

GOVERNMENTAL FORBEARANCE: MYTH OR REALITY?

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In their thoughtful book, *Property*, Thomas W. Merrill and Henry W. Smith posit that various factors induce governments to forbear from unduly undermining the expectations of property owners and, as a result, operate to safeguard the security of property rights.¹ This Essay seeks to explore this hypothesis, and questions whether one can realistically expect governmental forbearance to provide meaningful support for the rights of individual property owners.

Can modern government be induced to forbear from making policy changes that unreasonably and unpredictably impair the value of property? Or to quote the Georgia Supreme Court in 1851, is the security of private property “confined to the uncertain virtue of those who govern?”² I submit that the answer is far from obvious. There are, of course, a number of constitutional restraints on government, such as the Contract Clause,³ the Takings Clause, and the due process requirement.⁴ These are important provisions, but they have received such checkered enforcement in modern law that they can hardly be expected to compel governmental respect for the rights of property owners.⁵

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1. THOMAS W. MERRILL & HENRY E. SMITH, *THE OXFORD INTRODUCTIONS TO U.S. LAW: PROPERTY* (2010).

2. *Parham v. Justices of Inferior Court of Decatur Cnty.*, 9 Ga. 341, 348 (1851).

3. Section 10 of article I of the U.S. Constitution provides in part: “No State shall . . . pass any . . . Law impairing the obligation of Contracts . . .” U.S. CONST. art. I, § 10, cl. 1.

4. In fact, it is debatable whether property owners always receive even rudimentary procedural due process when their property is acquired through eminent domain. A number of states permit quick-take condemnations that allow the immediate acquisition of title and possession by the condemning agency before a hearing. Not only are procedural safeguards bypassed, but quick-take condemnation hampers an owner’s ability to challenge a taking. Such expedited takings are particularly prone to abuse. See 6A-28 NICHOLS ON EMINENT DOMAIN, § 28.02 (3d ed. 2013).

5. James W. Ely, Jr., “*Poor Relation*” *Once More: The Supreme Court and the Vanishing Rights of Property Owners*, 2004–2005 CATO SUP. CT. REV. 39, 69 (2005) (“The blunt fact is that an abiding dislike of property rights, derived from New Deal constitutionalism, continues to hold intellectual sway.”). See also RICHARD A. EPSTEIN, *SUPREME NEGLECT: HOW TO REVIVE CONSTITUTIONAL PROTECTION FOR PRIVATE PROPERTY* 8 (2008) (“The Supreme Court is guilty of massive neglect in its interpretation of the takings clause.”).

Merrill and Smith view Chief Justice Roger B. Taney's famous opinion in *Charles River Bridge v. Warren Bridge* (1837),⁶ which denied a Contract Clause challenge to the state-authorized construction of a free bridge to compete with an existing toll bridge under a prior charter, as striking a good balance between the need for change in the face of technological innovation and the importance of stability to encourage investments. The original toll bridge company claimed that its corporate charter impliedly conferred monopoly status that the state could not abridge. Taney declared that a corporate charter should be strictly construed to encompass only express guarantees, not implied privileges. Building on Taney's analysis, Merrill and Smith contend that government could never be expected to refrain from any interference with the expectations of owners in order to accommodate a perceived need for useful economic and social change. In a revealing comment, the authors observe that implicit in Taney's view "is the assumption that the government can generally be trusted to do the right thing."⁷ This theme of confidence in the government is a guiding star for the authors, and one that colors their treatment of forbearance and explains their preference for minimal judicial protection of property.

However, there are significant problems in seeing Taney as the fountainhead of a policy of trusting in government. Important as it was, the *Charles River Bridge* decision does not give a complete picture of Taney's Contract Clause jurisprudence or of the extent to which he stressed stability of contractual rights against governmental interference. In fact, Taney vigorously enforced the Contract Clause against state interference with both private agreements and public contracts.⁸ For example, in *Bronson v. Kinzie* he invalidated two Illinois laws that retroactively limited mortgage foreclosure sales and gave mortgagors broad rights to redeem foreclosed property.⁹ Taney stressed that the Contract Clause "was undoubtedly adopted as a part of the Constitution for a great and useful purpose. It was to maintain the integrity of contracts, and to secure their faithful

6. *Proprietors of Charles River Bridge v. Proprietors of Warren Bridge*, 36 U.S. (11. Pet.) 420 (1837). See generally STANLEY I. KUTLER, PRIVILEGE AND CREATIVE DESTRUCTION: THE CHARLES RIVER BRIDGE CASE (1971).

7. MERRILL & SMITH, *supra* note 1, at 226.

8. HERBERT HOVENKAMP, ENTERPRISE AND AMERICAN LAW, 1836-1937, 20 (1991).

9. 42 U.S. (1 How.) 311 (1843).

execution throughout the Union . . . ”¹⁰ Likewise, the Supreme Court under Taney repeatedly invoked the Contract Clause to strike down state legislation that attempted to abrogate state tax exemptions,¹¹ to regulate state-chartered banks,¹² or to repudiate bonded debt.¹³ In these cases Taney and his colleagues were not content to rely on governmental forbearance. Nor did they demonstrate confidence in the ability of state governments to “do the right thing.”

