4654(a) (2006).

158. Uniform Relocation Assistance & Real Property Acquisition Policies Act, 42 U.S.C. § 4654(a) (2006).

159. See Berliner, *supra* note 137, at 8.

160. Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957, 1005–06 (1982) (“This suggests that if the personhood perspective is expressed in law, one might expect to find an implied limitation on the eminent domain power. That is, one might expect to find that a special class of property like a family home is protected against the government by a ‘property rule’ and not just a ‘liability rule.’”).

market value method of compensation.¹⁶¹ The government does not pay a landowner for any subjective or sentimental value that she attaches to her property nor for the “cost(s) and inconvenience of relocation.”¹⁶² Instead, Professor Merrill argues the government merely pays the value that a marginal owner would attach to her property.¹⁶³

At the 2006 annual meeting of the Association of American Law Schools, Professor Vicky Been suggested that this area of the law is ripe for some empirical research because we know so little about how eminent domain works in practice.¹⁶⁴ Professor Nicole Stelle Garnett, however, has culled the available data and found that our intuitions and rhetoric about eminent domain may not reflect real world experience.¹⁶⁵ For example, her research suggests that private property owners routinely receive more than fair market value for their property.¹⁶⁶

The federal government already requires all federal entities and state and local entities using federal funds to provide relocation expenses whenever they displace private property owners.¹⁶⁷ Assistance for residential property owners under the Uniform Relocation Assistance and Real Properties Acquisition Act (Uniform Act) includes moving expenses,¹⁶⁸ any increased mortgage costs,¹⁶⁹ and closing costs.¹⁷⁰ With respect to farms, non-profit organizations, and small businesses, the Uniform Act provides for reasonable expenses for searching for a replacement farm or business¹⁷¹ and expenses incurred in reestablishing one’s business up to \$10,000.¹⁷²

The Uniform Act also recognizes that the purchase price of the condemned property may not be enough for the private property owner

161. See Thomas W. Merrill, *The Economics of Public Use*, 72 CORNELL L. REV. 61, 82–83 (1986).

162. *Id.* at 83.

163. See *id.* at 82–83.

164. Ben Barros, *What We Don’t Know About Eminent Domain*, Jan. 11, 2006, http://lawprofessors.typepad.com/property/2006/01/what_we_dont_kn.html.

165. Nicole Stelle Garnett, *The Neglected Political Economy of Eminent Domain*, (Michigan Law School Working Paper, Paper No. 06-01, 2000) available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=875412.

166. *Id.*

167. Uniform Relocation Assistance and Real Properties Acquisition Act, 42 U.S.C. § 4630 (2006). See Nicole Stelle Garnett, *What a Strange Place to Put a Church: The Political Economy of “Just Compensation”*, (Notre Dame Legal Studies Paper, Paper No. 06-01), available at http://ssrn.com/sol3/papers.cfm?abstract_id=875412 for a discussion of the statutory provisions that entitled private property owners to above-market compensation for their condemned properties.

168. 42 U.S.C. § 4622(a)(1) (2006).

169. 42 U.S.C. § 4623(a)(1)(B) (2006).

170. 42 U.S.C. § 4623(a)(1)(C) (2006).

171. 42 U.S.C. § 4622(a)(3) (2006).

172. 42 U.S.C. § 4623(a)(1) (2006).

to secure comparable housing. If comparable housing is more than the purchase price, the condemning authority must give the owner a housing replacement payment, not to exceed \$22,500.¹⁷³ Indeed, if comparable replacement housing is not available, then on a case-by-case basis, the condemning authority may exceed the \$22,500 limit or provide such housing itself.¹⁷⁴ The Uniform Act further provides that no person may be forced to move from his residence unless the condemning authority is satisfied that comparable replacement housing is available.¹⁷⁵

Many states have comparable provisions guaranteeing private property owners more than the fair market value of their property.¹⁷⁶ And at least one state, California, claims to pay even more than the Uniform Act requires.¹⁷⁷

Yet in spite of this paucity of empirical data about abuse of the power of eminent domain and legislation that already requires payment above fair market value for condemned private property, there have been many federal and state legislative initiatives in the wake of *Kelo v. City of New London*. Below this Article will review the most salient aspects of the proposed legislation, while highlighting those provisions that are somewhat unique.

2. Federal Legislative Approaches

Though the Supreme Court directly prodded the states to limit their powers of eminent domain, some members of the U.S. Congress also took up the charge. Senator John Cornyn (R-TX) introduced the Protection of Homes, Small Businesses, and Private Property Act of 2005 in reaction to the *Kelo* decision.¹⁷⁸ In its findings, the bill states that “[i]t is appropriate for Congress . . . to restore the vital protections of the Fifth Amendment.”¹⁷⁹ This language suggests that we somehow have *lost* the original meaning of “public use” and that we need to bring

173. 42 U.S.C. § 4622(a)(1) (2006).

174. 42 U.S.C. § 4626(a) (2006).

175. 42 U.S.C. § 4626(b) (2006).

176. See, e.g., CAL. GOV'T. CODE §§ 7260–7277 (2006); Relocation Assistance for Persons Displaced by Acquisition of Real Property, KAN. STAT. ANN. § 58-3501 – 58-3508 (2005); MD. CODE ANN., REAL PROP. § 12-201 – 12-212 (2005); MICH. COMP. LAWS §§ 213.321–332, 213.351–361 (2005); N.Y. GEN. MUN. LAW § 74-b (2005); OHIO REV. CODE ANN. § 163.51-62 (2006); Relocation Assistance and Real Property Acquisition Policies, VA. CODE ANN. §§ 25.1-400 – 25.1-421 (2005).

177. See *United Auto Workers, Local 887 v. Dep't of Transp.*, 25 Cal. Rptr.2d 290, 295 (Cal. Ct. App. 1993) (“Payment of the greater California benefits assures compliance with the minimums of federal law.”).

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

179. S. 1313.

that constitutional concept out of *exile*. The bill provides that “[t]he power of eminent domain shall be available only for public use”¹⁸⁰ and defines “public use” as *not* including “economic development.”¹⁸¹ This act would apply to the federal government and to the states if they use federal funds.¹⁸²

The House version, introduced by Representative Henry Bonilla (R-TX), has a little bit more flair. The short title of the act is the Strengthening the Ownership of Private Property Act of 2005 or the “STOPP Act of 2005.”¹⁸³ In addition to prohibiting the use of federal funds for the exercise of eminent domain power for “private commercial development,” the bill would prohibit federal funding if the use of that power “fails to pay relocation costs to persons displaced by use of the power of eminent domain for economic development purposes.”¹⁸⁴ But, as discussed in Part III.B.1.b., the federal government already requires the payment of relocation expenses so that provision adds little.

The House ultimately passed the Private Property Rights Protection Act of 2005 on November 3, 2005 by a vote of 376 to 38, with 218 Republicans, 157 Democrats, and one Independent voting in favor of the measure.¹⁸⁵ The bill prohibits the receipt of “Federal economic development” funds by any state or political subdivision thereof that exercises the power of eminent domain over property that is or will be used for economic development when the property is conveyed or leased to a private person.¹⁸⁶ Federal economic development funds are those funds “designed to improve or increase the size of the economies of States or political subdivisions of States.”¹⁸⁷ States or political subdivisions thereof that violate the prohibition will be ineligible for such funds for two fiscal years.¹⁸⁸

Other key features of the legislation include the creation of a private right of action with a seven-year statute of limitations that allows a private property owner to initiate suit in federal or state court. In such a suit, the bill also places the burden upon the government to demonstrate

180. S. 1313.

181. S. 1313.

182. S. 1313.

183. Strengthening the Ownership of Private Property Act of 2005, H.R. 3405, 109th Cong., § 1 (2005).

184. H.R. 3405.

185. Final Vote Results for Roll Call 568, <http://clerk.house.gov/evs/2005/roll568.xml>, (last visited Nov. 3, 2005).

186. Private Property Rights Protection Act of 2005, H.R. 4128, 109th Cong., §§ 2(a), 8(1) (2005).

187. H.R. 4128, at § 8(2).

188. H.R. 4128, at § 2(b).

by clear and convincing evidence that it did not violate this prohibition.

Though she eventually voted for the measure, Representative Maxine Waters (D-CA) was initially critical of it. “‘We’re fooling ourselves if we put forth legislation that we claim protects our citizens from having their private property taken, when you have these types of exceptions and loopholes,’ Waters said.”¹⁸⁹ The bill exempts traditional public uses such as roads,¹⁹⁰ common carriers,¹⁹¹ and flood control facilities,¹⁹² but the measure also contains some additional flexibility. Additional exemptions include “leasing property to a private person or entity that occupies an *incidental* part of public property or a public facility, such as a retail establishment on the ground floor of a public building”¹⁹³ and “redeveloping a brownfield site.”¹⁹⁴

On November 4, 2005, the House sent the Private Property Rights Protection Act of 2005 to the Senate and the bill was referred to the Senate Committee on the Judiciary. Further action on this bill is uncertain, however, because Congress passed a rider to an appropriations bill that prohibits the use of federal funds for any eminent domain project that “*primarily* benefits private entities.”¹⁹⁵ That rider will be analyzed in Part III.C.1.

3. State Legislative Approaches

Once again, the states have outdone Congress. Following the Supreme Court’s lead, at least forty-five states, at last count, have legislation pending or newly enacted that would in some way address the ruling in *Kelo*.¹⁹⁶ Many of those bills seek to reinvigorate the “lost” concept of “public use.” As I have argued elsewhere about the private property rights acts,¹⁹⁷ this proposed state legislation bears little relationship to an actual problem with eminent domain. Other commentary regarding the private property rights acts applies with equal

189. Charlene Carter & Seth Stern, *House Committee Moves to Narrow Use of Eminent Domain*, CQ TODAY, Oct. 27, 2005 (commenting on H.R. 4128, 109th Cong. (2005)).

190. H.R. 4128, at § 8(1)(A)(i).

191. H.R. 4128, at § 8(1)(A)(ii).

192. H.R. 4128, at § 8(1)(A)(iv).

193. H.R. 4128, at § 8(1)(C) (emphasis added).

194. H.R. 4128, at § 8(1)(G).

195. Transportation, Treasury, Housing and Urban Development, the Judiciary, the District of Columbia, and Independent Agencies Appropriations Act 2006, Pub. L. No. 109-115, 119 Stat. 2396, 2494–95 (emphasis added).

