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Legislatively Revising *Kelo v. City of New
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Congressional Powers

Bernard W. Bell*

*Rutgers Law School (Newark), bbell@kinoy.rutgers.edu

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Abstract

This paper explores Congress' power to limit state and local authorities' use of eminent domain to further economic revitalization. More particularly, it examines whether Congress can constrain the discretion to invoke eminent domain which state and local officials appear entitled to under the Supreme Court's recent decision in *Kelo v. City of New London*, — U.S. —, 125 S.Ct. 2655 (2005). The question involves an exploration and assessment of the Supreme Court's recent jurisprudence regarding federalism and judicial supremacy.

In providing that private property may not be taken for "public use" without just compensation, the Fifth Amendment implicitly precludes government officials from compelling citizens to relinquish their property for something other than a "public use." However, the United States Supreme Court has long defined "public use" expansively, so expansively that the federal courts do not meaningfully review government officials' justifications for invoking eminent domain. In *Kelo*, the Court revisited its deferential approach. *Kelo* involved a claim that a municipality's attempt to take land by eminent domain and transfer it to a private entity, as a part of an economic revitalization plan, did not qualify as a taking for a "public use," and thus was constitutionally prohibited. The Court ultimately reaffirmed its expansive definition of "public use."

The decision not only sparked public outrage and state legislative initiatives to restrict the use of eminent domain for economic redevelopment, but attracted congressional attention. The House enacted a resolution disapproving the decision and an appropriations rider barring funding to enforce the ruling. At least three

bills have been introduced in the House and Senate to withhold federal funds to economic revitalization projects sited in whole or in part of land acquired by local authorities using eminent domain. This paper concludes that Congress has power to constrain state and local use of eminent domain under the Enforcement Clause of the Fourteenth Amendment and the Commerce Clause, and that Congress' power to proceed under the Spending Clause may not be as expansive as it appears.

The Enforcement Clause of the Fourteenth Amendment allows Congress to limit state and local authorities use of eminent domain to protect property owner's Fifth Amendment rights. Because the Court recognizes citizen's rights to prevent the taking of their property for "private use" by another, but faces problems in enforcing that right, Congress may take some precisely-tailored actions that will give the right practical protection. Such measures might include: 1) altering the measure of "just compensation" due when property is taken for economic development, 2) specifying minimal procedures to assure that state and local officials make eminent domain decisions in a transparent and politically-accountable manner, 3) establishing rebuttable presumptions that in certain circumstances a taking is for a "private," not a "public," use, or 4) prohibiting the use of eminent domain altogether in certain situations.

The Commerce Clause also gives Congress some leeway to legislate with regard to state and local reliance upon eminent domain. Congress may take steps to ensure that eminent domain, which serves as an alternative to the market for real estate, does not operate in an economically wasteful manner or harm involuntary participants in the process. Congress may also take steps to address the consequences of any undue influence interstate commercial enterprises gain over local governments by their ability to play one tax-strapped locality off against another, and one of those consequences may be the excessive or oppressive use of eminent domain. However, the Court may more vigorously police congressional limitations on state use of eminent domain than congressional legislation conflicting with states' assertions of their regulatory powers. The Court may conclude that the power of eminent domain, like the privilege of sovereign immunity, is such an inherent and essential aspect of sovereignty that the constitutionally-mandated respect for the states as independent sovereigns imposes special constraints on congressional authority. See, e.g., *Alden v. Maine*, 527 U.S. 706, 715, 748-49 (1999)(discussing sovereign immunity).

Congress' spending clause powers appear virtually unlimited — the Court has not found Congress to have exceeded its Spending Clause authority since the *Lochner* Era. Not surprisingly, then, Congress' initial response to *Kelo* focuses on denying federal funding to states and localities that exercise the eminent domain powers recognized in *Kelo*. The limits on Congress' power to condition federal funding on waiver of certain individual rights and sovereign prerogatives has bedeviled courts and commentators in a variety of contexts. The issue is most often discussed in terms of "unconstitutional conditions." The paper categorizes the federal government's interest in imposing grant limitations as: 1) "program defining," 2) "symbolic" or "dissociative," 3) "functional," or 4) "protective." Congress should have more leeway in imposing grant conditions that serve functional purposes as opposed to symbolic or dissociative purposes. Ultimately, Congress' interest in limiting support for state and local projects sited in whole or in part on land acquired by eminent domain, is really a symbolic or dissociative one, which merely permits Congress to ensure state and local authorities do not use federal funds to acquire property taken by eminent domain. The symbolic interest does not support the scope of the grant conditions currently contemplated by Congress, prohibiting all funding in connection with a redevelopment project sited in whole or in part on land acquired by eminent domain. While the paper's analysis focuses on grant conditions regarding eminent domain, the general analysis of government grant conditions has a much wider application.

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In providing that private property may not be taken for “public use” without just compensation, the Fifth Amendment implicitly precludes government officials from compelling citizens to relinquish their property for something other than a “public use.” However, the United States Supreme Court has long defined “public use” expansively, so expansively that the federal courts do not meaningfully review government officials’ justifications for invoking eminent domain.¹ Many state courts have also treated government officials’ invocations of eminent domain with nearly complete deference.² In general, the United States Supreme Court has been somewhat sensitive to traditional property rights. Indeed, it has increasingly protected such rights, by expanding the definition of a “taking,”³ and thereby enlarging government officials’ obligations to proffer “just compensation.” Nevertheless, its refusal to constrain government’s use on the takings power has come under severe criticism from those with varied perspectives.⁴

*Associate Dean, Professor, and Herbert Hanooh Scholar, Rutgers Law School (Newark). I gratefully acknowledge the assistance of the Dean’s Research Fund in completing this project. I thank my colleagues who attended the Rutgers Faculty Colloquium for their comments on a prior draft of this paper.

¹ Hawaii Housing Auth. v. Midkiff, 467 U.S. 229 (1984); Berman v. Parker, 328 U.S. 26 (1954); Ruckelshaus v. Monsanto 467 U.S. 986 (1984); see, Thomas W. Merrill, *The Economics of Public Use*, 72 CORNELL L. REV. 61, 61 (1986) (“most observers today think the public use limitation is a dead letter”). In his 1986 article, Merrill reported 15 cases in which plaintiffs had claimed that a taking was for private, rather than public use, and that none of those claims had succeeded.

² Many state courts have taken a similar approach. 2A JULIUS L. SACKMAN, NICHOLS ON EMINENT DOMAIN, §7.02[3] (3d ed. 2002). Some states, however, have been more aggressive, as Merrill found in his 1986 study. Merrill, *supra* note 1, at 96, 115 (reporting that in all federal cases in which parties challenged a taking as one not for “public use,” the government prevailed, whereas in 16.2% of state cases the court found that the taking did not serve a “public use”).

³ E.g., Lucas v. South Carolina Coastal Council, (1992); Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982); Nollan v. California Coastal Comm’n, 438 U.S. 825 (1987), Dolan v. City of Tigard, 512 U.S. 374 (1994); First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304 (1987).

⁴ E.g., DANA BERLINER, PUBLIC POWER, PRIVATE GAIN: A FIVE-YEAR, STATE-BY-STATE REPORT EXAMINING THE ABUSE OF EMINENT DOMAIN (Institute for Justice April 2003), Ralph Nader & Alan Hirsch, *Making Eminent Domain Humane*, 49 VILLANOVA L. REV. 207 (2004), STEVEN GREENHUT, ABUSES OF POWER: HOW THE GOVERNMENT MISUSES EMINENT DOMAIN (2004), Thomas W. Merrill, *The Economics of Public Use*, 72 CORNELL L. REV. 61 (1986); RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN (1985); Brief for the National Association for the Advancement of Colored People, *Kelo v. City of New London*.

In *Kelo v. New London*,⁵ the Court reconsidered its deferential approach, in the context of local officials' use of eminent domain to acquire properties in conjunction with economic development efforts.⁶ In recent years, localities have sought to pursue economic revitalization plans, often relying upon eminent domain to acquire land needed for those redevelopment projects. The Court not only rejected the challenge to New London's invocation of its eminent domain powers to acquire land for a major redevelopment project, but crafted an opinion that is quite deferential to governmental authorities. Indeed, the type of review that the opinion embraces resembles the extremely deferential "rational basis" review employed by the Court in examining equal protection and due process challenges to government actions that involve neither "suspect classifications" nor "fundamental rights."⁷ Such a reaction is hardly surprising, because the inquiry raises similar issues about the relative roles of judges and democratically-elected officials in determining the government's role in the society, and therefore the purposes governments can legitimately pursue.⁸ It is not clear, however, whether the Court, if left to its own devices, would ultimately produce a jurisprudence that resembles "rational basis" review or some more robust form of review instead. Justice Kennedy's special concurrence suggests some concerns that might lead him to invalidate certain takings and to engage in more than perfunctory review of officials' determinations that the taking qualifies as a "public use."⁹

The reaction to the Court's decision has been swift and sharp. Opinion polls have shown a

⁵— U.S. —, 125 S.Ct. 2655 (2005).

⁶ States have long allowed the use of eminent domain to further economic development, particularly to enable private parties to fully develop the state's natural resources. 1 NICHOLS ON EMINENT DOMAIN, *supra* note 2, §§ 1.22[7], [8 & [14], 7.03[1], 7.03[2][c] (3d ed. 2002); *id.*, at §§ 7.03[10][c], 7.03[1], 7.03[2][c] (3d ed. 2002); *Kelo*, 125 S.Ct. at 2662 n.8. However, these often involve easements rather than acquisition of title to property for transfer to another.

⁷ Rational basis review is described in JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW §11.4 at 387-90, § 14.3 at 601 (5th ed. 1995); *see generally*, Suzanne B. Goldberg, *Equality Without Tiers*, 77 S. CAL. L. REV. 481, 489 (2004).

⁸Thomas W. Merrill, *The Economics of Public Use*, 72 CORNELL L. REV. 61, 66-68 (1986); 1 LAWRENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 8.4 (3d ed. 2000).

⁹ *Kelo*, 125 S.Ct. at 2669-71 (Kennedy, J., concurring).

public sharply critical of the decision.¹⁰ Four states have already taken legislative action to restrict the use of eminent domain for economic revitalization. Lawmakers in at least 17 states have begun, or announced plans to begin, legislative initiatives in response to the Court's decision. Several states have created commissions to study the use of eminent domain for economic redevelopment efforts.¹¹ Indeed, the State of Connecticut, from which *Kelo v. City of New London* arose, has already considered a bill to restrict the use of eminent domain.¹² While the bill was defeated, the Governor has called for a moratorium on the use of eminent domain until the legislature reconvenes. On the federal level, the United States House of Representatives almost immediately passed both a resolution of disapproval and an appropriations rider prohibiting the use of funds to enforce the decision.¹³ Legislation has been introduced in both the House and the Senate to reverse *Kelo*. Indeed, the decision seems to have united members of Congress from across the political spectrum, including, for example, conservative Republican House Majority Leader Tom DeLay to liberal Democrat Representatives John Conyers and Barney Frank.¹⁴

The severity of the reaction is particularly striking because the Court *upheld* the challenged government action. (Moreover, in doing so, the *Kelo* majority did not even depart from well-established precedent.) Virtually all of the Supreme Court constitutional decisions that have provoked widespread outrage, such as *A.L.A. Schechter Poultry Corp. v. United States* and the series of cases invalidating New Deal legislation in 1935 and 1936, *Brown v. Board of Education* and subsequent school desegregation cases, *Engel v. Vitale*, *Abington School District v. Schempp*, and subsequent school prayer cases, *Miranda v. Arizona* and other Warren Court criminal procedure

¹⁰ Opinion polls indicates that the public believes, in overwhelming numbers, that the exercise of eminent domain should be constrained more significantly than the court constrained such powers in *Kelo*. *The Polls Are In: Americans Overwhelmingly Oppose Use of Eminent Domain for Private Gain* (available at <http://www.castlecoalition.org/announcements/kelo-polls-6-28-05.asp>) (last visited August 18, 2005).

¹¹ Maura Kelly Lannan, *Many States See a Push to Limit Property Seizures*, NEWARK STAR LEDGER 7 (July 20, 2005); Timothy Egan, *Ruling Sets Off Tug of War Over Private Property*, N.Y. TIMES A1 (July 30, 2005).

¹² See, Stacey Stowe, *On Eminent Domain Many Shifting Stances*, N.Y. TIMES B3 (July 13, 2005).

¹³ H. Res. 340 (June 30, 2005); 151 CONG. REC. H5593; H. Amdt. 427 to H.R. 3058 (June 30, 2005); 151 CONG. REC. H5512-13. The vote in favor of the resolution was 365-33. The Rider passed by a vote of 231-189

¹⁴ 151 CONG. REC. H5578 (Statement of Representative Conyers); id., at H5580 (statement of Representative Delay); id. (statement of Representative Frank).

rulings, *Roe v. Wade*, *Furman v. Georgia*, and *Texas v. Johnson*, for example, involve *invalidation* of government action. Even more remarkably, the governmental bodies that most benefit from the discretion reaffirmed by *Kelo* are not federal agencies, but state and, particularly, local governments, theoretically the entities most responsive to the citizenry.

I will not dwell upon the merits of the *Kelo* decision. I wish to consider whether Congress can constrain state and local officials' reliance on eminent domain. Phrased more provocatively, my query is whether Congress can legislatively overrule, or at least revise, the conception of the "public use" requirement embodied in *Kelo*, and constrain the discretion to which states and localities seem entitled under the decision. Grappling with the question will involve assessing the implications of the Court's recent judicial supremacy and federalism jurisprudence.¹⁵

Part I of this paper will summarize *Kelo* and outline the congressional reaction to the decision. Part II will explore the potential bases for congressional action, focusing largely on Congress' powers under Section 5 of the Fourteenth Amendment, the Commerce Clause, and the Spending Clause. I will conclude that broad action of the kind Congress has begun to consider, which seeks to prohibit use of eminent domain for economic redevelopment, will fall victim to the principles of federalism and judicial supremacy. However, Congress could seek to target specific problems surrounding the use of eminent domain for economic development, and indeed the use of eminent domain more generally, and the Court may well uphold such targeted approaches.

PART I: *Kelo v. New London* and the Congressional Response

A. *Kelo v. New London*

By 1998, after decades of economic decline, designation by a state agency as a "distressed city," and the closure of a military installation in the Fort Trumbull section of the City, New London's unemployment rate was nearly twice the State average and its population at the lowest

¹⁵ This question will require many, including virtually all of the Justices, and perhaps a sizable number of Senators and Representatives to grapple with contradictory impulses. The Justices who dissented in *Kelo*, and seek rigorous judicial review of the "takings" power, have more generally sought to constrain federal powers over the states and most zealously guarded the Court's role as the preeminent interpreter of the Constitution. On the other side, all but one of the Justices that formed the *Kelo* majority have favored an expansive view of federal power that affords Congress greater leeway to impose limitations upon the states based on Congress' own independent conception of particular constitutional provisions.

level since 1920. Pfizer Inc., an international pharmaceutical company, announced plans to build a major facility adjacent to Fort Trumbull. New London officials, with the assistance of the New London Development Corporation (“NLDC”), a private non-profit entity, crafted a redevelopment plan focused on 90 acres in Fort Trumbull. They designed the project to capitalize on the economic activity Pfizer’s facility would attract. Officials anticipated that the redevelopment would create jobs, generate tax revenue, make the city physically more appealing, and create recreational opportunities. The mixed-use development would include a waterfront conference hotel anchoring a cluster of restaurants and shops. It would also include a marina, new homes, a museum, and office space. The city council authorized submission of the plan to state authorities, which, after evaluating six alternative proposals, approved it.¹⁶

Though most of the land was purchased from willing sellers, Susette Kelo and eight other property owners refused to sell their property, and the City sought to acquire their property by eminent domain. By statute, the State of Connecticut has declared that the taking of land, even developed land, as a part of an economic development project qualifies as a taking for a “public use.” Kelo and the other landowners sought to prevent the City from invoking eminent domain, arguing that the taking of property to further local economic development did not qualify as a “public use.” The trial court enjoined some of the proposed takings, and permitted others. The Connecticut Supreme Court held all of the proposed takings constitutionally permissible.¹⁷

The United States Supreme Court affirmed.¹⁸ Justice Stevens, writing for the Court, noted that a city could not use eminent domain, consistent with the Fifth Amendment, to take land in order to confer a private benefit on a particular private party. Nor could a locality use a public purpose as a pretext for such a coerced transfer of property for private gain. However, the majority noted, the record contained no evidence of such an illicit purpose, and, indeed, city officials had not adopted the development plan to benefit a particular class of identifiable individuals.¹⁹

¹⁶ Id. at 2658-60.

¹⁷ Id. at 2560-61.

¹⁸ The case attracted an enormous number of amicus brief submissions from a wide array of parties.

¹⁹ Id. at 2661-62.

Though eminent domain could be used to acquire land for use by the general public, Justice Stevens observed, New London was not planning to open all of the condemned land for use by the general public, either through public ownership or transfer of the property private entities operating public accommodations (*i.e.*, businesses open to all for a fee). Justice Stevens noted that the Court had long rejected a narrow definition of the term “public use” that would permit use of eminent domain only when the government would make the acquired land available to the general public. Rather, he explained, the validity of the City’s invocation of its eminent domain powers turns on whether its development plan serves a “public purpose,” a concept that has traditionally been defined “broadly” and reflects the Court’s “longstanding policy of deference to legislative judgments” with respect to such matters.²⁰

In the majority’s view, its eminent domain precedents have recognized that society’s needs have evolved over time and may vary geographically. The Court has “wisely eschewed rigid formulas and intrusive scrutiny in favor of affording legislatures broad latitude in determining what public needs justify the use of the takings power.”²¹

While New London’s elected officials were not confronted with blight, like that facing defendants in *Berman v. Parker*,²² their determination that the area was sufficiently distressed to justify a program of economic rejuvenation merited deference. The majority refused to adopt plaintiffs’ proposed bright-line rule that would define “public use” to exclude economic development efforts. Justice Stevens explained that “promoting economic development is a traditional and long-accepted function of government” and that the Court could draw no principled distinction between economic development and other uses recognized as “public” in *Berman*, *Hawaii Housing Authority v. Midkiff*,²³ *Ruckelshaus v. Monsanto*,²⁴ and other precedents. Any blurring of the boundary between

²⁰ Id. at 2662-63.

²¹ Id. at 2664.

²² 328 U.S. 26 (1954)(upholding use of eminent domain to acquire land for purposes of revitalizing a blighted area).

²³ 467 U.S. 229 (1984)(upholding Hawaii’s use of eminent domain to redistribute land and thus reduce the concentration in land ownership in the state).

²⁴ 467 U.S. 986 (1984)(upholding a federal statute allowing an applicants for a pesticide approval to rely on data submitted by a prior applicant, so long as it paid “just compensation” for the data).

takings for public and private purposes was of no concern, and indeed “the government’s pursuit of a public purpose will often benefit individual private parties.” Justice Stevens added: “[t]he public end may be as well served through an agency of private enterprise than through a department of government.”²⁵

The majority also refused to require government officials to establish “reasonable certainty” that the expected economic benefits from a proposed redevelopment would actually accrue to satisfy the “public use” requirement. Quoting *Hawaii Housing Authority v. Midkiff*, Justice Stevens explained that “[e]mpirical debates over the wisdom of takings — no less than debates over the wisdom of other kinds of socio-economic legislation — are not to be carried on in the federal courts.”²⁶ And such a rule would create a significant and unwarranted impediment to comprehensive redevelopment efforts.²⁷

In the final paragraph of its opinion, the majority acknowledged the hardships that condemnations may entail even when property owners receive adequate compensation, and acknowledged the importance of questions raised about the fairness of the measure of “just compensation.” It also emphasized each state’s freedom to impose greater restrictions on the power of eminent domain. The Court did not suggest that Congress had any role to play in addressing potential abuses of eminent domain by states and localities. Finally, the Court acknowledged that “the necessity and wisdom of using eminent domain to promote economic development are certainly matters of legitimate public debate.”²⁸

Justice Kennedy, writing separately, asserted that a court “applying a rational basis review” to determine whether a taking satisfied the “public use” requirement should invalidate any taking that, “by a clear showing, is intended to favor a particular private party with only incidental or pretextual public benefits.” He cited *Cleburne v. Cleburne Living Center, Inc.*²⁹ and *Department of*

²⁵ *Kelo*, 125 S.Ct. at 2666 (quoting *Berman*, 348 U.S. at 34); *Id.* at 2664-66.

²⁶ *Id.* at 2667.

²⁷ *Id.* at 2667-68.

²⁸ *Id.* at 2668.

²⁹ 473 US. 432 (1985).

Agriculture v. Moreno,³⁰ two Equal Protection cases, as examples of Supreme Court determination that a challenged governmental restriction failed “rational basis” review precisely because the restriction was primarily intended to disadvantage certain private parties. Justice Kennedy admonished courts confronting a plausible claim of impermissible favoritism to treat the claim seriously and carefully review the record.³¹ In *Kelo*, he explained, the trial court had conducted just such a serious inquiry. Engaging in a “careful and extensive” inquiry regarding whether the development plan primarily benefitted the developer, Pfizer, and the businesses that would relocate in the area, the trial court had heard testimony from government officials and corporate officers and reviewed documentary evidence of communications between the parties.

Justice Kennedy noted that a “more stringent” review might be appropriate for categories of takings involving “private transfers in which the risk of undetected impermissible favoritism of private parties” is particularly acute. He refused to speculate about categories of cases that might warrant more intense judicial scrutiny. However, he underscored several aspects of *Kelo* that made departure from the deferential *Berman/Midkiff* standard of review inappropriate. First, the taking occurred in the context of a comprehensive development plan addressing “a serious city-wide depression.” Second, the projected economic benefits were more than *de minimis*. Third, city officials did not know the identities of most of the private beneficiaries when they formulated their redevelopment plan. Fourth, the City had complied with elaborate procedural requirements, requirements that, moreover, facilitate judicial review.³²

Justice O’Connor, writing for the dissenters, acknowledged that “in certain circumstances and to meet certain exigencies,” the Court had held the taking of property destined for a private use satisfied the “public use” requirement. However, she viewed the majority’s deferential approach, which in her view permitted any taking of property for private use so long as the new use generated some benefit to the public, as a complete abdication of the judiciary’s role in scrutinizing government official’s justifications for taking private property. Nearly any lawful use of private

³⁰ 413 U.S. 528 (1973)

³¹ *Kelo*, 125 S.Ct. at 2669 (Kennedy, J., concurring).

