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# Toward a More Just Compensation in Eminent Domain

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# Toward a More “Just” Compensation in Eminent Domain

Dale Orthner\*

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## I. INTRODUCTION

Other than the occasional lava flow or drain-and-fill operation, there simply is not much “new” land being created. While many parts of the world remain undeveloped, these tracts are increasingly removed from population and transportation centers.<sup>1</sup> This reality gives rise to the three familiar rules of real estate acquisition: 1) Location; 2) Location; 3) Location. Very often a desired parcel is in or near an urban center and already contains one or more structures that are incompatible with more profitable plans. There are only two practical ways to gain title to this land: buy it from the owner at a mutually agreed price or take it from the owner under the state’s power of eminent domain.<sup>2</sup> The latter option is the subject of this Comment.

Of the relevant portion of the Fifth Amendment, “nor shall private property be taken for public use, without just compensation,”<sup>3</sup> most of the emphasis has been placed on the Public Use Clause in adjudicating eminent domain takings.<sup>4</sup> This Comment argues that, if the states wish to meaningfully and productively reform eminent domain power, the focus must shift away from what constitutes a “public use” and instead center on the definition of “just compensation.” To balance the incentives of the state to take property against the incentives of a property owner to litigate the taking, states should redefine “just compensation” to include a substantial premium over and above the fair market value of the property.<sup>5</sup>

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1. Looking out a window of a commercial flight on a clear day at altitude quickly reveals vast expanses of undeveloped land and equally large sections of farmland, punctuated by comparatively dense urban areas. See RUBEN N. LUBOWSKI ET AL., U.S. DEP’T OF AGRIC., MAJOR USES OF LAND IN THE UNITED STATES 1 (2002), available at [http://www.ers.usda.gov/publications/EIB14/eib14\\_reportsummary.pdf](http://www.ers.usda.gov/publications/EIB14/eib14_reportsummary.pdf) (last visited Jan. 12, 2007) (on file with the *McGeorge Law Review*) (stating that urban land comprises only 2.6 percent of the land area of the United States).

2. Obtaining title by means other than eminent domain, such as foreclosure, gift, inheritance, adverse possession, seizure, escheat, encroachment, or duress, are not within the scope of this Comment.

3. U.S. CONST. amend. V.

4. See *infra* Part II (discussing the historical development of the Supreme Court’s takings jurisprudence with respect to the definition of “public use”).

5. This Comment addresses only the issue of governmental seizures of land under eminent domain power. Regulatory takings, while of great importance, involve different incentives, to both the government and the property owner, than do seizures and thus require separate treatment. *But see infra* Part IV.B.4 (discussing the similar treatment of seizures of, and “damage” to, property in California’s failed Proposition 90); *infra* text accompanying note 130 (mentioning the enormous consequences of Oregon’s 2004 Ballot Measure 37, which requires compensation for regulation restrictions that reduce the fair market value of property).

Part II provides a brief overview of the development of eminent domain jurisprudence, concluding with the now infamous *Kelo v. City of New London*,<sup>6</sup> which ignited the current firestorm of debate. Part III looks at some of the abuses of eminent domain power that have occurred, spurred by the loosening of the Fifth Amendment restrictions on takings. Part III also considers the motivations of states to condemn property and the incentives of property owners to contest a taking. Part IV explores the effectiveness of various jurisdictions' attempts to address the public outcry over *Kelo* and whether efforts to redefine "public use" are likely to yield a viable solution to the current turmoil over eminent domain. Lastly, Part V urges states to focus on shedding the fair market value definition of "just compensation" in favor of a compensation premium that will provide a better balance between a state's use of its power of eminent domain and the impact of that use on property owners.

## II. DEVELOPMENT OF EMINENT DOMAIN

### A. Foundation

The history of eminent domain dates back to Roman law (*eminent dominium*), but the development most relevant to current issues began during the downfall of feudalism, when property rights were developing in Europe.<sup>7</sup> The protection of property rights is clearly recognizable in the Magna Carta, which stated, "No Freeman shall be . . . de-seized of his freehold . . . but by lawful judgment of his peers or by the Law of the Land."<sup>8</sup> In the seventeenth century, Grotius, a legal scholar and writer, originated the term "eminent domain."<sup>9</sup>

The United States Supreme Court has acknowledged that the Fifth Amendment limitations on the taking of private property are a tacit recognition of a power that pre-dated the Constitution, a power that is inherent in the sovereignty of the state.<sup>10</sup> Thus, the Constitution is not the source of eminent domain authority, but rather a restriction on what is inherently a sovereign right

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6. *Kelo v. City of New London*, 545 U.S. 469 (2005).

7. Joseph J. Lazzarotti, *Public Use or Public Abuse*, 68 UMKC L. REV. 49, 53 (1999).

8. *Id.* (citing MAGNA CARTA § XXXIX (1215)).

9. See Martin J. King, *Rex Non Protest Peccare???: The Decline and Fall of the Public Use Limitation on Eminent Domain*, 76 DICK. L. REV. 266, 268 n.11 (1972) ("Grotius also first indicated that public use and compensation are requisite to eminent domain." (citing HUGO GROTIUS, DE JURE BELLI AC PACIS, Lib. III, Cap. xx, Lib. II, Cap. xv, § vii (1631))).

10. *United States v. Carmack*, 329 U.S. 230, 241-42 (1946); see also U.S. CONST. amend. V ("[N]or shall private property be taken for public use, without just compensation.").

of the government.<sup>11</sup> States are limited in their use of eminent domain by the text of the Fourteenth Amendment, which applies federal restrictions to the states.<sup>12</sup>

## B. Historical Applications in the United States

### 1. Early Cases

The United States Supreme Court heard its first eminent domain case in 1796, which concerned an action by the state of Virginia.<sup>13</sup> The first federal case came in 1875 when land in Cincinnati was condemned to build a post office.<sup>14</sup> In resolving the eminent domain issues that arose in that litigation, the Supreme Court listed reasons for which property could be taken from private owners, including to build “forts, armories, and arsenals, for navy-yards and light-houses, for custom-houses, post-offices, and court-houses, and for other public uses.”<sup>15</sup> The federal government applied this definition of public use in subsequent eminent domain proceedings for decades.<sup>16</sup>

### 2. *Berman v. Parker*

In 1896, the Supreme Court held that the taking of private property by a state for the private use of another is not due process of law and thereby violates the Fourteenth Amendment.<sup>17</sup> This due process test lasted until 1954, when the Court decided *Berman v. Parker* using a more expansive interpretation of public use.<sup>18</sup> At issue in *Berman* was the constitutionality of an act of Congress that directed the redevelopment of “substandard housing and blighted areas” in the District of Columbia.<sup>19</sup> The act created the District of Columbia Redevelopment Land

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11. See *Kohl v. United States*, 91 U.S. 367, 371 (1875). “It has not been seriously contended during the argument that the United States government is without power to appropriate lands or other property within the States for its own uses, and to enable it to perform its proper functions. Such an authority is essential to its independent existence and perpetuity.” *Id.*

12. See generally Katherine M. McFarland, Note, *Privacy and Property: Two Sides of the Same Coin: The Mandate for Stricter Scrutiny for Government Uses of Eminent Domain*, 14 B.U. PUB. INT. L.J. 142, 146 (2004) (discussing the history of the Takings Clause); see also U.S. CONST. amend. XIV, § 1 (“[N]or shall any state deprive any person of life, liberty, or property, without due process of law.”).

13. See *Ware v. Hylton*, 3 U.S. 199, 220 (1796) (holding, in part, that although the State of Virginia had the power of eminent domain, this right did not extend beyond its borders; thus, a debt owed by its citizens to British subjects was valid and payable according to the definitive Treaty of Peace between the United States and Britain).

14. *Kohl*, 91 U.S. at 367.

15. *Id.* at 371.

16. McFarland, *supra* note 12, at 147.

17. *Mo. Pac. Ry. Co. v. Nebraska*, 164 U.S. 403, 417 (1896).

18. *Berman v. Parker*, 348 U.S. 26, 35-36 (1954).

19. *Id.* at 28.

Agency and granted it the power of eminent domain to redevelop areas that were “injurious to the public health, safety, morals, and welfare.”<sup>20</sup>

The appellants challenged the taking of a department store for land that would be put to private use, arguing violations of due process and the public use restriction of the Fifth Amendment.<sup>21</sup> Tying the exercise of eminent domain to the police power of Congress to exercise control over the District of Columbia, the Court held that since Congress determined that the legislation was for a “public purpose,” the role of the judiciary in reviewing that assessment was “an extremely narrow one.”<sup>22</sup> Thus, the Court broadened the Fifth Amendment term “public use” to include the term “public purpose.”<sup>23</sup>

### 3. Poletown Neighborhood Council v. Detroit

In another landmark case,<sup>24</sup> the Michigan State Supreme Court upheld the wholesale removal of a “tightly-knit residential enclave of first and second generation Americans, for many of whom their home was their single most valuable and cherished asset and their stable ethnic neighborhood the unchanging symbol of the security and quality of their lives.”<sup>25</sup> Under legislation granting municipalities the authority to use eminent domain to promote industry and commerce,<sup>26</sup> General Motors Corporation (GM) and the City of Detroit wanted to raze the neighborhood to make way for a new car assembly facility.<sup>27</sup> In determining whether a public benefit was present in the proposed taking, the court also used interchangeably the terms “use” and “purpose.”<sup>28</sup>

Weighing on the decision was the substantial economic hardship of both the American automotive industry and the related economic depression of the Detroit area.<sup>29</sup> GM’s argument that the taking would benefit the community by adding hundreds of jobs and related activity prevailed over appellants’ claims that the condemnation was solely for the private use of an individual corporation.<sup>30</sup> The

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20. *Id.* at 28-29.

21. *Id.* at 31.

22. *Id.* at 32.

23. *See generally id.* at 31 (discussing “public use” as used in the statute and Constitution, but discussing only “public interest,” “public purpose,” etc., in the remainder of the opinion).

24. *See generally* Timothy Sandefur, *A Gleeful Obituary for Poletown Neighborhood Council v. Detroit*, 28 HARV. J.L. & PUB. POL’Y 651, 652-54 (2005) (providing more information on the story of Poletown).

25. *Poletown Neighborhood Council v. Detroit*, 304 N.W.2d 455, 470 (Mich. 1981) (Ryan, J., dissenting).

