

Colloquy Essays

THE LAW AND EXPRESSIVE MEANING OF CONDEMNING THE POOR AFTER *KELO*[†]

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I. INTRODUCTION

The Supreme Court's decision in the *Kelo* case has been widely criticized, and has ignited a firestorm of "reform" in the states. Twenty-four state legislatures have passed reform statutes, and nineteen of these statutes have been signed into law. Reform legislation has been introduced in at least thirteen other states. This Essay addresses the question of what message is sent by—what is the expressive meaning of—the *Kelo*-inspired reform movement. My argument is that, in substantial part, this reform movement privileges the stability of middle-class households relative to the stability of poor households and, in so doing, expresses the view that the interests and needs of poor households are relatively unimportant.

The law of eminent domain is a complex mixture of state and federal constitutional law and state and federal statutory law. Federal law applies to all states equally, but state law, constitutional and statutory, can vary a great deal from state to state. Among the states, there are still some in which it appears likely that public condemnations of private land for the purposes of "economic development" and "blight removal" will remain fully lawful and fairly easy for local and state officials to achieve (legally if not politically). In many other states, the law seems to be shifting to bar, restrict or encumber economic development condemnations in middle-class areas. With the notable exception of Florida, these other states continue to permit blight condemnations. Some of these states have recently adopted somewhat more specific definitions of "blight." But this re-definition of blight only accentuates its link to poverty by making it more difficult for local officials to stretch the "blight" category to include non-poor areas with higher quality housing stock.

That "reform" efforts in the law of eminent domain have largely focused on economic development condemnations in middle-class areas, and

[†] This Essay was previously published in the *Northwestern University Law Review Colloquy* on November 8, 2006, as David A. Dana, *The Law and Expressive Meaning of Condemning the Poor after Kelo*, 101 NW. U. L. REV. COLLOQUY 5 (2006), <http://www.law.northwestern.edu/lawreview/colloquy/2006/2/>.

not blight condemnations in poor areas, is fully consistent with the fact that the two cases that have spawned the greatest public outrage both involved middle-class areas. These two cases are the case of the condemnations in the lower-middle-class, largely European immigrant Poletown neighborhood in Detroit in 1980,¹ and the case of the condemnations of Susan Kelo and her neighbors' homes in a middle-class section of New London, Connecticut.² As the Washington Times columnist Bruce Fein notes, the "*Kelo* litigation is a middle-class reenactment" of the *Berman* case in which the Supreme Court approved blight condemnations in poor areas.³ The media, commentators, and (most importantly) legislators have revolted against the *Kelo* condemnations, however, while they quietly approved or at least accepted the *Berman* condemnation.

That the *Kelo*-inspired reform movement privileges condemnations for blight removal and, by extension, privileges the stability of middle-class households, does not, in and of itself, establish that the reform should be abandoned or (where already implemented) undone. The expressive cost of the reform—the devaluation of the poor in legal and political discourse—might be outweighed by whatever non-expressive benefits the reform produces. But the burden is, or should be, on the proponents of reform.

II. CONSTITUTIONAL LAW OF EMINENT DOMAIN

A. Federal Constitutional Law

The Fifth Amendment to the United States Constitution contains the following language, often labeled the Takings Clause or the Just Compensation Clause: "nor shall private property be taken for public use, without just compensation."⁴ With a few exceptions, the state constitutions contain very similar language.⁵ For example, the Michigan Constitution provides that "[p]rivate property shall not be taken for public use without just compensation,"⁶ and the Connecticut Constitution mandates that "[t]he property of no person shall be taken for public use, without just compensation therefor."⁷ Thus, as a matter of both federal and state constitutional law, there are some limits on the government's power to take private property.

¹ Poletown Neighborhood Council v. City of Detroit, 304 N.W.2d 455 (Mich. 1981), *overruled by* County of Wayne v. Hathcock, 684 N.W.2d 765, 787 (Mich. 2004).

² Kelo v. City of New London, 125 S. Ct. 2655 (2005).

³ Bruce Fein, *Eminent Domain, Eminent Nonsense*, WASH. TIMES, Oct. 11, 2004, at A16.

⁴ U.S. CONST. amend. V.

⁵ Only three state constitutions—Florida's, Georgia's, and Louisiana's—contain the phrase public purpose instead of public use. See FLA. CONST. art. 10, § 6(a); GA. CONST. art. 1, § 3, ¶ I(a); LA. CONST. art. 1, § 4(B).

⁶ MICH. CONST. art. 10, § 2.

⁷ CONN. CONST. art 1, § 11.

The Fifth Amendment of the United States Constitution does not state that no government may take private property for public use without just compensation. On its face, the Fifth Amendment thus would seem to bind only the federal government. But the United States Supreme Court held that the Takings Clause of the Fifth Amendment applies to the states by virtue of the ratification of the Fourteenth Amendment to the United States Constitution.⁸ Thus, to be constitutional, a state or local government's condemnations must pass muster under *both* the federal constitution and that of the state in which the property in question is located.

The Takings Clause of the Fifth Amendment—"nor shall private property be taken for public use without just compensation"—has been construed to create two distinct limitations on government. The first limitation is that the government may take private property only for a public use: the government may not take private property for a non-public use, no matter how much compensation is paid. The second limitation is that, when the government does take private property for a public use, it must pay "just compensation."

What it means to "take" private property is clear in the cases of both market purchases and formal condemnations. The government is not regarded as taking private property when it acquires title to private property by means of a non-compelled, market transaction: the government can buy property without constitutional constraint. By contrast, when the government formally invokes its eminent domain power by forcing the transfer of title of the property to itself via a condemnation proceeding, the government unquestionably has taken private property.