Even when courts in the nineteenth century tended to protect economic rights more broadly than is the norm today, they nonetheless experienced difficulty in curbing governmental behavior. Again the history of the Contract Clause is instructive. Numerous federal and state court decisions invalidating state stay laws and mortgage moratoria as impairments of contract¹⁴ did not prevent state legislators from enacting such laws during periods of economic distress. The practical impact of court rulings was often muted. As Charles Warren perceptively noted, adverse decisions “did not, in fact, cause great hardship to debtors because, by reason of the interval of time which elapsed between enactment on these stay-laws and the Courts’ decisions as to their invalidity, the laws to a great extent achieved their main purpose of preventing sacrifice of debtor’s property.”¹⁵ In short, judicial opinions did not always succeed in promoting governmental forbearance. Legislators responded to perceived political imperatives heedless of constitutional limits or social norms that supposedly dictated restraint.

Merrill and Smith mention the unique position of railroads that owned fixed assets that could not be relocated to another jurisdiction

10. *Id.* at 318. See also *McCracken v. Heyward*, 43 U.S. (2 How.) 608 (1844).

11. *E.g.*, *Gordon v. Appeal Tax Court*, 44 U.S. (3 How.) 133 (1845); *Piqua Branch of the State Bank of Ohio v. Knoop*, 57 U.S. (16 How.) 369 (1854); *Dodge v. Woosley*, 59 U.S. (18 How.) 331 (1856).

12. *E.g.*, *Planters’ Bank of Miss. v. Sharp*, 47 U.S. (6 How.) 301 (1848); *Woodruff v. Trapnall*, 51 U.S. (10 How.) 190 (1851).

13. *Gelpcke v. City of Dubuque*, 68 U.S. (1 Wall.) 175 (1864). Although scholars have long debated whether *Gelpcke* was an application of the Contract Clause to encompass judicial interference with contracts or was the formulation of a uniform commercial law for diversity cases, under neither interpretation was the Supreme Court deferring to the state.

14. *E.g.*, *Bronson v. Kinzie*, 42 U.S. (1 How.) 311 (1843); *Malony v. Fortune*, 14 Iowa 417 (1863); *Robinson v. Howe*, 13 Wis. 341 (1861); *People ex rel. Thorne v. Hays*, 4 Cal. 127 (1854); *Sheets v. Peabody*, 7 Blackf. 613 (Ind. 1845); *Mundy v. Monroe*, 1 Mich. 68 (1848); *Jones v. Crittenden*, 4 N.C. 55 (1814).

15. CHARLES WARREN, *BANKRUPTCY IN UNITED STATES HISTORY* 90 (1935).

and were thus especially vulnerable to state regulations and taxation.¹⁶ The experience of railroads with tax exemptions in New Jersey is illuminating. The state granted tax concessions to several railroads during the 1830s and 1840s. By the 1870s changed economic circumstances in the state convinced lawmakers in effect to renege on these concessions. Although the highest court in New Jersey upheld the tax concessions under the Contract Clause, the governor and legislature adopted coercive tactics that eventually persuaded the carriers to relinquish their exemptions. Political pressure prevailed over the supposed sanctity of contracts. This experience has led one scholar to ponder whether government can ever be trusted to keep its side of a bargain.¹⁷

Or consider the Takings Clause, which in modern law is surely more potent than the generally neglected Contract Clause.¹⁸ Merrill and Smith correctly observe that the current fair market value standard falls well short of providing a complete indemnification for owners whose property is taken by eminent domain.¹⁹ Not only is the determination of market value in the context of a forced sale problematic, but the prevailing standard takes no account of lost profits, relocation expenses, loss of business good will, destruction of community ties, and costs of litigation. It is evident that the fair market value standard does not provide “a full and exact equivalent” for the property taken.²⁰ Since the ascertainment of “just compensation”

16. MERRILL & SMITH, *supra* note 1, at 230.

17. Christopher Grandy, *Can Government Be Trusted to Keep Its Part of a Social Contract? New Jersey and the Railroads, 1825–1888*, 5 J.L. ECON. & ORG. 249 (1989).

18. See James W. Ely, Jr., *Whatever Happened to the Contract Clause?*, 4 CHARLESTON L. REV. 371 (2010) (discussing the decline of the Contract Clause in constitutional jurisprudence).

