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### The Uselessness of Public Use

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# ESSAY

## THE USELESSNESS OF PUBLIC USE

*Abraham Bell\* and Gideon Parchomovsky\*\**

*The Supreme Court decision of Kelo v. City of New London has been denounced by legal scholars from the entire political spectrum and given rise to numerous legislative proposals to reverse Kelo’s deferential interpretation of the Public Use Clause of the Fifth Amendment, and instead, limit the use of eminent domain when taken property is transferred to private hands.*

*In this Essay, we argue that the criticisms of Kelo are ill conceived and misguided. They are based on a narrow analysis of eminent domain that fails to take into account the full panoply of government powers with respect to property. Given that the government can achieve any land use goals through the powers of regulation and taxation without paying compensation to the aggrieved property owner, eminent domain is the government power least pernicious to property owners as it is the only one that guarantees them compensation. An important and counterintuitive implication of this insight is that the calls to restrict the government’s ability to use eminent domain by narrowly construing public use are going to harm, rather than help, private property owners.*

*This Essay then poses the intriguing question: Why does the government ever choose to pay compensation? To answer this question we develop a model of political decisionmaking with respect to land use. Our model enables us to elucidate the political calculus that governs the compensation decision and to specify the conditions under which political decisionmakers will elect to pay compensation regardless of the policy instrument chosen.*

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\*\* Professor, University of Pennsylvania Law School; Visiting Professor, Bar Ilan University, Faculty of Law. This Essay greatly benefited from comments and criticisms by Ben Depoorter, Assaf Hamdani, Wendell Pritchett, Lawrence Rosenthal, Peter Siegelman, Bill Treanor, and Thomas Ulen.

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INTRODUCTION

Everyone hates *Kelo*.

In 2005, the Supreme Court upheld the City of New London’s taking of Susette Kelo’s private home<sup>1</sup> for purposes of economic development. The Court’s ruling in *Kelo v. City of New London* broke no new legal ground; it merely affirmed a longstanding rule that a taking evidences the constitutionally required “public use” whenever the state acts within its police powers. Yet critics’ reactions were immediate, intense, and harsh.

Libertarians hate *Kelo* for granting excessive deference to state actions that impair private property rights. Libertarian critics of the decision argue that the Court’s deferential approach to questions of public use extends an open invitation to the government to take private property anytime it believes it has identified a better use (public or private) for it. To libertarians, then, *Kelo* constitutes a judicial endorsement of massive government intervention in the private property market. In their view, this intervention extends well beyond the narrow need to supply public goods, and permits government to second-guess private owners’ autonomy in deciding how to develop their property and when to transfer it.<sup>2</sup>

Liberals, too, hate *Kelo* for permitting large corporations to acquire the property of small owners without their consent and for the imprimatur it places on state victimization of the poorest property owners.<sup>3</sup> The facts of *Kelo* illustrate the first concern; New London took Kelo’s property, along with more than a hundred others, in order to assemble land for the pharmaceutical giant Pfizer.<sup>4</sup> For such critics, *Kelo* represents an

1. There were eight other petitioners, the taking of whose property was upheld in the same action. *Kelo v. City of New London*, 125 S. Ct. 2655, 2660 (2005).

2. See *infra* Part I.B.

3. See *infra* Part I.B.

4. *Kelo*, 125 S. Ct. at 2659–60. While some traditional liberal media outlets, such as the *New York Times*, supported the decision, Editorial, *The Limits of Property Rights*, N.Y. Times, June 24, 2005, at A22, critics noted that the *Times*’s endorsement of the *Kelo* ruling followed on the heels of New York’s seizure of private land in midtown Manhattan for the construction of new corporate headquarters for the newspaper. See, e.g., Steve Cuozzo, *Unfit to Print: Times Omits Own Eminent-Domain Tale*, N.Y. Post, Jan. 19, 2006, at 31.

affirmation of the infamous *Poletown Neighborhood Council v. City of Detroit*,<sup>5</sup> in which the Michigan Supreme Court upheld the state constitutionality of Detroit's seizure of nearly all private realty in a working-class neighborhood and transfer of the land to General Motors.<sup>6</sup> The latter concern is compounded by a belief that government exercises of eminent domain have a disparate negative impact on the least well-off. This concern finds empirical support in a study by Patricia Munch Danzon in which she demonstrated that owners of less valuable properties are systematically undercompensated when their properties are taken, while owners of greater-value property receive excess compensation.<sup>7</sup> Therefore, liberals find the broad interpretation of "public use" extremely unappealing on distributional grounds.<sup>8</sup>

Furthermore, some liberal critics tie the distributional concern to race and ethnicity by highlighting the correlation between poverty and membership in certain minority groups. To them, *Kelo* reaffirms the ruling of *Berman v. Parker*, which found a permissible public use in the seizure of private properties for transfer to private developers as part of an urban renewal plan.<sup>9</sup> Representative John Conyers (D-MI) assailed such exercises of the takings power as having been used "historically to target the poor, people of color, and the elderly."<sup>10</sup> Likewise, Justice Thomas noted in his *Kelo* dissent that "[o]f all the families displaced by urban renewal from 1949 through 1963, 63 percent of those whose race was known were nonwhite."<sup>11</sup>

The Court's ruling in *Kelo* has also become the lightning rod for more generalized criticism of governmental abuse of eminent domain. Nobel prize laureate Gary Becker, for example, argues that a broad government power to take by eminent domain is an anachronism, justifiable only in the old days when "governments did rather little."<sup>12</sup> Given shortcomings in takings compensation doctrine, Becker argues that the authority to seize property by eminent domain opens the door to inefficient projects born of corruption and enabled by abusive exercise of govern-

5. 304 N.W.2d 455 (Mich. 1981).

6. Wendell E. Pritchett, The "Public Menace" of Blight: Urban Renewal and the Private Uses of Eminent Domain, 21 Yale L. & Pol'y Rev. 1, 48-49 (2003).

7. Patricia Munch, An Economic Analysis of Eminent Domain, 84 J. Pol. Econ. 473, 495 (1976).

8. See *infra* Part I.B.

9. 348 U.S. 26, 35 (1954).

10. 151 Cong. Rec. H5577, H5578 (daily ed. June 30, 2005) (statement of Rep. Conyers).

11. *Kelo v. City of New London*, 125 S. Ct. 2655, 2686-87 (2005) (Thomas, J., dissenting) (quoting Bernard L. Frieden & Lynne B. Sagalyn, *Downtown, Inc.: How America Rebuilds Cities* 28 (1989)).

12. Posting of Gary Becker, *On Eminent Domain*, to The Becker-Posner Blog, at <http://www.becker-posner-blog.com/archives/2005/06/index.html> (June 27, 2005) (on file with the *Columbia Law Review*).

ment powers.<sup>13</sup> In Becker's view, *Kelo* represents a missed opportunity to cut back on the government's takings power.

*Kelo* has even come under attack from communitarians such as Amitai Etzioni. Despite his general belief that "individual rights have been unduly expanded, often at the cost of the common good," Etzioni singled *Kelo* out as the case that "open[ed] the floodgates" to excessive seizures without setting adequate limits to secure private property.<sup>14</sup>

The political response to *Kelo* has been broad and far reaching. Several states have already refined their state constitutional standards for eminent domain to reject *Kelo* and impose a narrower test of public use, while others have taken up bills to do the same.<sup>15</sup> Both houses of Congress have considered, and the House of Representatives has approved, proposed legislation that would force states to adopt a narrower definition of public use at the penalty of losing federal funds.<sup>16</sup> *Kelo* remains a popular punching bag in the media,<sup>17</sup> and the decision came up for criticism repeatedly in confirmation hearings for the recently appointed Chief Justice Roberts and Justice Alito.<sup>18</sup>

In light of the anti-*Kelo* consensus, defending the ruling is a daunting task. Even Justice Stevens, who authored the decision, has been lukewarm, and even apologetic, in defending his own handiwork.<sup>19</sup>

Nevertheless, in this Essay, we argue that *Kelo* was rightly decided and that criticisms of the decision are ill conceived and misguided. We show that any other interpretation of the public use component of takings law

13. Cf. Abraham Bell & Gideon Parchomovsky, Taking Compensation Private, 59 Stan. L. Rev. (forthcoming 2006) (manuscript at 17–23, on file with the *Columbia Law Review*) [hereinafter Bell & Parchomovsky, Private] (pointing out flaws in takings compensation).

14. Amitai Etzioni, States to the Rescue, Nat'l L.J., Sept. 19, 2005, at 31.

15. See *infra* note 83 and accompanying text.

16. Senate bills include the Private Property Rights Protection Act, S. 1895, 109th Cong. (2005); the Private Property Protection Act of 2005, S. 1704, 109th Cong. (2005); and the Protection of Homes, Small Businesses, and Private Property Act of 2005, S. 1313, 109th Cong. (2005). The proposed Private Property Rights Protection Act of 2005, H.R. 4128, 109th Cong. (2005) passed the House on November 3, 2005 and as of this writing is pending in the Senate. See 151 Cong. Rec. H9561, H9561–62 (daily ed. Nov. 3, 2005). The bill would prevent the exercise of the power of eminent domain for "economic development" by the federal government and such state and local governments as receive federal funds, subject to a number of exceptions such as seizure for purposes of conveying the property to public ownership or for use by a public utility. H.R. 4128 §§ 2(a), 3, 8(1)(A)–(G).

17. See Gideon Kanner, The Public Use Clause: Constitutional Mandate or "Hortatory Fluff"?, 33 Pepp. L. Rev. 335, 345 n.55 (2006) (collecting "sampling of the vigorous public reactions").

18. See, e.g., 152 Cong. Rec. S235, S236 (2006); 152 Cong. Rec. S145, S174, S189 (2006); 152 Cong. Rec. S35, S57 (2006); 151 Cong. Rec. S10,631, S10,633 (2005); 151 Cong. Rec. S10,529, S10,546, S10,553, S10,565 (2005); 151 Cong. Rec. S10,481, S10,501 (2005).

19. Linda Greenhouse, Justice Weighs Desire v. Duty (Duty Prevails), N.Y. Times, Aug. 25, 2005, at A1.

would produce inconsistencies within the constitutional law of property rights and create perverse incentives for government decisionmakers considering eminent domain and property regulations. Indeed, adopting the narrower construction of public use proffered by *Kelo*'s dissenters and critics would exacerbate, rather than remedy, the erosion of private property rights and the potential abuse of government power.

The Achilles heel of the anti-*Kelo* movement is its failure to consider the place of the public use doctrine within the full arsenal of government regulatory powers over property. The real problem posed by situations such as that addressed in *Kelo* is how to protect private property owners against abusive government acts in a legal world that gives great deference to economic judgments of political branches and wishes to continue to do so. We show, counterintuitively, that the solution is to be found in expanding, not contracting, the number of cases in which the government can use its power of eminent domain, while limiting its ability to avoid compensation when otherwise infringing upon private property rights.

Eminent domain is not the only power the government can use to take private property. As many scholars have noted, the government has at its disposal functionally equivalent powers, such as property regulation and taxation, which enable it to transfer title from private property owners to itself and others without having to pay full compensation. Furthermore, as we will explain, even when the government seizes property by eminent domain, it can employ various strategies to lower the compensation award. For example, government can declare an area "blighted," a declaration that typically precipitates a drop in property values, and then obtain title to the relevant properties on the cheap.

Paradoxically, therefore, the broad reading of public use affirmed in *Kelo* is necessary to preserve the best case scenario for private property owners. Limiting the ability of government to use eminent domain to further economic goals will not prevent the government from using its more invasive powers to inflict identical harms on private property rights, but without compensation. Contrary to public sentiment, then, eminent domain should be seen as the least offensive of government's property-related powers.

To be sure, a broad reading of public use, à la *Kelo*, does not force the government to declare a taking and pay compensation. Why doesn't the government use one of its more invasive powers anyway? In fact, it often does—and herein lies the cardinal mistake of *Kelo*'s critics. In targeting the public use doctrine as key to curbing government abuse of property rights, the critics have made the compensated seizure a less-attractive option for government decisionmakers and missed the opportunity to fight the promiscuous use of government's other powers without compensation. Indeed, if the public use doctrine were now narrowed as *Kelo* critics demand, the situation would only worsen, as the government

would be forced to use its nontakings powers to accomplish any property-related missions.

