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CONTROLLING THE GRASPING HAND: ECONOMIC DEVELOPMENT TAKINGS AFTER *KELO*

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06-01

Forthcoming in *Supreme Court Economic Review*

GEORGE MASON UNIVERSITY LAW AND
ECONOMICS RESEARCH PAPER SERIES

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July 2006

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INTRODUCTION

In *The Wealth of Nations*, Adam Smith famously argued that decentralized market transactions generate wealth as if “by an invisible hand,”¹ and that they usually achieve this end better than direct governmental efforts to control the allocation of resources. Takings for “economic development” are based on the exact opposite assumption: that resources will often fail to generate as much wealth as they should unless their allocation is controlled by the visible hand of the state. Unfortunately, the visible hand of eminent domain often destroys as much wealth as it creates and too easily becomes a grasping hand serving the interests of the politically powerful at the expense of the weak. This Article therefore contends that courts should forbid most if not all uses of the economic development rationale as inconsistent with the Public Use Clauses of the federal and state constitutions. It also assesses and criticizes the Supreme Court’s recent decision in *Kelo v. City of New London*, which upheld development condemnations in a close 5-4 vote.²

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For helpful suggestions and comments, I would like to thank Benjamin Barros, Dana Berliner, Scott Bullock, Lloyd Cohen, Steve Eagle, Jim Ely, Rick Hills, Francesco Parisi, Alan Weinstein, Michael Wheeler, and an anonymous reviewer. I would also like to acknowledge the contributions of Andrew Grossman, Amanda Hine, Greg Staiti and Carlos Wall, who provided valuable research assistance, and Roger Skalbeck of the George Mason University law school library, who helped with library materials. Some material in Parts I and IV of this Article is adapted from Ilya Somin, *Overcoming Poletown: County of Wayne v. Hathcock, Economic Development Takings, and the Future of Public Use* 2004 MICH. ST. L. REV. 1005.

¹ ADAM SMITH, I AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 477 (University of Chicago Press ed. 1976).

² *Kelo v. City of New London*, 125 S.Ct. 2655 (2005).

Kelo and recent state court decisions have rekindled the debate over whether government can condemn private property and transfer it to new private owners for the purpose of promoting “economic development.” Both the Fifth Amendment to the federal Constitution and all state Constitutions contain a Public Use Clause that prohibits government from taking private property except for a “public use.”³ In the nineteenth century, these provisions were often interpreted so as to forbid most takings that transfer condemned private property to other private parties.⁴ But over the last fifty years, the U.S. Supreme Court and many state courts allowed that restriction on the condemnation power to atrophy.

In the leading case of *Hawaii Housing Authority v. Midkiff*, the Supreme Court held that condemnations and private-to-private transfers are acceptable under the public use provision of the Takings Clause so long as they are “rationally related to a conceivable public purpose.”⁵ As a result of *Midkiff* and similar decisions in many state courts, local governments have been able to undertake so-called “economic development takings”—transfers from one owner to another simply because the new owner is expected to make a greater contribution to the local economy. A recent treatise concludes that “nearly all courts have settled on a broader understanding [of public use] that requires only that the taking yield some public benefit or advantage.”⁶ This statement was not entirely accurate even at the time it was written,⁷ but it did reflect the dominant view of the late twentieth century.

³ *E.g.*, U.S. Const., Amend. V: “...nor shall private property be taken for public use without just compensation.”

⁴ *See, e.g.*, Eric R. Claeys, *Public Use Limitations and Natural Property Rights*, 2004 MICH. ST. L. REV. 877, 894-905 (2004) (detailed discussion of limited eighteenth and nineteenth century conceptions of public use that banned most private-to-private takings); James W. Ely, Jr., *Can the “Despotic Power” be Tamed? Reconsidering the Public Use Limitation on Eminent Domain*, 17 PROB. & PROP. 31, 32-36 (2003) (describing how nineteenth century courts generally upheld “private to private” takings only in cases where the new private owner was a common carrier such as a railroad or regulated a public utility); Tim Sandefur, *A Natural Rights Perspective on Eminent Domain in California: A Rationale for Meaningful Judicial Scrutiny of “Public Use,”* 32 SW. U. L. REV. 569, 595-651 (2003) (providing detailed discussion of nineteenth century state jurisprudence constraining “public use,” especially in New York and California).

⁵ *Hawaii Housing Auth. v. Midkiff*, 467 U.S. 229, 241 (1984).

⁶ THOMAS MERRILL & DAVID A. DANA, *PROPERTY: TAKINGS* 196 (2002); *See also* STEVEN J. EAGLE, *REGULATORY TAKINGS* § 1-10(c)(2) (3d ed. 2005) (noting that “[i]n the twentieth century, the “public benefit” approach clearly predominates.”).

⁷ *See, e.g.* *Baycol, Inc. v. Downtown Dev. Auth.*, 315 So.2d 451, 457 (Fla. 1975) (holding that a “public [economic] benefit” is not synonymous with ‘public purpose’ as a predicate which can justify eminent domain”); *In re Petition of Seattle*, 638 P.2d 549, 556-57 (Wash. 1981) (disallowing plan to use eminent domain to build retail shopping, where purpose was not elimination of blight); *Owensboro v. McCormick*, 581 S.W.2d 3, 8 (Ky. 1979) (“No ‘public use’ is involved where the land of A is condemned merely to enable B to build a factory”); *Karesh v. City of Charleston*, 247 S.E.2d 342, 345 (S.C. 1978) (striking down taking justified only by economic development);

More recently, however, the public use issue has been dramatically reopened. In *Kelo v. New London*,⁸ the U.S. Supreme Court upheld the economic development rationale in surprisingly narrow 5-4 decision. *Kelo* followed closely after *County of Wayne v. Hathcock*,⁹ in which the Michigan Supreme Court overruled *Poletown Neighborhood Council v. City of Detroit*,¹⁰ the most famous earlier decision justifying economic development takings.¹¹

For years, *Poletown* stood as both the most infamous symbol of eminent domain abuse and a precedent justifying nearly unlimited power to condemn private property.¹² *Poletown* held that condemnations transferring property from one private party to another satisfied the “public use” requirement even if the only claimed public benefit was that of “bolster[ing] the economy.”¹³ While it was not the first decision upholding so-called “economic development” takings,¹⁴ *Poletown* was by far the most widely publicized. The notoriety stemmed from the massive scale of Detroit’s use of eminent domain: destroying an entire neighborhood and condemning the homes of 4,200 people, as well as numerous businesses, churches, and schools, so the land could be transferred to General Motors for the construction of a new factory.¹⁵

In addition to the highly publicized cases of *Hathcock* and *Kelo*, the supreme courts of Illinois, Oklahoma, and South Carolina have recently invalidated or significantly restricted the economic

City of Little Rock v. Raines, 411 S.W.2d 486, 495 (Ark. 1967) (private economic development project not a public use); Hogue v. Port of Seattle, 341 P.2d 171, 181-191 (Wash. 1959) (denying condemnation of residential property so that agency could “devote it to what it considers a higher and better economic use,” *id.* at 187); Opinion of the Justices, 131 A.2d 904, 905-06 (Me. 1957) (condemnation for industrial development to enhance economy not a public use); City of Bozeman v. Vaniman 898 P.2d 1208, 1214-15 (Mont. 1995) (holding that a condemnation that transfers property to a “private business” is unconstitutional unless the transfer to the business is “insignificant” and “incidental” to a public project).

⁸ 125 S.Ct. 2655 (2005).

⁹ County of Wayne v. Hathcock, 684 N.W.2d 765 (Mich. 2004).

¹⁰ Poletown Neighborhood Council v. City of Detroit, 304 N.W.2d 455 (Mich. 1981), *overruled* County of Wayne v. Hathcock, 684 N.W.2d 765 (Mich. 2004).

¹¹ For a detailed discussion of *Hathcock* see Ilya Somin, *Overcoming Poletown: County of Wayne v. Hathcock, Economic Development Takings, and the Future of Public Use* 2004 MICH. ST. L. REV. 1005 (symposium on *County of Wayne v. Hathcock*) (hereinafter, “Somin, *Overcoming Poletown*”).

¹² *Poletown*, 304 N.W.2d at 464.

¹³ *Poletown*, 304 N.W.2d at 458.

¹⁴ *See, e.g.*, Prince George’s County v. Collington Crossroads, 339 A.2d 278, 287 (Md. 1975) (1975 Maryland high court decision holding that “industrial development” qualifies as a legitimate public use).

¹⁵ *See* Ilya Somin, *Michigan Should Alter Property Grab Rules*, DETROIT NEWS, Jan 8, 2004, at 11 (brief description of the facts and background of *Poletown*).

development rationale for takings.¹⁶ Ten state supreme courts now categorically forbid virtually all economic development takings,¹⁷ and others at the very least restrict them.¹⁸

This Article argues that state and federal courts should ban economic development takings. A categorical ban is probably the best solution to the problems created by this rationale. At the same time, it is essential to recognize that a *Hathcock*-style ban is not a panacea for all abuses of the power of eminent domain on behalf of private interests. Indeed, even a categorical ban on economic development takings could be undermined through overextension of exceptions to the rule.

The argument of this Article is based primarily on political and economic theory rather than on analysis of the history and text of federal and state public use clauses. The objective is not to denigrate the importance of the latter, but rather to focus on aspects of economic development takings that have not so far been as much discussed in the literature as have historical issues.¹⁹ Moreover, the argument of this Article is of relevance to any interpretation of the text and original meaning that assumes – as do even the majority justices in *Kelo* – that the Public Use Clause forbids “taking [privately owned] land for the purpose of conferring a private benefit on a particular private party.”²⁰ If we accept this basic point,²¹ then the major ground for dispute becomes the question of what degree of judicial intervention is necessary to distinguish “private” takings from “public” ones.

¹⁶*Bd. of County Com'rs of Muskogee County v. Lowery*, 2006 WL 1233934 at *4-7 (Okla. May 9, 2006) (holding that “economic development” is not a “public purpose” under the Oklahoma state constitution); *Ga. Dep’t of Transp. v. Jasper County*, 586 S.E.2d 853, 856 (S.C. 2003) (holding that even a “substantial . . . projected economic benefit” cannot justify a “condemnation”); *Southwestern Ill. Dev. Auth. v. National City Env.*, 768 N.E.2d 1, 9-11 (Ill.), *cert. denied*, 537 U.S. 880 (2002) (holding that a “contribu[tion] to economic growth in the region” is not a public use justifying condemnation).

¹⁷ The ten states are Arkansas, Florida, Illinois, Kentucky, Michigan, Maine, Montana, South Carolina, and Washington. See cases cited in nn. _____ above.

¹⁸ *See, e.g.*, *Merrill v. City of Manchester*, 499 A.2d 216, 217-18 (N.H. 1985) (economic development condemnation for industrial park not a public use where no harmful condition was being eliminated); *Opinion of the Justices*, 250 Ne.2d 547, 558 (Mass. 1969) (holding that economic benefits of a proposed stadium were not enough of a public use to justify condemnation).

¹⁹ On the history of public use, see, for example, works cited in note 4; *see also* William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 COLUM. L. REV. 782 (1995).

²⁰ *Kelo*, 125 S.Ct. at 2661.

²¹ For an opposing view, see Jed Rubenfeld, *Usings*, 102 YALE L.J. 1077 (1993) (arguing that the text and original meaning of the Public Use Clause impose no substantive constraints on takings whatsoever).

Part I analyzes the flaws of economic development takings generally. Such condemnations allow politically powerful interest groups to “capture” the condemnation process for the purpose of enriching themselves at the expense of the poor and politically weak. While economic development takings are not the only type of condemnation subject to this kind of abuse, they are especially vulnerable to it because “economic development” can justify almost any condemnation that transfers property to a commercial enterprise. Several other aspects of economic development takings also exacerbate the danger, including the failure to require the new owners of condemned property to actually provide the economic benefits that supposedly justify condemnation in the first place, and the refusal of courts to consider the social costs of condemnation as well as the claimed benefits.

Part II considers the major alternatives to a categorical ban. While these proposals are not without merit, none can prevent eminent domain abuse as effectively as forbidding the economic development rationale altogether. The first such alternative was put forward by the *Poletown* majority itself, which required “heightened scrutiny” in cases where “the condemnation power is exercised in a way that benefits specific and identifiable private interests.”²² Unfortunately, the heightened scrutiny test is not an adequate bulwark against the dangers of economic development takings, and may in some cases actually exacerbate those risks. The same weaknesses bedevil academic proposals to impose “means-ends” scrutiny on takings, which bear a considerably resemblance to the heightened scrutiny test.

Increasing the compensation awarded to property owners targeted for condemnation is another possible alternative to a ban. While this idea has some merit, it is almost impossible to accurately calculate the appropriate amount of compensation for “subjective value.” Moreover, even a perfect compensation formula cannot offset the damage caused by economic development takings because the victims of such condemnations include not only property owners, but also taxpayers whose resources are spent on projects that benefit politically powerful interest groups at the expense of the general public.

Many defenders of the *Kelo* decision advocate procedural protections for property owners as an alternative to vigorous judicial enforcement of public use limitations on takings. Though procedural

²²*Poletown*, 304 N.W.2d at 459.

protections have real value, they are unlikely to be an adequate substitute for a judicial ban on economic development takings. Many of the same political forces that lead to interest group exploitation of the eminent domain power also make it unlikely that legislatures will enact procedural protections strong enough to deter most abusive condemnations.

Lastly, it is possible that strong judicial review of economic development takings is unnecessary because localities that abuse their eminent domain powers will be disciplined by interjurisdictional competition in a federal system. Aggrieved property owners can move out of the offending jurisdiction, thereby using their right to “exit” to better their condition and create an incentive for local government restraint in exercising the power of eminent domain. While exit rights are an extremely valuable tool for forcing governments to respect the needs and interests of citizens,²³ it has only limited utility in protecting property rights in land because real property is an immobile asset that owners cannot take with them when they move to another jurisdiction.

In Part III, I consider the Supreme Court’s decision in *Kelo*. In advocating broad deference to local governments on public use issues, the *Kelo* majority ignored the serious defects in the political processes that control economic development takings. The Court’s analysis of history and precedent also has significant weaknesses, particularly in its heavy reliance on early twentieth century precedents that were based on “substantive due process” rather than on the Takings Clause of the Fifth Amendment.

Nonetheless, *Kelo* actually represents a modest improvement on the Court’s previous public use decisions, by holding out the possibility of slightly greater judicial scrutiny than was available under *Midkiff* and *Berman v. Parker*.²⁴ More significant is the fact that four justices not only dissented, but actually advocated a categorical ban on economic development rationale.²⁵ This breakdown – which -

²³ See Ilya Somin, *Revitalizing Consent*, 23 HARV. J.L. & PUB. POL’Y 753, 795-97 (2000) (explaining how exit rights can play a key role in strengthening the consensual basis of government); Ilya Somin, *Political Ignorance and the Countermajoritarian Difficulty: A New Perspective on the Central Obsession of Constitutional Theory*, 89 IOWA L. REV. 1287, 1344-47 (2004) (hereinafter, “Somin, *Political Ignorance*”) (explaining advantages of “voting with your feet” over conventional ballot box voting).

²⁴ 348 U.S. 26 (1954).

²⁵ *Kelo*, 125 S.C. at 2674-77 (O’Conner, J., dissenting); id. at 2685-88 (Thomas, J., dissenting).

stands in sharp contrast to the 9-0 decision in *Midkiff* - suggests that public use issues will remain in contention on the Court in the future.

A final important aspect of *Kelo* is the strong bipartisan political reaction against it, which has led Congress and numerous state legislatures to consider legislation restricting the use of eminent domain. Unfortunately, much of the proposed legislation is likely to have little effect and may simply represent “position-taking” intended to mollify public opinion.

Part IV strikes an additional note of caution, showing that even a categorical ban on economic development takings is not a comprehensive solution to the underlying problem of eminent domain abuse. Although *Hathcock* held that “a generalized economic benefit” is not by itself enough to justify condemnation,²⁶ it does not forbid all condemnations that transfer private property to other private parties. The same is true of similar decisions in other states.

The *Hathcock* court outlined three categories of takings in which private-to-private transfers are still permissible: “public necessity of the extreme sort”; cases in which the condemned property remains subject to “public oversight” after transfer to a private entity; and situations in which the condemned property “is selected because of ‘facts of independent public significance’” rather than because of the new owner’s uses.²⁷ Unfortunately, both logic and experience in other states show that these exceptions, particularly the second and third, may be vulnerable to some of the same interest group exploitation as economic development takings.

I. DANGERS OF THE ECONOMIC DEVELOPMENT RATIONALE FOR CONDEMNATION.

A categorical ban on economic development takings is the best way to control abuse of the eminent domain power for the benefit of private interests. A variety of circumstances render these types of condemnations highly vulnerable to interest group exploitation.

²⁶Hathcock, 684 N.W.2d at 786.

²⁷*Id.* at 783.

A. The economic development rationale can justify almost any taking that benefits a commercial enterprise

The main danger posed by “economic development” takings is the possibility that this rationale can be used to condemn virtually any property for transfer to a private commercial enterprise. As the Michigan Supreme Court explained in *Hathcock*:

[The] “economic benefit” rationale would validate practically *any* exercise of the power of eminent domain on behalf of a private entity. After all, if one’s ownership of private property is forever subject to the government’s determination that another private party would put one’s land to better use, then the ownership of real property is perpetually threatened by the expansion of plans of any large discount retailer, “megastore,” or the like.²⁸

Courts in at least two of the other states that forbid economic development takings have reached the same conclusion. The Supreme Court of Illinois recently refused to allow a “contribu[tion] to economic growth in the region” to justify a taking because such a standard could justify virtually any condemnation that benefited private industry since “every lawful business” contributes to economic growth to some degree.²⁹ Similarly, the Supreme Court of Kentucky banned the economic development rationale in 1979 largely because “[w]hen the door is once opened to it, there is no limit that can be drawn.”³⁰ The U.S. Supreme Court dissenters in *Kelo* have also focused on this threat, warning that “nearly all real property is susceptible to condemnation on the Court’s theory” that the economic development rationale is a sufficient justification.³¹

Those decisions and dissents may slightly overstate the case, but their basic logic is sound. Economic development can rationalize virtually any taking that benefits a private business because any such entity can claim that its success might “bolster the economy.”³² It is perhaps possible to try to limit the scope of the development rationale by requiring that the economic benefit gained exceed some preset minimum size. This, indeed, is what the *Poletown* court tried to do when it held that the benefit must be

²⁸*Id.* at 786 (emphasis in original).

²⁹*Southwestern Ill. Dev. Auth. v. National City Env.*, 768 N.E.2d 1, 9 (Ill.), *cert. denied*, 537 U.S. 880 (2002).

³⁰*Owensboro v. McCormick*, 581 S.W.2d 3, 8 (Ky. 1979). (quoting 26 Am.Jur.2d Eminent Domain § 34, at 684-85 (1966)).

³¹ *Kelo*, 125 S.Ct. 2655, 2677 (2005) (O’Connor, J., dissenting).

³²*Poletown*, 304 N.W.2d at 458.

“clear and significant.”³³ Yet this amounts simply to saying that any taking benefiting a sufficiently large business enterprise can qualify. Moreover, this rationale actually creates perverse incentives to increase the amount of property condemned for any given project.³⁴

Even some of the defenders of the economic development rationale admit that it is extraordinarily broad. At the *Kelo* oral argument, Justice Sandra Day O’Connor asked New London’s counsel Wesley Horton whether the economic development rationale would allow condemnation of “a Motel 6 [if] a city thinks ‘if we had a Ritz-Carlton, we’d get higher taxes.’” Horton answered that that would be “OK.”³⁵ In response to Justice Antonin Scalia’s question asking whether “[y]ou can take from A and give it to B, if B pays more in taxes,” Horton answered “[y]es, if it’s a significant amount.”³⁶

Almost any condemnation that benefits a large business at the expense of a smaller competitor, a residential owner, or a nonprofit organization, could be rationalized on the grounds that there would be a “significant” increase in tax revenue. Residential owners and especially nonprofit organizations (which generally do not pay taxes on their property) are especially vulnerable.³⁷ While the economic development rationale may not be literally limitless, it is certainly close to it.

B. Dangers of the failure to impose binding obligations on new owners of condemned property.

The danger of abuse created by the economic development rationale has been exacerbated by courts’ failure to require new owners of condemned property to actually provide the economic benefits that justified condemnation in the first place. The lack of a binding obligation creates incentives for public officials to rely on exaggerated claims of economic benefit that neither they nor the new owners have any obligation to live up to. Courts in a number of jurisdictions have held that property cannot be

³³ *Id.*

³⁴ *See* § I.D *infra*.

³⁵ *Kelo v. City of New London*, U.S. Supreme Court Oral Argument Transcript, 2005 WL 529436 at *20-21.

³⁶ *Id.* at *21.

³⁷ *See Kelo v. City of New London*, Amicus Br. of Becket Fund for Religious Liberty, 2004 WL 2787141 at 8-11, 8 n. 20 (explaining the special vulnerability of religious nonprofits and listing numerous examples where they have been targeted by economic development takings).

condemned without assurances that it will be employed only for public uses that are precisely specified in advance.³⁸ Unfortunately, decisions permitting economic development takings depart from this principle.

1. *Poletown's failure to impose binding legal obligations on the new owners of condemned property.*

The *Poletown* court upheld the massive condemnations in Detroit primarily, if not solely, because of the “clear and significant” economic benefits that the GM factory was expected to provide for the city.³⁹ Indeed, the majority suggested that if the expected benefits were not so great, “we would hesitate to sanction approval of the project.”⁴⁰ This fact renders all the more dubious the court’s failure to require either the city or GM to ensure that the expected benefits would actually materialize.

Yet, as Justice Ryan emphasized in his dissenting opinion, the court failed to impose even minimal requirements of this kind.⁴¹ *City of Detroit v. Vavro*,⁴² a 1989 Michigan Court of Appeals decision interpreting *Poletown*, confirmed Ryan’s view, holding that “a careful reading of the *Poletown* decision reveals that . . . a binding commitment [to provide the economic benefits used to justify condemnation] is unnecessary in order to allow the city to make use of eminent domain.”⁴³ Indeed, the *Vavro* court went on to conclude that *Poletown* did not even require the new owner to proceed with the

³⁸See, e.g., *Cincinnati v. Vester*, 281 U.S. 439, 447-48 (1930) (holding that “private property could not be taken for some independent and undisclosed public use”); *County of San Francisco v. Ross*, 279 P.2d 529, 532 (Cal. 1955) (en banc) (invalidating agreement that lacked controls over the use of the condemned property because “[s]uch controls are designed to assure that use of the property condemned will be in the public interest.”); *State ex. rel. Sharp v. 0.62033 Acres of Land*, 110 A.2d 1, 6 (Del. Super. Ct. 1954), *aff’d* 112 A.2d 857 (Del. 1955) (holding that “[t]he doctrine of reasonable time prohibits the condemnor from *speculating* as to *possible* needs at some *remote* future time”) (emphasis in the original); *Alsip Park Dist. v. D & M P’shp*, 625 N.E.2d 40, 45 (Ill. App. Ct. 1993) (holding that “[I]f the facts” in a condemnation proceeding “established that . . . [the condemnor] had no ascertainable public need or plan, current or future for the land, defendants [property owner] should prevail”); *Mayor of the City of Vicksburg v. Thomas*, 645 So.2d 940, 943 (Miss. 1994) (holding that property may only be condemned for transfer to “private parties subject to conditions to insure that the proposed public use will continue to be served”); *Krauter v. Lower Big Blue Nat. Res. Dist.*, 259 N.W.2d 472, 475-76 (Neb. 1977) (holding that “a condemning agency must have a present plan and a present public purpose for the use of the property before it is authorized to commence a condemnation action The possibility that the condemning agency at some future time may adopt a plan to use the property for a public purpose is not sufficient.”); *Casino Reinvestment Dev. Auth. v. Banin*, 727 A.2d 102, 111 (N.J. Super. Ct. 1998) (holding that when a “public agency acquires . . . property for the purposes of conveying it to a private developer,” there must be advance “assurances that the public interest will be protected”).

³⁹*Poletown*, 304 N.W. 2d at 459.

⁴⁰*Id.*

⁴¹*Poletown*, 304 N.W. 2d at 480 (Ryan, J., dissenting) (noting that “there will be no public control” over the GM plant scheduled to be built on the *Poletown* site).

⁴²*City of Detroit v. Vavro*, 442 N.W.2d 730 (Mich. Ct. App. 1989).

⁴³*Id.* at 731-32.

project that was initially used to justify the condemnation, much less proceed with it in a way that provided some predetermined level of economic benefit to the public.⁴⁴

2. Inflated claims of economic benefit in *Poletown*

The *Poletown* condemnations dramatically illustrate the danger of taking inflated estimates of economic benefit at face value. The City of Detroit and GM claimed that the construction of a new plant on the expropriated property would create some 6,150 jobs.⁴⁵ The estimate of “at least 6,000 jobs” was formally endorsed by both Detroit Mayor Coleman Young and GM Chairman Thomas Murphy.⁴⁶ Yet neither the city nor GM had any legal obligation to actually provide the 6,000 jobs or the other economic benefits they had promised.

The danger inherent in this arrangement was apparent even at the time. As Justice Ryan warned in dissent, “there are no guarantees from General Motors about employment levels at the new assembly plant . . . [O]nce [the condemned property] is sold to General Motors, there will be no public control whatsoever over the management, operation, or conduct of the plant to be built there.”⁴⁷ Ryan pointed out that “General Motors will be accountable not to the public, but to its stockholders”; it would therefore make decisions as to the use of the property based solely on stockholder interests, not the city’s economic interests, which the condemnation was intended to further.⁴⁸ “[O]ne thing is certain,” Ryan emphasized, “[t]he level of employment at the new GM plant will be determined by private corporate managers primarily with reference, not to the rate of regional unemployment, but to profit.”⁴⁹ Justice Ryan’s warning was prescient. The GM plant opened two years late; and by 1988—seven years after the

⁴⁴*See id.* at 731 (upholding a taking transferring property to the Chrysler Corporation for the construction of a new auto assembly plant despite the fact that “Chrysler . . . has not entered into a binding commitment with the City of Detroit to construct the [plant] following the city’s use of the power of eminent domain”).

⁴⁵*Id.* at 467 (Ryan, J., dissenting).

⁴⁶*See id.* at 467-68 (citing statement of Mayor Young and reprinting letter from Thomas A. Murphy, Chairman of the Board, General Motors, to Coleman A. Young, (October 8, 1980)).