19. MERRILL & SMITH, *supra* note 1, at 249–50.

20. The Supreme Court defined “just compensation” in terms of “a full and exact equivalent” in *Monongahela Navigation Co. v. United States*, 148 U.S. 312, 326 (1893) (Brewer, J.). There is a substantial body of scholarship insisting that the fair market value standard as presently understood does not put the owner in as good position as if his property had not been taken. See RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 51–56, 182–86 (1985); Gideon Kanner, “Fairness and Equity,” or Judicial Bait-and-Switch? *It’s Time to Reform the Law of “Just” Compensation*, 4 ALBANY GOV’T L. REV. 38, 41–58 (2011). In *Community Redevelopment Agency v. Abrams*, 543 P.2d 905 (Cal. 1975), for example, the Supreme Court of California reached the bizarre conclusion that business goodwill, although treated as property for some purposes, was not property in the context of just compensation for eminent domain.

has long been viewed as a judicial matter,²¹ it would seem appropriate for courts to reconsider the present compensation formula.

In a remarkable but revealing decision, the Supreme Court of California in 1960 maintained that it had a duty to hold down the amount of condemnation awards. Otherwise, it worried, the cost of public improvements would increase and “impose a severe burden on the public treasury.”²² The court was evidently more concerned with an imagined impact on government than with the constitutional right of an individual to receive a full indemnity. This reasoning entirely inverts the purpose of the “just compensation” requirement. To the extent that this parsimonious attitude prevails, the protective function of the “just compensation” standard is diluted in a manner not calculated to promote governmental forbearance. Indeed, skimpy awards encourage governmental overreach, and constitute in effect a subsidy to government and allied developers at the expense of individual owners. Merrill and Smith aptly point out that formulation of a standard “aimed at providing more complete compensation would enhance the security of property rights, and would be consistent with a general objective of promoting government forbearance.”²³ If government was required to compensate for the full economic loss suffered by individuals whose property was taken, it might well be more guarded in the exercise of eminent domain.²⁴ The need to raise tax revenue, always politically hazardous, could make government more circumspect in resorting to compulsory acquisitions of private property. “The pocket-book,” Justice David J. Brewer observed in 1891, “is a potent check on even the reformer.”²⁵

Yet there is room to doubt that even a strengthened formula for determining “just compensation,” although a help, would necessarily

21. See 148 U.S. at 327 (holding that the determination of compensation when property is taken is “a judicial inquiry”); *Van Horne’s Lessee v. Dorrance*, 2 U.S. (2 Dall.) 304, 312 (C.C. Pa. 1795) (Paterson, J.) (observing that the legislature “cannot constitutionally determine upon the amount of the compensation, or value of land”).

22. *People ex rel. Dep’t of Pub. Works v. Symons*, 357 P.2d 451, 455 (Cal. 1960).

23. MERRILL & SMITH, *supra* note 1, at 250–51.

24. James Geoffrey Durham, *Efficient Just Compensation as a Limit on Eminent Domain*, 69 MINN. L. REV. 1277, 1313 (1985) (“Efficient just compensation should provide the significant legal check on the use of eminent domain that is now lacking. As long as the Court chooses not to permit meaningful review of public use claims, just compensation is the only effective constitutional check on governmental exercises of eminent domain.”).

25. David J. Brewer, *Protection to Private Property from Public Attack*, 55 NEW ENGLANDER & YALE REV. 97, 105 (1891).

constrain government very much. As Merrill and Smith note, the cost of paying compensation is placed on the taxpayers, not on the political figures utilizing eminent domain. “The incentives of government officials,” they maintain, “are especially likely to be skewed if the linkage between government action and the need for higher taxes is not very transparent.”²⁶ Moreover, although the decision to acquire private property is frequently characterized as legislative in nature, such power is in fact commonly vested in unelected officials, such as redevelopment agencies and irrigation districts, which are largely immune from political controls.²⁷ Loose judicial language about deference to the public will is problematic. Further, the expense of acquisition may well be obfuscated as officials have every incentive to downplay costs while making rosy promises about future public benefits.²⁸ A further complication is that the success or failure of projects facilitated by eminent domain may not be apparent for years after the condemnation. In short, democratic accountability is frustrated. The public frequently has no realistic way of either assessing the cost of projects or of halting unwanted schemes.²⁹ The present tendency to inadequately compensate property owners is particularly worrisome because the “public use” limitation on the exercise of eminent domain has been largely eviscerated at least at the federal level.³⁰

26. MERRILL & SMITH, *supra* note 1, at 227.

27. For example, in the controversial case of *Kelo v. City of New London*, 545 U.S. 469, 473–75 (2005) the exercise of eminent domain was initiated by the New London Development Corporation, a private non-profit entity. See Kanner, *supra* note 20, at 51 n.44.

28. Ilya Somin, *Overcoming Poletown: County of Wayne v. Hathcock, Economic Development Takings, and the Future of Public Use*, 2004 MICH. ST. L. REV. 1005, 1016 (2004) (“Both corporate interests and political leaders dependent on their support have tremendous incentives to overestimate the economic benefits of projects furthered by condemnation.”).

