Legislatively Revising Kelo v. City of New London: Eminent Domain, Federalism, and Congressional Powers

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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. Many state courts have also treated government officials' invocations of eminent domain with nearly complete deference. 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" and thereby enlarging the obligation to proffer "just compensation." Nevertheless, commentators from various perspectives have severely criticized the Supreme Court's refusal to constrain government's use of the takings power.

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2. 2A NICHOLS ON EMINENT DOMAIN § 7.02[3] (Julius L. Sackman ed., 3d ed. 2002). Some states, however, have been more aggressive, as Merrill found in his 1986 study. Merill, supra note 1, at 96 (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 appellate cases the court found that the taking did not serve a "public use").


In *Kelo v. City of New London*, the Court reconsidered its deferential approach in the context of local officials’ use of eminent domain in conjunction with economic development efforts. In recent years, localities have sought to pursue economic revitalization plans, often relying upon eminent domain to acquire land needed for redevelopment projects. The Court not only rejected the challenge to New London’s invocation of eminent domain to acquire land for a major redevelopment project but crafted an opinion quite deferential to governmental authorities. Indeed, the type of review that the opinion embraces resembles the extremely deferential “rational basis” review the Court employs in examining equal protection and due process challenges to government actions that involve neither “suspect classifications” nor “fundamental rights.” 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 society, and therefore the purposes government can legitimately pursue. 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 a taking qualifies as a “public use.”

Reaction to the Court’s decision has been swift and sharp. Opinion polls have shown a public sharply critical of the decision. Many states have enacted or are considering legislation restricting the use of eminent domain for economic revitalization. Several states have created commissions to study the use of eminent domain for economic redevelopment. Indeed, legislation restricting the use of eminent domain for economic development has even been considered in Connecticut, the state from which *Kelo* arose. On the federal level, the United States House of Representatives almost immediately passed both a resolution of disapproval and an

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5. *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 states’ natural resources. *Id.* at 2663 n.8; 1 NICHOLS ON EMINENT DOMAIN, *supra* note 2, §§ 1.22[7]–[8]; 2A NICHOLS ON EMINENT DOMAIN, §§ 7.03[1], 7.03[2][c], 7.03[10][c]. However, these uses often involve easements rather than acquisition of title to property for transfer to another.


10. Opinion polls indicate 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*. Castle Coalition, *The Polls Are In: Americans Overwhelmingly Oppose Use of Eminent Domain for Private Gain*, http://www.castlecoalition.org/resources/kelo_polls.html (last visited Apr. 5, 2006).


appropriations rider prohibiting the use of funds to enforce the decision. \textsuperscript{13} Both the House and the Senate have introduced legislation to reverse \textit{Kelo}. Indeed, the decision seems to have united members of Congress from across the political spectrum, including, for example, conservative former Republican House Majority Leader Tom DeLay and liberal Democrat Representatives John Conyers and Barney Frank. \textsuperscript{14}

The severity of the reaction is particularly striking because the Court upheld the challenged government action. (Moreover, in doing so, the \textit{Kelo} majority did not even depart from well-established precedent.) Virtually all Supreme Court constitutional decisions that have provoked widespread outrage, such as \textit{A.L.A. Schechter Poultry Corp. v. United States} \textsuperscript{15} and the series of cases invalidating New Deal legislation in 1935 and 1936; \textit{Brown v. Board of Education} \textsuperscript{16} and subsequent school desegregation cases; \textit{Engel v. Vitale}, \textit{School District of Abington Township v. Schempp}, \textsuperscript{18} and subsequent school prayer cases; \textit{Miranda v. Arizona} \textsuperscript{19} and other Warren Court criminal procedure rulings; \textit{Roe v. Wade}; \textit{Furman v. Georgia}; \textsuperscript{21} and \textit{Texas v. Johnson}, \textsuperscript{22} for example, involve \textit{invalidation} of government action. Even more remarkably, the governmental bodies that most benefit from the discretion that \textit{Kelo} reaffirmed are not federal agencies, but state and, particularly, local governments—theoretically the political jurisdictions most responsive to the citizenry.

I will not dwell upon the merits of the \textit{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 \textit{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. \textsuperscript{23}

Part I of this paper will summarize \textit{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

\begin{footnotes}
\item[16] 347 U.S. 483 (1954).
\item[21] 408 U.S. 238 (1972).
\item[22] 491 U.S. 397 (1989).
\item[23] 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 \textit{Kelo} and seek rigorous judicial review of the takings power have more generally sought to constrain federal powers over the states and have 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 \textit{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.
\end{footnotes}
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.

II. *Kelo v. City of New London* and the Congressional Response

A. *Kelo v. City of New London*

By 1998, after decades of economic decline, designation by a state agency as a "distressed municipality," and the closure of a military installation in the Fort Trumbull section of the City, New London's unemployment rate had risen to nearly twice the State average and its population had reached its lowest level since 1920.²⁴ Pfizer Inc., an international pharmaceutical company, announced plans to build a major facility adjacent to Fort Trumbull.²⁵ New London officials, with the assistance of the New London Development Corporation (NLDC), a private non-profit entity, crafted a redevelopment plan focused on ninety acres in Fort Trumbull.²⁶ They designed the project to capitalize on the economic activity Pfizer's facility would attract.²⁷ Officials anticipated that the redevelopment would create jobs, generate tax revenue, make the city aesthetically more appealing, and create recreational opportunities.²⁸ The mixed-use development would include a waterfront conference hotel anchoring a cluster of restaurants and shops.²⁹ It would also include a marina, new homes, a museum, and office space.³⁰ The city council authorized submission of the plan to state authorities, which, after evaluating six alternative proposals, approved it.³¹

Though most of the land was purchased from willing sellers, Susette Kelo and eight local landowners refused to sell their property, and the City sought to acquire their property by eminent domain.³² By statute, the State of Connecticut declared that the taking of land, even developed land, as part of an economic development project qualified as a taking for a "public use."³³ Kelo and the other landowners sought to prevent the City from invoking eminent domain, arguing that taking property to further local economic development did not qualify as a "public use."³⁴ The trial court enjoined some of the proposed takings and permitted others.³⁵ The Connecticut

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²⁵ *Id.* at 2659.
²⁶ *Id.*
²⁷ *Id.*
²⁸ *Id.*
²⁹ *Id.*
³⁰ *Id.*
³¹ *Id.*
³² *Id.* at 2660.
³³ *Id.*
³⁴ *Id.*
³⁵ *Id.*
Supreme Court held all of the proposed takings constitutionally permissible. The United States Supreme Court affirmed. 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.

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 the general public’s use, either through public ownership or transfer of the property to 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 the 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 power turned on whether its development plan served 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.

In the majority’s view, eminent domain precedent recognizes 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.”

While New London’s elected officials did not confront blight, as did the defendants in Berman v. Parker, 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 “[p]romoting 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.

36. Id. at 2660–61.
38. Kelo, 125 S. Ct. at 2661.
39. Id. at 2661–62.
40. Id. at 2662.
41. Id. at 2662–63.
42. Id. at 2663.
43. Id. at 2664.
44. 348 U.S. 26, 36 (1954) (upholding use of eminent domain to acquire land to revitalize a blighted area).
45. Kelo, 125 S. Ct. at 2665.
46. 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).
Ruckelshaus v. Monsanto,\(^{47}\) and other precedents. Any blurring of the boundary between 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.”\(^{48}\) Justice Stevens added: “[t]he public end may be as well served through an agency of private enterprise than through a department of government.”\(^{49}\)

The majority also refused to hold that the “public use” requirement required government officials to establish a proposed redevelopment project’s expected economic benefits to a “reasonable certainty.”\(^{50}\) Quoting Hawaii Housing Authority v. Midkiff, Justice Stevens explained that “empirical 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.”\(^{51}\) Such a rule would create a significant and unwarranted impediment to comprehensive redevelopment efforts.\(^{52}\)

In the final paragraph of its opinion, the majority acknowledged both the hardships that condemnations may entail even when property owners receive adequate compensation and the importance of questions that had been raised about the fairness of the measure of “just compensation.”\(^{53}\) It also emphasized each state’s freedom to impose greater restrictions on the power of eminent domain.\(^{54}\) The Court did not suggest that Congress had any role to play in addressing states’ and localities’ potential abuses of eminent domain. Finally, the Court acknowledged that “the necessity and wisdom of using eminent domain to promote economic development are certainly matters of legitimate public debate.”\(^{55}\)

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.”\(^{56}\) He cited Cleburne v. Cleburne Living Center, Inc.\(^{57}\) and Department of Agriculture v. Moreno,\(^{58}\) two equal protection cases, as examples of cases in which the Supreme Court had found that a governmental action failed “rational basis” review precisely because the challenged action was primarily intended to disadvantage certain private parties.\(^{59}\) Justice Kennedy admonished courts confronting a plausible claim of impermissible favoritism to treat the claim seriously and carefully review the record.\(^{60}\) In Kelo, he explained, the trial court had conducted just such a serious inquiry. The trial court engaged in a

\(^{47}\) 467 U.S. 986 (1984) (upholding a federal statute allowing an applicant for pesticide approval to rely on data submitted by a prior applicant so long as it paid “just compensation” for the data).

\(^{48}\) Kelo, 125 S. Ct. at 2666.

\(^{49}\) Id. (quoting Berman, 348 U.S. at 34).

\(^{50}\) Id. at 2667.

\(^{51}\) Id. at (quoting Hawaii Housing Authority, 467 U.S. at 242).

\(^{52}\) Id. at 2667–68.

\(^{53}\) Id. at 2668.

\(^{54}\) Id.

\(^{55}\) Id.

\(^{56}\) Id. at 2669 (Kennedy, J., concurring).

\(^{57}\) 473 U.S. 432 (1985).

\(^{58}\) 413 U.S. 528 (1973).

\(^{59}\) Kelo, 125 S. Ct. at 2669 (Kennedy, J., concurring).

\(^{60}\) Id.
"careful and extensive" inquiry regarding whether the development plan primarily benefited the developer, Pfizer, and the businesses that would relocate in the area. The court, for example, 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 that, moreover, facilitate judicial review. 

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 opinion 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 officials' justifications for taking private property. Nearly any lawful use of private property arguably generates some incidental benefit to the public. 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. Justice O'Connor distinguished 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 private benefit and incidental public benefit are, by definition, merged and mutually reinforcing." 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 new private use are enough to ensure the 'public purpose' in a taking, why should

61. Id. at 2669–70.  
62. Id. at 2670.  
63. Id.  
64. Id.  
65. Id. at 2670.  
66. Id.  
67. Id. at 2673 (O'Connor, J., dissenting).  
68. Id. at 2673, 2675.  
69. Id. at 2675; 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 takings in those cases targeted properties that were inflicting affirmative harm, and, thus, the takings themselves had served to eliminate that harm. Id. at 2674–75 (O'Connor, J., dissenting).  
70. Id. at 2675 (O'Connor, J., dissenting).
it matter, as far as the Fifth Amendment is concerned, what inspired the taking in the first place?"\textsuperscript{71}

Justice Thomas added his own dissent. Arguing that the Court should reconsider its precedents, he undertook a textual analysis of the Takings Clause and a historical examination of understanding of the term "public use."\textsuperscript{72} 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.\textsuperscript{73} He also complained that deference to public officials' determinations that proposed uses qualify as "public uses" was both inappropriate and inconsistent with the Court's non-deferential review of government actions threatening other Bill of Rights protections.\textsuperscript{74} He pointedly noted that poor and minority communities would be those most likely to suffer displacement under the majority's ruling—first, land in such communities is more often underutilized; second, such communities possess the least political power.\textsuperscript{75}

\textbf{B. The Congressional Response}

As noted above, congressional reaction was swift. The House of Representatives almost immediately adopted a resolution disapproving the decision. Two representatives successfully added a rider, designed to prohibit federal funds to enforce the \textit{Kelo} judgment, to the fiscal year 2006 appropriations bill covering the Departments of Transportation, Treasury, and Housing and Urban Development. Senators and Representatives introduced companion bills seeking to limit federal involvement in economic development projects that were furthered by the use of eminent domain. In November, the House passed the Private Property Rights Protection Act of 2005.