196. See *infra* Appendix.

197. See generally Marcilynn A. Burke, *Klamath Farmers and Cappuccino Cowboys: The Rhetoric of the Endangered Species Act and Why it (Still) Matters*, 14 DUKE ENVTL. L. & POL’Y F. 441 (2004).

force here:

[T]hese laws do not appear to come about through a concerted effort on the part of aggrieved constituents. Instead, . . . these laws are often being promoted by individual state legislators based on their ideological commitment to the concept of the laws, and their own political sense of the law's necessity in their state.¹⁹⁸

The "Castle Coalition" has proposed "model language" for limiting the power of eminent domain.¹⁹⁹ The group provides three suggestions. The first suggestion is to define "public use" to exclude certain uses of property. "The public benefits of economic development, including an increase in tax base, tax revenues, employment, general economic health, shall not constitute a public use."²⁰⁰ The second suggestion would limit transfers to private parties for commercial projects unless the property is transferred "to private entities that are common carriers . . . to private entities that occupy an incidental area within a publicly owned and occupied project, [such as a retail establishment on the ground floor of a public building];" or "the use of eminent domain . . . eliminates a direct threat to public health or safety."²⁰¹ The final suggestion would prohibit the use of eminent domain for economic development and defines economic development as a project that does not result in "(1) the transfer of land to public possession; (2) the transfer of land to a private entity that is a . . . common carrier [such as a railroad or utility]; . . . or (3) the transfer of property to a private entity when eminent domain will eliminate a direct threat to public health or safety."²⁰²

The proposed state legislation generally falls into four categories: 1) narrowing "public use" to exclude private development²⁰³ or economic development,²⁰⁴ except in the case of blight;²⁰⁵ 2) procedural reforms such as requiring notice, hearings, and written findings;²⁰⁶

198. HARVEY M. JACOBS, *STATE PROPERTY RIGHTS LAWS: THE IMPACTS OF THOSE LAWS ON MY LAND* 14 (1999).

199. Castle Coalition, *Model Language for State Statutes Limiting Eminent Domain Abuse*, http://www.castlecoalition.org/legislation/model/state_statute.html (last visited Feb. 3, 2006).

200. *Id.*

201. *Id.*

202. *Id.*

203. *E.g.*, A.B. 590, 2005 Leg., 2005–06 Sess. (Cal. 2005).

204. *E.g.*, H.J. Res. 31, 2006 Leg., Reg. Sess. (Fla. 2005).

205. *E.g.*, S.B. 136, 2006 Leg., 2006 Reg. Sess. (Ala. 2006); H.B. 4605, 184th Gen. Ct., 2006 Reg. Sess. (Mass. 2005).

206. *E.g.*, S.B. 217, 143d Gen. Assem., 2005 Sess. (Del. 2005); A.B. 143, 73d Leg., Reg. Sess. (Nev. 2005).

3) appointment of a task force to study the issue;²⁰⁷ and 4) moratoria while studying the issues.²⁰⁸ The exception for blight is a common provision. Professor John Echeverria cautions that limiting the use of eminent domain to blighted areas “invariably targets low-income communities.”²⁰⁹ Thus, it is quite likely that the reaction to *Kelo* in many cases will have a negative impact on private property owners and tenants in low-income and minority communities.

Some state legislatures have recommended special protections for residential property. For example, a bill in New Jersey would prohibit the condemnation of residential property.²¹⁰ Similarly, legislators in Connecticut introduced a bill “[t]o prohibit the acquisition of small owner-occupied residential dwellings by eminent domain for use in a municipal development project that will be privately owned or controlled.”²¹¹

At least three states have proposed to limit the use of the power of eminent domain to instances in which its use is *necessary* for or *essential* to achieving a public purpose,²¹² or only upon a judicial determination that no alternative action exists to achieve the public purpose.²¹³ Several states have prohibited the exercise of this power if its primary purpose is to increase tax revenues or bases.²¹⁴ Finally, legislators in Kentucky and Rhode Island have urged Congress to introduce a Constitutional amendment to more fully protect private property from eminent domain.²¹⁵

However, some states have enacted unique provisions that are worthy of note. For example, California has introduced legislation that prohibits condemnation of agricultural property.²¹⁶ One New Jersey bill would

207. *E.g.*, S.B. 1026, 2005 Leg., 2005–06 Reg. Sess. (Cal. 2005); Exec. Order No. 05-15 (Mo. 2005); S.B. 167, 126th Gen. Assem., 2005–06 Reg. Sess. (Ohio 2005).

208. H.B. 331, 126th Leg., Reg. Sess. (Ohio 2005), § 2(B).

209. Pristin, *supra* note 26.

210. S.B. 2739, 211th Leg., 2d Reg. Sess. (N.J. 2005).

211. H.B. 5062, 2005 Leg., Jan. Sess. (Conn. 2005).

212. *E.g.*, H.B. 4605, 184th Gen. Ct., Reg. Sess. (Mass. 2006); A.C.R. 255, 211th Leg., 2d Reg. Sess. (N.J. 2004).

213. S.C.A. 15, 2005 Leg., 2005–06 Reg. Sess. (Cal. 2005).

214. *E.g.*, S.B. 86, 148th Gen. Assem., 2005–06 Reg. Sess. (Ga. 2005); H.B. 2426, 104th Gen. Assem., 2005 Sess. (Tenn. 2005); S.J.R. 15, 79th Leg., 1st Sess. (Tex. 2005).

215. *E.g.*, B. Res. 134, 2006 Leg., 2006 Reg. Sess. (Ky. 2005); H.B. 6636, 2005 Gen. Assem., Jan. Sess. (R.I. 2005).

216. S.B. 1099, 2005 Leg., 2005–06 Reg. Sess. (Cal. 2005). The U.S. House of Representatives also expressed special concern over agricultural lands, but in the legislation that it ultimately passed, it only expressed the “sense of Congress regarding rural America” and did not pass any special provisions. Private Property Rights Protection Act of 2005, H.R. 4108, 109th Cong., § 7 (2005).

repeal long-term tax exemptions for redevelopment projects.²¹⁷ The Ohio Senate passed a resolution amending the state constitution to remove the power of eminent domain from municipalities and allow the exercise of such power only when granted by the General Assembly.²¹⁸

Some states arguably already limit their powers of eminent domain more than the U.S. Constitution does, giving much less deference to legislative determinations. Arizona,²¹⁹ Kentucky,²²⁰ Virginia,²²¹ and Washington²²² could be counted among that group. Interestingly, these states have also introduced new legislation that is arguably unnecessary to prevent a situation similar to *Kelo*.²²³ The introduction of multiple pieces of legislation in these jurisdictions smacks of political posturing more than a desire to grant greater protection to private property rights.

Below, this Article examines in more detail two states' provisions that arguably would change the legal landscape in those states: New York and Nevada.

217. A.C.R. 256, 211th Leg., 2d Reg. Sess. (N.J. 2004).

218. S.J. Res. 6, 126th Gen. Leg., 2005–06 Reg. Sess. (Ohio 2005).

219. *Bailey v. Myers*, 76 P.3d 898, 903 (Ariz. 2003) (“The federal constitution provides considerably less protection against eminent domain than our Constitution provides.”).

220. *City of Owensboro v. McCormick*, 581 S.W.2d 3, 6 (Ky. 1979) (ruling consistently in the context of eminent domain that “public benefit” or “public purpose” is not equivalent to “public use”).

221. “Public use and public benefit are not synonymous terms.” *Richmond v. Carneal*, 129 Va. 388, 393, 106 S.E. 403, 405 (1921). It is of no importance “. . . that the public would receive incidental benefits, such as usually spring from the improvement of lands or the establishment of prosperous private enterprises: the Public use implies a possession, occupation, and enjoyment of the land by the public at large, or by public agencies; and a due protection to the rights of private property will preclude the government from seizing it in the hands of the owner, and turning it over to another on vague grounds of public benefit to spring from the more profitable use to which the latter may devote it.

Phillips v. Foster, 211 S.E.2d 93, 96 (Va. 1975) (quoting 2 COOLEY’S CONSTITUTIONAL LIMITATIONS 1126–29 (8th ed. 1927)).

222. *Manufactured Housing Communities of Washington v. Washington*, 13 P.3d 183, 189 (Wash. 2000) (“[P]reexisting state law provides a literal definition of ‘private use.’ Washington state courts thus provide Washington citizens with enhanced protections against taking private property for private use.”).

223. *E.g.*, S.B. 1091, 47th Legis., 2d Reg. Sess. (Ariz. 2006) (requiring condemning authority to reach a 75% consensus that public uses of condemnation power “substantially outweigh” the private uses); H.B. 114, 2006 Legis., Reg. Sess. (Ky. 2006) (forbidding “the condemnation of private property for transfer to a private owner solely for the purpose of economic development that benefits the general public only indirectly”); H.B. 94, 2006 Gen. Assem., 2006 Reg. Sess. (Va. 2006) (“Public uses shall not include the taking or damage of private property through the exercise of the power of eminent domain if the primary purpose is the enhancement of tax revenues.”); H.B. 2427, 59th Legis., 2d Sess. (Wa. 2006) (“The taking of private property by the state for economic development does not constitute a public use where the primary purpose of such development is for an increase in tax base, tax revenues, employment, or general economic health.”).

a. New York

Some New York legislators would like to give pause to condemning authorities by making it more expensive to take owner-occupied residential dwellings through eminent domain. Several bills would require the condemning authority to pay the owner 150% of the fair market value²²⁴ or 125% of the value established by the “highest approved appraisal.”²²⁵ Other proposed legislation in New York would require the condemning authority to pay the property owner “incidental or consequential expenses” associated with the condemnation such as any penalties for pre-payment of a mortgage, recording fees and transfer taxes, and the pro-rata portion of real property taxes.²²⁶ And some of the proposed legislation calls for relocation expenses,²²⁷ which may include:

transportation and storage of household goods; real estate brokerage fees, costs, charges, or commissions; title searches and title insurance; attorney’s fees; any costs, fees, charges, or taxes required by the state or a political subdivision of the state to be paid in connection with the recording, filing, or approval of any instruments pertaining to real property; expenses for transitional housing for up to three months, taking into consideration the market conditions of the locality and the value of the housing from which the condemnee is displaced; and housing financing costs.²²⁸

Though the proposals may call for higher payments than have previously existed, New York already pays property owners’ relocation expenses.²²⁹ Several statutes provide for the payment of moving expenses and expenses in searching for a replacement business or farm.²³⁰ They also provide for payment up to \$15,000 over the purchase price to obtain comparable replacement property and payment of any increased interest costs for financing the purchase of replacement property.²³¹ Moreover, if the individual or family is displaced from the

224. *E.g.*, Eminent Domain Reform Act, S.B. 5946, 228th Leg., Reg. Sess. § 4 (N.Y. 2005).

225. *E.g.*, Comprehensive Eminent Domain Procedure Reform Act, A.B. 9050, 228th Leg., Reg. Sess. § 11 (N.Y. 2005).

226. *E.g.*, N.Y. A.B. 9050, § 13; S.B. 5938, 228th Leg., Reg. Sess. § 3 (N.Y. 2005).

227. N.Y. S.B. 5938, § 3.

228. N.Y. A.B. 9050, § 13.

229. *E.g.*, N.Y. GEN. MUN. LAW § 74-b (2005) (expenses of up to \$1,000 for owners or tenants of residential properties and up to \$2,500 for owners or tenants of commercial property, in cities with a population of less than one million).

230. *E.g.*, N.Y. AGRIC. & MKTS. LAW § 27(10) (2005); N.Y. CANAL LAW § 40(9) (2005); N.Y. CORRECT. LAW § 21(10) (2005); N.Y. EDUC. LAW § 307(10) (2005); N.Y. ENVTL. CONSERV. LAW § 3-0305(10) (2005).