29. *Id.* at 1022–23 (pointing out that most voters are not in a position to assess the economic merits of projects which rely on eminent domain); Durham, *supra* note 24, at 1295 (“The likelihood that the public educates itself with all the facts and figures behind eminent domain actions . . . is slight.”). See also ILYA SOMIN, *DEMOCRACY AND POLITICAL IGNORANCE: WHY SMALLER GOVERNMENT IS SMARTER* (2013) (arguing that widespread voter ignorance and irrationality calls into question meaningful political accountability in a democratic society).

30. James W. Ely, Jr., *Thomas Cooley, “Public Use,” and New Directions in Takings Jurisprudence*, 2004 MICH. ST. L. REV. 845, 851 (2004) (“For all practical purposes, the Supreme Court, followed by many state courts, has virtually eliminated the ‘public use’ limitation as a meaningful restraint on eminent domain.”); Thomas W. Merrill, *Rent Seeking and the Compensation Principle*, 80 NW. U. L. REV. 1561, 1569 (1987) (“The Supreme Court has largely abandoned the requirement that the power of eminent domain be devoted to public rather than private ends.”).

In other areas of takings jurisprudence, Merrill and Smith are inclined to endorse a rather modest level of judicial supervision. Consider the “public use” requirement of the Fifth Amendment and its counterparts in state constitutions. It has long been held that private property could not be taken for private use even with the payment of compensation.³¹ Similarly, prominent scholars also stressed that eminent domain was limited to use by the public.³² Nonetheless, the authors correctly recognize that the Supreme Court has given the “public use” clause “a weak interpretation.”³³ It is hard to quarrel with that conclusion, at least with respect to post–World War II cases. Not only has the Supreme Court equated “public use” with the more expansive notions of public purpose and public interest, it has been highly deferential to legislative and administrative determinations of the need to acquire private property. Indeed, the Court in *Berman v. Parker* (1954) envisioned a very narrow role for judicial review in condemnation cases, declaring that “when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive.”³⁴

31. *E.g.*, *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 388 (1798) (Chase, J.) (insisting that a legislature could not validly enact “a law that takes property from A. and gives it to B.”); *Wilkinson v. Leland*, 27 U.S. (2 Pet.) 627, 658 (1829) (Story, J.) (“We have known of no case, in which a legislative act to transfer the property of A. to B. without his consent, has ever been held a constitutional exercise of legislative power in any state in the union.”); *Olcott v. The Supervisors*, 83 U.S. (16 Wall.) 678, 694 (1872) (“The right of eminent domain nowhere justifies taking property for a private use.”); *Bd. of Comm’rs of Tippecanoe Cnty. v. Lucas*, 93 U.S. 108, 114 (1876) (“Private property cannot be taken from individuals by the State, except for public purposes, and then only upon compensation”); *Mo. Pac. Ry. Co. v. Nebraska*, 164 U.S. 403, 417 (1896) (holding that taking private property “for the private use of another” violates the due process clause of the Fourteenth Amendment); *Thompson v. Consol. Gas Utils. Corp.*, 300 U.S. 55, 80 (1937) (Brandeis, J.) (declaring that “this Court has many times warned that one person’s property may not be taken for the benefit of another private person without a justifying public purpose, even though compensation be paid”).

32. THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 531 (1st ed. 1868) (“The *public use* implies a possession, and occupation, and enjoyment of the land by the public, or public agencies; and there could be no protection whatever to private property, if the rights of government to seize and appropriate it could exist for any other purpose.”); JOHN LEWIS, A TREATISE ON THE LAW OF EMINENT DOMAIN IN THE UNITED STATES 506–07 (2d ed. 1909) (“Public use means the same as use by the public, and this it seems to us is the construction the words should receive in the constitutional provision in question.”). For Cooley’s views about the appropriate use of eminent domain, see Ely, *supra* note 30, at 846–50 (noting Cooley’s concern that “eminent domain, unless confined, would become a tool for the powerful and politically well-connected to promote their interests, to the detriment of individuals with little political clout.”).

33. MERRILL & SMITH, *supra* note 1, at 242.

34. 348 U.S. 26, 32 (1954).

This trend culminated in much criticized case of *Kelo v. City of New London* (2005),³⁵ in which the Court sustained the exercise of eminent domain to acquire non-blighted residences for transfer to private developers for the purpose of promoting economic growth. Somewhat sympathetic to the Court's deferential approach, Merrill and Smith stress the difficulties in ascertaining the appropriate scope of the eminent domain power in a variety of situations. In light of *Kelo*, they feel that the Supreme Court is unlikely to put many teeth in the "public use" limitation. Still, the authors reject "a universal right of eminent domain."³⁶ They point to state court decisions tightening the definition of "public use" under state constitutions, and to post-*Kelo* state legislation and constitutional amendments seeking to restrict economic development takings.³⁷

The discussion of "public use" by Merrill and Smith raises several questions. Do we not at the federal level already have "a universal right of eminent domain?" The authors admit that "practically any exercise in eminent domain can be described as satisfying a public-interest standard."³⁸ Dissenting in *Kelo*, Justice Sandra Day O'Connor lamented: "The specter of condemnation hangs over all property. Nothing is to prevent the State from replacing any Super 6 with a Ritz-Carlton, any home with a shopping center, or any farm with a factory."³⁹ The record indicates that hardly any condemnations of property are ever invalidated in federal court.⁴⁰ So, in effect, does not private property depend on the whim of governmental officials? Nor do the authors tackle the question of why courts treat "just compensation" as a judicial rather than a legislative matter, but then adopt supine deference to legislative decisions to take property.