The House Resolution states that the majority opinion in \textit{Kelo} "renders the public use provision in the Takings Clause of the fifth amendment [sic] without meaning," and "justifies the forfeiture of a person's private property through eminent domain for the sole benefit of another private person."\textsuperscript{76} 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."\textsuperscript{77} 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."\textsuperscript{78} The resolution declares that "all levels of government have a Constitutional responsibility and a moral obligation to . . . defend property . . . rights" and that such a duty requires each level of government to "only execute the power of eminent domain for those

\textsuperscript{71} Id. at 2675–76.
\textsuperscript{72} Id. at 2678 (Thomas, J., dissenting).
\textsuperscript{73} Id. at 2680–82.
\textsuperscript{74} Id. at 2684–85.
\textsuperscript{75} Id. at 2686–87. He reviewed the history of local economic redevelopment, including the Urban Renewal program, to show that such efforts predominantly displaced minority and poor communities. \textit{Id}.
\textsuperscript{77} Id. (quoting \textit{Kelo}, 125 S. Ct. at 2672 (O'Connor, J., dissenting)).
\textsuperscript{78} Id. (quoting \textit{Kelo}, 125 S. Ct. at 2677 (O'Connor, J., dissenting)).
purposes that serve the public good." The resolution then specifically disapproves of the majority’s opinion and explicitly endorses the dissenting opinion.

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 an usurpation of" individual property rights. 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 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" that Kelo occasions.

Representatives Scott Garrett and Mark R. Kennedy, pursuing a separate legislative initiative, successfully proposed a rider to the fiscal year 2006 appropriations bill covering the Departments of Transportation, Treasury, and Housing and Urban Development. The rider bans expenditure of any funds to enforce the judgment of the Court in Kelo. 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.

Representative Dennis Rehberg and Senator John Cornyn respectively introduced the companion House and Senate bills to overturn Kelo, entitled the "Protection of Homes, Small Businesses, and Private Property Act of 2005." 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

79. Id. § 2(A).
80. Id. § 1(A)-(B).
81. Id. § 2(C).
82. Id. § 2(E)-(F).
84. Id. An amendment to reduce the funding of the Supreme Court in reaction to Kelo, H. Amend. 427, however, was overwhelmingly defeated 374-42. 151 CONG. REC. at H5504-05.
86. Id. In his view, "[t]he 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." Id. 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." Id. Moreover, it would "prohibit Federal dollars from building a new entrance ramp or an 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. Id. at 5483.
88. H.R. 3083 § 3(b); S. 1313 § 3(b).
economic development. Given the bills' 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.* 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." The statute neither explicitly provides a right of action against the federal government nor abrogates state sovereign immunity. The bills have been referred to committee. 

The Private Property Protection Act of 2005 is far more robust than the legislation discussed above. It precludes states and their subdivisions from using eminent domain for economic development during any year in which they receive federal economic development funds. Moreover, any violation of the provision subjects the offending state or political subdivision to a two-year period of ineligibility for federal economic development funds (unless the entity can cure the violation). The statute defines an economic development taking as "conveying or leasing . . . property [of] one private person or entity to another private person or entity for commercial enterprise carried on for profit, or to increase tax revenue, tax base, employment, or general economic health," with certain exceptions. The bill grants a right of action to landowners who believe their property has been taken in violation of the statute and expressly waives state immunity to such lawsuits. The legislation also provides specific protection for religious and non-profit institutions, specifying that no state or subdivision shall use eminent domain with respect to the property of a religious or non-profit institution "by reason of the nonprofit or tax-exempt status of such organization, or any quality related thereto" on pain of losing eligibility to receive federal economic development funds for two years. In explaining Congress' authority to enact such legislation, the proponents of the measure cited Congress' Spending Clause power, as well as its Commerce Clause power and its power to enforce the

90. 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. 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. BERLINER, supra note 4, at 5; GREENHUT, supra note 4, at 7–9.
91. H.R. 3083 § 3(c); S. 1313 § 3(c)(1–2).
94. Id. § 2. The legislation also provides that the federal government shall not exercise eminent domain for economic development purposes. Id. § 3.
95. Id. § 2(b)–(c). To cure the violation, the entity must return all real property acquired in violation of the prohibition and replace or repair any property damaged as a result of the violation. Id. § 2(c).
96. Id. § 8(1). The exceptions include conveyance to a common carrier for use as a road or other means of public transportation; or for use as an aqueduct, flood control facility, or pipeline. Id. § 8(1)(A)(i–iv). Exceptions are also provided for removing harmful uses of land that cause an immediate threat to public health and safety, leasing property to a private person that owns an incidental part of a public building, acquiring abandoned property, clearing defective titles, and acquiring property for use of a public facility. Id. § 8(1)(B–F).
97. Id. § 4(a).
98. Id. § 13(a)–(b).
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Fourteenth Amendment.\textsuperscript{99}

The various legislative proposals focus on the use of eminent domain by the federal government and the use of federal funds to support state and local projects made possible by those governments' use of their powers of eminent domain. The limitations on the federal governments' use of eminent domain will likely prove insubstantial—few federal projects are likely to be considered "economic development project[s]."\textsuperscript{100} The limitation on federal funding could prove more significant, particularly the far-reaching provisions of the House-approved Private Property Rights Protection Act of 2005.\textsuperscript{101}

Even the broadest proposals restricting state and local use of eminent domain seem largely incongruent with Congress' real concerns. In particular, Congress views the Court as providing inadequate protection for property rights.\textsuperscript{102} 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.\textsuperscript{103} 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 Congress conceptualized them, are violated. Granted, however, as a practical matter, reliance on federal economic development funds may be so extensive that states and localities would have little choice but to abandon the use of eminent domain for economic development purposes.

\textbf{C. Congressional Options}

Congress could seek to address state and local use of eminent domain in several ways. It could: 1) specify 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) create 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

\begin{itemize}
\item \textsuperscript{100} Kelo v. City of New London, 125 S. Ct. 2655, 2660 (2005). 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 effectuated by the federal government's invocation of its own eminent domain powers. See BERLINDER, supra note 4; GREENHUT, supra note 4.
\item \textsuperscript{101} H.R. 4128, 109th Cong. (2005). The significance of the Garrett-Kennedy Rider or the Rehberg-Comyn proposal are difficult to assess, in part because the breadth of the prohibition is unclear. The proposals may prohibit use of federal funds only to pay for property acquired by eminent domain for economic development purposes but allow federal funding of segregable aspects of the redevelopment project. Alternatively, the proposed provisions might preclude all federal financial assistance to a project that uses land improperly acquired by a state or local use of eminent domain. 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 an offending project).
\item \textsuperscript{102} See, e.g., H.R. 3135, 109th Cong. (2005). The 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 (2005) ("Property rights are fundamental freedom... Congress must take action to protect property owners in the aftermath of this flawed decision.").
\item \textsuperscript{103} 151 CONG. REC. H5505 (2005).
\end{itemize}
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 the government invokes eminent domain, it has the right to acquire the property at market value. It need not compensate owners for the increase in value expected as a result of the government project, nor need it compensate individuals for financial losses and hardships not recognized by the market. Thus, the courts ordinarily do not require the government to compensate business owners for the loss of good will or the losses from business interruption caused by the need to relocate. 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. Indeed, such uncompensated costs may be particularly pronounced for homeowners and businesses displaced from poorer neighborhoods.

The measure of "just compensation" has importance because the Taking Clause's "just compensation" requirement provides a 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 to make economic sense. If the measure of "just compensation" understates a taking'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 a project's real social costs exceed its benefits. A measure of compensation that accurately reflects a taking's true cost would force governments to properly balance public needs against the harm to individuals. At the same time, of course, imposing unrealistically high costs

104. United States v. Miller, 317 U.S. 369, 374 (1943); 4 NICHOLS ON EMINENT DOMAIN, supra note 2, § 12.02.

105. Miller, 317 U.S. at 375; 3 NICHOLS ON EMINENT DOMAIN, supra note 2, § 8.07 ("The general rule forbids consideration of the effect of the proposed project upon the value of the property taken."); see also 4 NICHOLS ON EMINENT DOMAIN, supra note 2, § 12.02(1); id. § 12B.17(1).


108. 3 NICHOLS ON EMINENT DOMAIN, supra note 2, § 8.22; Achieving Just Compensation, supra note 106, at 696.

109. See Daniel A. Farber, Public Choice and Just Compensation, 9 CONST. COMMENT. 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. Id. at 287–88. As I suggest in discussing the political context of local takings, local officials may not seriously weigh the costs of eminent domain on those displaced without a financial incentive to do so. Supra text accompanying notes 209–216, 285–289. See generally WILLIAM A. FISCHEL, 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).

110. Placing limitations on damages and valuation rules provides one means to protect constitutional rights. See BMW of N. Am. v. Gore, 517 U.S. 559, 575 (1996) (setting forth guideposts limiting size of punitive damages awards); Gertz v. Robert Welch, Inc., 418 U.S. 323, 348–50 (1974) (limiting presumed damages in certain defamation cases). The constitutional right was vindicated in both the defamation and punitive damages contexts by limiting state damage awards rather than requiring larger awards than those
would improperly inhibit the use of eminent domain, and indeed could, if severe enough, preclude governments from using such authority altogether.\footnote{111}

Congress might establish minimum requirements for just compensation when a locality acquires property for transfer to third parties in connection with its redevelopment efforts.\footnote{112} 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.\footnote{113} 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.\footnote{114} 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 society as a whole should shoulder.\footnote{115} 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.\footnote{116}

In addition, the projects constructed for economic development purposes differ from many traditional government projects sited on land acquired by eminent domain. Profit-making entities that own economic development projects expect to make a profit on the projects constructed, unlike most government projects, which profit-making entities do not own. Some might justify requiring citizens to subsidize projects, by receiving compensation that does not fully cover the inconvenience caused by eminent domain, as a sacrifice reasonably demanded of citizens to support non-profit-making government operations. (Such operations 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.) However, it seems unreasonable to demand such sacrifice for the benefit of a profit-making enterprise. Profit-making enterprises should be expected to cover the costs of producing the goods and services they offer, including the cost of displacing pre-existing landowners.

The remaining options for congressional action can be discussed more briefly.

\footnote{111. United States v. One Parcel of Land, 131 F. Supp. 443, 445-46 (D.D.C. 1955). In other words, compensation must be just to the condemnor as well as the condemnee. 3 Nichols on Eminent Domain, supra note 2, § 8.01[1].}

\footnote{112. United States v. Fuller, 409 U.S. 488, 492 (1973).}

\footnote{113. Merrill, supra note 1, at 84-85 (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, § 8.06[1]; see also Epstein, supra note 4, at 184 (discussing use of bonuses in England).}

\footnote{114. 4 Nichols on Eminent Domain, supra note 2, § 12.01[3]. 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 a judicial issue. Nevertheless, legislatures have the power to require that condemners pay more than minimum compensation. Id. § 8.22[1].}

\footnote{115. The Supreme Court has observed that the Takings Clause ensures that particular individuals do not bear a burden that the public should share more broadly. See Tahoe Sierra Pres. Council v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 332 (2002); Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 123-24 (1978) (relying on the principle in deciding whether a compensable taking has indeed occurred).}

\footnote{116. But see United States v. 564.54 Acres of Land, 441 U.S. 506, 514 (1979).}
Congress could seek to ensure that eminent domain decisions are made in a transparent and politically-accountable manner—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. Perhaps it can also require that the politically-accountable officials make the decision. Indeed, in *Kelo*, Justice Kennedy noted the importance of procedures for determining whether a redevelopment plan served a public purpose.\(^{117}\) He noted that Connecticut's procedures ensured the compilation of a record that would facilitate judicial review.\(^{118}\)

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 when 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 applicable jurisdiction's employment opportunities or tax revenues. Concerns about local officials' motives might justify reversing the customary 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.\(^{119}\)

A rebuttable presumption could perhaps address the concerns frequently expressed about the particularly damaging impact economic development condemnations have on racial and ethnic minorities.\(^{120}\) For example, Congress could establish a rebuttable presumption that requires invalidation of economic redevelopment projects that disproportionately affect racial and ethnic minorities, the elderly, or the poor, unless local officials 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 traditional local powers 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 of eminent domain to acquire land on which to build a stadium primarily for use by a professional sports team. Alternatively, 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.

