Is This the Start of a Silent Spring? Kelo v. City of New London's Effect on Environmental Reforms

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When the Supreme Court decided *Kelo v. City of New London* in June 2005, people from all political persuasions reacted strongly against the notion that state and local governments could take private property, with just compensation, for private commercial development. On one hand, liberals feared the ruling would displace people living in blighted areas of cities, while on the other hand, conservatives sought to protect private
property interests. One California citizen, Logan Darrow Clements, even wrote a letter to Justice Souter's hometown of Weare, New Hampshire, suggesting that the town take the Justice's farmhouse (for just compensation) and use it as a hotel to augment the area's economic earnings. Legislatures soon followed suit by proposing state legislation that would specifically limit their states' abilities to take private property under eminent domain. Despite the fact that states are never mandated to aside to attract them back. Officials make tax deals with money-making companies while squeezing revenue and taxes out of the faithful few left behind. This is called progress.


4. Bill Clements, Dispute Underscores Eminent Domain Debate in Minnetonka, ST. PAUL LEGAL LEDGER, Feb. 13, 2006, available at 2006 WLNR 2637253; Broder, supra note 2; see also Sean Flynn, Will the Government Take Your Home?, PARADE, Aug. 6, 2006, at 6, 6 (warning that because Kelo "made clear that middle-class homes could be replaced with . . . anything that might increase tax revenue," such as a mall or luxury homes, "anyone's home can be taken away from them [and] no one's home is safe" (quoting Dana Berliner, attorney for the Institute for Justice)); cf Carla T. Main, How Eminent Domain Ran Amok, POL'Y REV., Oct.-Nov. 2005, available at http://www.hoover.org/publications/policyreview/2920831.html (arguing that the motive behind economic development takings is not as some conservatives and liberals believe—"greed and legislative influence peddling")—rather, "a better description of motive here is the American lust for land," which emphasizes the importance of land in the United States and people's relationship with their property).

5. Eminent Domain This!, supra note 2 (explaining that the letter was posted on conservative radio show host Rush Limbaugh's website). In the letter, Mr. Darrow explains that, "the justification for such an eminent domain action is that our hotel will better serve the public interest as it will bring in economic development and higher tax revenue to Weare." Id.

6. This Comment examines Arizona, California, and Washington because they are three of the states cited with the most drastic reaction to Kelo. See William Yardley, Anger Drives Property Rights Measures, N.Y. TIMES, Oct. 8, 2006, § 1, at 34 ("The more far-reaching proposals in the West—in Idaho, Arizona, California and Washington State—are citizens' initiatives supported by signature petitions, and they are often supported financially and logistically by national libertarian groups."). This Comment also discusses Ohio because it is the first state where a state supreme court decided to deal directly with the Kelo issue. Ian Urbina, Ohio Supreme Court Rejects Taking of Homes for Project, N.Y. TIMES, July 27, 2006, at A18. Urbina explains why the Ohio Supreme Court rejected the view that a $125 million redevelopment project was a taking for a "public purpose":

The Ohio [Supreme Court] rejected [Kelo], and is part of a broader backlash. Since the ruling last year, 28 state legislatures have passed new protections against the use of eminent domain.

"This is the final word in Ohio, and it says something that I think all Americans feel," said Dana Berliner, a lawyer with the Institute for Justice, a public-interest law firm in Arlington, Va., who argued on behalf of the homeowners before the Ohio court. "Ownership of a home is a basic right, regardless of what the U.S. Supreme Court may have decided."

Id.

seize property by eminent domain, and such seizures usually occur by state or local government legislative action, state legislatures seem to be rushing to bind themselves to standards stricter than that demanded by the Federal Constitution.

It appears that state legislators initially intended to protect their constituents' private property from being taken for just compensation for private commercial development; nevertheless, the effect of such legislation has the potential to be hazardous to environmental restrictions that use, or would use, eminent domain as a way to preserve natural resources. The Supreme Court's "public use" test to decide when eminent domain is justifiable has sanctioned environmental justifications for taking private property. However, if states succeed at prohibiting themselves from taking private property for any purpose but the narrowest
public use purposes, states may greatly hamper current and future eminent domain takings for environmental preservation purposes. To prevent this, this Comment proposes three possible courses of action. First, environmentalists could lobby for mandatory environmental considerations when state or local governments condemn land. Second, although this may superficially appear to be inconsistent with the first suggestion, environmentalists could lobby for more extensive and express definitions of what constitutes a public use to include more environmental concerns (for example, enumerating parks as acceptable justifications for government takings). Finally, environmentalists could act outside the realm of eminent domain and lobby to pass zoning ordinances that mandate strict compliance with environmental regulations for the use of any land, including land seized by the government and used by private entities.

This Comment explores the law on eminent domain that led up to the Supreme Court's decision in *Kelo*, which allowed local governments to take private property for economic development. Next, this Comment will examine the effect of *Kelo* on state court rulings and new anti-eminent domain statutes passed by state legislatures. Third, this Comment will analyze the negative legislative effect on environmental reform.

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14. See *Fallbrook*, 164 U.S. at 158 (describing the states' interpretation of state takings clauses, prior to the application of the Fifth Amendment to the states via the Fourteenth Amendment, as nonharmonious, with the "inclination of some ... courts being towards a narrower and more limited definition").

15. See, e.g., WASH. REV. CODE ANN. § 8.12.030 (West 1992) (providing that eminent domain is authorized when there is a "purpose of protecting such supply of fresh water from pollution, and to condemn land and other property and damage the same for such and for any other public use after just compensation having been first made or paid into court for the owner in the manner prescribed by this chapter").

16. See, e.g., id. (allowing for government takings for the creation of public parks and reservoirs, the upkeep of swamps, marshes, tidelands, and tide flats and ponds, and "for the purpose of protecting such supply of fresh water from pollution"); S.B. 167, 126th Gen. Assemb., Reg. Sess. (Ohio 2005).

17. Pima County v. Clear Channel Outdoor, Inc., 127 P.3d 64, 65, 67 (Ariz. Ct. App. 2006) (holding that Clear Channel had to remove billboards that were noncompliant with zoning rules). Specifically, the court noted:

   We hold that the state's governmental function exemption from local zoning and building regulations did not transfer to Clear Channel, which uses the property for commercial billboards, when the state transferred real property to it as just compensation in a condemnation action.

   ... The court in [a previous] case held that "county zoning ordinances cannot override the state's authority to regulate the use of its own land, whether the activity taking place on state land is pursued by the state or by a private entity with the state's approval." Here, however, [the Arizona Department of Transportation] conveyed the parcels to Clear Channel. As a result, Pima County is not attempting to regulate the state's use of its own land; rather, the County is attempting to regulate a private entity's use of its privately owned land for private gain.

   *Id.* at 68 (citation omitted).

resulting from the Supreme Court's interpretation of the Takings Clause under the Fifth Amendment of the United States Constitution in *Kelo*. Fourth, this Comment will scrutinize the various, and often counterintuitive, state reactions to the Supreme Court's apparent expansion of state and local government power. Finally, this Comment argues that environmental justifications for takings by state or local governments can persist if states narrowly limit the definition of "public use" to exclude economic redevelopment and local governments pass zoning regulations that provide for environmental protection.

I. FEDERAL AND STATE LAW CONCERNING EMINENT DOMAIN

A. The Supreme Court's Expansion of the Fifth Amendment Takings Clause

Although *Kelo v. City of New London* offers a new, and sometimes considered radical, take on eminent domain, courts have been battling with the meaning of the Takings Clause since 1896. In 1896, in *Fallbrook Irrigation District v. Bradley*, the Supreme Court applied the Fifth Amendment Takings Clause to the states via the Fourteenth Amendment. After deciding that the Fifth Amendment Takings Clause was not limited to the federal government's taking of private property in return for "just compensation," the Court turned to the interpretation of public use. Unlike the narrow interpretations of public use by state

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19. *See Broder, supra* note 2. Broder states that the decision has "sparked such an immediate legislative reaction, and one that scrambles the usual partisan lines." *Id.* Broder also notes that Justice Stevens, who wrote the majority opinion in *Kelo*, "all but apologized" for the decision. *Id.; see also Cooper, supra* note 11.

