Maintaining Government Accountability: Calls for a "Public Use" Beyond Eminent Domain

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"No man's life, liberty, or property are safe while the legislature is in session."[1]

"Government is a trust, and the officers of the government are trustees; and both the trust and the trustees are created for the benefit of the people."[2]

INTRODUCTION

In *Kelo v. City of New London*, the U.S. Supreme Court upheld the taking of private property for the purpose of an economic redevelopment project.[3] The decision has sparked a flurry of criticism.[4] Much legal commentary calls for heightened scrutiny of such economic development takings under the public use provision of the Takings Clause.[5] For these critics,[6] the Supreme Court's deferential standard is deficient in that it allows special interests to abuse the eminent domain power to pursue their own economic interests. As a result, governments routinely condemn property on behalf of politically connected private developers, who offer in return only the speculative public benefit of stimulating the local economy.

Apart from this line of criticism, this Note argues that seeking increased protection of private property rights under the public use provision lacks a strong constitutional basis. The Constitution does not require that economic legislation be free from the influence of special interests, and this principle is no less true for economic development takings. Given this weakness of the constitutional argument for heightened judicial scrutiny, if citizens wish to impose greater restraints on

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1. Estate of A.B., 1 Tuck. 247, 249 (N.Y. Surr. Ct. 1866).

2. Henry Clay, Speech at Ashland, Ky. (Mar. 1829).

3. 545 U.S. 469 (2005).

4. *See, e.g.*, Scott Bullock, *The Specter of Condemnation*, WALL ST. J., June 24, 2006, at A11 (characterizing the approval of the taking of private property for economic development in *Kelo* as "the most universally despised Supreme Court decision in decades," setting off "a nearly unprecedented, grass-roots backlash against eminent domain abuse . . ."); Michael Corkery & Ryan Chittum, *Eminent Domain Backlash Threatens Some Projects*, CHI. TRIB., Aug. 14, 2005, at 39 (reporting on public opinion regarding eminent domain, which, in the wake of *Kelo*, was overwhelmingly against the taking of private property for economic development); Dan Haar, *Plan Expertly Before Grabbing*, HARTFORD COURANT, July 31, 2005, at D1 (characterizing *Kelo* as "a touchstone for a nationwide uprising against 'eminent domain abuse'").

5. "[N]or shall private property be taken for public use, without just compensation." U.S. CONST. amend. V. As used herein, the "public use provision" refers to the "for public use" language of the Fifth Amendment.

6. See discussion *infra* Part I for an overview of the criticism of the Supreme Court's deferential review of economic development takings.

legislatures' use of eminent domain for economic development, they must demand those restraints not from the Federal Constitution, but from state law.

In determining the proper response—if any—to these demands for increased restrictions on eminent domain, state courts and legislatures should consider the source of those demands. In particular, this Note suggests that the recent criticism of the Supreme Court's eminent domain jurisprudence does not stem from a genuine belief that private property rights are sacred. Instead, these specific attacks against economic development takings reflect a more general frustration with perceived abuses of the political process. Consistent with this premise, state decision-makers who are considering eminent domain reform should recognize anti-*Kelo* sentiment for what it is—a genuine call for governmental accountability, but not necessarily a sound basis for categorically rejecting economic development takings. Courts and legislatures should accordingly resist the temptation to impose sweeping restrictions on states' condemnation authority for the sole purpose of amplifying the public outcry against *Kelo*. Instead, state decision-makers should engage in eminent domain reform only where necessary to provide a targeted, measured response to actual deficiencies in eminent domain practice.

Part I of this Note analyzes the principal Supreme Court cases that have applied minimal scrutiny to exercises of eminent domain and examines the main arguments for a heightened standard of review. Part II contextualizes the modern deferential standard by viewing it in light of the development of the Court's rational basis analysis. This perspective illustrates that the deference accorded to legislatures' use of eminent domain is consistent with that accorded to a larger category of economic legislation. Based on this consistency, the argument for heightened constitutional protections against the taking of private property lacks substantial merit.

Part III suggests that, given the weakness of the argument for increased judicial scrutiny of exercises of eminent domain, the recent criticism of economic development takings does not represent a genuine call for increased constitutional protection of property rights. Rather, this public outcry against eminent domain is merely symptomatic of a nationwide frustration with the misuse of public resources to benefit private interests. It is only the high visibility of a landmark eminent domain case that makes it a convenient vehicle through which to express a broader dissatisfaction with failures in government accountability.

Finally, Part IV evaluates recent decisions by state courts and legislatures to restrict the taking of private property for economic development. Many of these decisions enforce government accountability in the taking of private property, thereby offering a reasonable solution to eminent domain abuse. However, other more extreme court opinions and legislative bills impose sweeping restrictions on economic development takings, thereby sacrificing a significant portion of states' legitimate eminent domain authority.

I. EXPANSIVE READING OF THE PUBLIC USE PROVISION

Over the past half century, the Supreme Court's eminent domain jurisprudence has adhered to an expansive view of public use, affording legislatures broad discretion to determine which exercises of eminent domain further the public interest. The Court has also extended this view to accept economic development as a valid justification for the taking of private property.

The starting point is *Berman v. Parker*,[7] where the Court upheld the District of Columbia's condemnation of a department store as part of a larger project to redevelop an area ridden with "substandard housing and blighted areas."[8] Rejecting the argument that the taking of non-blighted commercial property failed to serve a public use, the Court held that Congress had the authority to determine that the redevelopment plan served a "public purpose."[9] The Court found no constitutional violation in the fact that the recipient of the property was a private developer, rather than the general public, since "the means of executing the project are for Congress and Congress alone to determine, once the public purpose has been established."[10]

Through this "public purpose" standard, the *Berman* Court adopted a conception of public use that was unquestionably broad. The subsequent case of *Midkiff v. Hawaii Housing Authority*,[11] however, went even further in removing any substantive protection of private property rights from the public use provision. The Court upheld an Act authorizing the forced transfer of residential tracts from landowners to existing tenants, finding that the resultant breakup of a land oligopoly constituted a valid exercise of the State's police power.[12] Writing for a unanimous Court,[13] Justice O'Connor stressed the importance of judicial deference toward a legislative decision to exercise eminent domain, which the Court would uphold if "rationally related to a conceivable public purpose . . . ."[14] Moreover, the Court in no uncertain terms rejected the notion that the public use provision provides any independent protection against legislative action: "The 'public use' requirement is . . . coterminous with the scope of a sovereign's police powers."[15]

Berman's acceptance of redevelopment as a valid public purpose and *Midkiff*'s even broader conception of public use intersected in the widely publicized case of *Kelo v. City of New London*.[16] At issue was the constitutionality of the City's condemnation of non-blighted residential property as part of an integrated plan to develop an "economically distressed" area.[17] The Court upheld the plan, finding that such a comprehensive revitalization program "unquestionably serves a public purpose" so as to "satisfy the public use requirement of the Fifth Amendment."[18] Writing for the majority, Justice Stevens put forth a principle of deference toward legislative judgment that was perhaps more qualified than *Midkiff*'s "conceivable public purpose" standard:[19] "[T]he City [would not] be allowed to take property under the mere pretext of a public purpose, when its actual purpose was to bestow a private benefit."[20]

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7. 348 U.S. 26 (1954).
8. *Id.* at 28.
9. *Id.* at 32–33.
10. *Id.* at 33.
11. 467 U.S. 229 (1984).
12. *Id.* at 242.
13. Eight members of the Court joined the opinion in *Midkiff* (including the author, Justice O'Connor), but Justice Marshall took no part in the case.
14. *Midkiff*, 467 U.S. at 241.
15. *Id.* at 240.
16. 545 U.S. 469 (2005).
17. *Id.* at 472.
18. *Id.* at 484.
19. *Midkiff*, 467 U.S. at 241.
20. *Kelo*, 545 U.S. at 478.

Nonetheless, the Court accepted economic development as a valid justification for the use of eminent domain, irrespective of whether the development project confers a benefit on individual private parties.[21]

This line of jurisprudence accepts a broad range of public purposes, including economic development, as sufficient to justify the taking of private property. Many commentators have attacked this deferential standard, arguing that courts should read the public use provision more narrowly so as to restrict the use of eminent domain when it would benefit private parties.