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118. *Id.*
119. 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).
120. See infra text accompanying notes 148–50.
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 idea set forth above merits adoption. However, the discussion above provides a range of options that Congress might consider. Perhaps more importantly, these options provide a useful context for assessing the scope of Congress’ powers to restrict states and localities’ use of eminent domain.

III. 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 of three Constitutional provisions: the Enforcement Clause of the Fourteenth Amendment, the Commerce Clause, or the Spending Clause. The Court’s recent federalism jurisprudence has cabined both the Enforcement Clause power and the Commerce Clause power. While no federalism challenge to Congress’ invocation of the Spending Clause has succeeded in the past sixty-five years, the Court has indicated that federalism principles limit Congress’ power to condition federal aid to states. I will discuss each of the three sources of potential congressional power in turn.

A. The Enforcement Clause of the Fourteenth Amendment

Congress often assumes a role in enforcing constitutional rights. Sometimes it even effectively defines the substantive scope of a constitutional right by enacting legislation reflecting its conception of the right. 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 to Title III of the Omnibus Crime Control Act of 1968) includes provisions protecting citizens against wiretapping that exceed the constitutional requirements established by the federal courts.

121. U.S. CONST. art. I, § 8, cl. 1 (Spending Clause); U.S. CONST. art. I, § 8, cl. 3 (Commerce Clause); U.S. CONST. amend. XIV, § 5 (Enforcement Clause). The Necessary and Proper Clause, U.S. CONST. art. I, § 8, cl. 18 supplements these powers.


125. 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, 509–10 (1986), Congress need not provide. See Cutter v. Wilkinson, 125 S. Ct. 2113, 2121–22 (2005). Republican efforts in the mid-1990s to require compensation when federal regulation reduced the value of property sought to expand the rights of individuals beyond the constitutional minimum recognized by the courts. E.g., Private Property Owners Bill of Rights, H.R. 790, 104th Cong. § 8 (1995); see William Michael Treanor, The Original Understanding of the Takings Clause and the Political Process, 95 COLUM. L. REV. 782, 879 (1995) (listing legislative proposals mandating compensation when regulation diminishes property
Congress may also expand upon judicially declared constitutional rights by granting citizens 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. However, Congress cannot expand upon constitutional rights when there is a countervailing constitutional restraint, such as the federalism doctrines. Congress possesses enhanced powers under the Fourteenth Amendment, which 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 jurisdiction the equal protection of the laws." The Amendment's Enforcement Clause confers upon Congress the power to enforce the Fourteenth Amendment, even when federalism doctrines would ordinarily bar such actions. As the Supreme Court has explained, the Civil War Amendments were specifically designed to expand federal power and intrude upon state sovereignty. However, no Civil War Amendment completely abrogates certain core federalism principles.

In the modern era, the scope of congressional power under the Enforcement Clause has been a matter of intense debate. Three cases in the 1960s and 1970s show the Court's willingness to allow Congress a significant role in the defining constitutional rights. In *South Carolina v. Katzenbach*, 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, which guarantees the right to vote regardless of race, color, or previous condition of servitude. The Voting Rights Act allowed Department of Justice officials to preclude the use of literacy tests in certain jurisdictions and required those jurisdictions to "preclear," with the Department of Justice, any changes in their voting rules. Any jurisdictions in which certain devices had been used to limit the franchise and in which less than fifty percent of voting age values); Timothy Egan, *Unlikely Alliances Attack Property Rights Measures*, N.Y. TIMES, May 15, 1995, at A1; John H. Cushman, Jr., *The 104th Congress: Property Rights*, N.Y. TIMES, Mar. 3, 1995, at A19.


127. 1 TRIBE, *supra* note 8, § 5-16, at 946.


130. Gregory, 501 U.S. at 468; *City of Rome*, 446 U.S. at 179.


134. 383 U.S. at 337. 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. Voting Rights Act § 4(a). 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. Id. § 13.

residents had registered to vote were subject to such restrictions. The Court explained that Congress’ legislative power pursuant to the Fifteenth Amendment’s Enforcement Clause extended beyond merely generally forbidding violation of 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 remedies only to particularly problematic political jurisdictions. The Court noted that Congress had reasonably found that case-by-case adjudication had not eliminated state violations of the Fifteenth Amendment. The Supreme Court’s holding, prior to the passage of the Voting Rights Act of 1965, that state reliance on literacy tests did not violate the Fifteenth Amendment per se, 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 in which the Voting Rights Act of 1965 suspended literacy tests, the tests had been instituted, constructed, and administered in a disparate fashion to disenfranchise African-Americans.

In *Katzenbach v. Morgan*, 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-language elementary schools (basically schools in Puerto Rico) to vote. The Court recognized that 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*, the Court upheld a statute giving eighteen-year-olds the right to vote, despite its own precedent suggesting that the Fifteenth Amendment permitted states latitude in determining the minimum voting age.

The Rehnquist Court asserted judicial preeminence with regard to constitutional interpretation and showed increased solicitude toward federalism. With regard to the Enforcement Clause of the Fourteenth Amendment, the nascent doctrines being developed in some earlier cases have been limited in *City of Boerne v. Flores, Florida Prepaid Post-Secondary Education Expense Board v. College Savings Bank*, United

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136. *Id.* at 317.
137. *Id.* at 325–26.
138. *Id.* at 327. The Court explained that: “[i]n 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.” *Id.* at 326.
139. *Id.* at 328.
142. *Id.* at 333–34.
144. *Id.* at 646–47.
145. *Id.* at 648–49.
147. *Id.* Interestingly, during this time period, Congress enacted the Highway Beautification Act, which required state and local governments to pay compensation to the owners of outdoor billboards when the state or locality enacted regulations that required removal of a billboard. The Act imposed a requirement of compensation even though under then-extant judicial doctrine, promulgating a regulation requiring removal of a billboard would almost certainly not constitute a regulatory taking. A federal district court upheld the statute in *Vermont v. Brinegar*, 379 F. Supp. 606, 614 (D. Vt. 1974). Of course, this controversy arose before *National League of Cities v. Usery*, 426 U.S. 833 (1976), and certainly before the resurgence of federalism in the Rehnquist Court.
States v. Morrison, Kimel v. Florida Board of Regents, Dickerson v. United States, and Board of Trustees of the University of Alabama v. Garrett.  

Those cases suggest that Section 5 of the Fourteenth Amendment enables Congress to enforce, but not alter, the constitutional standards the Court establishes. Thus, in City of Boerne, the Court invalidated the Religious Freedom Restoration Act (RFRA) because the Act gave individuals greater rights against state and local regulation than the Court had previously held constitutionally necessary. 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 VAWA lay beyond Congress’ Fourteenth Amendment power to ensure women the “equal protection of the laws.” In Dickerson, the Court held invalid congressional legislation providing for the admissibility of criminal confessions as inconsistent with Miranda v. Arizona. The Court declared the statute invalid, even though the Miranda Court adopted the warnings as one of a number of potentially acceptable prophylactic rules designed to protect the Fifth Amendment rights of criminal defendants. (Indeed, the Miranda Court had invited Congress to consider alternative approaches to safeguarding those rights.)

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


149. City of Boerne, 521 U.S. at 519, 536.


151. Morrison, 529 U.S. at 619.

152. Id. at 444; Miranda v. Arizona, 384 U.S. 436 (1966).

153. Dickerson, 530 U.S. at 440 n.5 (citing Withrow v. Williams, 507 U.S. 680, 691 (1993)).

154. Id. (citing Withrow, 507 U.S. at 691). Like the statute at issue in City of Boerne, however, the statute challenged in Dickerson was little more than an effort to reverse a constitutional ruling of the Court. In particular, the statute merely reestablished the voluntariness test for admissibility of confessions that existed before Miranda. Id. at 442–43; see also Miranda, 384 U.S. at 506-08 (Harlan, J., dissenting); Haynes v. Washington, 373 U.S. 503, 513–15 (1963). Moreover, the statute in Dickerson did not provide any efficacious alternative to the Miranda warning that would ensure that statements made during custodial interrogation were voluntary. Dickerson, 530 U.S. at 442.


156. Id. at 530.

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Human Resources v. Hibbs and Tennessee v. Lane. Generally, the dissenter in such cases that have insisted upon quite rigorous proof of "congruence" and "proportionality," for example, demanding systematic proof of intentional unconstitutional discrimination.

Thus, any congressional attempt to overrule Kelo would not likely succeed. It seems clear that the Court would invalidate a statute precluding economic development projects from ever qualifying as a "public uses." This would, in effect, change the right Congress purports to protect. However, a more focused approach designed to address specific abuses of the eminent domain power in the service of economic development may well lie within Congress' power under Section 5 of the Fourteenth Amendment.

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 constitutional right. Sometimes, perhaps controversially, the Court will specify a prophylactic rule that sweeps more broadly than the constitutional right. Sometimes the Court concludes, for institutional reasons, that it cannot judicially enforce a constitutional provision. At yet other times, however, the Court specifies procedures designed to ensure that politically accountable decision makers adequately take constitutional considerations into account. For example, the Court has refused to hold that the Free Speech and Free Press Clauses immunize media entities from taxation; however, the Court requires that any taxes imposed on media entities be

159. Lane, 541 U.S. at 531 (five Justice majority opinion).
160. Hibbs, 538 U.S. at 745-54 (Kennedy, J., dissenting).
161. See supra note 149 and accompanying text. The various federalism doctrines, other than sovereign immunity, protect localities as well as states. See Printz v. U.S., 521 U.S. 898, 931 n.15 (1997); see also Nat'l League of Cities v. Usery, 426 U.S. 833, 855 n.20 (1976); TRIBE, supra note 8, at 917-919.
162. Bell, The Madisonian Vision, supra note 123, at 202-04 (collecting sources). 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 VILL. L. REV. 189, 199-200 (1999) [hereinafter Bell, 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, The Justices of Rules and Standards, 106 HARV. L. REV. 22, 62 (1992). Moreover, because the Supreme Court takes so few cases, it has difficulty policing the lower courts' application of ad hoc standards. 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).
generally applicable to business entities or the citizenry as a whole. 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.

The Court has also outlined procedures for government institutions, even local government institutions, that it considers particularly suspect. Consider the restrictions the Supreme Court has imposed upon state and local censorship of obscenity. In *Freedman v. Maryland*, 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 makes securing judicial review unduly onerous, a censor’s decision might in practical effect be final. In light of these structural concerns, the Court designed requirements that local censorship regimes had to satisfy.