231. *E.g.*, N.Y. AGRIC. & MKTS. LAW § 27(11) (2005); N.Y. CANAL LAW § 40(11) (2005); N.Y. CORRECT. LAW § 21 (11) (2005); N.Y. EDUC. LAW § 307(11) (2005); N.Y. ENVTL. CONSERV. LAW § 3-

primary residence and is not otherwise entitled to payment under these statutes, the individual or family may receive up to \$4,000 to lease or rent a dwelling or make a down payment on a replacement dwelling.²³² Expenses to be paid in the case of acquiring a replacement dwelling include expenses for “evidence of title, recording fees, and other closing costs.”²³³

Proposed groundbreaking legislation in New York includes a bill that would require a municipality to hold a vote after it decides to condemn private property.²³⁴ Another bill would require a “comprehensive economic development plan” that includes the expected benefits of the project and a “homeowner impact statement” that would compare the actual harm to the condemnee with the expected benefits to the community.²³⁵ Further legislation would establish a state eminent domain ombudsman to assist governmental and private entities.²³⁶

b. Nevada

Nevada’s legislature also has proposed some novel approaches. Proposed legislation there would prohibit the use of the power of eminent domain to acquire property for “open space use.” Open space use is defined as—

- (a) The preservation of land to conserve and enhance natural or scenic resources;
- (b) The protection of streams and stream environment zones, watersheds, viewsheds, natural vegetation and wildlife habitat areas;
- (c) The maintenance of natural and man-made features that control floods, other than dams;
- (d) The preservation of natural resources and sites that are designated as historic by the office of historic preservation of the department of cultural affairs; and
- (e) The development of recreational sites.²³⁷

Moreover, the proposed legislation would prohibit the use of the power

0305(12) (2005).

232. *E.g.*, N.Y. AGRIC. & MKTS. LAW § 27(11) (2005); N.Y. CANAL LAW § 40(11) (2005); N.Y. CORRECT. LAW § 21 (11) (2005); N.Y. EDUC. LAW § 307(11) (2005); N.Y. ENVTL. CONSERV. LAW § 3-0305(12) (2005).

233. *E.g.*, N.Y. AGRIC. & MKTS. LAW § 27(11) (2005); N.Y. CANAL LAW § 40(11) (2005); N.Y. CORRECT. LAW § 21 (11) (2005); N.Y. EDUC. LAW § 307(11) (2005); N.Y. ENVTL. CONSERV. LAW § 3-0305(12) (2005).

234. *E.g.*, A.B. 8865, 228th Leg., Reg. Sess. § 1 (N.Y. 2005).

235. Eminent Domain Reform Act, A.B. 9043, 228th Leg., Reg. Sess. § 4 (N.Y. 2005).

236. Eminent Domain Ombudsman Act, A.B. 9152, 228th Leg., Reg. Sess. (N.Y. 2005).

237. NEV. REV. STAT. ANN. § 376A.010(3) (Michie 2005).

for “protect[ing], conserv[ing] or preserv[ing] wildlife habitat.”²³⁸ Oddly enough, these uses are incontrovertibly public, but the proponents of the legislation are using this current controversy over transfers of private property to private entities to advance another agenda—one that is hostile to environmental and natural resources protection.

In an act of direct democracy, a former state district court judge in Nevada has launched a petition to have an initiative placed on the ballot in November 2006 to amend the state’s constitution.²³⁹ Originally dubbed the “People’s Initiative to Stop the Taking of Our Land” or “PISTOL,”²⁴⁰ the Nevada Property Owners’ Bill of Rights begins with “[a]ll property rights are hereby declared to be fundamental constitutional rights and each and every right provided herein shall be self-executing.”²⁴¹ The intent is to protect private property rights just as freedom of speech or equal protection through strict scrutiny.²⁴² The former judge believes that the government abuses the power of eminent domain in almost every circumstance.²⁴³

The Nevada Property Owners’ Bill of Rights also has two unique provisions regarding the judiciary. First, only elected judges or justices may preside over an eminent domain proceeding.²⁴⁴ The former judge argues that “[i]n eminent domain actions there is a tendency in some Nevada courts to switch elected judges and justices with unelected senior judges, who do not have to answer to the voters.”²⁴⁵ Second, property owners are entitled to one peremptory challenge against the *judge or justice*. If such a challenge is made, the clerk of the court is to “randomly select a currently elected district court judge to replace the judge or justice who was removed by preemption [sic].”²⁴⁶ Currently under the Nevada Supreme Court rules, a party may challenge a district court judge if the case is not on appeal from a lower court, but a party may not challenge a supreme court justice.²⁴⁷

A newspaper’s telephone poll indicates that “62 percent of those surveyed would support the measure aimed at prohibiting the taking of

238. S.B. 326, 73d Leg., Reg. Sess. § 1 (Nev. 2005).

239. Initiative Petition, Nevada Property Owners’ Bill of Rights (filed Sept. 20, 2005), http://secretaryofstate.biz/nvelection/int_ref/NvPropOwnBOR.pdf.

240. Erin Neff, *Ex-Judge Targets Eminent Domain*, LAS VEGAS REV.-J., Sept. 20, 2005, at 1A.

241. Initiative Petition, *supra* note 239, at § 1(9).

242. Property Bill of Rights, *Property Bill of Rights with Author Commentary*, http://www.propertybillofrights.com/your_rights.html (last visited Feb. 25, 2006).

243. *See id.*

244. Initiative Petition, *supra* note 239, at § 1(1).

245. Property Bill of Rights, *supra* note 242.

246. Initiative Petition, *supra* note 239, at § 1 (10).

247. *See* NEV. S.CT.48.1 (2005).

private property by government for use by another private person or company.”²⁴⁸ The Las Vegas Chamber of Commerce opposes the initiative, however, arguing that it overreaches and creates a trial lawyer’s dream for new litigation.²⁴⁹ For example, one provision would require “just compensation” if any government action resulted in “substantial economic loss to private property.”²⁵⁰

C. Projected Impacts of Newly Enacted Eminent Domain Legislation

1. Federal Legislation

On November 30, 2005, Congress passed a rider to an appropriations bill that prohibits the use of federal funds for any eminent domain project that “*primarily* benefits private entities.”²⁵¹ The impact of the rider, however, is likely to be minimal because federal funds rarely are involved in eminent domain projects that are not of a primarily public nature.²⁵² The measure exempts traditional public uses such as “mass transit, railroad, airport, seaport or highway projects as well as utility projects which benefit or serve the general public” and “projects for the removal of an immediate threat to public health and safety.”²⁵³ It also exempts the redevelopment of brownfields.²⁵⁴

Congress has directed “the Government Accountability Office, in consultation with the National Academy of Public Administration, organizations representing State and local governments; and property

248. Sean Whaley, *Hands Off Private Land*, LAS VEGAS REV.-J., Oct. 28, 2005, at 1B.

249. *Chamber Just Says ‘No’ to Initiatives*, LAS VEGAS BUS. PRESS, Jan. 10, 2006, http://www.lvbusinesspress.com/articles/2006/01/10/breaking_news/02news.txt.

250. Initiative Petition, *supra* note 239, at § 1(8).

251. Transportation, Treasury, Housing and Urban Development, the Judiciary, the District of Columbia, and Independent Agencies Appropriations Act 2006, Pub. L. No. 109-115, 119 Stat. 2396, 2494-95 (2005) (emphasis added).

252. Similarly, legislative efforts by some local governments may be largely symbolic because they rarely exercise the power of eminent domain. For example,

Thomas J. Abinanti, a Democrat who represents Greenburgh in the County Legislature, said it was a basic sense of fairness that led him and James Maisano, Republican of New Rochelle, to propose the legislation that would bar the county from condemning private property for another private use. But the bill is, in some ways, a symbolic measure. The county has little say in municipal land-use matters, except in affordable housing developments, where it plays a key role.

Scharfenberg, *supra* note 37.

253. Transportation, Treasury, Housing and Urban Development, the Judiciary, the District of Columbia, and Independent Agencies Appropriations Act 2006, Pub. L. No. 109-115, 119 Stat. 2396, 2495.

254. *Id.* at 2495.

rights organizations” to conduct a study within twelve months on the use of eminent domain throughout the country.²⁵⁵

2. State Legislation

Despite the cries of anguish that local governments’ exercises of their powers of eminent domain are going unchecked by the courts, the Wall Street Journal reported several years ago that courts were increasingly putting limits on this power, particularly through narrowing the concept of “public use.”²⁵⁶ But perhaps those decisions were not as limiting as the Wall Street Journal thought; instead, they may have merely required governments to provide a redevelopment plan to satisfy the “public use” requirement whenever it transferred private property to another private party.²⁵⁷ And courts are likely to defer to government officials with respect to those redevelopment plans.²⁵⁸

Though one’s prediction of the direct impact of these new laws is speculative, it is instructive to review some of the provisions to determine if the power has been significantly narrowed, or if perhaps the great number of exemptions for typical municipality actions consumes the new laws.²⁵⁹ The legislatures of Alabama,²⁶⁰ Delaware,²⁶¹ Michigan,²⁶² Ohio,²⁶³ South Dakota,²⁶⁴ and Texas²⁶⁵ have each passed

255. *Id.* at 2495.

256. Dean Starkman, *More Courts Rule Cities Misapply Eminent Domain*, WALL ST. J., July 23, 2001, at B1.

257. *See id.*

258. *See, e.g.,* Berman v. Parker, 348 U.S. 26 (1954) (upholding a redevelopment scheme even as applied to a non-blighted commercial property).

259. *See* Timothy Sandefur, *The “Backlash” So Far: Will Citizens Get Meaningful Eminent Domain Reform?*, 2006 Mich. St. L. Rev. (forthcoming 2006) (arguing that the laws passed thus far will provide little additional protection for private property owners).

260. S.B. 68A, 2005 Leg., 1st Spec. Sess. (Ala. 2005).

261. S.B. 217, 143d Gen. Assem., 2005 Sess. (Del. 2005) (limiting exercise of power of eminent domain only “for the purposes of a recognized public use”).

262. S.J.Res. E, 93d Legis., Reg. Sess. (Mich. 2005) (proposing an amendment to the state constitution that provides that compensation for the taking of an individual’s primary residence shall not be less than 125% of the property’s fair market value and prohibiting “the taking of private property for transfer to a private entity for the purpose of economic development or enhancement of tax revenues”).

263. S.B. 167, 126th Gen. Assem., 2005–06 Reg. Sess. (Ohio 2005) (establishing, *inter alia*, a moratorium until December 31, 2006 on taking “private property that is in an unblighted area when the primary purpose for the taking is economic development that will ultimately result in ownership of the property being vested in another private person”).

264. H.B. 1080, 81st Legis., Reg. Sess. (S.D. 2006) (prohibiting transfer of private property to “any private person, nongovernmental entity, or other public-private business entity . . . or primarily for enhancement of tax revenue” and requiring right of first refusal to original property owners if within seven years of acquisition the government wants to transfer the property to a non-public entity).

