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Kelo's Legacy

by Daniel H. Cole

Editors' Summary: Rather than signaling the death of private property rights, as media and the public initially feared, the Supreme Court decision in Kelo v. City of New London *ushered in an era of increased state and federal protection for private property. In this Article, Daniel H. Cole examines* Kelo*'s repercussions for urban redevelopment. He begins with a description of the case, and then examines the resulting backlash from the media and public opinion, which decried the decision as unduly expanding eminent domain powers. He concludes with some thoughts on the implications of* Kelo*'s legacy for legal theory and practice.*

I. Introduction

When the U.S. Supreme Court decided *Kelo v. City of New London*[1] in 2005, Justice Sandra Day O'Connor (in dissent), property rights advocates, media pundits, and state and federal legislators all assailed the ruling as the death knell for private property rights. But to paraphrase Mark Twain,[2] the reports of private property's demise have been greatly exaggerated.

In response to *Kelo*, states throughout the country have increased protections for private property by constitutional amendment or ordinary legislation. In some states, organized groups of private citizens have responded directly to *Kelo* through public referenda. At the federal level, the U.S. Congress responded in the most effective way it could: by cutting off federal funding to development projects utilizing eminent domain. For better or worse, the increased protections for private property offered by post-*Kelo* legislation and state court decisions are making it more difficult for local planners and developers to engage in urban redevelopment. From a theoretical perspective, the political response to *Kelo* underscores an important point that many U.S. jurists do not sufficiently appreciate: the existence and protection of private property does not depend exclusively—and perhaps not even primarily—on the courts.

This Article briefly reviews the *Kelo* ruling, highlights some of the legislative responses to the Court's decision in that case, and briefly discusses some of the implications of those responses for protecting private property rights in a constitutional democracy.

II. The *Kelo* Case

The city of New London, Connecticut, was founded in 1646.[3] Before *Kelo*, the town was best known for having been torched by Benedict Arnold's troops during the Revolutionary War. During the 19th century, a rebuilt New London became a prosperous manufacturing center. But during the second half of the 20th century, New London's fortunes, like those of many northeastern "rust belt" cities, declined. As the jobs left, so too did the people. By the time the *Kelo* case arose, New London's population stood at a century-low 24,000. Average household income in New London was well below the state average; the unemployment rate of 7.6% was twice the state average. In 1990, the state of Connecticut officially designated New London a "distressed municipality," and that was before the U.S. Navy closed its Naval Undersea Warfare Center on the Fort Trumbull peninsula, putting another 1,500 people out of work.

In 1998, New London received a much needed infusion of good jobs when Pfizer Pharmaceuticals announced plans to build a $300 million research facility on the city's Fort Trumbull peninsula. This announcement gave impetus to New London's decision to redevelop the adjacent area. The city authorized the New London Development Corporation (NLDC) to plan and oversee the redevelopment effort. After

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1. 545 U.S. 469, 35 ELR 20134 (2005).

2. For the original note in which Twain wrote that reports of his death were "an exaggeration," see Mark Twain Quotations, *Death*, http://www.twainquotes.com/Death.html (last visited Mar. 14, 2007).

3. The background information in this section is adapted from Daniel H. Cole, *Why* Kelo *Is Not Good News for Local Planners and Developers*, 22 Ga. St. U. L. Rev. 803 (2006).

a series of public meetings, the NLDC issued its redevelopment plan for a 90-acre area of the Fort Trumbull peninsula in August 1999. The plan included retail and commercial properties, a marina, conference center, museum, a public park, and other amenities. The NLDC estimated that redevelopment would create up to 3,000 jobs and generate as much as $1.25 million in tax revenues for New London. On January 18, 2000, the city of New London approved the redevelopment plan.

Before redevelopment could begin, the NLDC needed to assemble the 90-acre area of land into a single parcel, with itself as owner. To that end, the city of New London authorized the NLDC to acquire existing properties in Fort Trumbull, by eminent domain if necessary. The NLDC purchased 98% of the land in voluntary market transactions (though, perhaps, in the shadow of eminent domain), but nine property owners, who possessed a total of just 1.54 acres, refused to sell. While the NLDC negotiated with them, the first stage of redevelopment work commenced, including $12 million in infrastructure improvements. Finally, in November 2000, the NLDC filed lawsuits to condemn the holdouts' properties by eminent domain, and placed $1.6 million into escrow as compensation. The nine holdouts, including Susette Kelo, sued to prevent the taking on grounds that economic redevelopment did not constitute a valid public use of their non-blighted lands. A property rights advocacy group, the Institute for Justice, financed and argued the case on behalf of the plaintiffs. The city of New London won at trial and on appeal to the Connecticut Supreme Court. The U.S. Supreme Court granted certiorari on September 28, 2004, and affirmed the Connecticut Supreme Court's ruling on June 23, 2005.