20. *See* *Fallbrook Irrigation Dist. v. Bradley*, 164 U.S. 112, 158-60 (1896). The plaintiff, Bradley, owned real estate in Fallbrook, San Diego County, California. *Id. at* 114. Under California law, Matthew Tomlins, collector of the irrigation corporation, was authorized to sell part of Bradley's land to use for the construction and maintenance of an irrigation system. *Id.* The plaintiff brought a suit claiming that the California law was unconstitutional because it violated the Fifth Amendment. *Id. at* 158. The Court disagreed and held that state and local governments could take private property for public use in return for just compensation. *Id. at* 176-78.

21. *Id. at* 158. The Court explained:

It is claimed, however, that the citizen is deprived of his property without due process of law, if it be taken by or under state authority for any other than a public use, either under the guise of taxation or by the assumption of the right of eminent domain. In that way the question whether private property has been taken for any other than a public use becomes material in this court, even where the taking is under the authority of the State instead of the Federal government.

*Id.*

22. *See* U.S. CONST. amend. V. (requiring "just compensation" when private property is taken for public use); *Fallbrook*, 164 U.S. at 158.

23. *Fallbrook*, 164 U.S. at 159-60.
courts prior to *Fallbrook*, the Court reasoned that "[i]t is obvious . . . that what is a public use frequently and largely depends upon the facts and the circumstances surrounding the particular subject-matter in regard to which the character of the use is questioned." Determining that a California irrigation system that benefited all who used the water on their lands was a valid taking under the Fifth Amendment because it was sufficiently intended for use by the public, the Court eschewed a literal interpretation of the Takings Clause in favor of a broad interpretation in which a public use could indirectly benefit the public. It was precisely this notion of a "broader and more natural interpretation of public use as 'public purpose'" that laid the groundwork for *Kelo* to further expand a state's power to take private property for public use.

In 1906, the Court upheld and expanded its *Fallbrook* decision in *Strickley v. Highland Boy Gold Mining Co.* to include indirect benefits to the public in addition to direct benefits in its interpretation of public use. In *Strickley*, the Court decided that an aerial tramway for transporting coal for a private coal company constituted a public use, despite the fact that the company was privately owned and no passengers could use the tramway. Analogizing the tramway to the constitutionally permitted taking for irrigation systems, the Court pointed to "the inadequacy of use by the general public as a universal test." By rejecting a narrow interpretation of public benefit, *Strickley* expanded *Fallbrook*'s definition of public use. After *Strickley*, a public use not only includes a taking that directly helps members of the public, thereby increasing the

24. *Id.* at 158 (surmising that state court opinions on the matter were "not . . . harmonious" because "the inclination of some of these courts [was] towards a narrower and more limited definition of such use than those of others").
25. *Id.* at 159-60.
26. *Id.* at 162-63.
27. *Id.* at 163-64. The Court held that not only was the irrigation of arid land in California a "public purpose" but the water that resulted from the irrigation and the taxes from the increased property value of the land benefited the public as well. *Id.* at 164.
29. *Id.* at 484-85.
30. See *Strickley v. Highland Boy Gold Mining Co.*, 200 U.S. 527 (1906). In this case, a Utah statute allowed for the government condemnation of land to facilitate private mining operations. *Id.* at 530. Holding that the development of Utah's mineral uses constituted a public use, the Court upheld the taking. *Id.* at 531.
31. *Id.* at 529-31. The Court described the taking as a right of way . . . [which] is to be used for the erection of certain towers to support the cables of the line, with a right to drive along the way when necessary for repairs, the mining company to move the towers as often as reasonably required by the owners of the claim for using and working the said claim.
32. *Id.* at 531.
33. *Id.*
34. *Id.*
general welfare of the whole, but also a taking that confers no direct
benefit upon the public.\footnote{35} Implicit in the reading of \textit{Strickley}
is the notion that coal mining, or the “development of [Utah’s] mineral resources,”
indirectly serves the general welfare as a source of economic develop-
ment for the State of Utah.\footnote{36} \textit{Strickley}, decided nearly one hundred
years before \textit{Kelo},\footnote{37} shares the same holding as \textit{Kelo}, but on a smaller scale and
particular to Utah’s eminent domain statutes.\footnote{38}

\footnote{35. \textit{See id.} at 530-31. Similarly, before \textit{Strickley}, the Court in \textit{Fallbrook}
recognized that the irrigation system increased the value of the property owner’s land and thus
benefited the public by increasing the water supply and farming abilities. \textit{Fallbrook Irrigation Dist. v. Bradley}, 164 U.S. 112, 159-60 (1896).

36. The defendant’s argument to the Supreme Court in \textit{Strickley} explained that “[t]he
legislature of Utah has declared the great public necessity of developing the mineral
wealth of the State. The legislature has declared that it is a public use to construct the
aerial tramways for the development of its mineral resources.” \textit{Strickley}, 200 U.S. at 529
(argument for the defendants in error); \textit{cf. RICHARD A. POSNER, ECONOMIC
ANALYSIS OF LAW} 62-63 (5th ed. 1998) (“A good economic argument for eminent domain, although
one with greater application to railroads and other right-of-way companies than to the
government, is that it is necessary to prevent monopoly. Once the railroad or pipeline has
begun to build its line, the cost of abandoning it for an alternative route becomes very
high. Knowing this, people owning land in the path of the advancing line will be tempted
to hold out for a very high price—a price in excess of the opportunity cost of the land. . . .
This is a problem of bilateral monopoly . . . .”).


38. \textit{Compare Strickley}, 200 U.S. at 529-31 (noting Utah’s eminent domain statute,
which provided that “‘the right of eminent domain may be exercised in behalf of the
following public uses: . . . (6) Roads, railroads, tramways, tunnels, ditches, flumes, pipes
and dumping places to facilitate the milling, smelting or other reduction of ores, or the
working of mines’” (omission in original) (citation omitted)), \textit{with Kelo}, 545 U.S. at 490
(holding that the city’s condemnation of private property for economic development of the
area was within the meaning of “public use” under the Fifth Amendment).
In 1984, in *Hawaii Housing Authority v. Midkiff,* the Supreme Court decided that the Hawaii Housing Authority (HHA) was serving a legitimate public purpose when it sought to limit the number of lots that a purchaser could buy in Hawaii because a concentrated land ownership created undesirable economic market conditions. Though the Court

39. 467 U.S. 229 (1984). Justice O'Connor, who dissented in *Kelo,* wrote the majority opinion in *Midkiff.* *Kelo,* 545 U.S. at 494 (O'Connor, J., dissenting); *Midkiff,* 467 U.S. at 231. Justice O'Connor's *Midkiff* opinion appears in conflict with her dissent in *Kelo,* in which she broadly interpreted the ramifications of allowing private development to constitute a "public use," by warning that "[a]ny property may now be taken for the benefit of another private party, the fallout from this decision will not be random." *Kelo,* 545 U.S. at 505 (O'Connor, J., dissenting). By contrast, in *Midkiff,* Justice O'Connor took a more theoretical position on the issue of what constituted a "public use":