265. TEX. GOV’T CODE § 2206 (Vernon 2005).

legislation purporting to curtail the power of eminent domain post-*Kelo*. The discussion below will focus upon the new laws in Alabama and Texas.

a. Alabama

Alabama was one of the first states to enact legislation following *Kelo*.²⁶⁶ “Calling the high court’s June 23 ruling ‘misguided’ and a ‘threat to all property owners,’ [Governor Bob] Riley said, ‘[A] property rights revolt is sweeping the nation, and Alabama is leading it.’”²⁶⁷ Alabama’s new provisions prohibit condemnation of property “for the purposes of private retail, office, commercial, industrial, or residential development; or primarily for enhancement of tax revenue; or for transfer to a person, nongovernmental entity, public-private partnership, corporation, or other business entity.”²⁶⁸ The new provisions still allow classic public uses such as public buildings, roadways, parks, and recreation facilities.²⁶⁹ The important exception is that property may be taken for those purposes if there is a finding of blight in an area covered by a redevelopment or urban renewal plan.²⁷⁰

The blight exception is common among much of the proposed legislation, but as one author cautions, this exception is “as slippery as an eel.”²⁷¹ With respect to urban renewal plans, “blighted” means “‘blighted, deteriorated, or *deteriorating*.’”²⁷² The Alabama legislature defined “blighted property” with respect to redevelopment plans to be property that is among other things—

- unfit for human habitation or occupancy,
- a fire hazard or otherwise dangerous to the safety of people or property,
- lacking in sufficient utilities,
- overgrown with weeds, a place for trash and debris to accumulate, haven for mosquitoes, rodents, etc.,
- a public or attractive nuisance,
- in violation of codes affecting health and safety,

266. ALA. CODE §§ 11-47-170(b), 11-80-1(b) (2005) (enacted Aug. 3, 2005).

267. Donald Lambro, *Alabama Limits Eminent Domain*, WASH. TIMES, Aug. 4, 2005, at A1.

268. §§ 11-47-170(b), 11-80-1(b).

269. §§ 11-47-170(b), 11-80-1(b).

270. §§ 11-47-170(b), 11-80-1(b).

271. Gideon Kanner, *Kelo v. New London: Bad Law, Bad Policy and Bad Judgment*, 49 ALI-ABA 1, 54 (2006).

272. ALA. CODE § 24-3-4 (2005) (emphasis added).

- subject to tax delinquencies that exceed the value of the property, or
- environmentally contaminated and poses a threat to public health or safety.²⁷³

Thus, it is not clear that the new provisions would prevent the use of eminent domain in the manner that the City of New London did because there was no allegation of blight in that case.

Interestingly, the Alabama legislature states that the “act is declaratory of existing law and shall apply to any pending action for condemnation.”²⁷⁴ Thus, while Alabama’s new law may appear at first glance to have teeth, it may be just another paper tiger.

b. Texas

Texas Governor Rick Perry signed into law amendments to the Government Code, “Limitations on Use of Eminent Domain” on September 1, 2005, to become effective on November 18, 2005.²⁷⁵ With great flourish, Governor Perry announced that the new law would protect small private property owners from the use of eminent domain for economic development. As Perry stated:

There is no bigger supporter of economic development than I. But I draw the line when government begins to pick winners and losers among competing private interests, and the loser is the poor Texan who owns the land to begin with.

...

The legislation I am proud to sign today means mom and pop businesses and residential property must be willingly sold – not unfairly seized – when a project’s purpose is private profit-making.²⁷⁶

The amendments exclude projects designed to provide public goods such as highways,²⁷⁷ flood control,²⁷⁸ and parks.²⁷⁹ However, in acquiring property for highways, a condemning authority continues to have the power to obtain property for “an ancillary facility that is anticipated to generate revenue for . . . maintenance, or operation of a toll project, including a gas station, garage, store, hotel, restaurant, or

273. H.B. 654, 2006 Leg., Reg. Sess. (Ala. 2006).

274. H.B. 186, 2005 Leg., Reg. Sess. (Ala. 2005).

275. TEX. GOV’T CODE § 2206 (Vernon 2005).

276. Press Release, Gov. Perry Signs New Law Protecting Property Rights (Aug. 31, 2005), <http://www.governor.state.tx.us/divisions/press/pressreleases/PressRelease.2005-08-31.3313>.

277. TEX. GOV’T CODE § 2206.001(c)(1) (Vernon 2005).

278. TEX. GOV’T CODE § 2206.001(c)(3) (Vernon 2005).

279. TEX. GOV’T CODE § 2206.001(c)(4) (Vernon 2005).

other commercial facility.”²⁸⁰ This legislation, however, limits that power in that the acquisition of such property must be “for one of multiple ancillary facilities included in a comprehensive development plan approved by the county commissioners court.”²⁸¹

The new legislation also exempts economic development from these limitations if “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.”²⁸² The Texas Community Development Act of 1975, however, provides that community development activities under that act are directed toward “prevention of *blighting* influences and of the *deterioration* of property and neighborhood and community facilities important to the welfare of the community.”²⁸³ Therefore, it appears that a municipality still may exercise the power of eminent domain to prevent blight or deterioration and the inquiry will be whether the activities are actually a pre-text for conferring a private benefit or some other prohibited economic development.

The amendments also do not apply to “energy transporters” as defined under the Utilities Code which are otherwise authorized by law to exercise the power of eminent domain.²⁸⁴ An energy transporter is “a person who gathers or transports oil, gas, or oil and gas products by pipeline.”²⁸⁵ Given that Houston, Texas is known as the “Energy Capital of the World,”²⁸⁶ this exemption may not be insignificant.

In sum, this Part of the Article suggests that exemptions may subsume the new laws, and thus, these laws will have little effect on how governments conduct their affairs. The new laws and the rhetoric surrounding them, however, are of paramount importance to a movement that is attempting to shift the country away from its history of regulation of social and economic affairs. That movement will be examined in the next section.

280. TEX TRANSP. CODE § 203.052(b)(9) (Vernon 2005).

281. TEX TRANSP. CODE § 203.052(c) (Vernon 2005).

282. TEX. GOV'T CODE § 2206.001(b)(3) (Vernon 2005).

283. Texas Community Development Act of 1975, TEX. LOCAL GOV'T CODE, § 373.002(b)(2) (Vernon 2005) (emphasis added).

284. TEX GOV'T CODE § 2206.001(c)(7)(B) (Vernon 2005).

285. TEX. UTIL.CODE, § 186.051(3) (Vernon Supp. 2005).

286. Energy Capital Houston Homepage, <http://www.energycapitalhouston.org/> (last visited Mar. 1, 2006).

IV. A RETURN TO *LOCHNER*: THE CONSTITUTION IN EXILE

The public outcry and legislative reactions to *Kelo* sparked by various interest groups should be viewed in conjunction with a systematic attempt to shift the country's constitutional theory of interpretation. The theory, in essence, is that the judiciary should interpret the Constitution according to its original meaning or the *ratifiers*' original understanding (as opposed to according to the framers' original intent).²⁸⁷ This movement has several names. Chief Judge Douglas H. Ginsburg of the D.C. Circuit dubbed the movement "the Constitution-in-exile."²⁸⁸ Professor Cass Sunstein labels it as "fundamentalism," stating that it resembles religious fundamentalism in its desire "to restore the literal meaning of a sacred text."²⁸⁹

This Section of the Article will delineate the contours of the Constitution in Exile movement and describe and critique its use of original meaning as an interpretative theory. This Section will also analyze the movement's desire to return the courts to something approximating the era before the 1930s, when the federal judiciary resisted proper constitutional interpretation by allowing the New Deal legislation to stand. This approach could be labeled "*Lochner*-lite" in which a "presumption of liberty" instead of a presumption of constitutionality would prevail to limit significantly state and federal legislation authority.

A. *The Constitution in Exile Movement in Brief*

The goal of the Constitution in Exile movement is for the judiciary to rediscover certain parts of the Constitution which the movement thinks have been erased from the country's jurisprudence. The movement wishes to rediscover the Necessary and Proper Clause, the Privileges or Immunities Clause, the Ninth Amendment, and the Tenth

287. SUNSTEIN, *supra* note 3, at xiii.

288. So for 60 years the nondelegation doctrine has existed only as part of the Constitution-in-exile, along with the doctrines of enumerated powers, unconstitutional conditions, and substantive due process, and their textual cousins, the Necessary and Proper, Contracts, Takings, and Commerce Clauses. The memory of these ancient exiles, banished for standing in opposition to unlimited government, is kept alive by a few scholars who labor on in the hope of a restoration, a second coming of the Constitution of liberty-even if perhaps not in their own lifetimes.

Douglas H. Ginsburg, *Delegation Running Riot*, REGULATION, No. 1, 1995, at 83, 84 (reviewing DAVID SCHOENBROD, POWER WITHOUT RESPONSIBILITY: HOW CONGRESS ABUSES THE PEOPLE THROUGH DELEGATION (1993)), available at <http://www.cato.org/pubs/regulation/reg18n1f.html>.

289. SUNSTEIN, *supra* note 3, at xiii.

Amendment.²⁹⁰ Most relevant to this Article are the movement's efforts "to reinvigorate the Constitution's Takings Clause to insulate property rights from democratic control"²⁹¹ and to narrow the scope of the Commerce Clause²⁹² to eliminate much of the modern regulatory state. For the states, the movement's interpretation of the Privileges or Immunities Clause and the Due Process Clause of the Fourteenth Amendment would limit the states' exercise of police power.²⁹³ In so doing, the movement would restore the constitutional protection of "economic liberty" that it believes has been minimized by swollen conceptions of "personal and political liberty."²⁹⁴

In Professor Randy Barnett's view, a number of factors during the last two decades of the nineteenth century changed the country's original political culture from one of understanding government as "a necessary evil" to understanding it as "the vital instrument for addressing social problems." This expansion occurred on the both federal and state levels. To restore the proper balance, the movement hopes for, in the words of Judge Ginsburg, "a second coming of the Constitution of liberty." Similarly, Barnett argues that we should replace the current presumption of constitutionality in judicial review of legislation with a "Presumption of Liberty" that places the "burden on the government to establish the necessity and propriety of any infringement on individual freedom."²⁹⁵ To be proper, according to Barnett, the "law must be a means to the achievement of an object or power enumerated in the text."²⁹⁶

B. *The Lochner Era*

So the question arises of how a return to the "Constitution of liberty" would affect economic liberty and more particularly private property rights. The movement envisions that the country would return to something akin to the era epitomized by the Supreme Court's decision in *Lochner v. New York*²⁹⁷ and its presumption of liberty rather than a

290. RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY 1 (2004).

291. SUNSTEIN, *supra* note 3, at 10.

292. BARNETT, *supra* note 290, at 312–18.

293. *See id.* at 199–219.

294. *See* William E. Forbath, *The New Deal Constitution in Exile*, 51 DUKE L.J. 165, 165–66 & nn. 3–4 (2001).

295. BARNETT, *supra* note 290, at 319.

296. *Id.* at 312–18.

297. While many believe that the adherents to this interpretive theory want a return to the pre-New Deal era, Professor Sunstein believes that one can trace this movement not back to *Lochner* but to the landmark decision of *Dred Scott v. Sandford* that upheld the right to own slaves. SUNSTEIN, *supra*

presumption of constitutionality. Barnett believes that the state of New York failed to carry its burden in *Lochner* to show that the law restricting the liberty interest had a “direct relation, as a means to an end,” and that “the end itself must be appropriate and legitimate.”²⁹⁸

To understand more fully the Constitution in Exile movement’s desire to return to another time, it is useful to examine some of the original cases upholding the “presumption of liberty.” In Professor Barnett’s view, *Lochner* represents “the conception of civil rights or ‘privileges or immunities’ held by the framers of the Fourteenth Amendment.”²⁹⁹ Though the modern Court has firmly rejected this “Allgeyer-Lochner-Adair-Coppage constitutional doctrine”³⁰⁰ and its philosophy of due process, the movement would have the country restore it.