*Hampton v. Mow Sung Wong* provides another example of judicial use of structural protections where the Justices could not, for institutional reasons, engage in rigorous substantive review. In *Hampton*, the Court specified that certain decisions rife with constitutional implications be made at the highest levels of government to ensure that officials sensitive to the constitutional interests made those decisions. The Court held that a Civil Service Commission regulation barring aliens from federal employment violated the Equal Protection and Due Process Clauses. 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 the 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

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167. *Id.* at 446.
168. *Id.* at 445–46; Minneapolis Star & Tribune Co. v. Minn. Comm'r 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 becomes acute.” *Id.* at 585. Note that the Court does not limit singling out the press or some elements of the press for especially favorable treatment. Bernard W. Bell, *Filth, Filtering, and the First Amendment: Ruminations on Public Libraries’ Use of Internet Filtering Software*, 53 FED. COMMUN. L.J. 191, 227–28 (2001).
169. 380 U.S. 51, 57–58 (1965) (“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.”).
170. *Id.* at 57.
171. *Id.* at 59.
172. *Id.* 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.*
174. *Id.* at 116.
175. *Id.* at 103; Bell, *The Madisonian Vision*, supra note 123, at 217–19.
176. *Hampton*, 426 U.S. at 100–02.
177. *Id.* at 103–04.
178. *Id.* at 116.
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 government, be made at a comparable level of government.\textsuperscript{179}

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 the Unfunded Mandate Reform Act of 1995 demonstrates.\textsuperscript{180} 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.\textsuperscript{181} While contemporary scholars and jurists have almost exclusively focused on the role of the states in protecting individual liberty from federal encroachment, the reverse is also true. As Alexander Hamilton observed: "[p]ower being almost always the rival of power, the general government will at all times stand ready to check the usurpations of the state governments."\textsuperscript{182} 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 state and local governments jeopardize constitutional rights.

State and local exercise of eminent domain implicates the right to own property,\textsuperscript{183} including the right to prevent government expropriation of that property for the private benefit of another.\textsuperscript{184} The \textit{Kelo} majority, and in particular Justice Kennedy, acknowledged the existence of such a constitutionally-protected right to own property.\textsuperscript{185}

However, the Court appears unable to vindicate such constitutionally-protected rights due to institutional concerns. Judges face difficulty in formulating a judicially-administrable test that does not arrogate to themselves decisions about the role of government in society and the interrelationship between the public and the private—

\textsuperscript{179} Id. Alternatively, if the Commission is to impose such a restriction, it must defend it based on considerations that are properly the concern of the Commission. Id.
\textsuperscript{182} THE FEDERALIST No. 28, at 181 (Alexander Hamilton) (Clinton Rossiter ed. 1961).
\textsuperscript{183} See Lynch v. Household Fin. Corp., 405 U.S. 538, 552 (1972) (right to enjoy property is a personal right). In his path-breaking article entitled \textit{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 the continued existence of an independent citizenry. Charles A. Reich, \textit{The New Property}, 73 YALE L.J. 733 (1964); see id. at 756-60, 768-74 (discussing the relationship between property and liberty).
\textsuperscript{184} 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 penal incursions into the rights of individuals"); James W. Ely Jr., Can the "Despotic Power" Be Tamed: Reconsidering the Public Use Limitation on Eminent Domain, 17 PROB. & PROP. 31, 31 (2003) ("Eminent domain is one of the most intrusive powers of government. It requires that individual owners relinquish their property without their consent.").
\textsuperscript{185} \textit{Kelo}, 125 S. Ct. at 2661; id. at 2669 (Kennedy, J., concurring).
issues that, in a democracy, the political branches of government should resolve. The *Kelo* majority and Justice Kennedy agreed that the government cannot take property from one citizen and transfer it to another solely to advantage that other person, but how is the Court to enforce this limitation? The Court has three options: 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.

The first option is problematic and promises a return to *Lochner* Era jurisprudence. Public use, if defined in terms of the benefits sought, rather than the types of uses to which the property is put, requires a court to categorize governmental purposes as “public” or “private” in a context where public and private interests are inextricably intertwined. Indeed, to the extent that interest group theory has succeeded in convincing us that polities really consist of interest groups competing to secure government action, we might question whether any significant public interest exists independent of private interests. For example, even when a government action is meant to benefit specific individuals, one might easily view the action as providing a public benefit. 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 on grounds that they serve a “private” purpose.

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186. 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. See generally Treanor, supra note 125. Saul Levmore has also noted the structural function of requiring just compensation—moreover, in his view, the requirement is primarily designed to protect individuals, rather than more organized groups (such as corporations or organized interest groups). See Saul Levmore, *Just Compensation and Just Politics*, 22 CONN. L. REV. 285, 306–08 (1990).

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


190. See *Tribe*, supra note 8, at 837.

191. See one of the few cases in which a federal court has found the public purpose used to justify a taking pretextual, the local officials made a plausible argument that they were seeking to help a private business for the benefit of the local community. 99 Cents Only Stores v. Lancaster Redevelopment Agency, 237 F. Supp. 2d 1123, 1129–30 (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. at 1129. The Court was able to reject the argument on a statutory ground, that the California Constitution did not permit condemnation to forestall prospective blight. Id. at 1129–31.

192. The private necessity defense reflects the judgment that a benefit to a private party can be viewed as a sufficiently “public” benefit to override private property rights. The defense allows a private citizen to use private property to avoid physical injury, even if that use causes significant property damage. See *Ploof* v. Putnam, 71 A. 188, 189 (Vt. 1908); *Vincent* v. Lake Erie Transp. Co., 124 N.W. 221, 221–22 (Minn. 1910); see also *DAN B. DOBBS, THE LAW OF TORTS § 107 (2000).*

193. For examples of situations where courts have invalidated salutary social programs on private purpose
domain in particular, the efforts of state courts to develop a concise definition of "public use" that distinguishes between permissible and impermissible takings has hardly been a success. 194

The second option, which the Kelo majority appears to have chosen, focuses on public officials' subjective motives and illicit public purposes. 195 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. 196 Indeed, motive tests, such as that adopted by the majority, have often proven anemic and provided citizens with illusory protection against government officials at best. 197 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. 198 As I suggest below, such tests confront the courts with numerous difficulties. 199

The third option is to limit the government's invocation of eminent domain to preclude use in certain circumstances even if its use furthers the public interest in an important, or even essential, manner. 200 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 privately owned, remains accessible to all citizens. 201 This theory has a rich heritage, but most courts have found grounds, see generally Loan Ass'n v. Topeka, 87 U.S. 655 (1874) (invalidating Topeka's issuance of city bonds to encourage a private company to establish a bridge manufacturing plant in the city); State ex rel. Walton v. Edmondson, 106 N.E. 41 (Ohio 1914) (invalidating two statutes that expended public funds for the benefit of the blind); Ferrie v. Sweeney, 72 N.E.2d 128 (Ohio Ct. Comm. Pleas 1946) (expenditure of public funds for the operation and maintenance of day care centers); Stanley v. Dep't. of Conservation & Dev., 199 S.E.2d 641 (N.C. 1973) (issuance of tax-exempt revenue bonds for private industry use to finance pollution abatement and control facilities); William D. Popkin, Materials on Legislation: Political Language and the Political Process 1057-58 & 1063-64 (4th ed. 2005). But see Common Cause v. State, 455 A.2d 1 (Me. 1983) (rejecting attack on public funds used to create a private ship repair facility).

194. 2A Nichols on Eminent Domain, supra note 2, § 7.02[1] (noting that several jurisdictions have concluded that the task is impracticable); Brown v. Gerald, 61 A. 785, 789 (1905) ("The term public use is difficult of exact definition, and most courts have avoided giving one"); Board of Educ. v. Pace College, 271 N.Y.S.2d 773 (1966) ("The concept of a public use within the context of the condemnation laws is not susceptible of precise definition"); 2A Nichols on Eminent Domain, supra note 2, § 7.02[7].


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


198. See N. Douglas Wells, Prosecution as an Administrative System: Some Fairness Concerns, 27 Cap. U. L. Rev. 841, 843 (1990); Race and the Prosecutor's Charging Decision, 101 Harv. L. Rev. 1520, 1557 (1988); Notes, Constitutional Risks to Equal Protection in the Criminal Justice System, 114 Harv. L. Rev. 2098, 2108 (2001); see also Randall Kennedy, Race, Crime and the Law 354 (1997) ("Research has uncovered no cases, however, in which a court has ruled that, on grounds of racial discrimination, a prosecutor has abused his discretion.").

199. Cf. Ely, supra note 165, at 136-45 (finding such tests useful).

200. For example, 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 2A Nichols on Eminent Domain, supra note 2, § 7.03[10][c].

201. Kelo, 125 S. Ct. at 2679, 2681, 2682 (Thomas, J., dissenting). Some states go so far as to specify in their constitutions the types of takings that fall within the definition of "public use." 2A Nichols on Eminent Domain, supra note 2, § 7.03[10][c].
it unduly restrictive. Moreover, even this test allows for takings that benefit a narrow range of private individuals. First, a general right of access that all citizens possess may mean little if only few have any interest in such access. Second, 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 governmental 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 the Court imposed on state legislatures in the name of protecting private property allowed the Court to severely hamper state regulation in the *Lochner* era. However, the Court could distinguish a congressional power to vindicate citizens’ rights 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,” but enacting a regulation rarely constitutes a “taking." As the *Loretto* Court explained, a physical taking “is perhaps the most serious form of invasion of an owner’s property interests,” destroying each of the rights associated with property ownership. Indeed, both the Court and scholars note that this distinction underlays the Framers’ conception of a taking. Several state constitutions suggest the unique nature of eminent domain by specifying that the courts must determine whether an

202. See 2A NICHOLS ON EMINENT DOMAIN, supra note 2, §§ 7.02[2], 7.02[3].


205. *Loretto*, 458 U.S. at 435. Though the protection extends beyond physical takings, a landowner’s 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. COMMENT. 279, 304 (1992); Levmore, *supra* note 186, 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 FISCHEL, supra* note 109, at 334–35.

206. *Loretto*, 458 U.S. at 435. In *Loretto*, the Court explained that a physical taking precludes one of the most treasured rights in the bundle of property rights—the right to exclude. *Id.* Moreover, the government’s permanent occupation of private property prevents the owner’s use of the property and drains his or her right to transfer the property at any value. *Id.* at 436.

207. See Treanor, *supra* note 125, at 791–92; *id.* at 838–39 (discussing Madison’s views); *id.* at 794–96 (discussing early Supreme Court cases); Legal Tender Cases, 79 U.S. 457, 551–52 (1870) (“[The Takings Clause] has always been understood as referring only to a direct appropriation, and not to consequential injuries resulting from the exercise of lawful power.”).
asserted public use is actually public, without giving any deference to legislative
determinations that the use qualifies as a public use. 208

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. 209 Of course, this very majoritarian responsiveness may place
federal constitutionally-based interests in jeopardy. 210 More importantly, however,
special financial interests may more often dominate smaller units of government,
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. 211

However, there is particular reason for concern with regard to the undue influence
economic interests have 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; the revenue that an
invocation of eminent domain for a commercial enterprise provides may hold even
greater significance than the votes of citizens adversely affected. 212 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. 213

Moreover, some takings may occur in circumstances where there is limited

208. See Ariz. Const. art. II, § 17; Colo. Const. art. II, § 14; Mo. Const. art. 1 § 28, Wash. Const. art
I, § 16; see also 2A Nichols on Eminent Domain, supra note 2, § 7.03[11][c].

209. See Bell, The Madisonian Vision, supra note 123, at 232; 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) (discussing four advantages of states—greater accuracy, greater protection of liberty,
greater degree of community, and greater diversity of approaches resulting from decentralization); cf. Bell,
The Madisonian Vision, supra note 123, at n.244 (localities closer to problems).

210. Bell, The Madisonian Vision, supra note 123, at 234 & nn.229-231. Indeed, the Court much more
frequently invalidates state and local actions, as opposed to federal statutes, for reflecting illicit purposes. See
id. at 246 & n.317.

211. The Federalist No. 10 (James Madison). See generally Bell, The Madisonian Vision, supra note
123, at 237-39. Granted the framers of the Constitution rejected Madison’s proposal that the national
government be given the power tonullify state enactments, Jack N. Rakove, Original Meanings:
Politics and Ideas in the Making of the Constitution 47-48, 51 (1996), a proposal which reflected
Madison’s concerns about the vulnerability of small political units to the dangers of “faction.” However, the
Fourteenth Amendment could be viewed as establishing the federal government’s power to combat
domination of local governments by special interests, at least when such dominance threatens constitutional
rights and interests. See Fischel, supra note 109, at 7, 104-07, 328-29, 367 (discussing the problem of
majority friction). 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 125, at 843-44, 867-68; Brief for NAACP et al. as Amici Curiae Supporting Petitioners, supra
note 4, at 28-29 (“Local governments are particularly prone to capture by private, politically influential and
economically powerful interests.”).