For purposes of the compelled transfer of title of private property from a private property owner to the government, there is no question that a taking has occurred, but there remains the question whether the taking was for "public use" and whether "just compensation" was paid. For the taking to be constitutionally permissible, both the public use and just compensation requirements must be satisfied. Even if just compensation—indeed, even if more-than-just compensation—is paid, a taking that is not for public use is constitutionally impermissible. A key question, therefore, is: what does "public use" mean?

One plausible understanding of the words "public use" is that the property in question must actually be controlled by, and hence available for actual use by, the general public, as is true, for example, of a public park or highway. At least some commentators believe that the original meaning of public use—the meaning at the time of constitutional founding—was actual public use, and that our courts honored that original meaning for some years

⁸ See *Chi., Burlington & Quincy R.R. Co. v. Chicago*, 166 U.S. 226, 239 (1897).

after the founding.⁹ Other commentators question whether the original meaning of public use was limited to actual public use, and whether the courts after the founding ever interpreted public use as requiring actual use.¹⁰ In any event, it is quite clear that the courts had disavowed the conception of public use as requiring actual public use (assuming they ever avowed it) by the end of the nineteenth century. As long ago as 1896, Justice Holmes, writing for the Supreme Court, emphasized “the inadequacy of use by the general public as a universal test.”¹¹ More importantly perhaps, on the current United States Supreme Court, only Justice Thomas appears to have any sympathy for restricting public use to actual use by the public.¹²

Once public use is unmoored from actual control and availability for use by the public, it becomes very difficult to delimit the term. The federal and state courts now all read for a “public use” to mean for a “public purpose.” In this view, a condemnation that serves a public purpose may fulfill a public use even if the property is not owned or otherwise used by the government or open to the public. The move from public use to public purpose raises the question: what kind of purpose is a public purpose such that a government lawfully may exercise its eminent domain power?

One possible answer is that a condemnation has the constitutionally requisite public purpose as long as it has the purpose of providing a benefit, incidental or direct, to the public. The shift from purpose to benefit, however, would seem to require a sorting as to which kinds of benefits count and which do not. If all kinds of benefits count, the public use limitation on eminent domain is no limitation at all, since it is hard to imagine a project that cannot be said to generate some sort of benefit for the public. But if only some kinds of benefits count, by what criteria are we to identify those benefits? The case law does not provide any comprehensive answer to this question. What the case law does is identify two distinct kinds of public benefits that can justify the use of eminent domain: the removal of “blight” and “economic development.”¹³ The cases spawned by the massive, feder-

⁹ See, e.g., Roger Clegg, *Reclaiming the Text of the Takings Clause*, 46 S.C. L. REV. 531, 542–43 (1995); Matthew P. Harrington, “Public Use” and the Original Understanding of the So-Called “Takings” Clause, 53 HASTINGS L.J. 1245, 1245–49 (2002).

¹⁰ See e.g., Buckner F. Melton, Jr., *Eminent Domain, “Public Use,” and the Conundrum of Original Intent*, 36 NAT. RESOURCES J. 59 (1996). The fact is there is almost no direct evidence one way or the other as to the framer’s understanding of “public use.” See DAVID A. DANA & THOMAS W. MERRILL, PROPERTY: TAKINGS 8–25 (2002). Nonetheless, it may be that, if asked, “[m]ost Americans” would say that “public use” means “actually going to be used by the public as, for example, a road or a park.” John Tierney, *Supreme Home Makeover*, N.Y. TIMES, Mar. 14, 2006, at A27.

¹¹ *Strickley v. Highland Boy Gold Mining Co.*, 200 U.S. 527, 531 (1906).

¹² See *Kelo v. City of New London*, 125 S. Ct. 2655, 2679 (2005) (Thomas, J., dissenting) (arguing for a reading of the “public use” requirement as allowing the taking of property only if “the government owns, or the public has a legal right to use, the property, as opposed to taking it for any public purpose or necessity whatsoever”).

¹³ The Supreme Court in 1984 held that compelled land transfers from former lessees to future lessees as part of a plan to end an oligopoly in land ownership qualified as a public use. See *Haw. Hous.*

ally-funded urban renewal projects of the 1950s and 60s, and in particular *Berman v. Parker*,¹⁴ gave rise to the conventional wisdom that states and localities enjoy very broad discretion in making blight designations and in using eminent domain to curb the blight. Indeed, as in *Berman* itself, a property may be condemned even when it is indisputably not blighted, as long as it is located in a blighted area designated for renewal.¹⁵ Writing for a unanimous court, Justice Douglas made clear that the federal constitution places no real constraint on urban renewal and redevelopment undertaken under the blight removal label:

It is not for the courts to oversee the choice of the boundary line nor to sit in review on the size of a particular project area. Once the question of the public purpose has been decided, the amount and character of land to be taken for the project and the need for a particular tract to complete the integrated plan rests in the discretion of the legislative branch.¹⁶

There almost certainly is some limit to how far “blight,” however amorphous that term may be, can be stretched. If an area is made up almost uniformly of tidy, well-tended, middle-class brick bungalows occupied by stable, gainfully-employed owners, a designation of the area as blighted might not pass muster even under the very deferential *Berman* standard of review. After all, the department store at issue in *Berman*, although in good repair, was located in a poor area of the District of Columbia that did contain at least some dilapidated buildings.¹⁷ Hence the “need” for the category of “economic development” condemnations—condemnations of non-blighted properties in non-blighted areas done in the interest of fostering economic development within a locality. Economic development is not a term with any precise definition, but the gist of the term seems to be development that is expected to improve the locality’s tax base or job base. Thus, a condemnation done to replace well-tended, middle-class brick bungalows with luxury condominiums and mansions would qualify as an economic development condemnation.