Justice John Paul Stevens' majority opinion for the Court (joined by Justices Stephen G. Breyer, Ruth Bader Ginsburg, Anthony M. Kennedy, and David H. Souter) upheld the taking based on numerous federal and state court precedents extending back to the 19th century. Those precedents established several propositions, including the following: (1) the government cannot take property from one specific private owner and give it to another for purely private use; and (2) it is well-settled that "economic development takings" can satisfy the Public Use Clause. In particular, the majority relied on three previous Court rulings in *Berman v. Parker*,[4] *Hawaii Housing Authority v. Midkiff*,[5] and *Ruckelshaus v. Monsanto Co.*[6] In *Berman*, the Court upheld the taking of a non-blighted department store as part of a large-scale economic redevelopment plan for a blighted part of Washington, D.C. In *Midkiff*, the Court approved the state of Hawaii's decision to take lands from a small group of oligopolists and give them to tenants in order to create a modern, functional land market in that state. In *Monsanto*, the Court upheld federal pesticide legislation that permitted the federal government to "take" trade secrets from chemical companies upon payment of compensation in order to prevent barriers to entry into pesticide markets.

The majority also pointed to other rulings in which the Court had endorsed takings designed to promote mining and agriculture because of the perceived importance of those industries to the economic welfare of specific states.[7] Given the breadth and scope of the precedents, the majority were convinced that the Court was not breaking any new ground in upholding the taking of Susette Kelo's land for economic redevelopment. Justice Stevens and his colleagues found substantial evidence to support the city of New London's determination that economic redevelopment was desirable. They found no evidence, however, that New London preferred one group of identifiable private owners over another.

Justice Kennedy concurred in the judgment, but wrote separately to express his view that the Court ought to adopt a higher standard of review for redevelopment takings. He did not specify what that higher standard of review should be, but he concluded that the Fort Trumbull redevelopment plan would have met it.[8]

Justice O'Connor and her fellow dissenters (including Chief Justice William H. Rehnquist and Justices Antonin G. Scalia and Clarence Thomas) took a fundamentally different view of the case. Whereas the majority thought the law was well-settled by 150 years of precedents, Justice O'Connor referred to *Kelo* as a "case of first impression."[9] What was new, in her view, was the absence of any finding that the existing uses of the land sought to be taken were publicly harmful. Unlike *Berman*, *Kelo* involved no finding of blight, which would have constituted a public nuisance. Unlike *Midkiff* (a case in which Justice O'Connor wrote the majority opinion), *Kelo* involved no finding that the preexisting system of land ownership was publicly harmful. Justice O'Connor and the other dissenters in *Kelo* felt that the Court should not permit redevelopment takings in the absence of an express finding of public harm, supported by substantial evidence. Otherwise, Justice O'Connor wrote, redevelopment takings could simply redistribute property from one group of private owners to another. In her view, that was precisely the result of the Court's ruling in *Kelo*. As a consequence, she wrote, all private property in the United States is now "vulnerable to being taken and transferred to another private owner, so long as it might be upgraded."[10] In effect, the words "for public use," have been "deleted . . . from the Takings Clause of the Fifth Amendment."[11]

Justice Thomas wrote separately to argue for a literal reading of the Public Use Clause. In his view, public use means public use, period. The U.S. Constitution permits eminent domain takings only when the government plans to keep the property in public ownership for actual use by the public. Such an interpretation presumably would restrict eminent domain to noncontroversial activities, such as road and school building, and, perhaps somewhat more controversially, the location of hospitals, public utilities, and public parks. Justice Thomas would have overruled *Midkiff*, *Berman*, and all other cases allowing takings for private economic development or redevelopment.[12]

4. 348 U.S. 26 (1954).
5. 467 U.S. 229, 14 ELR 20549 (1984).
6. 467 U.S. 986, 14 ELR 20539 (1984).
7. *See* Strickley v. Highland Boy Gold Mining Co., 200 U.S. 527 (1906); Fallbrook Irrigation Dist. v. Bradley, 164 U.S. 112 (1896).
8. Kelo v. City of New London, 545 U.S. 469, 492, 35 ELR 20134 (2005) (Kennedy, J., concurring). If Justice Clarence Thomas is an "originalist," and Justice Antonin G. Scalia a sometime "textualist," sometime "originalist," then perhaps we might describe Justice Kennedy's concurrence in *Kelo* as "inscrutablist" or "obfuscationist."
9. *Id.* at 497 (O'Connor, J., dissenting).
10. *Id.* at 494 (O'Connor, J., dissenting).
11. *Id.*
12. *Id.* at 520 (Thomas, J., dissenting).

Given Justice Thomas' interpretation of the Public Use Clause, it is difficult to comprehend why he signed onto Justice O'Connor's dissent. If anything, the space between their respective interpretations of the Public Use Clause is greater than that separating Justice O'Connor's interpretation from the majority's. This is not to say that Justice Thomas' strict textualist interpretation of the Public Use Clause is obviously correct or preferable to either Justice O'Connor's interpretation or the majority's view of the Public Use Clause. In testimony before the U.S. Senate Judiciary Committee about the *Kelo* ruling, Prof. Thomas Merrill explained that the Framers probably did not intend the Public Use Clause to be interpreted literally.[13]

Leaving aside Justice Kennedy's concurrence and Justice Thomas' dissent, neither of which attracted a second vote, which side had the better of the arguments in *Kelo*? Justice O'Connor's dissent suffers from two glaring weaknesses. First and foremost, its attempt to distinguish *Kelo* from *Berman* is weak. Both cases involved the taking of non-blighted properties to further redevelopment plans. In *Berman*, the surrounding community was "blighted"; in *Kelo*, New London was designated a "distressed municipality." How much difference should that make? Perhaps a blight designation signifies marginally greater public harm than a distressed municipality designation, but it seems a slender reed on which to rest a different outcome. For all practical purposes, the plaintiff in *Berman* was in precisely the same position as the plaintiffs in *Kelo*. Moreover, nothing in the majority's decision or reasoning in *Kelo* extends beyond the Court's ruling or reasoning in *Berman*. This is not to claim that either *Berman* or *Kelo* was correctly decided, but it is difficult to see how Justice O'Connor and the other dissenters in *Kelo* believed they could rule against the city of New London without overruling *Berman* (as only Justice Thomas would have done).