The State of Hawaii has never denied that the Constitution forbids even a compensated taking of property when executed for no reason other than to confer a private benefit on a particular private party. A purely private taking could not withstand the scrutiny of the public use requirement; it would serve no legitimate purpose of government and would thus be void. But no purely private taking is involved in these cases. The Hawaii Legislature enacted its Land Reform Act not to benefit a particular class of identifiable individuals but to attack certain perceived evils of concentrated property ownership in Hawaii—a legitimate public purpose. Use of the condemnation power to achieve this purpose is not irrational. *Midkiff,* 467 U.S. at 245. Professor D. Benjamin Barros reflects on this contradiction. D. Benjamin Barros, Nothing "Errant" About It: The *Berman* and *Midkiff* Conference Notes and How the Supreme Court Got to *Kelo* with Its Eyes Wide Open 2 (Working Paper Series, 2006), available at http://ssrn.com/abstract=902926. Professor Barros notes that his article

draw[s] on the Court's conference notes and other internal documents in *Berman* and *Midkiff* to contest Justice O'Connor's assertion in her *Kelo* dissent that "there is a sense in which this troubling result [in *Kelo*] follows from errant language in *Berman* and *Midkiff.*" The Court's internal deliberations in those cases in fact reveal that the Court used broad language intentionally (in *Berman*) and was aware of the risk of broad language (in *Midkiff*). Further, the broad language that O'Connor found objectionable was essential to the Court's holdings in *Berman* and *Midkiff,* and the cases could not have been decided on narrower grounds. Justice O'Connor's suggestion that broad language in *Berman* and *Midkiff* was mere dicta or the result of a judicial slip of the pen therefore is incorrect. *Id.* (alteration in original) (footnote omitted).

40. *Midkiff,* 467 U.S. at 245. The Court acknowledged and traced Hawaii's problems with concentrated property ownership by giving a short summary of Hawaii property ownership history, explaining that:

The Hawaiian Islands were originally settled by Polynesian immigrants from the western Pacific. These settlers developed an economy around a feudal land tenure system in which one island high chief, the ali'i nui, controlled the land and assigned it for development to certain subchiefs. The subchiefs would then reassign the land to other lower ranking chiefs, who would administer the land and govern the farmers and other tenants working it. All land was held at the will of the ali'i nui and eventually had to be returned to his trust. *There was no private ownership of land.* *Id.* at 232 (emphasis added). The Court continued to explain that in the early 1800s, the federal government owned approximately 49% of Hawaii's land, while another 47% of the land was privately owned by only seventy-two landowners. *Id.* at 232. Because of this, "[t]he legislature concluded that concentrated land ownership was responsible for skewing
plicitly stated that "[a] purely private taking could not withstand the scrutiny of the public use requirement [because] it would serve no legitimate purpose of government and would thus be void," the Court also implied that the public use requirement could be fulfilled by something as seemingly abstract as the "perceived evils" that a concentrated real estate market would have on Hawaii's ability to provide more affordable housing to tenants. The *Midkiff* decision did not say that states could take

the State's residential fee simple market, inflating land prices, and injuring the public tranquility and welfare." *Id.* at 232; see also Main, *supra* note 4 (advocating political action in response to economic takings). Main expresses a similar parallel historical view on the issue of takings:

To understand this, one must consider how deeply ingrained the idea of land is in the American character. After all, it was land that lured the original colonists to America's shores. At its inception, America was in essence a great mass of land: a beckoning, seemingly limitless siren teeming with wild-life and brimming with rich, arable soil. (The native cultures that inhabited North America were seen by the colonists as obstacles or guides, but not an enticement.)

And all of it safely tucked an ocean away from the ancien régime of Europe, with its rigid class structures and feudal limitations on land ownership. "Land hunger doubtless attacked all landless European emigrants . . . coming from countries wherein economic independence and social status rested on the land. In America, economic advancement sprang from its easy acquisition. Most colonial fortunes were founded on it."

As Marion Clawson noted in *America's Land and Its Uses*, our colonial history was nearly as long as our history as a nation if one counts the colonial period as beginning with the settlement of Jamestown in 1607 and ending with the Declaration of Independence in 1776. Those 169 years were a hurly-burly land-grab, with the nations of Europe competing ferociously for territory in the New World.

That crucial century and a half of colonial history set the stage for Americans' deeply personal and abiding relationship to, and their ongoing obsession with, the land. Tossing off the shackles of entailment, primogeniture and other vestiges of traditional European restrictions on land ownership, American colonists during that period saw the beginnings of a far more permanent way of owning real property that is still in predominant use today: fee simple ownership. That is, buy it and keep it—all of it—including whatever mineral riches may lie within it and whatever air rights may lie above it. Oh, and your children get to keep it too.

*Id.* (omission in original).

41. *Midkiff*, 467 U.S. at 245.

42. *Id.*

43. *Id.* at 232-33. The Court explained the HHA's Land Reform Act:

Under the Act's condemnation scheme, tenants living on single-family residential lots within developmental tracts at least five acres in size are entitled to ask the Hawaii Housing Authority (HHA) to condemn the property on which they live. When 25 eligible tenants, or tenants on half the lots in the tract, whichever is less, file appropriate applications, the Act authorizes HHA to hold a public hearing to determine whether acquisition by the State of all or part of the tract will "effectuate the public purposes" of the Act. If HHA finds that these public purposes will be served, it is authorized to designate some or all of the lots in the tract for acquisition.

*Id.* at 233-34 (footnote and citations omitted).
land for commercial development, as *Kelo* does; nevertheless, it greatly expanded the traditional interpretation of the Takings Clause to include economic considerations as a factor in determining whether the state has a legitimate purpose of public use.  

**B. Taking for Economic Advancement**

In 1954, the Supreme Court held in *Berman v. Parker* that the government can take commercial property within "slums" or "blighted areas" for just compensation to redesign the geographic area for new homes, schools, parks, churches, shopping centers, and streets. Specifically, the Court explained that it was immaterial whether individual pieces of property within slums are "innocuous and unoffending," stating instead that "community redevelopment programs need not, by force of the Constitution, be on a piecemeal basis—lot by lot, building by building." Although the Court equated the purpose of the challenged District of Columbia Redevelopment Act of 1945 to a police power, or the promotion of the idea that a "community should be beautiful as well as healthy, spa-

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44. See *Kelo*, 545 U.S. at 485 ("Clearly, there is no basis for exempting economic development from our traditionally broad understanding of public purpose.").

45. See *Midkiff*, 467 U.S. at 245.


47. *Id.* at 28 n.1 (accepting the District of Columbia Redevelopment Act's definition of "substandard housing conditions" as the "conditions obtaining in connection with the existence of any dwelling, or dwellings, or housing accommodations for human beings, which because of lack of sanitary facilities, ventilation, or light, or because of dilapidation, overcrowding, faulty interior arrangement, or any combination of these factors, is in the opinion of the Commissioners detrimental to the safety, health, morals, or welfare of the inhabitants of the District of Columbia"").

48. *Id.* at 34-35; see also *Barros*, supra note 39, at 3-4. Barros notes: *Berman's reference to "a better balanced, more attractive community" raises an important contextual point about *Berman* that is not abundantly clear from the face of the Court's opinion. The District of Columbia Redevelopment Act, like many contemporaneous redevelopment acts enacted by legislatures around the country, was not concerned only with clearance of property that was blighted in the traditional sense of being decrepit and unfit for human habitation. Rather, the Redevelopment Act also was concerned with using the broader concept of blight clearance to encompass the taking of property "that owing to technological and sociological changes, obsolete lay-out, and other factors" might lead to the development of blight. In other words, the broader concept of redevelopment was concerned not just with slum clearances but with modernization of the urban environment. Both the lower court and the Supreme Court had the validity of this broader idea of redevelopment squarely in mind when they considered *Berman's challenge the District of Columbia Redevelopment Act.*

49. *Berman*, 348 U.S. at 35.