212. See generally Berliner, supra note 4, at 7.

213. Id. at 130 (casinos are big winners in condemnation because they bring the prospect of so much tax
revenue); Komesar, supra note 203, at 56-59 (discussing influence of economic interests such as developers
on local land use planning); see also id. at 114-15 (citing sources).
transparency. Sometimes the motives of politically-accountable local officeholders may be shrouded in secrecy, and other times the entities making decisions are not accountable to the electorate. 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.

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, use of eminent domain to advantage private parties rather than further public goals, may be too subtle to detect on a case-by-case basis. The Court upheld the Family and Medical Leave Act as permissible prophylactic legislation securing equal protection of the laws precisely because detecting certain forms of gender discrimination on a case-by-case basis presented such difficulties. Analogously, in the context of First Amendment challenges to campaign finance regulation, the Court has allowed broad prophylactic legislation regulating campaign contributions because illicit quid pro quo deals between officeholders, political parties, and contributors are too subtle for case-by-case identification. Indeed, recall that the Supreme Court upheld the Voting Rights Act because case-by-case adjudication had proven inadequate for 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 assess the reasonableness of the limitations congressionally-prescribed

214. See Armendariz v. Penman, 75 F.3d 1311, 1321 (9th Cir. 1996); Brief for NAACP et al. as Amici Curiae Supporting Petitioners, supra note 4, at 29 n.35; Audrey G. McFarlane, Local Economic Development Incentives in an Era of Globalization: The Exploitation of Decentralization and Mobility, 35 Urb. Law. 305 passim (2003) (discussing that there is little accountability to the general public for such decisions).

215. 75 F.3d 1311; Brief for NAACP et al. as Amici Curiae Supporting Petitioners, supra note 4, at 29 n.35 ("[T]he 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"). See generally Fischel, supra note 109, at 330-31, 367 (suggesting greater scrutiny for administrative agencies in part because they are not subject to pluralist interest group pressures).


217. Nevada Dep't of Human Res. v. Hibbs, 538 U.S. 721, 736 (2003) (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").

218. In McConnell v. FEC, 540 U.S. 93 (2003), the Court said that Congress could be concerned about the prospect that officeholders would decide issues according to contributors' wishes rather than on the merits or on their constituents' preferences. Id. at 153. However, the Court noted, such corruption is neither easy to detect nor easy to criminalize. Id. 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 preventing such corruption. Id. at 153.
prophylactic rules place on state and local use of eminent domain in light of the threat state and local invocation of eminent domain poses 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 officials’ invocation of eminent domain. Modification of the measure of “just compensation” can compensate for 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 inquiry 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 that taking causes.219 Modifying the measure of “just compensation” makes the political branches of government more sensitive to constitutional considerations, just as the requirement of generality makes tax 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 serve 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 in the form of rebuttable or irrebuttable presumptions,220 if the public use requirement is to serve as a real constraint on state and local officials.221 Justice Kennedy laid out some concerns, but suggested that his concerns by no means exhausted the issues.222 Justice Stevens’s 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.223

Rebuttable presumptions would more likely pass constitutional muster than irrebuttable ones. Thus, perhaps Congress can establish rebuttable presumptions that takings in certain circumstances constitute unlawful takings for private purposes, but cannot establish irrebuttable presumptions, such as a presumption that no taking for economic purpose can be found a taking for “public use.”224 Indeed, rebuttable presumptions will probably be less intrusive than prophylactic rules, such as those rules

219. See Fischel, supra note 109, at 364.
220. See generally Fallon, supra note 197, 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.”).
221. Kelo, 125 S. Ct. at 2670 (Kennedy, J., concurring).
222. See id. at 2670–71.
223. See id. at 2655–99.
224. Such an approach does not resurrect the discredited irrebuttable presumptions doctrine, which has now largely been abandoned. See, e.g., Vlandis v. Kline, 412 U.S. 441, 446 (1973); Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632, 644 (1974); Dep’t. of Agriculture v. Murry, 413 U.S. 508, 514 (1973); see Bell, Dead Again, supra note 162, 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 ways that limit state exercise of constitutionally protected sovereign powers.
the Supreme Court sometimes adopts when case-by-case adjudication fails to safeguard individual rights. Such prophylactic 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.

Congress might also focus on legislation 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 identified in debates regarding 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 interest, some have argued that local officials have incentives to target buildings owned by religious institutions for redevelopment, because such property is tax-exempt. Local officials allegedly seek to replace religious institutions with either commercial entities or residential property owners, who will produce the tax revenue needed to fund government activities. 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.

The *Kelo* dissents voiced concern about the disproportionate impact of economic development projects accomplished by eminent domain on “discrete and insular minorities.” In particular, Justice Thomas discussed at some length the effect of the Urban Renewal program’s displacement of African-American communities. The destruction of Poletown, an ethnic neighborhood in Detroit, Michigan condemned for

226. See Brief for the United States at 44–47, Dickerson v. United States, 530 U.S. 428 (No. 99-5525) (outlining several judicially-created prophylactic constitutional rules). Such rules presume that if the criteria triggering the rule are met, the conduct is unconstitutional. Thus, such rules offer government officials no opportunity to demonstrate that their actions are consistent with the underlying constitutional concerns, and thus should be found permissible.
227. GREENHUT, supra note 4, at 160–188; 151 CONG. REC. H5577-H5584 (statement of Rep. 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.”); Id. at H5585 (statement of Rep. Tiahrt); see David D. Kirkpatrick, *Ruling on Property Seizure Rallies Christian Groups*, N.Y. TIMES, July 11, 2005, at A13.
228. For an argument for special protection for First Amendment uses, see Shelly Ross 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 (2000)), 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. 42 U.S.C. § 2000cc(a)(1). The subsection applies whenever the activity imposing the burden is federally funded, affects interstate commerce, or involves individualized assessments of prospective land uses. Id. § 2000cc(a)(2). 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. Id. § 2000cc(a).
229. *Kelo* v. City of New London, 125 S. Ct. 2655, 2677 n.8 (2005) (O’Connor, J., dissenting); id. at 2686–87 (Thomas, J., dissenting); see BERLINER, supra note 4, at 102 (discussing the effects of condemnations for private parties in black neighborhoods); 151 CONG. REC. H5577–5581 (statement of Rep. Frank). Amici curiae, like that for the NAACP, did so as well. See Brief for NAACP et al. as Amici Curiae Supporting Petitioners, supra note 4, at 3–4.
the construction of a General Motors plant, provides another 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.\textsuperscript{231} 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 redevelopment efforts that have a disproportionate effect on racial, ethnic, or other “discrete and insular” minorities within the community.\textsuperscript{232}

2. Congruence and Proportionality

Congruence and proportionality depend upon the existence of established constitutional doctrines that define constitutionally impermissible state and local actions.\textsuperscript{233} Even where such established doctrines exist, Congress will possess very limited Section 5 power if the established constitutional tests seek primarily to make government actions immune from meaningful review.

The congruence and proportionality tests seek to distinguish mere harm to a group from harm to the group that constitutes a constitutional transgression.\textsuperscript{234} For example, in justifying legislative action, Congress must do more than show that the elderly or the handicapped have received unfavorable treatment at the hands of state officials; Congress must show that such unfavorable treatment rises to the level of constitutionally-prohibited discrimination.\textsuperscript{235} Proportionality is then assessed relative to the manitude 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, where clear constitutional standards designed to eliminate consideration of race (at least in ways that harm 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 the judiciary’s concerns about its own institutional limitations).\textsuperscript{236}

The congruence and proportionality tests may fail to provide Congress with


\textsuperscript{232} Treanor, supra note 125, 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 economic development takings cause significant costs that are not reflected in the award of just compensation, and the taking primarily uproots the politically powerless).

\textsuperscript{233} See Bd. of Tr. of the Univ. of Ala. v. Garrett, 531 U.S. 356, 365 (2001) (“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.”).

\textsuperscript{234} City of Boerne, 521 U.S. at 534–35 (unfavorable treatment insufficient, it must be motivated by religious animus); see Garrett, 531 U.S. at 368.

\textsuperscript{235} See Kimel v. Florida Bd. of Regents, 528 U.S. 62, 90 (2000); Garrett, 531 U.S. at 370.

\textsuperscript{236} Gerald Gunther, In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection, 86 HARV. L. REV. 1, 8 (1972) (noting that the rational basis test means minimal scrutiny in theory but none in fact).
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. 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 distinguishing licit and illicit purposes 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 officials' 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, the Supreme Court appears to have opted for the subjective approach.

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 purpose needed to satisfy the "public use" requirement. In particular, there are at least five major levels of public purpose from 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 must 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

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

238. Kelo v. City of New London, 125 S. Ct. 2655, 2669 (2005) (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 . . . "); see id. at 2661 (Stevens, J). "[T]he 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 2661; see id. at 2675–76 (O'Connor, J., dissenting) (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 otherwise; in addition an alternative site was available to Costco and Costco had made no effort to purchase property that the city sought to condemn on its behalf); see also Armendariz v. Penman, 75 F.3d 1311, 1321, 1327 (9th Cir. 1996).
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. 239 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. 240

As others have noted, subjective tests are beset by a conceptual difficulty—which actors’s 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? 241

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. 242 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 only 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 has involved abrogation of state sovereign immunity, a particularly critical attribute of state sovereignty recognized, at


240. These options are phrased in terms of a subjective test, but an analogous range of choices exists 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, alternatively, 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 public benefit, a predominant public benefit, a public benefit so strong that the project was justified even without private benefit, or an exclusively public benefit? See 2A NICHOLS ON EMINENT DOMAIN, supra note 2, § 7.03[5][d].


242. See infra text accompanying notes 300–314.
least to some extent, in the Eleventh Amendment. Arguably, Congress’ 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. 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, federal eminent domain legislation would not necessarily 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. 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 classifications in Kimel and Garrett, classifications subject only to rational basis scrutiny. 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.

243. Alden v. Maine, 527 U.S. 706, 715 (1999) ("The States . . . remain '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.") (emphasis added); Fed. Mar. Comm’n v. S.C. 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, 527 U.S. at 727–29. Note that in most cases, the entity that uses eminent domain for urban redevelopment is not the state government, but a locality. Constitutionally-based sovereign immunity does not cover local entities. Alden, 527 U.S. at 756.

244. Alden, 527 U.S. at 732–33, 754–56; S.C. 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 1377–80; Id. at 1377 ("Might the decisions mean only that some policies may not be enforced through private lawsuits for damages-hardly a retrograde idea for the Court to advance?").


246. Hibbs, 538 U.S. at 735. Chief Justice Rehnquist, for the majority, noted that although gender classifications received intermediate scrutiny, they must serve “important governmental objectives” and “substantially relate” to the achievement of those objectives. Id. at 736. 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 a “widespread pattern” of irrational reliance on such criteria. Id. 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 tests, even though the statute sought to ensure gender equality. Morrison, 529 U.S. at 625–26.
that give rise to heightened constitutional scrutiny.\textsuperscript{247}

The Court’s “rational basis” language in \textit{Kelo} suggests that a landowner’s claim 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.\textsuperscript{248} 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 \textit{Lane} and in \textit{Hibbs v. Winn}.

However, \textit{Florida Prepaid Post-Secondary Education Expense Board v. College Savings Bank},\textsuperscript{249} addressed a federal statute remedying state appropriation of property.\textsuperscript{250} The State claimed that Congress had exceeded its Section 5 powers in enacting the statute.\textsuperscript{251} The Court found that the statute failed the congruence and proportionality tests, and did not appear to employ any sort of relaxed scrutiny.\textsuperscript{252} Nevertheless, the \textit{Florida Prepaid} analysis would not govern review of a statute seeking to limit state and local official’s use of eminent domain.