³² *Id.* at 2570-71 (Kennedy, J., concurring).

property arguably generates some incidental benefit to the public.³³ The genesis of this failure to enforce the “public use” requirement lay in *Berman* and *Midkiff*, where the Court had erred in equating the concept of “public use,” the limitation on the state’s invocation of eminent domain, with that of “the police power,” a much broader concept.³⁴

Justice O’Connor criticized both the majority and Justice Kennedy for failing to give the lower courts any meaningful direction in seeking to identify impermissible takings designed to bestow a private benefit. As she observed, “the trouble with economic takings is that the private benefit and incidental public benefit are, by definition, merged and mutually reinforcing.”³⁵ Moreover, she said, the majority’s pretext test turned on the motives of state officials, which she considered a problematic basis for constitutional adjudication. She queried: “If it is true that incidental public benefits from a new private use are enough to ensure the ‘public purpose’ in a taking, why should it matter, as far as the Fifth Amendment is concerned, what inspired the taking in the first place?”³⁶

Justice Thomas added his own dissent. Arguing that the Court should reconsider its precedents, he undertook a textual analysis of the Takings Clause and historical examination of understanding of the term “public use.” He would have held that government entities could invoke the power of eminent domain only to acquire property that would be held by the government or made accessible to the general public as of right.³⁷ He also complained that deference to public officials’ determinations that proposed uses qualified as “public uses” was both inappropriate and inconsistent with the non-deferential approach the Court takes in reviewing government actions threatening other

³³ Id. at 2673, 2675 (O’Connor, J., concurring).

³⁴ Id. at 2674-75 (O’Connor, J., dissenting); *accord, id.* at 2683-84, 2685-86 (Thomas, J., dissenting). Justice O’Connor distinguished *Berman* and *Midkiff* from the case before the Court, explaining that the taking in those cases targeted properties that were inflicting affirmative harm, and the takings themselves had served to eliminate that harm. Id. at 2674-75.

³⁵ Id. at 2675-76 (O’Connor, J., dissenting).

³⁶ Id. at 2675-76 (O’Connor, J., dissenting).

³⁷ Id. at 2679, 2681, 2682 (Thomas, J., dissenting).

Bill of Rights protections.³⁸ He pointedly noted that poor and minority communities would be those most likely suffer displacement under the majority's ruling — first, land in such communities is more often underutilized, second, such communities possess the least political power.³⁹

B. The Congressional Response

As noted above, congressional reaction was swift. It consisted of the House's resolution disapproving the decision, the introduction of companion Senate and House bills seeking to limit federal involvement in economic development projects furthered by the use of eminent domain, and the enactment of an appropriation rider.

The House Resolution states that the majority opinion in *Kelo* “renders the public use provision in the Takings Clause of the Fifth Amendment without meaning,” and “justifies the forfeiture of private property through eminent domain for the sole benefit of another private person.” The resolution asserts that the dissenting opinion affirms the principle that the eminent domain power may be employed only to “compel an individual to forfeit her property for the public's use, but not for the benefit of another private person.” Quoting the dissent, it declares that beneficiaries of the decision are “likely to be those citizens with disproportionate influence and power in the political process, including large corporations and development firms.” The resolution declares that “all level of government have a constitutional responsibility and moral obligation” to defend property rights and that such a duty requires each level of government to “exercise the power of eminent domain only for the good of public use [sic].” The Resolution then specifically disapproves of the majority's opinion and explicitly endorses the dissenting opinion.⁴⁰

The resolution expresses the sense of the House that state and local governments use eminent domain only for purposes that serve the public good, and pay just compensation when they do — any taking that fails to satisfy those requirements “constitutes an abuse of government power and a

³⁸ Id. at 2584-85 (Thomas, J., dissenting).

³⁹ Id. at 2686-87 (Thomas, J., dissenting). He reviewed the history of local economic redevelopment, including the Urban Renewal program, to show that such efforts predominantly displaced minority and poor communities. Id.

⁴⁰ H. Res. 340, § 1.

usurpation of” individual property rights.⁴¹ The resolution further declares that eminent domain should never be used to advantage one party over another. It urges state and local governments to abstain from using *Kelo* “as a justification to abuse the power of eminent domain,” and expressly “reserves the right to address through legislation any abuses of eminent domain by State and local government” occasioned by *Kelo*.⁴²

The companion House and Senate bills to overturn *Kelo*, entitled “Protection of Homes, Small Businesses, and Private Property Act of 2005,” have been introduced by Representative Phil Gingrey and Senator John Cornyn respectively.⁴³ The bills set forth findings that largely criticize the majority’s opinion and endorse the dissenters’ views. The bills do not explicitly invoke any particular enumerated congressional power. The bills provide that eminent domain may be used to acquire property only for “public use” and specify that the term “public use” shall not be construed to include economic development. The drafters have left the term “economic development” undefined. As Justice Stevens noted in *Kelo*, a variety of takings, such as those that further exploitation of a state’s natural resources, might be considered takings in aid of economic development.⁴⁴ Given the bill’s context, however, courts might well construe any resulting legislation as limited to economic revitalization plans for non-blighted areas of the type at issue in *Kelo*.⁴⁵ The Act applies to “all exercises of eminent domain power by the Federal Government,” and “all exercises of eminent domain power by State and local government through the use of Federal funds.”⁴⁶ The statute neither explicitly provides a right of action against the federal government nor

⁴¹ Id., § 2(A) - ©).

⁴² Id., § 2(e) & (F)

⁴³ S. 1313 (Sen Cornyn); H.R. 3083 (Representative Gingrey).

⁴⁴ *Kelo*, 125 S.Ct. at 2662 n.8.

⁴⁵ Many courts have accepted removal of blight as a “public use” that could justify condemnation. Indeed, Justice O’Connor does so herself. *Kelo*, 125 S.Ct. at 2674-75. However, there has been some criticism about the validity of blight determinations, BERLINER, *supra* note 4, at 5; GREENHUT, *supra* note 4, at 7-9, and interpreting the statute to allow removal of blight might require federal agencies funding projects (and perhaps federal courts adjudicating challenges to the funding of projects) to review “blight” determinations.

⁴⁶ S. 1313, §3(c); H.R. 3083, §3(c).

abrogates state sovereign immunity. The bills have been referred to committee.⁴⁷

Representatives Scott Garrett and Mark R. Kennedy, pursuing a separate legislative initiative, proposed a rider to the fiscal year 2006 appropriations bill covering the Departments of Transportation, Treasury, and Housing and Urban Development. The House adopted the Rider, and the appropriations bill is now under Senate consideration. The Rider bans expenditure of any funds to enforce the judgment of the Court in *Kelo*.⁴⁸ Garrett explained that “if a private developer is going to push someone off their land, out of their house, and destroy that house or small business, then he should foot the bill for any infrastructure that he is going to build.” Thus the rider is designed to “ensure that the Federal Government does not contribute in any way financially” to such projects.⁴⁹

The various legislative proposals focus on use of eminent domain by the federal government and the use of federal funds to support state and local projects made possible by those government’s use of their powers of eminent domain. The limitations on the federal government’s use of eminent domain will likely prove insubstantial — few federal projects are likely to be considered “economic development projects.”⁵⁰ The limitation on federal funding could prove more significant, but its significance is difficult to assess, in part because the breadth of the prohibition is unclear. The proposed provisions, the Garrett-Kennedy Rider and the Gingrey-Cornyn bill, may prohibit use of federal funds only to pay for property acquired for economic development purposes against the landowner’s will, but allow federal funding of other aspects of the redevelopment project. Alternatively, the proposed provisions might preclude all federal financial assistance to a project that

⁴⁷ At least two other bills have been introduced, including the Strengthening the Ownership of Private Property Act, H.R. 3404, and the Private Property Rights Protection Act, H.R. 3135.

⁴⁸ H. Amdt. 427 to H.R. 3058.[Representative Scott Garrett] An amendment to reduce the funding of the Supreme Court in reaction to *Kelo*, H. Amdt 411, however, was overwhelmingly defeated 374-42. 151 CONG. REC. H5466.

⁴⁹ 151 CONG. REC. H5505 (Representative Garrett). In his view, “the practical effect of this will mean that we will prohibit Federal dollars from going out to be used for support purposes, infrastructure and the like, so that a private developer will benefit from the loss of people’s homes.” It would mean that “a bus stop will not be built on what was once [the] home [of someone whose property was taken by eminent domain] in order that a commercial building can be built there instead. Moreover, it would “prohibit Federal dollars from building a new entrance ramp or exit ramp in partnership with that developer so that that developer can build a strip mall there instead.” *Id.* The Rider, of course, would limit federal funding only for the upcoming fiscal year.

⁵⁰ Two major works detailing the use of eminent domain to further economic development do not identify any significant federal economic development projects, much less ones accomplished by the federal government’s invocation of its own eminent domain powers. See, BERLINER, *supra* note 4; GREENHUT, *supra* note 4.

uses land acquired by a state or local use of eminent domain that Congress identifies as improper. More broadly still, the proposals might ban federal funding for anything related to a project sited in whole or in part on land acquired from an unwilling landowner for economic development purposes (such as providing transportation funds for a mass transit station on or near the site of offending project).

Moreover, such limitations seem largely incongruent with Congress's real concerns. In particular, Congress views the Court as providing inadequate protection for property rights.⁵¹ Indeed, in Congress' view, the Court's ruling reflects a fundamentally flawed conception of citizens' rights under the Fifth Amendment. In addition, members of Congress expressed concern that the ruling would harm minorities, the poor, and the politically powerless. Such concerns are not fully addressed by limiting the federal government's use of eminent domain nor by limiting federal funding of state and local projects. State and local authorities would remain free to take property in circumstances where individuals' property rights, at least as conceptualized by Congress, are violated.

C. Congressional Options

Congress could seek to address state and local use of eminent domain in several ways. It could: 1) legislate with regard to the measure of compensation due as a result of a "taking," 2) establish procedures or disclosure requirements for states and localities invoking eminent domain, 3) specify certain rebuttable presumptions, identifying circumstances in which courts should presume a taking is for private use, and thus impermissible, absent evidence to the contrary, or 4) proscribe the use of eminent domain in certain circumstances. I will discuss the first option at length and the remainder more briefly.

The measure of "just compensation" may not adequately compensate property owners for their losses and, accordingly, may lead government officials to overuse eminent domain. Ordinarily, when it invokes eminent domain, the government has the right to acquire the property for market

⁵¹The concerns motivating this legislation are clearly a desire to vindicate the right to property, which members of Congress believe that the Constitution protects. 151 CONG. REC. H5505 (Representative Kennedy)("property rights are fundamental freedom . . . Congress must take action to protect property owners in the aftermath of this flawed decision"); 151 CONG. REC. H5578 (Representative Sensenbrenner).

value.⁵² It need not compensate owners for the increase in value expected as a result of the government project.⁵³ Nor need it compensate individuals for financial losses and hardships other than those recognized by the market.⁵⁴ Thus the courts ordinarily do not require the government to compensate business owners for the loss of good will or losses from business interruption caused by the need to relocate following a taking of their business premises. Nor do the courts require the government to compensate property owners for the sentimental or subjective value of their property, the inconvenience of moving, or the cost of finding a comparable property. And indeed, such uncompensated costs may be particularly pronounced for homeowners and businesses forced to relocate from poorer neighborhoods.⁵⁵

The measure of “just compensation” has importance, because the Taking Clause’s “just compensation” requirement provides a practical financial constraint on the use of eminent domain. A government project furthered by the use of eminent domain must be more valuable than the compensation due in order for the use of eminent domain make economic sense. If the measure of “just compensation” understates a takings’s full social cost, relieving the government from paying some of the costs attendant its taking, the government will sometimes engage in the practice even when its action’s real social costs exceed its benefits.⁵⁶ A measure of compensation that accurately

⁵² *United States v. Miller*, 317 U.S. 369, 374 (1943); 4 NICHOLS ON EMINENT DOMAIN, *supra* note 2, at § 12.02, at 12-70 to 12-71.

⁵³ *United States v. Miller*, 317 U.S. 369, 375 (1943); 3 NICHOLS ON EMINENT DOMAIN, *supra* note 2, at § 8.07 8-107 to 8-109 (“[t]he general rule forbids consideration of the effect of the proposed project upon the value of the property taken”); 4 NICHOLS ON EMINENT DOMAIN, *supra* note 2, at § 12.02[1] at 12-73; *id.* at §12B.17[1], at 12B-202.

⁵⁴ *U.S. v. Petty Motor Co.*, 327 U.S. 372, 377-78 (1946); 4 NICHOLS ON EMINENT DOMAIN, *supra* note 2, at § 12.01 at 12-21 (no account of sentimental value); *id.*, at § 12.04[2] at 12-96 to 12-98; *id.*, at § 13.14 at 13-189 to 13-190, 13-195; RICHARD A. EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* 183 (1985); W. Harold Bingham, *Fair Market Value, Just Compensation, and the Constitution*, 24 VAND. L. REV. 63 (1971). Merrill, *supra* note 1, at 82-83; Note, *Condemnations, Implicit Benefits, and Collective Losses: Achieving Just Compensation Through Community*, 107 HARV. L. REV. 696, 696 & n.1 (1994) [hereinafter “*Achieving Just Compensation* ”].

⁵⁵ 3 NICHOLS ON EMINENT DOMAIN, *supra* note 2, § 8.22, at 8-164 to -165; *Achieving Just Compensation Through Community*, *supra* note 54, at 696.

⁵⁶ See Daniel A. Farber, *Public Choice and Just Compensation*, 9 CONST. COMMENTARY 279, 281 & n.7, 287-88. Farber suggests, however, that public-spirited legislators would take into account the benefits and costs of takings even if no compensation is required, and, in most circumstances, will offer compensation to the dispossessed. As I suggest in discussing the political context of local takings, *supra* text accompanying notes 133-39 and 185-89, local officials may not seriously weigh the costs of eminent domain on those displaced without a financial incentive to do so. See generally,

reflects a taking's true cost would force governments to properly balance public needs against the harm to individuals.⁵⁷ At the same time, of course, imposing unrealistically high costs would improperly inhibit use of eminent domain, and indeed could, if severe enough, preclude governments from using such authority altogether.⁵⁸

Congress might establish minimum requirements for just compensation when property is acquired for transfer to third parties in connection with a locality's redevelopment efforts.⁵⁹ In particular, Congress could reasonably conclude that private developers should not receive all of the surplus generated by the redevelopment project, but rather that displaced landowners should share the surplus.⁶⁰ Thus, for purposes of determining "just compensation" in circumstances involving economic redevelopment takings, the valuation of the land might focus on the value of the property to be condemned in light of the prospect that the redevelopment project will be completed. Congress might also require that just compensation for such takings take into account the inconvenience a reasonable person would suffer in relocating.⁶¹ Such awards will make the cost of the project more representative of the project's true social costs, while relieving individuals of financial burdens that

WILLIAM A. FISCHER, *REGULATORY TAKINGS: LAW, ECONOMICS, AND POLITICS* 364-65 (1995) (describing the need for financial incentives to restrain government decision-making in the regulatory takings context).

⁵⁷ Placing limitations on damages and valuation rules provide one means to protect constitutional rights, *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 348-50 (1974) (limiting presumed damages in certain defamation cases); *BMW v. Gore*, 517 U.S. 559 (1996) (setting forth guideposts limiting size of punitive damages award). Granted in both the defamation and punitive damages contexts, the constitution right was vindicated by limiting state damage awards rather than requiring larger awards than those provided by the state.

⁵⁸ *U.S. v. One Parcel of Land*, 131 F. Supp. 443 (1955). In other words, compensation must be just to the condemnor as well as the condemnee. 3 NICHOLS ON EMINENT DOMAIN, *supra* note 2, at § 8.07 8-107 to 8-109.

⁵⁹ *United States v. Fuller*, 409 U.S. 488 (1973); *United States v. Bodcaw*, 440 U.S. 202 (1979).

⁶⁰ Merrill, *supra* note 1, at 85 (discussing surplus); EPSTEIN, *supra* note 4, at 162-66, 173-74. States have required payments of special damages and premiums for private and municipal corporations to exercise the power to condemn. 3 NICHOLS ON EMINENT DOMAIN, *supra* note 2, at § 8.06[1] at 8-100 to 8-101. See also EPSTEIN, *supra* note 4, at 184 (discussing use of bonuses in England).

⁶¹ Setting forth standards for determining the amount government bodies must pay for a "taking" is not an exclusively judicial function. For example, in some states valuation of property taken by eminent domain is considered is a judicial issue. Nevertheless legislatures have the power to require that condemnors pay more than minimum compensation. 4 NICHOLS ON EMINENT DOMAIN, *supra* note 2, at § 12.01[3] at 12-35; *id.*, at § 8.22[1].

society as a whole should shoulder.⁶² Moreover, it may ameliorate some of the harsh effects of redevelopment efforts on residents of neighborhoods targeted for redevelopment, in effect providing them sufficient compensation to allow them to secure comparable property.⁶³

In addition, the projects constructed for economic development purposes differ from many traditional government projects sited on land acquired by eminent domain. Economic development projects are owned by profit-making entities who expect to make a profit on the projects constructed, unlike most government projects, which are not owned by such profit-making entities. While requiring citizens to subsidize projects, by receiving compensation that does not fully cover the inconvenience caused by eminent domain, might perhaps be justified as a sacrifice reasonably demanded of citizens to support non-profit-making government operations (which may be non-profit-making precisely because the nature of the good or service precludes the market from producing the optimal amount of such good or service), it seems unreasonable to demand such sacrifice for the benefit of a profit-making enterprise. Profit-making enterprise should be expected to cover the costs of producing the goods and services they offer, including the cost of displacing pre-existing landowners.⁶⁴

The remaining options for congressional action can be discussed more briefly. Congress could seek to ensure that eminent domain decisions are made in a transparent and politically-accountable matter — the second option listed at the start of this section. To promote transparency and political accountability, Congress might require that local officials compile a record and set forth their justifications for concluding that a project will benefit the public as well as a private developer.

⁶² The Supreme Court has observed that one principle underlying the Takings clause which is used to determine when compensation for government action is required is whether particular individuals have been asked to bear a burden that should be shared more broadly by the public. *See, Tahoe Sierra Preservation Council v. Tahoe Regional Planning Agency*, 535 U.S. 302, 332 (2002); *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 123-24 (1978).

⁶³ *United States v. 564.54 Acres of Land*, 441 U.S. 506 (1979).

⁶⁴ Congress might also focus on ensuring the displaced access to comparable property. Thus, for example, Congress might require that plans for economic development make provision for housing in the same community that would be affordable for some portion of those who would be displaced. Such an approach would ensure that economic revitalization projects do not drive residents from a neighborhoods with unique attributes, like proximity to downtown or to a beach, with no hope of return because of the high price of housing in the redeveloped community. Such an approach might be particularly appropriate when the likely effect of the redevelopment effort is to radically change the racial and ethnic composition of the area, by displacing communities comprised largely of racial or ethnic minorities.

Perhaps it can also require that the decision be made by politically-accountable officials. Indeed, in *Kelo*, Justice Kennedy noted the importance of procedures for determining whether a redevelopment plan served a public purpose. He noted that Connecticut's procedures ensured the compiling of a record that would facilitate judicial review.

As a third option, Congress might seek to identify particular circumstances in which a taking is especially likely to have an impermissible private purpose. For example, local governments' attempts to condemn extremely small parcels unrelated to any larger redevelopment plan might warrant heightened scrutiny. Congress might establish a presumption that a taking has a prohibited private purpose where one private company will gain possession of all of the land taken by eminent domain, particularly when that enterprise provides a large part of the employment or tax revenue for the applicable jurisdiction. Concerns about local officials' motives might justify reversing the usual presumption of validity applicable to invocations of eminent domain. For example, Congress might mandate heightened judicial scrutiny when government officials seek to condemn tax-exempt property. Such adverse presumptions would be rebuttable.⁶⁵

Rebuttable presumptions might also be used to address the concerns frequently expressly about the heightened impact of such condemnations on racial and ethnic minorities.⁶⁶ For example, Congress could establish a rebuttable presumption that an economic redevelopment project that had a disproportionate effect on racial and ethnic minorities, the elderly, or the poor would be presumed improper unless local officials could make some heightened showing of necessity for the project. However, given that a large percentage of redevelopment efforts presumably have a disproportionate impact on such groups, such a rule might make virtually all urban economic development projects presumptively illegal. Such an extensive rebuttable presumption might be held to unduly infringe upon the prerogatives of localities recognized in *Kelo*.

Congress could embrace a fourth option, precluding states and localities from using eminent domain altogether in certain limited circumstances. For example, Congress could preclude the use

⁶⁵ Calling local officials to testify about their motives can itself be considered an expression of disrespect. Indeed, federal courts seek to avoid such inquiries even when reviewing the actions of unelected federal administrative officials. *See*, *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 420 (1971); *United States v. Morgan*, 313 U.S. 409, 422 (1941); *San Luis Obispo Mothers for Peace v. NRC*, 789 F.2d 26, 44 (D.C. Cir. 1986).

⁶⁶ See text accompanying notes 148-50 *infra*.

of eminent domain to acquire land to build a stadium primarily for use by a professional sports team. Or, for example, Congress might preclude the use of eminent domain in connection with an economic development project, when the land used for the project is solely or predominantly that of a non-profit institution. Such a rule would target the concern that local officials employ eminent domain to replace tax exempt institutions with taxable ones. Pursuing the fourth option involves placing the greatest restrictions on state and local powers, and thus carries the greatest risk of exceeding congressional power.

I do not necessarily suggest that any particular one or more of these ideas is a good one. However, the discussion above provides a range of options that Congress might consider. Perhaps more importantly, for purposes of this paper, these options provide a useful context for assessing the scope of Congress' powers to restrict states and localities' use of eminent domain.

PART II: Congress' Powers Regarding State and Local Use of Eminent Domain

Legislation restricting state and local use of eminent domain would most likely be premised on one or more of three Constitutional provisions conferring legislative power on Congress. Congress could ground such legislation either on the Enforcement Clause of the Fourteenth Amendment, the Commerce Clause, or the Spending Clause.⁶⁷ Both the Enforcement Clause power and the Commerce Clause power have been subjected to limitations under the Court's federalism cases. While no federalism challenge to Congress' invocation of the Spending Clause has succeeded in the past 65 years, the Court has indicated that principles of federalism limit Congress' power to condition federal aid to states upon states' commitment to take certain actions.⁶⁸ I will discuss each of the three sources of potential congressional power in turn.

⁶⁷ U.S. CONST. art. I, § 8, cl. 1 (Spending Clause); U.S. CONST. art. I, § 8, cl. 3 (Commerce Clause); U.S. CONST. amend 14, § 5 (Enforcement Clause). These powers are supplemented by the Necessary and Proper Clause, U.S. CONST. art. I, § 8, cl. 18.

⁶⁸ *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1, 17 & n.13.