50. *Id.* (pointing out that if innocuous property was permitted to remain unchanged, cities would have difficulties integrating holistic plans for redevelopment).
cious as well as clean, well-balanced as well as carefully patrolled," the effect of the decision was a promotion of these objectives through commercial development. By closely examining the holdings in earlier cases, the *Kelo* decision does not appear as radical as some commentators insinuate. Rather, *Kelo* may be interpreted as a more direct restatement of *Berman*.

*Ruckelshaus v. Monsanto Co.*, a 1984 Supreme Court case, emphasizes this point. In this case, pesticide manufacturer Monsanto Company challenged a federal statute that gave the Environmental Protection Agency (EPA) authorization to disclose trade secrets Monsanto revealed when applying to the EPA for a license. Monsanto claimed this public disclosure constituted a government taking. However, the Court stated that "[s]o long as the taking has a conceivable public character," the governing body can take the property for just compensation by any means it chooses. Citing "greater competition among producers of end-use products," *Monsanto* reaffirmed both *Midkiff* and *Berman*.

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51. *Id.* at 32-33.
52. *See id.* at 35.
53. *See* Broder, *supra* note 2 (explaining how states are reacting to *Kelo*). As for the states, Broder explains:

The reaction from the states was swift and heated. Within weeks of the court's decision, Texas, Alabama and Delaware passed bills by overwhelming bipartisan margins limiting the right of local governments to seize property and turn it over to private developers. Since then, lawmakers in three dozen other states have proposed similar restrictions and more are on the way, according to experts who track the issue.

Seldom has a Supreme Court decision sparked such an immediate legislative reaction, and one that scrambles the usual partisan lines. Condemnation of the ruling came from black lawmakers representing distressed urban districts, from suburbanites and from Western property-rights absolutists who rarely see eye to eye on anything. Lawmakers from Maine to California have introduced dozens of bills in reaction to the ruling, most of them saying that government should never seize private homes or businesses solely to benefit a private developer.

*Id.*

56. *Id.* at 1013-14 (holding that trade secrets are property and therefore protectable under the Fifth Amendment Takings Clause).
57. *Id.* at 990, 997-99.
58. *Id.* at 998-99.
59. *Id.* at 1014.
60. *Id.* at 1014-15.
C. States' Diverging Interpretations of Eminent Domain (Arizona, California, Washington, and Ohio)

1. Arizona

   a. Legislative Interpretation of Eminent Domain

   In general, Arizona statutes restrict takings to a greater extent than the federal government. Although Arizona statutes allow for eminent domain for housing developments in "slum" or "blighted areas," the state strictly forbids eminent domain for agricultural purposes and charter schools. In connection with the environment, as of September 18, 2006, Arizona statutes only refer to eminent domain as a condition that will not "extinguish", limit or impair an environmental restriction. Furthermore, the Arizona Constitution contradicts the Supreme Court's standard put forth in "Monsanto" regarding a court's role in interpreting "public use" by requiring that "[w]henever an attempt is made to take private property for a use alleged to be public, the question whether the contemplated use be really public shall be a judicial question, and determined as such without regard to any legislative assertion that the use is public.

61. Compare ARIZ. REV. STAT. ANN. § 15-183(N) (Supp. 2006) (stating that "[c]harter schools do not have the authority to acquire property by eminent domain"), with U.S. CONST. amend. V (no delineation of the governmental agencies that lack the power to use eminent domain).
62. See ARIZ. REV. STAT. ANN. § 36-1473 (Supp. 2006). In addition, an Arizona statute provides:
   A [p]ublic housing authority may exercise the power of eminent domain. The power of eminent domain may also be exercised on behalf of a public housing authority. This power shall only be exercised in relation to the provision of low income housing pursuant to this article. A public housing authority that acts on behalf of a city, town or county may exercise the power of eminent domain and may take property title in the name of that authority if it first obtains the written approval by resolution of the governing body that controls its acts and existence pursuant to this article.
   Id. § 36-1407 (2003).
63. Id. § 3-3305 (2002). Contra Fallbrook Irrigation Dist. v. Bradley, 164 U.S. 112, 162-65 (1896) (holding that not only was the irrigation of arid land in California a "public purpose" but the water resulting from that irrigation and the taxes from the increased property value of the land benefited the public as well).
64. ARIZ. REV. STAT. ANN. § 15-183(N) (Supp. 2006) ("Charter schools do not have the authority to acquire property by eminent domain.").
65. Id. § 49-158(B) (2005).
b. Judicial Interpretation of Eminent Domain

On January 25, 2006, the Court of Appeals of Arizona first considered the application of *Kelo* in Arizona.\(^\text{67}\) In *Pima County v. Clear Channel Outdoor, Inc.*, the defendant relied on *Kelo* to support its position that the term “use” in eminent domain takings extends beyond “physical use”;\(^\text{68}\) therefore, a new owner of property taken by eminent domain is entitled to the same exemptions from state zoning laws as state property.\(^\text{69}\) The Arizona court’s reaction to this argument was twofold. First, the court decided that when a private owner is granted property by eminent domain, the *Kelo* decision does not play a role at all in determining how that owner is subject to government regulations.\(^\text{70}\) Second, although the court ruled against the defendant concerning its obligation to follow state regulations,\(^\text{71}\) it implicitly supported the general holding of *Kelo*. The court held that the state is permitted to take private property and transfer it to another private owner for the purposes of commercial development by applying the rules regarding eminent domain to this case, instead of questioning whether the state’s taking of the land was appropriate.\(^\text{72}\) Initially, it may appear that the Arizona state courts accept the federal interpretation of the Takings Clause; however, because this case dealt with land that was taken for the generally accepted public use of widening a public highway,\(^\text{73}\) this decision may only reflect that Arizona courts accept the narrow language of the Supreme Court’s holding in *Fallbrook*,\(^\text{74}\) rather than the broader holding of *Kelo*.\(^\text{75}\)


\(^{\text{68}}\) Id. at 66.

\(^{\text{69}}\) Id. at 65-67.

\(^{\text{70}}\) Id. at 66-67. The court found that *Kelo* “did not address whether a private entity should be exempt from local zoning and building regulations.” Id. at 67.

\(^{\text{71}}\) Id. at 70 (remanding the case to the trial court “for entry of judgment in favor of Pima County on the issues of Clear Channel’s entitlement to the state’s exemption and collateral estoppel and for further proceedings consistent with this decision”).

\(^{\text{72}}\) See id. The court described the valid state taking in this case: “Here, Clear Channel received title to previously condemned land as compensation for the billboards it was required to remove.” Id.

\(^{\text{73}}\) Id. at 65.

\(^{\text{74}}\) See *Fallbrook Irrigation Dist. v. Bradley*, 164 U.S. 112, 174 (1896) (holding that an irrigation system was a public use that justified the taking of private property).