The second weakness of the dissent is Justice O'Connor's seemingly disingenuous assertion that the majority's holding permits transfers from one group of private owners to another whenever property "might be upgraded."[14] The majority stressed that such transfers would not satisfy the Public Use Clause. In addition, the majority emphasized the history of economic deterioration in New London, including the state of Connecticut's express finding that New London was a distressed municipality, as well as the fact that the decision to redevelop the Fort Trumbull neighborhood was made without regard to who owned, or would come to own, the properties.[15] In sum, contrary to Justice O'Connor's opinion, the Public Use Clause seems no more or less moribund after *Kelo* than it was before. Whether or not we approve of the use of eminent domain for economic development, we should at least recognize that existing precedents amply supported the Court's decision in *Kelo*. If the Court chooses to adopt a more restrictive interpretation of the Public Use Clause, it will simply have to overrule at least some of those precedents, most notably *Berman* and now *Kelo*.[16]

III. *Kelo*'s Legacy of Eminent Domain Reform

The media was quick to criticize—and mischaracterize—the Supreme Court's ruling in *Kelo*. *The Economist* wrote that *Kelo* "massively expanded the government's power of eminent domain."[17] A *Boston Globe* reporter claimed that *Kelo* "eviscerates . . . the Public Use clause."[18] Writing in the *Virginian-Pilot*, Rep. Thelma Drake (R-Va.) asserted that *Kelo* authorizes "arbitrary land grabs."[19] All of these assertions, and many others published in major media outlets,[20] were inaccurate, but they mimicked Justice O'Connor's own mischaracterizations of the majority opinion in *Kelo*. However inaccurate the criticism, *Kelo* remains a deeply unpopular decision.

Numerous public opinion polls reflected public outrage over the city of New London's treatment of Susette Kelo and the Court's decision to uphold the taking. A Zogby poll conducted for the National Farm Bureau found that Americans believe by two to one that governments should not use eminent domain except for roads or utilities; 83% believe that governments should not use eminent domain to promote private economic development.[21] Another national poll, conducted by NBC News and *The Wall Street Journal*, found that property rights protection has become the most important domestic legal issue for Americans, ahead of other issues such as parental notification for abortions by minors, the right to die, and medical marijuana use.[22] However, the NBC/*Wall Street Journal* poll did not ask for respondents' opinions on the *Kelo* decision, or whether eminent domain use should be curtailed. At least one non-scientific national poll by CNN found that a majority of Americans believe that the power of eminent domain should be abolished entirely.[23]

13. *See* Testimony of Thomas W. Merrill, Charles Keller Beckman Professor, Columbia Law School, United States Comm. on the Judiciary, *The* Kelo *Decision: Investigating Takings of Homes and Other Private Property* (Sept. 20, 2005), *available at* http://judiciary.senate.gov/print_testimony.cfm?id'1612&wit_id'4661.

14. Arguably, Justice O'Connor's reliance on public harm as a prerequisite for public use is also problematic, but I will reserve an analysis of that issue for another occasion.

15. *Kelo*, 545 U.S. at 477, 483-84.

16. *Midkiff* can probably be preserved as an ever-distinguishable, one-off case. In all likelihood, no state will ever again confront a virtually feudal system of land oligopoly. Arguably, in recognition of its special facts, unlikely to be repeated, the Court in *Midkiff* should have expressly restricted the case's precedential value.

17. *See Property Rights and Eminent Domain: Hands Off Our Homes*, Economist, Aug. 20, 2005, at 21.

18. Jeff Jacoby, *Eminent Injustice in New London*, Boston Globe, June 26, 2005, at D11.

19. Thelma Drake, *Property Rights Should Supercede Arbitrary Land Grabs*, Virginian-Pilot (Norfolk), July 1, 2005, at B11.

20. For other examples, *see, e.g.*, Op-Ed, *Homeowners Lose on Property Rights*, USA Today, June 30, 2005, at 13A; Robert J. Caldwell, Editorial, *Property Wrongs: A Supreme Blunder*, San Diego Union-Trib., July 3, 2005, at G1; Michael Doyle, *Cities Get More Power to Seize Homes; Supreme Court Broadens Use of Eminent Domain*, Star Trib. (Minneapolis, Minn.), June 24, 2005, at 1A; Mike Salinero, *Court Expands Power to Seize Land*, Tampa Trib., June 24, 2005, at A01.