A. The Enforcement Clause of the Fourteenth Amendment

Congress often has a role in enforcing constitutional rights. Sometimes it even effectively defines the substantive scope of a constitutional right by legislating substantive provisions reflecting its conception of the right.⁶⁹ Congress may provide individuals greater legal protection from the federal government than governing judicial doctrine requires. For example, the Electronic Communications Privacy Act (the successor of Title III of the Omnibus Crime Control Act of 1968)⁷⁰ includes provisions that protect citizens against wiretapping that exceed the constitutional requirements established by the federal courts.⁷¹

Congress may also expand upon judicially-declared constitutional rights by granting citizens such expanded rights against states and their subdivisions. It may do so pursuant to its Article I, Section 8 enumerated powers, like the power to regulate interstate commerce.⁷² However, Congress lacks such power when there is a countervailing constitutional restraint,⁷³ such as the federalism doctrines protecting the states. Congress possesses enhanced powers under the Fourteenth Amendment. Section 1 of the Amendment prohibits the states from “depriv[ing] any person of life, liberty or property without due process of law” and from “deny[ing] to any person within its

⁶⁹ For a more extended development of this theme, see Bernard W. Bell, *Marbury v. Madison and the Madisonian Vision*, 72 GEO. WASH. L. REV. 197, 209-17 (2003) (hereinafter “Bell, *The Madisonian Vision*”).

⁷⁰ Electronic Communications Privacy Act of 1986, Pub. L. 99-508 (codified, as amended, at 18 U.S.C. §§ 2510-2522).

⁷¹ Similarly, Congress has by statute granted military personnel rights to the free exercise of religion, which are greater than the rights required by the courts as a constitutional matter. For example, 10 U.S.C. § 3073 and 10 U.S.C. § 774(a)-(b), provide rights that, according to *Goldman v. Weinberger*, 475 U.S. 503 (1986), Congress need not provide to military personnel. See, *Cutter v. Wilkinson*, — U.S. —, 125 S.Ct. 2113, 2121-22 (2005). Republican efforts in the mid-1990's, to require compensation when regulation reduced the value of property were a failed effort to expand the rights of individuals as against the federal government. *E.g.*, Private Property Owners Bill of Rights, H.R. 790, § 8, 104th Cong (1995) (unenacted); see, William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 COLUM. L. REV. 782, 879 & nn.450 (1995) (listing legislative proposals mandating compensation when regulation diminishes property values); Timothy Egan, *Unlikely Allied Attack Property Rights Measures*, N.Y. TIMES 1 (May 15, 1995); John H. Cushman, Jr., *The 104th Congress: Property Rights*, N.Y. TIMES 19 (March 3, 1995).

⁷² Privacy Protection Act of 1980, Pub. L. 96-440 § 101, 94 Stat. 1879 (codified at 42 U.S.C. § 2000aa); Right to Financial Privacy Act of 1978, Pub. L. No. 95-630, 92 Stat. 3697 (codified as amended at 12 U.S.C. §§ 3401-3422); Video Privacy Protection Act of 1988, Pub. L. No. 100-618, 102 Stat. 3195 (codified at 18 U.S.C. § 2710); Omnibus Crime Control and Safe Streets Act of 1968, Title III, Pub. L. 90-351, 82 Stat. 197 (superceded); see Bell, *The Madisonian Vision*, *supra* note 68, at 205-06 & nn. 53-57.

⁷³ 1 TRIBE, *supra* note 8, § 5-16, at 946.

jurisdiction the equal protection of the laws.” The Amendment’s Enforcement Clause, section 5, confers upon Congress the power to enforce the Fourteenth Amendment even when federalism doctrines would ordinarily bar such actions.⁷⁴ As the Court has explained, the Civil War Amendments were specifically designed to expand federal power and intrude upon state sovereignty.⁷⁵ However, neither section 5 nor any other Civil War Amendment completely abrogates certain core federalism principles.⁷⁶

In the modern era, the scope of congressional power under the Enforcement Clause has been a matter of intense debate. Three cases in the 1960's and 1970's show the extent to which the Court was willing to permit Congress a significant role in the defining constitutional rights. In *South Carolina v. Katzenbach*,⁷⁷ the Court upheld the Voting Rights Act of 1965, finding that the statute lay within the powers of Congress under the Enforcement Clause of the Fifteenth Amendment, guaranteeing the right to vote regardless of race, color, or previous condition of servitude.⁷⁸ The Voting Rights Act allowed the Department of Justice officials to preclude the use of literacy tests in certain jurisdiction and subjected those jurisdictions to a requirement that changes in their voting rules had to be precleared with the Department of Justice. Covered jurisdictions were those that used certain devices to limit the franchise and in which less than 50% of voting age residents were registered to vote. The Court explained that Congress’ legislative power pursuant to the Fifteenth Amendment’s Enforcement Clause extended beyond merely generally forbidding states from violating the Fifteenth Amendment. Moreover, Congress need not leave it to the judicial process to fashion particular remedies for systematic constitutional violations or apply such extraordinary

⁷⁴ Gregory v. Ashcroft, 501 U.S. 452, 468 (1991); City of Rome v. United States, 446 U.S. 156, 179 (1980). This is most evident in the doctrine that section 5 authorizes Congress to abrogate the States’ Eleventh Amendment sovereign immunity. Fitzpatrick v. Bitzer, 427 U.S. 445, 452-56 (1976); accord, Kimel v. Florida Bd. Of Regents, 528 U.S. 62, 80 (2000).

⁷⁵ Gregory v. Ashcroft, 501 U.S. at 468; City of Rome v. United States, 446 U.S. at 179.

⁷⁶ Gregory v. Ashcroft, 501 U.S. at 468.

⁷⁷ 383 U.S. 301 (1966).

⁷⁸ The Act provided that the Attorney General could suspend literacy tests and similar state-imposed voting qualifications for five years from the last occurrence of voting discrimination. The Act also established a pre-clearance requirement in certain jurisdictions in which voter registration was particularly low, suspending all new voting regulations until federal authorities determined that their use would not perpetuate voting discrimination.

remedies to particularly problematic political jurisdictions.⁷⁹ The Court noted that Congress had reasonably found that case-by-case adjudication had not eliminated state violations of the Fifteenth Amendment.⁸⁰ The Supreme Court's holding, prior to the Voting Rights Act's passage, that state reliance on literacy tests as a voter qualification did not violate the Fifteenth Amendment *per se*,⁸¹ did not preclude Congress from banning the use of such tests in particular jurisdictions. The legislative record showed that in most, *but not all*, jurisdictions the Voting Rights Act subjected to the potential suspension of literacy tests, the test had been instituted, constructed, and administered in a disparate fashion to disenfranchise African-Americans.⁸²

In *Katzenbach v. Morgan*,⁸³ the Court upheld Congress' invocation of Section 5 as its source of authority to enact a statute requiring states to allow citizens educated in Spanish to vote. The Court recognized that part of its limitations in defining the scope of rights in adjudicating constitutional cases were uniquely judicial, and that the scope of constitutional rights might be greater than those judicially declared. In *Oregon v. Mitchell*,⁸⁴ the Court upheld a statute giving 18 year olds the right to vote, despite its own precedent suggesting that the Fifteenth Amendment permitted states latitude in determining the minimum voting age.⁸⁵

The Rehnquist Court has asserted judicial preeminence with regard to constitutional interpretation and shown increased solicitude toward federalism. With regard to the Enforcement Clause of the Fourteenth Amendment, the nascent doctrines being developed in some earlier cases

⁷⁹ *South Carolina v. Katzenbach*, 383 U.S. at 327. It explained that: "On the rare occasions when the Court has found an unconstitutional exercise of these powers, in its opinion Congress had attacked evils not comprehended by the Fifteenth Amendment."

⁸⁰ *Id.* at 328.

⁸¹ *Lassiter v. Northampton Co. Bd. of Elec.*, 360 U.S. 45 (1959).

⁸² *South Carolina v. Katzenbach*, 383 U.S. at 333-34.

⁸³ 384 U.S. 641 (1966).

⁸⁴ 400 U.S. 112 (1970).

⁸⁵ Interestingly, during this time period in the Highway Beautification Act, the Court required local government to pay compensation for the regulation of land prohibiting billboards even though under the then-extant law such a regulation was almost certainly not a regulatory taking. The statute was upheld in *Vermont v. Brinegar*, 379 F. Supp. 606 (D. Vt. 1974). Of course, this controversy arose before *National League of Cities v. Usery*, and certainly before the resurgence of federalism in the Rehnquist Court.

have been limited in *City of Boerne v. Flores*, *Florida Prepaid Post-Secondary Education Expense Board v. College Savings Bank*, *United States v. Morrison*, *Kimel v. Florida Board of Regents*, *Dickerson v. United States*, and *Board of Trustees of the University of Alabama v. Garrett*.⁸⁶ Those cases have suggested that Congress may enforce the constitutional standards set by the Court, but that the Section 5 power does not give Congress the power to change those doctrines.⁸⁷ Thus, in *City of Boerne*, the Court invalidated the Religious Freedom Restoration Act (“the RFRA”) because it gave individuals greater rights against state and local regulation than the Court had held constitutionally necessary.⁸⁸ Likewise in *Morrison*, the Court invalidated the Violence Against Women Act (“VAWA”), which gave a cause of action to victims of gender-motivated violence, concluding that it lay beyond Congress’ Section 5 powers to ensure women the “equal protection” of the laws. And in *Dickerson*, the Court held invalid congressional legislation providing for the admissibility of criminal confessions, as inconsistent with *Miranda v. Arizona*. It did so even though the *Miranda* Court had adopted the warnings as one of a number of potential prophylactic rules designed to protect criminal defendants’ Fifth Amendment rights, and had invited Congress to consider alternative approaches to safeguarding those rights.⁸⁹

The Court has crafted “congruence” and “proportionality” tests to limit Congress’ exercise of the Section 5 power. The Court demands “congruence” between the remedial measures Congress has adopted and the constitutional violations Congress seeks to address. The constraints imposed

⁸⁶ *City of Boerne v. Flores*, 521 U.S. 507 (1997); *Florida Prepaid Post-Secondary Education Expense Board v. College Savings Bank*, 527 U.S. 627, 638 (1999); *United States v. Morrison*, 529 U.S. 598 (2000); *Kimel v. Florida Board of Regents*, 528 U.S. 62, 80-82 (2000); *Dickerson v. United States*, 530 U.S. 428 (2000); *Board of Trustees of the University of Alabama v. Garrett*, 531 U.S. 356 (2001).

⁸⁷ *City of Boerne v. Flores*, 521 U.S. at 519, 535-36; *U.S. v. Morrison*, 529 U.S. at 437.

⁸⁸ The RFRA enacted in direct response to *Employment Division Department of Human Resources v. Smith*, 494 U.S. 872 (1990), where court had overturned *Sherbert v. Verner*, 374 U.S. 398 (1963). See, *City of Boerne v. Flores*, 521 U.S. at 512-16; *Cutter v. Wilkinson*, 125 S.Ct. at 2117-19.

⁸⁹ Like *City of Boerne v. Flores*, however, the challenged statute was a clear effort to do no more than reverse the Court by reestablishing the test pre-existing before *Miranda*. 18 U.S.C. § 3501. In particular, as with pre-*Miranda* law, Congress made “voluntariness” of the confession the crux of the issue. See *Haynes v. Washington*, 373 U.S. 503, 513-15 (1963); *Miranda v. Arizona*, 384 U.S. 436, 506-08 (1966) (Harlan, J., dissenting). Moreover, the statute did not provide any efficacious alternative to the *Miranda* warning, that would ensure that statements made during custodial interrogation were voluntary. The House resolution of disapproval of *Kelo* has a similar flavor of a direct acceptance of an argument explicitly rejected by the Court (albeit not reestablishing pre-existing law).

on the states must be “proportional,” that is, sufficiently tailored to qualify as a response to constitutional violations rather than an attempt to redefine judicially-declared constitutional rights.⁹⁰ Narrow majorities have sometimes found statutes congruent and proportional, as, in *Nevada Department of Human Resources v. Hibbs*⁹¹ and *Tennessee v. Lane*, though usually only one or two of the Justices who have crafted the tests have been persuaded.⁹² Generally, the dissenters have insisted upon quite demanding requirements, such as systematic proof of intentional unconstitutional discrimination.⁹³

Thus, any congressional attempt to overrule *Kelo* would not likely succeed. It seems clear that the Court would invalidate a statute that simply specified that economic development could never qualify as a “public use.” This would, in effect, change the right Congress purports to protect against state encroachment.⁹⁴ However, a more focused approach designed to address specific abuses of the eminent domain power in the service of economic development may well lay within Congress’ Section 5 power.

1. The Comparative Role of Congress and the Courts

The Court often cannot construct a rule that is perfectly coterminous with the scope of a

⁹⁰ *City of Boerne v. Flores*, 521 U.S. at 530-34; see also, *id* at 534; *Kimel*, 528 U.S. at 81-89; *Florida Prepaid*, 527 U.S. at 640, 647-48; *Garrett*, 531 U.S. at 372-74; *Lane*, 541 U.S. at 531-33.

⁹¹ 538 U.S. 721 (2003).

⁹²For example, the evidence the majority found sufficient to satisfy the congruence and proportionality tests in *Tennessee v. Lane* had been deemed insufficient in *Board of Trustees of the University of Alabama v. Garrett*, even though both cases involved the same statute. Four of the five Justices who had found the evidence insufficient in *Garrett* did so *Lane*. One of the five found the evidence sufficient and joined the four Justices who had dissented in *Garrett*. In *Hibbs*, only two of the five Justices that had joined the opinion of the Court in *City of Boerne v. Flores*, *Morrison*, and *Garrett*, *Kimel*, and *Florida Pre-Paid* found the evidence of unconstitutional discrimination sufficient — a majority of the five did not.

⁹³ *Hibbs*, 538 U.S. at 745-54 (Kennedy, J., dissenting); see, *id*, at 749-50.

⁹⁴See note 86 *supra*.

Most of the uses of eminent domain are accomplished not by states, but by localities. Generally, states delegate their powers of eminent domain to localities. In any event, the various federalism doctrines, other than sovereign immunity, protect localities as well as states. *Printz v. U.S.*, 521 U.S. 898, 931 n.15 (1997); see *National League of Cities v. Usery*, 426 U.S. 833, 855- 856, n. 20,(1976) (overruled on other grounds by *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528,(1985)); *TRIBE, supra* note 8, 917-919.

constitutional right.⁹⁵ Sometimes, perhaps controversially, the Court will specify a prophylactic rule that sweeps more broadly than the constitutional right.⁹⁶ At other times the court concludes, for institutional reasons, that it cannot judicially enforce a constitutional provision.⁹⁷ Sometimes it does little more. At other times, however, it specifies procedures designed to ensure that decision-makers adequately take constitutional considerations into account.⁹⁸ For example, the Court has refused to hold that the Free Speech and Free Press Clauses immunize media entities from taxation, however it requires that any taxes on media entities be ones of general applicability. The Court has justified this non-discrimination rule, at least in part, as a means to ensure that the political branches of government, primarily at the state and local level, do not infringe upon press rights, absent some substantial justification.⁹⁹

The Court has also outlined procedures for government institutions, even local government institutions, of which it is particularly suspicious. Consider the restrictions the Supreme Court has

⁹⁵ Bell, *The Madisonian Vision*, *supra* note 68, at 202 n.29 (collecting sources); *see, id.* at 202-04. Indeed, rules are inherently either over-inclusive or under-inclusive in relation to their purposes. See Bernard W. Bell, *Dead Again: The Nondelegation Doctrine, the Rules/Standards Dilemma and the Line Item Veto*, 44 VILLANOVA L. REV. 189, 199-200 (1999)(hereinafter “*Dead Again*”). Only an *ad hoc* standard can be coterminous with the constitutional interests it protects. Such standards, unfortunately, almost invariably produce unpredictable and inconsistent results. *Id.* at 200-201; Kathleen M. Sullivan, *Foreword: The Justice of Rules and Standards*, 106 HARV. L. REV. 22, 62-63 (1992). Moreover, because the Supreme Court takes so few cases, it will have difficulty policing the lower courts’ application of the standard. *See generally*, Peter L. Strauss, *One-Hundred Fifty Cases Per Year: Some Implications of the Supreme Court’s Limited Resources for Judicial Review of Agency Action*, 87 COLUM. L. REV. 1093 (1987) (discussing implication of the court’s limited docket on substantive doctrines involving judicial review of agency decisions).

⁹⁶ Brief for the United States at 44-47 *Dickerson v. U.S.*, 530 U.S. 428 (2000) (No 99-5525)(reprinted at 2000 WL 141075). Scalia took aim at this approach, at least when the Court applied its prophylactic rules to states in his dissent in *Dickerson v. U.S.*, 530 U.S. at 457-61 (Scalia, J., dissenting).

⁹⁷ Bell, *The Madisonian Vision*, *supra* note 68, at 202 n.29 (collecting sources); *see, id.* at 202-04; Michael McConnell, *Comment: Institution and Interpretations: A Critique of City of Boerne v. Flores*, 111 HARV. L. REV. 153 (1997).

⁹⁸ Indeed, the Court has largely embraced such an approach in its equal protection jurisprudence, as captured by the first prong of the *Carolene Products* approach. *U.S. v. Carolene Prods.*, 304 U.S. 144, 152 n.4 (1938); *see generally*, JOHN HART ELY, *DEMOCRACY AND ITS DISCONTENTS: A THEORY OF JUDICIAL REVIEW* (1980); *Railway Express Agency, Inc. v. New York*, 336 U.S. 106, 112-13 (1949); Bell, *The Madisonian Vision*, *supra* note 68, at 217-21.

⁹⁹ *See*, *Leathers v. Medlock*, 499 U.S. 439, 445-46 (1991); *Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue*, 460 U.S. 575 (1983). As the Court explained in *Minneapolis Star & Tribune*, “when the state singles out the press . . . the political constraints that prevent a legislature from passing crippling taxes of general applicability are weakened, and the threat of burdensome taxes are acute.” *Id.* Note that the Court does not limit singling out the press or some elements of the press for especially favorable treatment. *See generally*, Bernard W. Bell, *Filth, Filtering and the First Amendment*, 53 COMMUN. L.J. 191, 227-28 (2001).

imposed upon state and local censorship of obscenity. In *Freedman v. Maryland*,¹⁰⁰ the Court outlined concerns about censors' lack of objectivity. Such censors might err on the side of prohibiting constitutionally protected speech in order to justify their existence. Moreover, if the state or locality make securing judicial review unduly onerous, a censor's decision might in practical effect be final.¹⁰¹ In light of these structural concerns, the Court designed requirements that had to be met by local censorship regimes.¹⁰²

Hampton v. Mow Sung Wong provides another example of the Court's crafting of structural protections where it could not, for institutional reasons, engage in rigorous substantive review. There, the Court specified that certain decisions rife with constitutional implications be made at the highest levels of government to ensure that the decisions were made by officials sensitive to the constitutional interests. The Court held that a Civil Service Commission regulation barring aliens from federal employment violated the Equal Protection and Due Process Clauses.¹⁰³ The Court acknowledged the government's broad powers over immigration, and the concomitant limited judicial review of constraints on aliens, and noted that the Civil Service Commission had presented justifications that could support such a rule. Ordinarily, then, under a "rational basis" analysis, the Court would have upheld regulation. However, the Court concluded that only the President or Congress could invoke the interests used to justify the regulation — since the aliens had been admitted into the country pursuant to congressional and presidential decisions, due process required that decisions to deprive such aliens of an important liberty interest, *i.e.* working for the federal

¹⁰⁰380 U.S. 51 (1965).

¹⁰¹Id. at 58-59 ("Because the censor's business is to censor, there inheres the danger that he may well be less responsive than a court--part of an independent branch of government--to the constitutionally protected interests in free expression").

¹⁰²Id. at 58-59. In particular, under *Freedman*, any system of prior restraints must: 1) afford a prompt hearing to the person whose communication is at issue, 2) require the state to shoulder the burden of showing that the material is obscene, 3) defer the imposition of a valid final restraint on the material until a judicial proceeding is commenced and completed, and 4) require the state to seek affirmation of its initial finding of obscenity. See *id.* at 58-59; NOWAK & ROTUNDA, *supra* note 7, at § 16.61(c), at 1207-08.

¹⁰³ 426 U.S. 88, 103 (1976); *New York Times Co. v. United States*, 403 U.S. 713, 732, 740 (1971) (Pentagon Papers case)(White, J., concurring). See generally, Bell, *The Madisonian Vision*, *supra* note 68, at 217-20.

government, be made at a comparable level of government.¹⁰⁴

Congress can undoubtedly conclude that political safeguards do not adequately protect state prerogatives or individual rights from federal encroachment, and enhance those safeguards. For instance, Congress has acted on such a conclusion with regard to its own procedures, as exemplified by the Unfunded Mandates Reform Act of 1995.¹⁰⁵ Congress should also possess the authority to assess whether political safeguards fail to adequately prevent state and local governments from encroaching upon citizens' federal constitutional rights, and take action if it judges those safeguards inadequate. Indeed, federalism, like the separation of powers, creates a tension between governmental actors that protects individual liberty.¹⁰⁶ While recently scholars and jurists have focused on the states' role in protecting individual liberty from federal encroachment, the reverse is also true. As Alexander Hamilton observed: "Power being almost always the rival of power, the general government will at all times stand ready to check the usurpation of the state governments."¹⁰⁷ The Fourteenth Amendment's Enforcement Clause plays a critical role in the system of checks and balances that shape federal-state relations, explicitly empowering Congress to act when constitutional rights are jeopardized by state and local governments.

State and local governments' exercise of eminent domain implicates the right to own property,¹⁰⁸ including the right to prevent government expropriation of that property for the private benefit of another.¹⁰⁹ The *Kelo* majority, and in particular Justice Kennedy, as well as the dissenters,

¹⁰⁴ *Hampton v. Mow Sung Wong*, 425 U.S. at 116. Or, if the Commission is to impose such a restriction, it must defend it based on considerations that are properly the concern of the Commission.

¹⁰⁵ Pub. L. 104-4, 109 Stat. 48.

¹⁰⁶ *Gregory v. Ashcroft*, 501 U.S. at 458-59; *Printz v. U.S.*, 521 U.S. at 921; Lewis B. Kaden, *Politics, Money, and Stave Sovereignty: The Judicial Role*, 79 COLUM. L. REV. 847, 855-57 (1979).

¹⁰⁷ FEDERALIST No. 28 at 181 (Hamilton)(Clinton Rossiter ed.).

¹⁰⁸ See, *Lynch v. Household Finance Corp.*, 405 U.S. 538, 552 (1972) (right to enjoy property is an important personal right) Indeed, in his path-breaking article entitled the New Property, Charles Reich argued that a property interest should be recognized in government licenses, government grants, and government employment because having a property right in such essentials was crucial to an independent citizenry. Charles A. Reich, *The New Property*, 73 YALE L.J. 733 (1964); id. at 756-60, 768-71, 771-74 (discussing the relationship between property and liberty).