\(^{\text{75}}\) See *Kelo v. City of New London*, 545 U.S. 469, 478-79 (2005) (failing to limit justifications for takings to traditional public uses such as roads, schools, and irrigation systems, as in *Fallbrook*).
2. California

a. Legislative Interpretation of Eminent Domain

In stark contrast to Arizona, California statutes provide that "eminent domain is a decision left to the discretion of the person authorized to acquire the property." The California Constitution, however, still restricts eminent domain more than what is limited by the Federal Constitution. Article I, section 19 of the California Constitution allows private property to be taken for public use "only when just compensation, ascertained by a jury . . . has first been paid to . . . the owner." The provision never defines public use. In 2006, California voters rejected California proposition 90, a proposition that would have specifically limited the definition of "public use" under the California Constitution to exclude takings for economic development or to enhance tax revenue. This failed proposition limited the definition of "public use," but it never specifically mentioned environmental preservation.

b. Judicial Interpretation of Eminent Domain

On April 25, 2006, the California Court of Appeal first cited Kelo. In Syngenta Crop Protection, Inc. v. Helliker, Syngenta used pesticides in a possible violation of California Food and Agricultural Code section 12811.5. Nevertheless, the issue of eminent domain arose by analogy regarding the question of "public purpose" sanctioned by the state and federal governments. By citing Ruckelshaus v. Monsanto and

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76. CAL. CIV. PROC. CODE § 1230.030 (West 1982).
77. Compare CAL. CONST. art. 1, § 19, with U.S. CONST. amend. V (failing to require a jury determination of "just compensation").
78. CAL. CONST. art. 1, § 19.
79. Id.
81. Cal. Proposition 90 (2006). The proposition states: "Public use" shall have a distinct and more narrow meaning than the term "public purpose"; its limiting effect prohibits takings expected to result in transfers to non-governmental owners on economic development or tax revenue enhancement grounds, or for any other actual uses that are not public in fact, even though these uses may serve otherwise legitimate public purposes.
82. Id. § 3.
83. See id. § 3.
85. Id. at 196-98.
86. 467 U.S. 986, 1014-16 (1984) (holding that the EPA acted with a public purpose when it used data collected by a prior applicant because it would ultimately save time and resources for the agency, "making new end-use products available to consumers more quickly").
Kelo, the California Court of Appeal aligned with the federal court’s broad interpretation of “public purpose” or “public use.” Similar to the Arizona decision of Pima County v. Clear Channel Outdoor, Inc., California courts appear to tacitly approve of Kelo. It is significant that the court cited Kelo when the decision could have been based only on the case’s similarity to Monsanto because it indicates that the California Court of Appeal approves of the Kelo decision, at least to the extent of its definition of “public purpose” as applied to governmental agencies. Unfortunately, although Syngenta is an environmental case, the issue of how the court will view environmental justifications for state takings was not directly addressed. Rather, the court decided on the narrower public use issue of how the efficiencies of governmental agencies indirectly benefited the public instead of focusing on the environmental implications of Syngenta’s actions.

3. Washington

a. Legislative Interpretation of Eminent Domain

Of the three states discussed above, Washington provides city and state governments with the broadest powers concerning the taking of private property for a public use. In fact, enjoyment of the environment is spe-
specifically cited as a reason by which cities are permitted to take private property for the creation of parks.\textsuperscript{93} Despite Washington's broad interpretation of "public use," as compared to Arizona's and California's interpretations, the Washington Constitution contains the same provision as Arizona: "Whenever an attempt is made to take private property for a use alleged to be public, the question whether the contemplated use be really public shall be a judicial question, and determined as such, without regard to any legislative assertion that the use is public."\textsuperscript{94} It is less clear how the public's reaction to the \textit{Kelo} decision will affect Washington.

\textbf{b. Judicial Interpretation of Eminent Domain}

In Washington, the state's highest court recently approved a municipality's taking of private land for the future construction of a monorail system in \textit{HTK Management, L.L.C. v. Seattle Popular Monorail Authority.}\textsuperscript{95} One of the main issues in this case centered on the length of time the city would use the land condemned for a public use.\textsuperscript{96} The court determined that if the city used the property for a public use for a substantial period of time (for example, five to ten years), the city would be free to sell the property later to a private party, instead of returning it to the original owner.\textsuperscript{97} At the outset of the opinion, the majority clearly stated that \textit{Kelo} was not relevant to the issue at hand because a public monorail was "an undisputed, historic public use."\textsuperscript{98} In dissent, Judge Johnson scath-
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...criticized the majority opinion, stating, "the majority of this court is less enlightened than the citizenry or less inclined to restrain public agencies in their taking of private property. I side with the citizens and our Washington Constitution. I therefore dissent." It appears that although the Washington Constitution's provision on eminent domain, passed long before the Supreme Court decided Kelo, is one of the more conservative provisions in the country (and is almost as conservative as California's failed proposition 90 or Arizona's statutory provisions), Washington is perhaps insulated from a conservative backlash against Kelo. In Seattle Popular Monorail Authority, the Supreme Court of Washington stated that it would not interpret eminent domain more narrowly as a result of the Supreme Court's Kelo decision.

4. Ohio

a. Legislative Interpretation of Eminent Domain

Ohio is distinct from the other states analyzed in this Comment (Arizona, California, and Washington). Since Kelo, Ohio has passed a moratorium on any takings for economic development until December 31, 2006. Furthermore, this moratorium states that a taking for economic development directly violates sections 1 and 19 of Article I of the Ohio Constitution, thereby protecting “the rights of Ohio citizens to maintain property as inviolate.” By stating that the moratorium will endure until

Id. at 1180 (Johnson, J., dissenting). Judge Johnson also referred to Kelo as an example of federal "eminent domain abuse." Id.

Id. at 1180 (Johnson, J., dissenting). Judge Johnson also referred to Kelo as an example of federal "eminent domain abuse." Id.

Id. (majority opinion).


Id. The text of Article 1, section 19 of the Ohio Constitution provides:

Private property shall ever be held inviolate, but subservient to the public welfare. When taken in time of war or other public exigency, imperatively requiring its immediate seizure or for the purpose of making or repairing roads, which shall be open to the public, without charge, a compensation shall be made to the owner, in money, and in all other cases, where private property shall be taken for public use, a compensation therefor shall first be made in money, or first secured by a deposit of money; and such compensation shall be assessed by a jury, without deduction for benefits to any property of the owner.

OHIO CONST. art. 1, § 19.

Ohio S.B. 167. According to the moratorium:

The General Assembly hereby makes the following statements of findings and intent:

volve a certain area of the city, which included the condemnation of property in order to build a private hotel and new private residences to be owned by new homeowners.
appropriate “legislative remedies may be considered,”\textsuperscript{106} the legislators are provided more time to consider the ramifications of \textit{Kelo}. Compared to Arizona, California, and Washington, Ohio manifests the clearest intent not only to limit the courts from interpreting the Ohio Constitution in a manner similar to the Supreme Court’s interpretation of the Takings Clause, but also to buttress public opinion on the matter.\textsuperscript{107}

\textit{b. Judicial Interpretation of Eminent Domain}

Ohio is unique in that it passed a moratorium in reaction to \textit{Kelo}, as opposed to simply retaining the ability to interpret state constitutions or codes as inconsistent with \textit{Kelo’s} holding.\textsuperscript{108} Likewise, Ohio’s courts have directly addressed the validity of takings for private economic development.\textsuperscript{109} In \textit{City of Norwood v. Horney},\textsuperscript{110} decided on July 26, 2006, the Supreme Court of Ohio unanimously held that takings that transfer property to a private party for economic “redevelopment” are inconsistent with Article I, section 19 of the Ohio Constitution, and, therefore, are an inappropriate use of governmental power.\textsuperscript{111} Although this decision is certainly the most direct rejection of \textit{Kelo} compared to any other recent state decision,\textsuperscript{112} the holding is narrow.\textsuperscript{113} \textit{Norwood} only limits economic redevelopment takings; the decision does not limit the defini-

\begin{itemize}
\item \textit{Id.} (citation omitted).
\item \textit{Id.}
\item \textit{See} Ohio S.B. 167.
\item \textit{See} City of Norwood v. Horney, 853 N.E.2d 1115, 1122 (Ohio 2006).
\item \textit{Id.}
\item \textit{Id.} at 1123.
\item See Stephenson, \textit{supra} note 107 (quoting land use attorney Michael M. Berger as saying that the \textit{Norwood} case “was the post-\textit{Kelo} development to date.’ . . . ‘And it was as anti-\textit{Kelo} as it could be.’
\item \textit{Id.} (quoting Professor James Durham as stating that the \textit{City of Norwood} decision is actually “very narrow”).
\end{itemize}
tion of what is considered to be a public use.\textsuperscript{114} Therefore, although Ohio may be at the center of the "political firestorm of Kelo,"\textsuperscript{115} environmental takings are not mentioned directly or indirectly.