21. *See* "FB Survey: Americans Oppose Eminent Domain," The Voice of Agriculture Newsroom, Jan. 9, 2006, *available at* http://www.fb.org/index.php?fuseaction=newsroom.newsfocus&year=2006&file=nr0109a.html. This poll was a telephone survey of 1,076 adults conducted from Oct. 29, 2005, to Nov. 2, 2005, and had a margin of error of +/- 3%.

22. *See* Castle Coalition, Study #6055 (2005), *available at* http://www.castlecoalition.org/pdf/WSJ-NBC-Poll-7_15_05.pdf. Surveyors conducted telephone interviews with 1,009 adults from July 8-11, 2005. The poll has a margin of error of +/- 3.1%.

23. *See, e.g.*, CNN, *QuickVote*, http://www.cnn.com/POLLSERVER/results/18442.exclude.html (last visited Mar. 14, 2007).

(Anecdotally, I recall a letter to the editor in the *Indianapolis Star* declaring that "eminent domain is the most unconstitutional thing I've ever seen."[24] Such a belief demonstrates a lack of legal sophistication, but it may nevertheless reflect how members of the public view government expropriations of private property.)

Given *Kelo*'s unpopularity and its widespread media coverage, it is unsurprising that federal and state legislators quickly took notice and launched efforts to restrict the power of eminent domain. At the federal level, Congress held hearings on the *Kelo* decision.[25] During the Supreme Court nomination hearings for Chief Justice John G. Roberts and Justice Samuel A. Alito, Senators inquired about the nominees' views on the decision and on eminent domain more generally.[26] In 2005, Congress enacted appropriations legislation[27] for the 2006 fiscal year which, among other things, curtailed federal funding for federal, state, and local highway and housing projects that used eminent domain.[28] The legislation further specified that federal funds could not be used for economic development purposes that primarily benefit private entities.[29] Beyond that short-term fix, the U.S. House of Representatives passed a more comprehensive solution to the eminent domain problem. The 2005 Private Property Rights Protection Act expressly prohibited the use of eminent domain for any economic development projects receiving federal funding, and imposed penalties on states that use eminent domain in federally funded projects.[30] Since most economic development and redevelopment projects involve some federal funding—for example, the federal government provided $2 million for the Fort Trumbull redevelopment project in New London, Connecticut—the Private Property Rights Protection Act, if enacted, would have significantly reduced the use of eminent domain for economic development. However, the Senate failed to approve its version of the Act before the end of the 2006 legislative session.[31]

Meanwhile, according to the property rights advocacy group the Castle Coalition,[32] 34 states have enacted eminent domain reform laws in the wake of *Kelo*.[33] This is a truly impressive statistic: two-thirds of U.S. states placed limitations on eminent domain between the time *Kelo* was decided in June 2005 and the end of 2006. Another 450 separate legislative proposals to limit, or further limit, eminent domain remain under active consideration in more than 40 states. The vast majority of these legislative proposals will never make it to governors' desks, but a few will, and at least some of those can be expected to impose real limitations on eminent domain.

Of the state laws enacted so far, some accomplish very little, while others are quite significant. Alabama's 2005 Eminent Domain Code, for example, makes only a minor adjustment to existing law. It prohibits the use of eminent domain "for the purpose of nongovernmental retail, office, commercial, residential, or industrial development or use," except for blighted areas.[34] While this would ostensibly prevent a case like *Kelo* from arising in Alabama, the statute would only require cities to make more specific findings that an area is blighted.

The state of South Dakota, by contrast, adopted a far more stringent eminent domain reform law, which prohibits the use of eminent domain to transfer land from one private person to any other "private person, nongovernmental entity, or other public-private business entity."[35] In addition, the law prohibits the use of eminent domain "primarily for enhancement of tax revenue."[36] These are significant limitations, or they would be, if the practice of eminent domain in South Dakota actually required reform. The fact is that eminent domain is almost never used for economic development in states like South Dakota.[37] Thus, the opportunity costs of imposing strict limitations on eminent domain in that state were very low. A game theorist might well predict that the most stringent limitations on eminent domain would be enacted in such states that rely the least on that tool of government power.

However, tough eminent domain reform laws have been enacted in states where those reforms are relevant, that is, costly for government. Indiana's 2006 Eminent Domain law,[38] for example, specifies that "public use . . . does not include . . . economic development, including an increase in the tax base, tax revenues, employment, or general economic health."[39] And, in accordance with Justice O'Connor's dissent in *Kelo*, it limits the use of eminent domain to "public nuisances," "fire hazards," "structures unfit for human habitation," and "unimproved or vacant" lands.[40] The Indiana statute also raises the costs of eminent domain by requiring super-compensation: governments must pay 150% of fair market value when they take occupied residential

24. Letter, *Eminent Domain Used to Bully Taxpayers*, INDIANAPOLIS STAR, Aug. 15, 2005, at 7A.

25. *See, e.g.*, *Supreme Court's* Kelo *Decision and Potential Cong. Responses: Hearing Before the Subcomm. on the Constitution of the Comm. of the Judiciary H.R.*, 109th Cong. (2005), *available at* http://www.judiciary.house.gov/media/pdfs/printers/109th/23573.pdf.