⁴⁷*Id.* at 480.

⁴⁸*Id.*

⁴⁹*Id.*

Poletown condemnations—it employed “no more than 2,500 workers.”⁵⁰ Even in 1998, at the height of the 1990s economic boom, the plant “still employed only 3,600” workers, less than 60 percent of the promised 6,150.⁵¹

3. Inability to Impose Binding Obligations as a Systematic Weakness of the Economic Development Rationale for Condemnation.

Poletown’s failure to impose any binding obligations on the new owners of property was not idiosyncratic. The same problem is evident in other states that permit economic development takings. The *Kelo* case is remarkably similar to *Poletown* in this respect. As the dissenting opinion in Connecticut Supreme Court in *Kelo* pointed out, “[t]here are no assurances of a public use in the development plan [under which the owners’ property was condemned]; there was no signed development agreement at the time of the takings; and all of the evidence suggests that the economic climate will not support the project so that the public benefits can be realized.”⁵² Today, a year after the condemnations were upheld by the US Supreme Court, the New London development plan used to justify the *Kelo* condemnations has little prospect of success.⁵³ The plan’s poor outlook is the result of “contract disputes and financial uncertainty” and the unwillingness of investors to commit to a flawed project, not just the adverse publicity resulting from the public backlash against the Supreme Court’s decision.⁵⁴

Like Connecticut, other states that allow economic development condemnations also fail to require either the government or the new owners to actually provide the promised public benefits.⁵⁵

⁵⁰Marie Michael, *Detroit at 300: New Seeds of Hope for a Troubled City*, DOLLARS & SENSE, July 2001.

⁵¹*Id.* at 25.

⁵²*Kelo*, 843 A.2d at 602 (Zarella, J., dissenting).

⁵³ See William Yardley, *After Eminent Domain Victory, Disputed Project Goes Nowhere*, N.Y. Times, Nov. 21, 2005.

⁵⁴ *Id.*

⁵⁵*See, e.g.*, *Gen. Bldg. Contractors v. Bd. of Shawnee Cty. Comm’rs*, 66 P.3d 873, 881-83 (Kan. 2003) (upholding economic development condemnation for purpose of building industrial facility for later transfer to private owners with whom no development agreements had as yet been reached); *City of Jamestown v. Leever’s Supermarkets, Inc.*, 552 N.W. 2d 365, 373-74 (N.D. 1996) (following *Poletown* approach and concluding that economic development takings will be upheld so long as the “primary object” of the taking is “economic welfare”); *City of Minneapolis v. Wurtele*, 291 N.W. 2d 386, 390 (Minn. 1980) (holding, in a case endorsing the constitutionality of economic development takings, that “a public body’s decision that a [condemnation] project is in the public interest is presumed correct unless there is a showing of fraud or undue influence”); *Cf. Vitucci v. New York City Sch. Constr. Auth.*, 289 A.D. 2d 479, (N.Y. App. Div. 2001) (holding that an economic development taking passes muster despite

Thus, *Poletown* and *Kelo* highlight a systematic shortcoming of the economic development rationale generally. It is not an idiosyncratic problem confined to Connecticut and pre-*Hathcock* Michigan.

Why would such a systematic failure arise? I suggest two tentative explanations. First, requiring a binding commitment to the creation of specific economic benefits for the community might severely constrain the discretion of the new owners, thereby possibly leading to inefficient business practices. For example, if GM had been required to ensure that at least 6,000 workers were employed at the Poletown plant, it might have been forced to forgo efficient labor-saving technology. Courts may well be reluctant to intrude so severely on the new owners' business judgment. While this is a serious problem with requiring binding commitments, it also provides a strong argument against permitting economic development takings in the first place. If there is no effective way to ensure that the promised economic benefits of condemnation are actually provided, this circumstance supports the *Hathcock* court's conclusion that economic development projects are best left to the private sector.⁵⁶

A second possible explanation is that some judges may have an unjustified faith in the efficacy of the political process and thus may be willing to allow the executive and legislative branches of government to control oversight of development projects. For example, the *Poletown* majority emphasized that courts should defer to legislative judgments of "public purpose."⁵⁷

Whatever the general merits of such confidence in the political process, it is seriously misplaced in

the fact that the property was originally condemned to build a school, because "as long as the initial taking was in good faith, there appears to be little limitation on the condemnor's right to put the property to an alternate use upon the discontinuation of the original planned public purpose"). The Maryland Court of Appeals decision endorsing economic development condemnations was partly based on the fact that the government "will maintain significant control over the industrial park" that the new owner used the condemned property to build. *Prince George's County v. Collington Crossroads*, 339 A.2d 278, 283 (Md. 1975). However, the control in question involved merely the right to regulate the facility to ensure "health, safety, and welfare, control . . . hazards and nuisances, and guidelines for assuring a high quality physical environment"; and a guarantee that part of the project would be used as "open space." *Id.* It did not create a binding obligation to produce any actual economic benefits for the community of the kind that were used to justify condemnation in the first place.

⁵⁶See *Hathcock*, 684 N.W.2d at 783-84.

⁵⁷*Poletown*, 304 N.W.2d at 458-59.

situations in which politically powerful interest groups can employ the powers of government at the expense of the relatively weak.⁵⁸

4. Lack of binding obligations increases the danger of abuse.

In the absence of any binding obligations to deliver on the promised economic benefits, nothing prevents municipalities and private interests from using inflated estimates of economic benefits to justify condemnations and then failing to monitor or provide any such benefits once courts approve the takings and the properties are transferred to their new owners.

Localities and businesses can sometimes circumvent the public use requirement simply by overestimating the likely economic benefits of a condemnation. Municipalities may overestimate intentionally, or they may simply take a private business' inflated estimates at face value. Both business interests and political leaders dependent on their support have tremendous incentives to overestimate the economic benefits of projects furthered by condemnation. Courts are in a poor position to second-guess seemingly plausible financial and employment estimates provided by officials. Even if governments and businesses do not engage in deliberate deception, there is a natural tendency to overestimate the public benefits and the likelihood of success of projects that advance one's own private interests.⁵⁹ Whether corporate and government leaders deliberately lie or honestly believe that "what is good for General Motors is good for America," the outcome is likely to be the same.

C. Ignoring the costs of condemnation

An especially striking aspect of the *Poletown* decision was the majority's failure to even mention the costs imposed by condemnation on the people of Poletown or the city of Detroit as a whole.

⁵⁸For more extensive analysis of weaknesses in the political process that might justify stronger judicial review, see Somin, *Political Ignorance*, *supra* note ___ (showing how political ignorance undermines common "countermajoritarian difficulty" arguments against judicial review); Ilya Somin, *Posner's Democratic Pragmatism*, 16 CRITICAL REV. 1 (2004) (showing how political ignorance and interest group exploitation of the political process strengthen the case for aggressive judicial review).

⁵⁹See STEVEN PINKER, HOW THE MIND WORKS 421-23 (1999) (explaining how deception is more effective if those who seek to deceive actually believe their own lies, as a result of which self-interested self-deception may be a common genetic tendency of humans).

Unfortunately, this problem is not confined to Michigan's *Poletown*-era jurisprudence; it also arises in other states that permit economic development takings.

1. The Economic Costs of *Poletown*

The *Poletown* case dramatically illustrates how the promised economic benefits of condemnations often fail to materialize and are outweighed by the massive costs. Not only did the new GM plant create far fewer jobs than promised,⁶⁰ but the limited economic benefits the plant did create were likely overwhelmed by the economic harm the project caused the city.

According to estimates prepared at the time, "public cost of preparing a site agreeable to . . . General Motors [was] over \$200 million,"⁶¹ yet GM paid the city only \$8 million to acquire the property.⁶² Eventually, the costs of the condemnation rose to some \$250 million.⁶³ In addition, we must add to the costs borne by the city's taxpayers the economic damage inflicted by the destruction of some 600 businesses and 1,400 residential properties.⁶⁴ Although we have no reliable statistics on the number of people employed by the businesses destroyed as a result of the *Poletown* condemnation,⁶⁵ it is quite possible that more workers lost than gained jobs as a result of the decision. If we assume, conservatively, that the 600 eliminated businesses employed an average of slightly more than four workers, the total lost work force turns out to be equal to or greater than the 2,500 jobs created at the GM plant by 1988.⁶⁶ And

⁶⁰See nn. and accompanying text.

⁶¹*Poletown*, 304 N.W.2d at 470 (Ryan, J., dissenting).

⁶²*Id.*

⁶³Somin, *Overcoming Poletown*, at 1018.

⁶⁴Michael, *supra* note at 25. The estimate of the number of businesses eliminated in the *Poletown* takings is in fact unclear. While Marie Michael cites a figure of 600, other sources cite much lower numbers, in the range of 140 to 160. See Somin, *Overcoming Poletown* at 1017 n.52 (providing a detailed discussion of the conflicting estimates). If the lower estimates are correct, it would be much less likely that the number of jobs lost from the businesses shut down was equal to that created by the new factory. However, it is important to remember that the lost jobs were wiped out immediately whereas the new ones did not begin to appear for four years after the 1981 condemnations and that the job losses suffered from wiping out the businesses do not include jobs eliminated by the destruction of *Poletown*'s churches, schools, and hospitals, nor those lost as a result of the expulsion of over 4000 residents.

⁶⁵At the time, opponents of the condemnations claimed that 9000 jobs would be lost because of them. See John Bukowczyk, *The Decline and Fall of a Detroit Neighborhood: Poletown vs. GM and the City of Detroit*, 41 WASHINGTON & LEE LAW REVIEW 49, 68 (1984). This partisan estimate, like GM's own promise that 6000 jobs would be created, must be viewed with skepticism.

⁶⁶According to data compiled by the city, some one-third of the affected businesses closed down immediately, while two-thirds of the remainder (approximately 40-45 percent of the original total) relocated to other parts of Detroit.

this calculation does not consider the jobs and other economic benefits lost as a result of the destruction of numerous nonprofit institutions such as churches, schools, and hospitals. Overall, even if we consider the *Poletown* condemnation's impact in narrowly economic terms, it is likely that it did the people of Detroit more harm than good.

The failure of the *Poletown* takings to produce any clear net economic benefit for the city has significance beyond the case itself. In *Poletown*, the magnitude of the economic crisis facing Detroit and the detailed public scrutiny given to the city's condemnation decision led the court to conclude that the economic benefit of the taking was particularly "clear and significant."⁶⁷ The court even went so far as to say that, "[i]f the public benefit was not so clear and significant, we would hesitate to sanction approval of such a project."⁶⁸ If the claimed "public benefit" of even so "clear" a case as *Poletown* ultimately turned out to be a mirage, it seems unlikely that courts will do any better in weighing claims of economic benefit in more typical cases where the evidence is less extensive and less closely scrutinized.

2. Ignoring Costs in Other States.

Those states that continue to permit economic development takings also give little or no consideration to the harm they cause. In *Kelo*, the Connecticut Supreme Court conceded that the plaintiff property owners in the case would suffer serious harm if forced out of their homes and businesses.⁶⁹ In addition, some \$80 million in taxpayer money had been allocated to the development project, without any realistic prospect of a return that rises above a tiny fraction of that amount.⁷⁰ Yet the court refused to consider the significance of those massive costs, claiming "the balancing of the benefits and social costs

BRYAN D. JONES, ET AL., *THE SUSTAINING HAND: COMMUNITY LEADERSHIP AND CORPORATE POWER* 100 (1986). Even if we assume - implausibly - that those relocated businesses that stayed in Detroit continued to employ as many workers as before, the area would have suffered a net job loss if the approximately 350 businesses that either shut down or moved outside of the city employed an average of just seven workers each. And, obviously this does not even consider the job losses and other economic costs inflicted by the destruction of schools, churches, and other nonprofit institutions.

⁶⁷*Poletown*, 304 N.W.2d at 459.

⁶⁸*Id.*

⁶⁹*See Kelo v. City of New London*, 843 A.2d 500, 511 (Conn. 2004) *aff'd* 125 S. Ct. 2655 (2005) (noting that two of the plaintiffs' families have "lived in their homes for decades and others had put enormous amounts of time, effort, and money into their property").

⁷⁰*Id.* at 596-600 (Zarella, J., dissenting).

of a particular project is uniquely a legislative function.”⁷¹ The U.S. Supreme Court agreed, emphasizing that “we decline to second-guess the City’s considered judgments about the efficacy of its development plan.”⁷² Contrary to the Connecticut court, the political process often cannot be depended on to give due consideration to the “social costs” of economic development takings; such condemnations generally benefit the politically powerful, while the costs tend to fall on the poor and politically disadvantaged. Yet the approach adopted in *Poletown* and *Kelo* is similar to that followed in other states that permit economic development condemnations.⁷³

3. Nonmonetary costs of economic development takings

In addition to the economic costs to communities and homeowners, economic development takings also inflict major nonpecuniary costs on their victims by destroying communities and forcing residents to relocate to less desired locations. As Jane Jacobs explained in her classic 1961 study:

[P]eople who get marked with the planners’ hex signs are pushed about, expropriated, and uprooted much as if they were the subjects of a conquering power. Thousands upon thousands of small businesses are destroyed Whole communities are torn apart and sown to the winds, with a reaping of cynicism, resentment and despair that must be seen to be believed.⁷⁴

While “fair market value” may compensate homeowners and businesses for part of the financial losses they incur, it does not compensate them for the destruction of community ties, disruption of plans, and psychological harm they suffer.⁷⁵ These kinds of costs are known in the literature as losses of the

⁷¹*Id.* at 541 n.58.

⁷² *Kelo*, 125 S.Ct. at 2668.

⁷³ See cases cited in note_____, all of which set highly deferential standards for evaluating economic development takings that take little or no account of social costs.

⁷⁴ JANE JACOBS, *DEATH AND LIFE OF GREAT AMERICAN CITIES* 5 (1961).

⁷⁵ See generally MINDY THOMPSON FULLILOVE, *ROOT SHOCK: HOW TEARING UP CITY NEIGHBORHOODS HURTS AMERICA, AND WHAT WE CAN DO ABOUT IT* (2004) (describing extensive social and psychological costs of forced relocation); HERBERT J. GANS, *THE URBAN VILLAGERS* 362-86 (rev. ed. 1982) (same); BERNARD J. FRIEDEN & LYNNE B. SAGALYN, *DOWNTOWN INC: HOW AMERICA REBUILDS CITIES* 20-35 (1989) (same); Cf. Thomas W. Merrill, *The Economics of Public Use*, 72 *CORNELL L. REV.* 61, 82-85 (1986) (showing how the use of eminent domain systematically imposes “uncompensated subjective losses” because most property owners value their holdings at more than their market value).

owners' "subjective value."⁷⁶ Scholars from a wide range of ideological perspectives have reinforced Jacobs' early conclusion that development condemnations inflict enormous social costs that go beyond their "economic" impact, narrowly defined.⁷⁷ The existence of such large uncompensated costs strengthens the case for stringent scrutiny of economic development takings.

D. Economic development takings and interest group "capture" and rent-seeking.

Obviously, economic development takings are not the only exercises of the eminent domain power vulnerable to capture by interest groups seeking to use the powers of government for their own benefit ("rent-seeking" as it is known in the literature). Indeed, interest group capture of government agencies and rent-seeking are serious dangers for a wide range of government activities.⁷⁸ However, there are three major reasons why economic development takings are especially vulnerable to this threat: the nearly limitless applicability of the economic development rationale; severe limits on electoral accountability caused by low transparency; and time horizon problems.

1. Nearly limitless scope.

As we have seen, the economic development rationale for takings can potentially justify almost any condemnation that benefits a commercial enterprise.⁷⁹ Obviously, such a protean rationale for the use of eminent domain exacerbates the danger of interest group capture by greatly increasing the range of interest groups that can potentially use it. By the same token, it also increases the range of projects that those interest groups can hope to build on condemned land that is transferred to them; presumably, any

⁷⁶ For a helpful discussion see Merrill, *supra* note ____ at 82-84.

⁷⁷ See, e.g., Margaret Jane Radin, *The Liberal Conception of Property: Cross Currents in the Jurisprudence of Takings*, 88 COLUM. L. REV. 1667, 1689-91 (1988) (making the case for limitations on the eminent domain power because of the connection between "personal property" and individuals' sense of personhood and community); David R.E. Aladjem, *Public Use and Treatment as an Equal: An Essay on Poletown Neighborhood Council v. City of Detroit and Hawaii Housing Authority v. Midkiff*, 15 ECOLOGY L. Q. 671, 673-74 (1988) (same); Richard A. Epstein, *Property, Speech and the Politics of Distrust*, 59 U. CHI. L. REV. 41, 62 n.60 (1992) (criticizing *Poletown* as a "notorious" decision that "sustained a takeover of a neighborhood by General Motors that ignored huge elements of losses to the private owners who were dispossessed" and arguing for strict judicial constraints on similar condemnations).

⁷⁸ For a recent summary and analysis of the literature on rent-seeking and capture, see DENNIS C. MUELLER, PUBLIC CHOICE III 337-48 (2003).

⁷⁹ See § I.A.

project that might increase development or produce tax revenue would be acceptable. Both factors tend to increase the attractiveness of eminent domain condemnations as a means of making political payoffs to powerful interest groups.

2. Severely constrained electoral accountability.

Interest group manipulation of economic development takings could be curtailed if public officials responsible for condemnations faced credible threats of punishment at the polls after they approved condemnations that reward rent-seeking. Unfortunately, such punishment is highly unlikely for two important reasons. First, the calculation of the costs and benefits of most development projects is extremely complex, and it is difficult for ordinary voters to understand whether a particular project is cost-effective or not. Studies have repeatedly shown that most voters have very little knowledge of politics and public policy.⁸⁰ Most are often ignorant even of basic facts about the political system.⁸¹ Such ignorance is not an accident, or a consequence of “stupidity.” It is in fact a rational response to the insignificance of any one vote to electoral outcomes; if a voter’s only reason to become informed is to ensure that she votes for the “best” candidate in order to ensure that individual’s election to office, this turns out to be almost no incentive at all because the likelihood that any one vote will be decisive is infinitesimally small.⁸² Ignorance is likely to be an even more serious problem in a complex and nontransparent field such as the evaluation of economic development takings.

While the same danger may exist with some traditional takings, these usually at least produce readily observable benefits such as a road or a bridge—public assets that can be seen and used by the average voter. Moreover, these benefits usually become apparent as soon as the project in question is completed. By contrast, the alleged public benefit of economic development takings is a generalized

⁸⁰See Somin, *Political Ignorance*, *supra* note ___ at 1290-1304 (summarizing evidence of extensive voter ignorance); Ilya Somin, *Voter Ignorance and the Democratic Idea*, 12 CRITICAL REV. 413, 413-19 (1998) (hereinafter “Somin, *Voter Ignorance and the Democratic Ideal*”). (same).

⁸¹ Somin, *Voter Ignorance and the Democratic Ideal*, at 416-19.

⁸² For a more detailed discussion, see Somin, *Voter Ignorance and the Democratic Ideal* at 435-38.

contribution to the local economy that the average citizen often will not notice, much less be able to measure.

Second, even if voters were much better informed, democratic accountability for economic development takings may often be inadequate. Unlike with most conventional takings, the success or failure of a project made possible by economic development condemnations is usually apparent only years after the condemnation takes place. In the *Poletown* case, the GM factory did not even open until 1985, four years after the 1981 condemnations and two years behind schedule.⁸³ And not until the late 1980s did it become clear that the plant would produce far less than the expected 6,000 jobs.⁸⁴

By that time, of course, public attention had moved on to other issues, and in any event many of the politicians who had approved the 1981 condemnations might no longer be in office. Given such limited time horizons, a rational, self-interested Detroit political leader might well have been willing to support the *Poletown* condemnations even if he anticipated that the expected benefits would eventually fail to materialize. By the time that became evident to the public, he could be out of office in any event. In the meantime, he could benefit from an immediate increase in political support from General Motors and other private interests benefiting from the taking.

It could be argued that abusive condemnations will be constrained by the power of property owners over local governments. Because property owners are the dominant interest in many localities,⁸⁵ they may be able to use their political power to prevent abusive economic development condemnations. However valid with respect to other functions of local government, this argument is flawed when applied to economic development takings. Because of their nontransparent nature and the general problem of widespread, property owners are unlikely to be able to determine which development condemnations serve their interests and which do not. Moreover, even in situations where voters do understand the tradeoffs involved, the relevant variable is not the political power of property owners generally, but the

⁸³JEANIE WYLIE, *POLETOWN: COMMUNITY BETRAYED* 214 (1989).

⁸⁴*Id.* at 214-15; Michael, *supra* note ____.

⁸⁵ See generally WILLIAM A. FISCHEL, *THE HOMEVOTER HYPOTHESIS* (2001) (providing extensive evidence of the ability of homeowners to influence local governments to adopt policies that protect their interests and maximize property value).

power of those who are targeted for condemnation. As in *Poletown*, these are likely to be poor, politically unorganized or both.⁸⁶ Even if property owners are politically powerful as a group, this fact will not prevent eminent domain abuse if such abuses usually target subsets of owners who are politically weak.

Similarly, the political power of the press as a whole will not prevent government from violating free speech rights if such violations usually target segments of the press that are politically unpopular or have little lobbying power. Just as the political power of the press does not obviate the need for judicial enforcement of the First Amendment, the political power of property owners cannot substitute for judicial review of economic development takings.

E. Holdout problems.

The case for a categorical ban on economic development condemnations is further strengthened by the fact that they are usually not necessary to achieve their ostensible objective: allowing socially beneficial development projects to go forward without being blocked by “holdouts.” Large-scale development projects can and do succeed without recourse to the power of eminent domain. Private developers have effective ways to prevent and deal with potential holdouts.

1. Preventing holdouts without condemnation.

The most common argument for economic development takings is that they are necessary to facilitate economic development in situations where large-scale projects require assembling a large number of lots owned by numerous individuals. If the coercive mechanisms of eminent domain cannot be employed, the argument asserts, a small number of “holdout” owners could either block an important development project or extract an prohibitively high price for acquiescence.⁸⁷

For example, let us assume that a group of fifty contiguous properties with separate owners are each worth \$100 when in their current uses (\$5000 in all), but would be worth a total of \$50,000 (an

⁸⁶ See discussion in §I.A, III.C.2.

⁸⁷ See Merrill, *supra* note at 72-81 (describing the “holdout” rationale for use of eminent domain); see also Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules and Inalienability Rules: One View of the Cathedral*, 85 Harv. L. Rev. 1089, 1106-1108 (1972) (classic description of the holdout problem); Lloyd R. Cohen, *Holdouts and Free Riders*, 20 J. Leg. Stud. 351 (1991) (rigorously distinguishing holdouts from free-riders).

average of \$1000 each) if combined into a single large development project in order to build a factory. There would be thus be a net social gain of \$45,000 (\$50,000-\$5000) from combining the properties into a single tract. However, if the owners of the separate properties know that a developer is trying to buy them all up in order to build the factory worth \$45,000 more than the current use of their lands, any one of them could try to hold out and refuse to sell unless the developer gives them, say, \$5000. And it would be rational for the developer to accede to this demand if it were made by only one owner; in such an eventuality the developer still makes a net gain of about \$40,100 (\$50,000-\$5000 (paid to the holdout)-\$4900 (paid to the other forty-nine owners who, by assumption, sell at the market price of \$100). However, if all fifty current owners (or even just ten of them) resort to the same strategic gambit, the project will be blocked. In this scenario payments to the owners will equal or exceed the project's expected profit. In theory, then, holdouts could block many socially valuable assembly projects.

In analyzing holdouts, it is important to distinguish between “strategic holdouts” - those who refuse to sell because they hope to obtain a higher price and are holdouts in economic sense of the term - and “sincere dissenters” who genuinely value their land more than the would-be developer does. The former are attempting to take advantage of the developers' assembly problem in order to raise the price, as the above example illustrates. The latter, by contrast, are not attempting to get a better price but are instead unwilling to sell because they genuinely place a high enough value on their property that they prefer to keep it rather than accept any payment that the buyer is willing to offer. For example, the property owners in *Kelo* and *Poletown* refused offers of increased compensation and repeatedly indicated that their objective was to keep their homes rather than to obtain a higher price from the condemning authority.⁸⁸ As New London's lawyer noted at the *Kelo* oral argument, “there are some plaintiffs who are not going to sell at any price. They want to stay there.”⁸⁹

In a situation where there are sincere dissenters, transferring their property to a developer would actually lower the overall social value of the land because, by definition, the dissenters value it more than

⁸⁸ See WYLIE, *supra* note ___ at 83 (noting that “for the many who wanted to stay in Poletown, the primary concern was how much money they would be offered for their homes”).

⁸⁹ *Kelo v. City of New London*, U.S. Supreme Court Oral Argument Transcript, 2005 WL 529436 at *27.

the developer does. An ideally efficient policy would, therefore, enable developers to prevent strategic holdouts but not allow them to override the wishes of sincere dissenters.

As is suggested by the existence of numerous large development projects that did not rely on eminent domain, private developers have tools for dealing with holdout problems without recourse to government coercion. For reasons well summarized by Lloyd Cohen, holding out is not a simple strategy: “The successful holdout requires accurate information and a high degree of negotiating, bargaining, and bluffing skills.”⁹⁰ The would-be strategic holdout needs to first know that there is an assembly project going on and then be able to bargain effectively with those undertaking the project. Developers seeking to prevent holdout problems must therefore either deprive potential holdouts of the “accurate information they need” or take away their ability to “negotiate, bargain, and bluff.”⁹¹

Fortunately, there are at least two common strategies that can help achieve these objectives. The first – operating in secret – stymies potential holdouts by depriving them of information. The second – precommitment – undercuts the would-be holdout’s ability to bargain. In both cases, developers are able to prevent strategic holdouts, but cannot victimize sincere dissenters.

a. Assembling property in secret.

In many cases, developers can negotiate with individual owners in secret or use specialized “straw man” agents to assemble the properties they need without alerting potential holdouts to the possibility of making a windfall profit by holding the project hostage.⁹² Secret assembly prevents holdouts by denying them knowledge of the existence of a large assembly project.

The major drawback of secret assembly is the possibility of detection. As soon as potential holdouts learn that the land in the area is being bought up as part of a large assembly project, they have

⁹⁰ Cohen, *supra* note __ at 359.

⁹¹ *Id.*

⁹² See RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 43-44 (2d ed. 1977) (describing these methods); Patricia Munch, *An Economic Analysis of Eminent Domain*, 84 J. POL. ECON. 473, 479 (1976) (same).

the information that they need to engage in strategic bargaining. However, empirical evidence suggests that this is not as serious a problem as might be thought.