II. ANALYSIS OF KELO'S EFFECT ON STATE LAW

A. Is Kelo Truly a Radical Precedent?

When \textit{Kelo} was decided, both conservatives and liberals treated the decision as if it were unprecedented.\textsuperscript{116} Conservatives asserted their right to private property.\textsuperscript{117} Liberals' fears were two-fold: first, that \textit{Kelo} may permit local governments to displace the poor and middle class in favor of business or commercial growth; and, second, that an overzealous anti-\textit{Kelo} reaction would undo reforms intended to protect the environment.\textsuperscript{118} However, the reality is different: the Supreme Court has been slowly expanding the definition of a justifiable "public use" for government takings.\textsuperscript{119}

The \textit{Kelo} case arose when Susette Kelo and eight other plaintiffs refused to sell their homes in New London, Connecticut.\textsuperscript{120} The city of New London found that Kelo's neighborhood of Fort Trumbull, though not blighted, was at a great economic disadvantage to the rest of New London.\textsuperscript{121} In 1996, the federal government decided to close the Naval Undersea Warfare Center in Fort Trumbull.\textsuperscript{122} The center had employed over 1500 people, and just two years after the closing, unemployment

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{114} \textit{City of Norwood}, 853 N.E.2d at 1152.
\item \textsuperscript{115} Stephenson, supra note 107 (quoting the city of Norwood's attorney Timothy Burke as saying that "the political firestorm of Kelo did significant damage to the city of Norwood").
\item \textsuperscript{116} See Clements, supra note 4; Flynn, supra note 4; Posting of Cortescamden, supra note 3.
\item \textsuperscript{117} See Clements, supra note 4; Cooper, supra note 11.
\item \textsuperscript{118} \textit{Kelo Hearing}, supra note 3, at 27-28 (statement of Hilary O. Shelton, Director, NAACP Washington Bureau); cf. Broder, supra note 2 ("It's fair to say that many states are on the verge of seriously overreacting to the Kelo decision," said John D. Echeverria, executive director of the Georgetown Environmental Law and Policy Institute and an authority on land-use policy. The danger is that some legislators are going to attempt to destroy what is a significant and sometimes painful but essential government power. The extremist position is a prescription for economic decline for many metropolitan areas around the country.").
\item \textsuperscript{119} See Derek Werner, Note, \textit{The Public Use Clause, Common Sense and Takings}, 10 B.U. PUB. INT. L.J. 335, 341-46 (2001) (chronicling the history of the Supreme Court's "public use" doctrine jurisprudence). In addition, David R. Burch argues that "under the [Mukifi] Court's analysis, "it will be the truly rare taking that will not be for a public use." David R. Burch et al., \textit{Land Use Controls: Public Use and Private Beneficiaries}, 16 URB. LAW. 713, 714 (1984).
\item \textsuperscript{120} \textit{Kelo v. City of New London}, 545 U.S. 469, 475 (2005).
\item \textsuperscript{121} \textit{Id.} at 473.
\item \textsuperscript{122} Id.
\end{enumerate}
\end{footnotesize}
rates were nearly double the state’s rate. To prevent the deterioration of Fort Trumbull, the municipal government “reactivated” a previously created private nonprofit organization, the New London Development Center (NLDC), to target Fort Trumbull in an economic revitalization plan. The NLDC planned to lease the land to private entities, some of which would build research and office space, and others that would use adjoining parcels of land for an urban village (including restaurants, shopping, and marinas), a pedestrian riverwalk, and eighty new private homes. In short, the local government would condemn private property, the property owners would receive due compensation, and the land would be transferred to other private entities with the purpose of economically revitalizing the area. Nevertheless, nine homeowners in the Fort Trumbull area refused to sell their property, and in 2000, they brought an action against New London alleging wrongful taking of their land for private use.

The Supreme Court ruled that although there was no contention that the petitioner’s property was blighted, the taking was nonetheless valid. Because the NLDC's plan would indirectly benefit the citizens of New London by raising the socioeconomic level of the city, the taking of private land satisfied the “public use” requirement set forth in Fallbrook even though private parties directly benefited.

The Kelo opinion is not a departure from precedent. In 1896, Fallbrook held that a California irrigation system that only directly benefited farmers was a justified taking for “public use.” Ten years later, in 1906, Strickley held that private land could be condemned so that a private mining company could build a nonpassenger aerial tramway for mining

123. Id.
124. Id.
125. Id. at 473-74. The NLDC had been created several years earlier to help the city with economic development. Id.
126. Id. at 472.
127. Id. at 475.
128. Id.; see also supra note 46 (noting the Berman Court’s definition of “slums”).
129. Kelo, 545 U.S. at 489.
130. Id. at 478-79. The Court explained its application of rational basis review, instead of petitioner’s suggested “reasonable certainty” test as follows:

Alternatively, petitioners maintain that for takings of this kind we should require a “reasonable certainty” that the expected public benefits will actually accrue. Such a rule, however, would represent an even greater departure from our precedent. “When the legislature’s purpose is legitimate and its means are not irrational, our cases make clear that empirical debates over the wisdom of takings—no less than debates over the wisdom of other kinds of socioeconomic legislation—are not to be carried out by the federal courts.”

131. See Fallbrook, 164 U.S. at 159-60.
operations because mining indirectly benefited the State of Utah.\textsuperscript{132} Then, in 1954, the Supreme Court decided in \textit{Berman} that the government, under the public use justification, could seize well-maintained, profit-producing, and otherwise innocuous property within a "blighted" area for community development.\textsuperscript{133} In 1984, \textit{Monsanto} reaffirmed the broadening of the "public use" justification as long as the government had any "conceivable public character."\textsuperscript{134} Most recently, in the 1984 \textit{Midkiff} decision, the Supreme Court laid the final groundwork for \textit{Kelo} by holding that a state could justify a taking to eliminate the "perceived evils" that a concentrated real estate market could have on the State of Hawaii.\textsuperscript{135} For over one hundred years, the Supreme Court has approved state measures to condemn private property for the eventual, indirect, economic, and holistic benefit of the state through the Fifth Amendment Takings Clause.\textsuperscript{136} \textit{Kelo} is not radical; it is the logical outgrowth of federal precedent.

\textbf{B. State Legislation Limiting Eminent Domain and Its Potential Effect on Environmental Takings}

Although \textit{Kelo} is not a radical decision in terms of precedent, the state reaction to \textit{Kelo} has been described as a "political firestorm."\textsuperscript{137} The trend in restrictive state legislation is to explicitly forbid state or local takings for commercial development, not to enumerate acceptable public uses.\textsuperscript{138} Ohio, the state that most drastically reacted to \textit{Kelo}, did not act quickly to define and limit eminent domain.\textsuperscript{139} Rather, the Ohio legislature passed legislation that forbade governmental takings while the state and local legislatures took the time to carefully draft an appropriate way

\begin{itemize}
\item \textsuperscript{132} Strickley v. Highland Boy Gold Mining Co., 200 U.S. 527, 531 (1906).
\item \textsuperscript{133} Berman v. Parker, 348 U.S. 26, 35 (1954); see also Barros, supra note 39, at 3-4.
\item \textsuperscript{134} Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1014 (1984).
\item \textsuperscript{135} \textit{Midkiff}, 467 U.S. at 245.
\item \textsuperscript{136} See supra notes 131-36 and accompanying text.
\item \textsuperscript{137} See Stephenson, supra note 107; see also Editorial, supra note 7 (commenting on the effect of \textit{Kelo} on the 2006 congressional election: "There isn't much doubt, however, about another kind of electoral wave that has been building across America and is set to crash on Tuesday. That tsunami is the property-rights backlash, which is the direct result of last year's misguided and deeply unpopular Supreme Court decision in \textit{Kelo v. City of New London}. A narrow Court majority decided that the Constitution's 'takings' clause somehow allowed the government to seize private property not merely for 'public use' but also on behalf of other private interests.").
\item \textsuperscript{138} See \textit{ARIZ. REV. STAT. ANN.} § 36-1407 (2003); \textit{WASH. REV. CODE ANN.} § 8.12.030 (West 1992).
\item \textsuperscript{139} Stephenson, supra note 107 ("Ohio was one of 28 states that passed legislation after \textit{Kelo}, but the statute didn't make substantive changes. It established a moratorium on the use of eminent domain and created a task force to study the issue. A report from the task force was due [August 1, 2006].") Stephenson's article was published seventeen days after August 1, 2006. \textit{Id.}
to protect private property without causing a host of unintended problems and litigation.

