

Tulsa Law Review

Volume 44
Number 4 *The Scholarship of Richard A.
Epstein*

Summer 2009

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Recommended Citation

Robert C. Ellickson, *Federalism and Kelo: A Question for Richard Epstein*, 44 *Tulsa L. Rev.* 751 (2013).

Available at: <https://digitalcommons.law.utulsa.edu/tlr/vol44/iss4/5>

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FEDERALISM AND *KELO*: A QUESTION FOR RICHARD EPSTEIN

Robert C. Ellickson*

Richard Epstein started his distinguished law-teaching career at the USC Law School. The year was 1968. He was 25. In that era, USC law faculty followed a strategy that has since come to be known as “moneyball”—the hiring of candidates undervalued by faculties of less adventurous law schools.¹ Two years later, when I had the good fortune to be hired by USC, the median age of its law faculty was 33. In this hothouse of innovation, Richard was universally regarded as the most valuable player. This designation was literally true on the basketball court, where no other faculty member could jump high enough to touch the rim but Richard could touch it with the bottom of his palm. Richard visited at Chicago during 1972–73. Recognizing that he had found his natural home, he accepted Chicago’s offer of a permanent position. When Dean Dorothy Nelson reported this outcome at a USC faculty meeting, there were gasps of dismay. We all knew that we had lost one of a kind.

Because future historians will know the young Richard mainly from his writings, this is a fitting occasion to describe him more fully. For starters, it is notable that Richard’s social practice has been unusually communal. He has been an intensely loyal and dedicated member of the faculties to which he has belonged. This is not at all inconsistent with his libertarian streak, which permits an individual to voluntarily opt for social solidarity.

Richard possesses truly exceptional energy. On this dimension, he is situated perhaps four standard deviations above the median, shoulder to shoulder with his longtime colleagues Richard Posner and Cass Sunstein (two of the very few legal scholars whose work has drawn even more citations than Richard’s).²

In this age of increasing specialization, Richard Epstein also is one of the few law professors—again Richard Posner is another who comes to mind—to aspire to have a command of all fields of law. Epstein has taught most of the basic courses in the law school curriculum and his scholarship reflects the startling breadth of his legal

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1. Steven Michael Teles, *The Rise of the Conservative Legal Movement* 120–24 (Princeton U. Press 2008) (describing the role of USC in the early development of the field of law and economics).

2. According to a Brian Leiter tally, Epstein (4), Sunstein (2), and Posner (1) were among the four legal scholars most often cited in law journals in 2005–2008. Brian Leiter, *Top Ten Law Faculties in Scholarly Impact, 2005-2008*, http://www.leiterrankings.com/faculty/2008faculty_impact.shtml (last updated Feb. 19, 2009).

knowledge.

And Richard Epstein is a man of remarkable courage. For decades, he has challenged conventional opinion on a host of topics, knowing that he would draw fierce criticism from many commentators. Although most law professors nominally support the existence of a vigorous marketplace of ideas, most feel some discomfort when they venture a nonconformist opinion. Richard, by contrast, revels in the heat of academic battle.

To readers and acquaintances who do not know him well, Richard sometimes may appear to have an excessive self-confidence. This is an affect that helps him in settings where he is outnumbered by his critics. When he is among intimates, however, one of Richard's endearing graces is a bent for self-deprecation. At USC, he used to regale us with tales of his comically inept attempts to serve tea to classmates at Oxford and to teach, in his initial class as a law teacher, the fine points of future interests. Until Richard's wife Eileen eventually attained control over his wardrobe, he would have handily won any vote taken to identify the least stylishly dressed member of the USC law faculty.

Now in his sixties, Richard still maintains an affectingly boyish and innocent air. I recall participating in a panel discussion at Yale where a social scientist who had never met him cited a recent New York Times Magazine article that had hostilely profiled Richard.³ The speaker stated that he hoped that all law professors were duly aware of the menace posed by this ogre amongst us. This statement immediately brought a smile to the face of every law professor on the panel. We all knew from our associations with Richard that, temperamentally, he is far more the sprite than the ogre.