\textit{Florida Prepaid} involved a federal statute that required states to pay damages to patent holders whenever the state infringed a patent.\textsuperscript{253} A state could unquestionably acquire the property at issue (namely the right to use the patented technique), if it paid the owner.\textsuperscript{254} The Court concluded that Congress had not established a record of state disrespect for citizens’ right to property sufficient to justify the challenged legislation.\textsuperscript{255} In particular, Congress had not shown that the remedies for patent infringement under state law failed to ensure that patent owners received compensation for state infringements of their patents.\textsuperscript{256} A federal statute seeking to limit the state and local authority recognized in \textit{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 \textit{Florida Prepaid}, would be irrelevant—because they would not vindicate the property owner’s interest in retaining title to his property. Only state remedies that prevented the government’s acquisition of the property against the owner’s will, or restored the owner

\begin{footnotesize}
\footnote{247. 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 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. \textit{Lane}, 541 U.S. at 522–23.}
\footnote{249. 527 U.S. 627 (1999).}
\footnote{250. \textit{Id.} at 630.}
\footnote{251. \textit{Id.}}
\footnote{252. \textit{Id.} at 639.}
\footnote{253. \textit{Id.} at 630.}
\footnote{254. \textit{Id.}}
\footnote{255. \textit{Id.} at 645.}
\footnote{256. \textit{Id.} at 643–45.}
\end{footnotesize}
to possession, would vindicate such a right.\textsuperscript{257}

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 ("RFRA"), overturned in \textit{City of Boerne v. Flores},\textsuperscript{258} and the Family and Medical Leave Act ("FMLA"), upheld in \textit{Hibbs},\textsuperscript{259} is instructive. The RFRA subjected all state and local action to invalidation if that action "substantially burden[ed]" the exercise of religion, unless the relevant government body could demonstrate that its action furthered a compelling state interest, through the least restrictive means.\textsuperscript{260} The RFRA's coverage was "universal."\textsuperscript{261} It applied to all branches of the state government, to all state officials, and to all individuals acting under color of state law; it restricted the operation of all statutes and the implementation of statutory or other state law.\textsuperscript{262} Moreover, the RFRA subjected such state action to scrutiny that equaled that of the most demanding constitutional test.\textsuperscript{263}

The FMLA required employers, including state governments, to allow middle and lower level employees to take up to twelve weeks of unpaid leave annually to care for an ill spouse, child, or parent.\textsuperscript{264} The majority found the statute proportional to the constitutional violations resulting from state and local application of gender stereotypes regarding men's and women's relative familial responsibilities.\textsuperscript{265} In reaching its conclusion, the Court noted that Congress had exempted many employees from the operation of the statute. 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, were not entitled to statutorily-mandated leave.\textsuperscript{266} 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.\textsuperscript{267} In short, 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 overgeneralization" persists.\textsuperscript{268}

Some of the potential congressional responses discussed above focus rather

\textsuperscript{257} Cf. \textit{Lingle v. Chevron U.S.A.}, 125 S. Ct. 2074, 2083–84 (2005) (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).

\textsuperscript{258} 521 U.S. 507 (1997).

\textsuperscript{259} 538 U.S. 721 (2003).


\textsuperscript{261} \textit{Id.} at 516.

\textsuperscript{262} \textit{Id.}

\textsuperscript{263} \textit{Id.} at 534.


\textsuperscript{265} 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. \textit{Hibbs}, 538 U.S. at 736.

\textsuperscript{266} \textit{Id.} at 739.

\textsuperscript{267} \textit{Id.}

\textsuperscript{268} \textit{Id.} at 723.
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precisely either on 1) counteracting the pressures that may well lead local officials to misuse of eminent domain, 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. The more precisely Congress focuses any eminent domain legislation on real threats that local officials will either use eminent domain to further private purposes or fail to seriously consider the limits on their eminent domain powers implicit in the “public use” requirement, the more likely that the congressional legislation will survive judicial scrutiny. Finally, while certainly not required, a jurisdiction-specific approach to legislation, like that which characterizes the Voting Rights Act, may be particularly appropriate. The wide disparity in both the incidence of economic development takings in various states and the procedural limitations on the use of eminent domain suggest that the risk of local officials taking property for private purposes will likely vary quite substantially depending on the state in which the invocation 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 as a constitutional 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, the argument that the Commerce Clause provided an adequate basis for federal legislation restricting the use of eminent domain would have been relatively uncontroversial. Surely, in the aggregate, the numerous instances in which state and local officials use eminent domain to acquire real estate and transfer it to business entities for commercial redevelopment substantially affect the national economy. Lopez and United States v. Morrison have imposed constraints on the breadth of Congress’s Commerce Clause power. In particular, when Congress seeks to legislate with regard to intrastate, non-commercial activity, the Commerce Clause may not provide legislative authority even if the activity has a substantial effect on interstate commerce. Indeed, in Gonzales v. Raich, the justices primarily responsible for Lopez suggested a limited definition of the term “commercial activity,” which would

270. 529 U.S. 598 (2000).
272. Morrison suggests that statutes including a jurisdictional requirement will more likely be upheld against Commerce Clause attack. For example, a federal statute could limit restrictions on economic takings to those that have some nexus with interstate commerce, such as firms doing business in interstate commerce. 529 U.S. at 611–13.
leave even more activities beyond the reach of Congress’ Commerce Clause powers.\textsuperscript{274}

Even after Lopez and Morrison, however, Congress’ power to regulate commercial activity remains virtually boundless.\textsuperscript{275}

Acquisition of property by eminent domain likely qualifies as commercial activity, and that activity, when viewed in the aggregate, substantially affects interstate commerce. The acquisition of real estate would ordinarily constitute commercial activity. A locality’s acquisition of real property by eminent domain does not involve a market transaction; the acquisition is an exercise of a sovereign power. The Supreme Court has not yet had to determine whether the exercise of a sovereign prerogative can be considered commercial activity. Ordinarily, courts distinguish between governmental and non-governmental activities, and sometimes the courts subject those activities to different rules and constitutional constraints.\textsuperscript{276} However, there is no reason to conclude that the exercise of a sovereign power can 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 as a market transaction, and the measure of “just compensation” largely seeks to replicate the financial results that sellers would have obtained, had the property been sold on the market. Certainly, the exercise of eminent domain does not resemble mere possession of a particular article, the focus of the challenged statute in Lopez. In Lopez the Court held that regulation of possession of firearms in the vicinity of a school lay beyond Congress’ Commerce Clause powers.\textsuperscript{277} Nor does the exercise of eminent domain resemble the commission of an act of violence, which, in Morrison, the Court found outside VAWA’s reach because the violence in question was not commercial activity.\textsuperscript{278} The use of the takings power is not even like the cultivation and personal consumption of a product, the focus of the statute challenged in Raich, where three dissenting judges found that the regulation lay beyond Congress’ Commerce Clause powers.\textsuperscript{279} Of course, courts are particularly likely to view the acquisition of real estate by eminent domain as commercial activity when it is part of a 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 might often involve purely intrastate activity, namely a local government acquiring property from a local resident. Even apparently wholly intrastate “transactions” between a local

\textsuperscript{274} Id. at 2224-25 (O’Connor, J., dissenting); id. at 2236 (Thomas, J., dissenting).

\textsuperscript{275} Citizens Bank v. Alafabco, Inc., 539 U.S. 52, 57-58 (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).


\textsuperscript{278} United States v. Morrison, 529 U.S. 598, 627 (2000).

\textsuperscript{279} Gonzalez v. Raich, 125 S. Ct. 2195, 2238 (2005).
jurisdiction and an in-state resident might have a significant impact on the market facing potential out-of-state real estate purchasers, and thus affect the movement of individuals and businesses into the area from 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 to a real estate developer or 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 affects interstate commerce. Just as 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 affects large developers and the construction industry and may significantly impact 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 as a substitute for a market transaction, and Congress may legislate to ensure that the differences in the two processes do not result in individual property owners or the real estate market as a whole suffering 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 against another.\(^{280}\)

Congress should have the power to regulate processes that circumvent the market in real estate, a major national market.\(^{281}\) While eminent domain seeks to approximate the market valuation of land, it may do so imprecisely, or 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 seeking to amass land for major projects, the market should be allowed to operate.\(^{282}\) 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.\(^{283}\) As we have seen, the measure of "just compensation" focuses on a

\(^{280}\) Ely, supra note 165, at 31 ("A further source of aggravation is the charge that resort to eminent domain is frequently initiated by powerful and politically well-connected interests that have the ear of local officials.").

\(^{281}\) See, e.g., Daniel Gross, As the McMansions Go, So Goes Job Growth, N.Y. TIMES, Nov. 20, 2005, § 3, at 34; David Leonhardt, Boom in Jobs, Not Just Houses As Real Estate Drives Economy, N.Y. TIMES, July 9, 2005, at A1. Congress can be concerned not only about the vitality of the market, which may not be affected if just compensation is provided, but also about the fairness of eminent domain as an 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.

\(^{282}\) Eminent domain is often needed to address market imperfections. See Merrill, supra note 1, at 74–77.

\(^{283}\) 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, 22 U.S. 1, 196 (1824)); accord Hipolite Egg Co. v. United States, 220 U.S. 45, 58 (1911)
property's market price and fails to adequately account for the special value of property to the owner. 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. When 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 serves as a wasteful alternative to market transactions and one that places property owners in a worse position.

Congress may also act to address the undue influence of developers or major enterprises on local governments, particularly because many such entities are interstate in scope. As noted earlier, concern about the susceptibility of local governments to powerful or dominant local interests has a significant historical pedigree; indeed, it is reflected in the work of James Madison. The basis of such concerns about private dominance of local authorities and the potential effect of such dominance on decisions to exercise eminent domain powers is not merely speculative.

Local governments rely heavily on property taxes and commercial taxes and often find their revenues insufficient to satisfy their constituents' demands for government services. Local governments may find themselves in economic difficulty and also find themselves competing with other financially-strapped localities (both in-state and out-of-state) to entice businesses that will locate plants, offices, or other lucrative facilities within their jurisdiction. Indeed, one of the inducements localities use in this competition is a willingness to use eminent domain or threaten property owners with the prospect of eminent domain, to assist a business in assembling parcels of sufficient size to suit its needs. The competition between cities has become so intense that at least one scholar has characterized it as "a second Civil War." The Commerce Clause surely confers upon Congress the power to counteract the untoward effects of such

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(Congress can prevent commerce in adulterated articles and thus the Food and Drug Act provisions subjecting adulterated products to confiscation lay within Congress' Commerce clause powers); Champion v. Ames (The 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).

284. Part of this concern is evident in the campaign finance cases; in such cases, courts have allowed federal and state governments to place special restrictions on corporate donors, in part because of such entities' enhanced capacity to accumulate wealth threatens to overwhelm the political process. See FEC v. Mass. Citizens for Life, Inc., 479 U.S. 238, 256-58 (1986); FEC v. Nat'l Right to Work Comm., 459 U.S. 197, 204, 208-10 (1982); Pipefitters Local Union No. 562 v. United States, 407 U.S. 385, 415-16 (1972). While the First Amendment may limit the states or the federal government power to combat corporate dominance by restricting corporate speech, Congress presumably possesses broad authority to use its Commerce Clause power to prevent interstate enterprises from dominating local governments in other respects. First National Bank v. Belloti, 435 U.S. 765, 767 (1978).

285. Martin E. Gold, Economic Development Projects: A Perspective, 19 Urb. Law. 193, 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 businesses to encourage relocation to their jurisdictions).

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competition, including the undue influence that interstate businesses consequently gain over local officials making land use decisions. Indeed, the Supreme Court has already held that Congress may legislate to protect states from being drawn into a “race to the bottom,” offering more lenient regulation than their neighbors to lure business enterprises into their jurisdiction. 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.