26. *See* http://a257.g.akamaitech.net/7/257/2422/26jan20041230/www.access.gpo.gov/congress/senate/pdf/108hrg/92548.pdf; *Transcript: U.S. Senate Judiciary Committee Hearing on Judge Samuel Alito's Nomination to the Supreme Court, Part II of III*, WASH. POST, Jan. 11, 2005, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2006/01/11/AR2006011101335.html.

27. H.R. 3058, 109th Cong. (2006).

28. Pub. L. No. 109-115, §726.

29. *Id.*

30. H.R. 4128, 109th Cong. (2005), *available at* http://thomas.loc.gov/cgi-bin/query/z?c109:H.R.4128:. *See* Shaheen Pasha, *Eminent Domain Looks Less Imminent: House Passes Bill That Could Prevent Private Industry From Using Land Seizures*, CNNMONEY.COM, http://money.cnn.com/2005/11/04/news/economy/eminent_domain_bill (last visited May 30, 2007).

31. Castle Coalition, *Senate Fails to Pass Eminent Domain Reform: Thousands Remain Subject to Federally Funded Eminent Domain Abuse*, http://www.castlecoalition.org/media/releases/12_11_06pr.html?actionID'286 (last visited May 30, 2007).

32. Castle Coalition, *Enacted Legislation Since* Kelo, http://eminentdomainabuse.org/legislation/passed/index.html (last visited Mar. 14, 2007).

33. Castle Coalition, *Legislative Action Since* Kelo, http://eminentdomainabuse.org/pdf/publications/State-Summary-Publication.pdf (last visited Mar. 14, 2007).

34. 2005 Ala. Acts 05-313, 1st Sp. Sess.; ALA. CODE §18-1B-1 & 2(a) (2005).

35. *See* http://legis.state.sd.us/sessions/2006/bills/HB1080enr.htm (last visited Mar. 14, 2007).

36. *Id.*

37. *See* DANA BERLINER, PUBLIC POWER, PUBLIC GAIN 189 (2003), *available at* http://www.castlecoalition.org/pdf/report/ED_report.pdf.

38. H.B. 1010 (Ind. 2006).

39. *Id.* ch. 4.5, §1(a).

40. *Id.* §7.

properties and 125% of fair market value when they take agricultural lands. Moreover, landowners who fight eminent domain are entitled to recover "reasonable attorneys fees."[41] Although it has yet to be interpreted and enforced in court, Indiana's new statute appears to substantially limit the power of state and municipal governments to exercise eminent domain for economic development purposes.

In addition to eminent domain reform acts adopted pursuant to ordinary legislative procedures, private citizens responded directly to *Kelo* in several states that permit lawmaking or constitutional amendment by public referendum. In November 2006, citizens in 12 states—Arizona, California, Florida, Georgia, Idaho, Louisiana, Michigan, Nevada, New Hampshire, North Dakota, Oregon, and South Carolina—voted on a variety of ballot initiatives to limit eminent domain. Only in California and Idaho did voters defeat the reforms; in the 10 other states, the measures were enacted by an average majority of 70.2%.[42] Seven of the successful initiatives were constitutional amendments, some of which were enacted by state legislatures and subsequently submitted for voter approval. For example, Florida's House Joint Resolution 1569 amended the state constitution to require a three-fifths legislative majority to authorize the transfer to private entities of properties condemned by eminent domain.[43] Georgia's constitutional amendment requires local or state legislative approval for each and every act of condemnation.[44] In Louisiana, the state constitution now prohibits takings "(a) for the predominant use by any private person or entity; or (b) for transfer of ownership to any private person or entity."[45] Michigan voters constitutionalized aspects of the state supreme court's 2004 ruling in *County of Wayne v. Hathcock*.[46] In that case, the court ruled that private property could be condemned for transfer to another private entity only where one of the following three conditions is met: "(1) . . . 'public necessity of the extreme sort' requires collective action; (2) . . . the property remains subject to public oversight after transfer to a private entity; and (3) . . . the property is selected because of 'facts of independent public significance,' rather than the interests of the private entity to which the property is eventually transferred."[47] Article X, the new constitutional amendment approved by Michigan voters in November 2006, flatly prohibits the use of eminent domain for transfer to another private entity for purposes of economic development or enhancement of tax revenues. The amendment does permit takings of blighted properties, but only where the government establishes the existence of blight by clear and convincing evidence. In addition, when a person's "principle residence" is taken by eminent domain, the amendment requires compensation at 125% of fair market value.[48] Finally, a few of the successful ballot measures did not amend state constitutions but merely enacted ordinary legislation. Among them, Idaho's Proposition 2 and Oregon's Measure 39 both prohibit the taking of land, if at the time of taking, the government intends to transfer ownership to a private entity.[49]

In sum, a wave of eminent domain reform legislation has swept the country in the wake of the Court's 2005 *Kelo* ruling. It is difficult to recall the last time a single Supreme Court ruling—particularly one that changed the underlying law so little—generated such a rapid and profound legislative reform movement in the states. Those legislative reforms, far more than anything the Justices actually wrote in *Kelo*, are *Kelo*'s chief legacy.