In *Allgeyer v. Louisiana*, the Court explained a liberal conception of liberty that it constructed from the Fourteenth Amendment’s Due Process Clause.³⁰¹ And it that view of “liberty” and concomitant narrow view of governmental actions legitimately within the police power that drove the Court in its decision in *Lochner*.

In *Lochner v. New York*, in a 5–4 decision, the Court invalidated New York’s labor law concerning bakeries.³⁰² The law prohibited any employee of a bakery from working more than sixty hours in one week or more than ten hours in one day. The Court found that the statute interfered with the “liberty of contract” of the employee and employer to determine the number of hours the employee would work in the bakery, and “[t]he general right to make a contract in relation to his business is part of the liberty of the individual protected by the 14th Amendment of the Federal Constitution.”³⁰³

The state argued that the challenged law was intended to protect public health.³⁰⁴ However, the law had nothing to do with making baked goods safer for consumption. Accordingly, although the Court recognized that property and liberty are held subject to the exercise of

note 3, at 85–86. In that decision, the Supreme Court wrote that an “act of Congress which deprives a citizen of the United States of his . . . property . . . could hardly be dignified with the name of due process of law.” *Dred Scott v. Sandford*, 60 U.S. 393, 450 (1857).

298. BARNETT, *supra* note 290, at 214 (citing *Lochner v. New York*, 198 U.S. 45, 57–58 (1905)).

299. *Id.* at 215.

300. *Lincoln Fed. Labor Union No. 19129, American Fed’n of Labor v. Nw Iron & Metal Co.*, 335 U.S. 525, 535 (1949). The Court in *Coppage v. Kansas*, 236 U.S. 1 (1915), relied upon *Adair v. United States*, 208 U.S. 161 (1908), in which the Court held unconstitutional a federal law that prohibited discrimination against union workers. Professor Barnett acknowledges that law professors almost uniformly condemn *Lochner*. BARNETT, *supra* note 290, at 222.

301. *Allgeyer v. Louisiana*, 165 U.S. 578, 589 (1897).

302. *Lochner v. New York*, 198 U.S. 45 (1905).

303. *Id.* at 53.

304. *Id.* at 62–63.

the state's police power to protect the health, safety, welfare, and morals of the public,³⁰⁵ it held that "[t]here is no reasonable ground for interfering with the liberty of person or the right of free contract, by determining the hours of labor, in the occupation of a baker."³⁰⁶

The mere assertion that the subject relates, though but in a remote degree, to the public health, does not necessarily render the enactment valid. The act must have a more direct relation, as a means to an end, and the end itself must be appropriate and legitimate, before an act can be held to be valid which interferes with the general right of an individual to be free in his person and in his power to contract in relation to his own labor.³⁰⁷

The majority of the Court placed the burden of proof on the legislature to demonstrate the propriety of its actions. The Court ultimately concluded that these economic regulations were inappropriate and that even if they were, the state had not shown that its law would be effective.

Both dissenting opinions would have accorded New York's legislature greater deference, upholding the view that even if the Court believes that the legislature's action is unwise, it will not substitute its judgment for that of the legislature.³⁰⁸ Justice Harlan, quoting *Atkin v. Kansas*, wrote that while the Court is obligated to protect citizens from arbitrary exercises of the state's police power, "the public interests imperatively demand—that legislative enactments should be recognized and enforced by the courts as embodying the will of the people, unless they are plainly and palpably beyond all question in violation of the fundamental law of the Constitution."³⁰⁹ Justice Harlan concluded: "[T]his court will transcend its functions if it assumes to annul the statute of New York."³¹⁰

The Court continued on this path in *Coppage v. Kansas*, when it invalidated legislation enacted in Kansas that prohibited the use of certain types of coercion against employees.³¹¹ In particular, the state made it a criminal offense to coerce an employee to enter into any agreement "not to join or become or remain a member of any labor organization."³¹² This case arose because an employee refused to agree to withdraw from a labor organization and upon refusal was

305. *Id.*

306. *Id.* at 57.

307. *Id.* at 57–58.

308. See *id.* at 70–74 (Harlan, J., dissenting); *Id.* at 75–76 (Holmes, J., dissenting).

309. *Id.* at 74 (Harlan, J., dissenting) (quoting *Atkin v. Kansas*, 191 U.S. 207, 233 (1903)).

310. *Id.* at 70 (Harlan, J., dissenting).

311. *Coppage v. Kansas*, 236 U.S. 1 (1915).

312. *Id.* at 4.

terminated.³¹³

The Court again recognized the right of the state to exercise its police powers to “reasonably limit the enjoyment of personal liberty, including the right of making contracts” for the sake of public’s health, safety, welfare, and morals.³¹⁴ In expounding upon the meaning of “reasonably,” the Court reviewed several cases in which—by advancing the public’s interest—the state *incidentally* interfered with the rights of property and liberty.³¹⁵ However, the Court ultimately held in *Coppage* that the objective of the law was to interfere with property and liberty rights, and “not an incident to the advancement of the general welfare.”³¹⁶ Such interference, it held, violated the Fourteenth Amendment.³¹⁷

The Court, however, decisively ended the *Lochner* era approximately twenty-three years later with a series of cases, including *United States v. Carolene Products Co.*,³¹⁸ *NLRB v. Jones & Laughlin Steel Corp.*,³¹⁹ and *West Coast Hotel Co. v. Parrish*.³²⁰ In *Carolene Products*, for example, the Court upheld the Federal Filled Milk Act which prohibited interstate shipment of specified milk products.³²¹ In declining to find the act unconstitutional, the Court stated that in the absence of countervailing facts, it would presume that the legislation was founded upon a rational basis.³²² Though the Court found debatable the question of whether these skim milk products should be regulated, it held that “[a]s that decision was for Congress, neither the finding of a court arrived at by weighing the evidence, nor the verdict of a jury can be substituted for [a legislative decision].”³²³

If the Court had not changed course and continued to substitute its philosophy and ideology for that of people’s elected representatives, the legislative branches largely would have ceased to govern. Wisely, as Justice Hugo Black later explained, the Court abandoned

313. *Id.* at 7.

314. *Id.* at 18.

315. *Id.*

316. *Id.*

317. *Id.* at 18–19.

318. *United States v. Carolene Prod. Co.*, 304 U.S. 144 (1938).

319. 301 U.S. 1 (1937) (upholding Congress’ authority to regulate labor practices under the National Labor Relations Act because the effects of local economic activity on interstate commerce).

320. 300 U.S. 379 (1937) (upholding a state minimum wage law for women as a protection against “evil” and rejecting the argument that the law constituted a violation of due process as deprivation of the freedom of contract).

321. *Carolene Prod. Co.*, 304 U.S. at 148.

322. *Id.* at 152.

323. *Id.* at 154.

the use of the ‘vague contours’ of the Due Process Clause to nullify laws which a majority of the Court believed to be economically unwise We conclude that the Kansas Legislature was free to decide for itself that legislation was needed to deal with the business of debt adjusting. Unquestionably, there are arguments showing that the business of debt adjusting has social utility, but such arguments are properly addressed to the legislature, not to us. We refuse to sit as a ‘superlegislature to weigh the wisdom of legislation,’ and we emphatically refuse to go back to the time when courts used the Due Process Clause ‘to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought.’ . . . Whether the legislature takes for its textbook Adam Smith, Herbert Spencer, Lord Keynes, or some other is no concern of ours. The Kansas debt adjusting statute may be wise or unwise. But relief, if any be needed, lies not with us but with the body constituted to pass laws for the State of Kansas.³²⁴

A return to the type of judicial review rejected in *Carolene Products* would be difficult to reconcile with the country’s democratic theory of government,³²⁵ yet the Constitution in Exile movement urges us to make just that move.³²⁶

C. Originalism and Other Theories of Constitutional Interpretation

The theory of the Constitution in Exile movement is that the Constitution should be interpreted as the ratifiers originally understood it. “Early on, the movement found its intellectual guru in Richard Epstein. In the words of Michael Greve [of the American Enterprise Institute], Epstein is ‘the intellectual patron saint of everybody in this movement.’”³²⁷ Professor Epstein believes that “historical sources . . . are exceedingly helpful in allowing us to understand the standard meanings of ordinary language as embodied by constitutional text.”³²⁸ Yet he does not think it is useful to take into account the

324. *Ferguson v. Skrupa*, 372 U.S. 726, 731–32 (1963).

325. See JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 4–5, ch. 3 (1980) (discussing the problem of unelected judges substituting their values for those of the legislature and telling the people’s elected representatives how to govern).

326. What is perhaps more conceivable is a resurgence in areas of heightened judicial intervention such as Justice Harlan Fiske Stone suggested in the famous footnote 4 of *Carolene Products*: areas governed by the first ten Amendments of the Constitution and areas in which we cannot trust the political process to render fair results. *Carolene Prod. Co.*, 304 U.S. at 153 n.4.

327. Rosen, *supra* note 70. But see Steven G. Calabresi, *The Originalist and Normative Case Against Judicial Activism: A Reply to Professor Randy Barnett*, 103 MICH. L. REV. 1081, 1081 (2005) (“Barnett’s book immediately replaces Richard Epstein’s *TAKINGS* as the leading tome about constitutional law written from a libertarian perspective.”).

328. RICHARD A. EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN*

intentions of the parties who drafted or ratified the Constitution.³²⁹ Such considerations, according to Epstein, could lead to “more confusion than it eliminates”³³⁰ and the framers could not have anticipated the “novel institutions in changed social circumstances”³³¹ that we face today.

To determine what that original understanding of the Commerce Clause was, for example, Randy Barnett examines the text itself,³³² a 1785 dictionary,³³³ notes from the Constitutional Convention,³³⁴ *The Federalist*,³³⁵ records of the ratification conventions,³³⁶ and general usage in newspapers of the era.³³⁷ Ostensibly “[t]he central constitutional questions thus become historical ones.”³³⁸ Justice Scalia could be said to be an adherent of this interpretative philosophy: “What I look for in the Constitution is precisely what I look for in a statute: the original meaning of the text, not what the original draftsmen intended.”³³⁹

1. Critiquing the Movement’s Originalism

Strangely, the movement does not attempt to support its pro-private property views with original understanding. “An understanding of the founding period raises serious doubts about the pro-property position of purported fundamentalists.”³⁴⁰ The movement does, however, call for the expansion of protection of private property rights and the liberty to contract while at the same time defending the contraction of civil liberties in the name of national security.³⁴¹ Historical research does not

29 (1985).

329. *Id.* at 26.

330. *Id.*

331. *Id.* at 28.

332. BARNETT, *supra* note 290, at 278–79.

333. *Id.* at 280.

334. *Id.*

335. *Id.* at 280–81.

336. *Id.* at 282–89.

337. *Id.* at 289–91.