All or virtually all condemnations designated as blight condemnations could be characterized as economic development condemnations, inasmuch as the end goal of blight removal is economic redevelopment, often in the form of the construction of new housing and commercial space that is ex-

Auth. v. Midkiff, 467 U.S. 229, 241–42 (1984) (“[W]e have no trouble concluding that the Hawaii Act is constitutional. The people of Hawaii have attempted, much as the settlers of the original 13 Colonies did, to reduce the perceived social and economic evils of a land oligopoly traceable to their monarchs.” (internal citation omitted)). Outside of Hawaii, however, the question of land oligopoly has not arisen because no other American state had a similar history of land ownership concentrated in a single, enormous land trust.

¹⁴ 348 U.S. 26 (1954).

¹⁵ See *id.* at 34–35 (rejecting the argument that blight designations must proceed on a structure-by-structure basis).

¹⁶ *Id.* at 35–36.

¹⁷ *Id.* at 30–31.

pected to generate higher tax revenue. The department store in *Berman* was taken as part of a planned development project involving private developers who planned to build and sell homes and offices and other buildings that would make up a wealthier, more economically developed neighborhood.¹⁸ In reviewing the case law concerning blight removal, and in speaking to planners and other local officials, I could not locate an account of a single blight removal condemnation project that was not supposed to (whether it actually did or not) generate more tax revenue and more (or at least more economically valuable) jobs.¹⁹

One could *imagine* an instance of an isolated, problem structure, such as an apartment building controlled by drug dealers, where condemnation of the structure could proceed as a blight condemnation, but the ultimate goal of the condemnation would not be to generate higher-quality, more-tax-revenue-generating housing, but simply to replace the drug dealers with law-abiding but still low-income tenants. In practice, localities do not use condemnations as a means to address immediate crime or public health problems associated with particular problem structures because the condemnation process itself is lengthy and costly.²⁰ There are other, more expeditious means to force the cleaning up or abandonment of a problem structure, including aggressive policing, housing code enforcement, and tax collection.

Although all or virtually all blight condemnations can readily be re-characterized as economic development condemnations, the converse is not true: some economic development condemnations cannot readily be re-characterized as blight removal condemnations. State statutory definitions of blight are in large measure very vague, and allow for a wide range of fully occupied residences and economically viable businesses to be designated as part of a blight district. As Colin Gordon has noted, “‘blight’ is rarely defined with any precision in . . . statutes” and “courts have granted local interests almost *carte blanche* in their creative search for ‘blighted’ areas.”²¹ As one California state legislator complained in 1995, “defining blight [has] bec[o]me an art form.”²² But blight nonetheless does connote poor, especially urban and poor, and it decidedly does not connote wealthy or prosperous. Thus, the state redevelopment agency in the *Kelo* case did not even try to argue that the neighborhood lived in by Susan Kelo and her

¹⁸ *See id.*

¹⁹ I conducted twenty-one telephone interviews, notes for which are available. The interviews are suggestive, but I make no claim that I surveyed a fully representative sample of planners or developers.

²⁰ The high cost of acquiring property through eminent domain is explored in Thomas Merrill, *The Economics of Public Use*, 72 CORNELL L. REV. 61 (1986). *See also* Nicole Stelle Garnett, *Relocating Disorder*, 91 VA. L. REV. 1075, 1088–92 (2005) (discussing regulatory enforcement as a strategy to combat perceived problem properties in urban neighborhoods).

²¹ Colin Gordon, *Blighting the Way: Urban Renewal, Economic Development, and the Elusive Definition of Blight*, 31 FORDHAM URB. L.J. 305, 305–06 (2004).

²² *Id.* at 306 (quoting a statement by Philip Isenberg, California Legislature).

middle-class neighbors was blighted, even though such a characterization, if upheld, would have afforded them the benefit of *Berman* and similar precedents.

Prior to the United States Supreme Court's 2005 decision in *Kelo*, it was not entirely clear whether, as a matter of federal constitutional law, economic development was a public benefit sufficient to satisfy the public use requirement and hence render a condemnation constitutional. In oral argument in *Kelo*, several of the Justices expressed discomfort with the petitioners' argument that blight condemnations could be meaningfully distinguished from economic development condemnations for federal constitutional purposes.²³ The majority opinion subsequently authored by Justice Stevens reflects that discomfort in that it extends to political decisions to pursue economic development condemnations the same sweeping deference that the *Berman* court accorded political decisions to pursue blight removal condemnations half a century earlier. According to the majority opinion, "[p]romoting economic development is a traditional and long accepted function of government," and "[t]here is . . . no principled way of distinguishing economic development from the other public purposes that we have recognized," such as "the purpose of transforming a blighted area . . . through redevelopment."²⁴ Moreover, the Court in *Kelo* made clear that it is not the judiciary's role to "second-guess" public officials' judgments as to the efficacy of their economic development plan or as to what land needs to be acquired in order to effectuate the project.²⁵ Quoting *Berman*, the Court affirmed the principle that once the question of public purpose has been decided, the courts are to leave questions of how that purpose is effectuated to the discretion of politicians.²⁶

Read together, *Kelo* and *Berman* establish that, as a matter of federal constitutional law, both blight removal and economic development condemnations are constitutional. Nonetheless, within the current Supreme Court, economic development remains a more controversial rationale for condemnations than blight removal. Five justices joined the *Kelo* majority, but four dissented. In her powerful dissent joined by Chief Justice Rehnquist and Justices Scalia and Thomas, Justice O'Connor argued that *Berman*-style blight removal condemnations should continue to be constitutional but *Kelo*-style economic development condemnations should be flatly prohibited. If we assume that Justices Alito and Roberts would vote like the Justices whom they replaced (O'Connor and Rehnquist, respectively), then blight condemnations will remain safely constitutional for many years

²³ See Transcript of Oral Argument at 3–26, *Kelo v. City of New London*, 125 S. Ct. 2655 (No. 04-108).