26. *Id.* at 457 (majority opinion).

27. *Id.*

28. *Id.* at 458.

29. *Id.* at 465 (Ryan, J., dissenting).

30. *Id.* at 459 (majority opinion). “The power of eminent domain is to be used in this instance primarily to accomplish the essential public purposes of alleviating unemployment and revitalizing the economic base of the community. The benefit to a private interest is merely incidental.” *Id.*

court cited *Berman* in its rationale, saying that “when a legislature speaks, the public interest has been declared in terms ‘well-nigh conclusive.’”<sup>31</sup>

#### 4. Hawaii Housing Authority v. Midkiff

Shortly after the Michigan Supreme Court decided *Poletown*, the United States Supreme Court decided another private-to-private property taking case in *Hawaii Housing Authority v. Midkiff*.<sup>32</sup> A Hawaiian statute authorized the state to take property from a land oligopoly (owners of large amounts of land) and sell it to the individual occupants of the land who were leasing single-family residential dwellings.<sup>33</sup> The Legislature had determined that the concentrated land ownership, left over from Hawaii’s historical underpinnings, was causing inflated land prices and injuring the public tranquility and welfare.<sup>34</sup>

Citing *Berman* as the starting point for analysis, the Court reiterated: “Once the object is within the authority of Congress, the right to realize it through the exercise of eminent domain is clear.”<sup>35</sup> Further, deference to a determination of “public use” by a legislature is required “until it is shown to involve an impossibility.”<sup>36</sup>

On that basis, the Court had “no trouble” concluding that the Hawaii Act was constitutional.<sup>37</sup> Comparing Hawaii’s effort to regulate the “oligopoly and the evils associated with it” to the struggles faced by the early American colonists, the Court found that the use of the eminent domain power was rationally related to a conceivable public purpose.<sup>38</sup> Thus, the Public Use Clause imposed on the Act only the requirement that the Legislature could have rationally believed that the Act promoted its objective of relieving the constraints on the residential real estate market.<sup>39</sup>

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31. *Id.* (citing *Berman v. Parker*, 348 U.S. 26, 32 (1954)). *Poletown* was expressly overruled by *Wayne v. Hathcock* on the ground that the concept of public use as stated in *Poletown* was inconsistent with the common understanding of the phrase at the time the Michigan Constitution was ratified. *Wayne v. Hathcock*, 471 Mich. 445, 482-83 (2004).

32. 467 U.S. 229 (1984). *See generally* Thomas J. Coyne, Note, *Hawaii Housing Authority v. Midkiff: A Final Requiem for the Public Use Limitation on Eminent Domain?*, 60 NOTRE DAME L. REV. 388, 388-90 (1985) (providing an analysis of the effect of *Midkiff* on the public use requirement in eminent domain).

33. *Id.* at 232-34.

34. *Id.* at 232.

35. *Id.* at 240 (quoting *Berman v. Parker*, 348 U.S. 26, 33 (1954)).

36. *Id.* (quoting *Old Dominion Co. v. United States*, 269 U.S. 55, 66 (1925)).

37. *Id.* at 241.

38. *Id.* at 241-42.

39. *Id.* at 242-43.

### C. Recent Developments

#### 1. Kelo

In 2000, the City of New London, Connecticut approved a development plan pursuant to the state's municipal development statute.<sup>40</sup> As in *Berman*, *Poletown*, and *Midkiff*, the Connecticut Legislature had made a determination that the proposed taking was in the public interest.<sup>41</sup> New London had experienced decades of economic decline, had a population level that was at an eighty-year low, and had an unemployment rate that was twice the state average.<sup>42</sup> The taking involved approximately 115 privately owned properties, which would be redeveloped into part of a business and recreational area, including a hotel, shops, pedestrian riverwalk, state park, office space, and research and development facilities.<sup>43</sup>

Citing *Berman*, *Midkiff*, and other precedents, the Court, rather predictably, found that the redevelopment plan "unquestionably" served a public purpose.<sup>44</sup> Again, the Court gave deference to the municipality's determination that the proposed taking would serve the public.<sup>45</sup> The Court declined to address the challenges of "individual owners" on a "piecemeal basis," and instead assessed the entire plan and concluded that the "public use" requirement of the Fifth Amendment was met, even though private interests would benefit.<sup>46</sup>

#### 2. Reaction to Kelo

Even though the Court was dismissive of the claims of "individual owners," one of those owners was Susette Kelo, who had made extensive improvements to her house and who very much liked the water views her home afforded her.<sup>47</sup> Another was Wilhelmina Dery, who was born in her soon-to-be-taken house eighty-seven years prior and had lived there with her husband for the last sixty years.<sup>48</sup>

Therefore, although the Supreme Court's ruling in *Kelo* was substantially consistent with precedent, outrage over the decision swept the nation.<sup>49</sup> The result

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40. *Kelo v. City of New London*, 545 U.S. 469, 472-76 (2005).

41. *Id.* at 474 n.2.

42. *Id.* at 473.

43. *Id.* at 474.

44. *Id.* at 484-85.

45. *Id.* at 488-89.

46. *Id.* at 484.

47. *Id.* at 475.

48. *Id.*

49. See, e.g., Will Sullivan, *A Host of Questions*, U.S. NEWS & WORLD REPORT, Oct. 29, 2006, available at <http://www.usnews.com/usnews/news/articles/061029/6initiatives.htm> (on file with the *McGeorge Law Review*). The online version of this article contains a picture of Susette Kelo's home in New London, Connecticut.

has been the introduction of literally hundreds of pieces of legislation in the vast majority of states, in addition to Congressional action, to overturn or at least curtail the power of the government to take property from citizens.<sup>50</sup> In the November 2006 election, twelve states included ballot measures to limit the government’s ability to seize or regulate property.<sup>51</sup> Since *Kelo*, thirty-one states have passed laws restricting the power of eminent domain.<sup>52</sup>

Part IV analyzes in greater detail the effectiveness of these attempts to address the public outcry over *Kelo*. However, to better assess the need for a solution to the current state of eminent domain practice, it is instructive to first review some of the results of the rather lax standard of “public use” in the Supreme Court’s long-established takings jurisprudence.

### III. ABUSES OF EMINENT DOMAIN AND THE INCENTIVE TO LITIGATE

#### A. “Public Power, Private Gain”<sup>53</sup>

Horror stories abound regarding wasteful and misguided eminent domain takings and the substantial resources expended by both sides in fighting over definitions of blight, public use, and other supposed constraints on the government’s power to condemn land.<sup>54</sup> The following provides two anecdotal accounts to demonstrate significant problems that may result from the current state of eminent domain law.

##### 1. Bremerton, Washington

The City of Bremerton condemned twenty-two homes in 1996, ostensibly to accommodate a sewer plant extension. However, a newspaper article quoted the mayor as saying that the city intended to profit from the taking by selling surplus

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50. Patricia E. Salkin, *Swift Legislative (Over) Reaction to Eminent Domain: Be Careful What You Wish For*, SM004 A.L.I.-A.B.A. 865, 867 (2006).

51. Sullivan, *supra* note 49; see also Pauline Vu, *Voters Set to Judge Property Rights*, STATELINE.ORG, Sept. 29, 2006, <http://www.stateline.org/live/details/story?contentId=145355> (on file with the *McGeorge Law Review*). The twelve states are Arizona, California, Florida, Georgia, Idaho, Louisiana, Michigan, Nevada, New Hampshire, North Dakota, Oregon, and South Carolina. *Id.*

52. Sullivan, *supra* note 49.

53. DANA BERLINER, PUBLIC POWER, PRIVATE GAIN: A FIVE-YEAR, STATE-BY-STATE REPORT EXAMINING THE ABUSE OF EMINENT DOMAIN 1 (2003), available at [http://www.castlecoalition.org/pdf/report/ED\\_report.pdf](http://www.castlecoalition.org/pdf/report/ED_report.pdf) (on file with the *McGeorge Law Review*) [hereinafter BERLINER, PUBLIC POWER, PRIVATE GAIN] (documenting eminent domain uses and threats over a five-year period from January 1, 1998 through December 31, 2002).

54. The three reports cited in this Part were obtained from the Castle Coalition. See Castle Coalition, Citizens Fighting Eminent Domain Abuse, <http://www.castlecoalition.org> (last visited Jan. 5, 2007) (on file with the *McGeorge Law Review*). The Castle Coalition is a project of the Institute for Justice. *Id.* The Institute for Justice is a nonprofit, public interest law firm that litigates on behalf of individuals “whose rights are being violated by the government.” Institute for Justice, <http://www.ij.org> (last visited Jan. 5, 2007) (on file with the *McGeorge Law Review*).

parcels to private developers.<sup>55</sup> One of the owners, Lovie Nichols, an elderly widow who had lived in her home for fifty-five years, challenged the taking as pretextual.<sup>56</sup>

Having already sold her land to a local car dealer in 1998, the city sent her an eviction notice without informing her of the transfer.<sup>57</sup> Despite the considerable evidence that the taking was only for the purpose of selling to private interests, both the superior court and the state court of appeals ruled against Nichols.<sup>58</sup> The Washington Supreme Court declined to review the case, forcing Nichols to move out of her home.<sup>59</sup>

## 2. Cincinnati, Ohio

In 1998, retail giant Nordstrom made plans to locate a new department store in downtown Cincinnati to a site that included an existing Walgreens pharmacy.<sup>60</sup> Walgreens negotiated a deal with the Nordstrom developer under which Walgreens would relocate to a second site one block away. However, the second site contained a CVS drugstore, Walgreens' primary regional competitor.<sup>61</sup> When CVS refused to agree to relocate in favor of Walgreens, the city began the process of condemning the building in which CVS was located so that the Walgreens and Nordstrom deals could go through.<sup>62</sup>

Initially, CVS sued to oppose the taking, but it eventually negotiated a deal with the city.<sup>63</sup> However, the settlement moved the Walgreens to a location across the street from CVS to a third parcel where several small family businesses operated.<sup>64</sup> To obtain this land, the city condemned those properties, one of which contained Kathman's Shoe Repair, a family business that had been operating in Cincinnati for ninety-five years.<sup>65</sup>

Thus, Nordstrom obtained its site; CVS was able to remain in its location and Walgreens had a site to which it could relocate. "Only" a few small businesses, which lacked the clout to have the city condemn a new location for them, were shut down.<sup>66</sup> However, in a separate financing deal with the Nordstrom developer, the city agreed to leave the "new" Walgreens site (the third parcel)

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55. BERLINER, PUBLIC POWER, PRIVATE GAIN, *supra* note 53, at 208.