In addition, there is a legitimate concern about the potential financial influence 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 in order to make way for another private entity. Congress may surely take steps to minimize the risk that the eminent domain process, which serves as a substitute for market transactions, will become 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 or using eminent domain to provide land for the owner of professional sports teams to build a stadium. Alternatively, Congress might legislate to protect small businesses as an essential component of the economy. For instance, some commentators argue that use of eminent domain for economic development has particularly detrimental effects on small businesses. Congress might find such impacts especially disturbing given that small businesses create


291. See 151 CONG. REc. H5577-H5581 (2005) (statement of Rep. Frank) (arguing against use of eminent domain to build sports stadiums); BERLINER, supra note 4, at 95–97 (discussing several efforts to use eminent domain to acquire land for professional baseball stadiums in Massachusetts); GREENHUT, supra note 4, at 202–13.

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.\textsuperscript{293} Indeed, one theme underlying the congressional criticism of \textit{Kelo} is a concern about the effect of eminent domain on small businesses in areas targeted for economic revitalization.\textsuperscript{294}

However, unlike the federal statutes challenged in many of the Supreme Court's Commerce Clause cases, statutes restricting localities' use of eminent domain would limit a sovereign prerogative of the state: the ability to acquire land by eminent domain.\textsuperscript{295} The Court might view such a limitation on a sovereign prerogative as raising significant Tenth Amendment and Guarantee Clause concerns.\textsuperscript{296} Indeed, \textit{Tahoe Sierra Preservation Council v. Tahoe Regional Planning Agency},\textsuperscript{297} as well as \textit{Kelo}, suggest particular solicitude to local land use management. Moreover, the Court has shown particular solicitude to states when federal authorities intrude upon areas in which state and local authorities have traditionally assumed a preeminent role.\textsuperscript{298} The Court has already recognized land use regulation as one such area.\textsuperscript{299}

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 to heightened scrutiny any federal legislation that purports to limit that power. The power of eminent domain, like that of sovereign immunity, has been recognized by courts as an essential

\textsuperscript{293} Brief of America's Future, supra note 292, at 16–17, 20–21.

\textsuperscript{294} The 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. H5577–H5581 (2005) (statement of Rep. 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. H5483–H5505 (2005) (statement of Rep. 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).

\textsuperscript{295} Eminent domain is a sovereign prerogative of state governments, which have generally delegated that authority to many of their political subdivisions. See generally 1A NICHOLS ON EMINENT DOMAIN, supra note 2, §§ 3.03[3], at 3–52 to –53, 3.03[3][a].

\textsuperscript{296} The Tenth Amendment provides that any powers the Constitution neither delegates to the federal government nor prohibits states from exercising "are reserved to the States respectively, or to the people." U.S. CONST amend. X. The Guarantee Clause, article IV, section 4, provides that "[t]he United States shall guarantee to every State in the[e] Union a Republican Form of Government." U.S. CONST. art. IV, § 4.

\textsuperscript{297} 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); \textit{Kelo}, 125 S. Ct. at 2667 (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).

\textsuperscript{298} For example, \textit{Morrison} suggests that the federal government's ability to impinge upon the states' police powers is limited even when it legislates under the Commerce Clause. In invalidating the Violence Against Women Act, the Court pointedly noted that punishing crime is a quintessential aspect of the local police power. The Court cited family law another area of traditional state regulation. 529 U.S. at 615–16.

\textsuperscript{299} See, e.g., \textit{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 Auth. Trans-Hudson Corp., 513 U.S. 30, 44 (1994) ("[R]egulation of land use [is] a function traditionally performed by local governments.").
attribute of sovereignty. And like sovereign immunity, the power of eminent domain has an impressive historical pedigree.

The U.S. Supreme Court, the lower federal courts, and the state courts have long considered the power of eminent domain an inherent and essential attribute of sovereignty. The Supreme Court has held that "the power of eminent domain is an attribute of sovereignty, and inheres in every independent state." 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. 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. In these respects, eminent domain resembles sovereign immunity. "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." "It cannot be surrendered, and, if attempted to be contracted away, it may be resumed at will." The power of eminent domain "extends to all property within the jurisdiction of the state.”

The historical claim for eminent domain as an inherent aspect of sovereignty is also strong. Sovereigns’ power to acquire property within their jurisdictions has its origins in ancient Greece and Rome. 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. The power was well-established in England at the founding of the colonies, and the colonies frequently invoked it. In colonial practice, eminent domain was sometimes used for private purposes, such as creating private ways or mills. Indeed, there was no absolute right to compensation, although the need to compensate was often recognized as an

302. 1 Nichols on Eminent Domain, supra note 300, § 1.14[2]; id. § 1.14[4] (explaining that it was inherent in the powers of the colonies and the Northwest Territories).
303. 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.
306. Georgia, 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 its powers of eminent domain. 1 Nichols on Eminent Domain, supra note 300, 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. Id. at 1–37 & n.61 (citing cases).
307. Records indicate that the Greeks and Romans took private property for public use. 1 Nichols on Eminent Domain, supra note 300, § 1.12[1] (citing Annals of Tacitus, Bk. 1, p. 75).
308. Id. (citing De Jure Belli et Pacis Lib. III, C.20).
309. Id. §§ 1.21, 1.22.
obligation. "The power of eminent domain was thus well established in England by the time of the American Revolution, and the obligation to make compensation had become a necessary incident to the exercise of the power." At the commencement of the Revolution, the powers possessed by the British Parliament devolved to the governments of the respective states.

Eminent domain might be deemed necessary for acquisition of property for government ownership or for 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 and ability to raise sufficient revenue to operate. In various contexts, courts have recognized that government collection of revenue is particularly critical and should be particularly immune from interference. 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 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 attribute of state and local sovereignty.

C. The Spending Clause

The Spending Clause 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

310. Id. §§ 1.22[7], [8], [14].
311. Id. §§ 1.13[2], 1.21[5] (citing 1 BLACKSTONE’S COMMENTARIES 139). William Blackstone, with whom colonists were familiar, discussed the power, though he attributed it to remnants of feudalism. Id.
313. See generally Tracy 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.” Id.; see Hibbs v. Winn, 542 U.S. 88 (2004) (interpreting the Tax Injunction Act, 28 U.S.C. § 1341); 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); Federal Statutes and Regulations: The Tax Injunction Act, 118 HARV. L. REV. 486 (2004).
largess, but upon state and municipal recipients of that largess as well. For example, in *Oklahoma v. Civil Service Commission*, the Court upheld application of the Hatch Act, limiting political activities of civil servants, to state officials whose employment is financed with federal funds.

One noted commentator has suggested that "few internal limits exist to constrain" Congress' spending power, including its power to impose grant limitations. The Court has not invalidated a grant condition imposed upon states as exceeding Congress' Spending Clause powers since the 1930s. Nevertheless, the Court has pointedly noted on at least two occasions in recent years that those powers have limits. In *South Dakota v. Dole*, the Court explained that a law passed pursuant to the spending power must meet four requirements. First, the expenditure must further the "general welfare." 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. Third, the grant condition must be related to "the federal interest in particular national projects or programs." Fourth, because "other constitutional provisions 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.

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


318. 330 U.S. at 142.

319. Id. at 142–44; see 1 TRIBE, supra note 8, at 833.


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


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

325. *Dole*, 483 U.S. at 207.

326. Indeed, the Court's 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." *Id.* at 207–08. One commentator has expressed some skepticism concerning the efficacy of such an approach. Kaden, supra note 181, at 894, 896.

condition] turns into compulsion, and ceases to be an inducement.”

However, the Court has failed to give much substance 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 legitimate encouragement.

In *New York v. United States*, 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 by Congress may influence a State’s legislative choices.” 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.”

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. 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.

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, but it need not financially assist women’s efforts to terminate their pregnancies, and may even

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330. *Id.*; accord Rosenthal, *supra* note 321, 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 181, at 874. He also argued that such conditional grants “often result[ed] in some distortion of state fiscal decisions.” *Id.* at 882.


refuse to fund doctors’ provision of referrals to women who seek to consider abortion as an option.\textsuperscript{335} 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 twenty-one,\textsuperscript{336} but Congress may condition federal highway funding to states upon state adoption of such an increase in the drinking age.\textsuperscript{337} Thus, the federal government can ensure that its funds are spent for their intended purposes.\textsuperscript{338} 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.\textsuperscript{339}

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.\textsuperscript{340} 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.\textsuperscript{341} For example, if Congress withheld all federal aid to states that do not generally waive their constitutionally-recognized immunity,\textsuperscript{342} state governments would have no choice but to waive that immunity. Indeed, the 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.\textsuperscript{343} Such conditions show disrespect for the state as an independent sovereign—they advance federal policies by limiting the state’s ability to use its own funds or exercise its own sovereign prerogatives at the direction of its citizens.\textsuperscript{344} 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.\textsuperscript{345} 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 that 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 funding.\textsuperscript{346} Thus, a government program for medical assistance may prohibit reimbursement for cosmetic surgery or fertility treatments, because Congress sought to fund necessary care, and not elective therapies.\textsuperscript{347} For example, the governmental interest in \textit{Maher v. Roe} could be characterized as program definition—namely, the government may simply have found it more important to assist the indigent with child birth, and found services for terminating 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.\textsuperscript{348} 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 \textit{Rust v. Sullivan},\textsuperscript{349} 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 President's 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 it might actually have lowered the cost of the federal program by relieving the federal government of the expense of providing prenatal services to women who would decide to exercise their constitutional right to terminate their pregnancies. 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 a grant recipient's conduct and practices. Such control may be necessary, even if it involves conditioning grants upon the grantee's relinquishment of constitutionally recognized rights or sovereign prerogatives.\textsuperscript{350} For example, in \textit{Wyman v. James},\textsuperscript{351} plaintiff aid

\begin{itemize}
\item \textsuperscript{345} 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.
\item \textsuperscript{347} Or currently, with regard to Viagra, federal authorities could decide that while alleviating impotency in older men is perfectly fine goal, such therapy does not merit federal funding given competing budgetary priorities. \textit{See} Sheryl Gay Stolberg, \textit{House Rejects Coverage of Impotence Pills}, \textit{N.Y. TIMES}, June 24, 2005, at A10.
\item \textsuperscript{349} 500 U.S. 173 (1991).
\end{itemize}
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 the plaintiff's home, at least without a warrant or probable cause. However, the government was entitled to demand that the plaintiff consent to such visits, despite the 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. Similarly, in *South Dakota v. Dole*, South Dakota sought to exercise 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 twenty-one, because of the prospect that eighteen-, nineteen-, and twenty-year-old drivers who had consumed alcohol to the point of intoxication might imperil other drivers using the federally funded highways.

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* provides an example of the Supreme Court's consideration of a law serving this sort of "protective" purpose. In *League of Women Voters*, 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 of 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. The Solomon Amendment requires 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 Solomon Amendment is a congressional response to the decisions of educational institutions, most notably law schools, to disassociate themselves from the military because of the military's exclusion of openly-gay individuals from military service. The Solomon Amendment clearly seeks to induce such institutions to interact with the military, despite their opposition to its policies.

352. Id.
353. Id. at 318-19. The court stated: "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." Id.
354. In *South Dakota v. Dole*, the Court found that the expenditure was related because the purpose of highway grants was to facilitate safe travel. Furthermore, the lack of uniformity in drinking ages led youths to cross state lines to obtain and consume alcohol. 483 U.S. at 208-09.
356. Id.
The withdrawal of funds is not really directed at the purpose of many of the aid programs, which seek to provide educational opportunity.358

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 grant 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 Congress 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 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,359 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, 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” guaranteed each state under the Constitution.360 Thus, at most the federal government should have the power only to ensure its own neutrality.361 In any event, Congress’ mere disagreement with the decisions that states make in the exercise of their prerogatives should not provide a legitimate basis for imposing grant conditions penalizing states for such

358. See Forum for Academic & 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. The Court unanimously upheld the Solomon Amendment in Rumsfeld v. Forum for Academic and Institutional Rights. 126 S. Ct. 1297 (2006). The Court found that the power the Constitution confers on Congress to “provide for the common Defence,” “[t]o raise and support Armies,” and “[t]o provide and maintain a Navy” authorized Congress to mandate that campuses allow military recruiters access, and thus Congress’ pursuit of that goal by imposing a grant condition on federal grants-in-aid to educational institutions was constitutionally permissible. Id. at 1306.