²⁴ *Kelo v. City of New London*, 125 S. Ct. 2655, 2665 (2005).

²⁵ *Id.* at 2668.

²⁶ *Id.*

at least, but the continued constitutionality of economic development condemnations could turn on the very next appointment to the Court.

B. State Constitutional Law

State constitutional law tracks federal constitutional law in accepting blight removal as a constitutionally permissible basis for condemnations. The state court opinion most critical of blight condemnations so far is a single-justice partial concurrence, partial dissent by Michigan Supreme Court Justice Weaver. Justice Weaver makes the same argument as does Justice Thomas in his *Kelo* dissent: because public use means actual public control and hence guaranteed use by the public, many if not all blight and economic development condemnations should be held unconstitutional.²⁷

Prior to *Kelo*, a number of states held that economic development is a constitutionally permissible basis for condemnations as a matter of both federal and state constitutional law. Most famously, the Michigan Supreme Court in its 1981 *Poletown* opinion held that the City of Detroit acted constitutionally in condemning a stable, non-blighted neighborhood in order to provide General Motors with a site for a new plant. The *Poletown* case sparked a tremendous amount of criticism, in no small measure because *Poletown* was a flourishing ethnic neighborhood that was utterly destroyed and the General Motors plant never delivered the number of promised jobs. Although *Poletown* itself remains a highly controversial decision, state court opinions across the country have mirrored its reasoning in approving economic-development condemnation. The reasoning of the Michigan Supreme Court in *Poletown* essentially was the same as that employed more than two decades later by Justice Stevens in *Kelo*: according to the Michigan Supreme Court, when the legislature determines that a condemnation “meets a public need,” such as economic development, the Court’s role is “limited.”²⁸ “The determination of what constitutes a public purpose” should not be second-guessed by a court “except in instances where such determination is . . . manifestly arbitrary and incorrect.”²⁹

More recently, in 2004, two state supreme courts—Illinois and Michigan—explicitly held that, at least in some instances, economic development is not a public purpose that justifies condemnation as a matter of state constitutional law. In the Illinois case, the state supreme court held that relatively insubstantial, incidental contribution “to positive economic growth in the region” from a project—in this case an expanded parking lot for a race-track—did not justify condemnation even though the court acknowledged that in other cases the economic development benefits of a project might be

²⁷ See *County of Wayne v. Hathcock*, 684 N.W.2d 765, 796 (Mich. 2004) (Weaver, J., concurring in part and dissenting in part).

²⁸ *Poletown Neighborhood Council v. City of Detroit*, 304 N.W.2d 455, 458 (Mich. 1981), *overruled by* *County of Wayne v. Hathcock*, 684 N.W.2d 765, 787 (Mich. 2004).

²⁹ *Id.* at 459 (citation and internal quotation marks omitted).

sufficient to justify condemnation.³⁰ The Michigan case attracted national attention because it entailed the specific disavowal of the *Poletown* decision. Pointedly rejecting the reasoning it had employed in *Poletown*, the Michigan Supreme Court in *County of Wayne v. Hathcock* held that economic development was a meaningfully different purpose than blight removal for purposes of the state constitutional requirement that takings be for public use.³¹ Economic development, the court held, was a constitutionally insufficient purpose for condemnation even when the promised economic benefits of the business and technology park development are very substantial, such as 30,000 jobs and \$350 million in tax revenue.³² The court acknowledged certain poorly-defined categories of economic development condemnation that would pass constitutional muster, such as where the property was selected for condemnation because of “facts of independent public significance” rather than because of the preferences of private developers participating in the project.³³ But the tenor of the court’s opinion was very close to that of Justice O’Connor in her *Kelo* dissent.

Hence the state of state constitutional law at the time *Kelo* was decided in 2005: most state courts interpreted their state constitutional law to allow both blight and economic development condemnations, but two state supreme courts read their state constitution as requiring more searching review of economic development condemnations. It remains to be seen whether the post-*Kelo* uproar will lead other state supreme courts to follow Illinois’ and Michigan’s lead in interpreting the public use requirement of their state constitutions as requiring more than is required as a matter of federal constitutional law.

III. STATUTORY LAW OF EMINENT DOMAIN

A. Federal Statutory Law

The overwhelming majority of condemnations are pursued by state agencies or local governments acting pursuant to a delegation of the eminent domain power from the state. Federal statutes do not impose substantive requirements or limits on state and local condemnations. Congress could affect the incidence and design of state and local condemnations by virtue of conditions on federal funding for state and local development projects. Congress, however, has not taken advantage of its power to condition spending to control state eminent domain practices, but following *Kelo*, bills were introduced in Congress that would punish states and localities that engage in economic development condemnation by depriving them of

³⁰ Sw. Ill. Dev. Auth. v. Nat’l City Envtl., L.L.C., 768 N.E.2d 1, 9 (Ill. 2002).

³¹ *Hathcock*, 684 N.W.2d at 783–87.

³² *Id.* at 770–71.

³³ *Id.* at 783 (internal quotation marks omitted).

all federal economic development funding.³⁴ Although the proposed federal legislation does not explicitly exclude blight condemnation, the statements of the legislative proponents strongly suggest that the proposed legislation is not meant to affect blight condemnation practices.³⁵ In any event, the proposed legislation might best be interpreted as a symbolic gesture only. The legislation does not establish any mechanism by which a federal agency would find state and local condemnation practices to have entailed economic development condemnations and then effect the withdrawal of previously allocated federal funding. Furthermore, in other contexts where Congress has established such a mechanism—as, for example, in the federal Clean Air Act, where EPA is empowered to remove federal highway funding as a sanction for state non-compliance with air quality targets—actual funding withdrawals are unheard-of, in part because Congressional delegations from states that might lose funding always can be expected to oppose the withdrawal of funding.