35. 545 U.S. 469 (2005).

36. MERRILL & SMITH, *supra* note 1, at 247.

37. For a discussion of the judicial and legislative reaction to *Kelo*, see James W. Ely Jr., *Post-Kelo Reform: Is the Glass Half Full or Half Empty?*, 17 SUP. CT. ECON. REV. 127 (2009); Ilya Somin, *The Limits of Backlash: Assessing the Political Response to Kelo*, 93 MINN. L. REV. 2100 (2009).

38. MERRILL & SMITH, *supra* note 1, at 247.

39. 545 U.S. at 503 (O'Connor, J., dissenting).

40. For decisions upholding economic development takings, see, e.g., *Goldstein v. Pataki*, 516 F.3d 50 (2d Cir. 2008); *W. Seafood Co. v. United States*, 202 F. App'x 670 (5th Cir. 2006); *Didden v. Village of Port Chester*, 173 F. App'x 931 (2d Cir. 2006), *cert. denied*, 549 U.S. 1166 (2007). *But see* *99 Cents Only Stores v. Lancaster Redevelopment Agency*, 237 F. Supp. 2d 1123 (C.D. Cal. 2001) (invalidating proposed condemnation on grounds that the city's purpose was to benefit a particular commercial enterprise which threatened to leave the community).

“Why the Supreme Court,” Gideon Kanner has observed, “should be all but powerless to interpret the ‘public use’ clause, but all-powerful when it comes to interpreting the ‘just compensation’ clause—both appearing in the same sentence—has not been judicially explained.”⁴¹ After all, both “just compensation” and “public use” are constitutional standards designed to limit government power over individual owners. It is difficult to justify such disparate treatment of the two clauses. Another question relates to the theme of governmental forbearance. Merrill and Smith suggest that, in the absence of federal court review of condemnation cases, state courts may promote forbearance by more vigorously scrutinizing the “public use” standard with respect to eminent domain. But if that is so, would not a similar move by the Supreme Court do even more to rein in governmental misuse of condemnations? We are dealing with a national norm incorporated into the Bill of Rights. Should the Supreme Court simply wash its hands and relegate the matter to the state courts?

Clearly constitutional doctrines, as currently understood, are unlikely to play more than a secondary role in limiting governmental reach over property. Indeed, consistent with their preference for modest judicial oversight, the authors assert that constitutional provisions may not be the most important factor encouraging governmental forbearance. Among other sources of forbearance, they give attention to the political process. Merrill and Smith maintain that, as a practical matter, the government will hesitate before taking actions that would hurt a large number of property owners. This, they declare, explains the refusal of Congress to eliminate the tax benefits accorded homeowners despite repeated calls—at least by academics—to curtail such advantages.⁴² Now there is certainly some merit in the argument that the political culture is important for sustaining property rights; courts do not operate in a vacuum.

Still, the contention of the authors is reminiscent of Chief Justice Morrison R. Waite’s 1877 admonition: “For protection against abuses by legislatures the people must resort to the polls, not the courts.”⁴³ Too often, however, this call for political redress is simply a myth. Waite, for example, never explained how railroads headquartered

41. Kanner, *supra* note 20, at 52.

42. MERRILL & SMITH, *supra* note 1, at 230.

43. *Munn v. Illinois*, 94 U.S. 113, 134 (1877).

in other states or out-of-state investors were supposed to seek protection from the political process against confiscatory rates imposed by state governments in the late nineteenth century.⁴⁴ Nonetheless, with regard to the use of eminent domain, the federal courts have echoed Waite's deferential approach. In 2008 the Second Circuit Court of Appeals declared that "both in doctrine and in practice, the primary mechanism for enforcing the public-use requirement has been the accountability of political officials to the electorate, not the scrutiny of the federal courts."⁴⁵ Such a comment is little more than a flight into political fantasy. As a practical matter it is highly improbable that individual property owners can arouse sufficient public support to influence a general election when many issues compete for public attention. The free-wheeling exercise of eminent domain in the decades since World War II has resulted in the displacement of many thousands of persons from their homes.⁴⁶ Yet the political process, rather than affording protection to displaced persons, encouraged their removal in the name of urban renewal.

Some scholars have expressed great confidence in federalism as a restraint on governmental abuse of property rights.⁴⁷ Merrill and Smith contend that "a credible threat to exit from the jurisdiction" can furnish a political restraint on government.⁴⁸ The notion that people can "vote with their feet" and thereby reduce the threat of eminent domain abuse has some superficial appeal. But it fails to adequately take account of factors that limit its effectiveness. Moving

44. In the late nineteenth century the Supreme Court moved away from the deferential *Munn* doctrine and established judicial review of state-imposed rates to assure an adequate return on invested capital. See JAMES W. ELY, JR., *RAILROADS AND AMERICAN LAW* 96–99 (2001).