IV. Understanding *Kelo*'s Legacy and Its Institutional Implications

A. The Political Protection of Private Property and the American Juridical Tradition

When the Supreme Court decided *Kelo*, it appeared to mark a clear victory for municipal governments, local planners, and developers over lower and middle-class property owners like Susette Kelo. In hindsight, the "victory" appears pyrrhic and short-lived. The ongoing backlash against *Kelo* has made it far more difficult for local governments in many, if not most, states to engage in economic development takings than it ever was before *Kelo*. Even in states that have not yet enacted laws to counteract *Kelo*, municipal officials and local developers are feeling the sting of the backlash. The city of New London itself, which had a clear legal right to evict Susette Kelo and the other holdouts from the city's properties, shied away from asserting its rights and negotiated a settlement instead.[50] Pursuant to that settlement, Ms. Kelo was not forced out of her home; instead, her home was transferred, at taxpayer expense, to a different lot outside the redevelopment zone. A thousand miles away, in St. Louis, Missouri, the same chilling effect killed at least two redevelopment projects. According to the city manager of Maplewood City, a suburb of St. Louis, the government's tool of eminent domain became politically too hot to handle after *Kelo*.[51] Developers and commercial lenders grew concerned about the adverse publicity that accompanied use of eminent domain. In January 2006, BB&T, the country's ninth largest financial holdings company with $109.2 billion in assets, announced that it no longer would finance development projects involving lands taken from private citizens by eminent domain.[52] And it is not just adverse public

41. *See* http://www.in.gov/legislative/bills/2006/EH/EH1010.2.html (last visited Mar. 14, 2007).

42. My calculations are from figures presented at Castle Coalition, http://eminentdomainabuse.org/legislation/ballot-measures/index.html (last visited Mar. 14, 2007).

43. *See* http://www.myfloridahouse.gov/Sections/Documents/loaddoc.Aspx?FileName'_h1569er.doc&DocumentType'Bill&BillNumber'1569&Session'2006 (last visited May 30, 2007).

44. Georgia, H.R. 1306. *See* http://www.legis.state.ga.us/legis/2005_06/pdf/hr1306.pdf (last visited May 31, 2007).

45. Louisiana, Senate Bill No. 1, Act No. 851. *See* http://www.legis.state.la.us/billdata/streamdocument.asp?did'407125.
For other examples, see Castle Coalition, http://eminentdomainabuse.org/legislation/ballot-measures/index.html (last visited Mar. 14, 2007).

46. 471 Mich. 445 (Mich. 2004).

47. *Id.* at 477. The court in *Hathcock* expressly overruled the infamous *Poletown* case (*Poletown Neighborhood Council v. City of Detroit*, 410 Mich. 616, 11 ELR 20778 (Mich. 1981)). *Id.* at 483.

48. *See* http://www.legislature.mi.gov/documents/2005-2006/jointresolutionenrolled/Senate/pdf/2005-SNJR-E.pdf.

49. *See* http://www.idsos.state.id.us/ELECT/INITS/06init08.htm; and http://www.sos.state.or.us/elections/irr/2006/057text.pdf.

50. *See* Elizabeth Mehren, *Eminent Domain Plaintiff Will Keep Her House*, L.A. Times, July 1, 2006, at A15.

51. Eric Heisler, *Ruling Has Unexpected Effect Here—It Stalls Project*, St. Louis Post-Dispatch, Aug. 28, 2005, at B1.

52. *See* Institute for Justice, *BB&T Respects Property Rights, Won't Fund Eminent Domain Abuse*, http://www.ij.org/editorial/bbtwont-fund-ED.html (last visited Mar. 14, 2007). As BB&T loans

opinion that worries developers and their financial backers, but also the threat of lawsuits from well-heeled property rights advocacy groups like the Institute for Justice, which financed and argued the *Kelo* case all the way to the Supreme Court.

Kelo's legacy serves as a reminder that constitutional rights are protected not only by the courts, but also by democratically elected political bodies, which may sometimes protect private property rights better than the courts. Such a conclusion would undoubtedly surprise American jurists, many of whom casually assume that, in the absence of strict constitutional judicial review of takings (both by eminent domain and by over-regulation), legislative and regulatory bodies would quickly grind the institution of private property into dust.[53] According to the legal historian James W. Ely Jr., James Madison wrote the Takings Clause into the Fifth Amendment out of concern that property owners would become a "vulnerable minority," subject to dispossession by the non-property-owning majority.[54] Justice Oliver Wendell Holmes, in the famous *Pennsylvania Coal* case, wrote that when the Constitution's "seemingly absolute protection" of private property "is found to be qualified by the police power, the natural tendency of human nature is to extend the qualification more and more until at last private property disappears."[55] Seventy years later, in the equally famous *Lucas v. South Carolina Coastal Commission* case, Justice Scalia suggested that legislative bodies would always seek to impose burdens on discrete private landowners and avoid paying compensation whenever they could get away with it.[56]

The aftermath of *Kelo* suggests that these three outstanding jurists were substantially mistaken. State legislatures (and even some cities)[57] are in the process of doing precisely what Madison, Justice Holmes, and Justice Scalia have suggested they never could or would do: imposing legal constraints on themselves to prevent real or perceived abuses of eminent domain. While those jurists might be surprised, most social scientists presumably would not be because they appreciate that political and legislative protection of private property is consistent with both political-economic theory and historical practice.

money almost exclusively to consumers and small businesses, and does not finance large commercial developments, this commitment is not expected to have any effect on the company's bottom line. *See* Paul Nowell, *Regional Bank to Refuse Loans in Eminent Domain Projects*, Associated Press, http://www.law.com/jsp/law/LawArticleFriendly.jsp?id'1138183513209.