338. SUNSTEIN, *supra* note 3, at 26.

339. Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, in A MATTER OF INTERPRETATION 38 (Amy Gutmann ed., 1997). There are many versions of textualism, however. See generally A MATTER OF INTERPRETATION (Amy Gutmann ed., 1997) (containing essays by Gordon S. Wood, Laurence H. Tribe, and Ronald Dworkin expounding on textualism and originalism).

340. SUNSTEIN, *supra* note 3, at 223.

341. Students from Georgetown University Law Center protested at a speech by U.S. Attorney General Alberto Gonzales who was trying to defend President Bush’s domestic wiretapping without warrants program. The students held a banner with a quote attributed to Benjamin Franklin: “Those who would sacrifice liberty for security deserve neither.” Dan Eggen, *Gonzales Defends Warrantless*

suggest that such an expansion is warranted under the originalist approach. Instead, such research “justifies reconsidering why it is that the American constitutional order gives landowners so much power to evade economic regulation, compared to other kinds of property.”³⁴² While it may be true that “[t]he framers of the Constitution and Bill of Rights believed that property rights and individual liberty were inseparable,”³⁴³ it does not follow that they also believed that property rights could not be regulated in this manner. Thus, opposition to *Kelo* is not driven by some adherence to the text or reference to history. Instead, it is a desire for a particular ideological outcome that propels the movement forward.

2. Minimalism as a Superior Approach

Alternative theories of constitutional interpretation include original intent, perfectionism, majoritarianism, maximalism, and minimalism. The original intent theory requires courts to interpret the Constitution so as to give meaning to the constitutional framers’ original intent.³⁴⁴ Perfectionism requires courts to make the Constitution the best document that it can be.³⁴⁵ As Professor Cass Sunstein explains this view, “the Court should act to improve the democratic character of the political process itself. It should do so by protecting rights that are preconditions for a well-functioning democracy, and by protecting groups that are at special risk because the democratic process is not democratic enough.”³⁴⁶ Majoritarians want the democratic process to

Wiretapping, WASH. POST, Jan. 25, 2006, at A7. However, Benjamin Franklin said something slightly different: “Those who would give up *essential* Liberty, to purchase a *little temporary* Safety, deserve neither Liberty nor Safety.” Benjamin Franklin, Pennsylvania Assembly: Reply to the Governor, November 11, 1755, in 6 THE PAPERS OF BENJAMIN FRANKLIN 242 (Leonard W. Labaree ed., 1963) (emphasis added). Arguably, however, we are sacrificing essential liberty for a little bit of temporary safety.

342. John F. Hart, *Land Use Law in the Early Republic and the Original Meaning of the Takings Clause*, 94 NW. L. REV. 1099, 1104 (2000).

343. James W. Ely, Jr., *Kelo: A Setback for Property Owners*, PROB. & PROP., Jan./Feb. 2006, at 14.

344. See RONALD DWORKIN, *LAW’S EMPIRE* 359 (1986) (labeling such an interpreter as an “historicist” or one who “has settled on a style of constitutional adjudication that limits eligible interpretations of the Constitution to principles that express the historical intentions of the framers”).

345. See *id.* at 229 (likening judicial interpretation to writing a novel, where the judge tries to “make the novel being constructed the best it can be”).

346. Cass R. Sunstein, *Leaving Things Undecided*, 110 HARV. L. REV. 4, 13 (1996). Cf. *United States v. Carolene Prod. Co.*, 304 U.S. 144, 153 n.4 (1938) (“It is unnecessary to consider now whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation.”)

work with minimal intrusion by the courts. For example, Professor Mark Tushnet argues that “[w]e do not have to have a court that will strike down laws—a court with the power of judicial review—to have a vibrant language of fundamental rights available to us. We can support and oppose *legislation* by invoking the Declaration [of Independence]’s principles.”³⁴⁷ Maximalism seeks to establish broad rules that give guidance for the future.³⁴⁸ And finally, Professor Sunstein explains that minimalists’ “distinguishing feature is that they believe in narrow, incremental decisions, not broad rulings”³⁴⁹ Oliver Wendell Holmes could be said to have subscribed to this theory.

Of these approaches, minimalism is the most persuasive in the context of this debate. As the reactions to *Kelo* and *Sweet Home* demonstrate, the public has some very strong feelings about private property rights. Yet, little empirical data exists to suggest that governments abuse their police powers in the regulation of private property in these contexts. Also, as our economies change, governments—particularly state and local ones—increasingly will face fiscal challenges in seeking to advance their economies. Moreover, our values continue to change with respect to the protection of endangered species, for example. In the face of such a multi-variable analysis, courts should favor the minimalist approach over the originalist one.³⁵⁰

This debate is at bottom a theory of the proper role of government in the ordering of our society. It is a debate about politics and values, and it should not be limited to a historical inquiry.

V. JUDICIAL ACTIVISM

The Constitution in Exile movement feeds off and nurtures the sentiments expressed in a recent survey conducted for the American Bar Association (ABA) regarding judicial activism. While it may be difficult to define the term “judicial activism” in the context of the current debate, Yale Law School Professor Paul Gewirtz and recent graduate Chad Golder may be correct when they point out that “the word ‘activist’ . . . [o]ften . . . simply means that the judge makes decisions with which the critic disagrees.”³⁵¹ However, the ABA survey attempted to gauge the opinion of 1,016 adults with respect to judicial activism.

347. MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS*, 168–69 (1999).

348. See DWORKIN, *supra* note 344, at 5–30, 219–24.

349. SUNSTEIN, *supra* note 3, at xiii.

350. See Sunstein, *supra* note 346, at 8.

351. Paul Gewirtz & Chad Golder, *So Who Are the Activists?*, N.Y. TIMES, July 6, 2005, at A19.

The survey found that 56% of respondents strongly or somewhat agreed with two statements made by politicians regarding judicial activism.³⁵² The first statement, made by U.S. Representative Lamar Smith (R-TX) was “Judicial activism . . . seems to have reached a crisis. Judges routinely overrule the will of the people, invent new rights and ignore traditional morality.”³⁵³ The other statement was made by Missouri’s Republican governor, Matt Blunt. He stated “that court opinions should be in line with voters’ values, and judges who repeatedly ignore those values should be impeached.”³⁵⁴ Forty-six percent of respondents strongly or somewhat agreed with a statement by House Majority Leader Tom Delay (R-TX), who “called judges arrogant, out-of-control and unaccountable.”³⁵⁵

In reaction to the survey, Professor Charles Geyh posits that “[t]he idea that judges should somehow follow the voters’ views really reflects a fundamental misunderstanding of what judges are supposed to do.”³⁵⁶ But Professor John McGinnis states that he is not surprised by the results of the survey because no matter how one defines judicial activism, a lot of it has been occurring.³⁵⁷ He says that “the idea of the Constitution as a document that should be interpreted formally and without regard to the judge’s own values has been under attack. Judges today also do not give due deference to legislative decisions, and too frequently strike down statutory law.”³⁵⁸

Professor Cass Sunstein argues that “it is best to measure judicial activism by seeing how often a court strikes down the actions of other parts of government, especially Congress. Such decisions preempt the

352. See Martha Neil, *Half of U.S. Sees ‘Judicial Activism Crisis’*, ABA J. EREPORT, Sept. 30, 2005, <http://www.abanet.org/journal/redesign/s30survey.html>.

353. *Id.*

354. *Id.* These respondents apparently adhere to what Professor Cass Sunstein calls the majoritarian theory of constitutional interpretation which would require the Court to uphold the acts of Congress and the Executive unless they clearly violate the Constitution. SUNSTEIN, *supra* note 3, at 44. Alternatively, this attitude could be characterized as the “rule of clear mistake”; that is, the courts should uphold the acts of the other two branches unless they are manifestly unconstitutional. Sunstein, *supra* note 346, at 11, 12 (citing James B. Thayer, *The Origin and Scope of American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 139–52 (1893)).

355. Neil, *supra* note 352.

356. *Id.* (internal quotation marks omitted). But consider what Professor Cass Sunstein says is the belief of the Constitution in Exile movement. He argues that the movement believes that courts should be “agents of the people, implementing their commands. Consider the words of Oliver Wendell Holmes. ‘If my fellow citizens want to go to Hell I’ll help them. It’s my job.’” SUNSTEIN, *supra* note 3, at 57 (citing Oliver Wendell Holmes to Harold Laski, March 4, 1920, HOLMES-LASKI LETTERS, 249 Vol. 1 (1953)).

357. See Neil, *supra* note 352.

358. *Id.*

democratic process.”³⁵⁹ According to Professor Sunstein, the Rehnquist Court overturned more than three dozen federal laws in the past decade.³⁶⁰

One commentator argues that it is the conservatives on the Court—former Chief Justice William H. Rehnquist and Justices Antonin Scalia and Clarence Thomas—who are activists,³⁶¹ citing *United States v. Lopez*, where the Court, declaring the Gun-Free School Zones Act of 1990 unconstitutional, found that Congress had exceeded its authority to regulate interstate commerce.³⁶² Another oft-cited example is *United States v. Morrison*, in which the Court struck the civil remedy provision of the Violence Against Women Act.³⁶³ The dissent in each of those cases cautioned that the decisions could signal the beginning of the return to the undesirable *Lochner* era.³⁶⁴

Proponents of the Constitution in Exile movement as recently as last year stated their belief that there would be a lot of activity to restrict government at the state level, but not in the Supreme Court.³⁶⁵ However, since making that observation, proponents have seen the composition of the Court change significantly, and the movement’s hopes may be restored in the Supreme Court if the speculation about the Chief Justice John Roberts and Justice Samuel A. Alito, Jr. prove true. Some have speculated that Chief Justice Roberts is a member of the Constitution in Exile movement, though he has not publicly stated so. One indication of his possible adherence to this ideology, however, is his dissenting opinion in the denial of the real estate developer’s petition

359. SUNSTEIN, *supra* note 3, at 42–43.

360. SUNSTEIN, *supra* note 3, at 15.

361. See Greenhouse, *supra* note 61. Greenhouse notes that the Court declared four federal laws unconstitutional in the 1994–95 term, compared to declaring only 129 laws unconstitutional in the Court’s 250-year history. *Id.*

362. 514 U.S. 549 (1995). The five justices who struck down the law were Chief Justice Rehnquist and Justices Sandra Day O’Connor, Anthony M. Kennedy, Antonin Scalia, and Clarence Thomas.

363. 529 U.S. 598 (2000). The five justices who struck down the law were Chief Justice Rehnquist and Justices Sandra Day O’Connor, Anthony M. Kennedy, Antonin Scalia, and Clarence Thomas.

364. Since adherence to these formalistically contrived confines of commerce power in large measure provoked the judicial crisis of 1937, one might reasonably have doubted that Members of this Court would ever again toy with a return to the days before *NLRB v. Jones & Laughlin Steel Corp.*, 201 U.S. 1 . . . (1937), which brought the early and nearly disastrous experiment to an end.

United States v. Morrison, 529 U.S. at 642–43. See also Justice David Souter’s dissent criticizing the majority for returning to the *Lochner*-type review of legislation. *United States v. Lopez*, 514 U.S. at 603–15.