Several critics point to the potential for abuse of eminent domain to benefit special interests.[22] Absent judicial oversight, politically connected developers are free to influence government officials to condemn private property on their behalf, irrespective of the burdens placed upon politically powerless condemnees.[23] Related to this problem of political favoritism, a deferential judicial standard undermines the basic economic principle of free market negotiation. Unchecked by the courts, private developers have a strong incentive to appropriate the state condemnation power in order to bypass the free market and acquire land at less than fair value.[24]

Another line of criticism focuses not on the potential for abuse but on the speculative nature of economic development takings. Since governments do not hold private recipients of condemned property accountable to use it in a way that bolsters the local economy, the ultimate public benefit of the condemnation is dependent on the recipients' own initiative and success.[25] Hence, the taking does not serve a "public

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21. *Id.* at 484.

22. *See* Steven M. Simpson, *Judicial Abdication and the Rise of Special Interests*, 6 CHAP. L. REV. 173 (2003) (arguing that rational basis review of laws affecting economic and property rights encourages special interest legislation). In the context of economic development takings, Simpson states that a deferential judicial standard allows the condemnation of private property "on little more than legislative fiat." *Id.* at 198 (citing DANA BERLINER, PUBLIC POWER, PRIVATE GAIN: A FIVE-YEAR STATE-BY-STATE REPORT EXAMINING THE ABUSE OF EMINENT DOMAIN (2003), http://www.castlecoalition.org/pdf/report/ED_report.pdf.

23. *See* Nicole Stelle Garnett, *The Public-Use Question as a Takings Problem*, 71 GEO. WASH. L. REV. 934 (2003) (arguing for a heightened "means-ends" standard of review of economic development takings on the ground that rational basis review permits the exploitation of eminent domain against the politically unorganized); Ilya Somin, *Overcoming* Poletown*:* County of Wayne v. Hathcock, *Economic Development Takings, and the Future of Public Use*, 2004 MICH. ST. L. REV. 1005, 1008–10 (observing that the "economic development rationale" is so broad that it can justify any exercise of eminent domain, making economic development takings particularly prone to abuse by powerful commercial interests at the expense of the poor).

24. *See* Ashley J. Fuhrmeister, Note, *In the Name of Economic Development: Reviving "Public Use" as a Limitation on the Eminent Domain Power in the Wake of* Kelo v. City of New London, 54 DRAKE L. REV. 171, 213 (2005) (attacking judicial deference toward economic development takings as fostering "interest group capture" of the eminent domain power, allowing special interests to acquire land at a lower cost than that of the free market); Stephen J. Jones, Note, *Trumping Eminent Domain Law: An Argument for Strict Scrutiny Analysis Under the Public Use Requirement of the Fifth Amendment*, 50 SYRACUSE L. REV. 285, 301–02 (2000) (criticizing the judiciary for erroneously presuming that economic development takings result from a truly democratic process, when in fact special interests often abuse the eminent domain power to acquire land more cheaply than the open market price (citing RICHARD A. POSNER, THE PROBLEMS OF JURISPRUDENCE 354–55 (1993))).

25. *See* Fuhrmeister, *supra* note 24, at 207–09 (distinguishing economic development

purpose" in that it occurs without any guarantee that the project will produce a net public gain.[26] This lack of accountability is also problematic in that it encourages developers to seek increasingly favorable concessions from legislatures that are already willing to condemn property on the developers' behalf. The result is an "economic war among the states" to attract big business.[27]

Still other commentators focus on the disproportionate burden borne by the individual condemnee. These critics argue that, in interpreting the constitutional right to be free from uncompensated takings, courts should take into account the "demoralization costs" of condemnation—those psychological burdens associated with losing one's home that are not included in a fair market valuation of the property.[28] Under a permissive standard of review, however, courts do not require legislatures to consider these psychological costs, resulting in "inefficient and inequitable eminent domain actions."[29]

II. THE CONSTITUTIONAL CONSISTENCY OF A HOLLOW PUBLIC USE PROVISION

While the potential abuse of eminent domain has generated understandable frustration with the Supreme Court's deferential review of economic development takings, the fact that this abuse may occur does not in itself provide a constitutional basis for heightened scrutiny. On the contrary, applying minimal scrutiny to the use of eminent domain is consistent with the modern rational basis standard applied to all

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takings from "traditional" takings in that the asserted public benefits derived from the former, such as increased jobs and taxes, are not guaranteed but contingent on the future success of the private transferee).

26. *See id*. at 208 ("When the public purpose derived from a taking is merely a fortuitous side-effect of the subsequent private use, it is difficult to see how the public benefit is paramount to the private benefit."); Somin, *supra* note 23, at 1011 (emphasizing that the lack of accountability placed on private recipients to deliver the public gains contemplated by the taking "creates an incentive . . . to rely on exaggerated claims of economic benefit . . ."); Haar, *supra* note 4 (urging a drawback from *Kelo*'s permissive standard for approving economic development takings, "not because private property rights are sacred," but because the asserted benefits of the taking may not materialize due to "shoddy planning").

27. Ivan C. Dale, *Economic Development Incentives, Accountability Legislation and a Double Negative Commerce Clause*, 46 ST. LOUIS U. L.J. 247, 256–57 (2002) (decrying states' and localities' seemingly irrational decisions to offer economic incentives to attract business with no guarantee of a return public benefit); *see also* Peter M. Agnetti, Comment, *Are You Still Master of Your Domain? Abuses of Economic Development Takings, and Michigan's Return to "Public Use" in* County of Wayne v. Hathcock, 79 ST. JOHN'S L. REV. 1259, 1273–74 (2005) (suggesting that, without a federal standard of holding private recipients of condemned land accountable to deliver promised economic benefits, states and localities will "race to the bottom" in their competitive attempts to attract private developers).

28. *See* James Geoffrey Durham, *Efficient Just Compensation as a Limit on Eminent Domain*, 69 MINN. L. REV. 1277, 1306 (1985) (arguing that, because "[s]pecific demoralization costs appear to be greater for eminent domain actions than for other governmental actions," they should factor into the costs of taking private property); Garnett, *supra* note 23, at 944–49 (citing background research in support of the proposition that a fair market valuation of condemned property does not take into account the property owner's psychological losses).

29. Durham, *supra* note 28, at 1301; *see also* Garnett, *supra* note 23, at 938 (arguing for a stricter standard of review of economic development takings on the ground that fair market monetary compensation does not necessarily cover all of the condemnee's losses).

economic legislation. Accordingly, demands for heightened protection of private property rights under the public use provision run counter to the Court's well-established practice of deferring to legislative judgment in areas of economic policy.

The principle of carefully scrutinizing legislation that affects property rights is not completely lacking from Supreme Court precedent. In *Lochner v. New York*,[30] the Court invalidated a statute prohibiting bakers from working more than sixty hours per week, holding that the law was an "unreasonable, unnecessary and arbitrary interference" with the liberty of contract.[31] While acknowledging that the State could restrict property rights to protect the "general welfare of the public,"[32] the Court concluded that the statute was a "mere meddlesome interference[]" with the liberty of contract passed under the guise of a health law.[33]

Although discredited as a case of judicial activism to protect the rich at the expense of labor,[34] *Lochner* articulated a principle of judicially-enforced government accountability that, if practiced today, could benefit advocates of private property rights. Where a law passes under the "mere pretext" of promoting the public welfare[35] but in fact originates from "other motives"[36]—abuse of the legislative process to benefit special interests—a court should strike it as a violation of due process. However, as of the late 1930s, the Supreme Court had abandoned *Lochner*'s practice of carefully questioning the public benefit derived from economic legislation in favor of an increasingly deferential rational basis standard.

In *Nebbia v. New York*,[37] the Court stepped back from the *Lochner* approach of protecting private property rights, stressing that the judiciary is generally without authority to interfere with the economic policies of the states.[38] "With the wisdom of the policy adopted, with the adequacy or practicability of the law enacted to forward it, the courts are both incompetent and unauthorized to deal."[39]

Modern articulations of *Nebbia*'s permissive review of legislation affecting property rights are even more deferential. An illustrative case is *FCC v. Beach Communications, Inc.*,[40] where the Court made clear that legislatures are virtually unchecked in their decisions to enact socioeconomic policies. Such laws are valid "if there is any reasonably conceivable state of facts that could provide a rational basis"

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30. 198 U.S. 45 (1905).