Even high-profile property owners undertaking major projects have routinely used secret assembly successfully. For example, the Disney Corporation resorted to it to assemble the land needed to build Disney World in Orlando, Florida in the 1960s.⁹³ Disney has also made effective use of the same strategy to acquire land for a major new theme park in Virginia.⁹⁴ Others who have successfully used the same strategy include Harvard University, which has repeatedly used it to acquire property for major projects in the Boston area,⁹⁵ and locally prominent developers in Las Vegas, Providence, and West Palm Beach, among others.⁹⁶ If even high-profile developers such as Disney and Harvard can successfully utilize secrecy without their plans being discovered in time for holdouts to take advantage of the information, then lesser-known developers – who are less apt to be closely watched by the public and the press – should be able to use the same approach with at least equal prospects of success.

As Daniel Kelly points out in an important new article, the use of secrecy to prevent holdouts has a major advantage over eminent domain. Condemnation “may force a transfer where the existing owners actually value the land more than the private assembler.” By contrast, secrecy “eliminates the risk of erroneous condemnations” because it relies on “voluntary transactions, which ensure that every transfer is mutually beneficial (and thus socially desirable).”⁹⁷ In the terminology used here, secret assembly allows developers to prevent strategic holdouts but does not allow them to ignore the wishes of sincere dissenters.

⁹³ Michael Wheeler, *Disney (A): From Disneyland to Disney World- Learning the Art of Land Assembly*, Harvard Business School, Case Study No. 9-898-018, rev. ed., Sept. 27, 2000, at 3-4.

⁹⁴ Michael Wheeler, *Disney (B): The Third Battle of Bull Run*, Harvard Business School, Case Study No. 9-898-019, rev. ed., Sept. 27, 2000, at 2. While the plan for the Virginia park was eventually shelved due to local opposition (id. at 11-12), the failure was not due to land assembly problems but to the threat to Disney’s public image caused by its plan to build in the vicinity of historic Civil War sites. Id. at 7-8, 11-12. See also David S. Hilzenrath, *Disney’s Land of Make Believe: Acquisition Agent Used Ruse to Prevent Real Estate Speculation*, WASH. POST, Nov. 12, 1993, at A1 (describing success of Disney’s secret assembly strategy in Virginia).

⁹⁵ Daniel B. Kelly, *The “Public Use” Requirement in Eminent Domain Law: A Rationale Based on Secret Purchases and Private Influence*, Cornell L. Rev. (Forthcoming 2006), at 13-14, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=760405 (visited July 10, 2006)..

⁹⁶ Id. at 14-15.

⁹⁷ Id. at 15-16.

The availability of the secret assembly strategy helps explain why eminent domain should in at least some cases be available for traditional public uses such as government-owned facilities and private common carriers, even though it should not be used to transfer land to private developers. Unlike a private developer, government often cannot operate in secrecy because of the need for open deliberation and transparency in public administration.⁹⁸ Moreover, secrecy in government, even if feasible, might pose a heightened risk of corruption.⁹⁹ These points are vital to emphasize because many commentators have long assumed that the “holdout rationale applies equally to both takings for the government and takings for private parties.”¹⁰⁰

A slightly different rationale can be used to justify the use of eminent domain for private common carriers such as railroads and public utilities. In order to build a railroad or power line that connects Point A to Point B, the developer must acquire properties that connect with each other in a narrow, relatively straight line between A and B. Moreover, he or she cannot leave out even a small stretch of the distance, lest there be a break in the resulting railway or power line, rendering the whole useless. Other things equal, it is reasonable to assume that it is much more difficult to conceal the true purposes of such an unusual pattern of acquisition than those of the acquisitions for projects such as Disney’s or Harvard’s.

Furthermore, because of the highly regulated nature of public utilities, their acquisition processes may often require public openness for some of the same reasons as those of government. Therefore, common carriers and public utilities may need to utilize eminent domain, while ordinary developers probably will not.

b. Precommitment strategies.

A second mechanism by which developers can prevent holdout problems without recourse to eminent domain is by means of “precommitment” strategies or “most favored nation” contract clauses.

⁹⁸ Id. at 19-20; see also Merrill, *supra* note at 81-82 (arguing that government cannot operate in secrecy because of the need for openness and deliberation).

⁹⁹ Kelly, *supra* note at 19-20; Merrill, *supra* note at 81.

¹⁰⁰ Kelly, *supra* note ___ at 13. *See also* id. at n. 106 (citing sources).

The developers can sign contracts with all the owners in an area where they hope to build, under which they commit themselves to paying the same price to all, with, perhaps, variations stemming from differences in the size or market value of particular properties. By this means, the developer successfully “ties his hands” in a way that precludes him from paying inordinately high prices to the last few holdouts.¹⁰¹ Precommitment strategies work because they prevent the would-be holdout from being able to “negotiate, bargain, and bluff.”¹⁰² Any such attempt at bargaining or bluffing can be met with the response that the buyer is unable to accept the holdout’s terms because doing so would render the entire project unprofitable by requiring an equally hefty payout to all the other sellers.

In some respects, a precommitment approach is even better than secrecy, because it can potentially be utilized even by assemblers such as government agencies and public utilities, which must operate openly. At the same time, precommitment may be a more difficult strategy to implement effectively because it requires that the buyer predetermine a set price for each lot to be purchased in advance of beginning the assembly process. This increases the likelihood of making a mistake (such as offering too low a price as a result of underestimating a seller’s “subjective value”) that might lead to the failure of the assembly effort. Furthermore, empirical evidence on the use of precommitment strategies is much sparser than that for secrecy; the literature on the former has not – so far – revealed real-world examples of successful use of this strategy for major development projects comparable to the use of secrecy by Disney, Harvard, and others.

c. Implications.

Between them, secrecy and precommitment provide alternatives to eminent domain that render it largely unnecessary for use in private economic development projects. They also help explain why private

¹⁰¹ See THOMAS C. SCHELLING, *THE STRATEGY OF CONFLICT* 35-43, 120-31 (1960) (classic explanation of the ways in which tying one’s own hands can be an advantage in negotiations); see also Donald J. Kochan, “*Public Use*” and the Independent Judiciary: *Condemnation in an Interest-Group Perspective*, 3 *TEX. REV. L. & POL.* 49, 88-90 (1998) (explaining how precommitment strategies used to prevent holdouts in corporate transactions can be applied to economic development projects that might otherwise need to resort to eminent domain).

¹⁰² Cohen, *supra* note _____ at 359.

assembly projects can and should be distinguished from the assembly of land for government use or for common carriers and utilities. Nonetheless, it is impossible to categorically rule out the possibility that there might be socially beneficial economic development projects that can only succeed through the use of eminent domain. We can, however, conclude that such projects are likely to be extremely rare, in light of the fact that even major projects undertaken by prominent corporations and universities successfully rely on secret assembly.

In theory, of course, we should still allow the use of eminent domain for those rare efficient development projects that cannot utilize secrecy or precommitment to prevent holdouts. Unfortunately, however, there is no way of confining the use of the economic development rationale to those rare circumstances. Once the prospect of “economic development” is allowed to justify takings, it can and has been used by powerful interest groups to facilitate projects that either fail to provide economic benefits that justify their costs or could have been undertaken without resorting to coercion or both.¹⁰³ The political power of the beneficiaries of condemnations is likely to be a far more potent determinant of the decision to condemn than any objective economic analysis of holdout problems.

II. ASSESSING ALTERNATIVES TO A CATEGORICAL BAN.

While the dangers of economic development takings are now widely recognized, some scholars and jurists believe that they can be effectively minimized through safeguards that fall short of a categorical ban on the economic development rationale. Unfortunately, these approaches, while not wholly without merit, are unlikely to be as effective as a categorical ban. In some situations, they may even make the situation worse.

This Part examines four such alternatives to a categorical ban on economic development takings: heightened scrutiny of private-to-private condemnations, increased compensation payments to property owners victimized by takings, procedural protections for property owners, and reliance on interjurisdictional mobility and competition that might restrain abusive local governments. All four

¹⁰³ See Part I *infra*.

alternatives, have some advantages, but all also fall short of being adequate substitutes for a categorical ban.

A. Heightened scrutiny.

Unlike economic development takings decisions in some other states,¹⁰⁴ the *Poletown* opinion was careful to avoid giving a blank check for all condemnations that might be said to promote development, emphasizing that “[o]ur determination that this project falls within the public purpose . . . does not mean that every condemnation proposed by an economic development corporation will meet with similar acceptance simply because it may provide some jobs or add to the industrial base.”¹⁰⁵ Instead, the court held that “[w]here, as here, the condemnation power is exercised in a way that benefits specific and identifiable private interests, a court inspects with heightened scrutiny the claim that the public interest is the predominant interest being advanced.”¹⁰⁶ Unfortunately, this “heightened scrutiny” test failed to provide adequate protection against eminent domain abuse, and in one crucial respect actually made the situation worse. The same problems undercut recent academic proposals to control eminent domain abuse through “means-ends” scrutiny of condemnations.

1. Shortcomings of the *Poletown* heightened scrutiny test.

The purpose of the heightened scrutiny test was to ensure that there is a “clear and significant” public benefit resulting from condemnation. Unfortunately, the test creates a perverse incentive to increase the amount of property condemned rather than reduce it. Since the public “benefit” involved is the “bolstering of the economy,” the larger the commercial project served by a condemnation—and the more property owners expropriated as a result—the greater the chance that courts will find that the resulting economic growth is “clear and significant” enough to pass the test.¹⁰⁷

In fact, Michigan cases applying the heightened scrutiny test displayed precisely this kind of bias in favor of major projects dispossessing large numbers of property-owners. Courts applying the test

¹⁰⁴See, e.g., cases cited in note ____.

¹⁰⁵*Poletown*, 304 N.W.2d at 459

¹⁰⁶*Id.*

¹⁰⁷*Id.* at 458-59.

sometimes invalidated condemnations of small amounts of property intended to benefit individuals and small- to medium-size businesses.¹⁰⁸ But in the main, Michigan courts applying *Poletown* felt themselves compelled to uphold condemnations of large amounts of property for the benefit of major commercial enterprises. Thus, in 1989 the Michigan Court of Appeals reluctantly held that *Poletown* required it to uphold the condemnation of 380 acres of private property in order to “transfer the property to [the] Chrysler Corporation for the construction of a new automobile assembly plant.”¹⁰⁹ Ironically, the court of appeals believed that both the Chrysler condemnation and *Poletown* itself constituted “abuse[s] of the power of eminent domain.”¹¹⁰ Nonetheless, it was forced to follow *Poletown* and endorse the validity of the condemnation of large amounts of property for the benefit of Chrysler.¹¹¹ A 1995 court of appeals decision reaffirmed this holding.¹¹² And, of course, in *Poletown* itself, the construction of a large GM plant was held sufficient to justify the displacement of 4,200 people.¹¹³

The *Poletown* heightened scrutiny test protected property owners least precisely when protection was most needed: in cases where substantial numbers of people are displaced for the benefit of large, politically powerful interest groups. Indeed, interest groups seeking to ensure approval of condemnations under *Poletown* were well-advised to plan large construction projects utilizing as much property as possible.

The failure of the heightened scrutiny test to curtail the danger to private property created by the *Poletown* decision is evidenced by the prevalence of private-to-private condemnations in Michigan. According to a recent study by the pro-property rights Institute for Justice, from 1998 to 2002 alone, at

¹⁰⁸See, e.g., *Tolksdorff v. Griffith*, 626 N.W.2d 163, 167-69 (Mich. 2001) (invalidating legislation that allows condemnation of limited amounts of property in order to build roads for the benefit of landlocked property owners); *City of Lansing v. Edward Rose Realty, Inc.*, 502 N.W.2d 638, 643-46 (Mich. 1993) (invalidating taking of two apartment complexes for the benefit of a cable television company); *City of Center Line v. Chmelko*, 416 N.W.2d 401, 402, 404-407 (1987) (invalidating condemnation of “two parcels of property” in order to facilitate expansion of a “local car dealership”).

¹⁰⁹*Vavro*, 442 N.W.2d at 730.

¹¹⁰*Id.* at 731.

¹¹¹*Id.* at 731-32.

¹¹²See *Detroit Edison Co. v. City of Detroit*, 527 N.W.2d 9, 11 (Mich. Ct. App. 1995) (reaffirming *Vavro*'s conclusion that approval of the Chrysler condemnations is required by *Poletown*).

¹¹³Michael, *supra* note.

least 138 condemnation proceedings had been filed in Michigan for the purpose of transferring property to private parties; 173 more were threatened.¹¹⁴

Michigan's record in this respect compared poorly with that of other states. In the five-year period from 1998 to 2002, only two other states had more reported condemnation filings for the purpose of transferring property to private interests.¹¹⁵ The city of Detroit—the jurisdiction involved in both *Poletown* and *Hathcock*¹¹⁶—achieved the dubious distinction of filing more condemnations for private ownership than any other city in the nation in the same time period.¹¹⁷

The Institute for Justice figures may even be overly conservative. They likely underestimate the prevalence of condemnations for the benefit of private parties because they were compiled from news reports and court filings.¹¹⁸ Many cases are unpublished, and many other condemnations go unreported in the press.¹¹⁹ Thus, we cannot know the true prevalence of private-to-private condemnations in Michigan nor can we be completely certain that pre-*Hathcock* Michigan really was one of the very worst states in this regard. We can be reasonably confident, however, that Michigan's heightened scrutiny requirement failed to reduce such condemnations to levels significantly below those observed elsewhere, including in states that lack heightened scrutiny.¹²⁰

2. Means-Ends scrutiny.

¹¹⁴DANA BERLINER, PUBLIC POWER, PRIVATE GAIN: A FIVE YEAR, STATE-BY-STATE REPORT EXAMINING THE ABUSE OF EMINENT DOMAIN 100 (2003), available at <http://www.ij.org/publications/castle/>. It should be noted that the author of this study is one of the attorney's representing Susette Kelo and the other New London property owners in the *Kelo* litigation.

¹¹⁵*Id.* at 2.

¹¹⁶The technical plaintiff in *Hathcock* was the County of Wayne rather than the City of Detroit, however the purpose of the taking was to benefit Detroit by promoting development near the Detroit Metropolitan Airport. *County of Wayne v. Hathcock*, 2003 WL 1950233 at *1-2 (Mich. Ct. App. Apr. 24, 2003), *rev'd*, 684 N.W.2d 765 (Mich. 2004).

¹¹⁷Berliner, *supra* note ____ at 2. Detroit condemnations included takings for casinos and sports teams, and one in which a developer with ties to the mayor was able to obtain a condemnation that resulted in the destruction of an entire African-American neighborhood. *Id.* at 102-06.

¹¹⁸*Id.* at 100.

¹¹⁹*Id.* at 2.

¹²⁰Only one other state, Delaware, adopted the *Poletown* heightened scrutiny test. *See Wilmington Parking Auth. v. Land With Improvements*, 521 A.2d 227, 231 (Del. 1987) (holding that “when the exercise of eminent domain results in a substantial benefit to specific and identifiable private parties, a court must inspect with heightened scrutiny a claim that the public interest is the predominant interest being advanced”).

Recent academic proposals to increase scrutiny of economic development takings by imposing “means-ends” scrutiny of condemnation decisions are similar to the heightened scrutiny test and suffer from some of the same weaknesses.¹²¹ Supporters of means-ends scrutiny argue that it will constrain eminent domain abuse by ensuring that the “redevelopment project to be enabled by eminent domain is reasonably necessary to stem the tide of suburban sprawl, to renew a lifeless downtown, or to advance whatever goal the government uses to justify the exercise of eminent domain.”¹²² Courts could also use a means-ends test to determine whether the government is seeking to condemn more land than is really needed to advance its goals and whether those goals could be equally effectively achieved through “noncoercive means.”¹²³ In *Lingle v. Chevron*,¹²⁴ the Supreme Court recently held that “a means-end test” is “not a valid method of discerning whether private property has been “taken” for purposes of the Fifth Amendment.”¹²⁵ However, the Court did not foreclose the possibility that such a test might be relevant to the question of whether the condemnation serves a public use.¹²⁶

Means-ends scrutiny is vulnerable to the same types of perverse incentives as the *Poletown* heightened scrutiny test. The larger the development project in question, the easier it will be for condemning authority to claim that condemnation is “reasonably necessary” to ensure its completion and that noncoercive alternatives will not suffice. Thus, like *Poletown* heightened scrutiny, means-ends analysis is likely to create a perverse incentive to actually increase the scale of economic development condemnations.

¹²¹ See, e.g., Nicole Stelle Garnett, *The Public Use Question as a Takings Problem*, 71 GEO. WASH. L. REV. 934, 963-69 (2003) (arguing that courts should interpret the Public Use Clause to require “means-ends” scrutiny of takings to ensure that condemning a given property is “reasonably necessary” to achieve the government’s legitimate purpose); *Kelo v. City of New London*, Amicus Br. of Professors David L. Callies, James T. Ely, Paula A. Franzese, Nicole Stelle Garnett, James E. Krier, Daniel R. Mandelker, John Copeland Nagle, John Nolon, J.B. Ruhl, Shelley Ross Saxer, A. Dan Tarlock, Laura Underkuffler, and Edward F. Ziegler, 2004 WL 2803192 at 15-27 (same).

¹²² Garnett, *supra* note ____ at 966.

¹²³ *Id.* at 966-67,

¹²⁴ 125 S.Ct. 2074 (2005).

¹²⁵ *Id.* at 2083-84.

¹²⁶ See *id.* at 2084 (noting that means-ends scrutiny “probes the regulation’s underlying validity,” an inquiry that should be conducted under the “public use” clause).

A related problem is that, so long as economic development is regarded as a legitimate public use, means-ends scrutiny could probably be used to justify virtually any condemnation that dispossessed homeowners or nonprofit institutions for the benefit of for-profit business interests. Almost by definition, the latter are likely to produce more development and tax revenue than the former.¹²⁷ And so long as the current owners are unwilling to sell voluntarily at the price offered by the business interests, there is a strong argument that the “development” in question cannot be achieved by noncoercive means. Such an outcome may not be not desired by advocates of means-ends scrutiny. However the experience of Michigan’s relevantly similar heightened scrutiny test suggests that it is all too likely.

B. Increased compensation for property owners.

The injustices inflicted by economic development takings are exacerbated by the fact that the owners of condemned property generally receive compensation far below the true value of what they lose.¹²⁸ Scholars from a variety of political viewpoints have criticized economic development takings for providing insufficient compensation and have urged an increase.¹²⁹ During the *Kelo* oral argument, several justices, including Justices Breyer, Kennedy, and Souter – all of whom ultimately voted to uphold the *Kelo* takings - suggested that the traditional “fair market value” compensation standard was inadequate and seemed inclined to favor a more generous formula.¹³⁰ Justice Breyer asked whether “there is some way of assuring that the just compensation actually puts the [owner of a condemned home] in the position he would be in if he didn't have to sell his house.”¹³¹ Justice Kennedy, in turn, wondered whether

¹²⁷ See discussion in §I.A.

¹²⁸ See Somin, *Overcoming Poletown*, at 1020-21 (citing relevant evidence and scholarship); see also §I.C.3 *infra* (describing nonmonetary costs of takings that are rarely compensated).

¹²⁹ See, e.g., Radin, *supra* note at 1689-96 (arguing for increased compensation, as well as stricter scrutiny of public use in order to offset loss of community and other difficult to quantify values); Aaron N. Gruen, *Takings, Just Compensation, and Efficient Use of Land, Urban, and Environmental Resources*, 33 URB. LAW. 517 (2001) (arguing for increasing compensation by incorporating a wide range of excluded considerations into the calculation of the payment due); Richard A. Epstein, *Property, Speech and the Politics of Distrust*, 59 U. CHI. L. REV. 41, 62 n.60 62-63 (1992) (criticizing *Poletown* for providing inadequate compensation for business good will and community and arguing for increased compensation); Gideon Kanner, *Condemnation Blight: Just how Just is Just Compensation?*, 48 NOTRE DAME LAWYER 765 (1973) (arguing for increased compensation).

¹³⁰ *Kelo v. City of New London*, U.S. Supreme Court Oral Argument Transcript, 2005 WL 529436 at*15, 30, 32-34.

¹³¹ *Id.* at *32-33.

“when you have property being taken from one private person ultimately to go to another private person, that what we ought to do is to adjust the measure of compensation, so that the owner . . . can receive some sort of a premium for the development.”¹³² Leading property scholars such as James Krier and Thomas Merrill have also argued for increasing compensation as a tool for alleviating eminent domain abuse.¹³³

Unfortunately, there are two serious problems with this approach, one well known in the takings literature and the other largely ignored. The well known problem is the difficulty of estimating the “subjective value” that owners assign to their property.¹³⁴ In most cases, it is reasonable to assume that property owners value their holdings at more than the market price; otherwise, they would presumably have sold the property already. Unfortunately, it is often impossible to determine *how much* more. Simply asking the owner will not solve the problem, since she will have a strong incentive to overstate the value of the land to her in order to receive greater compensation.

Attempting to establish a formula that pays owners a set rate above market value runs into the same types of problems as the fair market value approach: whatever the rate set, some owners’ subjective valuation of their land will still be higher than the formula provides, while others might actually be overcompensated. Moreover, setting too high a compensation level might give owners an incentive to actually lobby *for* condemnation of their property, as may have happened in the famous *Midkiff* case, where some of the seventy-two large landowners who dominated Hawaii’s real estate market may preferred to have their land condemned rather than purchased on the market because the former turned out to be advantageous for tax reasons.¹³⁵ Therefore, it is difficult to imagine a compensation formula that can, in Justice Breyer’s formulation, put the property owner “in the position he would be in if he didn’t

¹³² *Id.* at *15.

¹³³ See James Krier & Christopher Serkin, *Public Ruses*, 2004 Mich. St. L. Rev. 859, 865-75 (arguing for increased compensation in cases where the eminent domain abuse is likely or where property owners suffer unusually severe burdens); U.S. Sen. Committee on the Judiciary, *The Kelo Decision: Investigating Takings of Homes and Other Private Property*, Sept. 20, 2005, at 6, available at http://judiciary.senate.gov/testimony.cfm?id=1612&wit_id=4661 (visited Sept. 30, 2005) (testimony of Professor Thomas A. Merrill) (arguing that increased compensation could reduce eminent domain abuse and is a better approach than judicial enforcement of public use restriction).

¹³⁴ For a summary of this issue, see Merrill, *supra* note at 82-84.

¹³⁵ *Hawaii Housing Auth. v. Midkiff*, 467 U.S. 229, 233 (1984) (noting that the landowners had avoided selling their land voluntarily because they would thereby incur “significant federal tax liabilities,” and indicating that the owners lobbied the state legislature to condemn their property instead, which would “mak[e] the federal tax consequences less severe”).

have to sell”¹³⁶ without simultaneously creating a serious risk of overcompensation that would create perverse incentives to lobby for condemnation.¹³⁷ To avoid confusion, it should be noted that this argument is not meant to attack the widespread (and in my view accurate) perception that current law undercompensates the owners of condemned property.¹³⁸ Rather, it highlights a danger that could arise if the law is changed to increase compensation to levels far above fair market value.

The second shortcoming of a compensation-based approach has been largely ignored,¹³⁹ but is perhaps even more telling. As the *Poletown* case dramatically demonstrated, property owners are not the only victims of ill-conceived economic development takings. The taxpayers who have to pay for the taking, as well as absorb some of the economic damage caused by the expropriation of existing businesses, nonprofit institutions and public buildings, are also among the victims. In *Poletown*, taxpayers eventually had to pay some \$250 million to acquire the property in question and prepare it for GM’s use, a figure that does not include various indirect costs to the community, such as the loss of expropriated businesses, churches and schools.¹⁴⁰ In *Kelo*, some \$80 million in taxpayer money has been spent on New London’s redevelopment project, with little prospect of anything approaching a commensurate return on the public’s investment.¹⁴¹ Ironically, raising compensation levels actually exacerbates the taxpayer costs of economic development takings.

While it could be argued that the political process will screen out and prevent takings that cost the taxpayers more than they are worth, this claim ignores the fact that economic development takings are

¹³⁶ *Kelo v. City of New London*, U.S. Supreme Court Oral Argument Transcript, 2005 WL 529436 at*32-33.

¹³⁷ See Nicole Garnett, *What a Strange Place to Put a Church: The Political Economy of “Just Compensation,”* Notre Dame Law School Legal Studies Research Paper No. 06-01, January 2006, at 48-51 (presenting evidence showing that increasing compensation levels may have the perverse effect of diminishing political resistance to inefficient condemnation projects).

¹³⁸ See, e.g., works cited in note _____. But see *id.* at 24-28 (arguing that the academic literature underestimates the amount of compensation many owners receive).

¹³⁹ But cf. Daryl Levinson, *Making Governments Pay: Markets, Politics, and the Allocation of Constitutional Costs*, 67 U. Chi. L. Rev. 345, 345 (2000) (arguing that “[g]overnment actors respond to political incentives, not financial ones – to votes, not dollars. We cannot assume that government will internalize social costs just because it is forced to make a budgetary outlay”); Garnett, *id.* at 43-46 (arguing that political incentives will often lead to condemnations whose costs exceed their benefit, even if compensation levels are increased).

¹⁴⁰ Somin, *Overcoming Poletown*, at 1017-18. While the owners of the condemned businesses and other institutions received compensation payments, the cost of the destruction of these institutions to the community at large were not compensated in any way.

¹⁴¹ See nn. and accompanying text.

extremely difficult for citizens to assess. As discussed above,¹⁴² widespread political ignorance, lack of transparency and time horizon problems combine to ensure that many economic development condemnations will be undertaken despite the fact that their costs to the public greatly outweigh the benefits.¹⁴³

These problems are exacerbated in situations where a large part of the cost is borne by taxpayers in jurisdictions other than the one that decides to proceed with condemnation and expects to reap the benefits of the development project.¹⁴⁴ Such a situation often arises when development condemnations undertaken by local governments are subsidized by state and federal grants.¹⁴⁵

If even highly publicized and much debated condemnations as *Poletown* and *Kelo* are vulnerable to these dangers, the risk is likely to be even more severe in more typical cases. These considerations significantly reduce the chance that even greatly increased compensation levels will significantly reduce the incidence of economically inefficient takings for development purposes.¹⁴⁶

To be sure, the danger of taxpayer exploitation can arise even with conventional takings. However, economic development takings are particularly susceptible to this problem because of the great difficulty of assessing their benefits, the long period of time that is likely to elapse before any benefits are realized, and the strong incentives of developers and condemning authorities to overstate their benefits in ways that are difficult for the public to penetrate.¹⁴⁷

None of this suggests that increasing compensation levels is a completely useless reform. The problem of subjective value suggests that there is a strong case for increasing compensation for takings at

¹⁴² See § I.D.2.