365. Rosen, *supra* note 70 (Professor Epstein noted that “the battle for the Constitution in Exile will continue at the state level—‘the emotional grab of those eminent-domain cases is so strong,’ he said—but confessed that he had little hope, for now, in the Supreme Court.”).

for rehearing en banc in *Rancho Viejo LLC v. Norton*.³⁶⁶

There, the U.S. Circuit Court of Appeals for the District of Columbia upheld the U.S. Fish and Wildlife Service's decision to prevent construction that would jeopardize the endangered arroyo southwestern toad.³⁶⁷ In his dissenting opinion denying rehearing of the case, Judge Roberts wrote that under the Endangered Species Act, the federal government could not use its powers under the Commerce Clause to protect "a hapless toad that, for reasons of its own, lives its entire life in California."³⁶⁸ Judge Roberts argued that the petition should be granted so that the court could "consider alternative grounds for sustaining application of the Act." Judge Roberts cited *GDF Realty Investments, Ltd. v. Norton*, in which the U.S. Circuit Court of Appeals for the Fifth Circuit upheld the U.S. Fish and Wildlife Service's decision to restrict development in the habitat of some endangered cave bugs that live their entire life within Texas.³⁶⁹

When questioned about that opinion during a confirmation hearing, Judge Roberts explained that he was not implying that the Endangered Species Act should be overturned but that the three-judge panel should have found another basis under the Commerce Clause for authorizing federal protection of such a species that never crosses state lines.³⁷⁰ The U.S. Supreme Court denied the petition for writ of certiorari.³⁷¹ Query whether Chief Justice Roberts would have voted to grant the petition in *GDF Realty Investments, Ltd.* as a member of the U.S. Supreme Court.

With Justice Samuel Alito, the Constitution in Exile movement may also find another adherent in the judiciary. During his confirmation hearing, when asked how he would interpret the Constitution, Judge Alito replied, "I think we should look to the text of the Constitution, and we should look to the meaning that someone would have taken from the text of the Constitution at the time of its adoption."³⁷² Though some commentary suggests that Alito is more committed to certain political

366. 334 F.3d 1158 (D.C. Cir. 2003). Cf. Adam Cohen, *Is Judge Roberts Too Much of an Activist?*, N.Y. Times, Aug. 27, 2005, at A12 (Editorial) (suggesting that this opinion is "the clearest indication yet of his tendencies toward judicial activism" to take away much of the power of Congress to protect Americans under the Commerce Clause).

367. *Rancho Viejo LLC v. Norton*, 323 F.3d 1062 (D.C. Cir. 2003).

368. 334 F.3d at 1160.

369. *Id.* (citing 326 F.3d 623, 634 (5th Cir. 2003)).

370. Transcript of Day Two of the Roberts Confirmation Hearings, Part IV, Sens. Dewine & Feinstein (Sept. 13, 2005) at <http://www.washingtonpost.com/wp-dyn/content/article/2005/09/13/AR2005091301469.html>.

371. *GDF Realty Invs. v. Norton*, 125 S.Ct. 2898 (2005).

372. *U.S. Senator Arlen Specter (R-Pa) Holds A Hearing On The Nomination Of Judge Samuel Alito To The U.S. Supreme Court*, FDCH CAP. TRANSCRIPT, Jan. 11, 2006.

outcomes than a particular interpretative theory of the Constitution,³⁷³ his dissent in *United States v. Rybar*³⁷⁴ may suggest otherwise. In that case, the Third Circuit Court of Appeals upheld a federal statute criminalizing possession of machine guns. Then-Judge Alito began his dissenting opinion with these questions: “Was *United States v. Lopez* . . . a constitutional freak? Or did it signify that the Commerce Clause still imposes some meaningful limits on congressional power?”³⁷⁵

Although the Constitution in Exile movement may be vocal in its opposition of judicial activism, the movement is itself activism of a certain sort. It opposes judges who uphold acts of state and federal legislatures that it cannot trace to some original understanding of the Constitution. It does not oppose, contrarily, judges who strike acts of Congress that are incongruent with some populist notions of what the role of government should be. And it has been successful in popularizing its view, perhaps because, as Professor John Flynn argues, lawyers have not done a very good job of informing the public about the duties of the judiciary.³⁷⁶

The *Kelo* decision was an act of judicial restraint, following the precedent of *Carolene Products* in which the Court declared that in cases of regulation of commerce where reasonable minds could differ, it would defer to the legislature.³⁷⁷ *Kelo* does not import a particular economic philosophy into the Constitution. Otherwise, the Court would have made an indefensible, value-laden intervention into the democratic process.

VI. WHY THIS RHETORIC MATTERS

This rhetoric about restoration of the original meaning of the Constitution is troubling for a number of reasons. First, rather than finding a *lost* Constitution, the goal of the Constitution in Exile movement appears to be to advance a conservative Republican or

373. “To a striking extent, Alito’s judicial conclusions track identifiable political commitments.” Cass R. Sunstein, *The Key Question For Alito. Same Difference*. NEW REPUBLIC ONLINE, Jan. 9, 2006, <http://www.tnr.com/doc.mhtml?i=w060109&s=sunstein010906>.

374. 103 F.3d 273 (3d Cir. 1996).

375. *Id.* at 286.

376. John J. Flynn, “*Making Law*” and “*Finding Facts*”—*Unavoidable Duties of an Independent Judiciary*, 18 UTAH B. J. 6, 6 (2005).

377. *United States v. Carolene Prod. Co.*, 304 U.S. 144, 154 (1938). In the opinion’s famous footnote 4, the Court notes in dicta that greater scrutiny may be appropriate in cases in which “prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities.” *Id.* at 153 n.4.

libertarian vision under the guise of neutral interpretive theory. “But there is nothing neutral in fundamentalism. It is a political choice, which must be defended on political grounds.”³⁷⁸ Second, even if the movement actually subscribed to an original meaning theory of interpretation, its recount of history in the area of property rights is slim and controvertible.³⁷⁹

Contrary to the conventional image of minimal land use regulation, government in the colonial period often exerted extensive authority over private land for purposes unrelated to avoiding nuisance. . . . Indeed, the public benefits pursued by such legislative action included some that consisted essentially of benefits for other private landowners. Legislatures often attempted to influence or control the development of land for particular productive purposes thought to be in the public good.³⁸⁰

Moreover, it is unclear from the evidence offered that there actually exists a problem that the newly enacted and proposed legislation would address. As noted above, very little empirical research has been conducted on condemnation. The available data shows, however, that approximately 80% of state and federal governments’ acquisition of private property is through voluntary transactions.³⁸¹ So these stories about abuse of the power of eminent domain might not be as widespread

378. SUNSTEIN, *supra* note 3, at 72.

379. See, e.g., John F. Hart, *Land Use Law in the Early Republic and the Original Meaning of the Takings Clause*, 94 NW. L. REV. 1099, 1100 (2000) (“This Article will demonstrate that the conventional history of land use law in the founding era is erroneous, and that the expansive reading of the Takings Clause derived from it, the so-called regulatory takings doctrine, is misconceived.”); William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 COLUM. L. REV. 782, 791 (1995) (“There are apparently no records of discussion about the meaning of the [takings] clause in either Congress or, after its proposal, in the states.”); William Michael Treanor, *Translation Without Fidelity: A Response to Richard Epstein’s Fidelity Without Translation*, 1 GREEN BAG 2d 177, 181 (1998) (“Rather, as a substantial body of historical scholarship produced over the last thirty years has shown, the founding generation’s worldview reflected both the presence of the communitarian philosophy of republicanism—in which property is held subject to the demands of the common good as those demands are established by majoritarian decisionmakers.”)

380. John F. Hart, *Colonial Land Use Law and its Significance for Modern Takings Doctrine*, 109 HARV. L. REV. 1252, 1257 (1996). See also Trevor W. Morrison, *Lamenting Lochner’s Loss: Randy Barnett’s Case for a Libertarian Constitution*, 90 CORNELL L. REV. 839, 861–63 (2005) (critiquing Barnett’s argument that history consistently supports his account of the proper scope of police power).

381. E.g., U.S. Dept. of Transp., Fed. Highway Admin., *Evaluation of State Condemnation Process*, <http://www.fhwa.dot.gov/realestate/cndmst.htm> (last modified Feb. 14, 2005) (reviewing condemnations for rights-of-way in Florida, Missouri, Pennsylvania, South Carolina, and Washington and reporting voluntary sales almost 80% of the time); COMPTROLLER GENERAL, *FEDERAL LAND ACQUISITIONS BY CONDEMNATION: OPPORTUNITIES TO REDUCE DELAYS AND COSTS* 81 (General Accounting Office 1980) (reporting voluntary sale 80% of the time); *Hearings on Real Property Acquisition Practices and Adequacy of Compensation in Federal and Federally Assisted Program Before the Select Subcomm. on Real Property Acquisition of the House Comm. on Public Works*, 88th Cong., 368–81, 383–90 (1963) (reporting voluntary sale 83% of the time).

as the rhetoric of reformers would suggest.

Notably, the failure or unwillingness to address this rhetoric directly and tell counter stories, allows the movement to create an ideologically reconfigured judiciary that challenges the authority of Congress and the states to regulate social and economic affairs in a myriad of areas including racial discrimination, labor laws, campaign reform, and voting rights to name a few.³⁸²

Many right-wing extremists even appear to have convinced themselves that by a remarkable coincidence, there is a close fit between their own political commitments and the Constitution itself. This is of course a delusion. But in a way, they're right. By appointing judges who see things their way, they are making the fit closer everyday.³⁸³

Fundamentalists know that current constitutional law does not reflect their own views and they tend to feel angry and even embattled about the fact. For this reason fundamentalists have radical inclinations; they seek to make large-scale changes in constitutional law.³⁸⁴

Those who oppose the movement need to develop a robust vocabulary in order to tell effective counter-stories that argue against such constitutional changes. Minimalism is preferable to originalism and thus must be a bulwark against the Constitution in Exile movement because minimalists "know that both law and life may outrun seemingly good rules and seemingly plausible theories."³⁸⁵ Justice cannot be determined in a vacuum or with simple reference to historical texts. Instead, justice must be meted out in context, and it is vital that the rhetoric of the debate accurately depict the situation.

VII. CONCLUSION

This Article has drawn the parallels between the past debate on regulatory takings after *Babbitt v Sweet Home* and the current debate on eminent domain after *Kelo v. City of New London*. As a result of the former debate, many states passed legislation allegedly to protect private property owners from overzealous regulators who were running roughshod over the owners' property right. Over a decade later, however, it appears that the legislative activity was full of sound and fury, signifying nothing as a practical matter. The current debate over eminent domain parallels the *Sweet Home* debate in many ways. This Article speculates that the impact of new legislation in this area is

382. See EPSTEIN, *supra* note 328, at x.

383. SUNSTEIN, *supra* note 3, at 19.

384. *Id.* at 26.

385. Sunstein, *supra* note 346, at 43.

similarly unnecessary and will have limited impact as well.

But, the Article does not argue that these debates and their legislative outcomes are unimportant. To the contrary, the rhetoric of the debates and the subsequent legislation are devices used to move the country toward an interpretative theory of the Constitution that would severely limit the role of government in our social and economic affairs. This theory ostensibly is based on originalism, yet many disagree about the accuracy of the historical account. Notwithstanding the question of the legitimacy of originalism, its use cannot be said to support the expansive view of private property rights offered in these debates.