¹⁰⁹ See Zygmunt J.B. Plater & William Lund Norine, *Through the Looking Glass of Eminent Domain: Exploring the "Arbitrary and Capricious" Test and Substantive Rationality Review of Governmental Decisions*, 16 B.C. ENVTL. AFF. L. REV. 661, 663-64 (1989) ("Eminent Domain condemnation represents one of the legal system's most drastic non-penal

acknowledged the existence of such a constitutionally-protected right.¹¹⁰

However, the Court appears unable to vindicate such constitutionality protected rights due to institutional concerns, namely the difficulty of formulating a judicially-administrable test that does not arrogate to courts decisions about the role of government in society and the interrelationship between the public and the private, issues that, in a democracy, the political branches of government should resolve.¹¹¹ The Justices agreed that the government cannot take property from one citizen and transfer it to another solely to advantage that other person,¹¹² but how is the Court to enforce this limitation? The Court could either impose its conception of the legitimate ends of government on state and local officials, review local government decision-making to identify the presence of an illicit private purpose, or place somewhat arbitrary limits on the government's power to invoke eminent domain.¹¹³

The first option is problematic and promises a return to *Lochner*-Era jurisprudence. Public use, at least if defined in terms of benefits sought rather than the types of uses to which the property is put, requires the Court to categorize governmental purposes as "public" or "private" in a context where public and private interests are inextricably intertwined.¹¹⁴ Indeed, to the extent that interest group theory has succeeded in convincing us that politics really consist of interest groups, some large

incursions into the rights of individuals"); James W. Ely, Jr., *Can the "Despotic Power" Be Tamed*, 17 PROBATE AND PROPERTY 31, 31 (Dec. 2003) ("eminent domain is one of the most intrusive powers of government. It requires that individual owners relinquish their property without their consent").

¹¹⁰ *Kelo*, 125 S.Ct. at 2661; id. at 2669 (Kennedy, J., concurring).

¹¹¹ Indeed, William Treanor argues that the Just Compensation requirement itself was a procedural protection designed to constrain government choice in exercising its power of eminent domain. Treanor, *supra* note 70, at 827, 829-30, 832, 834, 854, 860. Saul Levmore has also made an argument about the structural aspect of Just Compensation. Saul Levmore, *Just Compensation and Just Politics*, 22 CONN. L. REV. 285, 306-08 (1990).

¹¹² *Kelo*, 125 S.Ct. at 1661; id., at 1669 (Kennedy, J., concurring).

¹¹³ See, Jennifer Maude Klemetsrude, *The Use of Eminent Domain for Economic Development*, 75 NORTH DAKOTA L. REV. 783, 812 (1999).

¹¹⁴ *Kelo*, 125 S.Ct. at 2675-76 (O'Connor, J., dissenting).

and diffuse and others small and concentrated, competing to secure government action,¹¹⁵ we might question whether any significant public interest exists independent of private interests.¹¹⁶ So, for example, even when government actions is meant to benefit specific individuals, one might easily view the action as one that provides a public benefit.¹¹⁷ Efforts to distinguish public and private benefits for purposes of constitutional analysis have led courts, on both the federal and state level, to invalidate salutary social programs, like day care programs for working mothers, and other salutary efforts, like financially assisting an industry's pollution control initiatives, on grounds that they serve a "private" purpose.¹¹⁸ In eminent domain in particular, the efforts of state courts to develop a concise definition of public use that distinguishes between permissible and impermissible has hardly been a success.¹¹⁹

¹¹⁵ Frank H. Easterbrook, *Foreword, The Court and the Economic System*, 98 HARV. L. REV. 4, 14-18 (1984); Jonathan R. Macey, *Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model*, 86 COLUM. L. REV. 223, 232 (1986). See also, Richard Fallon, *What is Republicanism and Is It Worth Saving?*, 102 HARV. L. REV. 1695, 1698 (1989); Peter H. Schuck, *Against (and For) Madison: An Essay in Praise of Factions*, 15 YALE L & POL'Y REV. 553, 556-57 (1997).

¹¹⁶ See TRIBE, *supra* note 8, at 837. And indeed, if public interest theory is correct most legislation is private-regarding, pushed by narrow concentrated groups for their own interest and disadvantaging diffuse majorities, even if the narrow interest groups claim that their interest is the public interest, as they generally do. Macey, *supra* note 114; Easterbrook, *supra* note 114.

¹¹⁷ Even the case in which a federal district court found a pretextual public purpose used to justify a taking for private purposes, the government officials made a plausible argument that helping the company was for the benefit of the larger community. 99 Cents Only Stores v. Lancaster Redevelopment Agency, 237 F. Supp. 2d 1123, 1129 (C.D. Cal 2001). Local officials asserted that if they did not condemn plaintiffs property to transfer it to Costco, Costco would relocate and the surrounding businesses would fail, ultimately resulting in the area becoming blighted. *Id.* The Court was able to reject the argument on a statutory ground, that the California Constitution did not permit condemnation to forestall prospective blight.

Another example is the private necessity defense, allowing a private citizen to use private property to avoid physical injury of even significant property damage. *Ploof v. Putnam*, 81 Vt. 471, 71 A. 188 (1908); *Vincent v. Lake Erie Transp. Co.*, 109 Minn. 456, 124 N.W. 221 (1910); DAN B. DOBBS, *THE LAW OF TORTS* § 107 (2000). In this context, generally providing for persons who might suffer significant property loss is viewed as a public purpose, otherwise such a doctrine might raise a significant problem with regard to whether the taking constituted "public use."

¹¹⁸ *Citizens Sav. & Loan v. Topeka*, 87 U.S. 655 (1874); *Walton v. Edmonds*, 106 N.E. 41 (1914); *Ferrie v. Sweeney*, 72 N.E.2d 128 (Ohio Ct. Common Pleas 1946); *Stanley v. Department of Conservation & Development*, 199 S.E.2d 641 (N.C. 1973)(criticized in *Madison Cable v. City of Morgantown*, 325 N.C. 634, 647, 386 S.E.2d 200, 207-08 (1989). *Common Cause v. State*, 455 A.2d 1 (Maine 1983)(rejecting attack); see generally, WILLIAM D. POPKIN, *MATERIALS ON LEGISLATION: POLITICAL LANGUAGE AND THE POLITICAL PROCESS* 1057-58 & 1063-64 (4th ed. 2005).

¹¹⁹ 2A NICHOLS ON EMINENT DOMAIN, *supra* note 2, § 7.02[1](noting that several jurisdictions have concluded that the task is impracticable); *Brown v. Gerlad*, 100 Me. 351, 61 A. 785 ('The term public use is difficult of exact definition and most courts have avoided giving one . . . In an inevitably changing world an attempt to do so would be unwise, if

The second option, which the *Kelo* majority appears to have chosen, focuses on public officials' subjective motives.¹²⁰ Justice O'Connor's accusation that both the majority and Justice Kennedy offer the lower courts little guidance in identifying illicitly-motivated invocations of eminent domain is surely well-taken.¹²¹ And indeed, motive tests, such as that adopted by the majority, have often proven anemic and provided citizens with at best illusory protection against government officials.¹²² Thus, for example, even though criminal defendants can defend themselves by alleging discriminatory prosecution, the presence of a motive test in a context where the government decision-maker customarily enjoys a great deal of discretion, means that very few discriminatory prosecution claims succeed.¹²³ As I suggest below, such tests confront the courts with numerous difficulties.¹²⁴

Third, one might limit the government's invocation of eminent domain to preclude use in certain circumstances even if it furthers the public interest in important, or even essential ways.¹²⁵ Thus, Justice Thomas would construe the "public use" requirement as permitting government acquisition of land only when the government will retain ownership or when the land, though owned

not futile"); *Board of Education v. Pace College*, 271 N.Y.S.2d 773 (1966) ("The concept of public use within the context of condemnation laws is not susceptible of precise definition"); 2A NICHOLS ON EMINENT DOMAIN, *supra* note 2, § 7.02[7] at 7-37.

¹²⁰ Formidable evidentiary difficulties are presented by purpose test, Steven D. Smith, *Symbols, Perceptions, and Doctrinal Illusions: Establishment Neutrality and the "No Endorsement" Test*, 86 MICH. L. REV. 266, 284-90 (1987).

¹²¹ *Kelo*, 125 S.Ct. 2676 (O'Connor, J., dissenting).

¹²² Richard H. Fallon, Jr., *Foreword, Implementing the Constitution*, 111 HARV. L. REV. 56, 95 (1997).

¹²³ *Race and the Prosecutor's Charging Decision*, 101 HARV L. REV. 1520, 1557 (1988); N. Douglas Wells, *Prosecution as an Administrative System: Some Fairness Concerns*, 27 CAP. U. L. REV. 841, 843 (1990); Note, *Constitutional Risks to Equal Protect in the Criminal Justice System*, 114 HARV. L. REV. 2098, 2108 (2001); see RANDALL KENNEDY, RACE, CRIME AND THE LAW 354 (1997) (stating the research had uncovered no cases in which a court has ruled that a prosecutor has abused his charging discretion on grounds of racial discrimination).

¹²⁴ ELY, *supra* note 97, at 136-45 (finding such tests useful).

¹²⁵ Most often, state constitutions will list certain uses that benefit private parties as permissible, either by declaring them "public uses" or by allowing use of eminent domain for specified "private" uses. See, NICHOLS ON EMINENT DOMAIN, *supra* note 2, at §§ 7.03[10][c].

by a private entity, is accessible to all citizens (for free or on a fee-paid basis).¹²⁶ The theory has a rich heritage, but most courts have found it unduly restrictive.¹²⁷ Moreover, arguably even that test allows for takings that benefit a narrow range of private individuals. A general right of access possessed by all citizens may mean little if only few have an interest in access. The power to charge for access may also limit access to a narrow class as a practical matter. An expensive marina may nominally be available to all, yet, in reality, benefit only a narrow segment of the public who have the financial resources and interest to take advantage of the marina.

Thus, Congress can perhaps play a role in protecting property rights against state and local governments' use of their eminent domain powers. Skeptics may argue that allowing Congress to vindicate property rights, under authority granted by the Fourteenth Amendment's Enforcement Clause, would expand congressional power over the states beyond all means of constraint. After all, the limitations imposed on state legislatures by the Court in the name of protecting private property allowed the Court to severely hamper state regulation in the *Lochner* Era.¹²⁸ However, the Court could distinguish a congressional power to vindicate citizen's right to title in and physical possession of property from a broader and more dangerous congressional authority to protect property owners from state and local regulations that limit their use of property.

The distinction between depriving an owner of title or physical dominion over property and subjecting the property to regulation underlies the Court's jurisprudence — a physical invasion (much less formal assumption of title) is virtually always a "taking," enacting a regulation rarely constitutes a "taking."¹²⁹ As the Court explained in *Loretto v. Teleprompter Manhattan CATV Corp.*,

¹²⁶ *Kelo*, 125 S.Ct. at 2679, 2681, 2682 (Thomas, J., dissenting). Some states specify in their constitutions the types of takings that fall within the definition of "public use." 2A NICHOLS ON EMINENT DOMAIN, *supra* note 2, at §§ 7.03[10][c].

¹²⁷ 2A NICHOLS ON EMINENT DOMAIN, *supra* note 2, at §§ 7.02[2], 7.02[3], at 7-29, 7.02[5].

¹²⁸ See, ROBERT G. MCCLOSKEY, THE AMERICAN SUPREME COURT 150-57, 159-60, 161-62, 165-68 (1960); TRIBE, *supra* note 8, at §§ 8.2 - 8.4. See generally, NEIL K. KOMESAR, LAW'S LIMITS: THE RULE OF LAW AND THE SUPPLY AND DEMAND OF RIGHTS 111-12 (2001).

¹²⁹ *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 427-30 (1982) ("More recent cases confirm the distinction between a permanent physical occupation, a physical invasion short of an occupation, and a regulation that merely restricts the use of property"); *id.* at 435 (explaining normative attraction of physical appropriation rule). Granted this distinction has been criticized. EPSTEIN, *supra* note 4, at 93-104; Jed Rubenfeld, *Usings*, 102 YALE L.J. 1077, 1101-05 (1983). For a discussion of the narrow circumstances under which a court may find a regulatory taking, see *Lingle v. Chevron USA Inc.*, — U.S. —, 125 S.Ct. 2074, 2081-82 (2005) (four exceptions).

a physical taking is “the most serious form of invasion of an owner's property interests,”¹³⁰ destroying each of the rights associated with property ownership.¹³¹ Indeed, both the Court and scholars note that the distinction underlay the Framers’ conception of a “taking.”¹³² Several state constitutions suggest the unique nature of eminent domain by specifying that the courts must determine whether an asserted public use is actually public, without giving any deference to legislative determinations that the use qualifies as a “public use.”¹³³

Moreover, there is reason to believe that individual rights need protection in this sphere. On the most basic level, the large number of economic development takings might give rise to some skepticism about the legitimacy of the justification for those takings. In addition, local governments may be particularly likely to abuse their eminent domain powers. Many argue that local government is more representative than the national government, because local government offers citizens a more active role in government affairs.¹³⁴ Of course this very majoritarian responsiveness may place

¹³⁰ Though the protection extends beyond physical takings, a landowners right to compensation arguably extends only to regulations that courts consider functionally equivalent to government acquisitions. Daniel A. Farber, *Public Choice and Just Compensation*, 9 CONST. COMMENTARY 279, 304 (1992); Levmore, *supra* note 110, at 320 (“One might simply say that joined to the core of physical takings are cases in which the government sought to elevate form over substance in order to avoid compensating those burdened by its actions.”). See generally, FISCHER, *supra* note 56, at 334-35.

¹³¹ *Loretto*, 458 U.S. at 435-38; *accord*, *Tahoe Sierra Preservation Council v. Tahoe Regional Planning Agency*, 535 U.S. at 323-24 & n.19. In *Loretto*, the Court explained that a physical taking precludes the power to exclude, the most treasured right in the bundle. It forever denies the owner use of the property. It empties the right to transfer of any value. These are magnified by also taking title to property.

Of course the case involved a requirement of access to a cable company, and the Court did not assert that a physical invasion was a necessary element of a takings claim. And indeed, Jed Rubenfeld argues that the Court cannot consistently sustain the position that physical invasion is a sufficient condition for a taking. see Rubenfeld, *Usings*, *supra* note 128, at 1101-05; see, Treanor, *supra* note 70, at 811-12 (discussing current scholarly attacks on the “physicalist” conception of property). Though, of course, taking title is even more invasive and may be distinguishable from physical invasion. Accordingly, even Rubenfeld’s critique does not undermine the effort to distinguish regulating property from taking title to that property.

¹³² Treanor, *supra* note 70, at 791-92; *id.*, at 838-39 (discussing Madison’s views); *id.* at 794-95 (discussing early Supreme Court Cases); *The Legal Tender Cases*, 71 U.S. 551-52 (1871) (“The Takings Clause has always been understood as referring to direct appropriation and not to consequential injuries resulting from the exercise of lawful power”); Levmore, *supra* note 110, at 319.

¹³³ Ariz. Const. art. 2, § 17; Colo. Const. art. 2, § 14; Mo. Const. art. 1 § 28, Wash Const. art 1, § 16; see, 2A NICHOLS ON EMINENT DOMAIN, *supra* note 2, § 7.03[11][c].

¹³⁴ See, Bell, *The Madisonian Vision*, *supra* note 68, at 232. See also, *id.* at 236, 244 (localities closer to problems). Richard B. Stewart, *Pyramids of Sacrifice, Problems of Federalism in Mandating State Implementation of National Environmental Policy*, 86 YALE L.J. 1196, 1210-11 (1977)(discussion of four advantages of states — greater accuracy,

federal constitutionally-based interests in jeopardy.¹³⁵ More importantly, however, smaller units of government may more often be dominated by special financial interests, whose continued health and presence in the community are critical to the community and to its tax base. James Madison's writings reflect precisely these sorts of concerns — his most widely-recognized expression of these concerns is Federalist Number 10.¹³⁶

But there is particular reason for concern with regard to economic interests' undue influence on local decision-making pertaining to the use of eminent domain. In an era of tax aversion and a demand for government services, revenue-producing businesses may be critical to local political leaders. Indeed, the revenue provided by a commercial enterprise may have even greater significance than the votes of citizens adversely affected by an invocation of eminent domain. The criticisms of the use of eminent domain for economic development trace excessive and oppressive use of the practice to localities' hunger for tax revenues and the undue influence large commercial enterprises gain as a result.¹³⁷

Moreover, some takings may take place in circumstances where there is limited transparency.¹³⁸ Sometimes the motives of accountable local officeholders may be shrouded in

greater protection of liberty, greater degree of community, and greater diversity of approaches resulting from decentralization).

¹³⁵ Bell, *The Madisonian Vision*, *supra* note 68, at 234 & nn. 229-231. Indeed, the Court much more frequently invalidates state and local actions for illicit purposes than it does federal statutes. See *id.* at 246 & n.317.

¹³⁶ THE FEDERALIST No. 10 (James Madison); see generally, Bell, *The Madisonian Vision*, *supra* note 68, at 237-39. Madisonian concerns at the Founding that would give the national government power to nullify state enactments was rejected, JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 47-48, 51 (1996), but the Fourteenth Amendment makes this more viable at least with regard to constitutional rights and interests. See, FISCHER, *supra* note 56, at 7, 104-07, 328-29, 367 (discussing the problem of majority faction).

See generally, Merrill, *supra* note 1, at 115; Carol M. Rose, *Planning and Dealing: Piecemeal Land Controls as a Problem of Local Legitimacy*, 71 CALIF. L. REV. 839, 853-57 (1983); Treanor, *supra* note 70, at 843-44, 867; NAACP Brief at 28-29 (Local governments are particularly prone to capture by private, politically influential and economically powerful interests.).

¹³⁷ BERLINER, *supra* note 4, at 130 (casinos are big winners in condemnation because they bring the prospect of so much tax revenue); *Fasano v. Bd. Of County Comm'rs*, 264 Or. 547, 507 P.2d 23 (1973); KOMESAR, *supra* note 127, at 56-59 (discussing influence of economic interests like developers on local land use planning; *id.*, at 114-15 (citing sources)).

¹³⁸ *Armendariz v. Penman*, 75 F.3d 1311, 1321, 1321 (9th Cir. 1996); NAACP Br. at 29 n.35; Audrey F. McFarlane, *Local Economic Development Incentives in an Era of Globalization: The Exploitation of Decentralization and Mobility*, 35 URB. LAW. 305, passim (2003) (also discussing that there is little accountability to general public for such decisions).

Indeed, to the extent that the Republican Form of Government Clause is to guarantee public control of

secrecy. Sometimes the entities making decisions are not accountable to the electorate.¹³⁹ As one commentator has explained:

“The problem is also lack of public accountability. Economic development is carried out through a set of privatized structures and processes designed primarily, if not exclusively, to meet the needs of business elites and encourage capital investment in particular geographic areas to promote growth and increase in land prices and rents. That process is designed to be quickly responsive, private, and shielded from public scrutiny. This is accomplished through elites wielding informal channels of power as well as quasi-private government entities such as public authorities that operate free from public scrutiny.”¹⁴⁰

The Fourteenth Amendment should be viewed as conferring upon Congress the legislative authority to vindicate the interest in property protected by the Takings Clause. As with gender stereotypes that Congress sought to address in the Family and Medical Leave Act, the illicit conduct targeted here, abuse of eminent domain to advantage private parties rather than further public goals, may be too subtle to detect on a case-by-case basis. That was the Court’s rationale in upholding the Family and Medical Leave Act as permissible prophylactic legislation designed to secure equal protection of the laws.¹⁴¹ Analogously, in the context of First Amendment challenges to campaign finance regulation, the Court has also allowed broad prophylactic legislation regulating campaign contributions because illicit *quid pro quo* deals between officeholders, political parties, and

government, Deborah Jones Merritt, *The Guarantee Clause and State Autonomy: Federalism for A Third Century*, 88 COLUM L. REV. 1, 24-25 (1988)(discussing Framers’ views); TRIBE, *supra* note 8, at 908-10, that Clause itself might warrant intervention to ensure the transparency of local procedures for invoking eminent domain.

¹³⁹ NAACP Br. at 29 n.35 (“the delegation of the eminent domain power does not end at local governments, who are accountable to the public in at least some minimal way. The authority is commonly delegated to utilities, redevelopment agencies and the like”); McFarlane, *supra* note 137, at 314-15. See generally, FISCHER, *supra* note 56, at 330-31, 367 (suggesting greater scrutiny for administrative agencies in part because they are not subject to pluralist interest group pressures).

¹⁴⁰ McFarlane, *supra* note 137, at 314-15.

¹⁴¹ *Hibbs*, 538 U.S. at 736 (upholding statute because Congress reasonably concluded that gender-based stereotypes regarding the respective familial responsibilities of men and women “lead to subtle discrimination [by employers] that may be difficult to detect on a case-by-case basis”).

contributors are too subtle for case-by-case identification.¹⁴² And indeed, recall that the Supreme Court upheld the Voting Rights Act because case-by-case adjudication had proven inadequate to the task of protecting African-Americans' right to vote. The existence of such congressional authority nevertheless leaves a significant, and perhaps preeminent, role for the Judiciary. The Judiciary must consider whether the congressionally-prescribed prophylactic rules are reasonable limitations on state and local government's use of eminent domain in light of the threat to individual property rights.

Let us consider two types of potential congressional action: modifying the measure of "just compensation" in economic development cases and specifying certain presumptions with regard to the validity of official's invocation of eminent domain. Modification of the measure of "just compensation" can be justified as a means of addressing the judiciary's institutional inadequacies as a protector of property rights against invocations of eminent domain. Such an approach might then diminish the importance of judicial inquiries into the purposes of takings, by creating incentives for public officials and the citizenry they represent to balance the need for a taking and the true harm caused by the taking.¹⁴³ Modifying the measure of "just compensation" makes the political branches of government more sensitive to constitutional consideration, just as the requirement for generality makes taxing officials sensitive to the burden of taxes on media entities. Thus, state and local officials are less likely to abuse the power of eminent domain because using eminent domain will become more costly, at least to the extent it is used in furtherance of economic redevelopment.

Legislation specifying certain presumptions of invalidity for invocations of eminent domain in particular circumstances could perhaps be justified as prophylactic legislation designed to ensure the rights of property owners protected under the Fourteenth Amendment. Indeed, Justice Kennedy, in his separate concurrence, suggests that the Court will need to develop some guidelines, perhaps

¹⁴² In *McConnell v. Federal Election Commission*, 540 U.S. 93, 124 S.Ct. 619 (2003), the Court said that Congress could be concerned about the prospect the officeholders would decide issues according to contributor's wishes rather than on the merits or on their constituents' preferences. However, the Court noted, such corruption is neither easy to detect or to criminalize. It upheld a prophylactic rule limiting candidate solicitation of contributions of money for use by their political parties, explaining that removing "the temptation" provides the best means of presenting such corruption. *Id.* at 666.