Only a comprehensive approach that accounts for all the powers the government has over private property can yield a coherent takings policy. Unfortunately, with the outstanding exception of Richard Epstein's *Takings*,<sup>20</sup> such comprehensive accounts are rarely to be found in the scholarly literature on takings. Like Epstein, we argue that one cannot divorce most kinds of property regulations from a takings paradigm; by contrast with Epstein, we propose an instrumental model of takings compensation that commits to no particular view of the permissible role of government.

Nonetheless, our framework rules out a strict or narrow "public use" requirement; a stringent public use prong of takings law undermines the ability of the government to utilize what may be the most efficient of its powers over private property while leaving owners open to many uncompensated indirect takings. Indeed, we argue that *Kelo* and its predecessors sensibly made the public use requirement identical to the limitations on other government powers over property.

The remainder of this Essay unfolds in three parts. In Part I, we review the *Kelo* decisions and the harsh reactions they engendered. In Part II, we take a step back and discuss the full panoply of government powers affecting property, placing the power of eminent domain within the proper context. Here, we show that criticisms of one or another of the elements of eminent domain law in isolation miss the point. Indeed, by examining the interplay between the various government powers, we demonstrate that the government may always achieve any property regulation or seizure through a variety of government powers, with or without compensation. Thus, barring eminent domain for some purposes simply leads the government to use another power to the same effect. This leads in Part III to an examination of the considerations leading the government to use one or another of its powers. We offer a comprehensive framework for analyzing the government decision of which power to use and when to pay compensation. We show that, perversely, a strict interpretation of the public use prong of takings law leads to an erosion of private property rights by enhancing the relative attractiveness of uncompensated seizures, while leaving intact the ability to seize property and pay compensation under other government powers. A short conclusion follows.

## I. THE *KELO* STORM

### A. *The Kelo Ruling*

Supreme Court decisions in the area of takings often prompt harsh public reaction and heated public debate. Takings law has become one

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20. Richard A. Epstein, *Takings: Private Property and the Power of Eminent Domain* 179–80 (1985) [hereinafter Epstein, *Takings*].

of the primary battlefields for ideological wars among politicians and legal academics. Takings law, therefore, is no stranger to controversy. Yet, even in this controversy-ridden realm, the notoriety of the Supreme Court's decision in the case of *Kelo v. City of New London* is considered a rarity. In its 5-4 decision to uphold New London's plan to seize title to multiple private properties for the benefit of a Pfizer-built industrial park, the Supreme Court ruled that the plan did not violate the "public use" proviso in the Fifth Amendment.<sup>21</sup>

The decision won instant and near universal condemnation.

As a leading commentator recently noted, "*Kelo* galvanized the public at large because [it] unified the progressives with the classical liberals as few issues can."<sup>22</sup> The case united, if only for a short while, such unlikely allies as the Institute for Justice,<sup>23</sup> the NAACP,<sup>24</sup> Richard Epstein,<sup>25</sup> and Amitai Etzioni,<sup>26</sup> all of whom opposed the planned taking. The case has similarly spurred a public outcry and a swift political response. More than ten state legislatures rushed to introduce legislation that would bar the government from exercising its eminent domain power in circumstances similar to *Kelo*.<sup>27</sup> Proposed federal legislation to reverse *Kelo*'s effects in federally funded projects passed the House of Representatives, and has been introduced in the Senate.<sup>28</sup> *Kelo* also featured prominently in Chief Justice Roberts's and Justice Alito's confirmation hearings, and both were repeatedly probed about their opinion on the matter.<sup>29</sup>

The most astounding feature of *Kelo*, as even the case's harshest critics agree, is that from a legal standpoint, the ruling broke no new ground. The Supreme Court's broad interpretation of the public use requirement goes more than five decades back to the case of *Berman v. Parker*.<sup>30</sup> In *Berman*, the Supreme Court sanctioned an extensive urban renewal plan in Washington, D.C. that involved, inter alia, the condemna-

21. *Kelo v. City of New London*, 125 S. Ct. 2655, 2663-65 (2005).

22. Richard A. Epstein, *Kelo*: An American Original: Of Grubby Particulars and Grand Principles, 8 Green Bag 2d 355, 357 (2005) [hereinafter Epstein, *Kelo*].

23. See materials collected at Inst. for Justice, *Kelo v. New London*, at [http://www.ij.org/private\\_property/connecticut/](http://www.ij.org/private_property/connecticut/) (last visited Aug. 24, 2006).

24. Brief of Amici Curiae NAACP et al. in Support of Petitioners, *Kelo*, 125 S. Ct. 2655 (No. 04-108).

25. Brief for the Cato Institute as Amicus Curiae Supporting Petitioners, *Kelo*, 125 S. Ct. 2655 (No. 04-108).

26. See Etzioni, *supra* note 14.

27. Forty-three of the forty-four states that have gone into session this year have introduced legislation intended to restrict or prohibit the government from exercising its eminent domain power to spur economic development when doing so primarily benefits a private entity. To date, twenty-eight state legislatures have passed bills. See Nat'l Conference of State Legislatures, Eminent Domain, 2006 State Legislation, at <http://www.ncsl.org/programs/natres/emindomainleg06.htm> (last updated Sept. 12, 2006) (on file with the *Columbia Law Review*).

28. See *supra* note 16.

29. See *supra* note 18.

30. 348 U.S. 26 (1954).



tion and transfer of multiple private lots to private developers. *Berman* adopted a very broad interpretation of public use, explaining that the requirement is satisfied whenever the government acts within its police power.<sup>31</sup> The Court evinced no concern that many of the properties were to be transferred from one set of private hands to another, and it added that “[t]he role of the judiciary in determining whether that power is being exercised for a public purpose is an extremely narrow one.”<sup>32</sup> The only relevant distinction between *Berman* and *Kelo* is that many (though not all) of the taken properties in *Berman* were blighted or in a state of disrepair.<sup>33</sup>

Thirty years later, the Supreme Court revisited the issue of public use in *Hawaii Housing Authority v. Midkiff*.<sup>34</sup> Rather than narrowing the scope of *Berman*, the Court chose to reiterate its holding in even broader language. *Midkiff* concerned Hawaii’s passage of the Land Reform Act of 1974—an act intended to break the oligopoly of land ownership in the state. The legislation empowered tenants to force their landlords to relinquish their fee simple interest in the property and transfer it to the tenants.<sup>35</sup> The legislation was attacked for being at odds with the Public Use Clause in the Fifth Amendment. Importantly, in this case, the affected properties were in perfectly good shape. A unanimous Supreme Court upheld the Hawaii legislation, pronouncing that the Public Use Clause is coterminous with police power.<sup>36</sup>

Why then was the *Kelo* decision met with such wide criticism? The answer is that at the time of the decision many takings scholars and public figures expected (or hoped) that the Supreme Court would narrow down the definition of public use. This expectation was based on several state court decisions that adopted a restrictive definition of public use. Foremost among those was the 2004 ruling of the Michigan Supreme Court in *County of Wayne v. Hathcock*,<sup>37</sup> which overturned the broad reading of public use in Michigan law adopted twenty-three years earlier in *Poletown Neighborhood Council v. City of Detroit*.<sup>38</sup> *Poletown* was *Kelo*’s predecessor as the *bête noire* of takings law.<sup>39</sup> More importantly, the two cases shared some salient similar facts.

31. *Id.* at 32. The Court elucidated that “[p]ublic safety, public health, morality, peace and quiet, law and order—these are some of the more conspicuous examples of the traditional application of the police power to municipal affairs.” *Id.*

32. *Id.*

33. *Id.* at 30.

34. 467 U.S. 229 (1984).

35. *Id.* at 232–34.

36. *Id.* at 240.

37. 684 N.W.2d 765 (Mich. 2004).

38. 304 N.W.2d 455 (Mich. 1981).

39. Perhaps the best test of notoriety was advanced by Timothy Sandefur who wrote in reference to *Poletown*, “[a]s an extreme case, *Poletown* gained the sort of symbolic authority—and infamy—reserved for those few cases recognized by a single name (*Marbury*, *Plessy*, *Korematsu*).” Timothy Sandefur, A Gleeful Obituary for *Poletown*

In *Poletown*, the City of Detroit exercised its eminent domain power to assemble land for a General Motors plant in order to keep the car manufacturer from locating a new facility in a different state. The plan was devised in a period of economic recession, particularly in the domestic automotive industry.<sup>40</sup> A divided Michigan Supreme Court allowed the City of Detroit to carry out the taking, ruling that the public use provision does not bar government exercises of eminent domain that aim to spur economic development.<sup>41</sup>

Despite harsh scholarly criticism,<sup>42</sup> the *Poletown* ruling served as an important reference point for other state courts. Much to the chagrin of property rights champions, a number of state courts followed the ruling in *Poletown*, permitting wide use of eminent domain for the purpose of promoting economic development.<sup>43</sup> Among these state courts was Connecticut's Supreme Court, which upheld the taking in *Kelo*, specifically referencing the *Poletown* standard.<sup>44</sup> Therefore, it may be said that the decision in *Poletown* blazed the trail that ultimately led to the Supreme Court ruling in *Kelo*.

*Poletown* was an influential decision for nearly twenty-three years. In 2004, however, it underwent a reversal of fortunes when the Michigan Supreme Court issued its decision in *Hathcock*. The case involved Wayne County's plan to condemn title to private properties in order to pass them to a group of private developers for the construction of a business and technology park. Deviating from its past decisions, the Michigan Supreme Court struck down the government plan, and, more importantly, narrowed the definition of public use. Specifically, the court ruled that the public use requirement permits the government to use its eminent domain power to transfer land to private entities in only three sets of circumstances. First, a taking and transfer are permissible where necessary to overcome a collective action problem. An example of this would be the construction of a highway or pipeline. Second, the taking and transfer to private ownership are permitted where the taken property will be subject to continuous government oversight, such as when the seized

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*Neighborhood Council v. Detroit*, 28 Harv. J.L. & Pub. Pol'y 651, 665 (2005) (footnotes omitted). *Kelo* has already won the dubious honor of being in this group.

40. See Jeanie Wylie, *Poletown: Community Betrayed* 29–40 (1989) (offering anticorporatist account of events leading to decision).

41. *Poletown*, 304 N.W.2d at 457.

42. See, e.g., Epstein, *Takings*, supra note 20, at 179–80; Joseph L. Sax, *Some Thoughts on the Decline of Private Property*, 58 Wash. L. Rev. 481, 489–90 (1983); Ilya Somin, *Overcoming Poletown: County of Wayne v. Hathcock*, *Economic Development Takings, and the Future of Public Use*, 2004 Mich. St. L. Rev. 1005, 1006–07 [hereinafter Somin, *Overcoming Poletown*].

43. According to the count of one commentator, “[t]he *Poletown* case has been cited directly by the courts of nine other states, and the Seventh Circuit. More importantly, the equation of ‘public use’ with ‘public purpose’ that underlay that decision was adopted by the United State [sic] Supreme Court in *Hawaii Housing Authority v. Midkiff*.” Sandefur, supra note 39, at 664–65 (internal citations omitted).

44. *Kelo v. City of New London*, 843 A.2d 500, 527 (Conn. 2004).

properties will be used for a government-affiliated university campus. Third, a taking and transfer will be permitted where “facts of independent public significance” beyond the private recipient’s interest may justify the transfer—for example, when the government seeks to revive a severely blighted neighborhood.<sup>45</sup> The court unequivocally stated that the ruling overturned the broad public use rule established in *Poletown*.<sup>46</sup>

Although the ruling in *Hathcock* had no direct bearing on *Kelo*, it indicated that a new wind might be blowing in the world of takings. The outcome of *Hathcock* and other state court decisions, and the temporal proximity between the issuance of the *Hathcock* opinion and the *Kelo* hearing by the United States Supreme Court, gave the property rights camp hope that, at long last, the Supreme Court would overrule its broad interpretation of public use. This hope was augmented by some resemblance between the underlying facts of the two cases.

The *Kelo* case was brought after the City of New London announced its plan to condemn multiple private properties in order to assemble enough land to construct a lavish headquarters for the pharmaceutical giant Pfizer. The City adopted this plan in the midst of an economic downturn in order to lure Pfizer to New London.<sup>47</sup> A group of fifteen property owners challenged the constitutionality of the taking, arguing that it violated the Public Use Clause. The Supreme Court of Connecticut, in a 4-3 decision, affirmed the power of the government to utilize eminent domain for purposes of economic development.<sup>48</sup> The property owners turned to the United States Supreme Court for relief.