56. *Id.* Pretextual indicates that a taking is not actually for a public use or purpose, but rather to transfer to another private party.

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.* at 160.

61. *Id.* at 160-61.

62. *Id.*

63. *Id.* at 161.

64. *Id.*

65. *Id.*

66. *Id.*

vacant, so that the developer (of the first parcel) could attract “upscale” retailers to the area next to the new Nordstrom.<sup>67</sup>

Without the “new” Walgreens site being available for other stores, the Nordstrom deal fell through.<sup>68</sup> The now vacant lot where the original Walgreens stood was eventually paved over so that the city could at least use it as a parking lot.<sup>69</sup> Thus, after two years of work, millions of dollars paid to developers and property owners, and the dismantling of several family businesses, the city ended up with a few additional parking spaces.<sup>70</sup>

B. “Opening the Floodgates”<sup>71</sup>

The *Kelo* decision, while predictable, has undoubtedly emboldened local governments to press forward with the use of eminent domain for private development.<sup>72</sup> In the year since the ruling was handed down, local governments have condemned, or threatened to condemn, more than 5783 properties.<sup>73</sup> This figure represents a nearly threefold increase in the annual rate of threatened or condemned properties in the previous five years.<sup>74</sup>

Even more, the incidence of condemnations that actually get to the filing stage has dropped dramatically, since owners now largely concede rather than challenge what is almost certainly, in the wake of *Kelo*, an insurmountable litigatory challenge.<sup>75</sup> Therefore, while the incentive of property owners to litigate a taking has decreased, the risk of seizures has increased significantly.

Citing other outrageous private-to-private condemnations, Justice O’Connor’s dissent in *Kelo* lamented that current eminent domain law allows the unfettered “replacing [of] any Motel 6 with a Ritz-Carlton, any home with a shopping mall, or any farm with a factory.”<sup>76</sup> In addition to supplanting homes, shopping mall developers are increasingly using state power to build upscale houses in place of older dwellings, thereby displacing poorer residents in favor of

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67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.*

71. DANA BERLINER, OPENING THE FLOODGATES, EMINENT DOMAIN ABUSE IN THE POST-KELO WORLD 1, 6 (2006), available at <http://www.castlecoalition.org/pdf/publications/floodgates-report.pdf> (on file with the *McGeorge Law Review*) [hereinafter BERLINER, OPENING THE FLOODGATES] (providing a comprehensive compilation of published accounts and court papers regarding eminent domain actions in many states since the *Kelo* decision).

72. *Id.* at 1.

73. *Id.* at 2.

74. *Id.*

75. *Id.* at 2-3.

76. *Kelo v. City of New London*, 545 U.S. 469, 503 (2005) (O’Connor, J., dissenting).

wealthier ones.<sup>77</sup> Further, at least sixteen places of worship are being replaced with private uses that will convert the property into tax generating parcels.<sup>78</sup>

Justice O'Connor's predictions are coming true and at too high of a cost for those being displaced. While economic development is critical to the economic health of the country, property owners should not be so easily forced to bear the brunt of progress.

C. "Redevelopment Wrecks"<sup>79</sup>

Another reason to rebalance the power of states to condemn property with the right of citizens to be secure in their property is the unacceptably large number of redevelopment failures—projects that local governments likely would have shelved if the incentive to grab land in favor of a developer had been reduced.<sup>80</sup> Government officials, lured by the promise of increased tax revenue from higher land valuations, increased sales volume, and larger aggregate employment wages, often accept the embellished claims of fiscal rewards made by developers.<sup>81</sup>

Some redevelopment plans have failed because, even though the construction was completed, the promised revenues never materialized.<sup>82</sup> The new businesses produced fewer jobs and less tax revenue, too few tenants were secured, market conditions changed, or the project costs to the government increased beyond what the new tax revenue could repay.<sup>83</sup> Other redevelopment plans have failed because the promised projects are never fully implemented due to factors such as cost overruns or financing difficulties.<sup>84</sup> Often this happens after the condemned neighborhoods have been bulldozed into vacant lots.<sup>85</sup>

The City of New London fits into this second category.<sup>86</sup> Eight years after pharmaceutical giant Pfizer declared its intentions to build a \$270 million research facility, the city had little to show for the seizure of Susette Kelo's property and the surrounding neighborhood.<sup>87</sup> Had the laws been structured so

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77. BERLINER, OPENING THE FLOODGATES, *supra* note 71, at 3-4.

78. *Id.* at 3.

79. REDEVELOPMENT WRECKS: 20 FAILED PROJECTS INVOLVING EMINENT DOMAIN ABUSE (2006) 1, available at <http://www.castlecoalition.org/pdf/publications/Redevelopment%20Wrecks.pdf> (on file with the *McGeorge Law Review*) (detailing twenty prominent examples of over-hyped redevelopment projects that have not only failed to produce the promised gains in tax revenues and jobs, but have actually destroyed jobs and reduced tax revenues).

80. *See generally id.* (presenting examples of eminent domain abuse).

81. *Id.*

82. *Id.*

83. *Id.* at 1-2.

84. *Id.* at 1.

85. *Id.*

86. *Id.* at 10.

87. *Id.* at 11. Susette Kelo reached a deal with the city to move her house to a new location. Elizabeth Mehren, *Eminent Domain Plaintiff Will Keep Her House*, L.A. TIMES, July 1, 2006, at A15.

that the taking was based on something other than the definition of public use, the delays and uncertainties of the ensuing litigation could have been avoided, perhaps allowing the redevelopment to be a success instead of a failure.

#### IV. SEARCHING FOR A SOLUTION

Given the widespread public outcry over *Kelo*,<sup>88</sup> the frequent abuses of eminent domain power, and the often protracted and costly legal battles over eminent domain takings,<sup>89</sup> something clearly needs to be done to alleviate the disparities between the expectations of the public<sup>90</sup> and the current state of the law as interpreted by the Supreme Court.<sup>91</sup> This Part discusses some of the efforts to curtail the power of eminent domain and assesses their effectiveness in producing meaningful reform.<sup>92</sup> The effect that each proposal would have had on the case of Susette Kelo is also explored to assess the effectiveness of the legislatures in responding to the demands of the public.

##### A. Congressional Response to Kelo

Congress reacted swiftly to the *Kelo* decision. The House of Representatives adopted House Resolution 4128 (“H.R. 4128”) by a 376 to 38 margin, disapproving of the decision.<sup>93</sup> Using the spending power, the bill called for a two-year suspension of federal economic development funds for any state or political subdivision of a state that used its power of eminent domain for the purposes of economic development.<sup>94</sup> The bill defined economic development as the taking of private property, without an owner’s consent, and conveying it to

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88. See *supra* Part II.C.2 (discussing the nationwide reaction to the Supreme Court’s ruling).

89. See *supra* Part III (discussing examples of eminent domain abuse).

90. Of course, not all those who have their property taken by eminent domain resist the action. In fact, most either welcome the liquidation of their property or are at least not strongly opposed to the process. See Craig M. Call, *Finding the Right Settlement When Money May Not Be Enough*, SL049 A.L.I.-A.B.A. 313, 315-17 (2006) (categorizing property owners as “Eagers”—those eager to sell; “Whatevers”—those who did not want to sell, but also do not want to fight; “Thinkers”—those who need time to review the facts before signing on; “Dealers”—those who explore negotiation opportunities to try to get the best deal for their property; and “Fighters”—those who refuse to sign no matter what, arguing about principle, not money).

91. See *supra* Part II (discussing Supreme Court cases that define the constitutional limitations on eminent domain takings, but also acknowledging the lack of limitations).

92. See generally Theodore C. Taub, *Post-Kelo: Emerging Impacts and Issues in Eminent Domain*, SM004 A.L.I.-A.B.A. 1721 (2006) (providing a comprehensive overview of eminent domain legislation and cases since the *Kelo* decision).

93. Summary of H.R. 4128, available at <http://thomas.loc.gov/cgi-bin/bdquery/z?d109:HR04128:@@@L&summ2=m&> (last visited Dec. 26, 2006) (on file with the *McGeorge Law Review*). The bill was introduced in the House on October 25, 2005 and passed the House on November 3, 2005. *Id.*

94. The Private Property Rights Protection Act of 2005, H.R. 4128, 109th Cong. (as reported by Senate Committee on the Judiciary on November 4, 2005).

another private entity “for commercial purposes carried on for a profit, or to increase tax revenue, tax base, employment, or general economic health.”<sup>95</sup>

Given the substantial influence that federal spending has on local governments, H.R. 4128, in contrast to many state efforts, would have had a significant impact on *Kelo*-style takings.<sup>96</sup> Because of this, organizations such as the National League of Cities voiced opposition to the bill, claiming that it could “freeze the process of public-private economic development projects across the country.”<sup>97</sup> While economic development is generally a good thing for society, municipalities have an additional motive for using eminent domain to offer up attractive parcels to private developers—the prospect of sizeable tax revenue increases.<sup>98</sup>

With no mechanism to balance the economic needs of the state against the expectations of private citizens to hold onto their property, the broad definitions of H.R. 4128 would have swept away relatively uncontested development projects, as well as those that involved some level of predatory abuse.<sup>99</sup> Thus, the bill would have swung the pendulum of eminent domain power to the opposite side of the spectrum and, accordingly, limited much needed redevelopment in many cities across the country.<sup>100</sup> Had H.R. 4128 been enacted prior to the taking involving Susette Kelo, that project would likely have been shelved in favor of maintaining federal funding of a United States Coast Guard Museum, which was part of the revitalization plan.<sup>101</sup> But the cost to the community of abandoning the revitalization plan likely would have far exceeded the comparatively minor cost to the few displaced residents of New London.

### *B. States' Efforts to Restrict Eminent Domain*

As noted in Part II, the states are bound by the Fifth Amendment's limitations through the Fourteenth Amendment's due process requirement. However, as Justice Stevens made clear in the *Kelo* opinion, the states are free to impose greater restrictions on eminent domain power than those provided by the Constitution. Specifically, the Court asserted that “nothing in our opinion

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95. *Id.* § 8(1).