THE EPSTEIN STYLE: THE SCHOLAR AS LONE RANGER

From the outset of his academic career, Richard has largely presented his ideas as if they were self-generated—*sui generis*, to use a phrase from a language that he loves. A cautious scholar starts an article by describing the previous literature on the topic at hand, and then attempts to add a modest increment to it. This is not Richard's way. He has developed a distinctive voice by starting from basic normative principles of his own choosing. To resolve basic issues in the law of torts, he looks to determine "who hit whom."⁴ To divine "simple rules for a complex world," he has relied mostly on his own intuitions.⁵ This approach, of course, has contributed to his astonishing productivity. Once Richard has determined his governing normative principles, he can quickly apply them to the issues at hand.

Richard at times does cite authority, of course, to support his choices of basic principles. Westlaw's Journals and Law Reviews (JLR) database identifies him as the author of 221 articles, a remarkable total.⁶ Table 1 reveals the number of these articles

3. Jeffrey Rosen, *The Unregulated Offensive*, 154 N.Y. Times Mag. 42 (Apr. 17, 2005) (supplement of the N.Y. Times).

4. Richard A. Epstein, *A Theory of Strict Liability*, 2 J. Legal Stud. 151 (1973).

5. Richard A. Epstein, *Simple Rules for a Complex World* 30–36 (Harv. U. Press 1995).

6. The search was conducted on Feb. 9, 2009. The search term used was au(richard +2 epstein), which likely produced a number of false positives.

that contain citations to certain authors or sources. The table confirms that Richard has a penchant for venerable authority. Of the sources that I chose for inclusion in the tallies, John Locke, cited in 67 of Richard's articles, is the runaway winner. Richard frequently cites Locke to support the notion that first possession is the prime source of private property rights, the bedrock of his system of normative entitlements. Those who know Richard's work also will not be surprised to see that Table 1 reveals that he frequently makes references to Roman law (a subject that he has taught on and off throughout his career) and to Friedrich Hayek, whom he usually cites when arguing the merits of allocating resources by means of markets as opposed to central government planning.

<u>Author or Source</u>	<u>Number of Citing Articles</u>
<i>Some favorites</i>	
John Locke	67
"roman law"	39
Friedrich Hayek	34
William Blackstone	31
Robert Nozick	24
Adam Smith	21
<i>Some non-favorites</i>	
Milton Friedman's <i>Capitalism and Freedom</i>	1
Edmund Burke	0

Table 1. The Number of Epstein's 221 Articles that Include at Least One Citation to Selected Authors or Sources

Consistent with his inclination to go it alone, Richard tends to distance himself from notable conservative scholars of the generation just senior to his. Milton Friedman's famous *Capitalism and Freedom*, published when Richard was in college at Columbia, presents a powerful argument in favor of limited government and strong protection of negative liberties.⁷ Although Richard himself endorses these same substantive positions, Table 1 demonstrates that he never elevated Friedman's book into his personal canon. Richard's writings pay somewhat more respect to Robert Nozick, a prominent libertarian and advocate of small government.⁸ In *Takings*, however, Richard lumps Nozick together with John Rawls in an extended discussion of "rival theories," and takes pains to distinguish Nozick's approach from his own.⁹

7. Milton Friedman, *Capitalism and Freedom* (U. Chi. Press 1962).

8. See Robert Nozick, *Anarchy, State, and Utopia* (Basic Bks. 1974). Richard has acknowledged that Nozick "exerted much influence on my intellectual development." Richard A. Epstein, *Taking Stock of Takings*, 15 Wm. & Mary Bill Rights J. 407, 419 (2006).