¹⁴³ See, FISCHER, *supra* note 56, at 364.

in the form of rebuttable or irrebuttable presumptions,¹⁴⁴ if the public use requirement is to serve as a real constraint on state and local officials. He laid out some concerns, but suggested that his concerns by no means exhausted the issues. Justice Stevens' majority opinion also suggests that the majority might consider whether the presumption of regularity is warranted when a taking is not related to a comprehensive development plan.

Rebuttable presumptions would clearly more likely pass constitutional muster than irrebuttable ones. Thus, perhaps Congress can establish rebuttable presumptions that takings in certain circumstances are for private purposes, but may not establish irrebuttable presumptions, such as a presumption that no taking for economic purpose can be found a taking for "public use."¹⁴⁵ Indeed, rebuttable presumptions are likely to be less intrusive than the standard judicial response to circumstances in which case-by-case adjudication fails to safeguard individual rights, promulgation of a prophylactic rule. Such rules, like the rule regarding custodial interrogation set forth in *Miranda v. Arizona*, operate in large part as irrebuttable presumptions, sweeping within them more conduct than that which actually offends the relevant constitutional interests.¹⁴⁶

Congress might also focus legislation on protecting constitutional rights, other than the right to property, threatened by state and local use of eminent domain. Two such independent constitutional interests have been discussed in connection with the use of eminent domain for economic development: ensuring the free exercise of religion and preventing the denial of equal protection to racial groups or other "discrete and insular" minorities. With regard to the first, some have argued that local officials are especially likely to target buildings owned by religious

¹⁴⁴ Fallon, *supra* note 121, at 95 ("In light of history and familiar psychology, however, some types of actions--as identified either by their contents or their effects--can be seen in the aggregate as likely to reflect forbidden purposes. When this is so, a sensible doctrinal response is to elevate the applicable level of scrutiny.")

¹⁴⁵ Such an approach does not resurrect the discredited irrebuttable presumptions doctrine, see, e.g., *Vlandis v. Kline*, 412 U.S. 441 (1973); *Cleveland Bd. of Educ. v. LaFluer*, 441 U.S. 632 (1974); *Dept of Agriculture v. Murray*, 413 U.S. 508 (1973), which has now largely been abandoned. See generally, Bell, *Dead Again*, *supra* note 94, at 203-04. While legislative power should ordinarily not be subject to an equal protection challenge when it chooses to create an irrebuttable as opposed to a rebuttable presumption, the distinction may have relevance when Congress seeks to legislate in way that limit state exercise of constitutionally protected sovereign powers.

¹⁴⁶ See, Brief for the United States at 44-47 *Dickerson v. U.S.*, 530 U.S. 428 (2000) (No 99-5525)(reprinted at 2000 WL 141075)(outlining several judicially created prophylactic rules of constitutional law). Such rules presume that if the criteria triggering the rule is met, the conduct is unconstitutional, and offer government officials no opportunity to demonstrate that their actions are consistent with the underlying constitutional concerns, and thus should be permissible.

institutions for redevelopment, because such property is tax exempt. Local officials allegedly seek to replace religious institutions with owners, either commercial entities or residential property owners, that will produce the tax revenue needed to fund government activities.¹⁴⁷ The Fourteenth Amendment should authorize Congress to craft legislation providing focused protection to tax-exempt religious or other charitable institutions against state and local use of eminent domain.¹⁴⁸

The *Kelo* dissenters voiced concern about the disproportionate impact of economic development projects accomplished by eminent domain on “discrete and insular minorities.”¹⁴⁹ Justice Thomas in particular discussed at some length the effect the Urban Renewal program’s displacement of African-American communities. The destruction of Poletown, an ethnic neighborhood in Detroit, Michigan for the construction of a General Motors plant provides another widely-known notorious example of the deleterious effects takings by local authorities can have on racial and ethnic communities that lack political power. Others have expressed such concerns about the use of eminent domain for economic development.¹⁵⁰ While the dissenters sought to address these concerns by wholesale prohibition on economic redevelopment, such concerns could also be addressed by means of heightened review upon redevelopment efforts that have a disproportionate

¹⁴⁷ GREENHUT, *supra* note 4, at 160-188; 151 CONG. REC. H5584 (statement of Representative Sensenbrenner)(“I would point out that the property that is probably the most at risk under the *Kelo* case is that which belongs to our religious institutions and other organizations that have been granted tax exempt status pursuant to State law. ”); 151 CONG. REC. H5584 (Statement of Representative Tiahrt); David D. Kirpatrick, *Ruling on Property Seizure Rallies Christian Groups*, N.Y. TIMES A13 (July 11, 2005).

¹⁴⁸ For an argument for special protection for First Amendment uses see Saxer, *Eminent Domain Actions Targeting First Amendment Land Uses*, 69 MO. L. REV. 653 (2004).

The Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA) Pub. L. 106-274, 114 Stat. 803 (codified at 42 U.S.C. §§2000cc to 2000cc-5), may obviate the need for any additional protection for religious institutions. The Act provides that no government shall impose a land use regulation that substantially burdens religious practice or a religious institution unless the government establishes a compelling interest for doing so and the regulation is the least restrictive means for furthering that government interest. The subsection applies whenever the activity imposing the burden is federally funded or effects interstate commerce or involves individualized assessments of prospective land uses. More generally, it precludes all governments from imposing or implementing land use regulations in a way that discriminates against religious institutions or excludes religious institutions from the jurisdiction. 42 U.S.C. §2000cc.

¹⁴⁹ 125 S.Ct. at 2677 (O’Connor, J., dissenting); *id.* at 2686-87 (Thomas, J., dissenting). BERLINER, *supra* note 4, at 102; 151 CONG. RECORD H5581 (statement of Representatives Frank, etc.). Amicus like the NAACP did so as well.

¹⁵⁰ *See*, H. Res. 304; S. 1313; H.R. 3083; Nader & Hirsch, *supra* note 4; 151 CONG. REC. H5505 (statement of Rep. Kennedy); 151 CONG. REC. H5580 (statement of Representative Barney Frank); GREENHUT, *supra* note 4, at 113-120.

effect on racial, ethnic, or other “discrete and insular” minorities within the community.¹⁵¹

2. Congruence and Proportionality

Congruence and proportionality depend upon the existence of established constitutional doctrines that define constitutionally-impermissible state and local actions.¹⁵² Even where such established doctrines exist, Congress will possess very limited Section 5 power if the established constitutional tests are ones primarily designed to make government actions practically unreviewable.

The congruence and proportionality tests seek to distinguish mere harm to a group or interest as a result of state or local action, from harm to the group or interest at the hands of state or local governments that constitute a constitutional transgression.¹⁵³ Thus, in justifying legislative action, Congress must do more than show, for example, that the elderly or the handicapped have received unfavorable treatment at the hands of state officials, Congress must show that such unfavorable treatment amounts to constitutionally-prohibited discrimination.¹⁵⁴ Proportionality is then assessed relative to the extent of the violations Congress identifies. The established congruence and proportionality tests provide Congress substantial authority with regard to state and local actions that harm racial groups, for example, where clear constitutional standards designed to eliminate consideration of race (at least in ways that harms members of racial minorities) exist. The congruence and proportionality tests provide much less robust authority for Congress to attack state classifications subject only to “rational basis” review, a form of judicial review designed largely to immunize government action from meaningful constitutional scrutiny (often due to judiciary’s

¹⁵¹ Treanor, *supra* note 70, at 872-76 (suggesting heightened scrutiny of takings that have a disproportionate impact on “discrete and insular” minorities); Nader & Hirsch, *supra* note 4, at 224-31 (proposing strict scrutiny of invocations of eminent domain where takings cause significant costs, not reflected in the award of just compensation, primarily upon the politically powerless).

¹⁵² See, *Garrett*, 531 U.S. at 365 (“The first step in applying these now familiar principles [of congruence and proportionality] is to identify with some precision the scope of the constitutional right at issue.”).

¹⁵³ *City of Boerne*, 521 U.S. at 531 (unfavorable treatment insufficient, it has to be motivated by religious animus); *see generally, Garrett*, 531 U.S. at 368

¹⁵⁴ *Kimel*, 528 U.S. at 90; *Garrett*, 531 U.S. at 370.

concerns about its own institutional limitations).¹⁵⁵

The congruence and proportionality tests may fail to provide Congress with appropriate authority to constrain state conduct when judicial doctrines defining constitutional violations either have not been established or are in flux. When courts have not determined the types of conduct that violate the Constitution, it is difficult to assess any congressional constraints on state and local officials in relation to the state and local actions courts would recognize as constitutional violations.¹⁵⁶ The Court has not clearly defined the standard for finding a taking to be for a private, rather than a public, use, or, at least, the doctrine is now in flux. The Court appears to be working its way toward determining what purposes are illicit in the context of state and local invocations of eminent domain. At this point, several questions remain unanswered or at least subject to some doubt.

In considering challenges to state and local official's power to take property, the Judiciary could adopt an objective analysis, focusing on the effect of the taking, or a subjective analysis, focusing on the relevant decision-makers' subjective states of mind. Though many state doctrines defining "public use" seem to focus on the effect of the taking rather than the subjective motivations of decision makers,¹⁵⁷ the Supreme Court appears to have opted for the subjective approach.¹⁵⁸

¹⁵⁵ Gerald Gunther, *In Search for an Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 64 HARV. L. REV. 1, 8 (1972) (rational basis means minimal scrutiny with none in fact)

¹⁵⁶ In his *Morrison* dissent, Justice Souter argued that defendants could establish the constitutionality of the violence Against Women Act merely by showing that there had been significant violence against women before the statute was enacted, and that defendants need not show that such violence was unconstitutional as gender-motivated violence, because the Court had not even sufficiently set forth substantive doctrines defining the concept of "gender-motivated" was. *U.S. v. Morrison*, 529 U.S. at 629 n.2 (Souter, J., dissenting).

¹⁵⁷ In re Opinion of the Justices, 356 Mass. 775, 796, 250 N.E.2d 547, 558 (1969); 2A NICHOLS ON EMINENT DOMAIN, *supra* note 2, at § 7.02[4].

¹⁵⁸ *Kelo*, S.Ct. at 2669 (Kennedy, J., concurring) ("A court applying rational-basis review under the Public Use Clause should strike down a taking that, by a clear showing, is intended to favor a particular private party, with only incidental or pretextual public benefits"); *id.*, at 2661 (Stevens, J.) ("the City would no doubt be forbidden from taking petitioners' land for the purpose of conferring a private benefit on a particular private party . . . Nor would the City be allowed to take property under the mere pretext of a public purpose, when its actual purpose was to bestow a private benefit"); *id.* at 2675-76 (O'Connor, J.) (asserting, without protest from Justices Kennedy and Stevens that the majority has adopted a motive test).

In discussing pretext, the court might have been referring to the district court's analysis in *99 Cent Only Stores v. Lancaster Redevelopment Agency*, 237 F. Supp. 2d 1123, 1129 (C.D. Cal. 2001) (commercial property condemned only because Costco asserted that it would leave the community if the land were not condemned and alternatives were

Whether the Court continues to embrace a subjective approach or opts for an objective one, it will have to distinguish “public” purposes from “private” ones and determine the degree of public purpose sufficient to satisfy the “public use” requirement. The Court will have to identify purposes as public or private. For example, it will have to decide whether providing land to a major local employer to expand its operations is a “public” or “private” purpose. Assuming that it can do so, the Court will still need to determine the quantum of public purposes needed to satisfy the “public use” requirement. In particular, there are at least five major levels of public purpose from among which to choose.

First, the Court could hold that a taking must merely have some public purpose, no matter how negligible. Second, the Court could adopt a slightly more demanding standard, requiring a substantial public purpose. In other words, not only must the invocation of eminent domain have a public purpose, but that purpose must be more than a negligible consideration. Third, the Court could require that the public purpose be predominant, that is, the public purpose be the main purpose. Under this third approach, even if the public purpose is substantial, the taking is impermissible if that public purpose is not the predominant one. Of course, determining which of two or more purposes predominates poses significant problems in close cases (*i.e.*, the cases in which this standard might produce a different result from the substantial public purpose requirement). Fourth, the Court could focus on “but for” causation, and require that the public purpose be so compelling that the project would have been approved even if decision-makers had ignored any private purpose. In other words, the court would have to determine whether any private purpose was a “but for” cause of local officials’ decision to invoke eminent domain.¹⁵⁹ Fifth, the Court might adopt the most demanding standard, that the presence of any private purpose invalidates the taking, no matter how significant the public purpose.¹⁶⁰

available and no effort was made to purchase property). *See also*, *Armendariz v. Penman*, 75 F.3d 1311, 1321, 1327 (9th Cir. 1996).

¹⁵⁹ See *Mount Healthy v. Doyle*, 429 U.S. 274, 285-87 (1977); *accord*, *Bd. of Education v. Pico*, 457 U.S. 853, 871 n.22 (1982); *Arlington Heights*, 429 U.S. 252, 270-71 n.21 (1977).

¹⁶⁰ These options are phrased in terms of a subjective test, but an analogous range of choices exist if the Court ultimately adopts an objective standard. An objective test might examine who gains from the project, the government or the community as a whole or a few narrow interests. In focusing on the actual project advantages, the court could use any of the five following alternatives as the standard. Must the project merely produce some public benefit, a substantial

As others have noted, subjective tests are beset by a conceptual difficulty — which actors' motives are critical? Surely there will be a number of people involved in proposing the project from private lobbyists to elected city leaders to civil servants. Does the illicit motive of any one of them bar the taking? Or must the person with illicit motives have played a pivotal role, that is, must the person's contribution have been essential to the decision to proceed with the project? Or are the illicit motives of even such a critical participant dispositive in light of the proper motivation of other equally critical participants in the process?¹⁶¹

As we have seen, the congruence and proportionality tests may not perform well given the uncertainty of the underlying substantive constitutional doctrines regarding public use. However, the congruence and proportionality tests may permit a more relaxed and deferential review of congressional legislation in the context of constraining state and local invocations of eminent domain. First, the Court may find more deferential review of congressional eminent domain legislation appropriate because any regulation imposed upon the states need not involve abrogation of sovereign immunity, a particularly critical aspect of state sovereignty. (Of course, as discussed below, the eminent domain power might be considered an equally significant sovereign prerogative of state government).¹⁶² Second deferential review of congressional legislation seeking to restrict takings to those that serve a "public use" may be appropriate because such laws will seek to vindicate a fundamental right, which merits heightened scrutiny, rather than an equal treatment right asserted by a non-suspect group united by some characteristic, like age or disability.

Since *City of Boerne v. Flores*, every Enforcement Clause case in which the Court has applied the congruence and proportionality tests involved abrogation of state sovereign immunity, a particularly critical attribute of state sovereignty recognizes, at least to some extent, in the Eleventh

public benefit, a predominant public benefit, a public benefit so strong that the project was justified even without private benefit, or a benefit only to the public and have no private benefit? See NICHOLS ON EMINENT DOMAIN, *supra* note 2, at § 7.03[5][d], at 7-49 to 7-50.

¹⁶¹ Justice Scalia raises these questions in *Edwards v. Aguillard*, 482 U.S. 578, 636-39 (1987) (Scalia, J., dissenting) and makes a strong case for their intractability. See generally, *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 558 (1993)(Scalia, J., concurring).

¹⁶² See text accompanying footnotes 198 to 212 *infra*.

Amendment.¹⁶³ Arguably Congress's Section 5 power to authorize private claims for money damages against states is far more limited than its Section 5 regulatory powers over states. Notably, despite constitutionally-recognized sovereign immunity, the federal government may not only impose regulatory restrictions upon states, but may also pursue lawsuits against wayward states to enforce those regulatory restrictions.¹⁶⁴ In short, the Court may provide Congress greater leeway in constraining state and local use of eminent domain because, unlike most statutes based on the Section 5 power that have come before the Court since *City of Boerne v. Flores*, any federal eminent domain legislation would not abrogate state sovereign immunity.

The interest that Congress seeks to protect through restrictions upon state and local takings may affect the rigor with which the Court applies the congruence and proportionality tests. When Congress seeks to protect rights that the Court itself protects, in the context of constitutional adjudication, by subjecting government action to heightened scrutiny, the rigor of the congruence and proportionality tests are relaxed.¹⁶⁵ In *Hibbs*, the court upheld the Family and Medical Leave Act, explaining that the congruence and proportionality tests were less demanding because gender classification received intermediate scrutiny, unlike the classification in *Kimel* and *Garrett*, which

¹⁶³ *Alden v. Maine*, 527 U.S. 706, 715, 748-49 (1999) ("The States . . . retain 'a residuary and inviolable sovereignty.' . . . They are not relegated to the role of mere provinces or political corporations, but retain the dignity, though not the full authority, of sovereignty. . . . *The generation that designed and adopted our federal system considered immunity from private suits central to sovereign dignity*"); *Federal Maritime Comm'n v. South Carolina Ports Auth.*, 535 U.S. 743, 751-52, 760, 765, 769 (2002). Of course the Court has noted that the Eleventh Amendment does not set forth the full extent of constitutionally-protected state sovereign immunity. *Id.*, at 752-53; *Alden v. Maine*, 527 U.S. at 727-30.

Note that the invocations of eminent domain for urban redevelopment are usually made by localities. Constitutionally-based sovereign immunity does not cover such entities. *Alden v. Maine*, 527 U.S. at 756-57.

¹⁶⁴ *Alden v. Maine*, 527 U.S. at 732-33, 754-56; *South Carolina Ports Auth.*, 535 U.S. at 752; *Garrett*, 531 U.S. at 376 (Kennedy, J., concurring) ("It must be noted, moreover, that what is in question is not whether the Congress, acting pursuant to a power granted to it by the Constitution, can compel the States to act. What is involved is only the question whether the States can be subjected to liability in suits brought not by the Federal Government . . . but by private persons seeking to collect moneys from the state treasury without the consent of the State."); *TRIBE*, *supra* note 8, at 1379-80; *TRIBE*, *supra* note 8, at 1377 ("might these decisions mean only that some policies may not be enforced through private lawsuits for damages — hardly a retrograde idea for the Court to advance?").

¹⁶⁵ *Hibbs*, 538 U.S. 731 (rational basis plus allows more relaxed and congruence analysis — this time because the classification was one that required intermediate scrutiny; *Tennessee v. Lane*, 541 U.S. 509, 529 (2004) (rational basis plus allows more relaxed congruence and proportionality analysis).

involved classifications subject only to rational basis scrutiny.¹⁶⁶ In *Lane*, the Court applied the congruence and proportionality tests with less rigor because the statutory provisions under review, which ensured the handicapped physical access to courts, vindicated the right of access to courts, an amalgamation of several fundamental rights that give rise to heightened constitutional scrutiny.¹⁶⁷

The Court's "rational basis" language in *Kelo* suggests that a landowner's claims that his property has been taken for private use receives a level of scrutiny resembling that applicable to classifications based on age, disability, and poverty,¹⁶⁸ But fundamental rights, like the right to practice religion, the right to speak, and the right to own property, differ from equal treatment rights. Government classifications that burden fundamental rights are subject to heightened scrutiny, and this could justify the more relaxed congruence and proportionality review, as suggested in both *Tennessee v. Lane* and in *Hibbs v. Winn*.

However, *Florida Prepaid Post-Secondary Education Expense Board v. College Savings Bank*,¹⁶⁹ addressed a federal statute remedying state appropriation of property. The State claimed that Congress had exceeded its Section 5 powers in enacting the statute. The Court found that the statute failed the congruence and proportionality tests, and did not appear to have employed any sort of relaxed scrutiny. However, the *Florida Prepaid* analysis would not govern review of a statute

¹⁶⁶ Chief Justice Rehnquist, for the majority, noted that gender classifications received intermediate scrutiny, they must serve "important governmental objectives" and "substantially relate" to the achievement of those objectives. Moreover, any justifications for such classifications proffered must not rely on overbroad generalizations about the different talents, capacities, and preferences of males and females. Given the rational basis scrutiny courts used with respect to classifications based on age and disability, to invoke section 5 to address age and disability discrimination, Congress had to show "widespread pattern" of irrational reliance on such criteria. *Hibbs*, 538 U.S. at 735; *Kimel*, 528 U.S. at 90. The showing required to justify federal legislation attacking gender discrimination by states was less demanding given the heightened scrutiny due gender classifications. *Hibbs*, 538 U.S. at 735. However, in *Morrison*, which predates *Hibbs*, the Court overturned VAWA, finding that it failed the congruence and proportionality test, even though the statute sought to ensure gender equality.

¹⁶⁷ Though Congress was legislating with regard to the disabled, not a suspect classification, it was legislating to ensure disabled citizens' access to the courts. Access to the courts is a fundamental right, which encompasses the Due Process and Confrontation Clause rights of criminal defendants to attend the proceedings against them, the due process rights of civil litigants to access to courts to invoke judicial processes, the Sixth Amendment right that juries comprise a "fair cross section" of the community and thus not exclude identifiable groups playing major roles in the community, and the First Amendment's guarantee of a public right of access to criminal proceedings. *Tennessee v. Lane*, 541 U.S. at 522-23.

¹⁶⁸ *Massachusetts Bd. Or Retirement v. Murgia*, 427 U.S. 307 (1976)(age); *Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432 (1985)(disability); *James v. Valtierra*, 402 U.S. 137 (1971)(poverty).

¹⁶⁹ 527 U.S. 627 (1999).

seeking to limit state and local official's taking powers to protect citizens right to retain title to possession of their property. *Florida Prepaid* involved a federal statute that required the state to pay damages to patent holders when states infringed patents. A state could unquestionably acquire the property at issue if it paid the owner, and the Court concluded that Congress has not established sufficient state violations of citizen's right to property in the patent context. In particular, Congress had not shown that the remedies for such infringement under state law were not fully effective in ensuring that patent owners received compensation for state infringements of their patent. A federal statute seeking to limit the state and local authority recognized in *Kelo* would seek to vindicate a different interest, a property owner's interest in preventing the government from taking his property at all, even assuming the government were prepared to pay compensation. Thus, the effectiveness of the state remedies providing for compensation, critical in *Florida Prepaid*, would be irrelevant — because they would not vindicate the property owner's interest. The only relevant state remedies would be those that resulted in preventing or rescinding the government's acquisition of the property against the owner's will.¹⁷⁰

The proportionality test may well leave some significant leeway for congressional legislation seeking to constrain state and local use of eminent domain. The contrast between the Religious Freedom Restoration Act (“the RFRA”), overturned in *City of Boerne v. Flores*, and the Family and Medical Leave Act, upheld in *Nevada Department of Human Resources v. Hibbs*, is instructive. The RFRA subjected all state and local action to invalidation if that action “substantially burdened” the exercise of religion, unless the relevant government body could demonstrate that its action furthered a compelling state interest by the least restrictive means. The RFRA's coverage was “universal,” it applied to all branches of the state government, to all state officials, and all individuals acting under color of state law, and restricted the operation of all statutes and the implementation of statutory or other state law. Moreover, the RFRA subjected such state action to scrutiny that equaled that of the most demanding constitutional test.