96. See Timothy Sandefur, *The “Backlash” So Far: Will Citizens Get Meaningful Eminent Domain Reform?*, SL049 A.L.I.-A.B.A. 703, 740 (2006).

97. *Id.*

98. See generally WILLIAM FULTON, *GUIDE TO CALIFORNIA PLANNING* 255-58 (1999) (showing how municipalities can substantially enhance revenues by utilizing eminent domain to foster the replacement of low tax generating uses in favor of more lucrative retail operations).

99. See H.R. 4128 § 8, 109th Cong. (2005) (providing a few exceptions to the definition of economic development, but noting that they cover only purely public uses, incidental private uses, or other relatively isolated circumstances).

100. The last congressional action on H.R. 4128 occurred November 4, 2005. Summary of H.R. 4128, *supra* note 93.

101. See *Kelo v. City of New London*, 545 U.S. 469, 474 (2005) (stating that Parcel 2 “includes space reserved for a new U.S. Coast Guard Museum”).

precludes any State from placing further restrictions on its exercise of the takings power.”<sup>102</sup> A state may define “public use” in a manner that is “stricter than the federal baseline.”<sup>103</sup>

Further, state requirements for eminent domain takings may find their source in a state’s constitution or may be expressed in “statutes that carefully limit the grounds upon which takings may be exercised.”<sup>104</sup> Far from being the exclusive province of the federal government, “the necessity and wisdom of using eminent domain to promote economic development are certainly matters of legitimate public debate” in which the states are at liberty to engage, provided they maintain the minimum standards required by the Federal Constitution.<sup>105</sup>

Since *Kelo*, forty-six states have considered some form of legislation to curtail eminent domain power, with thirty having passed bills that do so to varying levels of success.<sup>106</sup> The legislative results of a few of these states are analyzed below.

### 1. Delaware

On July 21, 2005, Delaware passed Senate Bill 217, establishing that any property taken through the exercise of eminent domain is to be used “only for the purposes of a recognized public use” described at least six months in advance by the condemning agency.<sup>107</sup> Additionally, the measure provides that a court will determine whether to award attorney fees incurred by parties whose property is taken by eminent domain, rather than having the agency involved in the taking make the determination.<sup>108</sup>

Other than the six-month warning and the attorney fee provision, the public use restriction differs little from that litigated in *Kelo*. Indeed, the Delaware Supreme Court has held that the state may condemn private property if the “primary purpose” in doing so is to benefit the public.<sup>109</sup> “That the development may confer an incidental benefit upon private persons does not avail to impair the force of the primary purpose or to invalidate the act.”<sup>110</sup>

Therefore, the type of taking that occurred in *Kelo*, where private property was taken for a project that conferred “incidental benefits upon private persons,” is entirely within the law of Delaware, even after the passage of Senate Bill 217. Under the current law of Delaware, Susette Kelo would have enjoyed a six-

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102. *Id.* at 489.

103. *Id.*

104. *Id.*

105. *Id.*

106. *Vu, supra* note 51.

107. DEL. CODE ANN. tit. 29, § 9505(15) (2006).

108. *Id.* § 9503.

109. *Wilmington Parking Auth. v. Land With Improvements*, 521 A.2d 227, 231 (Del. 1986).

110. *Randolph v. Wilmington Hous. Auth.*, 139 A.2d 476, 483 (Del. 1958).

month notice of the impending loss of her property, and perhaps some compensation for attorney fees, but the end result would have essentially been the same.

## 2. Ohio

On October 26, 2005, Ohio passed Senate Bill 167, which established “a moratorium on the use of eminent domain by any entity of the state government” or political subdivision to take private property from one owner that will end up in the possession of another private owner.<sup>111</sup> But this moratorium “restriction” required the property be within a “blighted” area, “as determined by the public body,” and the “primary purpose” for the taking result in a transfer to another private person.<sup>112</sup> Further, the moratorium lasted only until the end of 2006.<sup>113</sup>

The bill also established a twenty-five member task force to specifically study, among other things, how the *Kelo* decision “affects state law governing the use of eminent domain in the state.”<sup>114</sup> The main product of the task force was a report for the General Assembly, detailing its findings and recommendations concerning the state’s use of eminent domain.<sup>115</sup> After the issuance of the report, which the Legislature was not required to act upon in any way, the task force ceased to exist.<sup>116</sup>

Being one of the more active states in the condemnation of private property,<sup>117</sup> it is of little surprise that Ohio’s “response” to *Kelo* was only a limited delay in some of its eminent domain takings. In fact, the state’s Constitution specifically calls for the state to “acquire” property “to create or preserve jobs and employment opportunities” and declares that doing so is in the public interest and a proper public purpose.<sup>118</sup> Therefore, even before the expiration of the moratorium at the end of 2006, had Susette Kelo’s house been in Ohio, she would have, at best, gained a relatively small delay in the process displacing her from her home.

## 3. Alabama

Claiming that “a property rights revolt is sweeping the nation and Alabama is leading it,” Alabama Governor Bob Riley signed Senate Bill 68 (“S.B. 68”) into law on August 3, 2005, just six weeks after the *Kelo* decision.<sup>119</sup> “What our new law does

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111. S.B. 167 (Ohio 2005) (uncodified).

112. *Id.* § 2(B)(1).

113. *Id.* § 2(A).

114. *Id.* § 3(C)(1)(b).

115. *Id.* § 3(C)(2). The bill established August 1, 2006 as the deadline for the report that recommended updates to state law governing eminent domain. *Id.*

116. *Id.*

117. See DANA BERLINER, PUBLIC POWER, PRIVATE GAIN, *supra* note 53, at 159 (showing the number of known condemnations involving benefits to private parties).

118. OHIO CONST. art. VIII, § 13.

119. Governor Riley Signs Strongest Property Protections Into Law, <http://www.governorpress.alabama.gov/pr/pr-2005-08-03-01-propertyrights-photo.asp> (last visited Jan. 4, 2007) (on file with the *McGeorge Law Review*).

is restore the level of protection that existed prior to the Supreme Court’s ruling in June,” said the governor, referring to *Kelo*.<sup>120</sup> “That ruling is a reminder of the awesome power that activist judges have, and unfortunately use, to rewrite our Constitution,” continued the Governor, adding that S.B. 68 “counteracts that ruling.”<sup>121</sup>

But S.B. 68 does no such thing.<sup>122</sup> Both of the sections amended by the bill provide that “a municipality or county may not condemn property for [purposes that include private use] . . . however . . . [the law] shall not apply to the use of eminent domain . . . based upon a finding of blight.”<sup>123</sup> A “blighted” property is defined by Alabama law as (1) land with structures that, for a long list of subjective criteria, are not fit for human habitation, (2) high density and overcrowding or structures that are fire hazards or otherwise dangerous, (3) a substantial number of properties with title defects, (4) the presence of structures without necessary utilities, and (5) excessive vacant land that is overgrown with weeds, piled with trash, or a haven for rodents, which the owner refuses to remedy.<sup>124</sup>

Any of the above conditions warrants a finding of blight and thereby provides an exception to the limitation of the use of eminent domain for purposes that include private use.<sup>125</sup> Alabama even widened the scope of eminent domain takings in 2006 by passing House Bill 654, which allows for projects to incorporate unblighted lands obtained through negotiation with the seller.<sup>126</sup> Further, the Alabama Supreme Court has held that, even though a city block “was clearly not a slum,” the entire block could still be subject to redevelopment if portions of it contained “several of the factors of blight.”<sup>127</sup> Thus, an otherwise unimpaired property can be condemned simply because one or more factors of blight are found nearby.

Had Susette Kelo been required to challenge the taking of her property under Alabama law, she probably would have incurred the additional expense of contesting a finding of blight in her general area because the city would likely have made such a determination to gain court approval of the redevelopment plan. Given the depressed economic conditions of New London, any finding of blight would have been quite difficult to overcome.<sup>128</sup>

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120. *Id.*

121. *Id.*

122. See 2005 Ala. Laws 313 (providing the text of S.B. 68).

123. ALA. CODE §§ 11-47-170(b), 11-80-1(b) (2006) (amended by S.B. 68).

124. *Id.* § 24-2-2(c).

125. *Id.* §§ 11-47-170(b), 11-80-1(b) (amended by S.B. 68).

126. *Id.* § 24-2-2(b) (amended by H.B. 654); see also 2006 Ala. Laws 584 (providing the text of H.B. 654).

127. *City of Birmingham v. Tutwiler Drug Co.*, 475 So. 2d 458, 466-67 (Ala. 1985).

128. See *Kelo v. City of New London*, 545 U.S. 469, 472 (2005) (detailing the dire economic condition of New London).

#### 4. California

One of the more famous attempts at rolling back the *Kelo* decision was California's Proposition 90 ("Prop 90").<sup>129</sup> Prop 90, along with initiatives in Arizona, Idaho, and Washington, was patterned after Oregon's 2004 Ballot Measure 37, which requires compensation for any regulatory restriction on the use of real property that reduces its market value, with very few exceptions.<sup>130</sup>

California's Prop 90 differed in part from Oregon's Measure 37 in that it covered governmental seizures of property as well as regulatory takings and required a "substantial economic loss" to the property before compensation was imposed.<sup>131</sup> While Prop 90 failed to pass, it still garnered 47.6% of the vote,<sup>132</sup> which, along with the passage of a similarly styled measure in Arizona<sup>133</sup> and

129. See California Proposition 90 (2006), available at [http://www.ss.ca.gov/elections/vig\\_06/general\\_06/pdf/proposition\\_90/entire\\_prop90.pdf](http://www.ss.ca.gov/elections/vig_06/general_06/pdf/proposition_90/entire_prop90.pdf) (on file with the *McGeorge Law Review*) (providing the text of Prop 90, the analysis of the Legislative Analyst, and arguments for and against the proposition). Groups supporting Prop 90 received \$3.3 million in funding from New York real estate investor Howard Rich, who has invested over eight million dollars in similar initiatives around the country. *Ahmanson Tells Center Why He Put \$200,000 Behind California's Proposition 90*, THE CENTER FOR PUBLIC INTEGRITY, <http://www.publicintegrity.org/about/release.aspx?aid=104> (last visited Dec. 29, 2006) (on file with the *McGeorge Law Review*); Samantha Young, *California Eminent Domain Measure Is a Part of National Effort*, SAN JOSE MERCURY NEWS, Oct. 31, 2006, available at [http://www.mercurynews.com/mld/mercurynews/news/local/states/california/northern\\_california/15895843.htm](http://www.mercurynews.com/mld/mercurynews/news/local/states/california/northern_california/15895843.htm) (on file with the *McGeorge Law Review*); see also Or. Dep't of Land Conservation & Dev., Summaries of Claims, [http://www.lcd.state.or.us/LCD/MEASURE37/summaries\\_of\\_claims.shtml](http://www.lcd.state.or.us/LCD/MEASURE37/summaries_of_claims.shtml) [hereinafter Summaries of Claims] (last visited Dec. 26, 2006) (on file with the *McGeorge Law Review*) (providing a more up-to-date listing of claims filed under Measure 37—referred to on the site as "Measure 37 Claims"); Bill Hogan, *Three Big Donors Bankrolled Americans for Limited Government in 2005*, TAKINGS INITIATIVES ACCOUNTABILITY PROJECT, [http://www.takinginitiatives.org/index.php?option=com\\_content&task=view&id=256&Itemid=62](http://www.takinginitiatives.org/index.php?option=com_content&task=view&id=256&Itemid=62) (last visited Dec. 29, 2006) (on file with the *McGeorge Law Review*) (providing more information about the political activities of Howard Rich in bankrolling ballot initiatives).