And though this rhetoric may be fraudulent, it is a device with consequences. As a character in Lorraine Hansberry's play entitled "Les Blancs" explains with respect to racism as a useful concept:

[R]acism is a device that, of itself, explains nothing. It is simply a means. . . .

. . . [B]ut it also has consequences: once invented it takes on a life, a reality of its own. . . . [Y]ou and I may recognize the fraudulence of the device, but the fact remains that a man . . . who is shot in Zatembe or Mississippi because he is black—is suffering the utter *reality* of the device. And it is pointless to pretend that it doesn't *exist*—merely because it is a lie!³⁸⁶

Because the current rhetoric about the use of eminent domain in this country may be inaccurate at best, such rhetoric must be challenged vigorously. For if we allow the inaccuracies to remain unchallenged long enough, we may find ourselves operating under the delusion that they are truths, unduly hampering governments' authority and obligation to regulate for the benefit of the public's health, safety, welfare, and morals.

386. LES BLANCS: THE COLLECTED LAST PLAYS OF LORRAINE HANSBERRY 121–22 (Robert Nemiroff ed., 1972).

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MUCH ADO ABOUT NOTHING

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Appendix
Examples of Proposed/Enacted State Eminent Domain Legislation

State	Citation	Description
Alabama	S.B. 68A, 2005 Legis., 1st Special Sess. (Ala. 2005) (enacted Aug.3, 2005)	See Part III.C.2.a.
Alaska	H.B. 318, 24th Legis., 2d Sess. (Alaska 2006)	providing exceptions for transfer of condemned property for economic development purposes
Arizona	S.B. 1091, 47th Legis., 2d Reg. Sess. (Ariz. 2006)	requiring condemning authority to reach a 75% consensus that public uses of condemnation power “substantially outweigh” the private uses
California	A.B. 1990, 2005–06 Legis., Reg. Sess. (Cal. 2006)	prohibiting the use of condemnation power for transfer to private parties or entities
Colorado	H.B. 1099, 65th Gen. Assem., 2d Reg. Sess. (Colo. 2006)	reaffirming that eminent domain may be used only for public purposes but providing exceptions
Connecticut	S.B. 34, 2006 Gen. Assem., Jan. Sess. (Conn. 2006)	requiring a 2/3 vote before property may be taken for economic development purposes and requiring a compensation of 150% of the fair market value of the condemned property
Delaware	S.B. 217, 143d Gen. Assem., 2005 Sess. (Del. 2005) (enacted July 21, 2005)	limiting exercise of power of eminent domain only “for purposes of a recognized public use”
Florida	S.B. 1820, 108th Legis., Reg. Sess. (Fl. 2006)	requiring government to pay landowner additional compensation if landowner’s property was taken for economic development and fair market value of property increases within five years of the taking
Georgia	H.B. 943, 148th Gen. Assem., 2005–06 Reg. Sess. (Ga. 2006)	“Economic development or redevelopment shall not constitute a public purpose for which property may be acquired by eminent domain.”
Hawaii	H.B. 2135, 23d Legis., 2006 Sess. (Haw. 2006)	“‘Public use’ shall not include any use of property that is for urban or economic development that would result in the development of any nongovernmental

State	Citation	Description
		retail, office, commercial, residential, or industrial development”
Idaho	H.B. 555, 58th Legis., 2d Reg. Sess. (Idaho 2006)	eminent domain may not be used for transfer to private parties or for economic development
Indiana	S.B. 391, 114th Gen. Assem., 2d Reg. Sess. (Ind. 2006)	prohibiting the transfer of condemned property to another person for commercial use unless it is located in a blighted area and “there is a substantial likelihood that the acquisition and transfer of the property will” either create business opportunities or “promote or retain the opportunity for gainful employment. . . .”
Illinois	H.B. 4091, 94th Gen. Assem., 2006 Sess. (Ill.2006)	allowing the use of eminent domain only for a “qualified public use”
Iowa	H.B. 2120, 81st Gen. Assem., 2d Sess. (Iowa 2006)	allowing the use of eminent domain for a private purpose upon the landowner’s consent
Kansas	H.B. 2543, 81st Legis., Reg. Sess. (Kan. 2006)	prohibiting the use of eminent domain for private uses unless governmental entity makes a finding of blight or the condemnation is part of an urban renewal plan
Kentucky	H.B. 114, 2006 Legis., Reg. Sess. (Ky. 2006)	prohibiting “the condemnation of private property for transfer to a private owner solely for the purpose of economic development that benefits the general public only indirectly”
Louisiana	S.B. 43A, 2006 Legis., 1st Extraordinary Sess. (La. 2006)	stating that a tool short of eminent domain should be afforded local governments in order to “renovate abandoned, blighted, and uninhabitable housing units”
Maine	H.B. 1310, 122d Legis., 1st Reg. Sess. (Me. 2006)	prohibiting the use of eminent domain for private purpose or for the increase of tax revenue
Maryland	H.B. 44, 421st Gen. Assem., Reg. Sess. (Md. 2006)	prohibiting use of eminent domain for economic development purposes and transfer to private persons
Massachusetts	H.B. 4605, 184th Gen. Ct., Reg. Sess. (Mass. 2006)	prohibiting the use of eminent domain power for economic domain unless purpose is to eliminate or prevent blight
Michigan	S.J. Res. E., 93d Legis., Reg. Sess.	proposing an amendment to the state constitution that provides that

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State	Citation	Description
	(Mich. 2005) (enacted Dec. 13, 2005)	compensation for the taking of an individual's primary residence shall not be less than 125% of the property's fair market value and prohibiting the "taking of private property for transfer to a private entity for the purpose of economic development or enhancement of tax revenues"
Minnesota	H.B. 2586, 84th Legis. Reg. Sess. (Minn. 2006)	prohibiting the transfer of condemned property to private persons
Mississippi	H.B. 100, 2006 Legis., Reg. Sess. (Miss. 2006)	prohibiting the use of eminent domain for transfer to private parties or to increase tax revenues
Missouri	H.B. 1363, 93d Gen. Assem., 2d Reg. Sess. (Mo. 2006)	prohibiting the use of eminent domain for economic development
Nebraska	L.B. 799, 99th Legis., 2d Reg. Sess. (Neb. 2006)	prohibiting the use of eminent domain to confer a benefit on private parties or for the primary benefit of economic development
New Hampshire	H.B. 1129, 159th Gen. Ct., 2d Yr. (N.H. 2006)	"The public benefits of economic development, including an increase in tax base, tax revenues, employment, and general economic health, shall not constitute a public use."
New Jersey	A.B. 1220, 212th Legis., 2006 Sess. (N.J. 2006)	requiring a referendum before a municipality is allowed to condemn property for economic development purposes
New Mexico	H.B. 27, 47th Legis., 2d Sess. (N.M. 2006)	"The state or a local public body shall not condemn private property if the taking is to promote private or commercial development and title to the property is transferred to another private entity."
New York	A.B. 9144, 228th Legis., 2006 Sess. (N.Y. 2006)	requiring a public hearing, a unanimous vote by the legislative body, and a referendum before allowing property to be condemned for a private purpose
North Dakota	D. 14, 60th Legis. Assem., 2005 Sess. (N.D. 2005)	"Private property may not be taken for the use of, or ownership by, any private individual or entity, unless that property is necessary for conducting a common carrier or utility business."

State	Citation	Description
Ohio	S.B. 167, 126th Gen. Assem., 2005–06 Reg. Sess. (Ohio 2005) (enacted Nov. 16, 2005)	Establishing, inter alia, a moratorium until December 31, 2006 on taking “private property that is in an unblighted area when the primary purpose for the taking is economic development that will ultimately result in ownership of that property being vested in another person”
Oklahoma	H.B. 2092, 50th Legis., 2d Sess. (Okla. 2006)	prohibiting the sale of condemned property to private persons for a period of five years after the exercise of eminent domain
Oregon	2005 H.B. 3505, 73d Legis. Assem., Reg. Sess. (Or. 2005)	declaring an emergency to exist and forbidding the condemnation of property unless “the primary purpose for taking the property is to allow the property to be owned, maintained, occupied, and used by the public for public purposes.”
Pennsylvania	H.B. 1835, 189th Gen. Assem., 2005–06 Reg. Sess. (Pa. 2005)	prohibiting the use of eminent domain for a nonpublic purpose, to increase the tax base, or without a reverter clause specifying that the property will revert back to the original owner or heirs should the property ever be used for a nonpublic purpose
Rhode Island	H.B. 6725, 2005–06 Gen. Assem., Jan. Sess. (R.I. 2006)	prohibiting transfer of condemned property to private developer for economic development or increase of tax revenues
South Carolina	H.B. 4292, 116th Gen. Assem., 2006 Sess. (S.C. 2006)	“If the [condemned] real property, or a portion of it, . . . is not used for the public purpose or use for which it was condemned within ten years from the effective date of its condemnation, the former owner, his successors or assigns, have the right of first refusal to reacquire the subject real property upon payment of the amount of the original condemnation award or its current appraised value, whichever is less.”
South Dakota	H.B. 1080, 81st Leg., Reg. Sess. (S.D. 2006) (enacted Feb. 17, 2006)	prohibiting transfer of private property to “any private person, non-governmental entity, or other public-private business entity . . . or primarily for enhancement of tax revenue” and requiring right of first refusal to original

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State	Citation	Description
		property owners if within seven years of acquisition the government wants to transfer the property to a non-public entity
Tennessee	H.B. 2426, 104th Gen. Assem., 2005 Sess. (Tenn. 2006)	prohibiting the use of eminent domain for transfer to private developers and for the purposes of increasing the tax revenue or economic development
Texas	Tex. Gov't Code §2206 (Vernon 2005) (enacted Sept. 1, 2005).	See Part III.C.2.b.
Utah	S.B. 117, 56th Legis., 2006 Gen. Sess. (Utah 2006)	adding some procedural safeguards and seeking to define what constitutes a "public use"
Vermont	H.B. 767, 2006 Legis., 2006 Sess. (Vt. 2006)	prohibiting the use of eminent domain if it confers "only a private benefit" or for economic development
Virginia	H.B. 94, 2006 Gen. Assem., 2006 Sess. (Va. 2006)	"Public uses shall not include the taking or damage of private property through the exercise of the power of eminent domain if the primary purpose is the enhancement of tax revenues."
Washington	H.B. 2427, 59th Legis., 2d Sess. (Wash. 2006)	"The taking of private property by the state for economic development does not constitute a public use where the primary purpose of such development is for an increase in tax base, tax revenues, employment, or general economic health."
West Virginia	H.B. 4001, 77th Legis., 2d Sess. (W.V. 2006)	prohibiting the use of eminent domain when the purpose is private economic development, unless the owner consents
Wisconsin	A.B. 657, 2005 Legis., Reg. Sess. (Wisc. 2005)	prohibiting the condemnation of property that is not blighted if the government condemning the property intends to convey or lease the acquired property to a private entity.
Wyoming	H.B. 26, 58th Legis., Budget Sess. (Wyo. 2006)	noting that public use does not include a use for the benefit of a private party, economic development, industrial development, an increase in the tax base or revenues, an increase in employment, or an increase in economic health