9. Richard A. Epstein, *Takings: Private Property and the Power of Eminent Domain* 334-38 (Harv. U. Press 1985).

LOCATING EPSTEIN WITHIN FOUR STRANDS OF CONSERVATIVE THOUGHT

Because Richard loves intellectual jousting, I devote the balance of this essay to posing a serious question to him. In many writings, he has severely criticized the Supreme Court's much-vilified *Kelo* decision, which held that the Public Use Clause of the Fifth Amendment did not prevent the City of New London, Connecticut, from exercising the power of eminent domain to acquire Ms. Kelo's house as part of an economic development project.¹⁰ My question is whether his position on *Kelo* is consistent with the principles one would expect to be held by a star speaker of an organization named the Federalist Society.

Richard is popularly identified as a "conservative," an imprecise word. To set up my discussion of the *Kelo* issue, I identify four political ideologies that commonly are included under this umbrella term: libertarianism, utilitarianism, Burkeanism, and federalism. On some issues, these creeds point in the same direction. On the *Kelo* issue, I argue, they do not.

According to Richard's own account, he started his scholarly career as a natural rights libertarian. His chief concern at the time was the protection of negative liberties, that is, an individual's entitlements to resist unjustifiable demands or interferences from either states or private actors. However, with the publication of *Takings* (his best-known book) in 1985, Richard's thinking took a distinctly utilitarian turn.¹¹ There he argued that "[a]ll government action must be justified as moving a society from the smaller to the larger pie."¹² This move was easy for him, however, because he asserted in *Takings* that "both libertarian and utilitarian justifications of individual rights . . . properly understood, tend to converge in most important cases."¹³ This has remained his position. For example, in 1998, he asserted in *Principles for a Free Society* that there is an "eerie congruence between natural law and utilitarian theories on some of the key building blocks" of legal principle.¹⁴

Richard's claim that libertarianism and utilitarianism are largely congruent has drawn forceful criticism.¹⁵ For example, even if the taking of Ms. Kelo's house would

10. *Kelo v. City of New London*, 545 U.S. 469 (2005).

11. See e.g. Richard A. Epstein, *The Uneasy Marriage of Utilitarian and Libertarian Thought*, 19 Quinnipiac L. Rev. 783, 784–85 (2000) (describing his own evolution from being a devotee of abstract libertarian principles to an analyst who focuses on the consequences of alternative legal rules). Utilitarianism can be considered a strand of conservative thought because many committed utilitarians, such as Richard himself, tend to be unenthusiastic about government efforts to redistribute resources from those who have more to those who have less. See Richard A. Epstein, *Standing Firm on Forbidden Grounds*, 31 San Diego L. Rev. 1, 3 n. 5 (1994) (asserting that he vacillates between (1) opposing all redistribution from one person to another and (2) tolerating it when it would be implemented entirely through the use of general tax revenues).

12. Epstein, *supra* n. 9, at 4. In the illustration that appears on the page cited, the shift from the smaller to the larger pie is Pareto superior because the shift increases the size of each individual's slice. Elsewhere in this book, however, Richard states that a government regulation may be defensible in some instances as long as the gainers gain more than the losers lose. *Id.* at 200–01. As he notes, this is the Kaldor-Hicks definition of efficiency, and more in keeping with his utilitarian creed. *Id.*

13. *Id.* at 5.

14. Richard A. Epstein, *Principles of a Free Society: Reconciling Individual Liberty with the Common Good* 11 (Basic Bks. 1998) [hereinafter Epstein, *Free Society*]; see also Richard A. Epstein, *The Utilitarian Foundations of Natural Law*, 12 Harv. J.L. & Pub. Policy 713, 716 (1989).