359. 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 Congress’ legislative authority. 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 any measure that falls within Congress’ other enumerated powers. Fulilove, 448 U.S. at 478–80; Dole, 483 U.S. at 217 (O’Connor, J., dissenting); see also Kaden, supra note 181, at 895. Thus, were Fullilove’s affirmative action holdings still good law, Congress could clearly impose affirmative action requirements on state and local recipients of federal grants by conditioning grants-in-aid to educational institutions was constitutionally permissible. Id. at 881.


361. 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).
choices. 362

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. 363

Congress had a legitimate interest in ensuring that eighteen- to twenty-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 individuals inebriated in this age range 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 this same group, 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 suggestion). 364 But more importantly, that approach would be unfair—why should sober eighteen- to twenty-year olds (and, for that matter, sober sixteen- and seventeen-year olds), be barred from federally funded highways because a disproportionate percentage of drivers in their age group 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. However, Congress’ chosen solution intruded deeply on constitutionally-recognized state prerogatives (and on individual liberty, albeit any freedom to consume alcohol lacks constitutional stature), conditioning government funds on states prohibiting anyone under twenty-one from drinking, whether they would use the federally funded highway system, keep to state highways, or refrain from driving at all. 365 These sorts of decisions about the limitations on states or individuals needed to accomplish the federal purpose are typically accorded great deference, 366 sometimes even when individual rights and state prerogatives are at stake. Such congressional decisions regarding the need for certain statutory provisions to effect federal interests should receive equal deference in the context of Spending Clause challenges. In the spending context, as in other contexts, such decisions involve engaging in sensitive factual inquiries and making difficult predictive judgments. Such inquiries and

362. 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.


364. Presumably, authorities would not enforce the provision by stationing officials at each on-and-off ramp of interstate highways, but by having officers driving on the highway stop drivers who are not entitled to use the highway. It is probably easier to spot an underage driver than it is to spot an underage driver who has had an alcoholic beverage but does not appear to be under the influence of an intoxicant. (If a driver appears under the influence, no special law would be needed to stop the driver, regardless of his age.).


assessments are generally considered to lie within the political branches' competence rather than the courts.' 367

Now contrast the actual South Dakota v. Dole with a hypothetical one. In the hypothetical case, Congress disapproves of state statutes lowering the legal drinking age to eighteen because Congress simply disagrees with the state judgment regarding the appropriate drinking age. Thus, let us assume that Congress justifies its refusal to provide highway funds to states whose drinking age is eighteen by asserting its desire to refrain from symbolically endorsing such state decisions. In other words, rather than serving a functional purpose, the limitation on state authority merely serves a dissociative purpose. In a sense, federal funding would facilitate drinking in this age group: if the federal government held firmly to denying federal highway funds to states whose legal drinking age was lower than twenty-one, the recalcitrant states would relent and prohibit such eighteen- to twenty-year olds from drinking. 368 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 twenty-one, but younger drinkers 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, 369 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, other branches of government, or private institutions, as well as conditional funding that in practical effect expands a government's regulatory powers. 373

The concern about undermining critical aspects or powers of coordinate sovereigns is evident in Crosby v. National Foreign Trade Council. 374 The Court has recognized that states possess a power to choose who they will do business with, and may wield


368. This would constitute facilitation in terms of a type of "but for" test as that used in torts. See, e.g., RESTATEMENT (THIRD) OF TORTS § 26 cmt. b (Proposed Final Draft 2001).

369. 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 serve the existing and planned future traffic of the highway in a manner that is conducive to safety, durability, and economy of maintenance." 23 U.S.C. § 109(a)(1) (2000).


that power to prefer their own citizens.\textsuperscript{375} 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.”\textsuperscript{376} In the 1980s and 1990s 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.\textsuperscript{377} One of the countries targeted was Myanmar. In Crosby, the Court invalidated Massachusetts’ 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’ use of its procurement power interfered with the nation’s, and in particular the President’s, power to conduct foreign policy.\textsuperscript{378} Presumably, a state could decide that it 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.\textsuperscript{379}

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 the President’s ability to take action with regard to matters that 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.\textsuperscript{380} In Velazquez, the plaintiffs challenged a federal statute and implementing regulations that limited entities receiving Legal Services Corporation grants from accepting representations that would involve challenging the constitutional or statutory validity of welfare statutes or regulations even if the issue became apparent after the representation was well underway. Congress can choose to fund the litigation it considers most important.\textsuperscript{381} It cannot, however, use grant restrictions to limit lawyers who receive grant funds in ways that 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


\textsuperscript{376} Reeves v. Stake, 447 U.S. 429, 438 n.10 (1980).

\textsuperscript{377} Head, supra note 375, at 123, 127–34.

\textsuperscript{378} Id. at 376.

\textsuperscript{379} This was Tribe’s approach in the second edition of his Constitutional Law treatise. Laurence H. Tribe, American Constitutional Law § 6–21, at 469 (2d ed. 1988).

\textsuperscript{380} 531 U.S. 533 (2001).

\textsuperscript{381} Id. at 536.
such a restriction impermissibly intrudes upon the judiciary’s domain by interfering with the proper operation of the judicial system.\textsuperscript{382} 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. \textit{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.\textsuperscript{383} 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. Co-opting an established institution, like legal representation, to communicate the government message was, the Court found, constitutionally impermissible.\textsuperscript{384} 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, in \textit{Arkansas Educational Television Commission v. Forbes}\textsuperscript{385} the Court rejected a minor candidate’s claim of a First Amendment right to participate in a debate sponsored by a public television station. Though the station was federally-funded, and publicly-owned, it retained editorial discretion. Exerciting authority over a broadcast station, even a publicly owned one, to specify the candidates that would participate in a debate would conflict 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.”\textsuperscript{386}

Finally, the concern that grant restriction might facilitate the undue expansion of the grantors’ regulatory power surfaces in the market participant cases.\textsuperscript{387} As noted earlier, the Court has recognized that the Commerce Clause was designed to limit states’ regulatory powers, not their participation in the market. While a state could not prefer its own citizens by imposing regulation that favored its citizens,\textsuperscript{388} it could favor its citizens in deciding with whom it would deal.\textsuperscript{389} It quickly became apparent that

\textsuperscript{382} Id. at 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.”).


\textsuperscript{384} \textit{Velazquez}, 531 U.S. at 544. Note, the same argument was made in \textit{Rust v. Sullivan} and the Court managed to avoid addressing it. \textit{Velazquez} may well undermine \textit{Rust} because arguably \textit{Rust} also involves funding limitations that coopt an established institution, namely the doctor-patient relationship.


\textsuperscript{386} \textit{Velazquez}, 531 U.S. at 543; \textit{see also} Schauer, supra note 332, at 107–08, 113–18.

\textsuperscript{387} 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. However, procurement and the award of grants-in-aid are both attributes of the spending power, and both potentially expand a government’s regulatory powers.


states could magnify the effect of wielding their limited market power by not only requiring that their contract partners be state citizens, but requiring that those contract partners, in turn, deal exclusively with its citizens.

In *South-Central Timber Development Co. v. Wunnikke*, 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 demand that its contract partners do the same. In effect, the Court attempted to draw a line between spending and market participation on the one hand, and regulation on the other.\(^{390}\)

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? If, of course, Congress can restrict state and local officials' invocation of eminent domain either under Section 5 of the Fourteenth Amendment or the Commerce Clause, it could accomplish the same result by imposing conditions on grants-in-aid. To the extent that neither Section 5 nor the Commerce Clause authorize such limitations, Congress' Spending Clause power is more limited. Congress may clearly prohibit federal funds from being used to pay "just compensation" for property taken in circumstances that Congress finds abhorrent. Even assuming that the only federal interest served by such a limitation is a symbolic one, Congress would merely be precluding states and localities from using federal funds to acquire property by eminent domain under circumstances in which Congress disapproves. States and localities would be left entirely free to exercise the power of eminent domain for economic development consistent with their own policies regarding the use of eminent domain—they would merely be required to use their own funds. States and localities would suffer no additional penalty for adhering to an eminent domain policy that differed from that of the federal government. Congress can no doubt also preclude states from using federal funds to pay for certain tasks that are a part of the eminent domain process, such as bringing lawsuits to acquire property by eminent domain.

The approach reflected in the Private Property Protection Act, withdrawing all federal economic development funding from a state or locality, even funding going to projects that in no way involve the use of eminent domain, should a state or locality invoke eminent domain for economic development purposes for any one project, should be considered impermissible. The House Judiciary Committee sought to provide a functional justification for withdrawal of all economic funds from states and localities that use eminent domain for economic development purposes. In particular, the Committee argued that "[s]tates or localities that have abused their eminent domain power by using 'economic development' as an improper rationale for a taking should not be trusted with Federal taxpayer funds for other 'economic development' projects which could themselves result in abusive takings of private property."\(^{391}\)

The House Committee clearly sought to rely on cases which provide that Congress can place conditions on grants-in-aid to ensure that the grant recipients are responsible partners.\(^{392}\) However, the federal government can clearly prohibit the use of federal funds for economic development in violation of federal policies by means other than


\(^{391}\) *Id.* at 11.

\(^{392}\) *See supra* note 315.
debarring from federal economic development programs states and localities who use their own funds to exercise eminent domain for economic development in a manner that the Supreme Court has recognized as falling within traditional state and local authority. The invocation of eminent domain by state and local officials is very public, and landowners adversely affected certainly have sufficient interest to bring state and local use of federal funds for economic development condemnations to the attention of the federal government.

The only substantial justification for the breadth of the penalty set forth in the Private Property Protection Act is Congress' disapproval of states and localities using their own funds to condemn land for economic development purposes. In the Private Property Protection Act, the House of Representatives goes beyond refusing to allow federal funds to be used for state and local activities it disapproves of, and seeks to penalize states and localities for engaging in certain eminent domain practices simply because it disagrees with those choices. Congress' "symbolic" or "dissociative" interest should not be sufficient to allow it to use a funding condition to dictate choices that states and local governments have a right to make.

A more difficult case would be posed by an expansive interpretation of the Garrett-Kennedy rider or the Gingrey-Cornyn proposal, which might require de-funding of segregable aspects of a redevelopment project because the state or locality used its power of eminent domain in acquiring land for some aspect of the project. The rationale underlying such an expansive withdrawal of funding is not entirely clear. If it is solely symbolic, the analysis above suggests that Congress should lack the power to withdraw funding merely because it disapproves of the state's decisions to exercise its powers of eminent domain using state funds. To take the Garret-Kennedy bill provisions as they might relate to transportation funds as an example, when deciding whether highway or mass transit funds can be used to provide a means to reach a particular development (i.e., a transportation link), the use of eminent domain by state or local officials in acquiring land for the development should be irrelevant. However, Congress should be able to use its Spending Clause power to reach state and local eminent domain practices used to acquire property needed for the federally-funded transportation link itself.

IV. CONCLUSION

Members of Congress from across the political spectrum disagree with *Kelo v. New London*, and find ample support for their position from an outraged citizenry. But responding to the decision poses something of a challenge for Congress. Members of Congress seem somewhat inclined to simply establish the rule endorsed by the dissent and rejected by the majority: acquisition of land for economic revitalization cannot

393. 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 makes an independent decision to displace others for a project that it will fund, federal authorities are to treat the location favorably 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*, 24 LOY. L.A. L. REV. 915, 923–24 (1991).
qualify as a “public use” that allows state and local authorities the power to use eminent
domain. Congress seeks 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 such legislative initiatives. 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.