B. State Statutory Law

Prior to the *Kelo* decision, in many states, the state legislature had enacted a statute defining blight (albeit, generally, in exceedingly broad terms) and approving of blight condemnations. Some states had statutes specifically approving of economic development condemnations, and even when they did not, the courts generally tolerated economic condemnations. Overall, although there was variation among the states, pre-*Kelo* state statutory law was not restrictive with respect to the purpose that state or local officials could lawfully adopt for proceeding with condemnations.³⁶

Kelo has given rise to legislative reform proposals across the nation. In the first flurry of such proposals, roughly from when the decision came down in June 2005 until the end of the 2005 legislative session, many of the proposed bills simply barred (or severely restricted) condemnations based on an economic development rationale without explicitly addressing whether condemnations based on blight were still permissible.³⁷ Other proposed bills during this period barred economic development condemnations

³⁴ The bill that has attracted the most attention is the Private Property Rights Protection Act of 2005, H.R. 4128, 109th Cong. (2005).

³⁵ See, e.g., Kenneth Harney, *Congress Might Put Leash on Property Grabs*, CHARLOTTE OBSERVER, Nov. 5, 2005, at H13 (explaining that legislative proponents did not intend for H.R. 4128 to “bar seizures of abandoned or blighted property to protect the public”).

³⁶ For a good, if somewhat ideologically-infused, account of each state’s law just prior to *Kelo*, see the Institute of Justice’s 2003 report, DANA BERLINER, PUBLIC POWER, PRIVATE GAIN (2003), http://www.castlecoalition.org/pdf/report/ED_report.pdf.

³⁷ See, e.g., H.B. 5062, 2005 Leg., Jan. Sess. (Conn. 2005); S.B. 221, 143d Gen. Assemb., Reg. Sess. (Del. 2005); H.J. Res. 31, 2005 Leg., Reg. Sess. (Fla. 2005); S.B. 86, 2005 Leg., Reg. Sess. (Ga. 2005); H.C.R. 57, 2005 Leg., Reg. Sess. (Ky. 2005); H.B. 5078, 93d Leg., Reg. Sess. (Mich. 2005); H.B. 159, 93d Gen. Assemb., 1st Reg. Sess. (Mo. 2005); S.B. 382, 2005 Leg., Reg. Sess. (Mont. 2005); H.B. 1806, 2005 Sess. (Va. 2005).

while explicitly preserving blight condemnations.³⁸ The proposed legislation in this first wave did not tackle the question of the definition of blight under state law. None of the proposed bills in this period purported to bar *both* economic development and blight condemnations.

Notably, out of bills that I reviewed that were introduced in 23 states during this period, only one proposed New York bill seems to evince any concern with displacement of existing residents as a result of condemnations.³⁹ But even then, the New York bill merely requires an assessment of such impacts before certain kinds of condemnations proceed, rather than actually limiting any condemnations *per se*.

During what might be called the second wave or stage of *Kelo*-inspired reform—that portion of the 2006 legislative session through June of 2006—many of the bills that had been introduced in 2005 “died” or were revised in committee, and in some cases the revised bills or new bills then passed the full state legislature. *Kelo*-inspired reform legislation is still under debate, but has not been enacted, in a number of states where the use of eminent domain has been controversial, including California, Michigan and New Jersey. *Kelo*-inspired legislation, however, has now been enacted in twenty-four states.⁴⁰ This set of enacted laws differs from the earlier *Kelo*-inspired proposed legislation in one major way: the question of “blight” is more often addressed, and when addressed, is addressed more substantively.

Only two states—South Dakota and Alaska—have enacted a law that bars economic development condemnations without addressing the question of blight condemnations at all.⁴¹ These legislatures may have intended to include blight condemnations within the bar on economic development condemnations. Or it may well be that, due to low levels of urbanization, relatively new housing stock, or other factors, the South Dakota and Alaska legislatures simply did not think blight condemnations were important enough to address one way or the other.

At present, only one state, Florida, has enacted a law flatly rejecting condemnations based on both economic development and “blight” rationales.⁴² Only Florida has opted for the across-the-board approach that Justice Thomas advocated for in his *Kelo* dissent, and in so doing, Florida has out-

³⁸ See, e.g., S.B. 68, 2005 Leg., Reg. Sess. (Ala. 2005); H. Docket 4634, 184th Gen. Court, 2005 Reg. Sess. (Mass. 2005); H. Docket 4662, 184th Gen. Court, 2005 Reg. Sess. (Mass. 2005); S.B. 326, 73d Sess. (Nev. 2005); A.B. 4392, 211th Leg., Reg. Sess. (N.J. 2005); Assemb. B. 9043, 228th Leg., Reg. Sess. (N.Y. 2005); Assemb. B. 9050, 228th Leg., Reg. Sess. (N.Y. 2005); H.B. 1835, 2005 Leg., Reg. Sess. (Pa. 2005); S.B. 881, 2005 Leg., Reg. Sess. (Pa. 2005); S.B. 7, 2005 Leg., 79th 2d Called Sess. (Tex. 2005).

³⁹ Assemb. B. 9043, 228th Leg., Reg. Sess. § 6 (N.Y. 2005).

⁴⁰ See National Conference of State Legislatures, *Eminent Domain: 2006 State Legislation*, <http://www.ncsl.org/programs/natres/emindomainleg06.htm> (last visited Sept. 12, 2006).

⁴¹ See H.B. 318, 24th Leg. (Alaska 2006); H.B. 1080, 2006 Sess. (S.D. 2006).