31. *Id.* at 56.

32. *Id.* at 53.

33. *Id.* at 61.

34. *See, e.g.*, Rebecca E. Zietlow, *Exploring a Substantive Approach to Equal Justice Under Law*, 28 N.M. L. REV. 411, 418–19 (1998) (characterizing the *Lochner* Court as an "agent of the wealthy" in its establishment of substantive economic rights and noting that no such constitutional protection has been extended to the economic rights of the poor).

35. *Lochner*, 198 U.S. at 56.

36. *Id.* at 64.

37. 291 U.S. 502 (1934).

38. *Id.* at 538.

39. *Id.*; *see also* W. Coast Hotel Co. v. Parrish, 300 U.S. 379, 399 (1937) ("Even if the wisdom of the policy be regarded as debatable and its effects uncertain, still the legislature is entitled to its judgment.").

40. 508 U.S. 307 (1993).

for the legislation.[41] Note the striking similarity between this language and *Midkiff*'s "conceivable public purpose" interpretation of the public use provision.[42]

Under this modern rational basis standard, the Court seems willing to forgo even the *Nebbia* check against "arbitrary" or "capricious" redistributions of wealth to benefit special interests.[43] Responding to a challenge that the proffered justification for the statutory classification at issue in *Beach Communications* belied legislative history, the Court stated, "[w]hether the posited reason for the challenged distinction actually motivated Congress is 'constitutionally irrelevant.'"[44]

This modern deferential standard of review of socioeconomic legislation leaves little constitutional basis for substantive protection of private property rights. Given the Court's self-admitted incompetence to question the wisdom of economic policies,[45] it is not surprising that the Court is unwilling to second-guess legislatures' taking of property for economic development.[46] Indeed, the Court has repeatedly highlighted this parallel between the deferential review of eminent domain proceedings and the broader standard of deference applied to all socioeconomic legislation.[47] Thus, contextualizing economic development takings as simply one example of legislative economic policy, it is apparent that arguments for heightened protection against these takings have little constitutional backing. Just as the Constitution does not require that economic legislation be free from the influence of special interests, it does not invalidate economic development takings that benefit politically connected developers. Just as the Supreme Court does not demand that economic policies guarantee a net public benefit, it does not throw out redevelopment projects simply because they promise only speculative public gains.

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41. *Id.* at 313; *see also* Heller v. Doe, 509 U.S. 312, 320 (1993) ("[A] legislative choice is not subject to courtroom factfinding and may be based on rational speculation unsupported by evidence or empirical data." (quoting *Beach Commc'ns*, 508 U.S. at 315)).

42. Haw. Hous. Auth. v. Midkiff, 467 U.S. 229, 241 (1984).

43. *Nebbia*, 291 U.S. at 525. Indeed, nowhere in the *Beach Communications* or *Heller* opinions does the word "arbitrary" appear.

44. *Beach Commc'ns*, 508 U.S. at 318 (quoting U.S. R.R. Ret. Bd. v. Fritz, 449 U.S. 166, 179 (1980)).

45. *See id.* at 313 (noting that the Fourteenth Amendment "is not a license for courts to judge the wisdom, fairness, or logic of legislative choices"); *Nebbia*, 291 U.S. at 531.

46. *See* Paul Boudreaux, *Eminent Domain, Property Rights, and the Solution of Representation Reinforcement*, 83 DENV. U. L. REV. 1, 16 (2005) (suggesting that the Supreme Court has not developed a heightened scrutiny standard for eminent domain controversies, despite the sharp criticism of its takings jurisprudence, because "eminent domain was carried along in the wide stream of judicial deference to economic regulation in the twentieth century").

47. *See* Kelo v. City of New London, 545 U.S. 469, 490 (2005) (Kennedy, J., concurring) (noting that the *Midkiff* public use requirement—that a taking be "'rationally related to a conceivable public purpose'"—"echoes the rational-basis test used to review economic regulation" (quoting *Midkiff*, 467 U.S. at 241)); *Midkiff*, 467 U.S. at 243 ("[E]mpirical debates over the wisdom of takings—no less than debates over the wisdom of other kinds of socioeconomic legislation—are not to be carried out in the federal courts."); Berman v. Parker, 348 U.S. 26, 32 (1954) (indicating that the principle of deference toward social legislation "admits of no exception merely because the power of eminent domain is involved").

III. DEMANDS FOR A PUBLIC USE BEYOND EMINENT DOMAIN

If, as this Note has argued, calls for heightened protection of property rights under the public use provision have no particular constitutional basis,[48] why has judicial approval of economic development takings provoked such extensive criticism? Much of this criticism focuses on the potential for abuse of the political process and the lack of accountability imposed on private developers of condemned property.[49] This Part suggests that these legal arguments directed specifically against economic development takings reflect a broader frustration with the misuse of government resources to benefit private interests. Further, given the localized, case-specific nature of condemnation proceedings, eminent domain jurisprudence provides a convenient venue within which to criticize these perceived failures in government accountability.

A. Backlashes Against Privatization and Calls for Government Accountability

Commentators have noted a shift in public opinion regarding the optimal division of responsibility between the public and private sectors in the management of government resources. In contrast to the view of previous decades that privatization was generally desirable to streamline a large, wasteful government, citizens in recent years have urged a larger role for the government in monitoring the private entities that provide public services.[50] Under this emerging view, waste and abuse of public resources originate not in the government itself, but in those private contractors employed by the government without adequate oversight.[51]

This backlash against privatization is indicative of—and is itself reinforced by—a growing perception among Americans that the government serves special interests at the expense of the public welfare. This Note does not seek to provide an exhaustive list of reports of public-private collaborations that have arguably involved abuses of government power. Nonetheless, because these perceived abuses form the backdrop to recent state efforts to reform eminent domain practice,[52] highlighting the more prominent examples informs the analysis.

Americans increasingly associate defense spending with the misuse of public resources to benefit private interests. The Department of Defense (DOD) receives continual criticism for granting military contracts without imposing sufficient oversight

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48. *See* discussion *supra* Part II.

49. *See* discussion *supra* Part I.

50. *See* Paul R. Verkuil, *Public Law Limitations on Privatization of Government Functions*, 84 N.C. L. REV. 397, 417–21 (2006) (comparing past public frustration over the seeming inefficiencies of government bureaucracy with the modern recognition of the essential role of the government in overseeing the provision of defense and entitlement programs); David Brooks, Editorial, *From Freedom to Authority*, N.Y. TIMES, May 14, 2006, at 12 (contrasting the conservatism of the 1970s and 1980s, which viewed less government as desirable for enhancing freedom, with that of the present, which fears not "bureaucrats possessing too much control" but "ungoverned sources surging out of control").

51. *See* Verkuil, *supra* note 50, at 418 (arguing that privatization has reached its limits in that civil services have been contracted out to such an extent that insufficient government personnel are available to conduct oversight on the provision of those services).

52. *See* discussion *infra* Part IV.

on private contractors,[53] and this lack of accountability becomes more problematic as defense expenditures increase.[54] The conflict in Iraq only exacerbates dissatisfaction with military outsourcing. Charges of political favoritism seem to increase directly with public impatience over the apparent lack of success in securing and reconstructing Iraq.[55]

Government responses to hurricane damage in the Gulf provide another example of perceived mismanagement of public resources. Investigators partly attribute the inadequate response to this national disaster to insufficient oversight in the contracting out of emergency services.[56] Hence, along with the Iraq conflict, Hurricane Katrina has been a major subject of criticism of abuse of political power to benefit private interests.[57] The Katrina issue also bears an interesting relationship to economic development takings. The public's growing distrust over the use of private contractors to provide emergency relief may make the use of eminent domain for reconstructing New Orleans politically infeasible.[58]

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53. *See, e.g.*, DAVID M. WALKER, U.S. GOV'T ACCOUNTABILITY OFFICE, GAO'S HIGH-RISK PROGRAM, GAO-06-497T, at 13–15 (2006) (reporting on the DOD's continued failure to hold contractors accountable for delivering services as promised, resulting in billions in wasted expenditures).