In a 5-4 decision, the United States Supreme Court upheld the ruling of the Connecticut high court. Writing for the majority, Justice Stevens adhered to the Court’s expansive interpretation of public use. Based on a careful review of the Supreme Court precedents, Justice Stevens ruled that New London’s proposed taking “unquestionably serves a public purpose” and thus “satisf[ies] the public use requirement of the Fifth Amendment.”<sup>49</sup> He categorically rejected the petitioners’ suggestion that economic development does not qualify as public use, noting that this proposition is supported neither by precedent nor by logic.<sup>50</sup> He added that “[p]romoting economic development is a traditional and long accepted function of government” and that there exists “no principled way of distinguishing economic development from the other public purposes that we have recognized.”<sup>51</sup>

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45. *County of Wayne v. Hathcock*, 684 N.W.2d 765, 781–83 (Mich. 2004) (quoting *Poletown*, 304 N.W.2d at 480 (Ryan, J., dissenting)).

46. *Id.* at 787.

47. *Kelo*, 843 A.2d at 508–09.

48. *Id.* at 520.

49. *Kelo v. City of New London*, 125 S. Ct. 2655, 2665 (2005).

50. *Id.* at 2665–67.

51. *Id.* at 2665.

The two dissenting opinions in *Kelo* were authored by Justice O'Connor and Justice Thomas. Justice O'Connor sought to narrow public use with a strategy similar to that adopted by the Michigan court in *Hathcock*. Under her reading, prior Supreme Court decisions identified three possible categories of takings that meet the public use requirement. The first consists of transfers of "private property to public ownership—such as for a road, a hospital, or a military base."<sup>52</sup> The second is comprised of transfers of "private property to private parties, often common carriers, who make the property available for the public's use—such as with a railroad, a public utility, or a stadium."<sup>53</sup> The third category covers takings necessary "to meet certain exigencies . . . even if the property is destined for subsequent private use."<sup>54</sup> Per Justice O'Connor, *Berman* and *Midkiff* fall under this last category because both involved takings of property being put to pretakings "harmful use."<sup>55</sup> Justice O'Connor argued that the majority's willingness to recognize public use, even when the properties taken are *not* harmful, eliminates "any distinction between private and public use of property—and thereby effectively [deletes] the words 'for public use' from the Takings Clause of the Fifth Amendment."<sup>56</sup>

The second dissenting opinion, penned by Justice Thomas, took a more direct approach. Unlike Justice O'Connor, Justice Thomas did not dispute the majority's interpretation of prior cases. Rather, he opined that the prior cases and the majority's opinion were all misguided. Accordingly, he characterized the majority opinion as "the latest in a string of our cases construing the Public Use Clause to be a virtual nullity, without the slightest nod to its original meaning."<sup>57</sup> In his view, the Public Use Clause constitutes "a meaningful limit on the government's eminent domain power."<sup>58</sup> Correctly understood, the Clause "allows the government to take property only if the government owns, or the public has a legal right to use [it]," and prohibits "'tak[ing] property from A. and giv[ing] it to B.'"<sup>59</sup>

Although the Supreme Court's ruling in *Kelo* permitted New London to proceed with the taking, ultimately, the City declined to take the properties. Instead, more than a year after the decision, the City privately negotiated an arrangement with Kelo and the other holdout property owners.<sup>60</sup> This result was due in great part to the overwhelmingly nega-

52. *Id.* at 2673 (O'Connor, J., dissenting).

53. *Id.*

54. *Id.*

55. *Id.* at 2675.

56. *Id.* at 2671.

57. *Id.* at 2678 (Thomas, J., dissenting).

58. *Id.*

59. *Id.* at 2679–80 (quoting *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 388 (1798)).

60. See Elizabeth Mehren, *Eminent Domain Plaintiff Will Keep Her House*, L.A. Times, July 1, 2006, at A15; William Yardley, *After Eminent Domain Victory, Disputed Project Goes Nowhere*, N.Y. Times, Nov. 21, 2005, at A1.

tive public and political response to the decision. It is to this response that we now turn.

### B. *Reactions to Kelo*

Few takings cases sparked as harsh a reaction as did *Kelo*. The decision attracted criticism from commentators of diverse, and often conflicting, political persuasions. Virtually all commentators found the ruling disconcerting, albeit for different reasons. *Kelo* also sparked a political maelstrom.

As one might expect, libertarians excoriated the ruling in *Kelo*. To libertarians, *Kelo* provided further proof of the perils “of faction and rent-seeking that only a strong system of property rights can effectively resist.”<sup>61</sup> In this sentiment, the libertarians echoed a sense shared by many laypeople about the sanctity of private property. As Richard Epstein, the leading scholar on takings law, wrote, “[f]or most people, the key question was whether a man’s home is his castle, for which the naïve answer is yes, except when property is used for traditional public purposes such as roads and parks.”<sup>62</sup> The facts of *Kelo* were particularly disturbing for libertarians, as they seemed to indicate that the petitioners’ property was designated for taking not for the industrial project, but rather without any sensible reason at all.<sup>63</sup>

Libertarians had hoped that the Supreme Court would intervene by reinvigorating the Public Use Clause. They believed that a stricter public use requirement would hamper the ability of the government to engage in redistribution of property and thereby cut back on the influence of various lobbyists and interest groups. The Court’s refusal to narrow down the interpretation of public use dashed the hopes of the libertarian camp. Worse yet, in their reading, the Court’s adherence to the broad construction under the specific facts of *Kelo* constituted an invitation to the government to trample private property rights in a broad range of circumstances and usurp the owners’ power to make decisions about the future of the property.

The liberal case against *Kelo* is predicated on a very different set of concerns. In the American political context, liberals do not oppose, in principle, government intervention in the private property market; nor do they object to any redistribution of wealth by the government from the well-to-do to the poor. The problem liberals perceive with *Kelo* is that it sanctioned the wrong kind of wealth redistribution: from the poor to the rich—from small homeowners like Susette Kelo and her fellow petition-

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61. Epstein, *Kelo*, supra note 22, at 357; accord Ilya Somin, Controlling the Grasping Hand: Economic Development Takings After *Kelo* 1 (George Mason Univ. Law & Econ. Research Paper Series, Paper No. 06-01, 2005), available at [http://ssrn.com/abstract\\_id=874865](http://ssrn.com/abstract_id=874865) (on file with the *Columbia Law Review*) (“[C]ourts should forbid most if not all uses of the economic development rationale . . .”).

62. Epstein, *Kelo*, supra note 22, at 356.

63. *Id.*

ers to large corporations like Pfizer. As the NAACP stated in the amicus brief it filed on behalf of the petitioners: "Elimination of the requirement that any taking be for a true public use will disproportionately harm racial and ethnic minorities, the elderly, and the economically underprivileged."<sup>64</sup>

The two dissenting opinions in this case seized on the very same point. Justice O'Connor's dissent focused on the effect of the ruling on the poor, while Justice Thomas's dissent highlighted the disparate impact of the decision on minority racial groups. In discussing the future effects of the majority opinion, Justice O'Connor wrote:

Any property may now be taken for the benefit of another private party, but the fallout from this decision will not be random. The beneficiaries are likely to be those citizens with disproportionate influence and power in the political process, including large corporations and development firms. As for the victims, the government now has license to transfer property from those with fewer resources to those with more. The Founders cannot have intended this perverse result.<sup>65</sup>

Justice Thomas concluded his dissent by reviewing the effect of past takings on minority owners. He pointed out that "[o]ver 97 percent of the individuals forcibly removed from their homes by the 'slum-clearance' project upheld by this Court in *Berman* were black."<sup>66</sup> He further noted that "[u]rban renewal projects have long been associated with the displacement of blacks; 'in cities across the country, urban renewal came to be known as 'Negro removal.'"<sup>67</sup>

These ominous predictions are supported to some degree by empirical data. In a careful study of the takings in Chicago, Patricia Munch Danzon found that owners of expensive lots are compensated at above market value, while owners of inexpensive properties are systematically undercompensated.<sup>68</sup> To the extent that there is correlation between lot value and wealth, the exercise of eminent domain benefits the affluent and hurts the poor.

Communitarian thinkers also found fault with *Kelo*. Communitarians generally oppose strong private property rights because of their deleterious effects on common resources. In this case, however, they thought that the Supreme Court went too far in the other direction, abdicating its responsibility to protect private property.<sup>69</sup> Large-scale takings for economic development pose a clear threat to existing communities and may

64. Brief of Amici Curiae NAACP et al. in Support of Petitioners, *supra* note 24, at 3.

65. *Kelo v. City of New London*, 125 S. Ct. 2655, 2677 (2005) (O'Connor, J., dissenting).

66. *Id.* at 2687 (Thomas, J., dissenting).

67. *Id.* (quoting Pritchett, *supra* note 6, at 47).

68. Munch, *supra* note 7, at 495.

69. See, e.g., Etzioni, *supra* note 14 (lamenting fact that "individual rights have been unduly expanded, often at the cost of the common good").

often cause them to unravel.<sup>70</sup> The case of *Poletown* illustrates this danger. There, a vibrant ethnic community was effaced in order to make possible the construction of G.M.'s plant.<sup>71</sup> Likewise, in *Berman*, multiple communities had to give way to allow the urban redevelopment project to go forward.<sup>72</sup>

Some economists also expressed dissatisfaction with the ruling. To them, *Kelo* represents a missed opportunity to scale back the scope of eminent domain. Gary Becker, for example, questioned the wisdom of retaining the power of eminent domain in this day and age. In his view, we could tolerate this power in the past because it was used sparsely and infrequently. Today, when government resorts to this power regularly, the harms it generates far outweigh its benefits.<sup>73</sup> Echoing to a large degree the libertarian concerns, some economists cautioned that the extensive use of eminent domain leads to inefficient government projects, breeds corruption, and erodes private property rights.<sup>74</sup>

Most importantly, politicians, both on the federal and state levels, have heeded the criticisms of the ruling and the public outcry that followed it and rushed to introduce various bills aimed at restricting the government's power to use eminent domain to spur economic development. Within three weeks of the ruling, Senator John Cornyn (R-TX) proposed legislation that would construe the Public Use Clause narrowly, so as to bar the use of eminent domain in order to achieve economic development.<sup>75</sup> Similar bills were introduced in the House of Representatives by Dennis Rehberg (R-MT),<sup>76</sup> Phil Gingrey (R-GA),<sup>77</sup> Maxine Waters (D-CA),<sup>78</sup> Henry Bonilla (R-TX),<sup>79</sup> Joel Hefley (R-CO),<sup>80</sup> and James Sensenbrenner (R-WI) together with ninety-seven cospon-

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70. See Gideon Parchomovsky & Peter Siegelman, *Selling Mayberry: Communities and Individuals in Law and Economics*, 92 Cal. L. Rev. 75, 133-42 (2004) (analyzing implications of communities on design of takings law); Margaret Jane Radin, *Market-Inalienability*, 100 Harv. L. Rev. 1849, 1878 (1987) (arguing that economic analysis "could take into account not only the monetary costs to landlords and would-be tenants, but also the decline in well-being of tenants who are forced to lose their homes, [and] break up their communities").

71. See Somin, *Overcoming Poletown*, supra note 42, at 1006.

72. See Pritchett, supra note 6, at 1-6, 37-47 (summarizing *Berman v. Parker*, 348 U.S. 26 (1954)).

73. See Posting of Gary Becker, supra note 12 (discussing possible harms resulting from government corruption and abuse of eminent domain).

74. See id. (opining that in modern era when "government [sic] at all levels do so much that the temptation is irresistible to use eminent domain condemnation proceedings to hasten and cheapen their accumulation of property for various projects, regardless of a project[']s merits," it may be desirable to do away with power of eminent domain).

75. S. 1313, 109th Cong. (2005).

76. H.R. 3083, 109th Cong. (2005).

77. H.R. 3087, 109th Cong. (2005).

78. H.R. 3315, 109th Cong. (2005).

79. H.R. 3405, 109th Cong. (2005).

80. H.R. 3631, 109th Cong. (2005).

sors,<sup>81</sup> and in the Senate by John Ensign (R-NV).<sup>82</sup> On the state level, nearly every state has considered, or will consider this year, legislation seeking to restrict or prohibit the government from exercising its eminent domain power to spur economic development when doing so primarily benefits a private entity, and a number of states have adopted the measures.<sup>83</sup>

## II. GOVERNMENT AND PROPERTY

Overlooked in all the furor over *Kelo* is the stark logic supporting the Court's position. The government has many powers that affect property, and in the post-New Deal world, these powers may be exercised without significant judicial oversight.<sup>84</sup> It is difficult to identify a characteristic of eminent domain that warrants treating differently this power from among all government economic powers. Indeed, as we show, the other economic powers are far more menacing to private property rights. Thus, it is perfectly sensible that in *Kelo*, as in all post-New Deal public use cases, the Court has refused to draw a sharp line between the permissible public uses that may motivate the power of eminent domain, on the one hand, and the permissible motives for exercising the state's police powers, on the other hand.