⁴² See H.B. 1567, 2006 Leg., Reg. Sess. (Fla. 2006).

done even the proposals of ideologically charged property rights advocacy groups such as the Castle Coalition.⁴³

All the remaining states that have enacted *Kelo*-inspired reform legislation follow the approach of barring or severely restricting economic development condemnations while continuing to permit blight condemnations. In other words, all of these laws privilege blight condemnations over economic development condemnations and, by extension, privilege the interests of owners and occupants of non-“blighted” property over that of owners and occupants of “blighted” property.

However, there are substantial differences among these states in whether they change the existing law of blight and, if so, how they change it. In six states, the enacted law simply exempts blight condemnations from the new bar on economic development condemnations without changing the procedure or requirements for a blight designation.⁴⁴ These states, in effect, codify the approach suggested by Justice O’Connor in her *Kelo* dissent.

In the rest of the states that have passed reform legislation, the reform legislation exempts blight condemnations from the new bar (or severe restriction) on economic development condemnations but at the same time, in some way, purports to change the law regarding blight designations.⁴⁵ In several states, such as Illinois and Missouri, the substantive definition of “blight” is not changed or even re-stated, but the procedure and level of proof required for a blight designation is altered.⁴⁶ These changes may deter or prevent authorities from using “blight” as a basis for condemnations in marginal cases, where the evidence of blight is quite weak within the designated area. As a practical matter, however, I suspect this change means that authorities can continue to use blight condemnations in poor areas and will face a real challenge only if they attempt to stretch

⁴³ The Castle Coalition’s model blight legislation would allow for condemnations based on findings that structures were “unfit for human habitation” or “dangerous to the safety of persons or property.” Castle Coalition, *Model Blight Legislation*, http://eminentdomainabuse.com/legislation/model/model_blight_legis.html (last visited Sept. 12, 2006).

⁴⁴ See H.B. 508, 2006 Leg., Reg. Sess. (Ky. 2006); H.P. 1310, 2006 Leg. (Me. 2006); L.B. 924, 2006 Leg., Reg. Sess. (Neb. 2006); S.B. 167, 126th Gen. Assemb., Reg. Sess. (Ohio 2006); S.B. 3296, 2006 Leg., Reg. Sess. (Tenn. 2006); S.B. 7, 2005 Leg., 79th 2d Called Sess. (Tex. 2006).

⁴⁵ See H.B. 654, 2006 Leg., Reg. Sess. (Ala. 2006); H.B. 1411, 2006 Leg., Reg. Sess. (Colo. 2006); H.B. 1313, 2006 Leg., Reg. Sess. (Ga. 2006); H.B. 555, 2006 Leg., 2d Reg. Sess. (Idaho 2006); S.B. 3086, 94th Gen. Assemb., Reg. Sess. (Ill. 2006); H.B. 1010, 2006 Leg., Reg. Sess. (Ind. 2006); S.B. 323, 2006 Leg., Reg. Sess. (Kan. 2005); S.B. 2750, 84th Leg., Reg. Sess. (Minn. 2006); H.B. 1944, 93d Gen. Assemb., 2d Reg. Sess. (Mo. 2006); S.B. 881, 2005 Leg., Reg. Sess. (Pa. 2006); S.B. 246, 2005 Leg., Reg. Sess. (Vt. 2006); Assemb. B. 657, 2005 Leg., Reg. Sess. (Wis. 2006); H.B. 4048, 2006 Leg., Reg. Sess. (W. Va. 2006).

⁴⁶ The Illinois law provides that any blight designation is “rebuttably presumed to be for a public purpose,” and that challenges to the blight designation may be filed within six months of the designation being made. S.B. 3086, 94th Gen. Assemb., Reg. Sess. § 5-5-5(c) (Ill. 2006). The Missouri law provides that blight designations must be supported by “substantial evidence.” H.B. 1944, 93d Gen. Assemb., 2d Reg. Sess. § 523.261 (Mo. 2006).

the blight category to include solidly working-class or (even more so) middle-class areas.

In other states, the new laws reformulate or restate the substantive definition of “blight.” In most cases, the new definitions do not dramatically differ from the old ones: “blight” is still understood to cover areas and not just particular structures, and substantial housing code violations or other indicia of dilapidation still suffice to categorize a structure (and then, by extension, an area) as blighted.⁴⁷ In a few instances, the statutory reformulation of “blight” does seem to impose a significantly higher burden on local authorities seeking to use their condemnation authority.⁴⁸ It is hard to say how much effect these reformulations or restatements of the definition of blight will have in practice, but again, I think it is reasonable to expect that local authorities will be able to identify “blight” and continue to pursue blight condemnations in poor—as opposed to working-class and middle-class—areas.

Out of the laws that modify the meaning or procedure for blight and blight designations, the laws in Indiana and Wisconsin stand out as the two that may prevent the use of blight designations for substantial redevelopment projects even in many poor areas.⁴⁹ The laws in both of these states specifically restrict the use of blight condemnations to the condemnation of particular blighted structures, and prohibit the use of blight designations to condemn non-blighted structures near blighted ones. Since even very poor neighborhoods, even ones with pervasive housing code violations, contain some structures that cannot easily be labeled blighted, this limitation of blight to particular structures might prevent local authorities from being able to use blight condemnations to facilitate land assembly and development in poor neighborhoods.

To summarize, economic development condemnations remain lawful as a matter of federal constitutional law, but perhaps only by one vote on the Supreme Court, and they face state constitutional restrictions in a few states and the likelihood of state statutory restrictions in a large number of states. Blight condemnations in poor areas, by contrast, are fully acceptable as a matter of federal and state constitutional law and, in almost every state, as a matter of state statutory law as well. However, in a significant number of states, changes in the statutory definition and requirements for blight des-

⁴⁷ For example, the Pennsylvania law allows a blight designation in state-authorized redevelopment areas based on code violations, and even outside such areas, based on code violations that are so serious they support a finding of unfit for human habitation. S.B. 881, 2005 Leg., Reg. Sess. § 205 (Pa. 2006). The Georgia law allows for a blight designation based on unsafe conditions, illegal activity near or on the property, and code violations. H.B. 1313, 2006 Leg., Reg. Sess. § 3 (Ga. 2006).