The FMLA required employers, including state governments, to allow middle and lower level

¹⁷⁰ *Cf.*, *Lingle v. Chevron U.S.A., Inc.*, 125 S.Ct. at 2083-84 (discussing the difference between a claim that an action constitutes a regulatory taking, which assumes the validity of the government action and merely seeks compensation and a substantive due process challenge to a government action constraining property rights, which contests the very validity of the government action).

employees to take up to 12 weeks of unpaid leave annually to care for an ill spouse, child, or parent. The majority found the statute proportional to the constitutional violations resulting from state and local application of gender stereotypes with regard to the relative familial responsibilities of men and women.¹⁷¹ In making this finding, the Court noted that many employees were exempt from the operation of the statute, namely employees who had been with their employer for less than one year, as well as those in high-ranking or sensitive positions, including state elected officials, their staffs, and appointed policymakers. Moreover, the FMLA did not require the employer to pay the employee during such leave, and the twelve-week maximum duration of FMLA-mandated leave was modest. The Court observed that unlike the RFRA, which broadly applied to every aspect of a state's operations, the FMLA had been "narrowly targeted at the faultline between work and family — precisely where [unconstitutional] sex-based overgeneralizations" persist.¹⁷²

Some of the potential congressional responses discussed above focus rather precisely either on 1) counteracting the pressures that may well lead local officials to use of eminent domain to further private parties' private purposes, or 2) seeking to ensure that in certain limited circumstances states and localities' decisions to invoke eminent domain become subject to more than perfunctory scrutiny, scrutiny that surely will not even approach the rigor of the "strict scrutiny" standard employed in certain equal protection contexts. Nevertheless, the more precisely Congress focuses any eminent domain legislation on real threats that local officials will use eminent domain to further private purposes or will fail to seriously consider the limits on their eminent domain powers implicit in the "public use" requirement, the more likely the congressional legislation is to be upheld. Finally, while certainly not required, a jurisdiction-specific approach to legislation, like that which characterizes the Voting Rights Act, may be particularly appropriate. In particular, the wide disparity in both the incidence of economic development takings in various states and the procedural limitations on the use of eminent domain, suggests that the risk of local officials taking property for private purposes will likely vary quite substantially depending on the state in which the invocation

¹⁷¹ In particular Congress found pervasive a stereotypical assumption that women had familial responsibilities that took precedence over their occupational duties, while men did not — and that such stereotypes led to employment discrimination that forced women to assume the role of primary caregivers, further reinforcing the prevailing stereotypes. *Hibbs*, 538 U.S. at 736.

¹⁷² *Hibbs*, 538 U.S. at 737.

of eminent domain occurs.

In short, despite the Court's recent federalism rulings, section 5 of the Fourteenth Amendment can provide a basis for some efforts to precisely target state and local abuses of eminent domain.

B. The Commerce Clause

Given the extraordinary breadth of Congress' Commerce Clause powers, the Clause may have more potential than the Fourteenth Amendment's Enforcement Clause to serve as a basis for federal legislation restricting local eminent domain practices. The Commerce Clause's reach, like that of Section 5, is limited by federalism concerns exemplified by the Tenth Amendment. Prior to *United States v. Lopez*,¹⁷³ the argument that the Commerce Clause provided an adequate basis federal legislation restricting the use of eminent domain would have been relatively routine. Surely, in the aggregate, the numerous instances in which eminent domain is used to take real estate and transfer it to business entities for commercial redevelopment substantially effected the national economy. *Lopez*, and *United States v. Morrison*,¹⁷⁴ have imposed constraints on the breadth of Congress's Commerce Clause power.¹⁷⁵ In particular, when Congress seeks to legislate with regard to intra-state non-commercial activity, the Commerce Clause may not provide legislative authority, even if the activity has a substantial effect on interstate commerce.¹⁷⁶ And, indeed, in *Gonzales v. Raich*¹⁷⁷ the Justices primarily responsible for *Lopez* have suggested a limited definition of the term "commercial activity," which would leave more activities beyond the reach of Congress' Commerce Clause

¹⁷³ 514 U.S. 549 (1995).

¹⁷⁴ 529 U.S. 528 (2000)

¹⁷⁵ *Solid Waste Agency v. U.S. Corps of Engineers*, 531 U.S. 159 (2001).

¹⁷⁶ In *Morrison*, there is also a suggestion that a jurisdictional element helps, so perhaps it would be necessary to limit restrictions on economic takings to those that have some nexus with interstate commerce, such as a firm doing business in interstate commerce. There is also a suggestion that it cannot infringe on the police power and the punishing crime is a quintessential element of the local police power. In this regard court also used family law as an example. And discussed other areas of traditional state regulation. 529 U.S. at 615-16.

¹⁷⁷ 125 S.Ct. 2195 (2005).

powers.¹⁷⁸ Even after *Lopez* and *Morrison*, however, Congress' power to regulate commercial activity remains virtually boundless.¹⁷⁹

Acquisition of property by eminent domain likely qualifies as commercial activity, and, the activity, when viewed in the aggregate, substantially affects interstate commerce. The acquisition of real estate would ordinarily qualify as a commercial activity. However, a localities' acquisition of real property by eminent domain does not involve a market transaction, the acquisition is an exercise of a sovereign prerogative. The Court has not had occasion to consider whether the exercise of a sovereign prerogative can be considered commercial activity. Ordinarily the governmental and non-governmental activities of government entities are distinguished, and sometimes subjected to different rules and constitutional constraints.¹⁸⁰ However, there is no reason to conclude that the exercise of a sovereign prerogative should never be considered "commercial activity" for purposes of delineating Congress' regulatory powers under the Commerce Clause.

Moreover, land acquisition by eminent domain is in some sense equivalent to a market transaction, it accomplishes the same goals and the measure of "just compensation" largely seeks to replicate the financial results that would have obtained had the property been acquired in the market. Certainly the exercise of eminent domain powers neither resembles mere possession of an article, as was the case in *Lopez*, where the Court held that regulation of possession of firearms in the vicinity of a school lay beyond Congress' Commerce Clause powers. Nor does it resemble commission of an act of violence, which, in *Morrison*, the Court found not amendable to VAWA's reach because the violence in question was not commercial activity. The use of the takings power is not even like the cultivation and personal consumption of a product, as was the case in *Raich*, where four dissenting judges found that the regulation lay beyond Congress' Commerce Clause powers. And, of course, the acquisition of real estate by eminent domain is particularly likely to be

¹⁷⁸ *Id.* at 2224-25 (O'Connor, J., dissenting); *id.* at 2236 (Thomas, J., dissenting).

¹⁷⁹ *Citizens Bank v. Alafabco, Inc.*, 539 U.S. 52 (2003) (summarily reversing Alabama Supreme Court, finding that a debt-restructuring agreement consummated between an Alabama bank and an Alabama construction company in Alabama lay within Congress' Commerce Clause powers, because: (1) the construction company did business in other states, (2) some of the construction company's inventory, on which the loan was based, was located outside Alabama, and (3) the aggregate effect of loans made lending an activity that had a substantial impact on interstate commerce)

¹⁸⁰ See generally, Michael Wells & Walter Hellerstein, *The Governmental-Proprietary Distinction in Constitutional Law*, 66 VA. L. REV. 1073(1980).

viewed as commercial activity when it is part of series of transactions resulting in the transfer of property to private entities for profit-making activities.

Localities' acquisition of land by way of eminent domain has a substantial effect on interstate commerce. The acquisition of property by eminent domain, by itself, might often, though certainly not invariably, involve purely intra-state activity, a local government acquiring property from a local resident. Even apparently wholly intrastate "transactions," between a local government and an in-state resident might have a sufficient impact on the market for real estate sought by out-of-staters, both individuals and commercial interests, to effect the flow of individuals and businesses into the area across state lines. More importantly, though, the acquisition of real estate by eminent domain for redevelopment must be considered in light of the localities' plans to subsequently transfer the property acquired by eminent domain to a real estate developer or some other commercial entity. Surely the acquisition of a number of parcels to create a commercial project that will attract many individuals and possibly house businesses operating interstate qualifies as an activity that substantially affect interstate commerce. And surely real estate development, in the aggregate, has a substantial effect on the national economy, even if the residents and customers living, working, or shopping in the completed economic development project will be in-state residents. Such activity surely has effects on large developers and the construction industry, and may well have a significant impact on the real estate market in general.

The power to regulate interstate commerce permits congressional regulation of local use of eminent domain for two reasons. First, eminent domain serves a substitute for a market transaction, and Congress may legislate to ensure that the differences in the two processes do not operate in a way that subject property owners individually or the real estate market as a whole to harm when eminent domain takes the place of market transactions. Second, Congress may legitimately seek to address the undue influence interstate commercial enterprises gain over local government by their ability to play one tax-strapped locality off against another.¹⁸¹

Congress should have the power to regulate a process that circumvents the market in real

¹⁸¹ James W. Ely, *supra* note 108, at 31 ("A further source of aggravation is the charge that resort to eminent domain is frequently initiated by powerful and politically-connected interests that have the ear of local officials.")

estate, which, after all, is a major national market.¹⁸² While eminent domain seeks to approximate the market valuation of land, it may not precisely do so, or may do so only at the cost of significant litigation expenses. Arguably, when the private market can operate adequately, and is not beset by imperfections that distort the market facing private entities that seek to amass land for major projects, the market should be allowed to operate.¹⁸³ Developers or other major commercial interests should not have the option of enlisting local authorities to acquire property by eminent domain in such circumstances.

Congress may also act to remedy any unfairness to property owners who involuntarily become involved in such an alternative process for the purchase and sale of property, particularly when the entities that will ultimately gain title are interstate enterprises.¹⁸⁴ As we have seen, the measure of “just compensation” does not adequately account for the special value of property not reflected in its market price. If property owners could refuse to sell their property unless offered the price at which they were willing to sell, they could perhaps recover the sentimental value of the property, or an amount truly sufficient to obtain equivalent accommodations. If interstate enterprises can secure property by enlisting local authorities to invoke eminent domain, property owners who have a sentimental attachment to their property, or who will find it hard to purchase replacement housing, or who just want to gain some financial compensation for undergoing the rigors of moving, are left without a remedy. In short, Congress could potentially find that in many situations the use of eminent domain for economic development is a wasteful alternative to market transactions, and one that places property owners whose homes or businesses are acquired in a worse position.

¹⁸² David Leonhard, *Boom in Jobs, Not Just Houses As Real Estate Drives Economy*, N.Y. Times Page 1 (July 9, 2005). Congress can be concerned not only about the vitality of the market, which may not be effected if just compensation is provided, but can be concerned about the fairness of this alternative to the real estate market, which may result in developers keeping surplus rather than having to share the surplus with the existing property owner.

¹⁸³ Eminent domain is often needed to address certain market imperfections. See, Merrill, *supra* note 1, at 74-76.

¹⁸⁴ *United States v. Darby*, 312 U.S. 100, 113 (1941)(observing “[t]he power to regulate commerce is the power ‘to prescribe the rule by which commerce is to be governed’ . . . [i]t extends not only to those regulations which aid, foster and protect the commerce, but embraces those which prohibit it” (quoting *Gibbons v. Ogden*, 9 Wheat. 1, 196); *accord*, *Lottery Case*, 188 U.S. 321, 354-56 (1903)(Congress may prohibit commerce in lottery tickets because of the effect of such commerce on public morals); *Hipolite Egg Co. v. United States*, 220 U.S. 45, 58 (1911)(found Congress can prevent commerce in adulterated articles in upholding food and drug act provisions subjecting adulterated products to confiscation).

Congress can also act to address the undue influence of developers or major enterprises, many of whom are interstate in scope, on local governments.¹⁸⁵ As noted earlier, there is a long-standing tradition, exemplified by the work of James Madison, of concern about the susceptibility of local governments to powerful or dominant local interests. The basis of such concerns and the potential effect on the exercise of eminent domain powers by local authorities is not merely speculative.

Local governments in particular rely heavily on property taxes and commercial taxes, and often find their revenues insufficient to satisfy their constituents' demands for government services. Local government may, in short, find themselves in economic trouble, and also find themselves competing with other financially-strapped localities in their own state or in others to entice business to locate plants, offices, or other lucrative facilities within their jurisdiction. Indeed, one of the enticements localities use in this competition is a willingness to use eminent domain or threaten property owners with the prospect of eminent domain to assist an enterprise in assembling parcels of sufficient size to suit its needs.¹⁸⁶ The competition between cities has become so intense that at least one scholar has characterized it as "a second Civil War."¹⁸⁷ Congress is not powerless to counteract the untoward effects of such competition, including the undue influence on local officials making land use decisions that interstate businesses gain as a result. Indeed, the Supreme Court has already held that Congress may legislate to prevent states from being drawn into a "race to the bottom," offering more lenient regulation than their neighbors to lure business enterprises into their

¹⁸⁵ Part of this concern is evident in the campaign finance cases in which special restrictions have been allowed on corporate donors in part because of potential to overwhelm the government process because they may amass wealth. *See*, F.E.C. v. Massachusetts Citizens for Life, Inc., 479 U.S. 238, 256-58 (1986); F.E.C. v. Nat'l Right to Work Committee, 459 U.S. 197, 204, 208-10; Pipefitters Local Union No. 562 v. U.S., 407 U.S. 385, 416 (1972). While the First Amendment may prohibit state or the federal government from relying on these concerns to limit the power to restrict corporate speech, *Bellotti*, there is no reason to believe that Congress cannot otherwise use its Commerce Clause powers to prevent dominance of local government by interstate enterprises.

¹⁸⁶ Martin E. Gold, *Economic Development Projects: A Perspective*, 19 URB. LAW. 193 (1987)(identifying use or threatened use of eminent domain to assist assemblage as one of eleven types of incentives states and localities offer to business to encourage relocation).

¹⁸⁷ Peter D. Enrich, *Saving the States from Themselves: Commerce Clause Constraints on Business Tax Incentives*, 110 HARV. L. REV. 377 (1996)(describing competition as "a second Civil War").

jurisdiction.¹⁸⁸ Congress can surely address such tendencies when localities wield their eminent domain powers to displace citizens in an effort to remain competitive in attracting businesses.¹⁸⁹

In addition, there is a legitimate concern about the potential influence of money on officials who make decisions to invoke eminent domain. In particular, legal political contributions or illegal pay-offs from developers or other commercial interests may influence local officials' decisions to displace property owners to make way for another private entity.¹⁹⁰ Congress should be able to take steps to minimize the risk that a process which serves as a substitute for market transactions is subject to such corrupt influences.

Congress presumably has the power to enact legislation focusing more precisely on condemnations related to interstate commerce, such as condemnations involving sports teams. Thus, for example, Congress could enact a statute prohibiting a locality from acquiring a team by eminent domain,¹⁹¹ or the use of eminent domain to provide land for the owner of professional sports teams to build a stadium.¹⁹² Or Congress might seek to legislate to protect small businesses as an essential component of the economy. For instance, some argue that use of eminent domain for economic

¹⁸⁸ *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 281-82 (1981); Richard Revesz, *Rehabilitating Interstate Competition: Rethinking the "Race-to-the-Bottom" Rationale for Federal Environmental Regulation*, 67 N.Y.U. L. REV. 1210, 1222 (1992) ("The presence of interstate externalities is a powerful reason for intervention at the federal level").

¹⁸⁹ At least one author has suggested federal legislation to constrain competition for corporate sitings. Steven R. Little, *Corporate Welfare Wars: The Insufficiency of Current Constraints on State Action and the Desirability of a Federal Response*, 22 HAMLINE L. REV. 849, 849-50, 854 (1999) (suggesting federal legislation to constrain such competition).

¹⁹⁰ John P. Martin, *Marlboro Official admits graft: Ex-councilman is latest Monmouth County corruption case*, NEWARK STAR LEDGER 23 (July 8, 2005); Steve Chambers & Jeff Whelan, *Politicians take up land fight: Corzine and Forester condemn eminent domain abuse*, NEWARK STAR LEDGER 19 (July 13, 2002)(use of eminent domain "has become more controversial in recent years as government began handing seized property over to private developers, often ones who had made large campaign contributions); Public Affairs Office, District of New Jersey, *Breaking News* http://www.usdoj.gov/usao/nj/publicaffairs/NJ_Press/break.html (visited July 27, 2005); *Hudson County Waterfront Developer Joseph Barry and Janiszewski 'Consultant' Indicted, Taken Into Custody* (http://www.usdoj.gov/usao/nj/publicaffairs/NJ_Press/files/barr1015_5.htm).

¹⁹¹ *See generally*, *City of Oakland v. Oakland Raiders*, 32 Cal. 3d 60, 646 P.2d 835, 183 Cal. Rptr. 673 (1982); *Mayor & City Council of Baltimore v. Baltimore Football Club Inc.*, 624 F. Supp. 278 (D. Md. 1985).

¹⁹² *See*, 151 CONG. REC. H5581 (statement of Representatives Frank)(arguing against use of eminent domain to build sports stadiums); *see* BERLINER, *supra* note 4, at 95, 96-97 (discussing several efforts to use eminent domain to acquire land for professional baseball stadiums in Massachusetts) GREENHUT, *supra* note 4, at 202-13.

development has a particularly detrimental effects on small businesses.¹⁹³ Congress might find such impacts especially disturbing given that, arguably, small businesses create between sixty and eighty percent of all new jobs in the country and employ at least half of all private sector workers, while also acting as particularly critical supporters of social and charitable activities that improve the quality of life in small communities.¹⁹⁴ And indeed, one theme underlying the congressional criticism of *Kelo* is a concern about the effect of eminent domain on small businesses in areas targeted for economic revitalization.¹⁹⁵

However, unlike the statutes that have been the subject of many of the Supreme Court cases discussing the scope of Congress' power to regulate interstate commerce, a statute that sought to limit localities' use of eminent domain would limit a sovereign prerogative of the state, the ability to acquire land by eminent domain. The Court might view such a limitation on a sovereign prerogative as raising significant Tenth Amendment and Guarantee Clause concerns.¹⁹⁶ And indeed, *Tahoe Sierra Preservation Council v. Tahoe Regional Planning Agency*, as well as *Kelo* suggest particular solicitude to local government efforts at land management.¹⁹⁷ Moreover, the Court has

¹⁹³ Brief of Amici Curiae America's Future Inc. and Somerset Transmission & Repair Center in Support of Petitioners, *Kelo v. City of New London* 2004 WL 2750340. One noted case in which a large chain sought to displace a small business with the help of local authorities using the power of eminent domain is *99 Cent Only Stores v. Lancaster Redevelopment Agency*, 237 F. Supp. 2d 1123 (C.D. Cal. 2001). See also, Steve Chambers, *Eminent Economics: Critics Question the Effects of Lower Wages Caused By Municipalities Seizing and Redeveloping Land*, NEWARK STAR-LEDGER, section 3, page 1 (August 28, 2005).

¹⁹⁴ Brief of America's Future, *supra* note 192, at 16-17, 20-21.

¹⁹⁵ Title of the House and Senate Bill is the Protection of Homes, *Small Businesses*, and Private Property Act (emphasis added); see, e.g., 151 CONG. REC. H5581 (statement of Representative Canon) ("This mistaken ruling has already emboldened governments and developers seeking to take property from home and *small business owners* and local communities") (emphasis added); 151 CONG. REC. H5505 (statement of Representative Garrett) ("if a private developer is going to push someone off their land, out of their house, and destroy that house or *small business*, then he should foot the bill for any infrastructure that he is going to build.") (emphasis added).

¹⁹⁶ The Tenth Amendment provides that any powers the Constitution neither delegated to the federal government nor prohibits states from exercising "are reserved to the States respectively, or to the people. The Guarantee Clause, article IV, section 4, provides that "[t]he United States shall guarantee every State in th[e] Union a Republican form of Government."

¹⁹⁷ 535 U.S. 302, 334-35 (2002) ("A rule that required compensation for every delay in the use of property *would render routine government processes prohibitively expensive or encourage hasty decisionmaking.*" (Emphasis added)). *Kelo*, 125 S. Ct. at 2668 (rejecting a rule that government officials must show "reasonable certainty" the expected public benefit will indeed come about, because such a rule would create a significant and unwarranted impediment to comprehensive redevelopment efforts).

shown particular solicitude to states when federal authorities intrude into areas in which state and local authorities traditionally have a preeminent role. The Court has already recognized land use regulation as one area in which state and local governments have historically maintained just such a preeminent position.¹⁹⁸

Like sovereign immunity, the power of eminent domain may be such an inherent attribute of sovereignty that Congress, even acting pursuant to its enumerated powers, cannot significantly diminish it. Accordingly, just as the Court has carefully protected the states' sovereign immunity, and viewed recognition of state sovereign immunity as an essential expression of respect for the states as independent sovereigns, the Court may carefully protect the states' eminent domain powers, and thus subject any federal legislation that purports to limit that power to heightened scrutiny. The power of eminent domain, like sovereign immunity, has been recognized by courts as an essential attribute of sovereignty and has an impressive historical pedigree.

The federal courts, including the U.S. Supreme Court, and the state courts have long considered the power of eminent domain as an inherent and essential attribute of sovereignty. The courts have held that "the power of eminent domain is an attribute of sovereignty, and inheres in every independent state."¹⁹⁹ A government's power of eminent domain does not require recognition in any constitution, but exists in absolute and unlimited form at the sovereign's inception.²⁰⁰ Indeed, constitutional provisions relating to eminent domain neither directly nor impliedly grant the power of eminent domain, but simply serve as limitations upon a power that exists independent of a constitution and would otherwise be unlimited.²⁰¹ In these respects eminent domain resembles

¹⁹⁸ See, e.g., *Solid Waste*, 531 U.S. at 174 (refusing to construe a statute to impinge upon "the States' traditional and primary power over land and water use"); *Hess v. Port Authority Trans-Hudson Corporation*, 513 U.S. 30, 44 (1994) ("[R]egulation of land use [is] a function traditionally performed by local governments").

¹⁹⁹ *State of Georgia v. City of Chattanooga*, 264 U.S. 472, 480 (1924); 1 NICHOLS ON EMINENT DOMAIN, *supra* note 2, § 1.14[2] at 1-25 to 1-27 (3d ed. 2002) ("the power [of eminent domain] comes into being *eo instante* with the establishment of the government and continues as long as the government endures"). See, *Kohl v. United States*, 91 U.S. 371-72 (1875).

²⁰⁰ *Adirondack RR. Co. v. New York*, 176 U.S. 335, 346-47 (1900) (counsel concession); 1 NICHOLS ON EMINENT DOMAIN, *supra* note 2, § 1.14[2] at 1-27.