45. 516 F.3d at 57.

46. Wendell E. Pritchett, *The "Public Menace" of Private Blight: Urban Renewal and the Private Uses of Eminent Domain*, 21 *YALE L. & POL'Y REV.* 1, 47 (2003) (concluding that the exercise of eminent domain in "urban renewal programs uprooted hundreds of thousands of people, disrupted fragile urban neighborhoods and helped entrench racial segregation in the inner city").

47. See, e.g., Robert C. Ellickson, *Federalism and Kelo: A Question for Richard Epstein*, 44 *TULSA L. REV.* 751 (2009); Vicki L. Been, "Exit" as a Constraint on Land Use Exactions: *Rethinking the Unconstitutional Conditions Doctrine*, 91 *COLUM. L. REV.* 473 (1991). See also WILLIAM A. FISCHER, *REGULATORY TAKINGS: LAW, ECONOMICS, AND POLITICS* 289–324 (1995) (contending that the ability to leave a jurisdiction is generally sufficient to safeguard property rights without judicial oversight, but agreeing that judicial intervention is warranted when the assets at issue are immobile).

48. MERRILL & SMITH, *supra* note 1, at 230.

costs could be considerable and act as a disincentive to relocate. More importantly, whatever the merit of exit strategies in theory, they do not pertain to immobile assets such as land and utilities.⁴⁹ As the authors recognize, foot voting simply cannot be employed to halt the exercise of eminent domain or the imposition of severe regulations on fixed assets.⁵⁰ Railroads were particular victims of this tendency in the late nineteenth century as states piled onerous taxes and strict rate controls on the industry. Only federal judicial intervention provided a modicum of relief. In a pioneering 1888 opinion Justice Brewer enjoined enforcement of a state-imposed railroad rate schedule and stressed the limitations of the exit option as a means to safeguard railroads from confiscatory regulations. He rejected the state's argument that if a carrier did not find the state's rate remunerative it could leave the business.⁵¹ Likewise, in most situations landowners cannot realistically escape eminent domain or severe regulation by threatening to leave the jurisdiction. We are also left with the question, addressed in part below, as to why federalism justifies deference to state and local government only with respect to property rights. Why not to other constitutional rights? Should we rely on federalism to safeguard freedom of speech or the Fourth Amendment guarantee against unreasonable searches of private property?

Therefore, any reliance on the political process to safeguard property interests requires significant qualification. First, the political system is not likely to afford much solace to individual owners, such as the *Kelo* complainants, facing the loss of their land by eminent domain. The same holds true with respect to land use regulations.⁵² Neither political officials nor judges unduly fret when land use controls impose severe economic hurt on particular owners. An anemic

49. Richard A. Epstein, *Exit Rights Under Federalism*, 55 L. & CONTEMP. PROBS. 147 (1992); Ilya Somin, *Federalism and Property Rights*, 2011 U. CHI. LEGAL F. 53, 54–66 (2011). For a thoughtful discussion of the strengths and weaknesses of foot voting, see SOMIN, *supra* note 29, at 119–54.

50. MERRILL & SMITH, *supra* note 1, at 230.

51. *Chi. & N.W. Ry. Co. v. Dey*, 35 F. 866, 880 (Cir. Ct. S.D. Iowa 1888) (Brewer, J.) (“Whatever of force there may be in such arguments, as applied to mere personal property capable of removal and use elsewhere, or in other business, it is wholly without force as against railroad corporations, so large a proportion of whose investment is in the soil and fixtures appertaining thereto, which cannot be removed.”).

52. The authors appear content with a weak regulatory takings doctrine, in line with their general confidence in government. MERRILL & SMITH, *supra* note 1, at 251–56.

regulatory takings doctrine does little to promote governmental forbearance and allows officials wide discretion to impose regulations.⁵³ Second, to the extent that the political system does provide a check on the exercise on eminent domain, the outcome is highly likely to be skewed in favor of those with political influence. Political clout is not shared evenly across society as a whole. Eminent domain is commonly directed against racial minorities or the politically weak.⁵⁴ The political process therefore may afford some protection to the politically well-connected, who may even benefit from the exercise of eminent domain,⁵⁵ but it is hardly a panacea for abuse. Third, democratic governments, both here and in Europe, are highly responsive to seemingly endless demands for enhanced entitlements, subsidies, and bailouts. These can only be funded—to the extent that they are paid for at all and do not simply add to the deficit—by placing the burden on property owners.⁵⁶ The redistributive nature of these measures poses a threat to the place of property in the polity. In other words, a broad if vague public sentiment supportive of private property may not translate into much help in concrete cases.