⁴⁸ Most notably, the Minnesota law seems to require that blighted structures not only have substantial housing code violations but also that the extent and magnitude of the violations makes repair economically infeasible. S.B. 2750, 84th Leg., Reg. Sess. § 2(7) (Minn. 2006).

⁴⁹ See H.B. 1010, 2006 Leg., Reg. Sess. (Ind. 2006); Assemb. B. 657, 2005 Leg., Reg. Sess. (Wis. 2006).

ignations may prevent authorities from using blight condemnations outside the most straightforwardly blighted—invariably, the poorest—areas.

IV. THE EXPRESSIVE MEANING OF CONDEMNATION LAW

Laws do not simply, or only, dictate what people and institutions are permitted or prohibited from doing. Laws are also a part of the culture that helps form prevailing values and understandings. Laws that (for example) criminalize and severely penalize domestic battery may not only reflect a social consensus that domestic battery is wrong, and deter battery by exposing batterers to the threat of jail, but also help to entrench the understanding of battery as wrongful within the populations that observes the passage and enforcement of the law. By the same token, laws that define the rights of different classes or types of property owners vis-à-vis the state or local government may express values—and thereby shape values within the populace—about both private property as a general matter and about the relative value of those various classes of property owners.

As we have seen, *Kelo*-inspired reform has ranged from a flat ban on the use of eminent domain for land assembly (Florida) to a ban on economic development condemnations with some arguably new requirements for (but no ban on or severe restrictions of) blight condemnations to a ban on economic development condemnations without any changes at all to the authority of officials to use blight as a rationale for condemnation. What are the expressive meanings—the message—of these responses?

In answering these expressive meaning questions regarding *Kelo*-inspired reform, I think it is very important to begin with what has *not* been part of *Kelo*-inspired reform anywhere. To the extent that *Kelo*-inspired reform addresses the question of the lack of decent, affordable housing in certain poor neighborhoods, it does so in terms of whether and when local authorities can use “blight” to condemn such housing or more broadly condemn the neighborhoods that contain such housing. But regardless of the answer the reformers have provided to that question, they have seem unconcerned with—or, in any event, they have neither debated nor taken legal action to help meet—the actual needs of low-income residents for decent, affordable housing in which to live.

Where (as in most states) *Kelo*-inspired reform would allow blight condemnation to continue more or less as before, at least in genuinely poor areas, there has been no legal movement to help ensure that households displaced by such condemnations are provided with better (or even as good) substitute housing. There has been no debate regarding measures that might ensure that the new blight-condemnation-facilitated development includes a substantial number of housing units for low-income households (whether those households had been displaced or not). Indeed, there has not, to my knowledge, been any coupling, even in proposals, let alone in enacted laws, of condemnation reform and funding for, or legal require-

ments designed to alleviate the shortage of, decent affordable housing in urban areas.

Similarly, where (as in Florida) the reform appears to bar all condemnations for land assembly purposes, including blight condemnations, there has been no accompanying debate about improving the quality of housing and other conditions in poor neighborhoods. That housing in a poor area can no longer be condemned does not, by itself, do anything about, or express any concern about, the lack of decent, affordable housing and the effects of the lack of such housing on poor people and poor neighborhoods.

The expressive meaning of the legal privileging of blight condemnation (as compared to economic development condemnations) should be understood against this background of an evidenced lack of concern regarding the dearth of decent affordable housing. Given this background, it is hard to understand any of the contours of *Kelo*-inspired reform as shaped by concern for the needs of the poor and poor neighborhoods.

A legal carte blanche for blight condemnations in poor areas, but not economic development condemnations in middle-class areas, in theory, could be understood as sending a message of equality—namely, that the poor, because they are fundamentally equal to the non-poor, are entitled to live in safe, healthful housing. Justice Douglas, writing for the Court in *Berman*, invoked this equality-expressive meaning for blight removal condemnations: blight removal recognizes the human dignity of the poor because it eliminates “[m]iserable and disreputable housing conditions” that may “suffocate the spirit by reducing the people who live there to the status of cattle.”⁵⁰

The implicit assumption of Douglas’ explanation is that blight condemnations will make way for the creation of new, more livable housing and social conditions for the poor who had lived in blighted housing. If that were the popular understanding of blight condemnations, the privileging of blight condemnations could be seen as expressing the value of the fundamental equality, the equal dignity, of all citizens regardless of income. However, the general public likely does not have this understanding of blight condemnations, and for good reason: as the media reports with reasonable accuracy,⁵¹ and as is routinely discussed in the academic literature,⁵² such condemnations have typically been part of development or redevelopment efforts that remove poor occupants and replace them with wealthier, often less-likely-to-be-minority occupants. These development projects

⁵⁰ *Berman v. Parker*, 348 U.S. 26, 32 (1954).

⁵¹ See, e.g., Joseph Picard, *Community Urged to Build Housing Crisis Solutions: Lack of Affordable Dwellings Called Crisis in New Jersey*, ASBURY PARK PRESS, Feb. 16, 2004, at A1 (reporting that “people [are] being driven from their homes when there are no affordable places for them to go”); *Progress or Discrimination?*, COURIER-POST (Cherry Hill, N.J.), Aug. 5, 2004, at 1G (reporting that redevelopment project brings “much more expensive housing stock” and “no real rental units”).