²⁰¹ 1 NICHOLS ON EMINENT DOMAIN, *supra* note 2, § 1.14[2] at 1-30; *id.*, at § 1.14[4] (explaining that it was inherent in the powers of the colonies and the Northwest Territories).

sovereign immunity.²⁰² “The taking of private property for public use upon just compensation is so often necessary for the proper performance of governmental functions that the power is deemed to be essential to the life of the state.”²⁰³ “It cannot be surrendered, and, if attempted to be contracted away, it may be resumed at will.”²⁰⁴ The power of eminent domain “extends to all property within the jurisdiction of the state.”²⁰⁵

The historical claim for eminent domain as an inherent aspect of sovereignty is also strong. The power of sovereigns to acquire property within their jurisdictions has its origins in Ancient Greece and Rome.²⁰⁶ The term “eminent domain” as a description of the sovereign power to take property derives from the Latin phrase *dominium eminens*, attributable to Seventeenth Century Dutch jurist Hugo Grotius.²⁰⁷ The power was well-established in England at the founding of the colonies, and the colonies frequently invoked it.²⁰⁸ Indeed, in colonial practice, eminent domain was sometimes used for private purposes, such as creating private ways or mills, and there was no absolute right to compensation, though the need to compensate was often recognized as an obligation.²⁰⁹ “The power of eminent domain was thus well established in England and the colonies by the time of the American Revolution, and the obligation to make compensation had become a

²⁰² Also eminent domain, like sovereign immunity, has fiscal implications for state governments, particularly if Congress alters the measure of “just compensation” to make the exercise of eminent domain more expensive.

²⁰³ *State of Georgia v. City of Chattanooga*, 264 U.S. at 480. Sovereign power to exercise eminent domain “is essential to a sovereign government.” *U.S. v. Carmack*, 329 U.S. 230, 255 (1946); *Kohl v. U.S.*, 91 U.S. at 371, 372, 374.

²⁰⁴ *State of Georgia v. City of Chattanooga*, 264 U.S. at 480; *Contributors to Pennsylvania Hosp. v. Philadelphia*, 245 U.S. 20, 23-24 (1917) (upheld against Contract Clause challenge).

²⁰⁵ *State of Georgia v. City of Chattanooga*, 264 U.S. at 480 (allowing a state to acquire by eminent domain land owned within its physical boundaries by a subdivision of another state). Supposedly a legislature cannot revoke NICHOLS ON EMINENT DOMAIN, *supra* note 2, at 1-35 n.58 (citing one case). By no form of contract or legislative grant can the state surrender its right to take property within the limits of the state when it may be required for the public use. NICHOLS ON EMINENT DOMAIN, *supra* note 2, 1-37 & n. 61 (citing cases).

²⁰⁶ Records indicate that the Greeks and Romans took private property for public use. ANNALS OF TACITUS, Bk. 1, p. 75; 1 NICHOLS ON EMINENT DOMAIN, *supra* note 2, at §1.2[1], at 1-68 to 1-69

²⁰⁷ DE JURE BELLI ET PACIS Lib. III, C.20; 1 NICHOLS ON EMINENT DOMAIN, *supra* note 2, §1.12[1] at 1-15.

²⁰⁸ 1 NICHOLS ON EMINENT DOMAIN, *supra* note 2, at §§ 1.21 & 1.22.

²⁰⁹ 1 NICHOLS ON EMINENT DOMAIN, *supra* note 2, at §§ 1.22[7] & [8] & [14].

necessary incident to the exercise of that power.²¹⁰ At the commencement of the Revolution, the powers possessed by the British Parliament devolved to the governments of the respective states.²¹¹

The power might be deemed necessary for acquisition of property for government ownership or use by the populace as a whole. But surely, critics of *Kelo* would argue, governments have no inherent power or essential need to acquire property by compulsion to aid private economic development. As a matter of historical practice and judicial precedent, the power of eminent domain has not been so limited. Moreover, the power to use eminent domain in aid of economic development might be seen as critical in terms of local government's taxing powers, that is, its ability to raise sufficient revenue to operate.²¹² In various contexts, courts have recognized that government collection of revenue is particularly critical, and should be particularly immune from interference.²¹³ In addition, use of eminent domain for economic redevelopment may also be essential to a community's ability to continue its own existence as a viable community. A community surely requires more than government-owned buildings, and may even require facilities other than those open solely to the public.

In sum, the Commerce Clause would provide a basis for a statute limiting state and local eminent domain powers, but a court would also consider the degree of infringement upon a key

²¹⁰ 1 NICHOLS ON EMINENT DOMAIN, *supra* note 2, at 1-76 to 1-77. See 1 BLACKSTONE'S COMMENTARIES 139. William Blackstone, with whom colonists were familiar, discussed the power, though he attributes it to remnants of feudalism. 2 BL. COMM. 408-09; 1 NICHOLS ON EMINENT DOMAIN, *supra* note 2, §1.13[2] n.36.

²¹¹ *Munn v. Illinois*, 94 U.S. 113, 124 (1876); *see*, 1 NICHOLS ON EMINENT DOMAIN, *supra* note 2, at §§ 1.23[1] & [2]. *Cf.*, *U.S. v. Curtiss-Wright Corp.* 299 U.S. 304, 316-17 (1936).

²¹² See generally, Tracey A. Kaye, *Show Me the Money: Congressional Limitations on State Tax Sovereignty*, 35 HARV. J. LEG. 149, 149 (1998) ("The Constitution establishes the dual sovereignty of the states and the federal government. One of the core elements of sovereignty reserved to the states under the Constitution is the power of a state to define its own tax system. Vital to the states' existence as independent entities, these taxes enable state governments to perform their various public duties. More eloquently stated, '[t]he power to tax is the power to govern.'"); See PAUL J. HARTMAN, *FEDERAL LIMITATIONS ON STATE AND LOCAL TAXATION* 4 (1981) (arguing that the power to impose and collect taxes for the support of state government must not be unduly curtailed); *Hibbs v. Wynn*, 542 U.S. 88 (2004) (interpreting the Tax Injunction Act, 28 U.S.C. 1341); *Federal Statutes and Regulations: The Tax Injunction Act*, 118 HARV. L. REV. 486 (2004).

²¹³ *Phillips v. Commissioner*, 283 U.S. 589, 596-97 (1931); *G.M. Leasing Corp. v. U.S.*, 429 U.S. 338, 352 n.18; *Fuentes v. Shevin*, 407 U.S. 67, 92 n.4 (1972); *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388, 396 (1971); *Bush v. Lucas*, 462 U.S. 357, 379-81 (1983). Indeed, as Justice Holmes famously noted "Taxes are what we pay for civilized society . . ." *Compania De Tabaco v. Collector*, 275 U.S. 87, 100 (1927)(Holmes, dissenting).

attribute of state and local sovereignty.

C. The Spending Clause

The Spending Clause²¹⁴ allows Congress to spend money, and Congress may condition grants in aid upon the aid recipients' satisfaction of certain requirements. Congress can impose such limitations not only upon private recipients of federal largess,²¹⁵ but on state and municipal recipients of that largess as well. For example, in *Oklahoma v. Civil Service Commission*,²¹⁶ the Court upheld application of the Hatch Act, limiting political activities of civil servants, to state officials whose employment is financed with federal funds.²¹⁷

One noted commentator has suggested that "few internal limits exist to restrain" Congress' spending power, including its power to impose grant limitations.²¹⁸ Not surprisingly, the Court has not invalidated a grant condition imposed upon states as exceeding Congress' Spending Clause powers since the 1930's.²¹⁹ Nevertheless, the Court has pointedly noted on at least two occasions in recent years that those powers have limits.²²⁰ In *South Dakota v. Dole*,²²¹ the Court explained that a law passed pursuant to the spending power must meet four requirements. First, the expenditure

²¹⁴ "The Congress shall have the power . . . to pay the debts and provide for the Common defense and General welfare of the United States." Art. I, § 8 cl. 1.

²¹⁵ *Wyman v. James*, 400 U.S. 309 (1971); *Rust v. Sullivan*, 500 U.S. 173, 193 (1991) (abortion counseling); *U.S. v. American Library Ass'n*, 539 U.S. 194, 123 S.Ct. 2297 (2003).

²¹⁶ 330 U.S. 127 (1947).

²¹⁷ *Id.* at 142-44; see, 1 *TRIBE*, *supra* note 8, at § 5-6. Indeed, *Tribe* has suggested that the Spending Power is one of the enumerated powers for which "few internal limits exist to restrain them." *Id.* at 833.

²¹⁸ 1 *TRIBE*, *supra* note 8, at § 5-6, at 833; accord, Albert J. Rosenthal, *Conditional Federal Spending and the Constitution*, 39 *STAN L. REV.* 1103, 1108-09 (1987). And the state experience in seeking to distinguish for instance permissible limitations on spending in appropriations bills from impermissible substantive provisions in such bills has not been particularly encouraging. States have this requirement and have not been entirely successful in setting forth clear lines. *South Dakota Educ. Assn v. Barnette*, 582 N.W. 2d 386, 391 (S.D. 1998); *Henry v. Edwards*, 346 So. 2d 153, 158 (La. 1977); see generally, WILLIAM D. POPKIN, *MATERIALS ON LEGISLATION: POLITICAL LANGUAGE AND THE POLITICAL PROCESS* 1165-66 (4th ed. 2005).

²¹⁹ The Court last invalidated a provision as exceeding the spending power in *U.S. v. Butler*, 297 U.S. 1 (1936).

²²⁰ *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1, 17 & n.13 (1981).

²²¹ 483 U.S. 203 (1987).

must further the “general welfare.”²²² Second, any conditions imposed upon state expenditures of federal funds must be clearly expressed in the applicable statute, so that states can make a knowing choice in accepting a grant.²²³ Third, the grant condition must be related to “the federal interest in particular national projects or programs.”²²⁴ Fourth, because “other constitutional provision may provide an independent bar to the conditional grant of federal funds,” enforcement of the condition must be consistent with the remainder of the Constitution.²²⁵ This fourth requirement, however, accords Congress great latitude in conditioning grants on the grantee’s agreement to relinquish constitutional rights or constitutionally-recognized sovereign prerogatives. Quite apart from the four principles set forth above, the Court continues to recognize a principle, left over from the 1930’s, that Congress may exceed its spending powers if “the pressure [exerted by a funding condition] turns into compulsion and ceases to be an inducement.”²²⁶ However, the Court has failed to give much definition to the concept of “coercion” in this context. In particular, given that federal authorities undoubtedly possess authority to condition grants-in-aid in ways that will influence state choices, the Court has yet to define the quantum of financial pressure that constitutes illegitimate coercion rather than mere legitimate encouragement.

In *New York v. United States*,²²⁷ decided several years after *South Dakota v. Dole*, the Court expressed its concern about the breadth of Congress’ spending power. The Court observed: “Where the recipient of federal funds is a State, as is not unusual today, the conditions attached to the funds

²²² Id. at 207. This does not involve meaningful judicial review of the basis for Congress’ conclusion that the expenditure furthers the general welfare. *South Dakota v. Dole*, 483 U.S. at 207. And indeed the test may not be judicially enforceable at all. Id. at 207 n.2; *accord*, *Helvering v. Davis*, 301 U.S. 619, 640 (1937); *Buckley v. Valeo*, 424 U.S. 1, 90 (1976); *TRIBE*, *supra* note 8, at 837 & n.19.

²²³ *South Dakota v. Dole*, 483 U.S. at 207.

²²⁴ Indeed, the Courts statement with regard to this requirement was quite tentative: “our cases have suggested (without significant elaboration) that conditions on federal grants might be illegitimate if they are unrelated to ‘the federal interest in particular national projects or programs’” *South Dakota v. Dole*, 483 U.S. at 206. Kaden has expressed some skepticism concerning the efficacy of such an approach Kaden, *supra* note 105, at 894, 896.

²²⁵ See generally, NOWAK & ROTUNDA, *supra* note 7, at §5.6.

²²⁶ *Stewart Machine Co. v. Davis*, 301 U.S. 548, 590 (1937); see *South Dakota v. Dole*, 483 U.S. at 211; *TRIBE*, *supra* note 8, at §5-7, at 840; Kaden, *supra* note 105, at 893; *Montgomery County v. Califano*, 449 F. Supp. 1230, 1247 (D. Md. 1978).

²²⁷ 505 U.S. 144, 167 (1992).

by Congress may influence a State's legislative choices.”²²⁸ Accordingly, the Court noted, the requirement of a relationship between a funding condition and the program’s purpose was critical, else “the spending power could render academic the Constitution's other grants and limits of federal authority.”²²⁹

The Spending Clause, and more particularly the scope of Congress’ power to impose conditions on grant recipients, raises issues that have bedeviled courts and commentators for years in many contexts.²³⁰ The federal government clearly must possess the power to direct the expenditure of its money by conditioning provision of its funds on the recipients’ commitment to spending such funds in accordance with federal wishes. When the federal government chooses to accomplish some goal indirectly, by providing funds to an intermediary who will perform the needed tasks, rather than directly, by performing the tasks itself, the intermediary cannot be free to disregard the intended scope of the use of the funds.²³¹

Indeed, while the federal government may not use its regulatory powers to prohibit private citizens’ exercise of their constitutional rights or states’ exercise of their constitutionally-recognized prerogatives, nothing in the Constitution requires the federal government to fund the exercise of such rights or prerogatives. Thus, for example, the federal government may not prohibit women from terminating their pregnancies in many circumstances or place undue regulatory burdens on such a right,²³² but it need not financially assist women’s efforts to terminate their pregnancies, and may even refuse to fund doctors’ provision of referrals to women who seek to consider abortion as an

²²⁸ *Id.*; *accord*, Rosenthal, *supra* note 217, at 1103-04. Lewis Kaden observed in an influential 1979 article that the most dramatic change in the grant-in-aid system had come from the proliferation of conditions attached to federal grants, which, taken together, had “altered the shape of the federal system. Kaden, *supra* note 105, at 874. He also argued that such conditional grants often result[ed] in some distortion of state fiscal decisions.” *Id.* at 882.

²²⁹ *New York v. United States*, 505 U.S. at 167.

²³⁰ In the individual rights sphere, this dilemma is typically discussed as the “unconstitutional conditions” doctrine. Frederick Schauer, *Principles, Institutions, and the First Amendment*, 112 HARV. L. REV. 84, 102-04 (1998) (questioning utility of the doctrine).

²³¹ *Rosenberger v. Rector and Visitors of University of Virginia*, 515 U.S. 819, 833 (1995) (“When the government disburses public funds to private entities to convey a governmental message, it may take legitimate and appropriate steps to ensure that its message is neither garbled nor distorted by the grantee”); *NEA v. Finley*, 524 U.S. 569, 612 (1998); *see, Rust v. Sullivan*, 500 U.S. 173, 194, 196-200 (1991).

²³² *See, Roe v. Wade*, 410 U.S. 959 (1973); *Planned Parenthood v. Casey*, 595 U.S. 833 (1992).

option.²³³ Similarly, the Twenty-First Amendment, which commits the regulation of liquor to the states, may bar the federal government from compelling states to raise their legal drinking age to 21,²³⁴ but Congress may condition federal highway funding to states upon state adoption of such an increase in the drinking age.²³⁵ Thus, the federal government can ensure that its funds are spent for its intended purposes.²³⁶ Even more generally, Congress may ensure that federal funds are not subject to possible misappropriation or theft by ensuring that grant recipients are responsible, including, for example, ensuring that state civil servants are not subject to political pressures that may lead them to make decisions based on improper considerations.²³⁷

On the other hand, given the pervasiveness of federal programs, the power to place conditions on federal funding could serve to undermine individual rights and state prerogatives if left unlimited.²³⁸ If the federal government may condition funding on the state or a private citizen refraining from using its own resources to engage in some activity, the state government or the private citizen may, as a practical matter, lose that sovereign prerogative or individual right.²³⁹ For example, if Congress withheld all federal aid to states that do not generally waive their

²³³ *Harris v. McRae*, 448 U.S. 297, 317-18 (1980) (“although the liberty protected by the due process clause affords protection against unwarranted government interference with freedom of choice in the context of certain personal decision, it does not confer an entitlement to such funds as may be necessary to realize all the advantages of that freedom”); *Maher v. Roe*, 432 U.S. 464 (1977); *Poelker v. Doe*, 432 U.S. 519 (1977).

²³⁴ *South Dakota v. Dole*, 483 U.S. at 205-206; *id.* at 218 (O’Connor, J., dissenting).

²³⁵ *South Dakota v. Dole*, 483 U.S. at 206-212

²³⁶ *Wyman v. James*, 400 U.S. 309, 318-19 (1971); *Sabri v. U.S.*, 541 U.S. 600, 124 S.Ct. 1941, 1946 (2004); *Maher v. Roe*, 432 U.S. 464 (1977); *Rust v. Sullivan*, 500 U.S. at 194, 196-200.

²³⁷ *Oklahoma v Civil Service Comm’n*, 330 U.S. 127, 142-44 (1947); see also *Sabri v. U.S.*, 541 U.S. 600, 124 S.Ct. 1941, 1946 (2004)

²³⁸ Reich, *supra* note 107, at 771-77, 779-85; *New York v. United States*, 505 U.S. at 167.

²³⁹ See Kaden, *supra* note 105, at 847 (the . . . standard[] which make the validity of a condition lacking independent constitutional support turn on the states’s option to escape the mandate by refusing the aid, may have had some plausibility at a time when federal aid amounted to a small fraction of all state and local government spending, and most federal funds were distributed for special projects” but no longer)

constitutionally-recognized immunity,²⁴⁰ state governments would have no choice but to waive that immunity. Indeed, this risk that federal grant conditions may undermine state sovereign immunity led the Court to adopt the strong presumption that federal statutes do not condition funding on state waiver of sovereign immunity.²⁴¹ Such conditions show disrespect for the state as an independent sovereign — to advance federal policies such conditions would limit the state’s ability to use its own funds or exercise its own sovereign prerogatives at the direction of its citizens.²⁴²

Thus, these two principles, the federal need to control the use of resources it provides and the importance of private citizens and state sovereigns retaining their discretion over matters the Constitution commits to them, must be accommodated.

The various federal interests in controlling the expenditure of federal funds can be grouped into four somewhat distinct categories. (In describing these categories, I will sometimes use cases in which states restrict the use of their funding, when such limitations provide crisper examples of a particular interest.) The first set of interests can be characterized as “program definition” interests. Here, Congress imposes restrictions to ensure that grant recipients spend grant funds for the purposes the program was designed to serve, and not for other purposes, even meritorious ones, that Congress finds less critical, or at least less worthy of its funding.²⁴³ Thus, a government program for medical assistance may prohibit reimbursement for cosmetic surgery or fertility treatments, because Congress sought to fund necessary care, not elective procedures or therapies.²⁴⁴ In part, the governmental interest in *Maier* could be characterized as program definition, namely Connecticut may simply have found it more important to assist the indigent with child birth, and found services for terminating

²⁴⁰ The Eleventh Amendment protects state sovereign immunity. The court has held that a broader range of state sovereign immunity is implicit in the constitutional plan. Thus I use the term “Eleventh Amendment and related” sovereign immunity. See note 162 *supra*.

²⁴¹ *Pennhurst, etc. v. Halderman*, 51 U.S. 1, 17, 23 (1981); *South Dakota v. Dole*, 483 U.S. at 207; *New York v. United States*, 505 U.S. 144, 167 (1992).

²⁴² Such concerns led the Court to adopt the commandeering doctrine. *Printz v. United States*, 521 U.S. 898, 920 (1997); *New York v. United States*, 505 U.S. at 168-69.

²⁴³ See, e.g., *Maier v. Roe*, 432 U.S. 464 (1977), *NEA v. Finley*, 524 U.S. 569 (1998).

²⁴⁴ Or currently, with regard to *viagra*, federal authorities could decide that while alleviating impotency in older men is perfectly fine goal, given limited resources it is not worth funding by the federal government given competing priorities. See Sheryl Gay Stolberg, *House Rejects Coverage of Impotence Pills*, N.Y. TIMES A10 (June 24, 2005).

pregnancy less worthy of funding.

The second category of federal interests served by grant restrictions can be termed “symbolic” or “dissociative.” Here, the federal government seeks to avoid endorsing a particular practice in which recipients wish to engage, and does so by refusing to allow the use of federal funds to facilitate that activity.²⁴⁵ Here Congress’ concern is not that the activity harms the operation of the government program, undermines the benefits provided by the federal program, or interferes with the program’s accomplishment of the government’s objectives; rather Congress simply does not wish to endorse or facilitate the practice. The regulations implementing Title X of the Public Health Service Act, at issue in *Rust v. Sullivan*, provide an example of a funding limitation embodying a “dissociative” interest. The federal regulation prevented grant recipients from providing referrals to doctors who offered abortion counseling because the Administration disapproved of abortion, not because providing women with referral to doctors who would discuss the abortion option would harm the program. Removing the restriction would not have cost the government money, and indeed might actually have lowered the cost by relieving the government of the expense of providing prenatal services to women who would decide, for their own reasons, to exercise their constitutional right to terminate the pregnancy. Nor would the removal of the restriction have made circumstances more difficult for impoverished women who wanted to carry their fetus to term.

The third type of federal interest that leads Congress to impose grant restrictions can be characterized as “functional.” Frequently, a government program may not work effectively unless the federal government can control certain aspects of grant recipient’s conduct and practices. Such control may be necessary, even if it involves conditioning grants upon grantees’ relinquishment of constitutionally-recognized rights or sovereign prerogatives.²⁴⁶ For example, in *Wyman v. James*,²⁴⁷ plaintiff aid recipient challenged the policy of home visits by social service agency caseworkers as a violation of her Fourth Amendment rights. Undoubtedly, the Fourth Amendment would ordinarily bar government officials from entering plaintiff’s home, at least without a warrant or probable cause.

²⁴⁵ See, e.g., *Rust v. Sullivan*, 500 U.S. 173 (1991).

²⁴⁶ See, e.g., *South Dakota v. Dole*, 483 U.S. 203 (1987); *Oklahoma v. Civil Service Comm’n*, 330 U.S. 127 (1947); *Wyman v. James*, 400 U.S. 309 (1971).

²⁴⁷ 400 U.S. 309 (1971).