Moreover, I remain mystified as to why property owners are relegated to the political process while so many others' claims of right receive greater judicial solicitude. Nothing in the text of Constitution or the views of the Framers suggests that there is a dichotomy between the protection afforded property rights and other individual liberties. Indeed, the Framers believed that personal rights and property were indissolubly linked.⁵⁷ This attitude generally prevailed

53. STUART BANNER, *AMERICAN PROPERTY: A HISTORY OF HOW, WHY, AND WHAT WE OWN* 271 (2011) (“A handful of specific government actions limiting the use of property now required compensating its owners, but the vast majority of the regulatory state remained in place, unhindered by the takings clause or by any of its statutory supplements.”).

54. 545 U.S. 469, 521–22 (2005) (Thomas, J., dissenting) (stressing that the losses resulting from economic development takings “will fall disproportionately on poor communities. Those communities are not only systematically less likely to put their lands to the highest and best social use, but are also the least politically powerful.”).

55. Beneficiaries of eminent domain have included Las Vegas casinos, the *New York Times*, and Columbia University. See *Kaur v. N.Y. State Urban Dev. Corp.*, 933 N.E.2d 721 (N.Y. 2010); *City of Las Vegas Downtown Redevelopment Agency v. Pappas*, 76 P.3d 1 (Nev. 2003), *cert. denied*, 541 U.S. 912 (2004); *West 41st St. Realty v. N.Y. State Urban Dev. Corp.*, 744 N.Y.S. 2d 121 (1st Dept. App. Div. 2002).

56. NIALL FERGUSON, *CIVILIZATION: THE WEST AND THE REST* 288 (2011) (“Private property rights are repeatedly violated by governments that seem to have an insatiable appetite for taxing our incomes and our wealth and wasting a large portion of the proceeds.”).

57. JAMES W. ELY JR., *THE GUARDIAN OF EVERY OTHER RIGHT: A CONSTITUTIONAL HISTORY OF PROPERTY RIGHTS* 43 (3d ed. 2008). See also Walter Dellinger, *The Indivisibility of Economic*

throughout the nineteenth century. “It should never be forgotten,” Justice Stephen J. Field observed in 1890, “that protection to property and to persons cannot be separated. Where property is insecure, the rights of persons are unsafe.”⁵⁸ The Progressive movement of the early twentieth century, however, launched a large-scale assault on the notion of individual rights, and especially on constitutionalized property.⁵⁹ A high regard for private property was increasingly abandoned in favor of a statist ideology. The Progressives laid the intellectual groundwork for a jurisprudence that largely stripped property of constitutional protection.⁶⁰ This agenda was brought to fruition by the New Deal Supreme Court, which separated property rights from individual freedom and instituted a double standard of judicial review. To rank rights into categories and assign property to a lesser category worthy of only minimal solicitude was an expression of judicial activism, reflecting New Deal political priorities.⁶¹ The result, of course, has been to enlarge legislative control over property and explains the reluctance of many courts to police eminent domain or to enforce the Contract Clause.

This is not to denigrate the significance of public sentiment in shaping a political climate favorable to property rights.⁶² I agree that courts cannot be expected to do it all. Judge Learned Hand warned a generation ago about undue reliance on judges to preserve our rights: “I often wonder whether we do not rest our hopes too much upon constitutions, upon laws and upon courts. These are false hopes, believe me, false hopes. Liberty lies in the hearts of men and women; when it dies there, no constitution, no law, no court can save it.”⁶³

Rights and Personal Liberty, 2003–2004 CATO SUP. CT. REV. 9, 19 (“Economic rights, property rights, and personal rights have been joined, appropriately, since the time of the founding.”).

58. Stephen J. Field, “The Centenary of the Supreme Court,” February 4, 1890, reprinted in 134 U.S. 729, 745.

59. James W. Ely, Jr., *The Progressive Era Assault on Individualism and Property Rights*, 29 SOC. PHIL. & POL’Y 255 (2012). Indeed, Progressives were hostile to judicial review and demonstrated little interest in any claims of individual right. For example, Edward S. Corwin declared in 1920 that “the cause of freedom of speech and press is largely in the custody of legislative majorities and of juries, which . . . is just where the framers of the Constitution intended it to be.” Edward S. Corwin, *Freedom of Speech and Press Under the First Amendment: A Résumé*, 30 YALE L.J. 48, 55 (1920).

60. RICHARD A. EPSTEIN, HOW PROGRESSIVES REWROTE THE CONSTITUTION 111–37 (2006).

61. ELY, *supra* note 57, at 139–41.

62. FISCHER, *supra* note 47, at 324 (“The United States has had a capitalist economy based on private property primarily because Americans prefer it to the alternatives.”).

63. LEARNED HAND, THE SPIRIT OF LIBERTY 189–90 (3d ed. 1960).

At the same time, there is little justification for courts to evade their responsibility to enforce the property clauses of the Constitution. Court decisions can help to mold public attitudes. The most significant impact of *Kelo* may well be heightened public awareness of the need to guard property rights, reflected in an outpouring of state constitutional amendments and statutory provisions designed to curb the use of eminent domain. I realize that the efficacy of such measure varies widely. Nonetheless, to my mind, the restoration of the rights of property owners to public and academic dialogue is a welcome development.