⁵² See, e.g., Wendell E. Pritchett, *The “Public Menace” of Blight: Urban Renewal and the Private Uses of Eminent Domain*, 21 YALE L. & POL’Y REV. 1 (2003).

have not entailed construction of new low-income units (at least beyond, in some cases, construction of a token number of units), and, as already stated, there do not appear to be any legislative proposals under serious consideration that would link the permissibility of blight condemnations to the construction of a meaningful amount of new, decent, affordable housing for low-income households.

If the message of the legal privileging of blight condemnation is not that the poor deserve better housing than what they currently have, what is the message? The poor people subject to blight condemnation differ from the middle-class people subject to economic development condemnations in two important respects: they are more often renters than home owners and they have less income and wealth. One way of understanding why home-owning, middle-class households should enjoy more protection from displacement than renting, poor households is that the stability of home-owning, middle-class households is simply more important—so much more important as to justify markedly greater legal protection from state and local authorities. At its crudest, the message of the differential treatment of poor households and middle-class households is that staying in your home only really matters if you are a middle-class person in a middle-class home. Thus, the Richmond Times Dispatch editorialized against the *Kelo* decision because “middle-class New London was not run-down, blighted, or a source of crime.”⁵³

One might argue that the message expressed by state laws that try to create more specific standards for what constitutes “blight” while banning economic development condemnations is more ambiguous than the message expressed by state laws that simply ban economic development condemnations while leaving the (usually amorphous) standards for blight condemnations unchanged. But the greater specification of the standards for blight condemnations cannot be understood as expressing a concern for the displacement of poor households because the predictable effect of that specification would seem to be that blight condemnations only displace truly poor households—the kind of households who occupy structures and areas that a judge (if he or she were ever asked to opine) could readily understand as “blighted.” And, once again, there seems to be no legislative effort to address the needs of the displaced, truly poor households.

If the meaning of the greater specification of the standards for blight condemnations is not concern for the poor, or a commitment to the view that all households deserve the same entitlement to protection against displacement by the government, what is the meaning of that greater specification? In my view, that greater specification is designed to, and over time will be understood as meaning, that middle-class people and neighborhoods do not want the “blight” category to be so expansive as to be able to spill

⁵³ Bob Marshall, Editorial, *It Can Happen Here: Law in Kelo Has Counterpart in Virginia Code*, RICHMOND TIMES DISPATCH, July 3, 2005, at E3.

over to their homes and their neighborhoods.⁵⁴ Legislators presumably understand that, in the absence of some greater specification as to what “blight” means, local authorities and developers would stretch the meaning of “blight” to allow them to pursue condemnations that they would have justified as economic development condemnations prior to a statutory ban on economic development condemnations. To prevent such stretching, and to prevent local authorities from trying to use “blight” as an end-run around a ban on economic development condemnations, legislators in some states have attempted to delimit the blight category. That delimitation, in this interpretation, simply underscores legislators’ primary concern for the stability of home-owning, middle-class households.

But then there are Wisconsin and Indiana, which do not bar blight condemnations but come closer than any of the other states other than Florida. Because these states have not taken accompanying measures to address poor housing conditions and the shortage of affordable housing, their *Kelo*-inspired reforms cannot readily be understood as expressing concerns for the poor per se, or a commitment to fundamental equality in living conditions of all citizens. A more plausible understanding of reform in these states is that it expresses a powerful commitment to “property rights”—a commitment that is so strong that it does not allow for differential treatment of the property rights of an owner of a suburban, middle-class home and the owner of a multifamily apartment building in a poor, urban neighborhood (who, of course, may well not live in a poor neighborhood).

To the extent that the differential treatment of poor households and middle-class households vis-à-vis displacement from condemnation sends the message that these two types of households are fundamentally unequal in importance, that differential treatment would seem to express something that is repugnant in our constitutional tradition. As Rick Pildes and Elizabeth Anderson explain,

[e]xpressive theories of law are concerned with evaluating state action. On the rights and equality side of constitutional law, such theories assert that state action is required to express the appropriate attitudes toward persons. State action must express ‘equal concern and respect’ for all persons (to cite Ronald Dworkin’s well-known formulation).⁵⁵

Expressive meanings can have harmful effects, but those effects are hard to identify and verify with any precision, as the few scholars who have taken on that task readily admit. Moreover, to the extent that legal differen-

⁵⁴ Indeed, legislative supporters of a more precise definition of “blight” in Pennsylvania were reportedly driven by concerns that “blight” is such an “amorphous” term that “it does not necessarily apply only to run-down inner-city areas but can apply to well-maintained areas as well.” Maureen Murphy McBride, *In the Eyes of the Beholder: Eminent Domain and Blight in Pennsylvania*, PA. L. WKLY., Feb. 27, 2006, at 12.

⁵⁵ Elizabeth S. Anderson & Richard H. Pildes, *Expressive Theories of Law: A General Restatement*, 148 U. PA. L. REV. 1503, 1520 (2000).

tiation of blight and economic-development condemnations expresses relatively high regard for the stability of middle-class households and relatively low regard for the stability of poor households, that legal differentiation has acted or will act, expressively, in tandem with other legal practices that seem to send the same or a similar message—such as the coupling of social service cuts with tax relief for wealthy Americans and large corporations, and the coupling of draconian sentences for low-level drug dealers and users with an elaborate array of protections for accused “white collar” offenders. In the current environment, restricting economic development condemnations while generally allowing condemnations for blight removal may not materially add to the expressive devaluation of poor households.

The effects of the legal differentiation of blight and economic development condemnations—from the legal practice endorsed by Justice O’Connor in her *Kelo* dissent—will not be merely expressive but also, straightforwardly, economic: this differentiation may change the economics of land development so as to produce more condemnations in poorer areas by making land assembly more expensive in middle-class neighborhoods relative to poor neighborhoods. The next step in understanding post-*Kelo* reform is thus an examination of how that reform may change the economics of condemning the poor.