¹⁴³ See discussion in § I.D.2.

¹⁴⁴ See William A. Fischel, *The Political Economy of Public Use in Poletown: How Federal Grants Encourage Excessive Use of Eminent Domain*, 2004 MICH. ST. L. REV. 929 (analyzing this problem).

¹⁴⁵ For example, about half the projected cost of the Poletown condemnation was paid for by state and federal funds. Somin, *Overcoming Poletown*, at 1018.

¹⁴⁶ For the argument that requiring sufficiently high compensation will deter inefficient takings and render eminent domain “self-limiting,” see e.g. WILLIAM A. FISCHEL, REGULATORY TAKINGS 74 (1995).

¹⁴⁷ See § I.D.2, *infra*.

least somewhat above market value.¹⁴⁸ Indeed, that case goes beyond economic development takings and is applicable to other types of condemnations as well. Nonetheless, there is good reason to believe that increased compensation is not by itself an adequate solution to the abuses caused by economic development takings. In some situations, it may even exacerbate them by increasing taxpayer costs and creating incentives for “overcompensated” property owners to lobby for condemnation of their property.

C. Procedural safeguards.

An alternative to judicial review urged by many *Kelo* critics is that of procedural safeguards for eminent domain defendants.¹⁴⁹ Possible protections include requiring extra advance notice of condemnation proceedings, mandating a detailed report laying out the purpose for which eminent domain is to be used, extensive “public hearings” to justify the planned taking, and an opportunity for opponents of the project to “voice their objections to being uprooted.”¹⁵⁰ In theory, “strict enforcement of these procedural protections makes eminent domain largely self-regulating” because “[r]equiring the condemning authority to jump through enough procedural hoops will cause the costs of eminent domain to rise relative to the costs of voluntary exchange,” thereby ensuring that “[e]minent domain will be used only when the transaction costs of voluntary exchange are truly prohibitive.”¹⁵¹

Procedural protections for eminent domain defendants certainly have some value and it is true that their cost could sometimes deter abusive condemnations. Advocates are certainly right to believe that the “delay” created by “procedural hoops” can increase the costs of condemnation and “increase . . . the bargaining leverage of property owners faced by condemnation.”¹⁵² However, there are several major

¹⁴⁸ *But see* MERRILL & DANA, *supra* note ____ at 173-79 (defending the market value formula). *But cf.* Merrill, *supra* note ____ (defending increased compensation, but without explicitly repudiating the views expressed in the author’s earlier work).

¹⁴⁹ See Merrill testimony at 6; Thomas M. Merrill, *The Misplaced Flight to Substance*, 19 *Probate & Property* 16, 18 (2005) (hereinafter Merrill, *Flight to Substance*); David J. Barron & Gerald E. Frug, *Make Eminent Domain Fair for All*, BOSTON GLOBE, Aug. 12, 2005, at A14.

¹⁵⁰ Merrill Testimony at 6.

¹⁵¹ Merrill, *Flight to Substance*, at 18. For an early version of the same argument, see Merrill, *supra* note ____, at 80-81.

¹⁵² Merrill, *Flight to Substance*, at 18.

reasons why procedural protections are unlikely to be an adequate substitute for a judicial ban on economic development takings.

Perhaps the most fundamental problem with the argument that the cost of “jumping through procedural hoops”¹⁵³ will deter abuses of the eminent domain power is that it implicitly assumes that the public officials who decide on condemnation and the private interests they seek to benefit will be the ones who bear those costs. In reality, however, many of the procedural costs are likely to be borne by taxpayers, not by condemning authorities or by the new owners of the condemned property. Certainly, it is the taxpayers who would bear the costs of additional hearings, preparation of reports justifying condemnation, and any extra compensation paid to property owners to persuade them not to exercise their procedural rights to the hilt.

This distinction would be unimportant if taxpayers closely monitored the costs of eminent domain to ensure that they do not begin to outweigh the benefits. In reality, however, the complex and nontransparent nature of the eminent domain process combine with generally widespread political ignorance to ensure that this will rarely be the case.¹⁵⁴ Thus, condemning authorities might often choose to accept even very substantial procedural costs, so long as those costs are borne by taxpayers who are unlikely to be aware of them and therefore unlikely to punish the offending officials at the polls.

A second problem with purely procedural remedies for eminent domain abuse is the possibility that increased costs might deter relatively small-scale condemnations, but not large ones. In most cases, many of the procedural costs, such as preparing a plan, holding hearings, and so forth, are likely to be relatively fixed, regardless of the size and scope of the planned condemnation. Thus, the procedural cost of condemning 1000 properties is likely to be far less than 1000 times greater than the cost of condemning one. In cases where the planned project and its associated condemnations are expected to be on a very large scale, any procedural costs are likely to be only a small fraction of the total cost. More importantly, they will be only a small fraction of the benefits expected by the new private owners, such as the Pfizer in

¹⁵³ Id.

¹⁵⁴ See § I.D.2, *infra*.

Kelo or *General Motors* in the *Poletown* case. Therefore, procedural remedies, like Michigan's pre-*Hathcock* "heightened scrutiny" test,¹⁵⁵ are likely to be least effective in those cases where very large numbers of people are likely to be displaced. Obviously, such large-scale condemnations also have the greatest potential for abuse.

The third major shortcoming of procedural remedies is the seeming impossibility of properly calibrating the level of protection. If procedural protections are to be "self-regulating" in the way that advocates such as Thomas Merrill hope,¹⁵⁶ they must be based on a reasonably accurate calculation of the level of cost that will deter socially harmful takings while still permitting beneficial ones to go forward. Unfortunately, there is no way for courts to judge what level of procedural protection to provide other than by trying to estimate the likely costs and benefits of the condemnations themselves.

Yet the major reason why supporters of procedural protection advocate them as an alternative to substantive scrutiny under the Public Use Clause is that they believe that "courts are not very good at policing the uses to which eminent domain is put."¹⁵⁷ Attempting to calibrate levels of procedural protection in order to achieve the "right" amount of deterrence merely reintroduces substantive judicial review of takings by the back door. Moreover, it actually forces courts to make a more complicated calculation than does traditional substantive review of public use issues. The latter requires that courts judge only the substantive nature of the taking. On the other hand, calibrating procedural protections to achieve optimal deterrence requires courts to both calculate the costs and benefits of condemnation *and also* determine what level of procedural protection is necessary to achieve the right level of deterrence.

To be sure, advocates of procedural remedies might argue that the relevant calculations should be made not by judges but by legislatures or by administrative officials. This could enable the use of greater technical expertise in setting protection levels. However, it does so at the cost of relying on the political process to solve the problem of eminent domain abuse despite the fact that it is the defects of that process which largely caused the problem in the first place. If victims of economic development takings had

¹⁵⁵ See § II.B, *infra*.

¹⁵⁶ Merrill, *Flight to Substance*, at 18.

¹⁵⁷ Merrill Testimony at 4.

sufficient political power to force legislatures to enact procedural protections strong enough to deter abuses, they would presumably also have had sufficient clout to prevent such condemnations from being initiated in the first place. Unfortunately, the political economy of economic development takings ensures that most property owners targeted condemnation are likely to have relatively weak political influence, while their opponents are likely to be powerful interest groups who are “repeat players” in the condemnation process.¹⁵⁸ Thus, the political process is unlikely to enact sufficient procedural protections to prevent socially harmful takings for precisely the same reasons that it often allows them to go forward in the first place.

Obviously, procedural protections for property owners caught up in the eminent domain process are not wholly worthless. They can serve a useful purpose in providing notice to affected property owners and allowing them to file objections. The cost of procedural protections might also serve to deter some relatively small-scale and marginal condemnations. However, this remedy is unlikely to be sufficient to prevent most of the worst abuses. It is equally unlikely to be an adequate substitute for a judicial ban on economic development takings.

D. Interjurisdictional mobility.

Interjurisdictional competition is a seemingly obvious alternative to judicial intervention as a means of protecting property owners against abusive takings. If a local government engages in repeated abusive condemnations, owners and investors are likely to choose to relocate elsewhere or not move to that community in the first place. Vicki Been has argued that courts need not closely police local government land use regulations because “a developer dissatisfied with a community’s exactions policy can take the project to another jurisdiction that offers better terms.”¹⁵⁹ The same analysis could be applied to economic development takings as well. This is part of the more general point that the combination of citizen mobility and interjurisdictional competition for tax revenue gives local governments an incentive

¹⁵⁸ See §§ I.A-C, *infra*.

¹⁵⁹ Vicki L. Been, “Exit” as a Constraint on Land Use Exactions: Rethinking the Unconstitutional Conditions Doctrine, 91 COLUM. L. REV. 473, 509 (1991).

to adopt policies that match the preferences of current and prospective residents.¹⁶⁰ “Exit” rights could potentially be an adequate protection for aggrieved property owners even absent judicial protection.¹⁶¹

Ironically, conservatives and libertarians who in other contexts strongly support decentralization and interjurisdictional competition, are also among the strongest supporters of federal judicial abolition of economic development takings.¹⁶² On the other hand, both the mostly liberal Supreme Court majority in *Kelo* and its academic defenders have appealed to “federalism” in order to justify the decision.¹⁶³ Thus - particularly for strong defenders of decentralized federalism - it is important to explain why competition and mobility are not adequate safeguards against abusive condemnation.

The empirical evidence showing that numerous abusive development condemnations occur is one indication that exit rights are not a sufficient solution to the problem.¹⁶⁴ After all, we should not observe cases such as *Poletown* and *Kelo* if the threat of exit were enough to force localities to desist from harmful condemnations.

Even if exit rights usually are an effective deterrent to eminent domain abuse, there will still be a subset of cases where they are not potent enough, thereby necessitating judicial intervention. There is an instructive analogy to First Amendment law: although the political power of the press will often be sufficient to deter legislators from undermining its rights, even the most powerful newspapers and

¹⁶⁰ The classic statement of the theory is Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416 (1956). For an extension of this argument to a wide variety of local government functions, see FISCHER, *supra* note __ at ch. 3.

¹⁶¹ The term is borrowed from ALBERT O. HIRSCHMAN, *EXIT, VOICE, AND LOYALTY* (1970).

¹⁶² This point certainly applies to the present writer. See Ilya Somin, *Closing the Pandora’s Box of Federalism: The Case for Judicial Restriction of Federal Subsidies to State Governments*, 90 GEO. L.J. 461, 468-71 (2002) (arguing for benefits of interjurisdictional competition); John McGinnis & Ilya Somin, *Federalism vs. States’ Rights: The Case for Judicial Review in a Federal System*, 99 N.W.U. L. REV. 89 (2004) (same).

¹⁶³ See, e.g., *Kelo*, 125 S.Ct. at 2664 (arguing that judicial deference to condemning authorities on public use issues “embodie[s] a strong theme of federalism”); Merrill Testimony at 5 (arguing that judicial review of public use issues by federal courts “disserves the values of federalism”).

¹⁶⁴ See BERLINER, *supra* note (citing thousands of cases during the 1998-2002 period).

television stations will still sometimes lose out in the political process, thereby necessitating judicial intervention to protect their free speech.¹⁶⁵

But there is also a theoretically deeper reason why exit rights are unlikely to provide effective protection for victims of economic development takings. By its very nature, real property is immobile. Therefore, owners cannot move it if they find their property rights endangered by a local government that makes excessive use of condemnation. “Voting with your feet” does not protect anything you can’t take with you when you flee.¹⁶⁶ This problem is particularly serious in the case of residential owners and nonprofit organizations such as churches, many of whom often have strong ties to their communities that make it extremely costly or even impossible to move to another jurisdiction the very sorts of people and institutions most likely to be victimized by economic development takings.¹⁶⁷

To be sure, localities may still to some extent be disciplined by exit rights because unbridled eminent domain abuse may deter new residents from coming in. Yet even this constraint is somewhat weakened by the fact that those residential owners most likely to be victimized by condemnation are usually poor,¹⁶⁸ and therefore less likely to add significantly to local tax revenue - the main incentive for interjurisdictional competition. Moreover, limited political time horizons ensure that the prospect of an immediate gain in political support resulting from transferring condemned property to powerful interest groups may often loom larger in politicians’ calculus than a reduction in in-migration, whose effects are likely to be felt only over a long period of time in the future.¹⁶⁹

The points advanced here do not show that exit rights are completely ineffective in constraining economic development takings. Although we do not have any systematic proof, it is certainly likely that eminent domain abuse would be more common in a world without exit rights and interjurisdictional

¹⁶⁵ See, e.g., *N.Y. Times Co. v. United States*, 403 U.S. 713 (1971) (judicial intervention protecting free speech rights of the nation’s most influential newspaper, the *New York Times*); *N.Y. Times v. Sullivan* 376 U.S. 254 (1964) (same).

¹⁶⁶ See Richard A. Epstein, *Exit Rights Under Federalism*, 55 *LAW & CONTEMP. PROBS.* 147, 154-59 (1992) (explaining limits of exit rights in protecting immobile assets).

¹⁶⁷ See §I.A *infra* (discussing special vulnerability of residential and nonprofit properties).

¹⁶⁸ See §§I.A, III.C.2. *infra*.

¹⁶⁹ See discussion of limited time horizons in §I.D.2.

competition. At the same time, however, we must recognize that the power of exit is at its weakest in protecting rights to real property and other immobile assets. For this reason, it is not an adequate substitute for judicial review.

III. KELO AND ITS AFTERMATH.

*Kelo v. City of New London*¹⁷⁰ is the first major U.S. Supreme Court public use case since *Hawaii Housing Authority v. Midkiff*, over twenty years ago.¹⁷¹ *Kelo* is a painful defeat for property owners in that it upheld the “economic development” rationale for condemnation and advocated broad judicial deference on public use issues.¹⁷² On the other hand, the *Kelo* Court does mark a slight tightening of judicial scrutiny of public use relative to *Midkiff*'s holding that the public use requirement is satisfied so long as “the exercise of the eminent domain power is rationally related to a conceivable public purpose.”¹⁷³ More importantly, the fact that four justices not only dissented but actually concluded that the economic development rationale should be categorically forbidden shows that the judicial landscape on public use has changed.¹⁷⁴ Support for a virtually limitless definition of public use is no longer the consensus view among mainstream jurists.

Finally, it is important to examine the strong political backlash that *Kelo* generated. Both Congress and over states have either adopted or considered legislation restricting eminent domain power.¹⁷⁵ As we shall see, this legislative activity has so failed to enact any reforms likely to have a major effect. It does nonetheless highlight the unpopularity of economic development takings in the wake of *Kelo*.

A. Berman, Midkiff, and the background to Kelo.

¹⁷⁰ 125 S.Ct. 2655 (2005).

¹⁷¹ 467 U.S. 229 (1984).

¹⁷² *Kelo*, 125 S.Ct. at 2662-66.

¹⁷³ *Midkiff*, 467 U.S. at 241.

¹⁷⁴ *Kelo*, 125 S.C. at 2674-77 (O’Conner, J., dissenting); *id.* at 2685-88 (Thomas, J., dissenting).

¹⁷⁵ For the most complete listing available, see <http://www.castlecoalition.org/legislation/states/index.asp> (visited Oct. 14, 2005).

Despite the outraged public reaction to *Kelo*, the decision is consistent with the Court's two most famous earlier public use decisions, both of which gave the government even more deference than the *Kelo* majority. In the 1954 case of *Berman v. Parker*, the Court upheld a Washington, DC condemnation justified on the grounds of alleviating urban "blight."¹⁷⁶ Although there was little doubt that the area in question was indeed severely blighted,¹⁷⁷ a unanimous Court went beyond the narrow conclusion that government could condemn property for the purposes of alleviating blight, and emphasized the supposed need for extreme deference to legislative determinations of public use. Justice Douglas' opinion for the Court claimed that "[t]he role of the judiciary in determining whether [eminent domain] is being exercised for a public purpose is an extremely narrow one."¹⁷⁸ If the "legislature has spoken, the public interest has been declared in terms well-nigh conclusive."¹⁷⁹ The fact that the condemned property was to be transferred to another private owner was specifically rejected as a basis for invalidating the taking or even for subjecting it to greater scrutiny.¹⁸⁰

The Court was perhaps even more deferential to government in its next major public use case, the 1984 decision in *Midkiff v. Hawaii Housing Authority*.¹⁸¹ *Midkiff* was the result of an unusual factual background. For complicated historical reasons, some 47% of the land in Hawaii was owned by "only 72 private landowners," while another 49% was held by the federal or state governments.¹⁸² The state claimed that the 72 landowners had established an "oligopoly" in the market for land and decided to establish a program to condemn the property. Although there is serious doubt as to whether there really was a landowner oligopoly setting prices above the market level,¹⁸³ the Supreme Court accepted the state's claim that one existed at face value.

¹⁷⁶ 348 U.S. 26 (1954).

¹⁷⁷ See *id.* at 30 (noting that "64.3% of the dwellings [in the area] were beyond repair, 18.4% needed major repairs, only 17.3% were satisfactory").

¹⁷⁸ *Id.* at 32.

¹⁷⁹ *Id.*

¹⁸⁰ *Id.* at 33-34.

¹⁸¹ 467 U.S. 229 (1984).

¹⁸² *Id.* at 232.

¹⁸³ See Sumner Lacroix & Louis Rose, *Public Use, Just Compensation, and Land Reform in Hawaii*, 17 Res. L. & Econ. 7 (1995) (presenting evidence that there was no real exercise of monopoly power in the Hawaii land market). Even if there was an oligopoly problem, Hawaii's use of eminent domain did little to increase the availability of land

While the Court could have upheld the Hawaii condemnations on the relatively narrow ground that “[r]egulating oligopoly and the evils associated with it is a classic exercise of a State’s police powers,”¹⁸⁴ it chose – as in *Berman* – to go beyond the facts of the case and endorsed a much broader doctrine of deference to government power. In a unanimous opinion written by Justice O’Connor, the Court held that the scope of public use is “coterminous with the scope of a sovereign’s police powers” and that takings must be upheld under the Public Use Clause so long as “the exercise of eminent domain power is rationally related to a conceivable public purpose.”¹⁸⁵

In light of the extremely deferential language in *Berman* and especially *Midkiff*, most expert observers believed that the Fifth Amendment public use constraints on takings were virtually dead. The *Kelo* case, therefore, was surprising less for its pro-government outcome than for the fact that it in some ways represented a retreat from the *Berman-Midkiff* consensus.

B. The facts of *Kelo*.

The *Kelo* case arose from the condemnation of ten residences and five other properties as part of a 2000 “development plan” in New London, Connecticut that sought to transfer the property to private developers for the stated purpose of promoting economic growth in the area.¹⁸⁶ Unlike in *Berman*, none of the properties in question were alleged to be “blighted or otherwise in poor condition.”¹⁸⁷ The condemnations were initiated pursuant to a plan prepared by the New London Development Corporation (NLDC), a “private nonprofit entity established . . . to assist the City in planning economic development.”¹⁸⁸ The constitutionality of the plan was upheld by the Supreme Court of Connecticut in a

on the housing market. See Eric Young & Kerry Kamita, Extending Land Reform to Leasehold Condominiums in Hawaii, 14 U. Haw. L. Rev. 681 (1992) (arguing that the land reform program upheld in *Midkiff* did little to make more land available to tenant farmers); WILLIAM A. FISCHER, REGULATORY TAKINGS 72 (1995) (same). However, the Supreme Court did not appear to doubt either the existence of an oligopoly or the appropriateness of eminent domain as a solution to the problem.

¹⁸⁴ Id. at 242..

¹⁸⁵ Id. at 240-41.

¹⁸⁶ *Kelo v. City of New London*, 125 S.Ct. 2655, 2658-60 (2005).

¹⁸⁷ Id. at 2660.

¹⁸⁸ Id. at 2659.

4-3 decision,¹⁸⁹ after which the U.S. Supreme Court granted certiorari and agreed to hear the defendants' appeal.

The NLDC plan was initially intended to work in conjunction with the construction of a new research facility in the area by pharmaceutical giant Pfizer, Inc.¹⁹⁰ Otherwise, the New London development plan was, in considerable part, vague in its projected uses for the condemned properties. Some of the properties are located in "Parcel 3" of the plan, which is supposed to be used for "research and development office space;" the rest were in Parcel 4A, a "2.4 acre site that will be used either to support the adjacent state park, by providing parking or retail services for visitors, or to support the nearby marina."¹⁹¹

Even more importantly, there were few indications that the planned condemnations would actually achieve the economic benefits that were used to justify them. As Justice Zarella pointed out in a detailed dissent in the Connecticut Supreme Court, at the time of the condemnation there was no signed development agreement providing for the future exploitation of the condemned property, a circumstance that greatly reduced the chances achieving any economic development, and made it "impossible to determine whether future development of the area primarily will benefit the public or will even benefit the public at all."¹⁹² Justice Zarella also pointed out that the proposed development plan imposed few restrictions on the new private owners of the condemned property and flew in the face of market conditions that made it unlikely that the city would be able to reap significant economic benefits from the condemnations.¹⁹³ In weighing the expected economic benefits of the plan, the City failed to even consider "the loss in revenue that could result from the relocation of former residents and taxpayers out of

¹⁸⁹ *Kelo v. City of New London*, 843 A.2d 500 (Conn. 2004), *aff'd* 125 S.Ct. 2655 (2005).

¹⁹⁰ *Kelo*, 125 S.Ct. at 2659.

¹⁹¹ *Id.* at 2659-60.

¹⁹² *Kelo v. City of New London*, 843 A.2d 500, 596 (Conn. 2004) (Zarella, J., dissenting), *aff'd* 125 S.Ct. 2655 (2005).

¹⁹³ *Id.* at 597-602.

the area” or to weigh the loss of \$80 million in public money that had already been committed to the project.¹⁹⁴

The development plan’s prospects were further called into question by Pfizer’s apparent retreat from its earlier interest in the project. By 2002 - three years before the US Supreme Court heard the case - the pharmaceutical giant was no longer interested in utilizing the new facilities expected to be built in the development area.¹⁹⁵ Thus, the economic utility of the condemnations became even more questionable.

Finally, it is important to recognize that both the majority and dissenting justices in the U.S. Supreme Court, as well as their counterparts in the Connecticut Supreme Court, assumed that the New London condemnations arose from the NLDC’s and the city government’s desire to promote economic development, not from interest group lobbying by Pfizer or other private parties.¹⁹⁶ This assumption was perhaps understandable on the basis of the record before the Court. But it nonetheless turned out be flawed in ways that call into question some of the arguments used to justify the Court’s decision.¹⁹⁷

C. The *Kelo* opinions.

1. The majority opinion.

The opinion of the Court written by Justice Stevens was relatively unsurprising in light of *Berman* and *Midkiff*. Like those earlier precedents (on which the *Kelo* majority heavily relied), it emphasized the need to maintain the Court’s “policy of deference to legislative judgment in this field.”¹⁹⁸

¹⁹⁴ Id. at 598-99.

¹⁹⁵ See Kate Moran, *Developer Says Fort Trumbull Hotel Plan Not Viable Since 2002; Project Became Unrealistic Without Pfizer Commitment*, THE DAY, June 12, 2004, at C4 (describing Pfizer’s loss of interest in the project and resort to alternative arrangements to house its employees).

¹⁹⁶ See *Kelo*, 125 S.Ct. at 2661 (asserting that “there was no evidence of illegitimate purpose in the case”); id. at 2670-71 (Kennedy, J., concurring) (stating that there is no evidence of “an impermissible private purpose” in *Kelo*); id. at 2671 (O’Connor, J., dissenting) (stating that the NLDC had acted “[c]onsistent[ly] with its mandate” to “assist the city council in economic development planning”); *Kelo*, 843 A.2d at 538-41 (concluding that the NLDC and New London were not motivated by a desire to advance Pfizer’s interests); id. at 595 (Zarella, J., dissenting) (stating that “[t]he record clearly demonstrates that the development plan was not intended to serve the interests of Pfizer, Inc., or any other private entity, but rather, to revitalize the local economy”).

¹⁹⁷ See nn. __ and accompanying text.

¹⁹⁸ Id. at 2663.

The majority rejected the property owners’ argument that the transfer of their property to private developers rather than to a public body required any heightened degree of judicial scrutiny.¹⁹⁹ It also refused to require the City to provide any evidence that the takings were likely to actually achieve the claimed economic benefits that provided their justification in the first place.²⁰⁰ On all these points, the *Kelo* majority chose not to “second-guess the City’s considered judgments about the efficacy of the development plan.”²⁰¹ Though the majority position on these issues was doctrinally consistent with previous Supreme Court decisions, it is vital to recognize that the factual circumstances of *Kelo* were considerably different from those of the earlier cases. For the first time, the Supreme Court upheld the condemnation of nonblighted residential property for transfer to private interests solely on the ground that the resulting transfer might increase economic development. While this result is consistent with preexisting doctrine, it nonetheless makes explicit a threat to ordinary middle and working class homeowners that in the earlier cases was merely latent.

The majority also justified its emphasis on deference by relying on cases from “the late nineteenth” and early twentieth centuries that supposedly “embraced the broader and more natural interpretation of public use as ‘public purpose.’”²⁰² As we shall see, these Progressive-era precedents did not purport to apply the Public Use Clause, but instead addressed challenges to takings based on *Lochner*-era doctrines of economic substantive due process under the Due Process Clause of the Fourteenth Amendment.²⁰³

Despite the broad theme of deference and the extensive reliance on *Berman* and *Midkiff*,²⁰⁴ Stevens’ majority opinion nonetheless departs from near-total deference in two ways. First, references to *Midkiff*’s ultra-deferential statement that takings will be upheld if they are “rationally related to a

¹⁹⁹ Id. 2666.

²⁰⁰ Id. at 2667-68.

²⁰¹ Id. at 2668.

²⁰² Id. at 2662-64 & nn. 9-11.

²⁰³ See § III.D.2, *infra*.