54. *See* U.S. GOV'T ACCOUNTABILITY OFFICE, CONTRACT MANAGEMENT: DOD VULNERABILITIES TO CONTRACTING FRAUD, WASTE, AND ABUSE, GAO-06-838R, at 3–6 (2006) (noting that the DOD's expenditures on services provided by the private sector have increased just as the size of its acquisition workforce has decreased, subjecting more public funds to the risk of waste, fraud, and abuse).

55. *See, e.g.*, Verkuil, *supra* note 50, at 441 (characterizing the conflict in Iraq as a "bonanza" for private contractors); James Glanz, *Series of Woes Mar Iraq Project Hailed as Model*, N.Y. TIMES, July 28, 2006, at A1 (reporting on the failure of an American construction company to complete a children's hospital, "the latest in a series of American taxpayer-financed health projects in Iraq to face overruns, delays, and cancellations"); Frank Rich, Editorial, *The Road from K Street to Yusufiya*, N.Y. TIMES, June 25, 2006, at 13 (decrying the Bush Administration's "lax privatization of [Iraq's] reconstruction" with "pet companies and campaign contributors and without safeguards or accountability to guarantee results").

56. *See* WILLIAM T. WOODS, U.S. GOV'T ACCOUNTABILITY OFFICE, HURRICANE KATRINA: PLANNING FOR AND MANAGEMENT OF FEDERAL DISASTER RECOVERY CONTRACTS, GAO-06-622T, at 6–7 (2006) (reporting that federal agencies deployed insufficient personnel to oversee private contractors hired to provide disaster relief in response to Hurricane Katrina).

57. *See, e.g.*, Editorial, *At Their Bidding–Katrina Works Out Well for Administration's Friends*, PITT. POST-GAZETTE, Sept. 20, 2005, at B6 (comparing the government's "leisurely response" to the Katrina catastrophe with the speed with which no-bid contracts were awarded "to politically well-connected firms whose names you may recognize from the roster of those rebuilding Iraq"); Molly Ivins, Editorial, *Hurricanes Bringing Out Corruption*, BUFFALO NEWS, Sept. 28, 2005, at A7 (criticizing the award of $1.5 billion in no-bid contracts for Hurricane Katrina relief by the Federal Emergency Management Agency (FEMA) as indicative of a "pattern of crony contracts" and "corporate clout" in the Bush Administration); Rich, *supra* note 55 (attributing the inadequate response to Hurricane Katrina to poor leadership at FEMA, which had been privatized to such an extent that "there was little government left to manage the disaster").

58. *See* Judy Coleman, *The Powers of a Few, the Anger of the Many*, WASH. POST, Oct. 9, 2005, at B2 (suggesting that, while the use of eminent domain may be the only way to attract the private investment necessary to rebuild New Orleans, "[t]he urgency of government

These salient, large-scale misuses of public resources reinforce a broader perception that, increasingly, the government functions not for the benefit of the general welfare, but for the benefit of politically connected private interests.[59] Viewed within this context, it is reasonable to conclude that criticism against economic development takings is simply another indicator of public frustration with widespread failures in government accountability.[60] Indeed, the arguments offered by those who criticize economic development takings provide support for this conclusion. The most zealous opponents of eminent domain focus not on the substantive rights of property owners, but on the potential for abuse of the political process.[61] States enact legislative reforms[62] not for the practical purpose of addressing actual eminent domain practice within their own jurisdictions, but for the expressive purpose of disapproving of *Kelo*.[63]

Based on this analysis, criticism of economic development takings at the local level bears a much stronger relationship to government accountability failures at the national level than it may first appear. Just as commentators attack the transfer of property to private developers as an abuse of the political process, they allege political favoritism in the award of federal contracts. Just as the speculative nature of economic development takings prompts calls for heightened judicial scrutiny, federal agencies' failure to hold private contractors accountable generates calls for reform. *Kelo*, although involving the eminent domain power of a single state, really has served as "a touchstone for a *nationwide* uprising" against the use of political power to benefit private interests.[64]

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planning . . . is offset by the fact that the first contracts went out to some of the usual suspects").

59. *See, e.g.*, Editorial, *Backlash*, BALT. SUN, Nov. 8, 2006, at 22A (attributing the shift in party power resulting from the 2006 congressional elections to voters' frustration with political corruption, abuse of power, and special-interest projects); Judy Sarasohn, *Under Bush, the Revolving Door Gains Speed*, WASH. POST, Oct. 27, 2005, at A25 (suggesting that the movement of personnel between the private and public sectors "contributes to a cynicism about government—who is making policy and why, and who is making money off public service").

60. *See* Coleman, *supra* note 58 (characterizing the backlash against *Kelo* not as a genuine defense of American property values, but as a "deeper distrust" that government operates as a "too-eager partner of private interests").

61. *See* BERLINER, *supra* note 22, at 3 (identifying the states' "widespread abuse of eminent domain . . . for private benefit and private profit").

62. *See* discussion *infra* Part IV.B.

63. *See, e.g.*, Act of Oct. 3, 2006, ch. 84, § 1(a)(1), 2006 Alaska Sess. Laws (finding that *Kelo* "demonstrates that an overly expansive application of eminent domain powers can be a threat to the property rights of all private property owners"); Act of May 18, 2006, ch. 192, 2006 Kan. Sess. Laws 1345 (presenting as the purpose of eminent domain legislation a reaction against the U.S. and Kansas Supreme Courts' approval of "the taking and transferring of private property from one private party to another . . ."); CASTLE COALITION, INST. FOR JUST., 50 STATE REPORT CARD: TRACKING EMINENT DOMAIN REFORM LEGISLATION SINCE *KELO* 33 (2007), http://www.castlecoalition.org/pdf/publications/report_card/50_State_Report.pdf (observing that the Governor of New Hampshire signed eminent domain legislation on the one-year anniversary of the *Kelo* decision).

64. Haar, *supra* note 4 (emphasis added).

B. The Particular Focus on Takings

If, as this Note has suggested, attacks against the use of eminent domain to benefit private interests are merely a symptom of a broader frustration with failures in government accountability,[65] why have economic development takings generated such particular criticism within the legal community?

One key factor is the potential for high visibility in eminent domain controversies. The individual citizen who actively resists the condemnation of private property is likely to draw media attention, providing a sympathetic figure for calls against abuse of government power.[66] This high visibility combines with conditions that facilitate litigation. While systemic waste in the award of military contracts may be highly visible and detrimental to the public welfare,[67] the frustrated taxpayer has neither the incentive[68] nor the right[69] to challenge this government mismanagement in court. In contrast, eminent domain proceedings involve concrete, localized cases in which the burdens of state action fall disproportionately on a small number of property owners.[70] Such individualized circumstances are far more likely to generate litigation, and, resultantly, a Supreme Court decision that may serve as the topic of numerous law review articles.

In addition to the individualized nature of eminent domain controversies, it is noteworthy that the Federal Constitution makes explicit reference to the taking of private property for public use.[71] Although this Note has argued that the public use provision provides little substantive protection against compensated condemnations,[72]

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65. *See* discussion *supra* Part III.A.

66. *See* William A. Fischel, *The Political Economy of Public Use in* Poletown*: How Federal Grants Encourage Excessive Use of Eminent Domain*, 2004 MICH. ST. L. REV. 929, 934 (comparing the "embarrassingly visible" nature of abuses of eminent domain with less politically costly means of granting special favors, such as tax breaks and deregulation); Audrey G. McFarlane, *The New Inner City: Class Transformation, Concentrated Affluence and the Obligations of the Police Power*, 8 U. PA. J. CONST. L. 1, 6 (2006) (noting that the most publicized controversies surrounding urban renewal projects involve eminent domain, and the individual property owner who resists condemnation "becomes an embodiment of the status quo in the face of structural change and often an inadvertent champion of community interests").

67. *See* discussion *supra* Part III.A.

68. Durham, *supra* note 28, at 1307 (comparing the targets of eminent domain proceedings, who directly observe the consequences of government actions that adversely affect them, with federal taxpayers, who do not directly link particular government actions with which they disapprove to their individual tax burdens).

69. *See* DaimlerChrysler Corp. v. Cuno, 547 U.S. 332, 343–48 (2006) (observing that federal taxpayers have no standing to challenge tax or spending policies by virtue of their status as taxpayers and holding that state taxpayers also lack such standing).