15. See e.g. Larry Alexander & Maimon Schwarzschild, *The Uncertain Relationship Between Libertarianism and Utilitarianism*, 19 Quinnipiac L. Rev. 657 (2000); Eric R. Claeys, *Takings: An*

increase the aggregate pie of New Londoners, a natural rights libertarian might nevertheless see it as an unwarranted interference with her personal autonomy. In many normative contexts, however, I myself find Richard's utilitarian approach highly congenial. I agree with Richard that judges and legislators engaged in shaping small-bore legal doctrines usually serve us best when they give primacy to efficiency considerations, such as the reduction of transaction costs and the provision of incentives.¹⁶ This sort of utilitarian logic underlies, for example, the tendency of the common law of property to confer simple *in rem* entitlements on single owners.

In many policy arenas, the utilitarian approach is not at war with concerns about distributive justice. A citizen's interactions with a state play out over many years and occur on numerous fronts. If the state were consistently to adhere to rule utilitarianism—that is, to strive to adopt, without regard to the incidence of benefits or costs, cost-justified rules when dealing with the many varied items on its legal agenda—in the long run, as a probabilistic matter, the vast majority of citizens would end up net gainers.¹⁷

When foundational legal entitlements are at stake, however, I myself would not necessarily make efficiency considerations paramount.¹⁸ These basic entitlements include self-ownership, the protection of bodily integrity, and the ground rules that enable exchange. Virtually all of us would strongly oppose the institution of slavery on both distributive and liberty grounds, even in a context where it could somehow be proven that the system of slavery would benefit the non-slave population more than it would hurt those enslaved. And Richard, who has called self-ownership a “moral imperative,” appears to agree.¹⁹ Most legal issues that courts and legislatures confront, however, including the issue in *Kelo*, are not foundational. I agree with Richard that these other sorts of issues are appropriately analyzed by means of a largely, or even entirely, utilitarian calculus.

In his voluminous scholarly works, Richard usually focuses primarily on the proper configuration of substantive rights, not on the processes of legal change and the allocation of lawmaking responsibilities among different institutions. By contrast, Burkeanism and federalism, the final two strands of conservative thought that I identify, give primacy to these sorts of structural questions.

The thought of Edmund Burke is back. This Irish-born statesman warned of the dangers of overly rapid legal change—notably, in his own time, the French Revolution.²⁰

Appreciative Retrospective, 15 *Wm. & Mary Bill Rights J.* 439, 452–55 (2006).

16. Epstein, *supra* n. 5, at 30–36.

17. See A. Mitchell Polinsky, *Probabilistic Compensation Criteria*, 86 *Q.J. Econ.* 407 (1972); Richard A. Posner, *The Ethical and Political Basis of the Efficiency Norm in Common Law Adjudication*, 8 *Hofstra L. Rev.* 487, 491–95 (1980); but cf. John Rawls, *A Theory of Justice* 60–65 (Harv. U. Press 1971) (arguing that a person behind a veil of ignorance would reject an approach that would not serve the interests of those who are most disadvantaged).

18. See Robert C. Ellickson, *Order Without Law: How Neighbors Settle Disputes* 174–76 (Harv. U. Press 1991); see also Robert C. Ellickson, *The Household: Informal Order Around the Hearth* 13–21 (Princeton U. Press 2008). In my view, issues of distributive justice unquestionably warrant attention but usually are better addressed by means of broad tax and welfare policies than by adjustments to small-bore legal rules. See Louis Kaplow & Steven Shavell, *Should Legal Rules Favor the Poor?* 29 *J. Leg. Stud.* 821 (2000).

19. Epstein, *supra* n. 5, at 59. He couples this moral assertion with various utilitarian arguments against slavery. *Id.* at 54–59.

20. Edmund Burke, *Reflections on the Revolution in France* (Frank M. Turner ed., Yale Univ. Press 2003).

Burke also was highly skeptical of top-down social planning and instead preferred to assign major roles to the diffuse institutions of civil society. A liberal state, by means of its property, contract, and association law, helps enable its citizens to build these institutions from the bottom up.