Admittedly, only with eminent domain may the state formally reassign ownership from a private citizen to the government. However, the government may indirectly accomplish the same objective under at least two alternative powers—its power to tax and its power to regulate property, including the power to define property.

Importantly, the government is required to pay compensation to the private property owner only when its action is classified as a taking. Otherwise—insofar as the Constitution is concerned—the property owner must simply bear the cost. Thus, from the vantage point of private property owners, eminent domain is preferable to both taxation and regulation, as it offers them compensation for the taken property. This fact is reflected by property rights advocates' embrace of doctrines of regulatory takings and an attendant surfeit of inverse condemnation actions.<sup>85</sup>

In this Part, we examine the various government powers and demonstrate that they can reach functionally equivalent results. As a result, we show that doctrines adjusting the powers of the government in eminent domain cannot operate in a vacuum; there is a constant interplay between the various government powers. Forbidding the exercise of emi-

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81. H.R. 4128, 109th Cong. (2005); see also H.R. 3135, 109th Cong. (2005), which has 136 cosponsors.

82. S. 1895, 109th Cong. (2005).

83. See Nat'l Conference of State Legislatures, *supra* note 27.

84. See *infra* Part II.A.

85. See, e.g., Castle Coal., Citizens Fighting Eminent Domain Abuse, at <http://www.castlecoalition.org/> (last visited Aug. 14, 2006) (on file with the *Columbia Law Review*) (collecting litigation stories).



ment domain under specified conditions—such as when seized property is subsequently to be put to private use—does not prevent government seizure; it only prevents seizure under eminent domain. In light of this fact, seizure by eminent domain represents the best scenario for affected property owners, since such seizure comes with guaranteed market-value compensation.

### A. *The Regulatory Powers*

Especially in the post-New Deal world, the government has vast regulatory powers regarding property.<sup>86</sup> The government constantly creates and refines legal property rights, recognizing new rights, abolishing old ones, and modifying the scope and strength of existing rights.<sup>87</sup> Modification of property is achieved through a number of government powers. States often act under their police powers—their residual authority as sovereigns, permitting them to act almost without limitation in the interests of public welfare, safety, or morals.<sup>88</sup> The federal government cannot access these residual powers, but it too has vast powers regarding property, such as its powers to regulate commerce,<sup>89</sup> to create and protect intellectual property rights,<sup>90</sup> and to engage in the common defense.<sup>91</sup> Indeed, the scope of government powers in the regulation of property is so broad that it is extremely rare that the formal power justifying a property regulation is even explicitly invoked, let alone questioned.

There were periods in American history during which the state's economic powers were seen to be more restricted than they are today. Historians have argued over the nature of property regulation in the early

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86. See, e.g., Carol M. Rose, *Property Rights, Regulatory Regimes and the New Takings Jurisprudence—An Evolutionary Approach*, 57 *Tenn. L. Rev.* 577, 580 (1990) (explaining that Supreme Court decisions in *Village of Euclid, Ohio v. Ambler Realty Co.*, 272 U.S. 365 (1926), and *United States v. Carolene Products Co.*, 304 U.S. 144 (1938), established that “property rights were poor relations in the world of rights and, as such, much more subject to governmental intrusion than the rights that more directly safeguard political liberty and equality to insulated minority groups”); Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 *Harv. L. Rev.* 405, 473 (1989) (“In the aftermath of the New Deal reformation, courts have been reluctant to use the Constitution’s explicit protection of property and contracts in a way that would seriously interfere with social and economic regulation.”).

87. See generally Abraham Bell & Gideon Parchomovsky, *Of Property and Federalism*, 115 *Yale L.J.* 72 (2005) [hereinafter Bell & Parchomovsky, *Of Property*] (discussing creation and modification of property rights and regimes). For a discussion that targets the takings context, see Stewart E. Sterk, *The Federalist Dimension of Regulatory Takings Jurisprudence*, 114 *Yale L.J.* 203, 222–26 (2004) (discussing how takings laws differ among different states).

88. See D. Benjamin Barros, *The Police Power and the Takings Clause*, 58 *U. Miami L. Rev.* 471, 498–524 (2004).

89. U.S. Const. art I, § 8, cl. 3.

90. *Id.* art I, § 8, cl. 8.

91. *Id.* art I, § 8, cls. 10–16.

years of the Republic;<sup>92</sup> however, it is fairly clear that, at least as a political matter, governments refrained from many of the invasive regulations that characterize state relations to property today. Particularly during the end of the nineteenth century and the early twentieth century, courts developed a robust jurisprudence of the Contracts Clause and the Due Process Clauses, as well as a narrow interpretation of the Commerce Clause, that had the effect of barring many types of economic regulations. Indeed, many scholars refer to this period as the *Lochner* Age,<sup>93</sup> in reference to the Supreme Court's decision in *Lochner v. New York* that laws setting the maximum number of working hours in bakeries unconstitutionally interfered with freedom of contract.<sup>94</sup>

The first half of the twentieth century witnessed a dramatic growth in judicial deference to economic judgments by the political branches of government, particularly in the wake of President Franklin Roosevelt's declared plan to pack the Supreme Court with justices sympathetic to his New Deal economic policies.<sup>95</sup> Five years after Roosevelt's Court-packing scheme, the Court essentially erased all restrictions on the exercise of federal Commerce Clause power.<sup>96</sup> Courts no longer accept arguments

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92. See, e.g., Morton J. Horwitz, *The Transformation of American Law 1780–1860*, at 31 (1977) (arguing that in eighteenth century property rights were absolute); Bernard Schwartz, *A Commentary on the Constitution of the United States, Part II: The Rights of Property* 231 (1965) (claiming that before industrialization owners were free to develop their land without control by others); James W. Ely, Jr., *The Enigmatic Place of Property Rights in Modern Constitutional Thought*, in *The Bill of Rights in Modern America After 200 Years* 87, 93 (David J. Bodenhamer & James W. Ely, Jr. eds., 1993) (“Historically landowners could use their property for any lawful purpose, restrained only by the common-law prohibition against creating a nuisance.”); John F. Hart, *Colonial Land Use Law and Its Significance for Modern Takings Doctrine*, 109 *Harv. L. Rev.* 1252, 1253 (1996) (“[C]olonial governments regulated land use extensively for purposes other than preventing harm.”); John F. Hart, *Land Use Law in the Early Republic and the Original Meaning of the Takings Clause*, 94 *Nw. U. L. Rev.* 1099, 1107–31 (2000) (discussing American land use restrictions from 1776 to 1789 that were not concerned with securing health, safety, or property).

93. See, e.g., Bruce Ackerman, *We the People: Transformations* 269 (1998); Cass R. Sunstein, *Lochner's Legacy*, 87 *Colum. L. Rev.* 873, 874 (1987).

94. 198 U.S. 45 (1905).

95. See Joseph Alsop & Turner Catledge, *The 168 Days: A Study of Judicial Review as an Instrument of Popular Government* 141–47 (1938); Edward S. Corwin, *Court over Constitution* 127 (1957); Benjamin F. Wright, *The Growth of American Constitutional Law 200–02* (1942) (detailing Roosevelt's Court-packing plan).

96. See *Wickard v. Filburn*, 317 U.S. 111, 124–25 (1942) (extending federal commerce power to small-scale intrastate activities that may affect interstate commerce when considered cumulatively). In recent years, the Supreme Court has begun to cut back again on the Commerce Clause power. See, e.g., *United States v. Morrison*, 529 U.S. 598, 613 (2000) (“Gender-motivated crimes of violence are not, in any sense of the phrase, economic activity.”); *United States v. Lopez*, 514 U.S. 549, 558 (1995) (limiting activities Congress may regulate under Commerce Clause to three defined categories). But see *Gonzales v. Raich*, 125 S. Ct. 2195, 2209 (2005) (holding that Commerce Clause allows federal prohibition of locally grown medical marijuana, based on cumulative effects reasoning of *Wickard*).

that economic legislation or regulation should be struck down for violating the Contracts Clause, the Equal Protection Clause, or the Substantive Due Process Clauses.<sup>97</sup> Together with the birth of the administrative state,<sup>98</sup> these developments created a new regulatory environment in which valuable property rights are routinely restricted and eliminated.

Consider just some of the common regulations of property.

The advent and popularity of zoning has led to an extensive land use law that prescribes in very restrictive terms the bounds within which realty may be used. Zoning laws commonly permit only certain kinds of uses of property. They determine the permissible physical shapes of buildings and other structures, height and setback, architectural style, construction materials, their number of inhabitants or residents, and whether commercial services may be offered.<sup>99</sup> Together with safety regulations and building licensing, zoning laws cover nearly every facet of activity and use of realty and fixtures.

In addition, state governments define the nature and scope of ownership in land and chattels.<sup>100</sup> The government recognizes or refuses to recognize the various estates in land,<sup>101</sup> describes the scope of the owner's right to exclude,<sup>102</sup> to alienate and restrict alienation,<sup>103</sup> and to transfer by gift or devise.<sup>104</sup> New quasi-property rights—such as a right to one's likeness<sup>105</sup>—are created, and others—such as rights in genetic

97. See James W. Ely, Jr., *The Guardian of Every Other Right: A Constitutional History of Property Rights* 126–34 (2d ed. 1998) (describing Court's shift in 1937 to examine economic regulations with extreme deference); William E. Leuchtenburg, *The Supreme Court Reborn: The Constitutional Revolution in the Age of Roosevelt* 213–36 (1995) (same); Bernard Schwartz, *Powers of the President: The Rights of Property* 284–85 (1963) (describing shift in Contract Clause interpretation by courts).

98. For an excellent discussion of the rise of the administrative state and the corresponding corrosive effect it had on property rights, see Edward L. Rubin, *Beyond Camelot: Rethinking Politics and Law for the Modern State* 296–300 (2005).

99. See generally Georgette C. Poindexter, *Light, Air, or Manhattanization?: Communal Aesthetics in Zoning Central City Real Estate Development*, 78 *B.U. L. Rev.* 445, 447–48 (1998) (describing transformation in zoning laws to take into account community's views on aesthetics).

100. See Bell & Parchomovsky, *Of Property*, *supra* note 87, at 74–77.

101. An oft-cited example is the abolition of the fee tail estate in the United States. See, e.g., Robert Hockett, *Whose Ownership? Which Society?*, 27 *Cardozo L. Rev.* 1, 11 (2005) (“One of the first American changes to the English common law was the abolition of fee tail and primogeniture, this with a view to broadening the incidence of freeholding across the population.”).

102. See *infra* notes 109–112 and accompanying text.

103. See, e.g., *Restatement (Second) of Prop.: Donative Transfers* §§ 4.1–4.5 (1983) (outlining valid and invalid types of restraints on alienation).

104. See Ray Andrews Brown, *The Law of Personal Property* §§ 7.1–7.21, at 76–153 (Walter B. Raushenbush ed., 3d ed. 1975) (discussing law of gifts of chattel).

105. See, e.g., *State ex rel. Elvis Presley Int'l Mem'l Found. v. Crowell*, 733 S.W.2d 89, 99 (Tenn. Ct. App. 1987) (holding that under Tennessee law celebrities have descendible right of publicity upon their death); Alexander Margolies, *Sports Figures' Right of Publicity*, 1 *Sports Law. J.* 359, 359 (1994) (describing property right one holds in one's own identity as relatively recent development).

materials<sup>106</sup>—denied. States have reallocated property rights among neighbors by changing rules in nuisance law regarding permissible land uses.<sup>107</sup> Similarly, states have transferred property rights from lessors to lessees by means of leasehold regulations.<sup>108</sup>

The result is that many of the prerogatives ordinarily associated with ownership may, in fact, be exercised by the government at any time. Traditionally, the right to exclude is considered the centerpiece of ownership rights; owners of realty generally may decide who may enter upon their land and what they may do while present.<sup>109</sup> However, the government may replace the owners' judgment and allow people to enter notwithstanding the owners' wishes to the contrary, such as aid workers in private organizations,<sup>110</sup> cable company workers,<sup>111</sup> or students handing out pamphlets in a mall.<sup>112</sup> The government may bar uses above a certain height, or underground, effectively seizing the air and subsurface rights associated with realty ownership. The government may take away the ability to use property in the fashion intended by the owner. It may force owners to design property in a fashion favored by the government.