130. Vu, *supra* note 51; see also OR. REV. STAT. § 197.352 (West 2005) (known as Measure 37). Measure 37 only applies prospectively and retroactively, subject to a two-year filing window. *Id.* § 197.352(5). Further, if the regulation continues for more than 180 days after the owner makes a written demand for compensation under Measure 37, the owner of the property has a cause of action for reimbursement of "reasonable attorney fees, expenses, costs, and other disbursements reasonably incurred to collect the compensation." *Id.* § 197.352(6). In lieu of paying just compensation to the owner, the governing body responsible may retract the regulation, returning the property to the uses permitted when the owner acquired it. *Id.* § 197.352(8). While there are exceptions for public nuisances, which "shall be construed narrowly in favor of a finding of compensation under this section," for the protection of public health and safety, or for compliance with federal law, Measure 37 provides for no other significant limitation on what constitutes a compensable regulation. *Id.* § 197.352. As of October, 20, 2006, over 2700 claims demanding more than six billion dollars in compensation have been made. Summaries of Claims, *supra* note 129. Although none of the claims have been paid by the cash-strapped state, because the state and local governments have instead chosen to waive the challenged restrictions, the claims still cripple the ability of the government to provide the much needed function of land use planning and control. Young, *supra* note 129.

131. Compare OR. REV. STAT. § 197.352 (West 2005), with CAL. CONST. art. I, § 19(b)(8) (as proposed by the failed California Prop 90).

132. See State Ballot Measures, California Secretary of State, <http://vote.ss.ca.gov/Returns/prop/00.htm> (last visited Dec. 29, 2006) (on file with the *McGeorge Law Review*) (listing the number of votes for and against various measures in the November 2006 election).

133. See *infra* Part IV.B.5 for a discussion of Arizona's Proposition 207.

several other ballot measures,<sup>134</sup> indicates that such an initiative may pass in the future.

Prop 90 expressly prohibited any takings expected to result in transfers to owners other than the government, whether for tax revenue enhancement, economic development, or any other uses that are “not public in fact,” even if the uses would otherwise serve a legitimate public purpose.<sup>135</sup> Further, the measure called for two different levels of compensation—one for takings that were truly for a public use (public roads, schools, etc.) and one for a “proprietary governmental purpose,” which involves a transfer to a private party that uses the property to perform a public use project.<sup>136</sup>

If the taking were for a truly public use, the valuation would be set at the “highest and best use”<sup>137</sup> of the property, without adjustment for any future dedication requirements.<sup>138</sup> However, if the property were taken for transfer to a private party who would be performing a public purpose on the land, the valuation would be set at the use to which the property was to be put, if that value were higher than a “best use” valuation.<sup>139</sup>

Thus, on the one hand, Prop 90 would have arguably gone too far by absolutely prohibiting the use of eminent domain for economic development and requiring compensation in proprietary use cases that might severely limit necessary functions. On the other hand, as proposed in the following Part, the measure did not go far enough since the compensation of permitted takings would only be a “highest and best use” valuation, which fails to compensate for the true cost of displacement. The measure did provide for reimbursement of “all reasonable costs and expenses actually incurred” by the displaced condemnee,<sup>140</sup> but this provision virtually begs for litigation over what costs are considered reasonable, and further, over how much of each allowed cost might be awarded.<sup>141</sup>

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134. See 2006 Ballot Measures, <http://www.castlecoalition.org/legislation/ballot-measures/index.html> (last visited Jan. 5, 2007) (on file with the *McGeorge Law Review*) (providing a summary of state ballot measures passed and rejected).

135. CAL. CONST. art. I, § 19(b)(1) (as proposed by the failed California Prop 90).

136. *Id.* § 19(b)(2), (5).

137. See Stephen C. Gara & Craig J. Langstraat, *Property Valuation for Transfer Taxes: Art, Science, or Arbitrary Decision?*, 12 AKRON TAX J. 125, 142 (1996) (explaining that the “highest and best use” for a property is “the use of the property that results in its highest value”).

138. CAL. CONST. art. I, § 19(b)(5) (as proposed by the failed California Prop 90).

139. *Id.*

140. *Id.* § 19(b)(6) (as proposed by the failed California Prop 90).

141. Prop 90 also contained the following text as part of the operative section that would have amended Article 1, section 19: “Nothing in this section shall prohibit the use of condemnation powers to abate nuisances such as blight . . . provided those condemnations are limited to abatement of specific conditions on specific parcels.” *Id.* § 19(e). This provision seems to provide a loophole that would have allowed a *Kelo*-style taking for any property that could be considered blighted. See CAL. HEALTH & SAFETY CODE §§ 33030-31 (West 2007) (providing a long and not very restrictive list of factors to consider in the determination of blight). But see 2006 Cal. Stat. ch. 595, §§ 1(e)-(g) (stating that, with the new law, “[i]t is the intent of the Legislature . . . to restrict the statutory definition of blight” and that “the statutory changes made by the act be liberally construed

If Susette Kelo's home were in California, and the same eminent domain action had occurred under the terms of Prop 90, the result would have indeed been different. The portion of the plan that called for private enterprise to hold land taken from private owners would have been struck down. Only the parcels comprised of land obtained from the former naval facility, or by negotiation,<sup>142</sup> could have been redeveloped, leaving patchwork gaps in the refurbished area.

Susette Kelo would have been able to keep her house, and keep her spectacular view,<sup>143</sup> from which she would have a front row seat to watch the city's continued, un-redeveloped decline.<sup>144</sup> If her parcel had instead been intended for conversion to a park, walkway, parking, or other truly public use, she would have done no better than in Connecticut.<sup>145</sup>

### 5. Arizona

One of the most "successful"<sup>146</sup> revolts against the *Kelo* decision came in the form of Arizona's Proposition 207 ("Prop 207"),<sup>147</sup> which passed with 64.8% of the popular vote, a nearly two to one margin.<sup>148</sup> Like the failed Prop 90 in California, Arizona's Prop 207, known as the "Private Property Rights Protection Act,"<sup>149</sup> was patterned after Oregon's Measure 37.<sup>150</sup> Unlike Prop 90, Prop 207 specifically mentions the *Kelo* decision as not adequately protecting private property rights.<sup>151</sup>

Prop 207 also prohibits the use of eminent domain for any purpose that is not truly public or against properties that are not abandoned or not proven to be

to effectuate their purposes").

142. Without the threat of eminent domain, which would have been seriously limited under Prop 90, some of the property owners that sold arguably would not have "voluntarily" sold their land to the redevelopment project.

143. See *Kelo v. City of New London*, 545 U.S. 469, 475 (2005) (stating that Susette Kelo prizes her house for its water view).

144. This assumes that her parcel was integral to the viability of the redevelopment plan. See REDEVELOPMENT WRECKS, *supra* note 79, at 10-11 (indicating that her parcel was not necessary for the plan to be successful).

145. See *Kelo*, 545 U.S. 469, 474-75 (providing some of the planned uses for the redevelopment area).

146. "Successful" in that, by its terms, Prop 207 significantly restricts the type of taking allowed in *Kelo*, although it remains to be seen whether the substantial limitations placed on redevelopment will prove successful in the long term.

147. ARIZ. REV. STAT. ANN. §§ 12-1131-1138 (2007) (enacted by Arizona Prop 207). See also Proposition 207, Arizona Secretary of State, <http://www.azsos.gov/election/2006/Info/PubPamphlet/english/prop207.htm> (last visited Dec. 29, 2006) (on file with the *McGeorge Law Review*) (providing the text of the proposed amendment, analysis by the Legislative Council, and arguments for and against the proposition).

148. See STATE OF ARIZONA OFFICIAL CANVASS 10, at 16 available at <http://www.azsos.gov/election/2006/General/canvass2006GE.pdf> (last visited Dec. 29, 2006) (on file with the *McGeorge Law Review*) (detailing the vote tally of propositions including Prop 207).

149. Arizona Proposition 207, § 1 (2006), available at <http://www.azsos.gov/election/2006/Info/PubPamphlet/english/Prop207.htm> (on file with the *McGeorge Law Review*).

150. Vu, *supra* note 51.

151. Arizona Proposition 207, § 2(A)(4)(a) (2006).

direct threats to public health or safety.<sup>152</sup> The latter category requires the state to prove by a clear and convincing standard that the taking of each parcel is necessary to eliminate a health threat and that “no reasonable alternative to condemnation exists.”<sup>153</sup> “Public use,” as defined by the measure, specifically excludes taking land for “the public benefits of economic development, including an increase in tax base, tax revenues, employment or general economic health.”<sup>154</sup>

An attorney fees and costs provision helps to somewhat reduce a property owner’s risk of litigation.<sup>155</sup> In a slum clearance case where the court determines that compensation exceeds the final offer by the government, the property owner “shall be awarded” reasonable attorneys’ fees.<sup>156</sup> If a property seizure is found not to be for a public use, the property owner also receives reasonable costs and expenses.<sup>157</sup> In no case is the property owner liable to the government for attorneys’ fees or costs.<sup>158</sup>

Susette Kelo would have fared about the same under Prop 207 as she would have under California’s failed Prop 90, but perhaps with an award of attorneys’ fees, costs, and expenses. The taking of her property for economic revitalization would have been struck down, requiring the city to piece together whatever redevelopment it could around homes that could not be shown to be a threat to public health. If she decided to negotiate a sale, the city would have been under no requirement to pay her anything more than market value.<sup>159</sup> Given that redevelopment is naturally difficult to accomplish without contiguous tracts of land, it is unlikely the city would have bothered to try to negotiate with the many landowners, since both sides would know that any one individual could unilaterally hold out and thereby defeat plan implementation.