Furthermore, many state statutes and constitutions have specific provisions that allow government takings for the creation of parks or recreation areas that are open to the general public. For example, the Ohio moratorium on eminent domain lists public parks as an approved "public use."\textsuperscript{141} Washington has a similar provision.\textsuperscript{142} Although not all environmental reforms are in the form of public parks, the general exception is indicative that these states are likely to find that environmental conservation or general environmental concerns constitute "public uses" if challenged.\textsuperscript{143} Along the same lines, both Arizona and Washington cite compliance with environmental regulations or reforms as reasons to either restrict eminent domain or justify a government taking.\textsuperscript{144} Therefore, because Ohio, Washington, and Arizona do not specifically prohibit environmental justifications for "public uses" as they do for commercial development justifications, and some form of environmental precaution is mentioned in connection with eminent domain, environmental reforms are neither the targets nor the incidental victims of eminent domain restrictions.\textsuperscript{145}

Compared to the other states discussed in this Comment, California seems to offer the least protection for environmental restrictions related to eminent domain.\textsuperscript{146} However, this conclusion may not be an accurate comparison because California's provisions concerning eminent domain are noticeably shorter than any of the other states.\textsuperscript{147} This brevity may not indicate a reluctance of California to consider environmental goals as "public uses"; rather, it may display that California views the debate on eminent domain in a more limited manner.

\textsuperscript{141} Id.
\textsuperscript{142} See WASH. REV. CODE ANN. § 8.12.030.
\textsuperscript{143} Washington's statute specifically allows for government takings for the creation of public parks and reservoirs, the upkeep of swamps, marshes, tidelands, and tide flats and ponds, and "for the purpose of protecting such supply of fresh water from pollution." Id.
\textsuperscript{144} See ARIZ. REV. STAT. ANN. § 49-158 (2005) ("If notice of the declaration of environmental use restriction that includes a specific description of the area of the property that is subject to the declaration of environmental use restriction is contained in the repository maintained by the department pursuant to § 49-152, subsection E, a declaration of environmental use restriction may not be extinguished, limited or impaired through . . . [the exercise of eminent domain."]). WASH. REV. CODE. ANN. § 8.12.030.
\textsuperscript{145} See supra notes 137-45 and accompanying text.
\textsuperscript{146} See CAL. CONST. art. I, § 19 (making no mention of the environment or anything tangentially related to the environment).
\textsuperscript{147} Compare ARIZ. CONST. art. II, § 17, with CAL. CONST. art. I, § 19.
C. Do State Courts' Decisions Interpreting “Public Use” Curtail Environmental Takings?

Although the possibility of new restrictions on eminent domain by state legislation is still lurking, the general trend appears to address the issue in a narrower way than first anticipated by journalists interviewing citizens and politicians shortly after *Kelo* was decided.\(^{148}\) State courts also appear to be following this trend,\(^{149}\) which is more significant based on the idea of legal precedent. For example, although Arizona, California, and Ohio have state provisions, either in propositions, statutes, or state constitutions, which limit the effect *Kelo* can have on eminent domain, each of these state courts have cited some aspect of *Kelo* as valid precedent within the state.\(^{150}\) In Arizona, the court cited *Kelo* to show that although Arizona does not consider economic development a public use, the court left the door open as to whether *Kelo* still establishes that the term “use” when referring to government takings means more than the literal definition of “physical use.”\(^{151}\) Similarly, in California, the court accepted the broad *Kelo* definition of “public purpose” as it refers to government agency action, but did not reflect on the difference between “public purpose” and the term “public use” found in the California Constitution.\(^{152}\) Ohio, by contrast, offered a direct rejection to *Kelo*’s expansion of “public use” to encompass economic redevelopment.\(^{153}\) Nevertheless, the Ohio Supreme Court only rejected the economic redevelopment aspect of *Kelo* and not the entire holding.\(^{154}\) Therefore, the Ohio court may be indicating its tacit approval of a generalized expansion of eminent domain, though not to the extent of the federal interpretation of the Fifth Amendment Takings Clause.

Washington is the only state of the four discussed in this Comment that has not directly discussed *Kelo* within its state courts. The majority in-

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148. E.g., Broder, *supra* note 2 (noting that some states were close to overreacting to *Kelo*).
150. See *Pima County*, 127 P.3d at 66-67; *Syngenta*, 42 Cal. Rptr. 3d at 218; *Seattle Popular Monorail Auth.*, 121 P.3d at 1175.
151. *Pima County*, 127 P.3d at 66-67. The court noted that “[a]t oral argument, Clear Channel also relied on *Kelo* v. *City of New London*... to support its contention that the state’s ‘use’ of property... is not limited to physical ‘use.’” *Id.* at 66 (citation omitted). However, the court did not agree with Clear Channel’s assertion. *Id.* at 66-67.
152. See *Syngenta*, 42 Cal. Rptr. 3d at 218.
sisted that \textit{Kelo} was irrelevant in \textit{Seattle Popular Monorail Authority.}\footnote{Seattle Popular Monorail Auth., 121 P.3d at 1168 n.1 ("Contrary to the dissent's view, the facts and legal issues in this case bear no resemblance to the recent decision in the United States Supreme Court in \textit{Kelo v. City of New London.}" (citation omitted)).} Judge Johnson, the dissenting judge in \textit{Seattle Popular Monorail Authority}, interpreted \textit{Kelo} as a "denial of federal constitutional protections against eminent domain abuse," while also acknowledging the "state's power to afford their citizens greater protection."\footnote{Id. at 1180 (Johnson, J., dissenting).} Judge Johnson took issue with the holding in \textit{Kelo}, and argued that \textit{Seattle Popular Monorail Authority} was the court's opportunity to distinguish the Washington Constitution from that of the federal government.\footnote{Id.} The court's refusal to apply \textit{Kelo}, or even acknowledge its pertinence to this decision is significant. It shows that the Washington Supreme Court is not taking this opportunity to follow \textit{Kelo}'s suggestion that states interpret "public use" under their own constitutions narrowly. Although Washington may later restrict its interpretation of public use under its own constitution, in this instance, it refrained from doing so. Therefore, perhaps Washington will be insulated against an anti-\textit{Kelo} "political firestorm"\footnote{Stephenson, supra note 107.} present in other states.