53. I specify "American" jurists because jurists in the U.K. and other Commonwealth countries that lack constitutional judicial review well understand that political bodies, such as the U.K.'s Parliament, substantially protect private property rights in the absence of judicial-enforced constitutional provisions. *See generally* Daniel H. Cole, *Political Institutions, Judicial Review, and Private Property: A Comparative Institutional Analysis*, 17 Sup. Ct. Econ. Rev. 141 (2007).

54. James W. Ely Jr., The Guardian of Every Other Right: A Constitutional History of Property Rights 54 (1998).

55. Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 416 (1922).

56. Lucas v. South Carolina Coastal Comm'n, 505 U.S. 1003, 1025 n.12, 22 ELR 21104 (1992).

57. For examples of cities that have restricted their own powers of eminent domain, see Cole, *supra* note 3, at 840-43. For a list of cities currently considering measures to restrict their powers of eminent domain, see Castle Coalition, *Current Proposed Local Legislation on Eminent Domain*, http://eminentdomainabuse.org/legislation/local/index.html (last visited Mar. 14, 2007).

B. Why Political Bodies Protect Private Property: Theory and History

According to modern theories of positive political economy, legislative bodies can be expected to create and substantially protect private property rights regardless of judicial review. Even on the most parsimonious theory of the state, completely self-interested, rent-seeking governments will establish and enforce property rights to the extent the governors believe that the institution of private property will increase their political and military support and revenues, thereby increasing their prospects for survival.[58] States may not provide a socially efficient level of protection for private property rights[59]; but they will provide some substantial level of protection.

History supports this theory: the traditional American presumption that constitutional judicial review is strictly necessary to protect private property rights conflicts with several hundred years of experience in the United Kingdom and other Commonwealth countries, where property rights are not constitutionally protected against democratic regulation or even uncompensated expropriation. Under the U.K. unwritten constitution, the courts are not authorized to overturn parliamentary legislation or to require Parliament to compensate property owners when its legislative measures take or adversely affect their rights. The U.K. courts do have authority to interpret parliamentary legislation and to enforce it against government agencies. That is, the courts exercise statutory, but not constitutional, judicial review.[60]

Even though the U.K. courts do not have the power to force Parliament to pay compensation when it takes title to property, Parliament virtually always pays compensation for outright takings of property and has done so since at least the 15th century. The practice of paying compensation developed into what British legal scholars refer to as a "constitutional convention"[61] and subsequently a common-law presumption. The U.K. courts presume that Parliament intends to compensate when it takes title to private property, although Parliament can defeat that presumption by clearly manifesting its intent not to compensate.[62] When Parliament manifests such intent, the courts are powerless to interfere because Parliament is supreme. As Lord Chief Justice Alexander Cockburn and Justice Baron C. Blackburn wrote in the 1872 case of *Ex parte Canon Selwyn*[63]: "There is no judicial body in the country by which the validity of an act of parliament can be questioned. An act of the legislature is superior in authority to any court of law . . . and no court could pronounce a judgment as to the validity of an act of parliament." It is worth noting, as a caveat, that when Parliament merely regulates private property, as opposed to taking title, the common law courts presume that Parliament does not in-

58. *See, e.g.*, Itai Sened, The Political Institution of Private Property 81 (1997); Douglass C. North & Robert Paul Thomas, The Rise of the Western World 6 (1973); Douglass C. North, Structure and Change in Economics History 33-34 (1981).

59. *See, e.g.*, North & Thomas, *supra* note 58, at 22, 28 n.12.

60. *See, e.g.*, Cole, *supra* note 3.

61. *See* K. Davies, *Eminent Domain and the Jury*, 150 New L.J. 1079 (2000); Frederic W. Maitland, The Constitutional History of England 342 (Herbert A.L. Fisher ed., 1908).

62. *See, e.g.*, Belfast Corp. v. O.D. Cars Ltd., [1960] NI 60 (1959).

63. 36 J.P. 54 (1872).

tend to compensate.[64] In sum, the only real constraint on Parliament's plenary authority over property rights is self-regulation in view of possible electoral replacement, revolution, or anarchy. About the only thing a Parliament cannot do is bind a future Parliament.

Given that Parliament does not have to pay compensation when it takes title to property, the question arises, why does Parliament ever compensate? This is a question that would confound some American jurists, such as Justice Scalia. In an obscure footnote to his majority opinion in the 1992 *Lucas* case, Justice Scalia suggested that only a legislature with a "stupid staff" would pay compensation for taking property if they could avoid it.[65] But Parliament virtually always compensates, even though it never has to. Perhaps Parliament has had a series of stupid staffs for the past 600 years. It seems rather more likely, however, that Parliament's practice of compensation confirms elements of the political-economic theory of the creation and protection of property, as discussed above.