It is no secret that regulation, therefore, functionally gives the government the power to take property just as it might through eminent domain. This realization has created one of the most prolific sources of judicial vexation:<sup>113</sup> the regulatory takings doctrine, which establishes that government regulations that go "too far" are subject to the same constitutional limitations as government exercises of the power of eminent domain. A series of cases in recent decades has established a handful of difficult-to-apply rules for determining which regulations go too far: Regulations are considered takings when they permanently eliminate all productive economic use of property,<sup>114</sup> impose permanent physical invasions upon real property,<sup>115</sup> or impose an excessive economic impact on

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106. See, e.g., *Moore v. Regents of the Univ. of Cal.*, 793 P.2d 479, 493 (Cal. 1990).

107. See, e.g., *Boomer v. Atl. Cement Co.*, 257 N.E.2d 870, 873–75 (N.Y. 1970).

108. See, e.g., *Lingle v. Chevron U.S.A., Inc.*, 125 S. Ct. 2074, 2084–85 (2005) (discussing whether rent control law constitutes a taking); *Yee v. City of Escondido*, 503 U.S. 519, 526–32 (1992) (same).

109. See Thomas W. Merrill, *Property and the Right to Exclude*, 77 *Neb. L. Rev.* 730, 747 (1998) (“[W]here the law recognizes a right to property, it confers a right to exclude.”).

110. E.g., *State v. Shack*, 277 A.2d 369 (N.J. 1971) (permitting members of organization to visit and aid migrant farmworkers on private property without owner's consent).

111. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982).

112. *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74 (1980).

113. We eschew the traditional string cite demonstrating the incoherence of the Supreme Court's regulatory takings jurisprudence, and instead direct the reader to the sources cited in Abraham Bell, *Not Just Compensation*, 13 *J. Contemp. Legal Issues* 29, 39–40 & n.49 (2003).

114. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1019 (1992); see also *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 330 (2002) (noting continued validity of *Lucas*).

115. *Loretto*, 458 U.S. at 426.

property in light of the owner's reasonable investment-backed expectations and the nature of the government action.<sup>116</sup> In addition, a regulation is considered a taking when it requires that an owner surrender title to a property interest as a condition for a government benefit unless there is an essential nexus between the condition and the benefit,<sup>117</sup> and rough proportionality between the property surrendered and the impact of the proposed development.<sup>118</sup>

Yet, even with these limitations on its regulatory power, the government may still functionally take without formally invoking the power of eminent domain or risking a judicial declaration of a regulatory taking. Thus, for example, New York could effectively seize the air rights over Grand Central Station under its Landmarks Preservation Law without compensation because it did not invoke the power of eminent domain.<sup>119</sup> California could similarly strip shopping mall owners of the right to exclude protesters without compensation.<sup>120</sup> The Tahoe Regional Planning Agency could strip regional property owners of all building rights of any kind for over two years.<sup>121</sup> The state of Delaware could essentially seize a permanent easement for a buffer zone alongside a highway without compensation.<sup>122</sup> Other examples abound. In short, the government may often seize property without compensation, so long as it refrains from a formal designation of the exercise of eminent domain and steers clear of the handful of clear regulatory takings tests.

### B. *The Taxing Power*

In addition to their regulatory powers, state, federal, and local governments have the ability to tax properties to raise revenue. Generally, in the United States, realty taxes are assessed at the local level.<sup>123</sup> However,

116. See *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978) (articulating factors determining a taking).

117. *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 837 (1987).

118. See *Dolan v. City of Tigard*, 512 U.S. 374, 391 (1994) ("No precise mathematical calculation is required, but the city must make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development.").

119. See *Penn Cent.*, 438 U.S. at 138 (holding that New York's action did not constitute a taking).

120. See *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 84 (1980) (holding that California's action did not constitute a taking).

121. *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 342-43 (2002).

122. *Booker v. State ex rel. Sec'y of Dep't of Transp.*, 642 A.2d 836 (Del. 1994) (unpublished table decision).

123. See generally William A. Fischel, *The Homevoter Hypothesis: How Home Values Influence Local Government Taxation, School Finance, and Land-Use Policies* (2001) (describing property tax as mainstay of local government).

various state<sup>124</sup> and federal<sup>125</sup> taxes are assessed on property transactions and affect property values.

Theorists have long observed the ability of the government to affect property values and even seize title to private property by using the taxing power.<sup>126</sup> William Stoebuck has even asserted that the taxing power “is not merely similar to eminent domain; it is the same, as far as the power itself goes.”<sup>127</sup> The power to tax enables the government to seize nearly all property value either directly by taxing the property interest or indirectly by taxing its transfer, its complements, or various other items that may affect property value. In the rare instances of in-kind taxation, the government may even directly seize title to the taxed property.<sup>128</sup>

As should be evident, the taxing power may often be interchanged with the regulatory powers or eminent domain.<sup>129</sup> Consider, for instance, the following three cases, which use different government powers to achieve the same result. In the first instance, the government uses its power of eminent domain to seize a use right over a small strip of a lot that abuts a stream and imposes a conservation easement. In the second instance, using its regulatory powers, the government forbids all nonconservational use of the small strip abutting the stream. In the third case, the government taxes lots abutting the stream at the value of the uses carried out within the small abutting strip.

Interestingly, while the courts have developed a massive regulatory takings jurisprudence to regulate the government’s choice among the regulatory powers and eminent domain, the courts have paid little attention to the boundary between taxings and other government powers to take. As Eduardo Peñalver recently wrote, “[o]ne of the abiding puzzles of the Supreme Court’s Takings Clause jurisprudence is the obvious tension between the rigor with which the Court scrutinizes regulations of property under the Takings Clause and the enormous deference it dis-

124. See, e.g., N.D. Cent. Code §§ 57-05-01 to -11 (2005) (assessing statewide property tax on railroad property).

125. The capital gains tax on gain or loss of disposition of property is assessed according to subtitle A, chapter 1, subchapter P of the Internal Revenue Code, 26 U.S.C. §§ 1200–1298 (2000).

126. See Stephen R. Munzer, *A Theory of Property* 420–22 (1990) (“[T]here is not always a clear line between taxes and takings.”); Abraham Bell & Gideon Parchomovsky, *Takings Reassessed*, 87 *Va. L. Rev.* 277, 284–85 (2001) (discussing government’s ability to take property through its power to tax); Eduardo Peñalver, *Regulatory Taxings*, 104 *Colum. L. Rev.* 2182, 2183–84 (2004) (noting similarities between takings and taxation); cf. Epstein, *Takings*, *supra* note 20, at 283–305 (arguing that every government action that diminishes property value—whether stemming from tax, eminent domain, or police powers—is a taking for which compensation is constitutionally mandated).

127. William B. Stoebuck, *A General Theory of Eminent Domain*, 47 *Wash. L. Rev.* 553, 571 (1972).

128. See Peñalver, *supra* note 126, at 2208–11 (discussing in-kind taxation).

129. See Richard A. Posner, *Taxation by Regulation*, 2 *Bell J. Econ. & Mgmt. Sci.* 22, 23 (1971) (suggesting one function of regulation is to tax).

plays toward the state's exercise of its power to tax."<sup>130</sup> In recognition of this contention, Saul Levmore has argued that "every theory of takings law should explain or at least struggle with the question of why the power to tax—without compensation, of course—is not fundamentally inconsistent with the constitutional obligation to compensate condemnees."<sup>131</sup> Richard Epstein, in fact, has suggested that many tax laws should be considered unconstitutional uncompensated takings.<sup>132</sup> Nevertheless, this is not the viewpoint held by the courts. There is no doctrine of "regulatory taxings" that treats purported exercises of the taxing power as takings for which compensation must be paid. Absent a tax so arbitrary as to fall out of the category of taxation altogether, taxation is always able to avoid the compensation requirement.<sup>133</sup>

### C. *Interplay Among Government Powers*

Given the panoply of available powers, the government may nearly always reach the same result in multiple ways. As we discuss in Part III, any time a limitation is placed on only one of the several government powers affecting property, the relative attractiveness of the powers changes. However, even without any prompting from legal rules, the government may find it advantageous to mix and match among its powers or to use an unconventional power to achieve its aims. In this section, we consider two examples that illustrate the government's ability both to use all its powers to achieve the same aims and to avoid compensation or limitations on eminent domain where convenient. Specifically, we look at two separate types of projects that are usually associated with a specific government power—protection of historic properties and landmarks, associated with regulation, and urban redevelopment to combat blight, associated with eminent domain—and show that the government has much more flexibility than is generally acknowledged. We show that while protecting historic property can be legally accomplished by means of uncompensated regulations, the government can and often does choose to compensate affected owners. Conversely, while eminent domain to

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130. Peñalver, *supra* note 126, at 2183.

131. Saul Levmore, *Just Compensation and Just Politics*, 22 *Conn. L. Rev.* 285, 292 (1990).

132. Epstein, *Takings*, *supra* note 20, at 283–84 (suggesting distinction between takings and taxes "rests upon a sleight of hand").

133. See, e.g., Bruce Ackerman, *Taxation and the Constitution*, 99 *Colum. L. Rev.* 1, 3 (1999) ("[T]here are no significant limits on the national government's taxing . . . powers . . ."); Boris I. Bittker, *Constitutional Limits on the Taxing Power of the Federal Government*, 41 *Tax Law.* 3, 4 (1987) (noting widespread view that federal tax power is "virtually immune to any constitutional restrictions"); Leo P. Martinez, "To Lay and Collect Taxes": The Constitutional Case for Progressive Taxation, 18 *Yale L. & Pol'y Rev.* 111, 128 (1999) ("The government's power to tax is essentially unlimited."); Peñalver, *supra* note 126, at 2198 ("In contrast with its tendency to scrutinize regulations challenged under the Takings Clause, the Court has shied away from all but the most deferential constitutional review of tax provisions.").

seize blighted properties requires compensation, we show that the government can and does take many actions to reduce compensation. Indeed, we show that attempts to restrict eminent domain only to the most downtrodden properties (through a doctrine of blight) cause the government to pay *less* compensation.

1. *Landmarking*. — The government has been involved in protecting historically notable or valuable properties since the 1930s. Early efforts included the Historic Sites, Buildings, and Antiquities Act of 1935,<sup>134</sup> which empowered the Secretary of the Interior to acquire historic properties by “gift, purchase, or otherwise,” subject to proper appropriations by Congress,<sup>135</sup> and the Antiquities Act of 1906,<sup>136</sup> which protected historic sites on government land. Legislation of this type views protection of historically valuable properties as a decision to be made by the owner. The government must acquire title—by purchase or other voluntary transfer or, if need be, by eminent domain—in order to protect the properties. Many more recent acts for protection of historically significant items, at both the state and federal level, adopt this approach.

However, as the landmark takings case *Penn Central* makes clear, states have an alternative means of achieving the same goal. Rather than taking title to the property it seeks to protect, the government may place restrictive regulations upon the owner, requiring the owner to preserve the property in precisely the same manner that the government would have were it the title holder. New York’s Landmarks Preservation Law, examined in *Penn Central*, adopts this approach. It permits a commission to designate private real properties as landmarks and neighborhoods of privately owned properties as historic districts. Once a building is so designated, the owner may no longer make any alterations to the external façade of the building without obtaining a certificate of appropriateness. As the power being exercised purports to be regulatory, rather than an application of the power of eminent domain, the government need pay no compensation, although the law does include some regulatory benefits (in the form of transferable development rights) for owners of buildings restricted by a designation as historic.<sup>137</sup> The New York law was upheld in *Penn Central*, and no similar law has been held to work as a regulatory taking since.

Yet, despite the free hand they enjoy in historic preservation legislation, governments still choose to compensate affected owners. Some states, rather than restrict private property rights outright, have chosen to offer tax benefits to properties that accept a landmark designation and whose owners voluntarily agree to accept the attendant development re-

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134. Act of Aug. 21, 1935, ch. 593, 49 Stat. 666 (codified as amended at 16 U.S.C. §§ 461–467 (2000)).

135. *Id.* § 2(d).

136. Act of June 8, 1906, ch. 3060, 34 Stat. 225 (codified at 16 U.S.C. §§ 431–433).

137. *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 108–15 (1978).



strictions.<sup>138</sup> Other states employ a combination of tactics. Landmarking legislation in these states uses both uncompensated regulation and transfer of property rights or prerogatives in order to achieve the goal of preservation.