70. *See* Garnett, *supra* note 23, at 944 (suggesting that the taking of a home imposes a burden on the homeowner that is far greater, even with just compensation, than that imposed on the taxpayers who must pay for the compensation).

71. U.S. CONST. amend. V.

72. *See* Simpson, *supra* note 22, at 198 (acknowledging but criticizing the fact that courts have not read the public use provision as providing protection of property rights any greater than the minimal protections afforded to other, non-enumerated economic rights); discussion *supra* Part II.

the mere presence of the Takings Clause may kindle academic debate over eminent domain. Coupling this constitutional reference with the case-specific nature of condemnation proceedings, the issue of eminent domain becomes a convenient vehicle through which to criticize perceived abuses of government power.

IV. RESTRICTIONS ON ECONOMIC DEVELOPMENT TAKINGS BY STATE DECISION-MAKERS

Even accepting that the Supreme Court's modern rational basis review of economic legislation neither provides substantive protection of property rights nor filters out the influence of special interests,[73] states do not have to accept such a deferential standard as a good idea. Indeed, *Kelo* expressly opened the door for states to impose additional restraints on the exercise of eminent domain, either through judicial interpretations of state constitutions or legislative initiatives.[74]

However, states electing to undertake *Kelo*'s invitation to reevaluate eminent domain practice should do so with caution. This Note has argued that criticism of economic development takings stems not from a genuine belief that private property rights are sacred, but from a widespread dissatisfaction with perceived abuses of the political process.[75] Consistent with this thesis, state decision-makers who are considering eminent domain reform should take the public outcry against *Kelo* for what it is—a genuine call for governmental accountability, but not necessarily a sound basis for categorically rejecting economic development takings. Stated another way, state decision-makers should resist the temptation of using anti-*Kelo* sentiment as a basis for imposing unnecessarily draconian restrictions on states' eminent domain authority.

This Part examines the responses to *Kelo* by state courts and legislatures. This analysis reveals that many such responses provide reasonable checks against eminent domain abuse. Some state-court decisions and legislation, however, take anti-*Kelo* sentiment too far and impose categorical restrictions on economic development takings.

A. Judicial Restrictions on Economic Development Takings

Several state high courts have had the occasion to strike down takings initiated for the ostensible purpose of economic development. Some of these courts have invalidated economic development takings on the narrow ground of providing a judicial check against the most obvious abuses of eminent domain. By adopting an approach that does not assume that all economic development takings are necessarily invalid, these courts have successfully resisted the temptation to read too much into the backlash against *Kelo*.

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73. *See* discussion *supra* Part II.

74. Kelo v. City of New London, 545 U.S. 469, 489 (2005) (emphasizing that nothing in the Court's decision precludes states from imposing greater restrictions on economic development takings, either as a matter of state constitutional law or through eminent domain legislation).

75. *See* discussion *supra* Part III.

Other courts, however, have used post-*Kelo* eminent domain controversies as an opportunity to impose sweeping, constitutional restrictions on the taking of private property for economic development. In so doing, these courts have improperly used eminent domain jurisprudence for the expressive purpose of disapproving of *Kelo*, at the cost of unnecessarily restricting states' legitimate use of economic development takings.

1. Judicially-Enforced Government Accountability

In *Rhode Island Economic Development Corp. v. Parking Co.*,[76] the Supreme Court of Rhode Island scrutinized the taking of The Parking Company's (TPC) contractual right to operate a parking garage servicing an airport owned by the Rhode Island Airport Corporation (RIAC).[77] RIAC had invoked the eminent domain power of its parent company, the Economic Development Corporation (EDC), after RIAC failed in its negotiations with TPC to acquire the right to operate the garage.[78] The court struck down EDC's actions as an "arbitrary, capricious, or bad faith taking of private property."[79]

In reaching its decision, the court relied not on any sweeping expansion of state constitutional restrictions on eminent domain beyond the federal baseline, but on specific facts that indicated an abuse of the eminent domain power.[80] In particular, RIAC had a contractual right to purchase the garage from TPC under a previously negotiated option agreement; however, making use of EDC's condemnation authority allowed RIAC to acquire the property for substantially less than the option price.[81] Under these circumstances, the court concluded that the taking did not represent a legitimate effort to further a public purpose, but rather a bad-faith commandeering of the State's eminent domain authority to "alter[] the balance of bargaining power."[82]

The Rhode Island Supreme Court's approach in *Parking Co.* is consistent with this Note's premise that courts should not restrict the scope of economic development takings for the mere expressive purpose of disapproving of *Kelo*. Indeed, the court did not disapprove, but rather distinguished, *Kelo*. Unlike the "hasty maneuvering" of EDC, the condemning authority in *Kelo* acted pursuant to a "comprehensive and thorough economic development plan."[83] By applying this narrow, fact-specific standard for scrutinizing exercises of eminent domain, the Rhode Island Supreme Court seems to appreciate that, *Kelo* notwithstanding, many economic development takings may serve the public interest.[84]

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76. 892 A.2d 87 (R.I. 2006).

77. *Id.* at 92–93.

78. *See id.* at 93.

79. *Id.* at 103 (quoting Romeo v. Cranston Redev. Agency, 254 A.2d 426, 434 (R.I. 1969)).

80. *See id.* at 104.

81. *See id.* at 104–05.

82. *Id.* at 106.

83. *Id.*; *see also id.* at 104 ("The City of New London's exhaustive preparatory efforts that preceded the takings in *Kelo*, stand in stark contrast to EDC's approach in the case before us.").

84. *See id.* at 103 (acknowledging that "traditional notions of public use . . . must yield to 'the ever changing conditions of our modern society' such that 'what constitutes a public use necessarily [varies] with the changing conceptions of the scope and functions of government'"

At the same time, *Parking Co.* responds to the calls for government accountability that underlie the reaction against economic development takings.[85] The decision recognizes that, although courts are generally limited in their ability to review legislative determinations of what constitutes a "public use," they will nonetheless step in to prevent takings that represent egregious abuses of the political process.[86]

The reasoning of *Parking Co.* obtains further support from its consistency with the rationales of pre-*Kelo* state-court decisions invalidating economic development takings. The courts in these cases obviously did not rule with the expressive purpose of disapproving of *Kelo*. Instead, these decisions, like *Parking Co.*, had the more judicious purpose of curbing abuses of the eminent domain power.

In *Southwestern Illinois Development Authority (SWIDA) v. National City Environmental, L.L.C.*,[87] the Illinois Supreme Court invalidated SWIDA's condemnation of private property for transfer to a racetrack operator. The court acknowledged that "economic development is an important public purpose" that could justify the use of eminent domain in certain cases.[88] However, because SWIDA failed to formulate an economic development plan of its own, but rather agreed to condemn whatever property the racetrack operator desired, the court concluded that SWIDA had abused its authority.[89] Thus, the peculiar facts of the case, rather than any heightened standard of review, prompted the court to invalidate the taking. As the court noted, the purpose of the taking was to bestow "a purely private benefit," not to serve a "public use" as required by the state constitution.[90]

In *Casino Reinvestment Development Authority (CRDA) v. Banin*, the court denied CRDA's authority to forcibly transfer private property to facilitate a hotel redevelopment project.[91] As in *SWIDA*, the court declined to apply a heightened standard of review to exercises of eminent domain that "result[] in a substantial benefit to specific and identifiable private parties."[92] However, much like the *SWIDA* court's disapproval of the private developer's control over the condemnation process, the *CRDA* court reasoned that the discretion afforded to the hotel developer over the use of the property defeated any finding of a "public purpose."[93] In particular, CRDA did not condition the transfer of the property on any assurances that the developer would use it for the public benefits that originally justified the taking.[94] Because the "consequences and effects" of the condemnation were left to the complete discretion of the private

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(quoting *Romeo*, 254 A.2d at 431)) (alteration in original).

85. *See* discussion *supra* Part III.

86. *See Parking Co.*, 892 A.2d at 101 ("[A] legislative determination on the issue of public use . . . will be accorded deference by this Court, but is not dispositive.").

87. 768 N.E.2d 1, 11 (Ill. 2002).

88. *Id.* at 9.

89. *Id.* at 10.