Interestingly, the amount of statutory protection for private property in the United Kingdom seems roughly similar to the level of constitutional protection in the Constitution, under current Supreme Court doctrines. Indeed, parliamentary legislation more or less mirrors Supreme Court doctrine regarding when compensation should be awarded for so-called regulatory takings. The *Lucas* case, for example, would have come out just the same in the United Kingdom under the 1947 Town and Country Planning Act (as amended), which provides for "compulsory purchase" of land when the government's failure to approve the owner's land development plans leaves the land without any use or value.[66] That same statute also prevents the kinds of exactions that the Supreme Court invalidated in the case of *Dolan v. City of Tigard*.[67] More broadly, the U.K.'s Town and County Planning Act allows for consideration of "landowners' reasonable and legitimate 'development expectations.'"[68] This is analogous to the "reasonable, investment-back expectations" test for regulatory takings, which the Supreme Court established in *Penn Central Transportation Co. v. New York City*.[69] In neither the United Kingdom nor the United States are landowners entitled to compensation for the effects of the vast majority of regulatory impositions. In both countries, the social costs of private land development are "borne by private land developers rather than public agencies."[70] On the other hand, in both the United Kingdom and the United States, landowners are always compensated when the government actually takes title, although the United Kingdom uses a lower measure of compensation: actual use value rather than fair market value.[71] Nevertheless, in international comparisons of the security of property rights, the United States and the United Kingdom are both held up as models, despite their significant institutional differences.[72]

V. Conclusion: The Implications of *Kelo*'s Legacy for Legal Theory and Practice

Taken together, the *Kelo* case, the legislative backlash it generated, positive political-economic theories, and the history of property rights protection in the United Kingdom and other Commonwealth countries suggest that the institution of constitutional judicial review may have less social utility for protecting private property rights than many, if not most, jurists suppose. If U.S. legislative bodies impose more restraints on themselves than the Supreme Court imposes on them under the Public Use Clause, and if property rights are nearly as well protected in the United Kingdom without the institution of constitutional judicial review, then it is at least worth wondering how much social value constitutional judicial review has for protecting private property. More specifically, we might ask whether the transaction costs of constitutional judicial review for protecting private property are worth the social benefits. This is an issue that this author and economist Peter Grossman model in a paper.[73] That model is intended to provide a platform for empirical studies that might measure, if only within substantial margins of error, the social welfare effects of constitutional judicial review for protecting private property. The goal would not be to eradicate constitutional judicial review or repeal the Fifth Amendment's Taking Clause from the Constitution, but simply to better understand the limitations of constitutional judicial review and its place in the institutional mix of our governmental system for protecting the institution of private property.

Most importantly, the available evidence—including the legislative responses to *Kelo*—cautions legal scholars and jurists to avoid casual presumptions about the social utility of constitutional judicial review for protecting private property rights, and suggests that the extreme variety of distrust of democratically enacted regulations—represented, for example, in some of the judicial opinions of Justice Scalia[74] and in the scholarly writings of Richard Epstein[75]—is probably unwarranted. Democratic institutions, especially at higher levels of government,[76] not only expropriate and regulate private property rights, but also substantially protect those rights, even when constitutional judicial review is weak or nonexistent.[77]

64. *See, e.g.*, Belfast Corp. v. O.D. Cars Ltd., [1960] NI 60 (1959).

65. *See supra* note 56 and accompanying text.

66. *See, e.g.*, Malcolm Grant, Urban Planning Law 63 (1982).

67. 515 U.S. 374, 24 ELR 21083 (1994). *See* Malcolm Grant, *If Tigard Were an English City: Exactions Law in England Following the* Tesco *Case*, *in* Takings: Land-Development Conditions and Regulatory Takings After *Dolan* and *Lucas* 332, 350 (David L. Callies, ed., 1996).

68. Grant, *supra* note 66, at 63 n.3.

69. 438 U.S. 104, 8 ELR 20528 (1978).

70. David L. Callies & Malcolm Grant, *Paying for Growth and Planning Gain: An Anglo-American Comparison of Development Conditions, Impact Fees, and Development Agreements*, 23 Urb. Law. 221, 221 (1991).

71. *See* J.B. Cullingworth, Town and Country Planning in England and Wales 157 (1964).

72. *See*, *e.g.*, Marc A. Miles et al., 2004 Index of Economic Freedom; James Gwartney & Robert Lawson, Economic Freedom in the World: 2004 Annual Report 15, 164-65 (2004).

73. *Protecting Private Property With Constitutional Judicial Review: A Social Welfare Analysis*. This paper is currently posted on the Social Science Research Network at http://papers.ssrn.com/sol3/papers.cfm?abstract_id'933734.

74. *See Lucas*, *supra* note 56 and accompanying text.

75. *See* Richard A. Epstein, Takings: Private Property and the Power of Eminent Domain 27 (1985).

76. This condition reflects the economist William Fischel's theory of regulatory takings, according to which higher levels of government, i.e., state and federal government bodies, can be expected to protect private property rights better than local governments where majoritarian pressures are more likely to abuse the property rights of disfavored minorities or individuals. *See* William A. Fischel, Regulatory Takings: Law, Economics, and Politics (1995).

77. For a more elaborate and detailed presentation of arguments made in this Article, see the various publications cited in the Editors' Note preceding this Article.