### C. The White House Attempts Reform

On June 23, 2006, the one-year anniversary of the *Kelo* decision,<sup>160</sup> President Bush signed an executive order purporting to limit the power of the federal

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152. ARIZ. REV. STAT. ANN. §§ 12-1131-1132 (2007).

153. *Id.* § 12-1132(B).

154. *Id.* § 12-1136(5). In the context of land use restrictions (i.e., regulatory takings), Prop 207, like Oregon’s Measure 37, provides compensation to landowners for government imposed restrictions that reduce the fair market value of their property. *Id.* § 12-1134(A). Several exceptions apply, including restrictions for public health and safety (such as building codes, sanitation, and pollution), public nuisance, utilities, and those required by federal law. *Id.* § 12-1134(B). Unlike Measure 37, Prop 207 is not retroactive, nor does it apply to restrictions placed on property before the current owner acquired it. *Id.*

155. *See id.* § 12-1135.

156. *Id.* § 12-1135(C).

157. *Id.* § 12-1135(B). In a regulatory taking case, a prevailing plaintiff “may” receive attorney fees, costs, and expenses. *Id.* § 12-1135(D).

158. *Id.* § 12-1135(A).

159. *Id.* § 12-1136(1).

160. *Kelo v. City of New London*, 545 U.S. 469 (2005).

government to seize private property.<sup>161</sup> The order states that the policy of the United States is to protect private property rights, which includes limiting “the taking of private property . . . for public use, with just compensation, and for the purpose of benefiting the general public and not merely for the purpose of advancing the economic interest of private parties to be given ownership or use of the property taken.”<sup>162</sup>

To review, the Fifth Amendment requires that “just compensation” be paid for property taken for “public use.”<sup>163</sup> The *Kelo* decision, like many decisions since “the close of the 19th century,” embraced “public purpose” as a “natural interpretation of public use.”<sup>164</sup> Therefore, the order’s limit on taking private property for public use with just compensation for the purpose of benefiting the public, constrains neither the Constitution nor *Kelo*’s interpretation of it.

*Kelo* also held that property could not be taken “under the mere pretext of public purpose”<sup>165</sup> and found that the city’s plan was not, as the order puts it, “merely for the purpose of advancing the economic interest of private parties,”<sup>166</sup> even though private parties did stand to benefit from the plan.<sup>167</sup> The executive order thus sounds more like a restatement of the *Kelo* holding, rather than a limitation of it.

Therefore, had *Kelo* been decided under the terms of the executive order that supposedly limits it,<sup>168</sup> the outcome would almost certainly have been identical. Susette Kelo’s ultimate disposition would likely have varied inconsequentially.

## V. COMPENSATION AS A BALANCING TOOL

Because the Supreme Court has set the “public use” bar quite low,<sup>169</sup> and since most legislative “solutions” to public dissatisfaction fail to meaningfully alter eminent domain power, or alter it too much,<sup>170</sup> a new approach should be taken. Instead of focusing on the Public Use Clause of the Fifth Amendment, much more attention should be given to the “Just Compensation” Clause. Increasing compensation will provide an improved compromise between the

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161. Exec. Order No. 13406, 71 Fed. Reg. 124 (June 23, 2006).

162. *Id.* § 1.

163. U.S. CONST. amend. V.

164. *Kelo*, 545 U.S. at 480.

165. *Id.* at 478.

166. Exec. Order No. 13,406, 71 Fed. Reg. 124 (June 23, 2006).

167. *Kelo*, 545 U.S. at 473.

168. See *Bush Signs Executive Order Limiting Eminent Domain Powers of Federal Government*, FOXNEWS.COM, <http://www.foxnews.com/story/0,2933,200832,00.html> (last visited Jan. 4, 2007) (on file with the *McGeorge Law Review*) (“Bush declared Friday that the federal government can only seize private property for a public use such as a hospital or road.”).

169. See *supra* Part II (discussing the historical development of the United States Supreme Court’s takings jurisprudence with respect to the definition of “public use”).

170. See *supra* Part IV (discussing the attempts of various jurisdictions to constrain the power of eminent domain).

state’s need to use eminent domain and an individual’s need not to be unduly harmed by the taking of his or her property.<sup>171</sup>

In discussing this shift in focus, this Part first considers the current judicial definition of just compensation. Second, it identifies some of the difficulties of appraising property to determine fair market value. Finally, this Part explores how the historical precedent of the Mill Acts provides a different perspective on reimbursing owners in takings cases.

#### A. Fair Market Value as Just Compensation

Along with the development of its takings jurisprudence, the Supreme Court has roughly equated the compensation due to an owner, per the Fifth Amendment, to the fair market value of the property at the time it is taken.<sup>172</sup> The term “just compensation,” in the Court’s opinion, means that an owner is provided “a full and perfect equivalent for the property taken”<sup>173</sup> and “put in as good position pecuniarily as he would have been if his property had not been taken.”<sup>174</sup>

Because the required methods of valuing condemned property may differ depending on the circumstances of each case, the Court does not adhere to a general formula, but has forwarded the concept of market value as a practical standard to determine compensation.<sup>175</sup> The Court has used the terms “value,” “market value,” and “fair market value,” the latter of which it defines as “market value fairly determined.”<sup>176</sup>

Early on, the Supreme Court recognized that potential uses of the property to be taken should be considered in determining the compensation to be paid to the owner.<sup>177</sup> Property should not be considered worthless just because an owner has left it sitting idle or does not individually have the financial resources to put it to another, more valuable use.<sup>178</sup> However, there must be a “reasonable possibility” that the owner could, with sufficient resources, actually put the property to a “higher” use to claim the alternative use as a basis for compensation.<sup>179</sup> This

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171. U.S. CONST. amend. V (“[N]or shall private property be taken for public use, without just compensation.”).

172. See *United States v. Miller*, 317 U.S. 369, 373-74 (1943) (providing a discussion of just compensation and fair market value and their meanings as used in past condemnation proceedings).

173. *Monongahela Navigation Co. v. United States*, 148 U.S. 312, 326 (1893).

174. *Seaboard Air Line Ry. Co. v. United States*, 261 U.S. 299, 304 (1923).

175. *Miller*, 317 U.S. at 373-74.

176. *Id.* at 374.

177. *Miss. & Rum River Boom Co. v. Patterson*, 98 U.S. 403, 407-08 (1878).

178. *Id.* at 408.

179. *Olson v. United States*, 292 U.S. 246, 256-57 (1934). In *Olson*, the United States instituted a condemnation proceeding to acquire easements on lands that bordered a lake, intending to expand the size of the lake and turn it into a more suitable water reservoir. *Id.* at 248. In rejecting the owner’s claim that this use should be the basis for determining the value of the land taken from him, the Supreme Court found that there was not a “reasonable possibility” that either the owner himself could use his tract, together with the other parcels, for reservoir purposes or that someone else would be able to acquire all the lands, or easements thereon,

concept is often referred to as valuing a property at the “highest and best use” to which it may be reasonably put.<sup>180</sup>

Although the Court recognizes the need to pay for the full value of the property, it does not interpret the Constitution as requiring payment for other losses that inevitably arise in eminent domain takings.<sup>181</sup> Indeed, even though “an owner often receives less than the value of the property *to him*,” only the market value of the property must be paid to the owner.<sup>182</sup> Because the market value of the property does not change with the needs of the government, nor with the needs of the individual property owner, compensation for loss of “profits, damage to good will, the expense of relocation and other such consequential losses” is not required by the Constitution.<sup>183</sup>

### B. Determining Fair Market Value

Requiring payment of only fair market value to a condemnee, exclusive of any moving expenses or incidental costs, would seem to make for a relatively straightforward process in compensating owners. However, appraising property to determine its value involves assessing many factors, including the valuation of the effect of uses to which the parcel has not been put.<sup>184</sup> The government, of course, prefers to focus on factors that point to a diminished value of the property, while the owner contests for the highest conceivable value.

Three different approaches are typically used in arriving at fair market value, depending on the particular nature of the property in question.<sup>185</sup> The most common method for valuing residential property, like Susette Kelo’s Victorian home, is the sales comparison approach. Under this method, the sale prices of similar homes that have recently sold near the subject property help determine the price that the parcel might receive on the open market. The comparable homes, once adjusted for the differences in various features between them and

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and put them to that use. *Id.* at 256-57.

180. Ann E. Gergen, *Why Fair Market Value Fails as Just Compensation*, 14 *HAMLIN J. PUB. L. & POL’Y* 181, 183 (1993); *see also* *United States v. Fuller*, 409 U.S. 488, 490 (1973) (stating that the Court “has held that generally the highest and best use of a parcel” is the measure of compensation to be paid to an owner in a condemnation proceeding); *Gara & Langstraat*, *supra* note 137.

181. *See United States v. Petty Motor Co.*, 327 U.S. 372, 377-78 (1946) (“It has come to be recognized that just compensation is the value of the interest taken”).

182. *Id.* at 377 (emphasis added).

183. *Id.* at 377-78. *But see* 42 U.S.C. § 4622 (2006) (providing that, as part of the Uniform Relocation Assistance and Real Property Acquisition Policies for Federal and Federally Assisted Programs, whenever a federal program or project displaces a person, that person is to be provided payment for actual reasonable moving expenses, actual direct losses of tangible personal property, and certain business related expenses, but not for the many other real yet subjective expenses, such as an individual’s time or sentimental value).

184. *See* Gergen, *supra* note 180, at 183 (discussing the Supreme Court’s inclusion of “highest and best” uses in valuing property for determining compensation in eminent domain cases).