90. *Id.* at 9–10.

91. 727 A.2d 102, 111 (N.J. Super. Ct. Law Div. 1998).

92. *Id.* at 104 (quoting City of Atl. City v. Cynwyd Invs., 689 A.2d 712, 721 (N.J. 1997)); *see also* Twp. of W. Orange v. 769 Assocs., L.L.C., 800 A.2d 86, 94 (N.J. 2002) (affirming that New Jersey courts do not apply "heightened scrutiny" to economic development takings, but rather a "manifest abuse of discretion test").

93. *CRDA*, 727 A.2d at 110.

94. *Id.* at 105.

transferee, the court concluded that "any potential public benefit is overwhelmed by the private benefit . . . ."[95]

Parking Co., *SWIDA*, *CRDA*, and other state cases restricting the scope of eminent domain[96] do not offer expressive disapproval of the Supreme Court's takings jurisprudence, nor do they purport to impose heightened constitutional protections against economic development takings.[97] Instead, these cases represent isolated checks against the most obvious abuses of public power by unusually influential private interests.[98] Accordingly, the reasoning of these decisions is consistent with this Note's argument that courts should contextualize the recent outcry against *Kelo* as symptomatic of a broader frustration with the perceived lack of government accountability.

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95. *Id.* at 111.

96. In addition to the state cases discussed herein, see also *Bailey v. Myers*, 76 P.3d 898, 904 (Ariz. Ct. App. 2003) (invalidating under the state constitution the taking of a business at the request of a private developer as not "'really public'"); *Avalon Bay Cmtys., Inc. v. Town of Orange*, 775 A.2d 284, 302 (Conn. 2001) (setting aside the Town's plan to take the property of a housing developer for construction of an industrial park as adopted in "bad faith" and as a mere pretext to prevent affordable housing); *In re Redevelopment Authority of City of Philadelphia*, 891 A.2d 820, 831 (Pa. Commw. Ct. 2006) (invalidating the City's forced transfer of property to religious entities to construct a private school as made under the mere pretext of a public purpose).

97. Not every pre-*Kelo* decision invalidating economic development takings relied on the narrow ground of preventing egregious abuses of the political process. In *County of Wayne v. Hathcock*, 684 N.W.2d 765, 782 (Mich. 2004), the court established heightened protections against economic development takings, holding that transfers of condemned property to a private entity satisfy the public use requirement of the Michigan Constitution only if the entity remains accountable to the public in its use of the land. However, the practicability of the Michigan Supreme Court's requirement that the property "remain[] subject to public oversight after transfer to a private entity," *id.* at 783, is questionable. *See* Agnetti, *supra* note 27, at 1270–74 (stating that the *Hathcock* decision "left readers and real property owners guessing as to how liberally [the public accountability] exception will be applied by the judiciary" and suggesting alternatives for enforcing the promises of private developers through public oversight); Boudreaux, *supra* note 46, at 5 (criticizing proposed reforms to the Supreme Court's deferential review of exercises of eminent domain, including the *Hathcock* formula, as "likely to lead courts into an inextricable bog of trying to assess and weigh the benefits of public development projects—a fact-finding job that is a legislative, not judicial, function"); Rachel A. Lewis, Note, *Strike That, Reverse It:* County of Wayne v. Hathcock*: Michigan Redefines Implementing Economic Development Through Eminent Domain*, 50 VILL. L. REV. 341, 366–67 (2005) (noting that the *Hathcock* court did not indicate what level of control over the private developer's use of the condemned property would have satisfied the "public use" requirement). In any event, one could agree with the Michigan Supreme Court that some level of heightened scrutiny of economic development takings is appropriate, while still agreeing with this Note's premise that courts choosing to apply such heightened review should not do so for the mere expressive purpose of disapproving of *Kelo*.

98. *See* Simpson, *supra* note 22, at 199–200 (characterizing the takings in *SWIDA* and *CRDA* as abuses of eminent domain to "dole out special favors").

2. Judicial Overreaction

Unlike those state courts that have invalidated takings only where necessary to prevent an abuse of the political process, some courts have fallen into the trap of using anti-*Kelo* sentiment as a basis for imposing severe restrictions on economic development takings. The Ohio Supreme Court was the first to accept *Kelo*'s invitation to extend its state constitutional protections against eminent domain beyond the federal baseline. In *City of Norwood v. Horney*, the court invalidated the City's exercise of eminent domain under an ordinance authorizing the condemnation of property falling within a "deteriorating area."[99] The court rested its decision primarily on the rationale that the "deteriorating area" test was a "standardless standard," making the ordinance unconstitutionally void for vagueness.[100] However, the court took the opportunity to rule much more broadly against economic development takings: "[T]he fact that the appropriation would provide an economic benefit to the government and community, standing alone, does not satisfy the public-use requirement of . . . the Ohio Constitution."[101]

Several aspects of this holding suggest that the Ohio Supreme Court was concerned not with developing a workable standard for reviewing economic development takings, but with disapproving of the U.S. Supreme Court's deferential review of such takings. First is the court's observation that, with respect to the limitations on eminent domain imposed by the Federal Constitution, *Kelo* represents the "death knell" of the public use requirement.[102] In addition, the court's application of the law to the facts centered almost entirely on the void-for-vagueness doctrine.[103] Indeed, because the City was not even asserting that an economic benefit alone motivated its decision to condemn,[104] the court's pronouncement that such a benefit "cannot serve as the sole basis" for a taking[105] would not seem essential to its decision. For these reasons, *Horney*'s disapproval of *Kelo*-type condemnations is more expressive than analytical, and the decision offers little in the way of an alternative standard of review of economic development takings.

The Oklahoma Supreme Court has also had the opportunity to use its state constitution as an amplifier of anti-*Kelo* sentiment. In *Board of County Commissioners of Muskogee County v. Lowery*, the court found that the County violated state constitutional and statutory restrictions on eminent domain by taking easements in property in order to construct water pipelines that would serve an electricity plant.[106] Much like the Ohio Supreme Court in *Horney*, the Oklahoma Supreme Court separated itself from the *Kelo* decision, holding that "economic development alone does not

99. 853 N.E.2d 1115, 1123 (Ohio 2006).

100. *Id.* at 1146.

101. *Id.* at 1123.

102. *Id.* at 1135.

103. *See id.* at 1142–46.

104. *See id.* at 1127 (indicating that the lower state court accepted the City's conclusion that the property was within a "deteriorating area" based on evidence that failing to implement a comprehensive development plan "could lead to impairment of sound growth, an economic liability and a menace to the public welfare").

105. *Id.* at 1141.

106. 136 P.3d 639 (Okla. 2006).

constitute a public purpose and therefore, does not constitutionally justify the County's exercise of eminent domain."[107] But also much like *Horney*'s sweeping disapproval of economic development takings, *Lowery*'s equivalent holding was arguably unwarranted by the facts before it. Indeed, the County was not bringing about a "specter of condemnation" by bulldozing a private home in favor of office space.[108] On the contrary, these takings of easements in land, while ultimately beneficial to a private utility operator, advanced interests beyond private economic development.[109] The Oklahoma Supreme Court's opinion, then, appears to contain a gratuitous element of joining the outcry against *Kelo*. *Lowery* does not provide a workable alternative to the U.S. Supreme Court's permissive review of economic development takings, but only a rejection of it.

In sum, several state courts have properly invalidated economic development takings where necessary to prevent the most egregious abuses of the eminent domain power. In contrast, cases such as *Horney* and *Lowery* have imposed sweeping constitutional restrictions on states' eminent domain authority for the mere expressive purpose of joining the public outcry against *Kelo*. The latter approach fails to appreciate anti-*Kelo* sentiment for what it is—a convenient vehicle through which to express broader frustrations with failures in government accountability, but not a sound basis for finding heightened constitutional protection of property rights.

B. Legislative Restrictions on Eminent Domain

The preceding discussion illustrates that specific instances may arise where state courts provide an important check against abuse of the eminent domain power. Nonetheless, based on the well-established principle of deference toward legislative determinations of economic policy, the judiciary's role in eminent domain controversies is generally limited.[110] Hence, if citizens have a genuine desire to impose greater restraints on legislatures' authority to exercise eminent domain,[111] they should first look to the legislatures themselves. In a majority of states, the people have done just that. Following the Supreme Court's decision in *Kelo*, forty-two states have passed

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107. *Id.* at 650.