2. *Blight*. — Just as the government may voluntarily compensate even when using its regulatory powers, the government may avoid compensation even when acting in an area traditionally associated with eminent domain. The takings doctrine associated with blight presents perhaps the most outstanding example of the government's ability to mix and match among its powers in order to evade the compensation requirements of eminent domain. We consider two doctrinal aspects of blight. First, we look at the phenomenon of "condemnation blight." Condemnation blight is the lowering of property values that occurs when a set of properties is designated for future taking by eminent domain as a result of the expected inadequacies of market value compensation. Essentially, in these cases, the government uses its powers to set policy, and other regulatory powers, to drive down the compensation it will have to pay for its eventual exercise of the power of eminent domain. Second, we consider the proposed doctrine that where taken property is to be given to subsequent private ownership for private purposes, the taking lacks a "public use" unless the pretaking property was in a "blighted" condition. We show that while the doctrine is supposed to help property owners by barring takings except in extreme situations, the doctrine actually compels the government to create blight by use of its other powers and thereby drives down compensation. Legally, these two types of blight are unrelated. Both, however, demonstrate the fluidity with which government can maneuver among its powers in order to seize whatever property interests it desires, at any compensation level, or at no compensation at all.

a. *Condemnation Blight*. — We begin by examining condemnation blight. Generally, compensation is paid for the value of property as of the day it is actually taken, rather than the day on which the taking was announced. Not surprisingly, these values may differ greatly. Businesses will not invest in a new property after the announcement of a taking, as the value of any built-up goodwill will disappear on the day of the taking. Similarly, purchasers of residential properties looking for a stable long-term home will avoid the area. As Gideon Kanner has noted, the announcement of a pending government taking often results in the precipitous decline of property values in the targeted neighborhood. Many sales are distress sales, where buyers are limited to those interested in short term uses only.<sup>139</sup> This phenomenon, known as "planning blight" or "condemnation blight," is the result of the impairment of marketability

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138. See, e.g., Alaska Stat. § 45.98.020 (2004) (granting loans); Fla. Stat. Ann. § 196.1977 (West 1999) (providing property tax exemptions for improvements to historic properties); N.M. Stat. Ann. § 7-2-18.2 (West 1978) (offering tax credits).

139. See generally Gideon Kanner, *Condemnation Blight: Just How Just Is Just Compensation?*, 48 *Notre Dame Law* 765 (1973).

caused by the knowledge that any ownership interest in the property is short-lived.<sup>140</sup>

While a handful of doctrines of takings compensation—de facto takings,<sup>141</sup> rolling back the date of measuring market value to the date that the government declared its intention to take,<sup>142</sup> and the scope of the project rule<sup>143</sup>—have been proposed to deal with this lost value, none has provided a complete solution. Importantly, in *Monongahela Navigation Co. v. United States*, the United States Supreme Court ruled that the constitu-

140. See Robert H. Freilich, *Planning Blight: The Anglo-American Experience*, 29 *Urb. Law* vii, xi–xiv (1997). Freilich distinguishes between planning and condemnation blight on the grounds that the latter is caused when “condemnation is inevitable—as opposed to the former, where condemnation is merely a possibility.” *Id.* at xii.

141. A de facto taking occurs whenever the state excessively interferes with property rights without carrying out a declared seizure by eminent domain. The category of de facto takings is a broad one and includes regulatory takings, physical invasions, and denial of access. See 2A Patrick J. Rohan & Melvin A. Reskin, *Nichols on Eminent Domain* § 6.01[15][a]–[d] (2006). Some courts have extended the concept to include particularly egregious instances of condemnation blight. See, e.g., *Foster v. City of Detroit*, 254 F. Supp. 655, 662–63 (E.D. Mich. 1966) (holding that city encouragement and aggravation of existing deterioration of land is a taking, despite lack of official eminent domain proceedings), *aff’d*, 405 F.2d 138 (6th Cir. 1968). Many cases, however, have refused to find that a takings declaration amounts to a de facto taking, even where the declaration itself leads to loss of property value. See, e.g., *Veillon v. Lafayette*, 467 So. 2d 184, 186–87 (La. Ct. App. 1985) (holding that mayor’s and project agent’s declaration to homeowners that their homes will be taken in order to facilitate transportation project does not constitute a taking).

142. *City of Buffalo v. J.W. Clement Co.*, 269 N.E.2d 895, 905 (N.Y. 1971) (finding that property owner may introduce evidence of “affirmative value-depressing acts” by government agency to increase valuation (quoting *City of Buffalo v. George Irish Paper Co.*, 299 N.Y.S.2d 8, 14 (App. Div. 1969))); *Lange v. State*, 547 P.2d 282, 288 (Wash. 1976) (noting that valuation must be at earlier time than date of trial to achieve just compensation). This doctrine produces results very similar to the de facto takings doctrine; the de facto takings doctrine moves back the date of the recognized taking, while the valuation rollback doctrine moves back the date of the valuation, while leaving the recognized takings date in place. Most states, however, agree that the correct valuation date is the date of the taking, leaving compensation blight uncompensated. See 8A Rohan & Reskin, *supra* note 141, § 18.04[1].

143. The rule posits that the state does not have to pay compensation for value created by the government project prompting the taking. Thus, if a government project raises the value of land to be taken for it, the government may discount from the compensation award all increases attributable to the project. See, e.g., *Almota Farmers Elevator & Warehouse Co. v. United States*, 409 U.S. 470, 477–78 (1973) (“The government must pay just compensation [only] for those interests ‘probably within the scope of the project from the time the Government was committed to it.’” (quoting *United States v. Miller*, 317 U.S. 369, 377 (1943))); *Miller*, 317 U.S. at 377 (holding that respondents were not entitled to compensation reflecting increase in land value arising from likelihood of government seizure); *City of Cleveland v. Carcione*, 190 N.E.2d 52, 56 (Ohio 1963) (recognizing this rule as “well-established”). The scope-of-the-project rule may also be used by property owner compensation claimants to support the argument that the owner is entitled to payment for the diminution of value caused by the takings announcement. This, however, is not the usual application of the rule.

tional requirement of just compensation does not include payment for condemnation blight.<sup>144</sup>

The phenomenon of condemnation blight is particularly important in light of the broader property powers of the government. The government can create condemnation blight not only by declaring its intent to take, but also by means of other declarations or actions. Government decisions to locate a garbage incinerator in a certain area, to reduce development rights under the local zoning plan, or to increase local property taxes, may all be expected to reduce property values. The government, in other words, may use many of the powers for which it does not have to pay compensation in order to reduce the amount that will be paid in compensation when the government eventually decides to use its power of eminent domain.

b. *Blight and Public Use*. — The malleability of property values and their vulnerability to government actions short of eminent domain are particularly important to the public use doctrine of blight.

Some states have adopted the narrow definition of public use suggested by *Kelo* opponents and denied the state the right to take private property for subsequent transfer to private individuals absent listed predicates. One of the most popular predicates is a “blighted” condition of the taken property. This version of the public use doctrine generally forbids the government to use its eminent domain power where the property is destined for post-taking private ownership, but carves out an exception where the eminent domain is intended to alleviate “blight.”<sup>145</sup> This view was adopted by Justice O’Connor in her dissent in *Kelo*<sup>146</sup> and by the Michigan Supreme Court in *Hathcock*.<sup>147</sup> This approach permits exercises of eminent domain intended to eliminate the negative economic effects resulting from “harmful” properties, but forbids the government to take nonblighted properties in order to encourage economic growth. The appeal of the position stems from the desire to block exercises of eminent domain that do not produce public property, while leaving open the possibility of using eminent domain as a tool for eliminating pockets of poverty.

As might be imagined, the line separating blighted from regular property is not clear. To begin with, it is often very difficult to decide when the government is clearing the path for economic growth by eradicating blight and when it is going beyond this and actively fostering eco-

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144. 148 U.S. 312, 326 (1893).

145. See, e.g., *City of Las Vegas Downtown Redevelopment Agency v. Pappas*, 76 P.3d 1, 11 (Nev. 2003); *Yonkers Cmty. Dev. Agency v. Morris*, 335 N.E.2d 327, 330–31 (N.Y. 1975); *AAAA Enters., Inc. v. River Place Cmty. Urban Redevelopment Corp.*, 553 N.E.2d 597, 600 (Ohio 1990); *Charleston Urban Renewal Auth. v. Courtland Co.*, 509 S.E.2d 569, 577–78 (W. Va. 1998).

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

147. *County of Wayne v. Hathcock*, 684 N.W.2d 765, 783 (Mich. 2004).

conomic development. Furthermore, it is often difficult to understand why the power of the government should be able to seize underutilized properties when their pre seizure value is deemed to reflect “disrepair,” but not when the underutilization stems from neglecting opportunities to improve. Indeed, local redevelopment officials have seized on this weakness and successfully raised the specter of “future blight” in order to achieve redevelopment of not yet blighted areas that were arguably likely to become blighted.<sup>148</sup>

But more importantly, blight is not exogenous to government policies. That is, as the phenomenon of condemnation blight attests, the government may always use its non-eminent domain powers to manipulate property values and cause properties to fall into disrepair. The government can induce blight by compromising the quality of municipal services, such as education, sanitation, or policing. Alternatively, it can adopt new construction and zoning standards that would render certain properties or even whole areas noncompliant. The government can also simply refrain from making the sort of zoning rule changes that would permit the neighborhood to adapt to social and economic changes.

As with all other policy decisions affecting private property, the government’s decisions on blight are ultimately made on grounds of political utility and may involve a mix of government powers.<sup>149</sup> *Kelo* provides a good example. The properties involved in *Kelo* were not designated blighted by the City of New London, although they were situated in an economically distressed area with a residential vacancy rate of close to twenty percent.<sup>150</sup> The properties, if not yet “blighted,” could well have been declared so in the near future—a point that was made by Justice Kennedy during the oral arguments, when he asked why it was necessary to “wait five or six years before we’re going to have blight.”<sup>151</sup>

It is quite plausible, though not likely, that the City of New London could have declared the properties litigated in *Kelo* blighted. However, taking the properties for the purpose of blight removal meant that the city would have to use its own budget to pay just compensation to the

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148. See Jonathan M. Purver, Annotation, What Constitutes “Blighted Area” Within Urban Renewal and Redevelopment Statutes, 45 A.L.R.3d 1096, § 3 (1972). For an example of legislation that specifically grants the government the power to “preempt” blight, see Mo. Ann. Stat. § 99.805(3) (West 1998) (defining “conservation area” as “not yet a blighted area but [one that] is detrimental to the public health, safety, morals, or welfare and may become a blighted area”).

149. See *infra* Part III.

150. Richard Brown, Eminent Domain: New London’s Story, 87 Pub. Mgmt. 7, 8 (2005), available at <http://www.icma.org/upload/library/2005-12/%7B77D7298C-982B-4692-801A-61B06A4C8B7D%7D.pdf> (on file with the *Columbia Law Review*) (“[T]he Fort Trumbull Municipal Development Area is situated in a commercial/industrial zone that has performed poorly, with an 80 percent commercial vacancy rate and a 20 percent residential vacancy rate.”).

151. Bill Mears, CNN.com, Supreme Court Examines the Limits of City’s Eminent Domain Power, Feb. 22, 2005, at <http://www.cnn.com/2005/LAW/02/22/scotus.eminent.domain/> (on file with the *Columbia Law Review*).

owners; taking the properties to achieve economic development enabled the city to pass the compensation costs to the State of Connecticut, which in turn established a special fund for supporting economic development in its municipalities.

In other words, the existence of a potential doctrine of blight would not have appreciably altered the City of New London's ability to seize the property in question. Through regulatory changes, the government could always have driven the property values down enough to expose the properties to seizure as blighted. Even had the government eschewed this course, it could have designated properties as blighted and seized them using the power of eminent domain. Even a restricted view of the public use clause would not have derailed the New London project. The truth was, and remains to this day, that political costs and benefits to the relevant government decisionmakers dictate the takings choice. Thus, it is politics, rather than legal restrictions, that ultimately blocked the takings litigated in *Kelo*. It is, therefore, to these political considerations that we turn in Part III.

#### D. *The Political Model and State Constitutional Restrictions on Property Regulation*

Our model is based upon the federal constitutional background outlined in Part II. That is, we have presumed an essentially limitless government power to accomplish all goals by numerous powers, some compensated, some uncompensated. Many state constitutions impose tighter restrictions on the regulatory or taxing powers.<sup>152</sup> How does this affect the analysis?