²⁰⁴ See, e.g., *Kelo*, 125 S.Ct. at 2663-64, 2667-68 (relying on these two precedents extensively).

conceivable public purpose,”²⁰⁵ are conspicuous by their absence. Nor does the *Kelo* majority rely on the almost equally broad *Midkiff* claim that the scope of public use is “coterminous with the scope of a sovereign’s police powers.”²⁰⁶

Second, Stevens’ opinion emphasizes the importance of the fact that the New London takings were part of a “comprehensive” development plan.²⁰⁷ Stevens distinguished between such condemnations and a “one-to-one transfer of property, executed outside the confines of an integrated development plan.”²⁰⁸ The latter scenario, Stevens notes, “raises the suspicion that a private purpose was afoot” and might potentially be unconstitutional.²⁰⁹

Even if we read the majority opinion as requiring that economic development condemnations be part of a “comprehensive” development plan, this rule is unlikely to impose any meaningful constraints on the condemnation powers of local governments. Since Stevens also emphasized that the Court will not “second-guess” either “the efficacy” of development plans or condemning authorities’ “determinations as to what lands [they] need to acquire,” it will almost always be possible for officials to concoct a plan to justify almost any condemnations they might wish to undertake.²¹⁰ Indeed, *99 Cents Only Stores v. Lancaster Redevelopment Agency*, the case cited by Stevens as an example of a pure “one-to-one transfer,”²¹¹ actually struck down a taking that the government justified as necessary to implement a redevelopment plan.²¹²

Still, the *Kelo* majority’s limited withdrawal from the ultra-deferential approach adopted in *Midkiff*, represents at least a small concession to increasing skepticism about the use of eminent domain. A future Court could potentially give some teeth to this element of *Kelo* by imposing substantive standards on the quality of development plans, by requiring cities to present at least some real evidence

²⁰⁵ *Midkiff*, 467 U.S. at 241.

²⁰⁶ *Id.* at 240.

²⁰⁷ *Kelo*, 125 S.Ct. at 2665.

²⁰⁸ *Id.* at 2667.

²⁰⁹ *Id.*

²¹⁰ *Id.* at 2668.

²¹¹ *Id.* at 2667 n.17.

²¹² See *99 Cents Only Store v. Lancaster Redev. Agency*, 237 F.Supp.2d 1123, 1125-26 (C.D. Cal. 2001) (noting that the case involves condemnation powers established pursuant to the “Amargosa Redevelopment Plan”).

that condemnation is indeed necessary to achieve the claimed public benefits of the plan, or by requiring them to present proof that the development plan in question is not merely a pretext for efforts to benefit private interests. Even these steps would fall well short of eliminating all eminent domain abuse. But it is nonetheless worth noting that *Kelo* leaves the door to them at least slightly ajar, whereas *Berman* and especially *Midkiff* had virtually slammed it shut.

2. Justice Kennedy's concurrence.

Justice Kennedy's concurrence holds out the prospect of more stringent judicial review of public use in two different ways. First, he suggests that the *Berman-Midkiff* standard of review should not be interpreted as requiring virtually complete deference to government determinations of public use. Second, and perhaps more radically, he leaves open the possibility that some takings should actually be presumed invalid.

Unlike the majority opinion, Kennedy reiterates *Midkiff's* highly deferential "rational-basis test."²¹³ However, he emphasizes that "[t]he determination that a rational-basis standard of review is appropriate does not . . . alter the fact that transfers intended to confer benefits on particular, favored, private entities, and with only incidental or pretextual public benefits, are forbidden by the Public Use Clause."²¹⁴ He contends that deference to condemning authorities might be relaxed if there is "a plausible accusation of impermissible favoritism to private parties."²¹⁵ In such cases, courts must "treat the objection as a serious one and review the record to see if it has merit."²¹⁶

Under Kennedy's approach, a court should "strike down a taking that, by a clear showing, is intended to favor a particular private party, with only incidental or pretextual public benefits."²¹⁷ This is intended to be rational basis review with at least some real bite, a point that Kennedy drives home by analogizing his approach to cases that use the Equal Protection Clause to strike down "classification[s]

²¹³ See *id.* (citing *Midkiff*, 467 U.S. at 241).

²¹⁴ *Id.*

²¹⁵ *Id.* at 2669 (Kennedy, J., concurring).

²¹⁶ *Id.*

²¹⁷ *Id.*

that [are] clearly intended to injure a particular class of private parties.”²¹⁸ These cases struck down classifications despite the fact that they would have been upheld under a straightforward application of the rational basis test that required the government to show merely that classification was “rationally related” to some possible public purpose.

Furthermore, Kennedy holds open “the possibility that a more stringent standard of review than that announced in *Berman* and *Midkiff* might be appropriate for a more narrowly drawn category of takings . . . in which the risk of undetected impermissible favoritism to private parties is so acute that a presumption (rebuttable or otherwise) of invalidity is warranted under the Public Use Clause.”²¹⁹ Kennedy is careful to note that such a presumption of invalidity will not be triggered merely by the fact that the condemnation is justified on the basis of promoting “economic development” and he refuses to engage in “conjecture as to what sort of cases might justify a more demanding standard.”²²⁰ Even so, Kennedy’s approach holds out the possibility of more stringent judicial review of public use in some types of cases.

The exact import of Kennedy’s opinion is extremely difficult to judge. Although he was the swing voter in a 5-4 decision, he signed on to the majority opinion and did not merely concur in judgment. This makes it difficult to tell to what extent there really is a difference between his view and that of the other four justices in the majority.²²¹ Furthermore, Kennedy is vague in his explanation of what would count as “a clear showing [that a condemnation] is intended to favor a particular private party, with only incidental or pretextual public benefits.”²²² And, as already noted, he refused to explain what circumstances, if any, would trigger a “presumption of invalidity.”²²³ Finally, as we shall see, it is far

²¹⁸ Id. (citing *Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432 (1985); and *Dep’t of Agriculture v. Moreno*, 413 U.S. 528 (1973)).

²¹⁹ Id. at 2670.

²²⁰ Id.

²²¹ See Richard A. Posner, *Foreword: A Political Court*, 119 Harv. L. Rev. 31, 95 (2005) (criticizing Kennedy for not concurring in the judgment only because he left “the reader uncertain whether the majority opinion or the concurring opinion should be regarded as the best predictor of how the Court would decide a similar case in the future”).

²²² *Kelo*, 125 S.Ct. at 2669 (Kennedy, J., concurring).

²²³ Id. at 2670.

from clear that inquiries into government motives – even if seriously pursued - can succeed in curbing eminent domain abuse.²²⁴

Thus, the future significance of Kennedy’s opinion is highly conjectural. This is particularly true in light of the fact that two of the four *Kelo* dissenters (Chief Justice Rehnquist and Justice O’Connor) have now left the Court; thus, we can no longer be certain if Justice Kennedy is still the Court’s median voter on public use issues.

These essential caveats notwithstanding, Justice Kennedy’s opinion, more so than Stevens’ majority opinion, leaves open the door for a retreat from judicial deference on public use issues. Whether a future Court will choose to enter that door remains to be seen.

3. The dissents.

The principal dissent in *Kelo* was written by Justice O’Connor, a striking development in light of her earlier authorship of the Court’s opinion in *Midkiff*, the most deferential of all the Court’s public use decisions.²²⁵ Even more striking is the fact that O’Connor and the other dissenters not only would have invalidated the New London takings, but would categorically forbid all private-to-private condemnations undertaken for the purpose of “economic development.”²²⁶ It is somewhat surprising (and for property rights advocates, heartening) that four justices were willing to take such a position despite the availability of narrower grounds for striking the New London takings, such as the lack of proof that the claimed benefits of the condemnations would ever be realized.²²⁷

Justice O’Connor acknowledges that the majority decision in “a sense . . . follows from errant language in *Berman* and *Midkiff*.”²²⁸ She therefore explicitly repudiates *Midkiff*’s statement that the scope of public use is “coterminous with the scope of a sovereign’s police powers” and *Berman*’s holding that

²²⁴ see nn.____ accompanying text.

²²⁵ See discussion §III.A.

²²⁶ *Kelo*, 125 S.Ct. at 2673 (O’Connor, J., dissenting).

²²⁷ This argument was advanced by the dissenters in the Connecticut Supreme Court. See *Kelo*, 843 A.2d 500, 596-603 (Conn. 2004), aff’d 125 S.Ct. 2655 (2005) (Zarella, J., dissenting).

²²⁸ *Kelo*, 125 S.Ct. at 2675 (O’Connor, J., dissenting).

legislatures could use eminent domain to accomplish any “object” otherwise within their authority.²²⁹ Strangely, she does not also reject – or even refer to – the *Midkiff* “rational basis” standard, despite the discussion of it in Justice Kennedy’s opinion. O’Connor would not, however, overrule *Berman* and *Midkiff*, which she believes were justified on the grounds that they eliminated “precondemnation use[s] of the targeted property [that] inflicted affirmative harm on society.”²³⁰ This emphasis on eliminating harmful preexisting uses is similar to Michigan Supreme Court’s effort to distinguish permissible blight condemnations from impermissible “economic development” takings.²³¹

O’Connor’s main argument is the claim that allowing economic development condemnations forecloses the possibility of any meaningful limits on the scope of condemnation. Because it is always possible to claim that transferring property from one owner to another would increase economic production, “[t]he specter of condemnation hangs over all property.”²³² Despite her admission that the Court’s decision was in part based on *Midkiff* and *Berman*, O’Connor contends that the *Kelo* majority “significantly expands the meaning of public use.”²³³ This argument is difficult to credit in light of the fact that the majority’s definition of public use is actually slightly narrower than O’Connor’s own expansive statement of the concept in *Midkiff*.²³⁴ Indeed, archival evidence strongly suggests that the justices who decided *Berman* and *Midkiff*, including O’Connor, were well aware that these decisions would have the effect of almost completely eliminating federal judicial review of public use issues.²³⁵

Unlike the majority, O’Connor emphasizes that the political processes that control condemnation are often defective and she expresses concern that “the fallout from this decision will not be random” but

²²⁹ *Id.* (repudiating *Berman*, 348 U.S. at 32 and *Midkiff*, 467 U.S. at 240).

²³⁰ *Id.* at 2674.

²³¹ See discussion in §IV.C.

²³² *Kelo*, 125 S.Ct. at 2676 (O’Connor, J., dissenting).

²³³ *Id.*

²³⁴ See nn. _____ and accompanying text.

²³⁵ See Benjamin Barros, *Nothing 'Errant' About It: The Berman and Midkiff Conference Notes and how the Supreme Court got to Kelo with its Eyes Wide Open*, (unpublished paper, May 17, 2006), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=902926 (visited July 9, 2006).

will instead sanction takings that victimize “those with fewer resources” for the benefit of “those with more.”²³⁶

Justice Thomas’ dissent is an even more thoroughgoing attack on the majority than O’Connor’s. Like O’Connor (whose dissent he joined), Thomas emphasizes the danger that economic development takings could target virtually any property and expresses concern that areas inhabited by the poor and minorities are likely to be disproportionately affected.²³⁷ Yet he would go much farther than this and perhaps actually overrule *Midkiff*, *Berman*, and other cases endorsing a broad definition of public use.²³⁸ Thomas “would revisit our Public Use Clause cases and consider returning to the original meaning of the Public Use Clause: that the government may take property only if it actually uses or gives the public a legal right to use the property.”²³⁹

Much of Thomas’ argument is based on a detailed analysis attempting to show that the original meaning of “public use” encompassed only condemnations that resulted in actual ownership by the state or a legal right of the public to use the condemned property.²⁴⁰ This aspect of Thomas’ opinion will not be analyzed in detail here. But it is important to recognize that, while its conclusion may be correct, the opinion fails to address opposing views that cite evidence suggesting that the original meaning of public use was broader than Thomas suggests.²⁴¹

D. Assessing *Kelo*.

While *Kelo* represents a modest advance over the extreme deference to government power established in *Berman* and *Midkiff*, it still has significant flaws. These include failure to take into account defects in the political process underlying takings, misinterpretation of relevant precedents, and an

²³⁶ *Kelo*, 125 S.Ct. at 2677 (O’Connor, J., dissenting).

²³⁷ *Id.* at 2678, 2687 (Thomas, J., dissenting).

²³⁸ *Id.* at 2685-86.

²³⁹ *Id.* at 2686.

²⁴⁰ *Id.* at 2681-85.

²⁴¹ See, e.g., William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 Colum. L. Rev. 782 (1995) (arguing that the original meaning of the takings clause was merely to prevent uncompensated physical takings of property); Rubinfeld, *supra* note ____ (same).

excessive confidence in judicial ability to ferret out on a case-by-case basis takings characterized by impermissible “favoritism” to private parties.

1. Deferring to a flawed political process.

Deference to the political process is the central theme of *Kelo*, as of *Berman* and *Midkiff* before it.²⁴² This stance has several major shortcomings. It fails to come to grips with the many defects of the political processes underlying economic development takings. As we have seen, these flaws make it likely that the condemnation process will be captured by interest groups, with the result that numerous takings might be undertaken whose costs greatly outweigh their benefits.²⁴³ Perhaps the most striking aspect of the Court’s stance is not that it came down on the side of deference, but that it failed to even consider the possibility that flaws in the political process might justify a stronger judicial role.

The Court’s advocacy of deference might be more defensible if it had concluded, as do some commentators, that the text and original meaning of the Public Use Clause simply do not place any substantive limits on the scope of eminent domain.²⁴⁴ Yet the *Kelo* majority, like the *Berman* and *Midkiff* courts before it, did not take that view. Instead, it emphasized that “the City would no doubt be forbidden from taking petitioners’ land for the purpose of conferring a private benefit on a particular private party.”²⁴⁵ However, it concluded that the judgment as to whether a particular taking is purely private is almost completely left up to the government, in order to “afford legislatures broad latitude in determining what public needs justify the use of the takings power.”²⁴⁶ In effect, the Court’s position gives state and local governments the power to determine the scope of an individual right guaranteed by the Bill of Rights, with little or no judicial scrutiny.

²⁴² See §§ III.A, III.B.1.

²⁴³ See Parts I-II, *infra*.

²⁴⁴ See, e.g., Rubinfeld, *supra* note ____.

²⁴⁵ *Kelo*, 125 S.Ct. at 2661; see also *Midkiff*, 467 U.S. at 245 (noting that “a purely private taking could not withstand the scrutiny of the public use requirement”).

²⁴⁶ *Id.* at 2664.

This holding might be understandable if there were little or no reason to expect government to overreach or to be “captured” by private interests seeking to benefit from the use of the eminent domain power. In fact, however, there are numerous reasons to expect problems in this area.²⁴⁷

At the very least, there is no reason to expect government to be able to police itself in the public use field better than it does with respect to most other individual constitutional rights. As James Ely notes, “among all the guarantees of the Bill of Rights, only the public use limitation is singled out for heavy [judicial] deference.”²⁴⁸ In his dissent, Justice Thomas rightly emphasizes that the Court’s approach is in serious tension with its much more aggressive stance in enforcing other constitutional rights, such as the Fourth Amendment right to be free from “unreasonable” searches and seizures.²⁴⁹ As Thomas puts it, the Court is willing to second guess legislative judgments “when the issue is only whether government may search a home,” yet is unwilling to question “the infinitely more intrusive step of tearing down . . . homes.”²⁵⁰

The Court’s deferential approach on public use also directly conflicts “with its handling of the other constitutional check on eminent domain, the just compensation requirement.”²⁵¹ In this field, the Court has consistently refused to defer to legislative judgment and has forced government to pay “fair market value.”²⁵² Yet it is difficult to understand why a government that can be trusted to determine when property should be condemned cannot also be trusted to determine what constitutes “just compensation.”²⁵³ The difference cannot simply be a matter of deference to legislative “expertise.” The question of determining how much compensation should be paid is often no less complex than that of public use. Neither is a field where the judiciary is likely to have greater technical expertise than the

²⁴⁷ See discussion in Parts I-II.

²⁴⁸ James T. Ely, Jr., “*Poor Relation*” *Once More: The Supreme Court and the Vanishing Rights of Property Owners*, 2005 CATO SUP. CT. REV. 39, 62.

²⁴⁹ U.S. Const. Amend. IV.

²⁵⁰ *Kelo*, 125 S.Ct. at 2685 (Thomas, J., dissenting).

²⁵¹ Ely, *supra* note __ at 63.

²⁵² See *United States v. 564.54 Acres of Land*, 441 U.S. 506, 511 (1979) (noting that “the Court . . . has employed the concept of fair market value to determine the condemnee’s loss” and the amount of compensation due).

²⁵³ U.S. Const. Amend. V.

legislature.²⁵⁴ More broadly, it is likely that legislative and executive officials also have greater expertise than judges on such traditional constitutional questions as whether or not a given search is “reasonable,” whether or not a particular type of speech should be suppressed, and whether racial or gender classifications are necessary to advance the public interest.

It may theoretically be possible to articulate a defense for the combination of heavy deference on public use and active judicial scrutiny of just compensation and other individual rights. Yet the *Kelo* majority does not even attempt to provide one.

2. Ferreting out favoritism?

A second shortcoming of the *Kelo* majority is their excessive confidence that courts can ferret out “improper” favoritism to private interests, while still maintaining a highly deferential posture. Justice Stevens’ majority opinion maintains that the risk of favoritism in economic development takings can be eliminated, or at least minimized so long as the taking in question is part of an “integrated development plan.”²⁵⁵ Justice Kennedy, in his concurring opinion, argues that undue favoritism can be prevented so long as “[a] court confronted with a plausible accusation of impermissible favoritism to private parties . . . treat[s] the objection as a serious one and review[s] the record to see if it has merit, though with the presumption that the government’s actions were reasonable and intended to serve a public purpose.”²⁵⁶

Neither approach is likely to be as effective as its advocates assume. The requirement of having an “integrated development plan” is especially unlikely to fulfill its purpose, as nearly all economic development takings are initiated as part of some sort of plan; this was even true of the case that Stevens’ opinion cites as a paradigmatic example of impermissible favoritism.²⁵⁷ Even if the jurisdiction in question did not initially intend to adopt a plan, after *Kelo*, it would surely choose to do so in order to

²⁵⁴ See Glenn S. Lunney, *Compensation for Takings: How Much is Just?* 42 CATH. U. L. REV. 721 (1993) (describing complex alternative methodologies for determining compensation); Robert C. Ellickson, *Alternatives to Zoning: Covenants, Nuisance Rules, and Fines as Land Use Control*, 40 U. CHI. L. REV. 681, 736-37 (1973) (arguing that condemning authorities should provide compensation at levels above fair market value).

²⁵⁵ *Kelo*, 125 S. Ct. at 2667.

²⁵⁶ *Id.* at 2669 (Kennedy, J., concurring).

²⁵⁷ See nn. ___ and accompanying text.

insulate itself from legal challenge. Since the *Kelo* majority specifically indicates that courts should not “second-guess” the plan’s quality or likelihood of it actually achieving its goals,²⁵⁸ even a very poorly designed plan is likely to be enough to pass muster.

The requirement of an integrated development may potentially stymie an extremely poor local government that cannot afford to put together even a rudimentary plan or an extremely incompetent one that does not think to do so even after *Kelo*. But it is highly unlikely that any significant number of dubious condemnations will be prevented.

Justice Kennedy’s approach at first glance seems more promising. Since he would require courts to investigate the possibility of favoritism in a relatively nondeferential way,²⁵⁹ there is at least some chance that courts acting as he recommends might uncover abuses in cases where they have occurred.

However, Kennedy’s model suffers from two important shortcomings: the possibility that favoritism is much more difficult to detect than he seems to suppose and the difficulty of dealing with cases where motives are mixed. In the real world, the pursuit of public and private benefit is often much more closely intertwined than Kennedy assumes.

The history of the *Kelo* case itself casts serious doubt on Kennedy’s assumption that courts can effectively ferret out illegitimate motives. The Connecticut trial court, all seven justices of the state supreme court, and both the majority and dissenting justices in the U.S. Supreme Court all concluded that the takings arose from the New London authorities’ desire to promote economic development, not from interest group lobbying by Pfizer or other private interests.²⁶⁰ Unfortunately, this assumption turned out to be wrong. Evidence uncovered by an investigative reporter for the New London newspaper *The Day* several months after the *Kelo* decision was issued shows that Pfizer “ha[d] been intimately involved in the

²⁵⁸ *Kelo*, 125 S.Ct. at 2668.

²⁵⁹ see nn. _____ and accompanying text.

²⁶⁰ See *Kelo*, 125 S.Ct. at 2661 (asserting that “there was no evidence of illegitimate purpose in the case”); *id.* at 2670-71 (Kennedy, J., concurring) (stating that there is no evidence of “an impermissible private purpose” in *Kelo*); *id.* at 2671 (O’Connor, J., dissenting) (stating that the NLDC had acted “[c]onsistent[ly] with its mandate” to “assist the city council in economic development planning”); *Kelo*, 843 A.2d at 538-41 (concluding that the NLDC and New London were not motivated by a desire to advance Pfizer’s interests); *id.* at 595 (Zarella, J., dissenting) (stating that “[t]he record clearly demonstrates that the development plan was not intended to serve the interests of Pfizer, Inc., or any other private entity, but rather, to revitalize the local economy”).

project since its inception” and that the NLDC development plan and associated condemnations was “a condition of Pfizer’s move” to New London.²⁶¹ Despite longstanding denials by both Pfizer executives and New London officials, documents obtained by *The Day* through state Freedom of Information Act requests show that the NLDC condemnations were undertaken in large part as a result of extensive Pfizer lobbying of state and local officials.²⁶² Pfizer representatives apparently demanded the redevelopment plan and its associated takings as a quid pro quo for its agreement to build a new headquarters in New London.²⁶³

The significance of these revelations about Pfizer’s influence over the New London condemnation decision extends well beyond their implications for the *Kelo* case itself. During the trial, the Institute for Justice lawyers who represented the New London property owners presented some evidence pointing to Pfizer’s role. This material included statement by James Hicks, executive vice president of a firm that helped develop the New London development plan, indicating that Pfizer was the “10,000 pound gorilla” behind the project.²⁶⁴ Nonetheless, both the trial court and the Connecticut Supreme Court concluded that the plan was primarily intended to benefit New London rather than Pfizer.²⁶⁵ Despite almost five years of litigation,²⁶⁶ massive coverage by both national and local media, and detailed judicial review by both state and federal courts, the extent of Pfizer’s role was not fully appreciated until after the case was over.

This history strongly suggests that timely exposure of favoritism towards private interests will be even less likely in ordinary economic development takings cases. Such cases are likely to receive little or no public scrutiny, and of course few will be reviewed by state or federal supreme courts. Moreover, most

²⁶¹ Ted Mann, *Pfizer’s Fingerprints on Fort Trumbull Plan*, THE DAY, Oct. 16, 2005.

²⁶² Id.

²⁶³ See id. (noting that state officials have admitted that “the redevelopment project” was “an integral part of the state’s deal with Pfizer” and that “the company would have built its headquarters in New London” without being assured that the surroundings would undergo radical change”).

²⁶⁴ Quoted in *Kelo*, 843 A.2d at 537. For other evidence of Pfizer’s involvement presented at the trial see, e.g., letter from Claire L. Gaudiani, President, New London Development Corporation to George Milne, Jr., President, Pfizer Corporation, Dec. 15, 1997 (indicating willingness to accommodate Pfizer’s needs in order to persuade the corporation to build a facility in New London) (available from the author) (entered into evidence before the *Kelo* trial court).

²⁶⁵ Id. at 537-38 (endorsing trial court’s findings on this point).

²⁶⁶ The condemnations were initiated in November 2000. *Kelo*, 125 S.Ct. at 2660.

property owners are likely to be represented by counsel with considerably less commitment, skill, resources, and experience than the Institute for Justice lawyers who provided pro bono representation for Susette Kelo and the other New London owners.²⁶⁷ Although the IJ lawyers were able to uncover at least some of the evidence pointing to Pfizer's role in the New London condemnations, it is likely that the less skilled and experienced lawyers who litigate most eminent domain cases will often be unable to achieve the same level of success.

Justice Kennedy's framework might trip up an occasional foolish or incompetent local government that makes the mistake of admitting improper motives. But the history of the *Kelo* takings strongly suggests that such cases are likely to be extremely rare. If New London and Pfizer were able to successfully conceal the true nature of their transactions even in the face of unprecedented public and judicial scrutiny, other localities and their favored private interests are likely to be at least equally effective under the far less adverse circumstances of ordinary eminent domain litigation.

Even more fundamentally, Justice Kennedy's approach is unlikely to be effective because it assumes an unrealistically clear separation between public and private interests. Almost any new commercial development will provide at least *some* benefit to the local economy in the form of increased employment or additional tax revenue for local government. For example, Pfizer's lobbying for the New London condemnations succeeded in part because of its claim that the establishment of its new headquarters in the city would generate 2000 jobs.²⁶⁸ Local officials can always cite such benefits as their "true" motivation and label any benefit to private parties incidental. Moreover, such assertions will not always be disingenuous. Like most other people, local government officials and the private interest groups they promote are likely to genuinely believe that policies that serve their political and economic self-interest also advance the public good.²⁶⁹ The problem is that in the absence of the sort of judicial

²⁶⁷ The Institute is a prominent libertarian public interest law firm with an extensive background in eminent domain litigation, including noteworthy victories such as the widely publicized 1998 invalidation of an Atlantic City effort to condemn an old woman's home for the purpose of building a parking lot for one of Donald Trump's casinos. *See* *Casino Reinv. Dev. Auth. v. Banin*, 727 A.2d 102 (N.J. Super. Ct. 1998).

²⁶⁸ Mann, *supra* note ____.

²⁶⁹ See nn. and accompanying text.

“second-guessing” that *Kelo* forbids, political leaders will often have strong incentives to pursue economic development condemnations whose costs to the community far outweigh their benefits.²⁷⁰

As Justice O’Connor’s points out in her dissent, “[w]hatever the details of Justice Kennedy’s as-yet-undisclosed test, it is difficult to envision anyone but the ‘stupid staffer’ failing it . . . The trouble with economic development takings is that private benefit and incidental public benefit are, by definition, merged and mutually reinforcing.”²⁷¹

Kennedy’s opinion is vague as to how much favoritism for private interests has to be found before a court can declare the resulting condemnations unconstitutional, or even what kind of evidence is necessary to trigger a less deferential form of judicial scrutiny than that applied by the majority.²⁷² At least some passages suggest that the sort of evidence revealed by *The Day* might have been sufficient to at least trigger “a more demanding standard” of scrutiny.²⁷³ For example, Kennedy states that his endorsement of the majority opinion was in part based on the purported fact that “[t]he identity of most of the private beneficiaries [of the condemnations] were unknown at the time the city formulated its plans,”²⁷⁴ an assertion falsified by the revelations about Pfizer’s dominant role in the initiation of the project. However, it is not clear whether this factor alone would be enough to cast doubt on a taking in Kennedy’s eyes.