\section*{III. \textit{Kelo}'s Implications for Environmental Protections}

Currently, state legislatures and courts are resisting completely redefining the concept of eminent domain in a way that is unique to their state.\footnote{See ARIZ. CONST. art. II, § 17 (delegating the role of determining what constitutes a "public use" to the judiciary, regardless of a purported legislative intent); CAL. CONST. art. I, § 19 ("Private property may be taken or damaged for public use only when just compensation ... has first been paid to ... the owner."); WASH. REV. CODE ANN. § 8.12.030 (West 1992) (authorizing a broad list of acceptable eminent domain takings, including for environmental reasons); see also Pima County v. Clear Channel Outdoor, Inc., 127 P.3d 64, 68 (Ariz. Ct. App. 2006) (applying the rules governing a taking for commercial development); Syngenta Crop Prot., Inc. v. Helliker, 42 Cal. Rptr. 3d 191, 218 (Ct. App. 2006) (following \textit{Kelo} implicitly by applying the \textit{Kelo}-approved \textit{Monsanto} definition of "public use"); \textit{City of Norwood}, 853 N.E.2d at 1140-42 (holding that economic benefit cannot by itself satisfy the public use requirement for a constitutional taking); \textit{Seattle Popular Monorail Auth.}, 121 P.3d at 1180 (implying that Washington would not more narrowly interpret acceptable eminent domain takings as a result of \textit{Kelo}).} Instead, states relied on statutes that expressly prohibit the condemnation of private land for economic development.\footnote{See, e.g., WASH. REV. CODE ANN. § 8.12.030.} Although this change differs greatly from over one hundred years of interpretation of the federal Takings Clause,\footnote{See supra Part I.A.-B.} it will not necessarily have a great impact on environmental legislation, reforms, and takings. The states discussed in this
Comment have limited their statutory or constitutional changes to the state concept of eminent domain with regard to economic development. As discussed above, in addition to citing environmental concerns as a reason to find that a taking does not serve an adequate public purpose, some states include provisions that directly authorize state and local governments to take private property for just compensation for the creation of public parks. This generally encouraging attitude toward environmental protection amidst the anti-Kelo firestorm of conservative legislation indicates that states will not actually carry out the once-discussed reactionary eminent domain reforms presented just after Kelo was decided. Furthermore, in each state discussed in this Comment, the state courts had an opportunity to wholly reject Kelo as applicable to that state's takings clause. Nevertheless, only one court, the Supreme Court of Ohio, directly rejected Kelo. Still, that rejection was limited to Kelo's holding on economic development, and not necessarily the Supreme Court's expansion of the "public use" justification for government takings.

A. What Can Environmentalists Do to Protect Environmental Takings?

Currently, environmental reforms are not in imminent danger of being invalidated because they conflict with state takings clauses; however, Kelo clearly acknowledged that states were free to restrict their interpretation of state eminent domain. In effect, Justice Stevens, writing for the majority in Kelo, encouraged disgruntled states to limit their own

162. See supra Part I.C.
164. See supra Part I. Contra Broder, supra note 2.
165. See supra Part I.C; see e.g., Pima County v. Clear Channel Outdoor, Inc., 127 P.3d 64, 66-67 (Ariz. Ct. App. 2006) (avoiding judicial interpretation of Kelo in a case concerning the granting of land to a private entity for the purpose of commercial development); Syngenta Crop Prot., Inc. v. Helliker, 42 Cal. Rptr. 3d 191, 218 (Ct. App. 2006); City of Norwood v. Horney, 853 N.E.2d 1115, 1123 (Ohio 2006); HTK Mgmt., L.L.C. v. Seattle Popular Monorail Auth., 121 P.3d 1166, 1168 n.1 (Wash. 2005) (refraining from interpreting the impact of Kelo because the court found that the facts in Kelo bore no resemblance to the issues in Seattle Popular Monorail Authority).
166. City of Norwood, 853 N.E.2d at 1141-42.
167. Id. at 1135; see also Stephenson, supra note 107.
168. See supra Part II.B-C.
169. Kelo v. City of New London, 545 U.S. 469, 489 (2005) ("In affirming the City's authority to take petitioners' properties, we do not minimize the hardship that condemnations may entail, notwithstanding the payment of just compensation. We emphasize that nothing in our opinion precludes any State from placing further restrictions on its exercise of the takings power. Indeed, many States already impose 'public use' requirements that are stricter than the federal baseline. Some of these requirements have been established as a matter of state constitutional law, while others are expressed in state eminent domain statutes that carefully limit the grounds upon which takings may be exercised.") (footnotes omitted)).
power to condemn land for public use. Although states have not thus far been successful at binding their legislatures and courts to a pre-1896 definition of "public use" or "public purpose," future legislation could potentially have an adverse impact on environmental reform.

In order to guard against such a situation, environmentalists could continue to promote environmental reform in the following manner. First, as evidenced by the Washington eminent domain statute, environmentalists could lobby for mandatory environmental considerations when state or local governments condemn land. If the taking of the land would adversely affect the environment in a substantial way, the taking could be deemed inconsistent with the state notion of public use. This way, environmentalists could oppose economic development when it substantially interferes with concrete environmental goals, but still guard against the conservative "anti-Kelo" backlash that John M. Broder warns of in his New York Times article, States Curbing Right to Seize Private Homes.

Second, environmentalists could lobby for more extensive and express definitions of what constitutes a valid public use to include more environmental concerns. Although many statutes list public parks as an example of a valid use of the government taking power, environmentalists could lobby to expand this list of definitions beyond uses that directly confer a benefit upon the public. For example, state statutes could list preservation of wildlife, anti-pollution measures, and restoration of forests as valid state exercises of eminent domain.

Finally, environmentalists could lobby to create more extensive zoning ordinances to protect environmental concerns. The Court of Appeals of Arizona decided that a private entity that receives previously condemned land from the government is subject to the same zoning ordinances as land that was obtained in any other fashion. Therefore, if the zoning regulations are strict in terms of environmental protections, the purpose of a government taking will not be permitted to be carried out if it conflicts with the regulations. This, in turn, may encourage state courts to

170. See id.
171. See generally Syngenta Crop Prot., Inc. v. Helliger, 42 Cal. Rptr. 3d 191, 214 (Ct. App. 2006); City of Norwood, 853 N.E.2d at 1132-33.
172. Cf. Cooper, supra note 11.
173. WASH. REV. CODE ANN. § 8.12.030 (West 1992) (providing that eminent domain is authorized to "protect[ ] such supply of fresh water from pollution, and to condemn land and other property and damage the same for such and for any other public use after just compensation having been first made or paid into court for the owner").
174. See Broder, supra note 2.
permit more environmentally friendly government takings by setting a more concrete standard for deciding what serves a public purpose.

IV. CONCLUSION

The *Kelo* decision, which interpreted the federal Takings Clause to permit a local government to take private land for the exclusive use by private entities using the property as part of an economic development plan, was based on Supreme Court precedent that dates back to 1896. When the decision was first announced, both conservatives and liberals proposed new legislation that would drastically reduce a state or local government's power to seize land under the concept of eminent domain. The current reality, however, reflects a much more limited state reaction. State statutes and constitutional provisions mostly restrict only the "economic development outside blighted areas" element of the *Kelo* decision, rather than the entire doctrine of government taking for general or even indirect public use. Currently, environmental reforms do not appear to be threatened because state limitations on eminent domain either (1) do not directly preclude environmental concerns from constituting a public use, or (2) list general environmentally friendly approved takings that could be analogized to expand the accepted environmental takings under the definition of public use. Although states thus far have not succeeded at drastically limiting governmental power to condemn private property, those concerned for the future ramifications of environmental reforms as they relate to a restricted definition of eminent domain could take several precautions. Environmentalists could lobby state and municipal legislatures to include specific examples of acceptable eminent domain takings that serve environmental protection purposes in proposed legislation. Environmentalists could also lobby the legislatures for further mandatory environmental considerations when determining when a taking benefits the public. And finally, environmentalists could support the passage of strict zoning ordinances that forbid using land taken by eminent domain in a manner detrimental to the environment.