185. Kurt J. Fischer & Melissa L. Mackiewicz, *Eminent Domain Reform’s Failure in Maryland*, MD. B.J., Sept.-Oct. 2006, at 14, 20.

the subject property, show at what price a willing seller might sell the property to a ready, willing, and able buyer.<sup>186</sup>

The second method, referred to as the cost approach, values the land as though it were vacant, adding the cost to build all of the existing improvements on the land, and then deducting for the accrued depreciation of the improvements.<sup>187</sup> Accrued depreciation consists of physical deterioration, functional obsolescence, and factors that are external to the property itself, yet bear on its value.<sup>188</sup> The cost approach is often used when the property is unique, such that comparable properties are hard to find or do not provide a reliable basis on which to value the subject property.<sup>189</sup>

The third method, referred to as the income or capitalization approach, values the property based on the amount of income the property generates for the owner.<sup>190</sup> An appraiser converts the income stream from the property, plus the projected residual value at the end of a particular time period, into a present value using a given rate of return, and thereby produces an estimate of what an investor would likely pay for the property.<sup>191</sup>

Given the various methods for determining the value of a property and the wide range of factors to be considered within each method, appraisals invariably involve some degree of subjective opinion as to true value.<sup>192</sup> However, because the current takings jurisprudence centers on “a determination of ‘the fair market value of the property’” as the “ultimate issue” in each case,<sup>193</sup> proposals, such as the one proposed in this Comment, that use fair market value as a starting point for eminent domain reform, are not hampered by the uncertainty and subjective nature of property valuation. Rather, the inherent limitations in achieving a reliable property value are all the more reason to augment the compensation

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186. This is the approach that residential real estate agents use almost exclusively to help a seller arrive at an optimal price for selling his or her home on the open market. Setting too high a price will cause the property to sit for a long period without selling and may also “stigmatize” the home in the minds of buyers and other agents. Setting too low a price will produce a quick sale, but will also result in the seller receiving less money. However, if the seller is desperate to sell, a lower price might be the in the seller’s best interest. In an eminent domain proceeding, the financial strength or weakness of an individual “seller” should not be a factor in determining the value of the property, per the principles enunciated in *United States v. Petty Motor Co.*, 327 U.S. 372, 377 (1946).

187. Fischer & Mackiewicz, *supra* note 185, at 20 (citing APPRAISAL INSTITUTE, *THE APPRAISAL OF REAL ESTATE* 50 (12th ed. 2001)).

188. *Id.*

189. *Id.* (quoting APPRAISAL INSTITUTE, *THE APPRAISAL OF REAL ESTATE* 352-53 (12th ed. 2001)).

190. *Id.*

191. *Id.*

192. Paula K. Konikoff, *CFO’s Guide to Real Estate Appraisals*, 534 PRAC. LAW INST. 843, 845 (2006); see also Andrew W. Schwartz, *Reciprocity of Advantage: The Antidote to the Antidemocratic Trend in Regulatory Takings*, 22 UCLA J. ENVTL. L. & POL’Y 1, 68 (2004) (stating that “[a]n appraisal is an opinion of value, rather than a scientific measuring process” and that appraisals that are biased are difficult to avoid).

193. *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 734 (1999) (Souter, J., dissenting).

awarded to the condemnee to further ensure that private owners do not bear the costs of improvements for the sake of society or private interests.

### C. *Following the Lead of the Mill Acts*

In *Kelo*, both Justice Stevens, in the majority opinion, and Justice Thomas, in his separate dissent, mention cases involving the early Mill Acts.<sup>194</sup> However, with analytical consistency,<sup>195</sup> the focus of both was on the degree to which these precedents relied on “public use” rather than “public purpose” as the test of their validity and not on the “just compensation” that the Mill Acts offered to condemnees. Justice Stevens did mention, in a footnote, that the question of “the fairness of the measure of just compensation” was “important,” but since the issue was not before the Court in that case, he did not discuss it further.<sup>196</sup> However, given the Court’s precedent and general practice of refusing to set forth in a judicial opinion what is essentially a legislative policy, any future ruling will likely yield the minimum compensation required, that is market value.<sup>197</sup>

The Mill Acts were statutes that many states had at the time of the founding, which authorized a grist mill owner to dam a river to provide for more water power to run a mill.<sup>198</sup> The government required the mill to offer services to the community, in addition to its own business.<sup>199</sup> The acts also established that any land of an upstream owner that was flooded as a result would be awarded compensation for damages to the land.<sup>200</sup> The Mill Act of New Hampshire provided that if the grist mill owner and the flooded land owner could not agree on the level of damages, a court would appoint a committee. Upon a

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194. See *Kelo v. City of New London*, 545 U.S. 469, 480, 512-14 (2005) (discussing respectively cases involving the Mill Acts).

195. See *supra* Part II.B-C (showing the Supreme Court’s focus on the meaning of “public use” in assessing the validity of various takings).

196. *Kelo*, 545 U.S. at 490.

197. See *United States v. Petty Motor Co.*, 327 U.S. 372, 377-78 (1946) (indicating that compensation for items such as relocation expenses are not constitutionally required). *But see* 42 U.S.C. § 4622 (2006) (providing, as part of the Uniform Relocation Assistance and Real Property Acquisition Policies for Federal and Federally Assisted Programs, that whenever a federal program or project displaces a person, that person is to be provided payment for “actual reasonable” moving expenses, “actual direct losses of tangible personal property,” and certain business related expenses, but not for the many other real yet subjective expenses, such as an individual’s time and sentimental value).

198. *Kelo*, 545 U.S. at 512 (Thomas, J., dissenting); see also *Head v. Amoskeag Mfg. Co.*, 113 U.S. 9, 16-17 (1885) (listing Virginia, Maryland, Delaware, North Carolina, Massachusetts, New Hampshire, and Rhode Island as having Mill Acts before the Declaration of Independence, and Tennessee, Maine, Kentucky, Missouri, Arkansas, Pennsylvania, Connecticut, Vermont, Kansas, Oregon, West Virginia, and Georgia as passing mill acts at varying times after 1776, and Indiana, Illinois, Michigan, Wisconsin, Iowa, Nebraska, Minnesota, Mississippi, Alabama, and Florida as passing Mills Acts while they were still territories and re-enacting them after they became states).

199. *Kelo*, 545 U.S. at 512 (Thomas, J., dissenting).

200. See *Head*, 113 U.S. at 9-11 n.\* (providing the text of the Mill Act of New Hampshire).

determination that the mill benefited the public, and that the dam was necessary to the operation of the mill, the committee would determine the damages caused by the flooding and make a report to the court.<sup>201</sup>

After receiving the committee report, the court would, as directed by the act, *add fifty percent* to the damages and render judgment based on the amount so increased.<sup>202</sup> If either party objected to the committee findings, the court would submit the issue to a jury, which would try the facts and assess the damages.<sup>203</sup> The judgment rendered on verdict of the jury, like that of the court in an uncontested finding, would include the assessed damages, *plus fifty percent*.<sup>204</sup>

Thus, a property owner who had land taken by eminent domain pursuant to the New Hampshire Mill Act would be compensated at a level significantly above the measure of actual damages.<sup>205</sup> The provision of adding fifty percent to the assessed damages arguably accomplished two important objectives in limiting the abuse of this eminent domain power. First, it created reluctance in the mill owner to employ the state granted power to effectively seize land, since the flooded property cost more to the grist mill owner than its fair market value. Second, it reduced the owner’s incentive to obstruct the development of a valuable service to the community, since the owner would recoup his reasonable loss of property value, plus pocket a fifty percent profit.

### *1. Reducing the Incentive of the Government to Use Eminent Domain*

Put simply, the more something costs, the less likely it is that someone will buy it. This is the basic function of supply and demand. Applied to eminent domain, the more the government will have to pay to seize property, the less likely it is to seize it. While governmental functions can sometimes become distorted due to bureaucratic complexities or self-dealing,<sup>206</sup> accountability to the public, tenuous though it may seem at times, generally works to keep the activities of the government in line with public expectations.

The effect of increasing compensation to property owners for takings that have a large private use component will be even more pronounced than in takings for purely public uses. Private enterprise is usually more accountable to financial interests than the government is to the general public. A private development that was only marginally profitable at 100% of fair market valuation for the condemned properties would likely be left uninitiated if the acquisition cost of

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201. *Id.* (listing the above provisions in sections 2 to 3 of the Mill Act of New Hampshire).

202. *Id.* (listing the above provisions in section 3 of the Mill Act of New Hampshire) (emphasis added).

203. *Id.*

204. *Id.* (emphasis added).

205. *Id.*

206. See *Nomination Hearing for Mr. David Safavian Before the Senate Committee on Governmental Affairs*, 108th Cong. (2004) (statement of David Safavian) (on file with the *McGeorge Law Review*) (pointing out the rather famous governmental acquisition of \$900 toilet seats and \$1200 hammers).

those properties was set at 150% of value. However, if the properties are truly blighted,<sup>207</sup> and thus relatively cheap, and the new development is rather profitable, society as a whole is likely to benefit from the redevelopment, even with paying a fifty percent premium for the land. The extra cost, whether borne by the developer or the taxpayers, would be justified by the substantial effectiveness of the plan.

## 2. *Reducing the Incentive of Property Owners to Litigate Eminent Domain Takings*

While it is true that money is not everything, for many people it is the most important thing. With the constitutional requirement for just compensation set at fair market value, and nothing more, it is of little surprise that some people will “go for broke” in fighting eminent domain, especially if faced with an egregiously low priced, strong arm offer from the government. Further, because “[i]t is a truism that fair market value . . . does not compensate landowners completely,”<sup>208</sup> and “the most striking feature of American compensation law . . . is that just compensation means incomplete compensation,”<sup>209</sup> needless litigation over takings is virtually guaranteed in any setting where the property owner can afford to challenge the taking.

However, with a substantial premium placed on valuation, even though there will always be the “fighters,” that is, people who fight over the principle of the government taking their property, regardless of the size of the offer,<sup>210</sup> most people would likely accept forced relocation if they come out ahead financially. But providing reimbursement for actual expenses only, instead of offering a flat premium, as does federal law and the law of some states,<sup>211</sup> will likely serve to increase litigation and uncertainty over what constitutes a compensable expense.