Lastly let us consider this question: why should we care about whether government shows forbearance toward private property? In an especially interesting paragraph, Merrill and Smith briefly explore the connection between democracy and property, positing that property rights are more secure under democratic government than under authoritarian governments. They observe: “There seems to be a loose associational relationship between widespread property ownership and political democracy, in that widespread property ownership supports democracy, and democracy helps support widespread ownership of property.”⁶⁴ It appears to me that this is a nod toward the Lockean emphasis on the rights of property owners as a bulwark of liberty. Is Locke correct? Are secure property rights a prerequisite for democratic government? Undoubtedly the absence of protected rights to property facilitates arbitrary government. As early as 1722 one English commentator aptly noted: “The only despotick Governments now in the World, are those where the whole Property is in the Prince.”⁶⁵ Indeed, there are few examples, either historical or contemporary, of free societies that do not respect the rights of property owners. In contrast, totalitarian governments in the twentieth century without exception either abolished property or severely curtailed private ownership to serve the dictates of the state.⁶⁶ Private

64. MERRILL & SMITH, *supra* note 1, at 230–31.

65. CATO’S LETTERS NO. 84 (John Trenchard, July 7, 1722).

66. See ANDREW BARNES, OWNING RUSSIA: THE STRUGGLE OVER FACTORIES, FARMS AND POWER 27–31 (2006) (discussing sweeping nationalization and collectivization of property in Russia in the 1930s, and concluding that “[t]he Stalinist system of ownership and control of property was thus remarkably extensive and coherent.”); GOTZ ALY, HITLER’S BENEFICIARIES: PLUNDER, RACIAL WAR, AND THE NAZI WELFARE STATE 16 (2005) (finding that “a source of the Nazi Party popularity was its liberal borrowing from the intellectual tradition of the socialist left”); ANDREW BARKAI, NAZI ECONOMICS: IDEOLOGY, THEORY, AND POLICY 3 (1990) (“It is quite

property may not guarantee political liberty, but its absence likely dooms free government.⁶⁷ Echoing many commentators from the past, Justice Anthony Kennedy declared in 2010: “The Takings Clause is an essential part of the constitutional structure, for it protects private property from expropriation without just compensation; and the right to own and hold property is necessary to the exercise and preservation of freedom.”⁶⁸ Whether Kennedy’s jurisprudence has always exemplified this sentiment is an issue beyond the scope of this essay, but his comment underscores the deep roots linking property and liberty.

In short, I agree with the authors’ conclusion that private property has proven resilient over time, demonstrating an ability to adapt to societal changes and technological innovation.⁶⁹ I cannot, however, share their confidence that, absent more vigorous judicial oversight, the political system can realistically constrain government from interfering with the rights of individual property owners. Only judicial supervision can halt abusive tactics by governmental agencies, such as threatening individual homeowners with ruinous fines if they dare to challenge an edict.⁷⁰ There is simply no excuse for judicial abdication concerning the constitutional protection of property rights.

clear that there was no free market economy in Germany throughout those years, even in comparison with other advanced industrial countries, none of which had operated under conditions of ‘pure competition’ since the beginning of the century. The scope and depth of state intervention in Nazi Germany had no peacetime precedent or parallel in any capitalist country, Fascist Italy included.”).

67. RICHARD PIPES, *PROPERTY AND FREEDOM* 281 (1999) (“The right to property in and of itself does not guarantee civil rights and liberties. But historically speaking, it has been the single most effective device for ensuring both, because it creates an autonomous sphere in which, by mutual consent, neither the state nor society can encroach: by drawing a line between the public and the private, it makes the owner co-sovereign, as it were.”). See also D. Benjamin Barros, *Property and Freedom*, 4 N.Y.U. J.L. & LIBERTY 36, 69 (2009) (“It is difficult to see how other freedoms to speech, religion, or association could be secure in a society without the institution of private property.”).

68. *Stop the Beach Renourishment, Inc. v. Fla. Dep’t of Env’tl. Prot.*, 560 U.S. 702, 733 (2010) (Kennedy, J., concurring). See also *Lynch v. Household Fin. Corp.*, 405 U.S. 538, 552 (1972) (Stewart, J.) (“In fact, a fundamental interdependence exists between the personal right to liberty and the personal right to property. Neither could have meaning without the other.”).

69. BANNER, *supra* note 53, at 3 (“[O]ur ideas about property have always been contested and have always been in flux.”).

70. *Sackett v. Env’tl. Prot. Agency*, 132 S. Ct. 1367 (2012). See Jeremy A. Rabkin, *Against the EPA, Absurdity Is No Defense*, 37 HARV. J.L. & PUB. POL’Y 41, 43–45 (2014).