Be that as it may, it is likely that even very detailed judicial scrutiny of the motivations behind economic development takings will fail to ferret out numerous instances of favoritism towards private interests. Experience under the pre-*Hathcock* Michigan state court doctrine of “heightened scrutiny” for all private-to-private condemnations - essentially a more rigorous version of Justice Kennedy’s approach - shows that this methodology often fails to prevent even very serious cases of abuse.²⁷⁵ Most notably, the “heightened scrutiny” doctrine failed to block the notorious *Poletown* condemnations in the case in

²⁷⁰ See §§ I.B-D, *infra*.

²⁷¹ *Kelo*, 125 S.Ct. at 2675 (O’Connor, J., dissenting).

²⁷² See *Kelo*, 125 S.Ct. at 2670 (Kennedy, J., concurring) (noting that “[t]his is not the occasion for conjecture as to what sort of cases might justify a more demanding standard of review”).

²⁷³ *Id.*

²⁷⁴ *Id.*

²⁷⁵ See discussion in §II.A.

which the rule was first adopted.²⁷⁶ Unfortunately, both Kennedy and the majority opinion completely ignore the pre-*Hathcock* Michigan experience.

Whatever the precise nature of Justice Kennedy's "as-yet-undisclosed" thinking,²⁷⁷ it is unlikely to matter greatly in the short term. Because Kennedy chose to endorse the majority opinion rather than concur in judgment only, his concurrence has no legally binding effect.²⁷⁸ On the other hand, Kennedy's approach may have some influence if he continues to be the Court's swing voter on public use issues.²⁷⁹ And even if Kennedy fails to persuade the U.S. Supreme Court to accept his view, it could potentially influence state courts. For these reasons, it is important to understand its significant shortcomings.

3. Reliance on inapplicable precedent.

a. Conflation of "substantive due process" precedents and public use.

The majority opinion in *Kelo* is in large part based on a claim of adherence to precedent. "For more than a century," the Court asserts, "our public use jurisprudence has wisely eschewed rigid formulas and intrusive scrutiny in favor of affording legislatures broad latitude in determining what public needs justify the use of the takings power."²⁸⁰ Justice Stevens' majority opinion repeatedly cites late nineteenth and early twentieth century cases to support the proposition that "when this Court began applying the Fifth Amendment to the states at the close of the nineteenth century, it embraced the broader and more natural interpretation of public use as 'public purpose.'"²⁸¹

²⁷⁶ See *id.* and also Somin, *Overcoming Poletown*.

²⁷⁷ *Kelo*, 125 S.Ct. at 2675 (O'Connor, J., dissenting).

²⁷⁸ Had Kennedy concurred in judgment, his concurrence might have had controlling precedential force under *Marks v. United States*, 430 U.S. 188 (1977). *Marks* held that **Error! Main Document Only.** "[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds." *Id.* at 193.

²⁷⁹ The departure of two of the four *Kelo* dissenters, Chief Justice Rehnquist and Justice O'Connor makes it difficult to predict whether this will in fact continue to be the case.

²⁸⁰ *Kelo*, 125 S.Ct. at 2664.

²⁸¹ *Id.* at 2662.

Unfortunately, however, the majority’s claim that the Court “began applying the Fifth Amendment to the states at the close of the nineteenth century”²⁸² is incorrect. The nineteenth and early twentieth century cases cited by Justice Stevens as support for extreme judicial deference under the Public Use Clause in fact addressed public use challenges under the *Lochner*-era substantive due process doctrine stemming from the Due Process Clause of the Fourteenth Amendment.

For example, the *Kelo* majority cites the 1896 case of *Fallbrook Irrigation District. v. Bradley* as the first instance where the Court expansively defined public use as “public purpose.”²⁸³ However, the *Fallbrook* decision itself unequivocally states that the constitutional issue raised in the case “is based upon that part of the fourteenth amendment of the constitution which reads as follows: ‘Nor shall any state deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.’”²⁸⁴ The *Fallbrook* opinion does not even mention the Fifth Amendment’s Public Use Clause. The same is true of the other early cases relied on by Stevens.²⁸⁵ Without exception, they address Fourteenth Amendment substantive due process challenges to takings and do not so much as mention the Fifth Amendment Public Use Clause.²⁸⁶ And even in regards to the Due Process Clause, the cases do not always reflect so complete a deference as the *Kelo* majority claims.²⁸⁷

Justice Stevens’ misinterpretation of these precedents is perhaps understandable in light of the fact that Justice Thomas commits the same mistake in his dissenting opinion. There, Thomas accepted the

²⁸² *Id.*

²⁸³ See *id.* (citing *Fallbrook Irrigation Dist. v. Bradley*, 164 U.S. 112, 158-64 (1896)).

²⁸⁴ *Fallbrook*, 164 U.S. at 156.

²⁸⁵ See *Kelo*, 125 S.Ct. at 2662-64 (citing *Mt. Vernon-Woodberry Cotton Duck Co. v. Ala. Interstate Power Co.*, 240 U.S. 30 (1916); *O’Neill v. Leamer*, 239 U.S. 244 (1915); *Strickley v. Highland Boy Goldmining Co.*, 200 U.S. 527 (1906); and *Clark v. Nash*, 198 U.S. 361 (1905)).

²⁸⁶ See *Mt. Vernon-Woodberry*, 240 U.S. at 31 (stating that the case is based on a claim that an Alabama condemnation statute “contravene[s] the 14th Amendment of the Constitution of the United States”); *O’Neill*, 239 U.S. at 249 (noting that the condemnation considered in that case was challenged on the ground that it was “contrary to the 14th Amendment, as amounting to a deprivation of property without due process of law”); *Strickley*, 200 U.S. at 531 (upholding a challenged condemnation “because “there is nothing in the 14th Amendment which prevents a state from requiring such concessions”); *Clark*, 198 U.S. at 369-70 (failing to state the precise constitutional basis of the challenge, but relying on *Fallbrook*’s Fourteenth Amendment analysis as a controlling precedent). None of these cases so much as mention the Fifth Amendment as a possible basis for the challenge to these takings.

²⁸⁷ See, e.g., *Clark*, 198 U.S. at 369 (noting that “we do not desire to be understood by this decision as approving of the broad proposition that private property may be taken in all case where the taking may promote the public interest”).

majority's claim that *Fallbrook* and its progeny adopted a broad interpretation of public use and merely argued that such a broad interpretation was not needed to address the facts of those cases, which actually involved traditional public uses where the condemned property was either owned by the government or open to use by the public as a matter of right.²⁸⁸ Both Stevens' majority opinion and Thomas' dissent simply ignore the fact that these cases were brought on the basis of substantive due process because the Supreme Court of that era rejected the idea of incorporation of the Bill of Rights against the states.²⁸⁹

Stevens' and Thomas' mistake may be due to the modern tendency to read our acceptance of incorporation back into precedents that date from an era when the idea of incorporation was rejected by the Supreme Court majority.²⁹⁰ Nonetheless, both the text of these early opinions and recent historical scholarship²⁹¹ show that they were part of the *Lochner*-era doctrine of Fourteenth Amendment substantive due process.

b. The *Gettysburg* case and heightened judicial scrutiny of private-to-private takings.

In a rare case where the late nineteenth century Court considered a challenge to a federal condemnation – one that therefore could be attacked under the Takings Clause even without incorporation – it intimated that private-to-private condemnations should receive greater judicial scrutiny than those for traditional public uses. In the 1896 case of *United States v. Gettysburg Electric Railway Co.*,²⁹² the Court considered a challenge to the federal government's condemnation of private property for the purposes of preserving the Gettysburg battlefield and building monuments to the soldiers who had fallen in the Civil

²⁸⁸ *Kelo*, 125 S.Ct. at 2683-85. (Thomas, J., dissenting).

²⁸⁹ See Bryan H. Wildenthal, *The Road to Twining: Reassessing the Disincorporation of the Bill of Rights*, 61 Ohio St. L.J. 1457 (2000) (detailing the history behind the Fuller Court's rejection of incorporation).

²⁹⁰ Cf. Lawrence Berger, *Public Use, Substantive Due Process, and Takings – An Integration*, 74 Neb. L. Rev. 843, 862-66 (1995) (noting the longstanding tendency of jurists to conflate substantive due process and public use challenges to takings).

²⁹¹ See, e.g., Michael G. Collins, *October Term, 1896 – Embracing Due Process*, 45 Am. J. Legal Hist. 71, 73-82 (2001) (citing extensive evidence that *Fallbrook* and other early Supreme Court takings cases were part of a more general movement towards expansion of economic substantive due process).

²⁹² 160 U.S. 668 (1896).

War's greatest battle.²⁹³ The *Gettysburg* case upheld the challenged taking,²⁹⁴ and this holding is usually seen as an example of the Fuller Court's deference to legislatures on public use questions.²⁹⁵ Justice Thomas' *Kelo* dissent harshly criticizes as excessively deferential *Gettysburg*'s statement that "when the legislature has declared the use or purpose to be a public one, its judgment will be respected by the court, unless the use be palpably without reasonable foundation."²⁹⁶

However, both Justice Thomas and academic commentators ignore the fact that this language is almost immediately followed (in the very next paragraph) by the qualification that broad deference to legislative judgment is only due in cases "where the land is taken by the government itself."²⁹⁷ The *Gettysburg* Court goes on to note that:

"[i]t is quite a different view of the question which courts will take when this power is delegated to a private corporation. In that case the presumption that the intended use for which the corporation proposes to take the land is public is not so strong *as when the government intends to use the land itself.*"²⁹⁸

This *Gettysburg* dictum is not entirely clear. In particular, it is difficult to tell whether heightened judicial scrutiny of condemnations is triggered only when the power to condemn is "delegated to a private corporation" or also in cases where the land is first condemned by the government but then immediately transferred to a private entity without the government "intend[ing] to use the land itself."²⁹⁹ Regardless, the *Gettysburg* case does suggest that early Supreme Court statements of broad judicial deference to legislative judgment in traditional public use cases do not automatically apply to situations where the condemned property is to be transferred to private parties.

c. Significance of the Court's mistake.

²⁹³ Id. at 679-80.

²⁹⁴ Id. at 680-81.

²⁹⁵ See, e.g., James W. Ely, Jr., *The Fuller Court and Takings Jurisprudence*, 2 J. SUP. CT. HIST. 120, 127 (1996) (citing *Gettysburg* as an example of the Court's "reluctan[ce] to treat the public use requirement as a significant restraint on the exercise of eminent domain").

²⁹⁶ *Kelo*, 125 S.Ct. at 2684 (quoting *Gettysburg*, 160 U.S. at 680).

²⁹⁷ *Gettysburg*, 160 U.S. at 680.

²⁹⁸ Id. (emphasis added).

²⁹⁹ Id.

The *Kelo* majority's mistaken reliance on early substantive due process precedents might be considered insignificant. After all, the Court could have established a precedential basis for its decision by relying solely on the sweeping language of *Berman* and *Midkiff*, which could be used to uphold almost any condemnation.³⁰⁰

Even so, the Court's error is noteworthy for at least three reasons. First, the majority justices themselves thought the early cases important enough to devote a considerable amount of space to analyzing them and to emphasize the resulting claim that *Kelo* rests on "more than a century" of Supreme Court precedent.³⁰¹ Second, tradition-minded jurists and commentators might be less willing to endorse the result in *Kelo* if they recognize that its true precedential basis relies only on broad, largely unsupported statements in two comparatively more recent decisions. Finally, the serious flaws in the Court's application of precedent are arguably significant in their own right, given that we rely on the Court to properly apply precedent in a wide range of constitutional and statutory fields.

E. Assessing the political backlash.

The *Kelo* decision is important not just because of its legal impact, but also because of the strong political backlash against it. Public reaction was intense and overwhelmingly negative.³⁰² The House of Representatives immediately passed a resolution denouncing *Kelo* by a lopsided 365-33 vote.³⁰³ In addition to expected denunciations from conservative and libertarian supporters of property rights, *Kelo* was condemned by numerous liberal political leaders including former President Bill Clinton,³⁰⁴ Democratic National Committee Chair Howard Dean (who blamed the decision on a "Republican-

³⁰⁰ See § III.A, *infra*.

³⁰¹ *Kelo*, 125 S.Ct. at 2664.

³⁰² See, e.g., <http://www.castlecoalition.org/announcements/kelo-polls-6-28-05.asp> (visited Dec. 27, 2005) (compiling numerous public opinion surveys showing opposition to *Kelo* and economic development takings).

³⁰³ U.S. House of Representatives, H.R. 340 (enacted June 30, 2005); Adam Karlin, *A Backlash on Seizure of Property*, *Christian Sci. Monitor*, July 6, 2005, at 1 (describing massive anti-*Kelo* backlash).

³⁰⁴ See Eric Kriss, *More Seek Curbs on Eminent Domain*, *SYRACUSE POST-STANDARD*, Jul. 31, 2005 at A16 (noting Clinton's opposition to the ruling).

appointed Supreme Court”),³⁰⁵ and prominent African-American politician and California Representative Maxine Waters.³⁰⁶ In the aftermath of *Kelo*, over forty state legislatures, as well as the U.S. Congress, have enacted or are considering enacting legislation to curb eminent domain abuse.³⁰⁷

Some prominent observers, including Judge Richard A. Posner and recently confirmed Chief Justice John Roberts (when questioned about *Kelo* at his confirmation hearing before the Senate), have suggested that this political backlash demonstrate that legislative initiatives are enough to protect property owners against eminent domain abuse and that judicial intervention may be unnecessary.³⁰⁸ Unfortunately, most of the state and federal legislation adopted since *Kelo* is likely to have little or no impact in curbing economic development takings.³⁰⁹ While it is too early for a definitive evaluation of the anti-*Kelo* backlash, at this writing it seems unlikely that it will be an adequate substitute for judicial intervention to ban economic development takings.

This result is a predictable outgrowth of the factors that led to the rise of dubious economic development condemnations in the first place: the power of organized interest groups and the general public’s lack of attention to the details of government condemnation policy. In consequence, legislatures can often mollify the public’s anger at *Kelo* with legislation that has symbolic significance but little real-world impact.

1. Already enacted state legislation.

³⁰⁵ See KSL TV [Salt Lake City] *Howard Dean Comes to Utah to Discuss Politics*, Jul. 16, 2005, available at <http://tv.ksl.com/index.php?nid=39&sid=219221> (visited Dec. 5, 2005) (quoting Dean as denouncing “a Republican appointed Supreme Court that decided they can take your house and put a Sheraton hotel in there”).

³⁰⁶ See Charles Hurt, *Congress Assails Domain Ruling*, WASH. TIMES, July 1, 2005 (quoting Waters denouncing *Kelo* as “the most un-American thing that can be done”).

³⁰⁷ For the most complete and up to date listing of state post-*Kelo* legislative initiatives see <http://www.castlecoalition.org/legislation/states/index.asp> (visited Dec. 20, 2005) (hereinafter “Castle Coalition”).

³⁰⁸ See Posner, *supra* note ____ at 98 (claiming that “the strong adverse public and legislative reactions to the *Kelo* decision are evidence of its pragmatic soundness”). At his confirmation hearing before the Senate, then-Judge John Roberts commented that the legislative reaction to *Kelo* shows that “this body [Congress] and legislative bodies in the states are protectors of the people’s rights as well” and “can protect them in situations where the court has determined, as it did 5-4 in *Kelo*, that they are not going to draw that line.” Washington Post, *Transcript: Day Three of the Roberts Confirmation Hearings*, Sept. 14, 2005 (available at <http://www.washingtonpost.com/wp-dyn/content/article/2005/09/14/ar2005091401445.html>) (visited Oct. 25, 2005).

³⁰⁹ For another recent analysis of the political backlash against *Kelo* that considers the four enacted state laws and the Federal Private Property Rights Protection Act (PRPA) and reaches similarly pessimistic conclusions, see Timothy Sandefur, *The “Backlash” So Far: Will Citizens Get Meaningful Eminent Domain Reform*, MICH. ST. L. REV. (forthcoming 2006).

In this Article, I consider the first four state reform laws enacted in the aftermath of *Kelo* – those of Alabama, Delaware, Ohio, and Texas.³¹⁰ The U.S. House of Representatives has also recently passed an act intended to discourage economic development takings.³¹¹ Unfortunately, all five of these pieces of legislation are likely to have very modest impact at best. The four post-*Kelo* state legislative enactments range from the purely symbolic (Delaware) to the marginally effective (Alabama). However, it is important to note that some of the shortcomings of the initial Alabama law have been remedied by a new law enacted on April 25, 2006.

I will consider the full range of post-*Kelo* reforms in a future paper.

a. Alabama.

Alabama was the first of the four states to enact post-*Kelo* eminent domain legislation, and its bill probably provides the greatest protection to property owners. Even so, it is only a modest improvement over the pre-*Kelo* status quo. Alabama Senate Bill 68 forbids the use of eminent domain to “condemn 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 or other business entity.”³¹² The Bill specifically exempts condemnations “based upon a finding of blight in an area covered by any redevelopment plan or urban renewal plan pursuant to Chapters 2 and 3 of Title 24.”³¹³

The ban on condemnation for “purposes of . . . private development”³¹⁴ leaves open the possibility that economic development takings will be permitted so long as the “purpose” is *public* economic development for the community. Obviously, virtually any local government will claim that the

³¹⁰ See Ala. Sen. Bill 68 (signed into law Aug. 3, 2005); Del. Gen. Assembly, Sen. Bill No. 217 (signed into law Jul. 21, 2005); Oh. Gen. Assembly, Amended Sen. Bill No. 167 (signed into law Nov. 16, 2005); Tex. Sen. Bill No. 7 (signed into law Sept. 1, 2005). The text of all four acts is available at Castle Coalition, *supra* note _____.

³¹¹ U.S. Congress, 109 H.R. 4128 (enacted Nov. 3, 2005).

³¹² Ala. Sen. Bill 68, §2(b) (signed into law Aug. 3, 2005) (codified at Ala. Code § 11-47-170(b)).

³¹³ *Id.*

³¹⁴ *Id.*

purpose of economic development condemnations is to benefit the public. Indeed, such a claim is already required under *Kelo*.³¹⁵

By contrast, the ban on takings that “transfer” property to private parties seems to be a much stronger restriction.³¹⁶ Much depends on whether Alabama courts interpret this provision to forbid condemnations where transfer to a private party is the *result* or merely those where such a transfer is the *purpose* of the condemnation. The former approach would provide extensive protection to property owners, while the latter would be subject to exactly the same types of evasions as those that could be used against the ban on condemnations for “private . . . development.” Unfortunately, the narrower, purpose-based interpretation might well prevail in state court because the broad one would render the ban on “private development” takings contained in the same sentence superfluous. If all condemnations that transfer property to private parties are forbidden, that would in itself ban virtually any condemnation “for purposes of private retail, office, commercial, industrial, or residential development.”³¹⁷ Alabama courts follow the standard canon of statutory construction that disfavors interpretations that render parts of a statute superfluous.³¹⁸

Even if the broad interpretation of the ban on transfers to private parties prevails, the provision may be rendered ineffective by the statute’s exemption for condemnations “based upon a finding of blight in an area covered by any redevelopment plan or urban renewal plan pursuant to Chapters 2 and 3 of Title 24.”³¹⁹ Alabama’s definition of blight, incorporated by reference in Senate Bill 68, is broad enough to encompass such factors as “deleterious land use,” “faulty arrangement or design,” and “excessive land coverage,” so long as “any combination of these or other factors, are detrimental to the safety, health, morals or welfare of the community.”³²⁰ Presumably, “the welfare of the community” is broad enough to

³¹⁵ *Kelo*, 125 S.Ct. at 2662.

³¹⁶ Ala. Code § 11-47-170(b).

³¹⁷ Ala. Code § 11-47-170(b).

³¹⁸ See, e.g., *Poole v. State*, 846 So.2d 370, 383 (Ala. Crim. App. 2001) (“According to a recognized canon of interpretation, . . . we are forbidden to assume, without clear reason to the contrary, that any part of this important amendment is superfluous.”).

³¹⁹ Ala. Code § 11-47-170(b).

³²⁰ Ala. Code §24-2-2.

encompass economic well-being and patterns of property use can be considered “faulty arrangement[s]” or “deleterious land use[s]”³²¹ if they are found to inhibit local economic development under “a redevelopment plan or urban renewal plan.”³²²

The need to secure a blight designation and the slim possibility that such a designation might be overturned in state court may inhibit a few local governments, especially if the Bill 68 ban on takings for transfer to private parties is given a broad interpretation. Overall, however, Senate Bill 68 provided only very modest new protection for property owners.

Many of the shortcomings of Senate Bill 68 were recently remedied by Alabama House Bill 654, enacted into law on April 25, 2006.³²³ House Bill 654 significantly narrows the definition of “blight,” limiting it to a relatively narrow range of situations, such as property that is “unfit for human habitation,” poses a public health risk, or has major tax delinquencies.³²⁴ The enactment of House Bill 654 represents the first and so far only case where an ineffective initial post-*Kelo* has been superseded by one with real teeth. It remains to be seen whether this pattern will be repeated in other states.

b. Delaware.

The Delaware bill is surely the least effective and most disingenuous of the four. It requires merely that the power of eminent domain only be exercised for “the purposes of a recognized public use as described at least 6 months in advance of the institution of condemnation proceedings: (i) in a certified planning document, (ii) at a public hearing held specifically to address the acquisition, or (iii) in a published report of the acquiring agency.”³²⁵ This bill does little more than restate current law, which already requires that condemnation be for a “recognized public use.” Indeed, even the *Kelo* majority notes

³²¹ *Id.*

³²² Ala. Code § 11-47-170(b).

³²³ Ala. H.B. 654 (enacted Apr. 25, 2006).

³²⁴ *Id.*, codified at Ala. Code §§ 24-2-2(C)(1-9) (listing new blight criteria).

³²⁵ Del. Sen. Bill 217, § 1 (codified at 29 Del. Code § 9505(14)).

that “‘purely private taking[s]’” are constitutionally forbidden.³²⁶ The real question, however, is what counts as a “recognized public use,” and this issue is in no way addressed by the new Delaware law.

The requirement that the purpose of the condemnation be announced six months in advance provides a minor procedural protection for property owners, but one that can easily be circumvented simply by tucking away the required announcement in a “published report of the acquiring agency.”³²⁷

c. Ohio.

The Ohio law is not quite as ineffectual as Delaware’s, but any impact it could have is likely to be vitiated by its temporary nature. The new law mandates that “until December 31, 2006, no public body shall use eminent domain to take . . . private property that is not within a blighted area, as determined by the public body, when the primary purpose for the taking is economic development that will ultimately result in ownership of that property being vested in another private person.”³²⁸

The most important shortcoming of the Ohio act is the time limit – it is set to expire less than fourteen months after its enactment.³²⁹ While it could theoretically be extended after that date, it seems unlikely that the political pressure to do so will be strong at a time when public attention is likely to have moved on to other issues.

Even within the short period of its effect, the law is likely to have only a very limited impact. While it forbids condemnations where “economic development” is the “primary purpose,” nothing prevents such takings if the community can cite some other objective to which the development objective is an adjunct or complement.³³⁰ It is unlikely to be difficult for creative local governments to come up with such proposals. Furthermore, the Ohio law explicitly exempts “blighted” areas from its scope.³³¹

³²⁶ Kelo, 125 S.Ct. at 2662 (quoting Midkiff, 467 U.S. at 245).

³²⁷ 29 Del. Code § 9505(14).

³²⁸ Oh. Gen. Assembly, Sen. Bill 167, § 2.

³²⁹ The law was enacted on November 16, 2005.

³³⁰ Oh. Gen. Assembly, Sen. Bill 167, § 2.

³³¹ Id.

This exclusion is significant in light of Ohio’s very broad statutory definition of blight,³³² which the new legislation incorporates by reference.³³³ Finally, given the temporary nature of the legislation, a local government can get around it simply by postponing a given condemnation project for a few months.

The Ohio legislation also establishes a “Legislative Task Force to Study Eminent Domain and its Use and Application in the State.”³³⁴ However, the twenty-five member commission is likely to be dominated by pro-eminent domain interests. Six of the members will be state legislators,³³⁵ one is to represent the “planning industry,” one a “labor organization,” one a “historic preservation commission,” one “municipal corporations,” one “counties,” one “representing townships.”³³⁶ The state Director of Development and Director of Transportation or their designated representatives will also be members.³³⁷ These fourteen members – a majority of the commission – are likely to have a strong interest in preserving broad eminent domain power, either to satisfy interest groups (in the case of the legislative members) or because they themselves are representatives of state or local agencies or private interests that benefit from condemnation.

Other members of the commission are to be representatives of the “home building industry,” “licensed realtors,” the “agriculture industry,” and the “commercial real estate industry.”³³⁸ These interest groups arguably have mixed motives, as they can be both victims and beneficiaries of broad condemnation authority, which sometimes harms them by condemning residential or agricultural property, but may also benefit them by opening up new areas for development. Three other commission members – a representative of the Ohio Prosecuting attorneys or the Ohio Association of Probate

³³² See Oh. Rev. Code § 303.26(E) (laying out broad definition of “blight” including such factors as “faulty lot layout” in relation to “ size, adequacy, accessibility, or usefulness”).

³³³ Oh. Gen. Assembly, Sen. Bill 167, § 1.

³³⁴ Id. at § 3.

³³⁵ Id. at §§ 3(A)(1-2).

³³⁶ Id. at § 3(A)(11).

³³⁷ Id. at S 3(A)(12-13).

³³⁸ Id. at §§3(A)(3 5, 6, 7).

Judges,³³⁹ and two attorneys “with expertise in eminent domain issues” to be appointed by the state Attorney General,³⁴⁰

Only four commission seats are likely to be filled by members clearly opposed to economic development takings: two that are to be held by eminent domain lawyers who “represent persons who own property and reside within Ohio,”³⁴¹ one to be held by a “statewide advocate on the issues raised in *Kelo v. City of New London*,”³⁴² and one by a representative of “small businesses,”³⁴³ an interest group that is often harmed by economic development takings. Thus there are likely to be fourteen commission members who will tend towards a pro-condemnation position, four who lean in the opposite direction, and seven with mixed or indeterminate interests. Even if we assume, for example, that half of the six legislators on the commission will take a strong pro-property owner stance, they would still be only a small minority on the commission and would have to attract support from at least five other members to get a majority in favor of broad reform.³⁴⁴

In any event, the state is not required to act on the commission’s recommendations in any way, and by the time its report on eminent domain reform is to be delivered (August 1, 2006),³⁴⁵ public attention is likely to have moved on to other issues, thus greatly reducing the political pressure for reform.

d. Texas.