Given that an individual’s home often represents the vast majority of their personal worth, news that the value of that home has just jumped fifty percent due to an eminent domain proceeding is likely to be met with great joy instead of fears of loss and uncertainty. Further, since the vast majority of people have

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207. See Taub, *supra* note 92, at 1727-32 (discussing the interpretations of the term “blight” to justify various eminent domain takings).

208. Lee Anne Fennell, *Taking Eminent Domain Apart*, 2004 MICH. ST. L. REV. 957, 962 (2004); see also RICHARD ALLEN EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* 183 (1985) (“The central difficulty of the market value formula for explicit compensation, therefore, is that it denies any compensation for real but subjective values.”).

209. Thomas W. Merrill, *Incomplete Compensation for Takings*, 11 N.Y.U. ENVTL. L.J. 110, 111 (2002); see also RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 57 (6th ed. 2003) (“[J]ust compensation is not full compensation in the economic sense.”).

210. See Call, *supra* note 90, at 315-17 (discussing various categories of property owners faced with eminent domain and defining a “fighter” as an individual “who is just not going to sign up no matter what the offer is”).

211. See, e.g., 42 U.S.C. § 4622 (2006); MD. CODE ANN., REAL PROP. § 12-205 (West 2006) (offering similar payment schemes for limited relocation expenses).

substantial mortgages on their home, and thus have far less equity than the fair market value,<sup>212</sup> a fifty percent premium can represent a multiple-fold increase in their net worth.

For example, a \$200,000 house bought with ten percent down carries a mortgage of \$180,000 and \$20,000 in equity. If the law required compensation at 150% of value, the owner would receive \$300,000 for the home and have \$120,000 cash in hand after paying off the mortgage. This money could be used to pay moving and other expenses and for a solid down payment on another home, likely one with improved amenities. A substantial portion of the property owner’s net worth would expand from \$20,000 to \$120,000 on completion of the eminent domain proceeding. That represents a six-fold increase in the property owner’s equity and would provide a powerful disincentive to obstruct the project with litigation over constitutional and statutory definitions of “public use,” “public purpose,” or “blight.”

### 3. Other Considerations

With regard to speculation in a compensation premium environment, investors, who might negotiate with landowners in an impending taking context in the hopes of securing a portion of the premium for themselves, would most likely be providing a service to the community. First, the best case scenario for any proposed eminent domain taking is that a targeted individual agrees to relocate of his or her own free will, in an open market setting, and with no coercive factors influencing the decision to do so. This is even more likely to be the case where there is an extra margin of negotiation (the premium) present. Any deal between a property owner and a speculator, with or without knowledge of the impending taking, will be at least as fair as that which would occur without a premium and probably much more so since the taking itself cannot be used as leverage against the owner.

Second, not all proposed takings end up as completed takings; thus the role of the speculator would be to serve as a hedge against this uncertainty. If the project goes through, the speculator receives a positive return, but the original property owner also receives an openly negotiated deal. If the project fails, the speculator, who is, by definition, positioned to absorb the loss, forfeits some portion of the anticipated premium, in favor of the original property owner, who is often less capable of recovering from a loss. Further, the speculator may pour more money into the property, and thereby the community, to turn a failed investment into a profitable one.

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212. See BD. OF GOVERNORS OF THE FED. RESERVE SYS., *FLOW OF FUNDS ACCOUNTS OF THE UNITED STATES* 102 (2006), available at <http://www.federalreserve.gov/releases/z1/current/z1.pdf> (on file with the *McGeorge Law Review*) (listing the value of household real estate as \$20.4808 trillion, against \$9.5017 trillion in mortgages, or a loan to value ratio of 46.4%).

Regarding the exact premium that states may wish to place on compensation to property owners in eminent domain cases, the fifty percent figure is just a rough estimate of what will provide meaningful relief to condemnees, yet still allow productive takings to occur. If certain types of redevelopment or public uses are favored by a legislature, then the percentage can be set accordingly lower.

For example, the acquisition of the long, thin strips of land needed for public transportation and utilities are not only very difficult to obtain by private negotiation, but also, given the large number of individual properties usually needed, paying a substantial premium for the land may make a vital project fiscally impossible. Since the uses to which such land is put also inure to the benefit of a wide range of society, a legislature, and the vast majority of its constituents, may prefer a lesser premium paid for such projects.<sup>213</sup>

On the other hand, if the legislative intent, perhaps spurred by popular support movements like those following *Kelo*, is to restrain certain uses of eminent domain, the premium can be set correspondingly higher. Care should be taken, however, to avoid complex schemes of varying compensation levels, which may both increase the already burdensome level of eminent domain litigation and create even more fear than the uncertainties of the current takings power naturally generates in the minds of property owners. With the prudent addition of a compensation premium to the law of eminent domain, the amount of litigation and public unease could be substantially reduced.

#### *D. Effect of a Compensation Premium on a Kelo-Style Taking*

The *Kelo* litigation concerned a plan for economic redevelopment, involving private parties who would end up holding some of the condemned properties.<sup>214</sup> In assessing how a legislature may plan for similar situations in the future, the interests and needs of the government and potential condemnees should be compared. While a city's interest in revitalizing a downtown area is great, especially a city like New London, with a high unemployment rate and a population level at an eighty-year low,<sup>215</sup> urban renewal is intimately tied with increasing the profitability and number of private businesses in the area. These businesses sometimes must replace residential units.

New London was not trying to cobble together a long public transportation or utility corridor, where significant premiums to a high number of property owners

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213. See *Poletown Neighborhood Council v. City of Detroit*, 410 Mich. 616, 675-76 (1981) (Ryan, J., dissenting) (pointing out how, without eminent domain, putting together parcels of land for "highways, railroads, canals, and other instrumentalities of commerce" would be "otherwise impracticable"). Justice Ryan goes on to say that "[a] railway cannot run around unreasonable landowners." *Id.* Nor could a roadway run around unreasonable financial burdens, such as an otherwise reasonable condemnation premium on a vast number of individual properties. *Id.*

214. *Kelo v. City of New London*, 545 U.S. 469, 472-75 (2005).

215. *Id.* at 473.

may put a project beyond a city’s budgetary capabilities. Instead, the city was trying to draw in businesses that would bring investment dollars and well-paid employees. These businesses and employees in turn would pay more in taxes to the city and spend more for local products and services of existing businesses, which would also pay more taxes, allowing the city to provide better services and public resources. The objective was to create an upward economic spiral out of the downwardly spiraling economy.<sup>216</sup>

Given that the purpose of a redevelopment plan is essentially to produce profit, both for private business and the city, displaced residents should not be forced to pay for this revenue enhancement. Rather, condemnees should share in the economic opportunity, even if indirectly in the form of a compensation premium. For the City of New London, a fifty percent premium on the relatively small amount that was to be paid to the contesting property owners would not likely have significantly impacted the viability of the plan. However, such an increase probably would have appreciably reduced the degree to which those owners litigated the taking.<sup>217</sup>

Most property owners would be delighted by the opportunity to upgrade to a fifty percent bigger and better residence.<sup>218</sup> Put simply, had Susette Kelo and the other plaintiffs received a substantially greater-than-market value offer up front, not only would their resistance to the plan likely have been far less, but the much needed redevelopment of the city would not have been delayed for nearly five years, nor the much needed revitalization funds spent on lengthy litigation.<sup>219</sup>

Therefore, in the case of economic redevelopment, a legislature should place a substantial premium, perhaps even greater than fifty percent, on compensation for condemned properties, certainly those certified as habitable for residential purposes. Revitalization projects that cannot be made profitable in light of such a premium are likely too speculative at the outset and should not be encouraged. The worthwhile plans that award such payment will receive the benefit of a more efficient implementation by avoiding much of the protracted legal and political resistance that so often occurs when individuals are faced with the feeling of uncompensated loss.

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216. See *id.* (stating that local planners hoped that a \$300 million research facility would “draw new business to the area, thereby serving as a catalyst to the area’s rejuvenation”).

217. See Eminent Domain: Fact and Fiction, <http://www.billfinch.org/blog/2005/11/eminent-domain-fact-and-fiction.html> (last visited Jan. 2, 2007) (on file with the *McGeorge Law Review*) (indicating that the amount paid to the property owners who were parties in the *Kelo* litigation was \$1.7 million).

218. See *id.* (stating that the only long term residents involved in the *Kelo* litigation were the Derys and that several others were landlords owning multiple properties). This is not to ignore the emotional attachment that many people have to their homes, which can serve as an integral part of their memories of life events. This attachment, while very real, is also very difficult to quantify in adjudicable terms.

219. The condemnation proceedings were initiated in November 2000. *Kelo*, 545 U.S. 475. The Supreme Court decided *Kelo* on June 23, 2005. *Id.* at 469.

## VI. CONCLUSION

The ultimate political power rests in every individual.<sup>220</sup> When large numbers of citizens demand change, as they have after hearing the *Kelo* decision, it is best to provide not just change, but a workable resolution that will productively address the issues and not lead to a similar revolt in the future. Most legislative responses to the public outcry over *Kelo* have either been ineffective reforms in name only, as in the case of Delaware and Ohio, or have swung the balance of power far to the other side of the political equation, as in the case of Oregon and Arizona.<sup>221</sup> The former may appease the public for a short time, only to have similar protests erupt after the next egregious taking. The latter may satisfy public concern longer, but only until the governmental paralysis brought about by the excessive reforms manifests itself in crippling decay.

Rather, legislatures should establish an improved balance between the power of the state to condemn land and the financial well-being of targeted property owners. Requiring the state, whether it is acting on its own behalf or in conjunction with private developers, to pay more for land it takes will reduce the number of takings, while still allowing for productive redevelopment. The reduction in takings will consist primarily of those that result from marginally profitable plans, which are more likely to end up as failures. Additionally, providing more than fair market value to condemnees will more accurately compensate for the true costs of a forced relocation and thus reduce the incentives of the property owner to litigate or otherwise oppose the taking. Therefore, to make productive reforms in the states' power of eminent domain, legislatures should focus more on providing a true "just compensation" than attempting to restrict the definition of "public use."

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220. See generally Christian G. Fritz, *Recovering the Lost Worlds of America's Written Constitutions*, 68 ALB. L. REV. 261, 262-68 (2005) (discussing the relationship between government and the governed and "the Right of Revolution").

221. See *supra* Part IV (detailing the legislative actions of the mentioned jurisdictions).

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