However, the government was entitled to demand that plaintiff consent to such visits, despite plaintiff's Fourth Amendment rights, because the government was entitled to determine the manner in which its funds were being spent and assess the grant program's effectiveness.²⁴⁸ Similarly, in *South Dakota v. Dole*, South Dakota had a governmental prerogative, expressly recognized by the constitution, to regulate the sale of alcohol within its borders. However, Congress could condition provision of highway funds on South Dakota raising its legal drinking age to 21, because of the prospect that 18, 19, and 20-year-old drivers who had consumed alcohol to the point of intoxication might imperil other drivers using the federally-funded highways.²⁴⁹

The fourth type of government interest furthered by grant limitation can be termed "protective." The government imposes the grant restriction to prevent some harm from befalling the federal government. For example Congress may prohibit use of funds for certain purposes because such funding would make certain issues legitimate matters for political conflict. *FCC v. League of Women Voters*,²⁵⁰ provides an example of the Supreme Court's consideration of a law serving this sort of "protective" purpose. In that case, non-commercial broadcasters challenged the grant restriction prohibiting federally-aided non-commercial broadcasters from broadcasting editorials. In enacting the challenged statute, members of Congress had expressed concerns about government-funded propaganda, and feared that the content of government-funded political commentary would become the subject political contention. In their view only private parties, and not the government, should fund the expression of editorial opinion.

A different type of "protective" interest is exemplified by the Solomon Amendment, requiring educational institutions that receive federal funding to provide military recruiters the same access to career services facilities that it provides to recruiters for employers that do not exclude openly-gay individuals from employment. The Amendment is clearly a congressional response to

²⁴⁸ Id. at 318-19 ("The agency, with tax funds provided from federal as well as from state sources, is fulfilling a public trust. The State, working through its qualified welfare agency, has appropriate and paramount interest and concern in seeing and assuring that the intended and proper objects of that tax-produced assistance are the ones who benefit from the aid it dispenses.").

²⁴⁹ In *South Dakota v. Dole*, the Court found that the expenditure was related because the purpose of highway grants was to create safe travel and the lack of uniformity in drinking ages led youths to cross state lines to obtain alcohol and drink. 483 U.S. at 208-09.

²⁵⁰ *FCC v. League of Women Voters*, 468 U.S. 364, 399-401 (1984)

the decisions of educational institutions, most notably law schools, to disassociate themselves from the military because of the military's exclusions of openly-gay individuals from military service. The Amendment clearly seeks to induce such institutions to interact with the military despite their opposition to its policies. The withdrawal of funds is not really directed at the purpose of many of the aid programs, which seek to provide educational opportunity.²⁵¹

My claim focuses upon distinguishing the symbolic and functional federal interests served by grant conditions. Stricter limits should be imposed on government use of grant limitations to further symbolic interests than on grant restrictions that serve functional interests, at least when the conditions exert financial pressure on states (or private citizens) that influence their choices in deciding matters constitutionally committed to them.

With regard to symbolic interests, Congress has a legitimate interest in refraining from facilitating state practices, but has no legitimate interest in penalizing states (or a private citizens) who decide to engage in those practices merely because it disagrees with the state's (or the private citizen's) decision to do so. The federal government can legitimately express its abhorrence of certain practices by specifying that its money will not fund such practices. *Absent some other enumerated power*, like Section 5 of the Fourteenth Amendment or the Commerce Clause,²⁵² Congress should lack the power to penalize states for making decisions that conflict with federal preferences, when the state uses its own resources in accordance with the preferences of its citizens

²⁵¹ *Forum for Academic and Institutional Rights v. Rumsfeld*, 390 F.3d 219, 224-28 (3d Cir. 2004)(discussing the history of the Solomon Amendment and subsequent modifications). The Amendment not only withholds Defense Department funds to offending institutions, but also funds administered by the Departments of Transportation, Labor, Health and Human Services and Education. *Id.* at 226. A full analysis of the constitutionality of the Solomon Amendment is beyond the scope of this paper. However, its constitutionality will surely turn on the question of whether the Constitution permits the federal government to impose conditions on grants largely *unrelated* to the purpose of the grant programs. In general, the federal government should have some leeway to use funding conditions to attempt to ensure that it is not subjected to unfavorable treatment, either at the hands of private citizens or state governments.

²⁵² Grant conditions designed to further civil rights, like those challenged in *Fullilove v. Klutznick*, 448 U.S. 448, 478-80 (1980), and *Lau v. Nichols*, 414 U.S. 563, 568-569 (1974), fall within Congressional legislative authority, because the Enforcement Clauses of the Civil War Amendments grant Congress the power to eradicate discrimination by public and private authorities, and the Spending Clause can be used to carry out government preferences that it can legitimately express through other enumerated powers. *Fullilove*, 448 U.S. at 478-80; *South Dakota v. Dole*, 483 U.S. at 217 (O'Connor, J. dissenting); Kaden, *supra* note 105, at 895. Thus, were *Fullilove* still good law with regard to affirmative action, Congress could clearly impose such affirmative action requirements on state and local recipients of federal grants with regard to expenditures of federal money. In addition, of course, a functional argument could quite possibly be made for such civil rights requirements. See generally, Kaden, *supra* note 105, at 881.

as perceived by their elected representatives. Indeed, the Supreme Court's anti-commandeering cases suggest that the ability of the citizenry of a state, acting through its elected state officials, to direct the use of that government's general revenues, is a critical attribute of the "republican form of government" each state is guaranteed under the Constitution.²⁵³ Thus, at most the federal government should have the power only to ensure its own neutrality.²⁵⁴ In any event, Congress' mere disagreement with the decisions states make in the exercise of their prerogatives should not provide a legitimate basis for imposing grant conditions penalizing states for such choices.²⁵⁵

By contrast, the Spending Clause should be viewed as providing Congress with broader power to pursue its functional interests in federal spending programs. The federal government must have the authority to ensure that recipients do not spend federal grant money in ways that frustrate the goals of a federal spending program, even if that means conditioning funds on states exercising their sovereign prerogatives in accordance with federal wishes. *South Dakota v. Dole* provides a good example of the importance of this sort of congressional power.

Congress had a legitimate interest in ensuring that 18-20 year olds did not use the federally-funded highway system while drunk and, thereby, endanger other highway users. Congress could have done so by barring inebriated 18-20 year olds from entering the highway system. While the approach is precisely calibrated to address the government's interest, it is wildly impractical. Congress could have sought to protect drivers using federal highways by simply barring 18-20 year olds, inebriated or not, from the highway system. Such a less-precisely-tailored solution would surely have proven somewhat impractical as well (though not as impractical as the first

²⁵³ *TRIBE*, *supra* note 8, at §5-12, at 909; Merritt, *supra* note 137, at 23-29 (88 Colum L Rev), *New York v. United States*, 505 U.S. at 168-69; *Printz v. United States*, 521 U.S. 920 ("a state's govt is accountable to its own citizens"); Michael Wells & Walter Hellerstein, *The Governmental-Proprietary Distinction in Constitutional Law*, 66 VA. L. REV. 1073, 1133 (1980)(explaining "market participant" exception to dormant Commerce Clause as an effort to ensure that states controlled their own funds).

²⁵⁴ To some extent one may have to define the baseline of entitlement in order to determine what government action constitutes neutrality. RICHARD A. EPSTEIN, *BARGAINING WITH THE STATE* 18 (1993).

²⁵⁵ After the rule is established, Congress will surely, in light of the rule, always seek to provide some functional argument in favor of the grant limitation

suggestion).²⁵⁶ But more importantly, that approach would be unfair — why should sober 18-20 year olds, and for that matter sober 16 and 17 year olds, be barred from federally-funded highways because a disproportionate percentage of drivers in their age cohort drive on such highways while inebriated and cause a disproportionate number of accidents?

Congress chose a practical and fair solution to the danger posed by drunk-driving teens, but one that intruded more deeply on constitutionally-recognized state prerogatives (and on individual liberty, albeit any freedom to consume alcohol is not constitutionally-protected), conditioning funds on states prohibiting anyone under 21 from drinking, whether they would use the federally-funded highway system, keep to state highways, or refrain from driving at all. These sorts of decisions about the limitations on states or individuals needed to accomplish the federal purpose are typically accorded great deference,²⁵⁷ sometimes even when individual rights and state prerogatives are at stake. Such congressional decisions regarding the need for certain statutory provisions to effect the federal interests should receive equal deference in the context of spending power challenges. In the spending context, as in other contexts, such decisions involve engaging in sensitive factual inquiries and making difficult predictive judgments, and such inquiries and assessments lie more within the competence of the political branches of governments than that of the courts.²⁵⁸

Now contrast the actual *South Dakota v. Dole* with a hypothetical one. In the hypothetical case, the Congress disapproved of state statutes lowering the legal drinking age to 18 because Congress simply disagreed with the state judgment, and sought to justify its refusal to provide

²⁵⁶ Presumably the provision would be enforced not by stationing officials at each on and off ramp of the federal highway, but by having officers driving on the highway stop those who should not be on the highway. It is probably easier to spot a driver younger than 21 than it is to spot a driver, younger than 21, who has had an alcoholic beverage but does not appear at the moment to be under the influence of an intoxicant. (If the person appears under the influence, no special law would be needed to pull that person over — it wouldn't matter if the person were under 21.)

²⁵⁷ *Gonzalez v. Raich*, — U.S. —, 125 S.Ct. 2195, 2206, 2211-15 (2005) (rational basis) (Commerce Clause); *McConnell v. Federal Election Comm*, 540 U.S. 93, 124 S.Ct. 619, 672-73 (2003) (campaign finance); *Turner Broadcasting System v. F.C.C.*, 512 U.S. 622, 665 (1994); *Turner Broadcasting System v. F.C.C.*, 520 U.S. 180 (1997). More generally, the Necessary and Proper Clause confers on Congress auxiliary legislative authority to make provisions necessary to accomplish its objectives, and courts accord Congress's actions under the Clause discretion.

²⁵⁸ DONALD L. HOROWITZ, *THE COURTS AND SOCIAL POLICY* 38-51 (1977); Cornelius J. Peck, *The Role of the Courts and Legislatures in the Reform of Tort Law*, 48 MINN L. REV. 265, 296-97 (1963). See generally, Stuart M. Benjamin, *Proactive Legislation and the First Amendment*, 99 MICH. L. REV. 281 332-42 (2000). Professor Benjamin accepts the proposition that legislatures are superior factfinders, but ultimately questions whether they are more accomplished predictors of consequences.

highway funds to states allowing 18-20 year olds to drink on its desire to avoid symbolically endorsing such state decisions. In other words, rather than serving a functional purpose, the limitation on state authority merely serves a dissociative one. In a sense federal funding would facilitate 18-20 year old drinking — if the federal government held firmly to denying federal highway funds to states whose legal drinking age was lower than 21, the recalcitrant states would relent and prohibit such 18-20 year olds from drinking.²⁵⁹ Thus, in a sense, the absence of the federal grant condition would be a necessary, and indeed important, condition precedent to teen drunk driving. However, in such a case the federal stance would hardly be considered a neutral one. Even absent the grant limitation desired by Congress, federal funds would not actually finance teen drinking, such as they would if the federal government funded beer distribution that was destined for drinkers not only older than 21, but younger ones as well. Rather, the federal government is using conditional funding and the prospect of its withdrawal to change the decisions of state officials with whom it disagrees. The highway program is designed to provide funds to create safe and useful roads, and in general decisions are intended to be made on that basis,²⁶⁰ and that statutory purpose thus provides a baseline for states' legitimate expectations. Withdrawing such funding because of disagreement with a state policy can be viewed as coercion, not merely removing encouragement.

Courts have been particularly careful with conditional funding that interferes with critical powers of coordinate sovereigns,²⁶¹ other branches of government,²⁶² or private institutions,²⁶³ as well as conditional fund that in practical effect expands a government's regulatory powers.²⁶⁴

The concern about undermining critical aspects or powers of coordinate sovereigns is evident

²⁵⁹ This is facilitation in terms of a type of “but for” test as that used in torts.

²⁶⁰ Federal statute specifies that federal highways are to be designed and constructed in accordance with criteria suited to accomplish the objectives of providing roadways that “adequately meet the existing and probable future traffic needs and conditions in a manner conducive to safety, durability, and economy of maintenance.” 23 U.S.C. § 109(a).

²⁶¹ *Crosby*, 530 U.S. 363 (2000).

²⁶² *Legal Services Corp. v. Velazquez*, 531 U.S. 533, 544 (2001); *Crosby*, 530 U.S. 363 (2000)

²⁶³ *Legal Services Corp. v. Velazquez*, 531 U.S. 533, 544 (2001); *Arkansas Educational Television Commission v. Forbes*, 523 U.S. 666 (1998).

²⁶⁴ *South-Central Timber Development Co. v. Wunnicke*, 467 U.S. 82 (1984).

in *Crosby v. National Foreign Trade Council*.²⁶⁵ The Court has recognized that states possess a power to choose who they will do business with and may wield that power to prefer their own citizens.²⁶⁶ As the Court has explained, states “may fairly claim some measure of sovereign interest in retaining freedom to decide how, with whom, and for whose benefit to deal.”²⁶⁷ In the 1980's and 1990's many state and local governments used their procurement discretion to express their disapproval of foreign governments, first in South Africa and then in many other countries.²⁶⁸ One of the countries targeted was Myanmar. In *Crosby*, the Court invalidated Massachusetts's policy of precluding its contractors from doing business with the Government of Myanmar. While the case was narrowly decided on obstacle preemption grounds (which limits state and local power, but not federal power), the Court observed more generally that Massachusetts's use of its procurement power interfered with the nation's, and in particular the President's, power to conduct foreign policy. Presumably a state could decide that it itself would not do business with a company based in a country whose regime it abhorred, though even then Congress might have the power to preempt such a state or local provision.²⁶⁹

The concern about interfering with other branches of government is evident in *Crosby* as well, with a concern not merely about federal prerogatives, but about Presidential prerogatives and

²⁶⁵ 530 U.S. 363 (2000).

²⁶⁶ It has recognized this expressly in the domestic context. *Hughes v. Alexandria Scrap*, 426 U.S. 794, 809-10 (1976); *Reeves v. Stake*, 447 U.S. 429, 438 & nn. 9-10 (1980). There is some debate among commentators about whether the market participant exception applies at all in the foreign context. *Board of Trustees v. Mayor and City Council of Baltimore*, 317 Md. 73, 562 A.2d 720, 752-54 (1989) (holding that it does apply but referencing contrary commentary from commentators); Thomas A. Barnico, *The Road After Burma: State Boycotts After Crosby*, 19 B.U. INTERNAT'L L. J. 89, 107-08 & nn. 142-44 (discussing debate about whether market participant power applies to the Foreign Affairs power); Wendy L. Wallace, *Are States Denied A Voice?: Citizen-Driven Foreign Policy After Crosby*, 52 CASE WESTERN RESERVE L. REV. 793, 793-95 (student noted) (examining private market participant and the dormant foreign commerce clause power and possibly the foreign affairs power); Carol E. Head, *The Dormant Foreign Affairs Power: Implications for State and Local Investment Restrictions Impacting Foreign Countries*, 42 BOSTON COLLEGE L. REV. 123 ((2000).

²⁶⁷ *Reeves v. Stake*, 447 U.S. 429, 438 n.10 (1980).

²⁶⁸ Carol E. Head, *supra* note 265, at 123, 127-34.

²⁶⁹ This was Tribe's approach in the second edition of his Constitutional Law treatise. LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 6-21 (2d ed. 1988) at 469.

States and localities possess analogous power with regard to making procurement decisions. *See, e.g.*, *Board of Trustees v. Mayor and City Council of Baltimore*, 317 Md. 73, 562 A.2d 720, 746-47 (1989); accord, *id.* at 744-52.

the President's ability to take action with regard to matters the Constitution commits to his discretion. *Legal Services Corp. v. Velazquez* provides a second illustration of the Court's concerns about grant conditions that intrude upon another branch of government. In *Velazquez* plaintiffs challenged a federal statute and implementing regulations that limited entities receiving Legal Services Corporation grants from accepting representations designed to change welfare laws or challenge the constitutional or statutory validity of welfare statutes or regulations. Congress can choose to fund the litigation it considers most important. It cannot, however, use grant restrictions to limit lawyers who receive grant funds in ways compromise their essential function in the judicial system, namely raising all issues presented by a case that warrant judicial consideration. In resolving cases, judges rely on lawyers to fully present the relevant arguments, including arguments that government officials have exceeded their constitutional or statutory authority. Allowing funding that imposes such a restriction impermissibly intrudes upon the judiciary's domain by interfering with the proper operation of the judicial system.²⁷⁰ The mere decision to fund certain cases and not others, however, would not have such an effect — it would merely express Congress' view that some types of litigation were more essential, or at least more worthy of funding, given the intense competition for federal funds.

Some cases exhibit judicial concern about grant restrictions that interfere with private institutions, and in particular their essential functions or attributes. *Velazquez* exemplifies this sort of concern as well. Lawyers not only serve a governmental function, but a private one as well, namely representing clients. That representation has essential features, including a duty of loyalty to the client, requiring the lawyer to put the client's interests above others, even those *funding* the representation.²⁷¹ The Congressional limitation threatened to compromise that loyalty. The grant restriction rested on the presumption that the role of legal aid lawyers, at least in part, is to communicate the government's message or otherwise serve the government's purposes. Coopting an established institution, like legal representation, to communicate the government message was,

²⁷⁰ *Velazquez*, 531 U.S. at 534, 544 (“the government may not design a subsidy to effect [a] serious and fundamental restriction on advocacy of attorneys and the functioning of the judiciary”).

²⁷¹ See, *U.S. v. Schwarz*, 283 F.3d 76, 91, 95-96 (2002).

the Court found, constitutionally impermissible.²⁷² The Court characterized some of its other holdings in these terms, though it did not necessarily use this theory as a rationale at the time of those decisions. Thus, it explained, in *Arkansas Educational Television Commission v. Forbes*²⁷³ it had rejected a minor candidate's claim of a First Amendment right to participate in a debate sponsored by a public television station because exerting such authority of a broadcast station, even a publicly owned one, was inconsistent with the editorial discretion essential for broadcasters. More particularly, "the dynamics of the broadcasting system gave station programmers the right to use editorial judgment to exclude certain speech so that the broadcast message could be more effective."²⁷⁴

Finally, the concern that grant restriction might facilitate the undue expansion of the grantors' power can be seen in the market participant cases. (Granted the market participant doctrine is not merely limited to grants, and indeed primarily takes the form of expenditures used to purchase goods and services, but the governmental power exercised is sufficiently analogous to the spending power to warrant consideration.) As noted earlier, the Court recognized that the Commerce Clause was designed to limit state regulatory power, and was not directed at its participation in the market. While a state could not prefer its own citizens by imposing regulation that favored its citizens,²⁷⁵ it could favor its citizens in deciding with whom it would deal.²⁷⁶ It quickly became apparent that states could magnify the effect of wielding their limited market power by not only requiring that their contract partners be state citizens, but in requiring those contract partners in turn to deal exclusively with citizens of the state. For example, South Dakota specified that any company that dealt with it must offer its lumber to the state citizens on a preferred basis. The State could not have imposed

²⁷² *Velazquez*, 531 U.S. at 544. Note the same argument was made in *Rust v. Sullivan* and avoided by the Court, but it appears that *Velazquez* certainly undermines *Rust* because arguably *Rust* also involves corrupting an established institution, namely the doctor-patient relationship.

²⁷³ *Arkansas Educational Television Commission v. Forbes*, 523 U.S. 666 (1998)

²⁷⁴ *Velazquez*, 531 U.S. at 534, 543. See generally, Schauer, *supra* note 229, at 107-08, 113-18.

²⁷⁵ E.g., *C & C Carbone, Inc. v. Town of Clarkson*, 511 U.S. 383, 392 (1994); accord, *Granholm v. Heald*, — U.S. —, 125 S.Ct. 1885, 1895-96 (2005); *Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978); see generally, *TRIBE*, *supra* note 8, at §6-6.

²⁷⁶ *Hughes v. Alexandria Scrap*, 426 U.S. 794 (1976); *Reeves, Inc. v. Stake*, 447 U.S. 429 (1980).

such a requirement by regulation, but its “market participant” power proved an effective substitute for its regulatory power.

In *South-Central Timber Development Co. v. Wunnicke* the court stopped this trend. While the market participant exception allowed states to choose their contracting partners based on residency, it did not allow states to enforce restrictions on who those contractors could use as contracting partners. In effect, the Court attempted to draw a line between spending and market participation on the one hand and regulation on the other.²⁷⁷

So what is the scope of Congress’ spending power in the context of Congress’ impending effort to limit state and local use of eminent domain? Congress may clearly prohibit federal funds from being used to pay “just compensation” for property taken in circumstances Congress finds abhorrent. Surely Congress can also preclude states from using federal funds to pay for certain tasks that are a part of the eminent domain process, such a bringing lawsuits to acquire property by eminent domain. But Congress should not have the power to de-fund segregable aspects of the redevelopment project because of its disapproval of the state’s decisions to exercise its powers of eminent domain.²⁷⁸ Funding should be made regardless of local choices with regard to eminent domain, except to the extent that acquiring land by eminent domain for economic development gives particular localities an identifiable advantage. The federal government could take steps to analyze grant applications so as to counteract such a competitive advantage. It certainly should not be able to use withholding transportation funds provided based on certain formulas or merits criteria in order to express its disapproval of local official’s choices with respect to invoking their power of eminent domain.

²⁷⁷ *South-Central Timber Development Co. v. Wunnicke*, 467 U.S. 82 (1984); *see*, *White v. Mass Council of Construction Employers, Inc.*, 460 U.S. 204, 211 n.7 (1983).

²⁷⁸ For instance, federal highway funding is to be provided based on probable future traffic needs and the safety, durability, and cost of maintenance of the highway. While federal authorities must also consider impacts on the public and the community, including displacement of people businesses or farms, nothing in the statute suggests that once a locality make an independent decision to displace others for a project that it will fund, that federal authorities are to treat the location unfavorably in terms of serving existing or probable future traffic needs, based on any disagreement with the state’s exercise of its discretion. *See generally*, Robert H. Freilich & S. Mark White, *Transportation Congestion and Growth Management: Comprehensive Approaches to Resolving America’s Major Quality of Life Crisis*, 25 LOYOLA L.A. L. REV. 915, 923-24 (1991).

CONCLUSION

Members of Congress from across the political spectrum disagree with *Kelo v. New London*, and find ample support from an outraged citizenry. But responding to the decision poses something of a challenge for Congress. Senators' and Representatives' initial inclination seem to be to simply establish the rule endorsed by the dissent and rejected by the majority, that acquisition of land for economic revitalization cannot qualify as a "public use" that allows state and local authorities the power to use eminent domain. Members of Congress seek to establish such a rule not by exercise of its regulatory authority, but by using federal grant programs as leverage. Whether Congress wishes to use its regulatory powers or its power of the purse, the assertion of preeminence as a constitutional interpreter implicit in such an approach will likely lead the Supreme Court, and indeed the lower federal courts, to invalidate the legislative initiative. The above analysis suggests that a more narrowly focused approach to protecting property owners from appropriation of their land for private use might well be grounded on the Enforcement Clause of the Fourteenth Amendment, the Commerce Clause, or the Spending Clause.

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