While the background restrictions on regulations or taxes obviously affect the optimal rule of public use, they do not modify the essential insight of our Essay that the public use rule should be set to match the rules restricting other government powers. If, for instance, state law requires a more compelling rationale for state regulations of property than mere nonarbitrariness (the federal standard), the same compelling rationale should be demanded of exercises of the power of eminent domain. However, once the public use requirement becomes stricter than the rules of state regulation or taxation, our analysis suggests that the likely result would be to encourage more uncompensated government actions.

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152. See, e.g., *Robins v. PruneYard Shopping Ctr.*, 592 P.2d 341, 347 (Cal. 1979) (denying property rights of owners of shopping mall to exclude political pamphleteers on grounds of state constitutional expressive rights), *aff'd*, 447 U.S. 74 (1980); *S. Burlington County NAACP v. Twp. of Mount Laurel*, 336 A.2d 713, 731–32 (N.J. 1974), appeal dismissed and cert. denied, 423 U.S. 808 (1975) (requiring zoning for low-cost housing under state constitutional law). See generally Anthony B. Sanders, *The "New Judicial Federalism" Before Its Time: A Comprehensive Review of Economic Substantive Due Process Under State Constitutional Law Since 1940 and the Reasons for Its Recent Decline*, 55 *Am. U. L. Rev.* 457 (2005) (reviewing historical record).

This outcome is due to the fact that our model is based upon the reality that government may choose a variety of means to achieve the same result. Once this variety of means is available, a narrowing of the Public Use Clause serves only to alter the political calculus away from the payment of compensation. Thus, the only relevant question for determining the proper scope of the Public Use Clause is the existing scope of other government powers.

### III. COMPENSATION AND GOVERNMENT MOTIVES

So far we have established that the government can implement its policies with regard to land use through a variety of powers and thereby affect its exposure to the payment of compensation. We have also shown that, of these powers, eminent domain is the most favorable to property owners and, at least in terms of direct cost, is apparently the most expensive for the government. These conclusions raise an obvious question: Why does the government ever choose to carry out its policies by using eminent domain?

In this Part, we explore some of the reasons why the government elects the ostensibly more costly method of eminent domain. To do so, we add a political economy dimension to our analysis. We show that there are cases where the political benefits of paying compensation outweigh the costs. Consequently, in such cases, government decisionmakers maximize political benefits by voluntarily paying compensation. However, the incentives for the government to take by eminent domain and pay compensation are not universal and, therefore, cannot always be relied upon to ensure compensation to property owners. Additionally, the existence of these incentives provides no reason to *deny* homeowners compensation by forbidding the government to use eminent domain when it would otherwise be motivated to do so. Indeed, we suspect that legally barring takings by eminent domain lowers the political costs of engaging in uncompensated takings by means of other government powers.

#### A. A Model of Compensation Decisions

In this Section, we propose a model of political decisions regarding property, and suggest when the government is likely to engage in explicit seizure involving required compensation and when it will favor regulatory or tax seizures that do not require compensation.<sup>153</sup>

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153. For different analyses of the politics of takings and compensation decisions, see William A. Fischel, *Regulatory Takings: Law, Economics, and Politics* 289–324 (1995) (examining various types of political action that can successfully protect property and arguing that “interest-group politics at higher levels of government offer more protection to owners of assets that are inelastic in supply and thus more vulnerable to regulatory takings”); Daniel A. Farber, *Economic Analysis and Just Compensation*, 12 *Int’l Rev. L. & Econ.* 125, 129–32 (1992) (discussing political clout of takings victims and its effect on state programs); Nicole Stelle Garnett, *The Public-Use Question as a Takings Problem*, 71

Our political model rests upon the assumption that the decision to pay is made by the government in order to maximize political benefits to decisionmakers. To put it simply, there are cases when payment of compensation brings high political benefits at relatively low political costs. In such cases, the government will voluntarily pay compensation. Conversely, there are instances where the payment of compensation is quite costly (politically) and the political benefits of such compensation low. In these cases, compensation will not be paid. For purposes of our model, we do not define the nature of the political benefits to be obtained by political decisionmakers. We simply identify some likely elements within the decisionmaker's political cost-benefit analysis. We show that, in all likelihood, any restriction on the power of eminent domain of the nature of a narrow interpretation of public use will increase the likelihood of uncompensated takings and distort political decisions.

Let us begin by imagining a simplified case in which there is a single decisionmaker who makes a political calculus that involves two kinds of benefits and costs for the decisionmaker: government budget effects and other effects. A government decisionmaker is considering a single project—a plan to create a grassy strip along the embankment of a local stream in order to absorb flood waters. The area is currently part of the private property of a landowner. The decisionmaker must choose from among the available government powers in order to preserve the strip. One possible way is by purchasing a conservation easement or restrictive covenant over the grassy strip from the private owner at an agreed-upon price. Another is seizure of a negative easement (or even outright title) by eminent domain. A third possibility is to impose a regulation on use of the strip to require that the owner preserve the strip in its grassy state. Yet a fourth possibility is the imposition of a near-confiscatory tax on all nongrassy use of the strip. Each of these options creates a different mix of political benefits, both on- and off-budget.

Acquisition of title or other property rights by the government is clearly the most expensive option for the government budget. Generally, acquisition of title through eminent domain is more expensive than voluntary transfer, as the former involves the costs of litigating the taking in court. However, the voluntary purchase may prove the more costly option for the government budget if negotiations are particularly costly, or the portion of the potential government surplus captured by the owner is particularly large.<sup>154</sup>

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Geo. Wash. L. Rev. 934, 951–63 (2003) (arguing that public choice theory demonstrates that judicial review of takings must analyze match between means and ends of governmental action); Saul Levmore, Takings, Torts, and Special Interests, 77 Va. L. Rev. 1333, 1355–60 (1991) (arguing that compensation depends on presence of “identifiable nonmajoritarian, or special interest, beneficiaries”); cf. Timothy J. Brennan & James Boyd, Political Economy and the Efficiency of Compensation for Takings, 24 *Contemp. Econ. Pol’y* 188, 195–97 (2006) (theorizing about effects on takings compensation caused by political interaction between landowners and environmentalists).

154. Indeed, strategic behavior may render voluntary purchase impossible altogether.

By contrast, the regulatory option should be much cheaper for the government budget, as it involves only oversight and enforcement costs. Depending on the penalties imposed for regulatory violations and the cost function of the owner, the regulation might even be costless (or possibly revenue producing) for the government. Similar observations may be made about the tax option.

However, the decisionmaker's political cost-benefit function does not correspond directly to the government's budget. To begin with, governmental budgetary costs are not out of pocket for the decisionmaker. The political costs faced by the decisionmaker will not even be a consistent percentage of the governmental budget. Spending on the same items may prove more or less popular over time as public trends change. Opportunity costs are not even uniform across the budget. Public willingness to absorb taxes is often altered by the designation of revenue streams to particular government programs, even though the funds in question may be completely fungible.<sup>155</sup>

Moreover, each of the proposed courses of action is accompanied by nonbudget effects. Generally, taxes or regulation are the most costly political course of action (insofar as nonbudget effects are concerned), as they leave clearly aggrieved and uncompensated property owners. Voluntary purchase, by contrast, is generally the least costly politically, as it disperses the cost among the public at large and presumably leaves the selling owner satisfied. Eminent domain also spreads costs, but may leave owners aggrieved as they are often undercompensated.<sup>156</sup> However, these nonbudget effects too are not uniform. In some cases, spreading the costs across the public may prove more politically costly than imposing them on a single owner or a small set of owners.

The result is that relative political costs and benefits differ among potential projects, and change over the course of time. An urban development project such as that ratified in *Berman* may have offered the highest political benefits as an eminent domain project in the 1940s and 1950s, whereas today it might be most politically advantageous to carry the project out through regulation, taxation, voluntary purchases, or some combination of the above. It is also possible that at different times, projects may produce positive or negative net political benefits.

We demonstrate some of the possibilities in Illustration 1 below. The illustration shows four different projects contemplated by a political decisionmaker. Project 4 produces negative net political benefits irrespective of the compensation policy. In this case, the decisionmaker will forgo the project altogether.

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155. Consider, in this regard, the large number of taxes whose revenue stream is dedicated to a particular type of expenditure, such as gasoline taxes for roads.

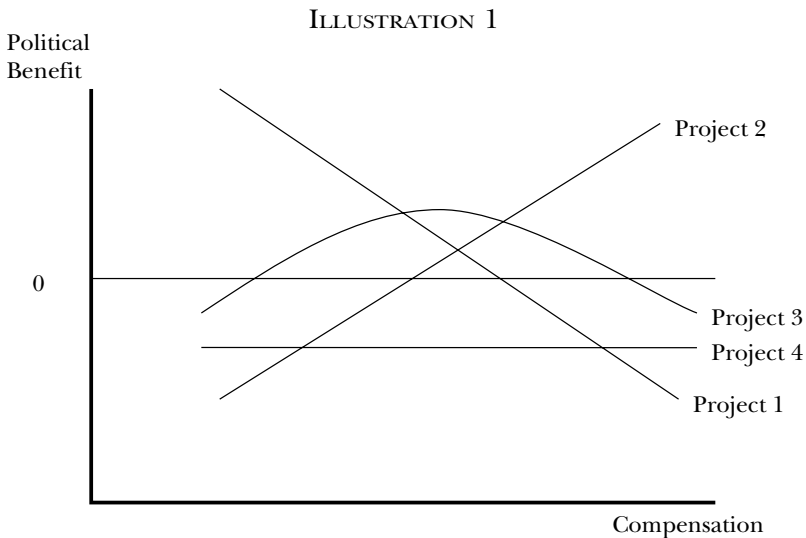
156. See Bell & Parchomovsky, *Private*, supra note 13 (manuscript at 17–23) (demonstrating that current eminent domain compensation scheme leads to undercompensation for owners).



Projects 1 through 3 produce positive benefits, but maximize these benefits with different compensation policies. Project 1 achieves the maximum political benefits with no compensation. In our example above, this would mean that the decisionmaker achieves maximum political benefits by imposing an uncompensated regulation on the owner of the grassy strip forbidding development. The development moratoria approved in *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency* appear to be an example of this type of project.<sup>157</sup> Similarly, many modern zoning regulations appear to fall into this category.

Project 2 achieves the maximum political benefit with full compensation. This means that in our example, the decisionmaker achieves maximum political benefits by negotiating a purchase of an easement, or by seizing an easement by eminent domain with market compensation. The City of New London believed that its proposed project with Pfizer fell into this category (although subsequent events indicate that the project may actually have belonged in the category of Project 4).

Finally, Project 3 achieves maximum political benefits at partial compensation. This result can be achieved by a combination of regulation and benefits; for example, the decisionmaker could impose the regulatory limitations while offering tax benefits or developmental rights in partial compensation. An example of this kind of project can be found in New York's landmarking scheme approved in *Penn Central*; the law stripped development rights, but offered partial compensation in limited offsetting regulatory benefits.<sup>158</sup>



157. See 535 U.S. 302, 341–43 (2002) (holding that development moratoria were not per se takings requiring compensation under Takings Clause).

158. See *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 113–15 (1978) (describing New York City zoning law that “gave the owners of landmark sites additional

### B. *An Expanded Model*

The model we have considered thus far has been based only on a single decisionmaker, and has assumed no effects as a result of legal restrictions. In this section, we take a clue from William Fischel and consider a more sophisticated model that takes into account such factors as the possibility of multiple decisionmakers.<sup>159</sup>

We begin by considering the possibility of multilevel government, such as a division of authority among local, state, and national authorities. The addition of several levels of government to our example complicates matters by altering the political calculus. While *some* level of government will have to pay to acquire title to the desired property, this level may not be identical to the level of government deciding on the taking. Consider the notorious *Poletown* case again. While seizing the property by eminent domain obviously required large outlays by Detroit, it also allowed the city to enjoy \$138 million in federal loans and grants from the Department of Housing and Urban Development.<sup>160</sup> The New London taking at issue in *Kelo* was paid for not by the City of New London, but by the State of Connecticut.<sup>161</sup> The multiple levels of government budgeting add two types of costs and benefits to the political calculus. On the one hand, passing costs to a different level of government may come at the price of some kinds of political influence with that level of government. On the other hand, strategic use of eminent domain allows local government decisionmakers to use others' money to dissipate political opposition. Not only is it highly unlikely that local decisionmakers will suffer any political disability as a result of their burdening the state or federal budget, it is likely they will enjoy political benefit. The ability to "bring home the bacon" is generally a prized political asset.