Texas’ post-*Kelo* legislation is likely to be almost completely ineffectual because of its major loopholes. It forbids condemnations

if the taking: (1) confers a private benefit on a particular private party through the use of the property; (2) is for a public use that is merely a pretext to confer a private benefit on a particular private party; or (3) is for economic development purposes, unless the economic development is a

³³⁹ Id. at § 3(A)(8).

³⁴⁰ Id. at § 3 (A)(14).

³⁴¹ Id. at §§ 3 (A)(9-10).

³⁴² Id. at §3(A)(4).

³⁴³ Id. at § 3(A)(11).

³⁴⁴ See also Sandefur, *supra* note ___ at 34 (noting that “the committee will include many members who can be counted on to be sympathetic to pro-condemnation interests, and very few who can be expected to defend the rights of property owners”).

³⁴⁵ Id. at §3(C)(2).

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.”³⁴⁶

Taken literally, the first criterion in the act might be used to forbid almost all condemnations, since even traditional public uses often “confer a private benefit on a particular private party through the use of the property.”³⁴⁷ Presumably, however, this prohibition is intended merely to forbid condemnations that create such a private benefit without also serving a public use. Otherwise, the state legislature would not be able to protect “community development” and “urban renewal” takings, which surely confer “private benefits” for “particular” persons.³⁴⁸

The legislation’s ban on pretextual takings merely reiterates current law. *Kelo* itself states that government is “no[t] . . . allowed to take property under the mere pretext of a public purpose, when [the] actual purpose was to bestow a private benefit.”³⁴⁹

The ban on takings for “economic development” purposes is largely vitiated by exemption for condemnations where “economic development is a secondary purpose resulting from municipal community development.”³⁵⁰ Virtually any “economic development” can be plausibly characterized as also advancing “community development.” It is difficult to see how the two concepts can be meaningfully distinguished in real world situations. Indeed, Texas law defines “community development” to permit condemnation of any property that is “inappropriately developed from the standpoint of sound community development and growth.”³⁵¹ It is surely reasonable to suppose that “sound community development and growth” includes economic “development and growth.”³⁵² Finally, like the Alabama and Ohio laws, the Texas law contains an exemption for “blighted areas” that could also be exploited by local

³⁴⁶ Tex. Sen. Bill No. 7 (signed into law Sept. 1, 2005) (codified at 10 Tex. Gov. Code §2206.001(b)).

³⁴⁷ Id.

³⁴⁸ Id.

³⁴⁹ *Kelo*, 125 S.Ct. at 2662.

³⁵⁰ 10 Tex. Gov. Code § 2206.001(b)(3).

³⁵¹ Tex. Local Gov. Code §373.005(b)(1)(A).

³⁵² Id.

governments.³⁵³ In this case, however, there may be little occasion for such exploitation, given the availability of the even broader “community development” exemption.

The Texas legislation does have two potentially positive elements. First, it eliminates judicial deference to governmental determinations that a challenged condemnation is for a legitimate public use.³⁵⁴ This shifts the burden of proof in public use cases to the condemning authority. Second, it seems to forbid private-to-private condemnations under statutes other than those allowing the use of eminent domain for blight alleviation and “community development.”³⁵⁵ However, as noted above, Texas’ definition of “community development” is so broad that it can be used to justify almost any condemnation even under a nondeferential approach to judicial review. Judges are unlikely to find that very many takings run afoul of the community development statute’s authorization of condemnation of property that is “inappropriately developed from the standpoint of sound community development and growth.”³⁵⁶ This broad standard can also be used to defend a wide range of condemnations for various private development projects even without specific legislative authorization other than the community development law itself. Ultimately, the potentially useful new rules in the Texas law are swallowed up by the “community development” exception.³⁵⁷

2. Federal legislation.

a. The Property Rights Protection Act of 2005.

On November 3, 2005, the U.S. House of Representatives passed the Property Rights Protection Act of 2005 by an overwhelming 376-38 margin (“PRPA”).³⁵⁸ The Act forbids state and local governments from “exercise[ing] [their] power of eminent domain or allow[ing] the exercise of such

³⁵³ 10 Tex. Gov. Code § 2206.001(b)(3).

³⁵⁴ Id. at § 2206.001(e).

³⁵⁵ These latter two statutes are listed as the only broad exceptions to the bill’s ban on takings “for economic development purposes.” 10 Tex. Gov. Code §2206.001(b).

³⁵⁶ Tex. Local Gov. Code §373.005(b)(1)(A).

³⁵⁷ Sandefur is more optimistic about these two provisions, calling them “significant improvements.” Sandefur, *supra* note ___ at 24. He does not, however, consider the possibility that they can be circumvented by means of the “community development” exception.

³⁵⁸ U.S. House of Representatives, 109 H.R. 4128 (enacted Nov. 3, 2005).

power by any person or entity to which such power has been delegated, over property to be used for economic development or over property that is subsequently used for economic development, if that State or political subdivision receives Federal economic development funds during any fiscal year in which it does so.”³⁵⁹ Violators are punished by the loss of all “Federal economic development funds for a period of 2 fiscal years.”³⁶⁰ Condemnation for “economic development” is broadly defined to include any taking that transfers property “from one private person or entity to another private person or entity for commercial enterprise carried on for profit, or to increase tax revenue, tax base, employment, or general economic health.”³⁶¹

If adopted relatively intact by the Senate,³⁶² the House bill might appear to create significant incentives to deter state and local governments from pursuing economic development takings. But any such appearance is deceptive because of the small amount of federal funds that offending state and local governments stand to lose.

States and localities that run afoul of the PRPA risk losing only “federal economic development funds,”³⁶³ defined as “any Federal funds distributed to or through States or political subdivisions of States under Federal laws designed to improve or increase the size of economies of States or political subdivisions of States.”³⁶⁴ The precise definition of “economic development funds” remains unclear, as it is difficult to tell precisely which federal programs are “designed to improve or increase the size of economies of States or political subdivisions of States.”³⁶⁵ A recent Congressional Research Service analysis concludes that the PRPA ultimately would delegate the task of identifying the relevant programs

³⁵⁹ Id. § 2(a).

³⁶⁰ Id. § 2(b).

³⁶¹ Id. § 8(1). The Act goes on to establish several exemptions, but these are relatively narrow. See id. at §8(1)(A-G) (exempting condemnations that transfer property to public ownership and several other traditional public uses).

³⁶² As this article goes to press, H.R. 4128 remains bottled up in the Senate. It is unclear whether it will pass at all, much less whether it will do so without amendments that might reduce its impact. Senator Arlen Specter, Chairman of the Senate Judiciary Committee has so far prevented the PRPA from coming to a vote before the full Senate. See Scott Bullock, *The Specter of Condemnation*, WALL STREET J., June 24, 2006 (criticizing Specter’s role).

³⁶³ 109 H.R. 4218 § 2(b).

³⁶⁴ Id. § 8(2).

³⁶⁵ Id.

to the Attorney General.³⁶⁶ It is hard to say whether the Bush administration or its successors would be willing to antagonize state and local governments by defining “economic development funds” broadly.

For present purposes, I count any grants to state and local governments that are designated as “development” programs in federal budget. The fiscal year 2005 federal budget defines only about 13.9 billion dollars of the annual total of the estimated 416.5 billion dollars in federal grants to states as designated for purposes of “community and regional development.”³⁶⁷ This amount includes 3.5 billion dollars in “homeland security” grants and over 3 billion dollars in “emergency preparedness and response,”³⁶⁸ funds that are unlikely to be categorized as “economic development” grants. Thus, it would seem that PRPA applies to at most just 7.4 billion dollars in federal grants to state and local governments, a mere 1.8% of all federal grants to states and localities.³⁶⁹

In some areas, of course, economic development grants might constitute an atypically large share of the local budget. So there are likely to be some parts of the country where PRPA has real bite. However, this effect is likely to be diminished by the ease with which offending localities can escape the sanction of loss of funding.

State or local authorities that run afoul of PRPA can avoid *all* loss of federal funds so long as they “return . . . all property the taking of which was found by a court of competent jurisdiction to have constituted a violation of the act” and replace or repair property damaged or destroyed “as a result of such violation.”³⁷⁰ Thus, condemning authorities have an incentive to roll the dice on economic development takings projects in the hope that defendants won’t contest the condemnation or will fail to raise the PRPA

³⁶⁶ Robert Meltz, *Condemnation of Private Property for Economic Development: Legal Comments on the House-Passed Bill (H.R. 4128) and Bond Amendment*, Congressional Research Service Report for Congress, Dec. 22, 2005, at 4. The report bases this conclusion on Section 5(a)(2) of the PRPA, which requires the Attorney General to compile a list of economic development grants, but does not explicitly state that the list should be used as a guide for determining which funds to cut off in the event of PRPA violations. *Id.* at 4 & n.7. Section 11 of the Act does require that Act “be construed in favor of a broad protection of private property rights.” 109 H.R. 4128, § 11. However, it is unclear whether this requirement will bind the Attorney General in his determination of the range of programs covered by the Act’s funding cutoff.

³⁶⁷ UNITED STATES GOVERNMENT BUDGET FISCAL YEAR 2005, ANALYTICAL PERSPECTIVES 123-30, tbl. 8-4 (2005). I have used the estimated figures for the 2005 fiscal year.

³⁶⁸ *Id.* at 125, tbl. 8-4.

³⁶⁹ The figure is arrived at by dividing 7.4 billion by 416.5 billion.

³⁷⁰ 109 H.R. 4128, § 2(c).

as a defense.³⁷¹ At worst, the offending government can simply give up the project, leaving itself and whatever private interests it sought to benefit not much worse off than they were to begin with. So long as it returns the condemned property, any such government stands to lose only the time and effort expended in litigation and the funds necessary to repair or pay for any property that has been damaged or destroyed.

While the PRPA may have some beneficial effects in deterring economic development condemnations in communities with an unusually high level of dependence on federal economic development funds, its impact if enacted is likely to be quite limited.

b. The Bond Amendment.

The Bond Amendment was enacted into law on November 30, 2005 as an amendment to the Transportation, Housing and Urban Development, District of Columbia, and Independent Agencies Appropriations Act. It forbids the use of funds allocated in the Act to “support” the use of eminent domain for “economic development that primarily benefits private entities.”³⁷²

For three interrelated reasons, the Bond Amendment is likely to have only a very modest impact on the use of eminent domain by state and local governments. First, the Amendment forbids only those economic development takings that “primarily benefit . . . private entities.”³⁷³ This restriction makes it possible for the condemning jurisdiction to argue that the primary benefit of the development will go to the public. Under *Kelo’s* extremely lenient standards for evaluating government claims that takings create public benefits,³⁷⁴ it is unlikely that such an argument will often fail in federal court.

Second, the Bond Amendment completely exempts condemnations for “mass transit, railroad, airport, seaport, or highway projects, as well as utility projects which benefit or serve the general public . .

³⁷¹ This may not be an unlikely occurrence, given that many property owners targeted for condemnation are likely to be poor and legally unsophisticated.

³⁷² P.L. 109-115, § 726. The full text of the Amendment is reprinted in Meltz, *supra* note _____ at 12.

³⁷³ *Id.*

³⁷⁴ See *Kelo*, 125 S.Ct. 2655, 2668 (2005) (holding that courts should not “second-guess [a] City’s considered judgments about the efficacy of its development plan”).

. other structures designated for use by the general public or which have other common-carrier or public-utility functions that serve the general public and are subject to regulation and oversight by the government, and projects for the removal of blight . . . or brownfields.”³⁷⁵ While many of these exceptions are unobjectionable because they fall within the traditional public use categories of facilities owned by the government or available for use by the general public as a matter of legal right, the listing of “utility projects which benefit . . . the general public” might open up the door to at least some private economic development projects.³⁷⁶

Finally, an additional reason why the Bond Amendment’s impact is likely to be small is that very few projects that do not fall within one of the Amendment’s many exceptions are likely to be funded by federal transportation and housing grants in any event. After all, the bill completely excludes from coverage “mass transit” and “highway projects” and also excludes “the removal of blight” (which would presumably allow the use of eminent domain to build new housing in poor neighborhoods). There are few if any eminent domain projects previously funded by federal transportation or housing grants that the bill would actually forbid.

3. Pending state legislation.

In many of the over forty states that have considered enacting post-*Kelo* legislation restricting eminent domain powers, the laws in question are still under consideration or pending. Thus, the analysis here must be considered preliminary. Nonetheless, it is noteworthy that many of the proposed laws are either purely symbolic in nature or likely to have only a minor impact. In the key state of California eminent domain reform proposals have already been blocked in the state legislature.³⁷⁷ Here, I consider some of the most common types of proposed legislation and show why they are likely to have little or no effect. These include laws that are purely symbolic, proposals that only forbid takings that are “solely” or

³⁷⁵ P.L. 109-115, § 726 (enacted into law Nov. 30, 2005).

³⁷⁶ *Id.*

³⁷⁷ Castle Coalition, *supra*; Dan Walters, *Eminent Domain Bills Are Stalled – Except One for Casino Tribe*, *Sacramento Bee*, Sept. 16, 2005, at A3.

“primarily” for development, and proposals with geographic or substantive exceptions broad enough to swallow their rules or at least greatly reduce their impact.

a. Purely symbolic legislation.

As of this writing, three states are considering legislation or executive orders with no substantive component at all. Two of these proposals- those of Arkansas and Missouri - only create commissions to study the problem of eminent domain abuse.³⁷⁸ The Rhode Island Senate and House of Representatives have each enacted separate purely symbolic bills urging the federal Congress to propose a constitutional amendment to curb eminent domain powers.³⁷⁹

At least six other states considering legislative responses to *Kelo* – Illinois, Florida, Kentucky, Michigan, South Carolina, and Washington³⁸⁰ – already have state supreme Court decisions forbidding economic development condemnations.³⁸¹ The post-*Kelo* legislation enacted in these states is likely to be primarily symbolic in nature unless it also restricts blight condemnations – the main tool used to circumvent bans on condemnations for economic development.³⁸²

b. Forbidding economic development takings if private development or enhancement of tax revenue is the “primary” or “sole” purpose.

At least seven state legislatures –Connecticut, Massachusetts, Mississippi, Oklahoma, Tennessee, Virginia, and West Virginia – are considering or have already passed legislation that would forbid economic development takings only if “private” development or benefit or an increase in tax revenue is the “primary” or “sole” purpose of a condemnation.³⁸³ That number will almost certainly grow by the time this article is published.

³⁷⁸ See Castle Coalition (describing Arkansas legislative study approved Aug. 31, 2005); id. (describing Missouri study initiated by an executive order by Governor Matt Blunt).

³⁷⁹ See R.I. Senate Bill 1237, available at <http://www.rilin.state.ri.us/Billtext/BillText05/SenateText05/S1237.pdf> (visited Dec. 26, 2005); R.I. House Bill 6636, available at Castle Coalition, supra note ____.

³⁸⁰ For details of proposed legislation in these states, see Castle Coalition, supra note ____.

³⁸¹ See cases cited in note ____.

³⁸² See *Infra* § IV.C.

³⁸³ See Castle Coalition, supra (describing Colorado bill that would forbid takings for “private” development); id. (describing bill passed by Massachusetts House that forbids economic development condemnations whose “sole

Obviously, it would be easy for condemning authorities to argue that private development is not the “primary” or “sole” purpose of the taking because they have the additional goal of benefiting the public. Indeed, condemnors already routinely make such claims and did so in the *Kelo* litigation itself.³⁸⁴ In a slight variation, the Mississippi proposal and West Virginia’s recently enacted law forbid only those takings that are for “private development.”³⁸⁵ As in the case of the initial Alabama legislation discussed above,³⁸⁶ such a ban can easily be circumvented through the simple expedient of claiming that the proposed condemnation is intended to provide “public” rather than purely “private” economic benefits.

Ironically, Connecticut - the state where the *Kelo* case originated and where some 88 percent of respondents in a recent survey say that they oppose condemnations for economic development³⁸⁷ - is one of the states whose post-*Kelo* legislative proposal is defective in this way. The post-*Kelo* legislation under consideration in the state legislature is likely to have little or no effect because it would permit economic development takings so long as the condemned property is “(1) is part of an integrated development plan

purpose” is “economic development, where one private individual benefits at the expense of another”); *id.* (describing Oklahoma Senate Bill 1035, which forbids condemnations that “take private property by eminent domain and sell, lease, or otherwise transfer it to a private person, partnership, corporation, business, or other private entity with the primary purpose being the benefit of such private entity”); *id.* (describing numerous Tennessee legislative proposals that would forbid condemnations whose “sole” purpose is economic development or enhancement of tax revenue); Connecticut Gen. Assembly Bill No. 24, available at <http://www.cga.ct.gov/jud/Documents/2006LCO00024-R00-BIL.html> (visited Dec. 26, 2005) (forbidding economic development takings unless the condemned property is “(1) is part of an integrated development plan that has substantial and significant public uses or public benefits, (2) is not being acquired solely to benefit a private party, and (3) is reasonably necessary to carry out the development plan of the condemning authority”); Ga. Sen. Bill 86, § 2(a), available at http://www.legis.state.ga.us/legis/2005_06/search/sb86.htm (visited Dec. 26, 2005) (forbidding condemnations “solely or primarily for the purpose of improving tax revenue or the tax base or the purpose of economic development”); Miss. House Bill 188, §1(2), available at <http://index.ls.state.ms.us/isysnative> (visited Feb. 4, 2006) (forbidding condemnation “for purposes of private retail, office, commercial, industrial, or residential development”); Miss. Sen. Bill 2237, § 1(2), available at <http://index.ls.state.ms.us/isysnative/UzpcRG9=sb2237in.pdf#xml=http://10.240.72.35/isysquery/ir17b5f/5/hilite> (visited Feb. 4, 2006) (same); Va. House Bill No. 1806, Para. 15.2-1900, available at <http://leg1.state.va.us/cgi-bin/legp504.exe?051+ful+HB1806> (visited Dec. 26, 2005) (forbidding private-to-private takings unless “any benefits that will accrue to the private entity as a result of its ownership or use of the property are merely incidental when compared to the benefits that will accrue to the public”); W.V. H.B. 4048, § 54.1.2(a)(11) available at http://www.legis.state.wv.us/Bill_Text_HTML/2006_SESSIONS/RS/BILLS/hb4048%20enr.htm (visited July 9, 2006) (enacted Mar. 11, 2006) (forbidding condemnations “primarily for private economic development”).

³⁸⁴ As noted above, all nine Supreme Court justices accepted such claims in the *Kelo* case. See nn. and accompanying text.

³⁸⁵ See proposals cited in note ____.

³⁸⁶ See § 4.E.1.a.

³⁸⁷ Quinnipiac University, *Connecticut Voters Say 11-1 Stop Eminent Domain, Quinnipiac University Poll Finds; Saving Groton Sub Base is High Priority*, Jul. 28, 2005, Question 33, available at <http://www.quinnipiac.edu/x11385.xml?ReleaseID=821> (visited Dec. 22, 2005).

that has substantial and significant public uses or public benefits, (2) is not being acquired solely to benefit a private party, and (3) is reasonably necessary to carry out the development plan of the condemning authority”³⁸⁸ Under these standards, the *Kelo* takings themselves would have been allowed, since they were clearly “part of an integrated development plan,” were not acquired “solely to benefit a private property,” and were “reasonably necessary” to carry out the plan.³⁸⁹ Indeed, nearly all economic development takings could probably pass muster under the proposed Connecticut law.

c. Proposals with exceptions that undermine their rules.

Pennsylvania, and Vermont have enacted legislation that, on its face, seems to ban all or most economic development takings but in reality has exceptions that to a large extent undermine the rule. The state of Maryland is considering similar bills.

In the case of Maryland and Pennsylvania, the exceptions are geographic in nature, exempting from coverage the two states’ major urban areas. The Pennsylvania law forbids “the exercise by any condemnor of the power of eminent domain to take private property in order to use it for private commercial enterprise.”³⁹⁰ However, the scope of this provision is undermined by the effective exclusion of Philadelphia and Pittsburgh from its coverage.³⁹¹ These two cities, by far the state’s largest urban areas, are also the sites of many of the state’s most extensive private-to-private takings.³⁹² Although the provision exempting the two cities is set to expire on December 31, 2012,³⁹³ by that time it is possible that legislators will be able to extend the deadline, once the public furor over *Kelo* has subsided. At least

³⁸⁸ Connecticut Gen. Assembly Bill No. 24, available at <http://www.cga.ct.gov/jud/Documents/2006LCO00024-R00-BIL.html> (visited Dec. 26, 2005).

³⁸⁹ *Id.* (emphasis added); cf. discussion of the Supreme Court’s emphasis on the importance of an integrated plan in §§ III.C.1 and III.D.1, *infra*.

³⁹⁰ Penn. House Bill No. 2054, ch. 2, § 204(a), (enacted May 4, 2006), available at <http://www.legis.state.pa.us/WU01/LI/BI/BT/2005/0/HB2054P3333.HTM> (visited Feb. 3, 2006).

³⁹¹ See *id.* at § 203(4-) (excluding areas designated as blighted within “a city of the First or Second Class,” which under Pennsylvania law turn out to be Pittsburgh and Philadelphia).

³⁹² See Berliner, *supra* note ____ at 173, 179-81 (describing major condemnation projects in the two cities).

³⁹³ H.B. No. 2054, ch. 2, § 203(4).

two proposed Maryland bills follow the same pattern. They forbid economic development takings but exempt the City of Baltimore, the state's largest urban area.³⁹⁴

By contrast, Vermont's new law has a substantive, rather than a geographic, exception that undermines its rule. Although it forbids condemnations that "confer . . . a private benefit on a particular private party" or are "primarily for purposes of economic development," it exempts condemnations undertaken "pursuant to Chapter 85 of Title 24."³⁹⁵ Unfortunately, Chapter 85 of Title 24 allows condemnation of any property that by reason of a variety of factors including "faulty lot layout" and "diversity of ownership," "substantially impairs or arrests the sound growth of a municipality" or "constitutes an economic or social liability."³⁹⁶ Obviously, it would be easy for a condemning authority to claim that promoting economic development is the same thing as promoting "sound growth" or removing "an economic or social liability." This broad exception that swallows its rule is similar to the Texas exception for "community development," analyzed above.³⁹⁷

4. Obstacles to effective reform.

Obviously, it is too early to reach any definitive conclusions on the impact of the post-*Kelo* political backlash. Several states have recently enacted post-*Kelo* legislation that is likely to have a substantial effect in curtailing economic development takings.³⁹⁸ Nonetheless, it is striking that most of the legislation enacted so far is likely to be mostly ineffective, and that the same is true of many of the proposals currently under consideration in numerous states.

Why, in the face of the massive public backlash against *Kelo*, has there been so much ineffective legislation? At this early date, it is difficult to provide a definitive answer. However, I would tentatively suggest that the weaknesses of much post-*Kelo* legislation are in large part due to the same public

³⁹⁴ See Md. House Bill 79 (filed Jan. 11, 2006, available at <http://mlis.state.md.us/2006rs/bills/hb/hb0079f.pdf> (visited Feb. 4, 2006) (enacting definition of "public use" that does not include economic development, but then exempting the City of Baltimore); Md. Senate Bill 173 (filed Jan. 20, 2006) (same).

³⁹⁵ Vt. Sen. Bill 246, § 1(a)(1-2) (enacted Apr. 14, 2006).

³⁹⁶ Vt. Statutes, Chapt. 85, Title 24, 24 V.S.A. §3201(3).

³⁹⁷ See nn. ____ and accompanying text.

³⁹⁸ See Sandefur, *supra* note ____ at 38-44 (discussing several examples of "meaningful" post-*Kelo* reform laws).

ignorance of the details of government policy that played a key role in allowing eminent domain abuse to become a serious problem in the first place.³⁹⁹

As noted earlier,⁴⁰⁰ the majority of voters are “rationally ignorant” about most aspects of public policy because there is so little chance that an increase in any one voter’s knowledge would have a significant impact on policy outcomes. This ignorance helps explain why economic development takings could become so common despite the fact that the vast majority of citizens oppose condemnation of private property for such purposes.⁴⁰¹ It is likely that, prior to *Kelo*, most of the public didn’t even realize that economic development condemnations exist.

The highly publicized Supreme Court decision in *Kelo* apparently increased awareness of the problem of eminent domain abuse, perhaps as a result of extensive press coverage. Some *Kelo* defenders complain that the backlash to the decision was grossly excessive in light of the fact that the case made little change in existing law.⁴⁰² A spokesman for the California Redevelopment Association lamented that *Kelo* had led to “a hue and cry about how bad things are in California, yet *Kelo* changed nothing.”⁴⁰³ But the reaction is understandable once we recognize that, - for most of the public, *Kelo* was probably the first inkling they ever had that private property – including homes – could be condemned merely to promote “economic development” by other private parties. This sudden realization led to understandable outrage and a desire for change.

But while the publicity surrounding *Kelo* made much of the public at least somewhat aware of the problem of economic development takings, it probably did not lead voters to closely scrutinize the details of proposed reform legislation. Few citizens have the time or inclination to delve into such matters and

³⁹⁹ See § I.D.2.

⁴⁰⁰ *Id.*

⁴⁰¹ See polls compiled at <http://www.castlecoalition.org/announcements/kelo-polls-6-28-05.asp> (visited Dec. 27, 2005).

⁴⁰² See, e.g., Michael A. Heller & Roderick M. Hills, Jr., *LADs and the Art of Land Assembly*, Aug. 25, 2005, at 1 (unpublished paper on file with author) (complaining that the reaction to *Kelo* was excessive in light of the fact that it merely reaffirmed existing law and told state legislatures “that they may do what they see fit”).

⁴⁰³ Quoted in Michael Gardner, *Lawmakers Rethink Land-Seizure Laws: High Court Ruling Leads to Groundswell in State, Proposed Moratorium*, SAN DIEGO UNION-TRIBUNE, Aug. 17, 2005, at A1.

many are often ignorant of the very existence of even the most important legislative items.⁴⁰⁴ Thus, it would not be difficult for state legislators to seek to satisfy voter demands by supporting “position-taking” legislation that purported to curb eminent domain,⁴⁰⁵ while in reality having little effect. In this way, they can simultaneously cater to public outrage over *Kelo* and mollify developers and other interest groups that benefit from economic development condemnations.