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

109. *See Lowery*, 136 P. 3d at 644 (indicating that the lower state court had authorized the taking on the ground that it was necessary for the installation of water lines that "'are necessary for the private electricity generation plant to operate, for the benefit of Muskogee County residents and the general public'").

110. *See* R.I. Econ. Dev. Corp. v. Parking Co., 892 A.2d 87, 103 (R.I. 2006) (embracing a liberal, evolving view of "public use" and affording broad discretion to the legislature in its decision to exercise eminent domain); discussion *supra* Part II.

111. The federal government, of course, also has eminent domain powers. However, the controversy surrounding eminent domain abuse largely focuses on condemnations by state authorities. *See* DANA BERLINER, OPENING THE FLOODGATES: EMINENT DOMAIN ABUSE IN THE POST-*KELO* WORLD (2006), http://www.castlecoalition.org/pdf/publications/floodgates-report.pdf (documenting condemnation proceedings either planned or initiated by local governments since the 2005 *Kelo* decision). Further, the legislative approach advanced by this Part is based on the efforts of state governments to restrict their authority to exercise eminent domain.

laws, either through legislation or constitutional amendment, that in some way limit their authority to take property for economic development.[112]

The wisdom of this rush toward legislative reform is questionable. This Note has argued that public criticism of economic development takings stems not from a belief that property rights are sacred, but from a widespread dissatisfaction with perceived abuses of the political process. Attacks against eminent domain abuse merely provide a convenient vehicle through which to express these broader frustrations.[113] It stands to reason, therefore, that this reform movement carries the risk of using anti-taking legislation not as a targeted response to real problems in eminent domain practice, but as an expressive outcry against the governance problems that *Kelo* has come to represent.

This Part examines characteristic provisions of recent eminent domain legislation for their consistency with the accountability goals advanced by this Note. Based on this analysis, reasonable legislative reforms are those that attach greater electoral accountability to decisions to exercise eminent domain, encourage increased public scrutiny of condemnation proceedings, and provide additional procedural opportunities for the condemnee to contest the taking. However, more extreme provisions, such as an absolute bar on economic development takings, risk taking anti-*Kelo* sentiment and the call for political accountability too far.

1. Accountability-Based Legislative Reform

In order to attach electoral accountability to decisions to condemn private property, some states have passed legislation requiring elected officials to expressly authorize any economic development taking. Both the Alaska and Kansas legislatures have passed bills that generally prohibit the taking of property for transfer to a private developer, but that allow the legislatures to approve such transfers on a case-by-case basis.[114] Utah has enacted a similar accountability provision that prohibits the taking of private property "unless the governing body of the political subdivision [within which the property is located] approves the taking."[115]

The Georgia legislature has raised this accountability reform to the constitutional level; voters have ratified an amendment requiring that "[e]ach condemnation of privately held property for redevelopment purposes . . . be approved by vote of the elected governing authority . . . ."[116] Florida voters have approved a similar constitutional amendment.[117]

This form of accountability legislation offers a reasonable approach to reforming eminent domain practice. By requiring elected officials to sign off on all economic development takings, these provisions impose a high political cost for allowing an

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112. CASTLE COALITION, *supra* note 63, at 1.

113. *See* discussion *supra* Part III.

114. ALASKA STAT. § 09.55.240(d)–(f) (2006); KAN. STAT. ANN. §§ 26-501a(b), -501b(f) (Supp. 2006).

115. UTAH CODE ANN. § 78-34-4(2)(b) (Supp. 2007).

116. GA. CONST. art. IX, § 2, ¶ VII(a).

117. FLA. CONST. art. X, § 6(c) (prohibiting transfers of condemned property to a private party "except as provided by general law passed by a three-fifths vote of the membership of each house of the Legislature").

exercise of eminent domain that, while strongly supported by private developers, may not be in the best interest of the public. Hence, these legislative reforms respond to the extensive body of criticism suggesting that economic development takings are inherently prone to abuse by private interests.[118]

A second favorable component to legislative reform is a requirement that authorities give full public notice of their plans to exercise eminent domain. For example, the Minnesota legislature now requires that a public hearing precede the commencement of condemnation proceedings and that the public receive notice of the meeting through publication.[119] Under a new Georgia bill, authorities must provide notice of meetings to approve a condemnation through both publication and a sign posted on the affected property.[120]

These public notice provisions are a key corollary to the electoral accountability provisions discussed above. Without the increased public scrutiny facilitated by the former, the latter would not effectively deter officials from abusing eminent domain for the benefit of politically connected private interests.

Finally, equally important as notice to the public is, of course, notice to the condemnee. Several of the states' recent eminent domain bills require that the property owner receive individual notice of a meeting to approve the condemnation, along with a statement of the right to attend and to object to the proceedings.[121] Missouri now requires that condemning authorities provide notice to the condemnee sixty days before filing the condemnation proceeding, along with a statement of the owner's rights, which include the opportunity to contest and to seek assistance from the State's newly-created Office of the Ombudsman for Property Rights.[122]

These increased procedural mechanisms serve the obvious purpose of affording the condemnee a full and fair opportunity to contest the condemnation proceedings. The primary goal of providing this opportunity is to ensure that the property owner is not marginalized from the political process, which, according to some commentators, is the true measure of the justness of an exercise of eminent domain.[123]

While these increased procedural opportunities are essential to afford political participation to the private condemnee, they are also effective in imposing greater burdens of justification on the government condemnor. Faced with the prospect of genuine opposition by local property owners, officials will be less likely to approve economic development takings that are not easily defensible as serving the public interest. Thus, these process-oriented legislative reforms work in tandem with the

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118. *See supra* notes 22–24 and accompanying text.

119. MINN. STAT. ANN. § 117.0412(2)(a) (West Supp. 2007).

120. GA. CODE ANN. § 22-1-10(a)(1), (3) (Supp. 2007).

121. *E.g.*, GA. CODE ANN. § 22-1-10(a)(2), (d) (Supp. 2007); IOWA CODE ANN. § 6B.2D(1) (West Supp. 2007).

122. MO. ANN. STAT. § 523.250 (West Supp. 2007).

123. *See* Boudreaux, *supra* note 46, at 47–48 (arguing that the level of scrutiny applied to exercises of eminent domain should focus not on the end use of the property or the economic benefit bestowed on private recipients, but on the affected property owner's ability to participate in the political process); Clayton P. Gillette, Kelo *and the Local Political Process*, 34 HOFSTRA L. REV. 13, 14–18 (2005) (suggesting that private property rights are best protected by political safeguards and that the Supreme Court upheld the taking in *Kelo* precisely because these safeguards were in place).

public notification provisions discussed above. Together, these measures reduce an elected representative's incentive to approve takings that, while trumpeted by private developers as offering economic revitalization, have only speculative public benefits. Based on this effect on political incentives, these legislative reforms address the concerns of some commentators that courts' deferential review of exercises of eminent domain encourages inefficient takings.[124]

2. Legislative Overreaction

In addition to the political accountability mechanisms discussed above, several states have responded to perceived eminent domain abuse with far more draconian legislative provisions. For example, many bills passed in the wake of *Kelo* simply disallow "economic development" as a sufficient purpose to justify the use of eminent domain.[125]

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124. *See supra* notes 25–27 and accompanying text.