The calculus is further complicated when there are multiple decisionmakers at the same level, such as multiple administrative agencies, multiple legislators, or multiple branches of government. Political credit and blame is not uniformly spread across the political spectrum, even at the same level of government. One actor may receive more of the benefits from a given project, while being able to avoid blame for the costs associated with the same. One legislator, for example, might be seen as primarily responsible for tax increases, while another receives credit for

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opportunities to transfer development rights" to "property across the street or across a street intersection").

159. See generally 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.

160. Carla T. Main, *How Eminent Domain Ran Amok*, Pol'y Rev., Oct. & Nov. 2005, at 1, 15–16; see also William A. Fischel, *Am. Law Inst. & Am. Bar Ass'n, The True Story of Poletown and Its Relevance for Kelo: How Federal Grants Encourage Excessive Use of Eminent Domain* 127, 132 (2005), at Westlaw, SL012 ALL-ABA 127 (on file with the *Columbia Law Review*) (noting that most of funding for Poletown project came from federal government, including \$100 million in federal loans).

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

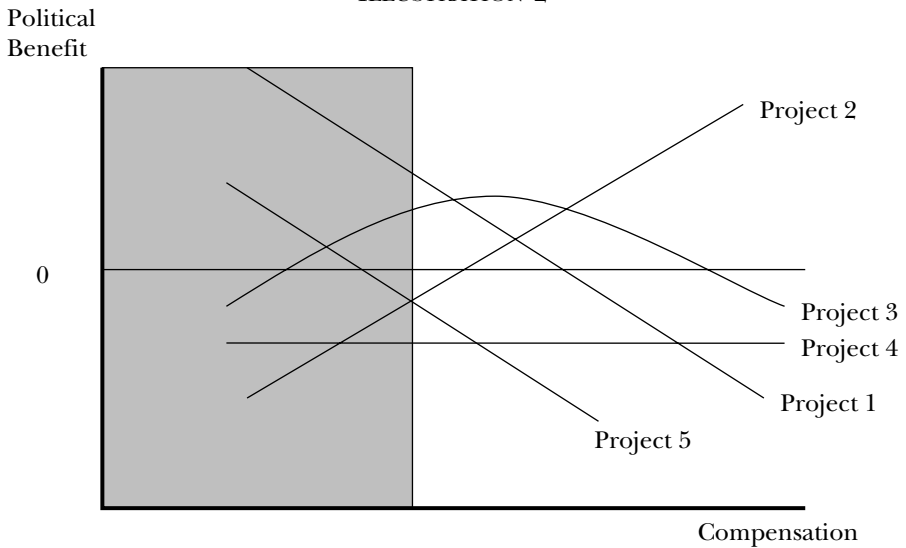
the benefits of projects funded by the taxes. One administrative agency might receive political benefits from initiating a regulatory project even as another bears the ire of aggrieved property owners.

As when there are single decisionmakers at every level, the political calculus is not uniform. Sometimes the split of responsibility will lead toward more compensation, other times toward less.

C. *The Political Model and the Public Use Clause*

Interestingly, while the political calculus of various projects is difficult to project, it is far easier to ascertain the likely political effects of a legal ruling restricting the availability of one or the other of the government powers. Importantly, the effects of legal rules are not symmetric across all powers. A legal doctrine that restricts the ability to seize without compensation (such as a strong regulatory takings doctrine) can eliminate certain kinds of projects, while forcing others to be accompanied by compensation even though an undisturbed political calculus would favor noncompensation. This result is shown in Illustration 2 below. By contrast, a legal doctrine that eliminates the ability to effect certain takings by eminent domain would not likely eliminate any projects whatsoever.

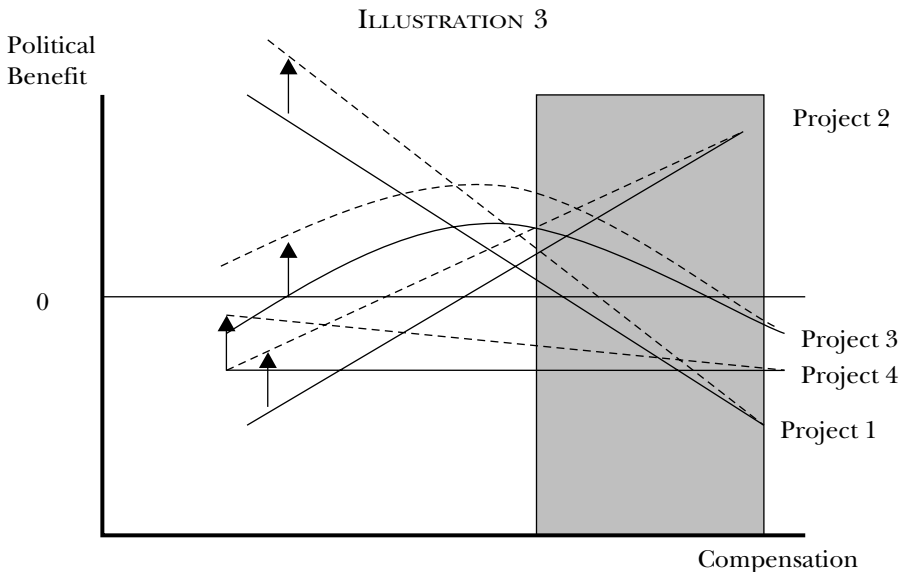
ILLUSTRATION 2



The illustration shows the effect of a stronger regulatory takings doctrine on the political calculus. Because the doctrine eliminates the possibility of seizure without compensation (regarding the relevant projects covered by the doctrine), it forbids decisionmakers from electing options within the shaded area. Thus, Project 5, which would have gone forward without the regulatory takings doctrine, will now be blocked as it cannot

be politically cost effective for the decisionmaker. Project 1, by contrast, will go forward, albeit with partial compensation. Projects 2, 3, and 4 will not be affected.

Contrast these results to those produced by a legal doctrine that eliminates the ability to effect certain takings by eminent domain such as a stronger public use doctrine as favored by *Kelo* opponents. This doctrine would not likely eliminate any projects whatsoever. While the elimination of takings by eminent domain would eliminate the use of that one power, it would not eliminate the use of other powers, such as the regulatory powers. And, since there is nothing barring the government from awarding compensation even where not required to do so, the government could still pursue the most politically advantageous course of action—whether it be compensated, partially compensated, or not compensated at all. Indeed, the judicial barring of seizure by eminent domain might very well alter the political calculus in favor of not compensating.<sup>162</sup> A project that previously offered the greatest net political payoff with compensation under eminent domain might now offer a greater payoff as an uncompensated regulation, since decisionmakers could use the judicial bar on eminent domain to dissipate the political cost of denying compensation. This result is shown in the illustration below.



In the illustration above, we show the alterations of the political calculus resulting from a public use doctrine that bars some kinds of eminent domain. *Kelo* opponents might claim that projects in the shaded

162. We are indebted to Ben Depoorter for this insight.

area would be blocked by the new public use doctrine. However, this is not the case. Even if the government cannot take by eminent domain, it may still pay compensation for the financial impact of its regulations, and it may still accomplish through regulation substantially everything it can accomplish through the eminent domain power. Thus, the decisionmaker will still be able to implement Project 2 at market compensation, Project 3 at partial compensation, and Project 1 without compensation as dictated by the political calculus.

The sole change will be that for every project, the political cost of refusing to pay compensation will be lowered, since the decisionmaker will be able to partially absolve itself of responsibility by blaming judicial rules that bar the exercise of eminent domain. This is shown by the shifts of the curves upwards at lower compensation levels. Depending on the shapes of the curves, this will either result in no change whatsoever in compensation policy or, in the worst case scenario for the owners, less compensation or even seizure (with no compensation) for projects that would otherwise not be politically cost effective.

The political model we offer suggests that the results of reversing *Kelo* would be undesirable. Like any doctrine that places limits on the eminent domain power without affecting other powers or directly affecting the compensation decision, a restrictive public use clause would not prevent seizures by the government. It would not even prevent compensated seizures. It would only prevent some seizures by means of eminent domain.

#### D. *The Political Model and Efficiency*

To this point, we have examined the likely effects of reversing *Kelo* and narrowing the public use doctrine to prevent using eminent domain for some types of government projects. As we have seen, the narrow public use doctrine would not prevent the government from carrying out any proposed projects, even with compensation, in light of the numerous powers available to the government. Moreover, we have seen that the likely effect on the political calculus of decisionmakers will be to pay the same or less compensation for implementing the same projects.

However, we have not yet examined whether any of the projects being considered by the government decisionmaker are actually good for society. We have not proposed any connection between the political calculus and societal benefit. Thus, it is plausible that political calculus leads government decisionmakers to implement projects that are socially inefficient, while eschewing other projects that are socially efficient. Does this fact alter our analysis of the public use doctrine? The surprising answer is no. Irrespective of whether the political calculus leads to good decisions or not, a beefed-up public use doctrine will not contribute to a more efficient decisionmaking process.

Consider that, given our analysis of the political calculus motivating government decisionmakers, a stronger public use doctrine will never

block any contemplated project—if anything, it will encourage the carrying out of projects that would not otherwise be politically beneficial. This means that if one's primary fear is that some government projects are inefficient, the stronger public use doctrine cannot and will not block such projects. To the contrary, it will simply encourage more potentially inefficient projects.

Even if one also fears that too many efficient government projects are blocked under current doctrine, the stronger public use doctrine is still undesirable. It is true that the stronger public use doctrine will lead to some projects being implemented that would otherwise be passed over by government decisionmakers. However, given that these are the projects that are only politically feasible with no compensation, there is a high likelihood that the projects are socially inefficient. For reasons that we have described elsewhere, where government compensates at a level between full subjective value to the owner and surplus value to the government, it will implement efficient projects and eschew inefficient projects.<sup>163</sup> At zero compensation, by contrast, there is little to guarantee that inefficient projects will be rejected. The fact that the project will only be carried out if no compensation is paid suggests, even if only indirectly, that society does not benefit from the project.

#### CONCLUSION

*Kelo v. City of New London* has proved to be one of the most controversial Supreme Court decisions of recent years. Although it broke no new ground legally, commentators, politicians, and property owners from across the political spectrum have denounced the decision, and argued for a new interpretation of the Public Use Clause of the Fifth Amendment that would bar most takings of private property that ultimately leave the taken property in private hands. Whether based in concerns for property rights and liberty, or apprehensions of government overreaching and bias against racial minorities or the poor, anti-*Kelo* criticism has posited that a narrower interpretation of permissible public uses is necessary to protect private property rights.

In this Essay, we have shown that the anti-*Kelo* criticism is misplaced and fails to take account of the myriad powers the government can use to infringe upon private property rights. Given its broad powers, the gov-

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163. See Bell & Parchomovsky, Private, *supra* note 13 (manuscript at 13–16) (describing efficiency-based justifications for takings compensation). We assume that the administrative costs associated with compensation are not so great as to negate this finding. This assumption is warranted so long as the property values in question are sufficiently large. Cf. Michael A. Heller & James E. Krier, Commentary, Deterrence and Distribution in the Law of Takings, 112 Harv. L. Rev. 997, 1008–09 (1999) (arguing against compensation for *de minimis* takings); Frank I. Michelman, Property, Utility, and Fairness: Comments on the Ethical Foundations of “Just Compensation” Law, 80 Harv. L. Rev. 1165, 1215–16 (1967) (noting that administrative costs—or “settlement costs” in Michelman’s taxonomy—must be taken into account in compensation calculus).

ernment may always seize private property rights, with or without paying compensation to private owners. The government pays compensation or not based on decisionmakers' political calculi, rather than for lack of choice. Consequently, changes in the structure of the law of eminent domain to render it unavailable for certain seizures is likely to harm, rather than aid, private property owners by ending or reducing compensation for some government seizures, while leaving other government seizures compensated at precisely the same level as they would be under current law.

Seizure of private property rights through eminent domain and other government powers is legitimately a matter of public concern. Excessive uncompensated and undercompensated seizures may harm social utility, have undesirable distributive effects, and even serve as a cover for racial and other biases. However, reversing *Kelo* and policing the "public uses" served by takings is not the answer. Granting the government broad deference under the Public Use Clause is a necessary protection for private property owners seeking relief from harmful government decisions.