This strategy seems to have been at the root of the failure of post-*Kelo* reform efforts in California. In that state, legislative reform efforts were initially sidetracked by the introduction of weak proposals that gave legislators “a chance . . . to side with anti-eminent domain sentiment without doing any real damage to redevelopment agencies.”⁴⁰⁶ At a later stage in the political battle, the Democratic majority in the state legislature tabled even these modest reforms by claiming that they were being blocked by the Republican minority, despite the fact that “the stalled bills required only simple majority votes and thus needed no Republicans to go along.”⁴⁰⁷ As one Sacramento political reporter puts it, the entire process may have been “just a feint to pretend to do something about eminent domain without actually doing anything to upset the apple cart.”⁴⁰⁸

Such maneuvers would be difficult to bring off if the public paid close attention to pending legislation. But they can be quite effective in the presence of widespread political ignorance. Unfortunately, public ignorance of the details of eminent domain policy is unlikely to be easily remedied. It therefore greatly increases the probability that post-*Kelo* eminent domain reform will have only a very limited impact. In many states, it could have virtually no effect at all.

⁴⁰⁴ See, e.g., Ilya Somin, *Political Ignorance is No Bliss*, Cato Institute Policy Analysis No. 525, Sept. 22, 2004, Tbl. 1 (providing data that the majority of citizens are unaware of the very existence of several of the most important pieces of legislation adopted by Congress in recent years).

⁴⁰⁵ For the concept of position-taking legislation, see DAVID MAYHEW, CONGRESS: THE ELECTORAL CONNECTION (1974).

⁴⁰⁶ Walters, *supra* note, at A3.

⁴⁰⁷ *Id.*

⁴⁰⁸ *Id.*

IV. EXCEPTIONS THAT SWALLOW THE RULE?

Even if the dissenting opinions in *Kelo* someday become the law and the Supreme Court forbids economic development takings, there is a real possibility that state and local governments could find ways to circumvent a ban. Understandably, *Hathcock* and other decisions striking down the economic development rationale fall short of a complete ban on private-to-private condemnations. Some of the exceptions, unfortunately, could potentially swallow the rule.

Hathcock laid out three scenarios in which private-to-private takings will still be upheld:

1. Where “public necessity of the extreme sort” requires collective action.
2. Where the property remains subject to public oversight after transfer to a private entity.
3. Where the property is selected because of “facts of independent public significance” rather than the interests of the private entity to which the property is eventually transferred.⁴⁰⁹

Those three categories might let in by the back door the same kinds of abuses that the *Hathcock* court sought to prevent by closing the front door. Moreover, at least two of the three exceptions are not unique to Michigan but have counterparts in other states that forbid economic development takings.

A. “Public necessity of the extreme sort.”

The public necessity exception seems to be the least problematic of the three, as the *Hathcock* court was careful to confine it within narrow bounds. Quoting Justice Ryan’s 1981 language, the court emphasized that this exception is limited to “enterprises generating public benefits whose very *existence* depends on the use of land that can be assembled only by the coordination central government alone is capable of achieving.”⁴¹⁰ As an illustrative example, the court cited the classic

⁴⁰⁹*Hathcock*, 684 N.W.2d at 783 (quoting *Poletown*, 304 N.W.2d at 478-80 (Ryan, J., dissenting)). The *Hathcock* court itself did not originate the three but consciously borrowed them from Justice Ryan’s *Poletown* dissent. *See id.* at 780-83 (relying extensively on *Poletown*, 304 N.W.2d at 478-80 (Ryan, J., dissenting)).

⁴¹⁰*Id.* at 781 (quoting *Poletown*, 304 N.W.2d at 478 (Ryan, J., dissenting)).

case of a railroad that “must lay track so that it forms a more or less straight path from point A to point B” and is thereby vulnerable to “holdout” problems such that “[i]f a property owner between points A and B holds out[—]for example by refusing to sell his land for any amount less than fifty times its appraised value—the construction of the railroad is halted unless . . . the railroad accedes to the property owner’s demands.”⁴¹¹ Even the strongest advocates of judicial enforcement of limits on public use concede that the exercise of eminent domain is defensible in cases involving clear collective action problems of this type.⁴¹²

The court was careful to indicate that this rationale cannot be expanded to justify the use of eminent domain for the purpose of promoting ordinary commercial development projects, such as the “business and technology park” at issue in *Hathcock*.⁴¹³ “To the contrary, the landscape of our country is flecked with shopping centers, office parks, clusters of hotels, and centers of entertainment and commerce. We do not believe . . . that these constellations required the exercise of eminent domain or any other form of collective public action for their formation.”⁴¹⁴

Nevertheless, there is an important ambiguity in the court’s holding. Is the relevant question whether the project at issue falls into a *category* that owes its “very existence” to “collective action,” or is it enough for the government to prove that the *individual project* is impossible without eminent domain?⁴¹⁵ Obviously, the government’s burden of proof would be considerably easier if only the latter need be established, since it is always possible to argue that a given project could be implemented only through use of eminent domain, especially if the relevant evidence is relatively complex. Indeed, often the only way to know for sure if a project requires condemnation is to forbid its use and then see if the developers are willing to go forward anyway.

B. Public oversight and control.

⁴¹¹*Id.* at 781-82.

⁴¹²*See, e.g.*, RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 162-69 (1985).

⁴¹³*Hathcock*, 684 N.W.2d at 783.

⁴¹⁴*Id.* at 783-84.

⁴¹⁵*Id.*

Hathcock's second exception is much more problematic than the first. Intuitively, the court's conclusion that private-to-private takings are permissible "where the property remains subject to public oversight" seems appealing.⁴¹⁶ At least in theory, such "oversight" could reduce the likelihood that the power of eminent domain is being used to facilitate rent-seeking behavior by private interest groups. Several other states that ban economic development takings follow a similar logic, concluding that public "control" might justify an otherwise impermissible taking.⁴¹⁷

But *how much* "oversight" is required? A broad interpretation of the public oversight exception would create two interrelated risks, one obvious and one less so. The obvious danger is that a mere fig leaf of public control could be used to justify a condemnation that effectively left the property under the near-total control of the new owners. Under such an approach, the court could have justified the *Poletown* takings so long as Detroit were empowered to conduct periodic inspections of the GM factory, even if city officials were powerless to actually order GM to make any changes in its policies following the inspections.

A more subtle risk is the possibility that oversight powers, however extensive in theory, might prove inadequate in practice. The logic of the public oversight exception implicitly assumes that officials will use their oversight powers to ensure that the new owners actually produce the public benefits used to justify condemnation. But this assumption clashes with the underlying dynamic that leads to eminent domain abuse in the first place: the fact that government agencies exercising the condemnation power are often "captured" by powerful private interest groups who use those powers for their own benefit rather than that of the general public.⁴¹⁸ If a local government is influenced in this way, it is unlikely to impose meaningful accountability on the new owners of condemned property, even if its "oversight" authority is - on paper - extensive. If, on the other hand, the political

⁴¹⁶Hathcock, 684 N.W.2d at 783.

⁴¹⁷ See, e.g., Ga. Dep't of Transp. v. Jasper County, 586 S.E.2d 853, 856 (S.C. 2003) (noting that a sufficiently high degree of "public control" can validate an otherwise illegal taking); Mfg. Housing Communities v. State, 13 P.3d 183, 189-90 (Wash. 2000) (en banc) (holding that Washington law requires a "literal" definition of forbidden "private use" under which the government must exercise a high degree of control over the condemned property in order to legitimate a taking, or allow the general public access to it after transfer to the new owners).

⁴¹⁸See § I.B.

process has *not* been captured, it is not clear why the judiciary should require any oversight beyond what legislative and executive officials have determined to be necessary. Thus, the public oversight exception poses serious dangers even if the degree of oversight required by courts is relatively high.

This point calls into question the adequacy of even very stringent oversight requirements. For example, Washington state courts have adopted a “literal” definition of “private use” that forbids condemnation unless the government retains ownership of the condemned property or creates a right of access for the general public.⁴¹⁹ On the surface, such a requirement seems extremely stringent. Yet consider the possibility that under this view the City of Detroit might have been able to take ownership of the Poletown property while simultaneously allowing GM to use the land in any way it saw fit. Although Detroit’s “public oversight” might have been very impressive in theory, in practice the situation would be little different from what actually occurred.

C. “Facts of Independent Public Significance” and Blight.

Hathcock’s third exception is perhaps the most problematic of the three, even though, like the others, it makes considerable intuitive sense. The exception has special significance because it has parallels in every other state. The basic idea behind the “independent fact” exception, as the court explains, is this: “the act of condemnation *itself*, rather than the use to which the land would eventually be put, was a public use.”⁴²⁰ For that reason, the danger of abuse on behalf of interest groups is minimized because it really doesn’t matter what the new owners of the property do with it so long as the old, harmful uses of the condemned land are done away with.

The court’s paradigmatic example of this type of scenario is the removal of “urban blight for the sake of public health and safety.”⁴²¹ As long as the blight is eliminated, it can be argued, courts shouldn’t care about what happens to the property afterward. Even courts that have invalidated economic development takings endorse this reasoning. For example, the Supreme Court of Illinois, in

⁴¹⁹ *Mfg. Housing Communities*, 13 P.3d 189-90.

⁴²⁰ *Hathcock*, 684 N.W.2d at 783.

⁴²¹ *Id.* (citing *Poletown*, 304 N.W.2d at 478-79 (Ryan, J., dissenting)).

a major recent decision rejecting the economic development rationale, was careful to note that “[c]learly, the taking of slums and blighted areas is permitted for purposes of clearance and redevelopment, regardless of the subsequent use of the property.”⁴²² Justice O’Connor’s *Kelo* dissent also endorses the use of condemn in blighted areas, and indeed adopts the same reasoning as the *Hathcock* court.⁴²³ Forty-nine states and the District of Columbia have statutes that permit condemnation of “blighted” property for redevelopment purposes.⁴²⁴

Unfortunately, this line of argument has two flaws that reveal the major dangers of the blight exception: overexpansion of the definition of “blight” and interest group exploitation of the condemnation process even in areas that really are “blighted.”

1. Overexpansion of the Definition of Blight.

The concept of “blight” is highly vulnerable to creative expansion. Early blight cases in the 1940s and 1950s upheld condemnations in areas that closely fit the layperson’s intuitive notion of “blight”: dilapidated, dangerous, disease-ridden neighborhoods. For example, in *Berman* the condemned neighborhood was characterized by “[m]iserable and disreputable housing conditions.”⁴²⁵ According to studies cited by the court, “64.3% of the dwellings [in the area] were beyond repair, 18.4% needed major repairs, only 17.3% were satisfactory; 57.8% of the dwellings had outside toilets, 60.3% had no baths, 29.3% lacked electricity, 82.2% had no wash basins or laundry tubs, [and] 83.8% lacked central heating.”⁴²⁶

⁴²² *Southwestern Ill. Dev. Auth. v. National City Env.*, 768 N.E.2d 1, 9 (Ill.), *cert. denied*, 537 U.S. 880 (2002)

⁴²³ *Kelo v. City of New London*, 125 S.Ct. 2655, 2674 (2005) (O’Connor, J., dissenting).

⁴²⁴ Hudson Hayes Luce, *The Meaning of Blight: A Survey of Statutory and Case Law*, 35 Real Property, Probate & Trust Journal 389, 391 (2000). This article is slightly out date because it does not account for Utah’s recent abolition of blight condemnations. See Utah Code § 17B-202-4 (amended Mar. 21, 2005 by Utah Sen. Bill 184) (outlining powers of redevelopment agencies and omitting the power to use eminent domain for blight alleviation or development).

⁴²⁵ *Berman v. Parker* 348 U.S. 26, 32 (1954). “Slum clearance” was upheld as a public use to justify condemnation under the Michigan state constitution in 1951. In *Re Slum Clearance*, 50 N.W.2d 340 (Mich. 1951).

⁴²⁶ *Id.* at 32.

In the years since those early cases, many states have expanded the concept of blight to encompass almost any area where economic development could potentially be increased. In the 2001 *West 41st Street Realty* case, a New York appellate court held that the Times Square area of downtown Manhattan was sufficiently “blighted” to justify the condemnation land needed to build a new headquarters for the *New York Times*!⁴²⁷ In the 2003 case of *City of Las Vegas Downtown Redevelopment Agency v. Pappas*, the Nevada Supreme Court held that downtown Las Vegas is blighted, thereby permitting condemnation of property for the purpose of building a parking lot servicing a consortium of Las Vegas casinos.⁴²⁸ The court concluded that downtown Las Vegas suffers from “[e]conomic blight [that] involves downward trends in the business community, relocation of existing businesses outside of the community, business failures, and loss of sales or visitor volumes.”⁴²⁹

Obviously, virtually any neighborhood, no matter how prosperous, occasionally suffers “downward trends in the business community, . . . business failures, and loss of sales or visitor volumes.”⁴³⁰ If Times Square and downtown Las Vegas are “blighted,” it is difficult to think of any place that isn’t. A sufficiently expansive definition of blight is essentially equivalent to authorizing economic development takings. Almost any large commercial enterprise can argue that condemning land for its benefit might help improve “trends in the business community.”⁴³¹ The road from the *Berman*-era cases to decisions like *West 41st St.* and *Pappas* is a classic slippery slope dynamic, one that is difficult to guard against because of the virtual impossibility of drawing a nonarbitrary distinction between “blighted” and “normal” areas, as well as because of powerful political pressures exerted by development interests that benefit from condemnation.⁴³²

While these two cases seem extreme, they are not aberrations but part of a widespread trend towards expansion of the definition of blight. In 1997, a St. Louis suburb declared a “thriving shopping

⁴²⁷*In re W. 41st St. Realty v. N.Y. State Urban Dev. Corp.*, 744 N.Y.S.2d 121 (N.Y. App. Div. 2002), *cert. denied*, 123 S.Ct. 1271 (2003).

⁴²⁸*City of Las Vegas Downtown Redev. Agency v. Pappas*, 76 P.3d 1, 12-15 (Nev. 2003), *cert. denied*, 124 S. Ct. 1603 (2004).

⁴²⁹*Id.* at 13.

⁴³⁰*Id.*

⁴³¹*Id.*

⁴³²*See generally* Eugene Volokh, *Mechanisms of the Slippery Slope*, 116 HARV. L. REV. 1026 (2003).

mall” blighted because it was “too small” and especially because it lacked a Nordstrom’s.⁴³³ Officials in the “affluent” city of Coronado, California went even further and declared the entire jurisdiction blighted in 1985.⁴³⁴ As we have seen, expansive definitions of blight under state law severely undercut the potential effects of recently enacted eminent domain reform statutes in Ohio and Texas.⁴³⁵ Broad definitions of blight have also inhibited post-*Kelo* reform efforts in other states.⁴³⁶ Overall, as a recent study concludes, the concept of “‘blight’ has lost any substantive meaning” and has become a mere “legal pretext” enabling local governments to attract funding and dispose of property as they see fit.⁴³⁷

The same slippage that occurred in New York, Nevada, and elsewhere is likely to recur in Michigan and other jurisdictions that follow the *Hathcock* approach unless courts make strong efforts to guard against it early on.⁴³⁸ Numerous state courts have either adopted very broad definitions of “blight” or deferred to legislative and administrative definitions that reach a similar result.⁴³⁹ Moreover, in the vast majority of states, courts review blight designations by redevelopment agencies only under deferential standards such as “arbitrary and capricious” behavior, “abuse of discretion,” or “clear error.”⁴⁴⁰ Such extreme judicial deference greatly increases the danger of abuse.

2. Condemnations in truly “blighted” neighborhoods.

The second danger posed by the blight exception is perhaps even more serious. Even in cases where the condemned property really is blighted under a narrow definition of the term, condemnation of

⁴³³ Colin Gordon, *Blighting the Way: Urban Renewal, Economic Development, and the Elusive Definition of Blight*, 31 FORDHAM URB. L.J. 305, 307 (2004).

⁴³⁴ *Id.* at 306.

⁴³⁵ See §§III.E.1.c-d, *infra*.

⁴³⁶ See Sandefur, *supra* note ____ at 29-36 (discussing exceptions for blight condemnations in several post-*Kelo* statutes).

⁴³⁷ Gordon, *supra* note ____ at 307.

⁴³⁸ On the history of blight condemnations and their gradual expansion over time, see *id.* at 306-24; Wendell E. Pritchett, *The “Public Menace” of Blight: Urban Renewal and the Private Uses of Eminent Domain*, 21 YALE L. & POL’Y REV. 1 (2003).

⁴³⁹ See Hudson Hayes Luce, *The Meaning of Blight: A Survey of Statutory and Case Law*, 35 REAL PROP. PROB. & TRUST JOURNAL 389 (2000) (discussing numerous criteria for blight applied by statutory definitions and court decisions); Gordon, *supra* note ____ at 307-22.

⁴⁴⁰ Luce, *supra* note ____ at 409-13. Several jurisdictions do not allow review of blight designations at all. *Id.* at 413-14.

property often serves the interests of developers while actually causing harm to the area's residents.

Indeed, condemnations in truly blighted neighborhoods have probably caused far more harm than either *Poletown*-style economic development condemnations in nonblighted areas or condemnations driven by dubious expansions of the definition of blight.

Large-scale condemnations to alleviate blight began with the "urban renewal" programs of the 1940s and 1950s. Such takings displaced hundreds of thousands of people and inflicted enormous social and economic costs, with comparatively few offsetting benefits.⁴⁴¹ A recent study concludes that the use of eminent domain in "urban renewal programs uprooted hundreds of thousands of people, disrupted fragile urban neighborhoods and helped entrench racial segregation in the inner city."⁴⁴² By 1963, over 600,000 people had lost their homes as a result of urban renewal takings.⁴⁴³ The vast majority ended up living in worse conditions than they had experienced before their homes were condemned,⁴⁴⁴ and many suffered serious nonpecuniary losses as well.⁴⁴⁵ More recent blight condemnations have inflicted similar harms on communities and poor property owners.⁴⁴⁶

⁴⁴¹See, e.g., JANE JACOBS, *DEATH AND LIFE OF GREAT AMERICAN CITIES*, 5, 270-90, 311-14 (1961) (describing enormous social and economic costs of urban development takings); MARTIN ANDERSON, *THE FEDERAL BULLDOZER* (pbk. ed. 1967) (same); HERBERT J. GANS, *THE URBAN VILLAGERS: GROUP AND CLASS IN THE LIFE OF ITALIAN-AMERICANS* 362-84 (, 2d ed. 1982) (documenting loss of community and economic harms caused by condemnations); SCOTT GREER, *URBAN RENEWAL AND AMERICAN CITIES: THE DILEMMA OF DEMOCRATIC INTERVENTION* 3-5 (1965) (describing various harms caused by urban renewal condemnations); Chester W. Hartman, *Relocation: Illusory Promises and No Relief*, 47 VA. L. REV. 745 (1971) (describing extensive uncompensated losses suffered by victims of urban renewal condemnations).

⁴⁴²Pritchett, *supra* note at 47.

⁴⁴³ANDERSON, *supra* note at 8, 54.

⁴⁴⁴*Id.* at 57-70.

⁴⁴⁵See generally MINDY THOMPSON FULLLOVE, *ROOT SHOCK: HOW TEARING UP CITY NEIGHBORHOODS HURTS AMERICA, AND WHAT WE CAN DO ABOUT IT* (2004) (describing extensive social and psychological costs of forced relocation); BERNARD J. FRIEDEN & LYNNE B. SAGALYN, *DOWNTOWN INC: HOW AMERICA REBUILDS CITIES* 20-35 (1989) (same).

⁴⁴⁶A 1994 summary of the evidence on redevelopment takings concludes that:

In essence, the powers and internal pressures [of the blight condemnation process] create a mandate to gentrify selected areas, resulting in a de facto concentration of poverty elsewhere, preferably outside the decision makers' jurisdiction. Numerous past experiences indicate that the process has been driven by racial animosity as well as by bias against the poor. The net result is that a neighborhood of poor people is replaced by office towers, luxury hotels, or retail centers. The former low-income residents, displaced by the bulldozer or an equally effective increase in rents, must relocate into another area they can—perhaps—afford. The entire process can be viewed as a strategy of poverty concentration and geographical containment to protect the property values—and entertainment choices—of downtown elites. Benjamin B. Quinones, *Redevelopment Redefined: Revitalizing the Central City with Resident Control*, 27 U. MICH. J. L. & REFORM, 680, 740-41 (1994).

The sheer scale of forced relocations driven by “urban renewal” condemnations dwarfs the harms inflicted by economic development condemnations in nonblighted areas. While *Poletown’s* displacement of some 4,200 people was regarded as extreme compared to other economic development takings,⁴⁴⁷ it is worth noting that the blight condemnation upheld in *Berman* condemned the homes of over 5,000 people,⁴⁴⁸ and this fact evoked little outrage or surprise among contemporary observers.⁴⁴⁹ Herbert Gans estimates that, altogether, some one million households were displaced by federally sponsored urban renewal condemnations between 1950 and 1980.⁴⁵⁰ Assuming that the average household size was equal to the 1962 national average of 3.65 persons,⁴⁵¹ that means that federally sponsored urban renewal condemnations forcibly relocated some 3.6 million people. And this figure does not include blight condemnations undertaken by state and local governments on their own initiative.⁴⁵²

This history points to a serious flaw in the logic endorsed by *Hathcock*: that in blight cases the disposition of condemned property is irrelevant because “the act of condemnation . . . *itself* . . . was a public use.”⁴⁵³ As Herbert Gans pointed out, the key flaw in urban renewal condemnations is precisely the fact that “redevelopment proceeded from beginning to end on the assumption that the needs of the site residents were of far less importance than the clearing and rebuilding of the site itself.”⁴⁵⁴ As a result, the residents of blighted neighborhoods suffered massive harm, while their former homes were converted to commercial or residential uses that primarily benefited developers and middle class city residents.⁴⁵⁵ In the *Berman* case, for example, only about 300 of the 5,900 new homes built on the site were affordable to the neighborhood’s former residents.⁴⁵⁶

⁴⁴⁷ see nn. and accompanying text.

⁴⁴⁸ *Berman*, 348 U.S. at 30.

⁴⁴⁹ See, e.g., Pritchett, *supra* note at 44 (noting that “none of the briefs in *Berman* even mentioned the fact that the project would uproot thousands of poor blacks”); cf. *Id.* at 37-41 (noting widespread contemporary support for early urban renewal takings despite recognition that thousands of poor residents would be displaced).

⁴⁵⁰ Gans, *supra* note at 385-86.

⁴⁵¹ Anderson, *supra* note at 54.

⁴⁵² For example, New York City “uprooted” some 250,000 people between 1946 and 1953 alone. Pritchett, *supra* note at 37.

⁴⁵³ *Hathcock*, 684 N.W.2d at 783.

⁴⁵⁴ Gans, *supra* note at 368.

⁴⁵⁵ *Id.* at 369-71, 378-81.

⁴⁵⁶ HOWARD GILLETTE, JR., *BETWEEN JUSTICE AND BEAUTY: RACE, PLANNING, AND THE FAILURE OF URBAN POLICY IN WASHINGTON, D.C.*, 163-64 (1995).

Gans and other reformers recommend that redevelopment programs be redesigned so as to create “benefit” for “the community as a whole and for the people who live in the slum area; not for the redeveloper or his eventual tenants.”⁴⁵⁷ However, such recommendations are flawed because they assume that benefiting local residents and “the community as a whole” is the real purpose of blight takings to begin with. In reality, such condemnations often deliberately target poor and minority property owners for the purpose of benefiting politically powerful development interests and middle class homeowners who are expected to move in after the redevelopment process is completed. So many poor African-Americans were dispossessed by urban renewal condemnations in the 1950s and 1960s that “[i]n cities across the country urban renewal came to be known as ‘Negro removal.’”⁴⁵⁸ Urban elites deliberately focused urban renewal condemnations on the poor and African-Americans.⁴⁵⁹ Between 1949 and 1963, 63 percent of all families displaced by urban renewal condemnations were nonwhite.⁴⁶⁰ Such results are not surprising. It is only to be expected that the condemnation process would target those least able to resist it politically, which in many cities is likely to be residents of poor and majority black neighborhoods.

To be sure, there may still be an economic rationale for using condemnation as a means of alleviating blight. It may sometimes be the case that the elimination of blight involves a collective action problem, since no one property owner in a blighted neighborhood will have a strong incentive to make major improvements on his own property unless others in the area do the same. If he is the only one to make improvements, he is unlikely to recoup their full value because the value of his property will still be dragged down by virtue of its location in a generally dilapidated area. On the other hand, if all or most of the other owners make improvements on their holdings, the first owner can reap the benefits of increased land values in the area even if he does nothing to improve his own tract. Yet even in these situations, the fact that some centralized coercion may be desirable does not mean that the use of condemnation is the

⁴⁵⁷GANS, *supra* note at 370.

⁴⁵⁸Pritchett, *supra* note at 47.

⁴⁵⁹*Id.*

⁴⁶⁰FRIEDEN & SAGALYN, *supra* note at 28.

proper solution to the problem. Local governments have numerous other tools to deal with these sorts of problems, including the application of nuisance law, enforcement of housing codes, and the use of tax abatements or subsidies to encourage improvement of property.

A complete evaluation of these alternatives is beyond the scope of this Article. However, it is worth noting that the use of eminent domain is likely to be inferior to most of the alternative policies for two major reasons: it requires dispossession of the current residents of “blighted” neighborhoods and it also carries a much more severe risk of interest group “capture.” Even if condemnation may be theoretically justified in some cases of blight, the interest group dynamics involved suggest that real-world blight condemnations are more likely to be driven by the needs and interests of politically powerful developers and middle class residents than those of the politically weak citizens of blighted neighborhoods. Thus, even where condemnation may be justifiable in theory, it should still be viewed with great suspicion in practice.

In sum, even in areas where there is “real” blight—perhaps especially there—the condemnation process is likely to be abused for the benefit of private interests at the expense of the poor and politically weak.

CONCLUSION

A categorical ban on the economic development rationale for condemnation is the best solution for the abuses it causes. At the same time, it would be wrong to dismiss more moderate approaches out of hand. The recent judicial and political trend toward increasing skepticism of economic development takings is a welcome step in the right direction. Even *Kelo* represents a slight increase in judicial scrutiny of public use issues relative to earlier Supreme Court precedents. Similarly, despite its severe limitations, the political reaction against the *Kelo* decision may yet result in the enactment of at least some useful legislative restrictions on eminent domain at either the state or federal level.

Nonetheless, even *Hathcock* and other comparatively robust decisions are not a panacea for eminent domain abuse; their longterm impact will in large part depend on future judicial interpretation. We have taken a few steps in the right direction but are still far from the end of the road.