125. LA. CONST. art. I, § 4(B)(1), (3) (barring the taking of private property except for "public purposes," which do not include "economic development, enhancement of tax revenue, or any incidental benefit to the public"); MICH. CONST. art. X, § 2 ("'Public use' does not include the taking of private property for transfer to a private entity for the purpose of economic development or enhancement of tax revenues."); COLO. REV. STAT. ANN. § 38-1-101(b)(I) (West 2007) (disallowing "the taking of private property for transfer to a private entity for the purpose of economic development or enhancement of tax revenue" as not a "public use"); GA. CODE ANN. § 22-1-1(9)(B) (Supp. 2007) ("The public benefit of economic development shall not constitute a public use."); IDAHO CODE ANN. § 7-701A(2)(b) (Supp. 2007) (prohibiting the exercise of eminent domain for "the purpose of promoting or effectuating economic development"); IOWA CODE ANN. § 6A.22(2)(b) (West Supp. 2007) (excluding economic development activities from the definitions of "public use," "public purpose," and "public improvement"); KY. REV. STAT. ANN. § 416.675(3) (LexisNexis Supp. 2006) (prohibiting the "condemnation of private property for transfer to a private owner for the purpose of economic development that benefits the general public only indirectly, such as by increasing the tax base, tax revenues, employment, or by promoting the general economic health of the community"); MO. ANN. STAT. § 523.271 (West Supp. 2007) ("No condemning authority shall acquire private property . . . for solely economic development purposes."); NEB. REV. STAT. ANN. § 76-710.04(1) (LexisNexis Supp. 2006) (disallowing a taking that is "primarily for an economic development purpose"); N.H. REV. STAT. ANN. § 162-K:2, IX-a(b) (LexisNexis Supp. 2006) ("[P]ublic use shall not include the public benefits resulting from private economic development and private commercial enterprise, including increased tax revenues and increased employment opportunities."); N.D. CENT. CODE § 32-15-01(3) (Supp. 2007) ("[A] public use or a public purpose does not include public benefits of economic development, including an increase in tax base, tax revenues, employment, or general economic health."); TENN. CODE ANN. § 29-17-102(2) (Supp. 2006) ("'Public use' shall not include either private use or the indirect benefits resulting from private economic development and private commercial enterprise, including increased tax revenue and increased employment opportunity . . . ."); TEX. GOV'T CODE ANN. § 2206.0001(b)(3) (Vernon Supp. 2006) (prohibiting the taking of private property "for economic development purposes, unless the economic development is a secondary purpose"); VT. STAT. ANN. tit. 12, § 1040(a) (Supp. 2006) (disallowing a taking that is "primarily for purposes of economic development"); W. VA. CODE ANN. § 54-1-2(a)(11) (LexisNexis Supp. 2007) ("[I]n no event may 'public use' . . . be construed to mean the exercise of eminent domain primarily for private economic development.").

Of course, states have the right to impose whatever restraints they wish over their authority to condemn property. However, this categorical exclusion of economic development from the legitimate scope of eminent domain embraces the outmoded conception of "public use" that the Supreme Court rejected as unworkable.[126] This approach is also problematic in that it may prohibit states from engaging in redevelopment projects that deliver an unquestionable public benefit.[127] In these cases, where the use of eminent domain would serve the public interest and occur with full procedural protections for the condemnee, it makes little sense to disallow the taking merely because it falls within the disfavored category of "economic development."[128] Rather than deny legislatures the ability to develop a "carefully formulated" economic development plan,[129] eminent domain reform should ensure that legislatures implement those plans in a manner that maintains the integrity of the political process.

Another recurring feature of eminent domain legislation is a requirement of stepped-up compensation for the taking of homes. These provisions focus not on political accountability throughout the condemnation process, but on mitigating the burden placed on the individual condemnee. For example, Missouri now requires that, in the case of such a "homestead taking," the State provide a minimum compensation of 125% of the fair market value of the property.[130] Kansas's new standard for compensation is potentially more extreme, but remarkably pliable: where the legislature exercises its authority to override the general prohibition on economic development takings, it "shall consider requiring compensation of at least 200% of fair market value to property owners."[131]

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126. Kelo v. City of New London, 545 U.S. 469, 479 (2005) (dismissing a narrow definition of public use as "impractical given the diverse and always evolving needs of society").

127. *See* Theodore C. Taub, *Post-*Kelo*: Emerging Impacts and Issues in Eminent Domain*, SM004 A.L.I.-A.B.A. 1721, 1772 (2006) (questioning the appropriateness of the legislative response to *Kelo* in light of the fact that "[r]edevelopment is a necessary tool in enhancing the public's quality of life"); Terry Pristin, *Developers Can't Imagine a World Without Eminent Domain*, N.Y. TIMES, Jan. 18, 2006, at C5 (commenting on the legislation passed in the wake of *Kelo* and suggesting that "weakening or destroying the power to condemn property will seriously undermine efforts to rehabilitate decaying cities and might even hinder the rebuilding of New Orleans").

128. Critics of the result in *Kelo* may argue that the taking of private property for the purpose of economic development is not in any event justifiable. *See, e.g.*, Charles E. Cohen, *Eminent Domain After* Kelo v. City of New London*: An Argument for Banning Economic Development Takings*, 29 HARV. J.L. & PUB. POL'Y 491, 497–98 (2006) (acknowledging that *Kelo* was the right result under Supreme Court precedent but arguing that, because economic development takings are unjust and not particularly effective at revitalizing economically distressed areas, legislatures should ban them). However, one can question the wisdom of economic development takings while still accepting this Note's premise that, to the extent that legislatures desire to deprive themselves of this significant redevelopment tool, they should do so not as a hasty, expressive reaction against the abuse of public power that *Kelo* has come to represent, but as a carefully considered determination that the public costs of economic development takings outweigh the public benefits.

129. *Kelo*, 545 U.S. at 483.

130. MO. ANN. STAT. § 523.039 (West Supp. 2007).

131. KAN. STAT. ANN. § 26-501b(f) (Supp. 2006).

This Note does not dispute the independent merits of these advanced compensation provisions. They provide a reasonable, if not complete, response to the concerns of many commentators that current eminent domain practice fails to take into account the high "demoralization costs" associated with the taking of one's home.[132] Nonetheless, these provisions do not address the need for transparency and accountability in the use of eminent domain. If, as this Note has argued, public frustration with eminent domain practice stems from perceived abuses of the political process, requiring that the legislature waste twenty-five percent more of the public's funds in acquiring the property is hardly a solution. Instead, if eminent domain legislation is to provide a meaningful response to government accountability failures, its provisions must impose political restraints on the decision to take property.

CONCLUSION

The Supreme Court has not read the public use provision of the Federal Constitution as providing substantive protection against the compensated taking of private property. On the contrary, the Court's broad interpretation of "public purpose" has expanded to include transfers of property to private parties for economic development. This judicial deference has invited much criticism; many commentators argue that heightened review of economic development takings is necessary to guard against the abuse of eminent domain by special interests. Nonetheless, the deferential standard applied to legislatures' use of eminent domain dovetails the rational basis review applied to a broader category of economic legislation. Accordingly, calls for stricter readings of the public use provision have no particular constitutional basis.

Based on the weakness of the argument for heightened judicial review, it is unlikely that the extensive criticism of economic development takings represents a genuine call for increased constitutional protection of property rights. Rather, demands for a "public use" of condemned property are merely a proxy for demands that all government resources be used on behalf of the public. While the image of the private homeowner standing against the state-sponsored developer may be especially compelling, the particular outcry against economic development takings actually reflects a deeper frustration with the mismanagement of public resources.

Unfortunately, several state courts and legislatures have failed to contextualize the public backlash against the Supreme Court's decision in *Kelo* as merely symptomatic of a broader frustration with failures in the political process. Instead, these decision-makers have taken anti-*Kelo* sentiment to the extreme, imposing severe restrictions on states' authority to initiate economic development takings. These sweeping judicial and legislative reforms are problematic in that, at best, they serve only the expressive purpose of disapproving of *Kelo* without addressing any real problems in the condemnation process, and, at worst, they unnecessarily restrict the legitimate scope of states' eminent domain authority.

More importantly, this overreaction against economic development takings misses the broader point of government accountability. If this Note is correct that the particular outcry against eminent domain abuse reflects a broader, nationwide call for government accountability, then state officials should not limit their response to

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132. *See supra* notes 28–29 and accompanying text.

passing an anti-taking bill. Rather, the real solution to the accountability problem that *Kelo* has come to represent is a renewed commitment to legitimate political processes and a continuing insistence on the responsible use of public resources. It is a solution that, somewhat ironically, *Kelo* already demands.[133]

133. *See* R.I. Econ. Dev. Corp. v. Parking Co., 892 A.2d 87, 104 (R.I. 2006) (interpreting *Kelo* as requiring "good faith and due diligence" on the part of a condemning authority); Gillette, *supra* note 123, at 17 (concluding that the Supreme Court's reasoning in *Kelo* implicitly imposed a requirement that a taking be free from "any apparent political process failure").