A generation ago, Alexander Bickel was one of the few law professors to find inspiration in Burke.²¹ During the past decade or two, however, a highly diverse group of legal scholars, including Anthony Kronman, Thomas Merrill, Cass Sunstein, and Ernest Young, have praised part or all of the Burkean mindset.²² Beyond the legal academy, commentators such as Sam Tanenhaus have pushed Burkeanism as the most promising basis for the revival of a conservative politics.²³ Given the boom in this brand of conservatism, it is noteworthy that *not one* of Richard's many articles includes a citation to Burke.²⁴

The fourth strand of conservative thought, the federalist perspective, most closely reflects my own views on structural issues. A federalist favors organizing political, economic, and social life in accordance with the principle of subsidiarity. This calls for the decentralization of the authority to handle a task to the least centralized agency capable of handling that task. When significant scale efficiencies would not be sacrificed, federalists should support the decentralization of authority from a national government to smaller governments, and, where sensible, from governments to the institutions and customs of civil society.²⁵ The principle of subsidiarity, whose venerable roots lie in Catholic social thought, is explicitly endorsed in the treaty that created the European Community.²⁶ The same principle also is implicit not only in the U.S. Constitution, which limits the powers of the national government, but also in the

21. See Alexander M. Bickel, *The Morality of Consent* 11–25 (Yale Univ. Press 1975).

22. See e.g. Anthony T. Kronman, *Precedent and Tradition*, 99 Yale L.J. 1029 (1990); Thomas W. Merrill, *Bork v. Burke*, 19 Harv. J.L. & Pub. Policy 509 (1995); Cass R. Sunstein, *Burkean Minimalism*, 105 Mich. L. Rev. 353 (2006); Ernest Young, *Rediscovering Conservatism: Burkean Political Theory and Constitutional Interpretation*, 72 N.C. L. Rev. 619 (1994). For a critical overview of the Burkean revival, see Carl T. Bogus, *Rescuing Burke*, 72 Mo. L. Rev. 387 (2007).

23. Sam Tanenhaus, *Conservatism is Dead: An Intellectual Autopsy of the Movement*, 240 The New Republic 12 (Feb. 18, 2009):

The story of postwar American conservatism is best understood as a continual replay of a single long-standing debate. On one side are those who have upheld the Burkean ideal of replenishing civil society by adjusting to changing conditions. On the other are those committed to a revanchist counterrevolution, the restoration of America's pre-welfare state *ancien regime*. And, time and again, the counterrevolutionaries have won. The result is that modern American conservatism has dedicated itself not to fortifying and replenishing civil society but rather to weakening it through a politics of civil warfare.

Id. at 13.

24. See *supra* tbl. 1.

25. Accord Epstein, *Free Society*, *supra* n. 14, at 31–39 (asserting that custom commonly is a defensible source of law).

26. *Treaty Establishing the European Community*, art. 5 (Dec. 24, 2002), 2002 O.J. (C 325) 33:

In areas which do not fall within its exclusive competence, the Community shall take action, in accordance with the principle of subsidiarity, only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community.

Id. at (C 325) 42. For both an overview and defense of the principle, see e.g., George A. Bermann, *Taking Subsidiarity Seriously: Federalism in the European Community and the United States*, 94 Colum. L. Rev. 331 (1994).

state statutory and constitutional provisions that confer home rule on some municipalities. Federalists tend to oppose resolving the highly contested issues of the day—such as abortion, the death penalty, euthanasia, same-sex marriage—through federal constitutional litigation. Federal constitutional mandates centralize in two obvious ways: they nationalize the policymaking process and also insulate it from legislative alteration.²⁷

Federalism is a close cousin of Burkeanism. Adherents of both creeds tend to be skeptical of the benefits, in many contexts, of centralized social planning. In some instances, however, the two systems of belief are not congruent. A federalist, for example, might favor a legal reform that would dramatically decentralize (such as the overruling of *Roe v. Wade*²⁸), whereas a Burkean might object that a legal change of that magnitude would be too unsettling.²⁹

Richard of course is fully aware that some scholars, including many who cannot be described as Burkeans or federalists, are deeply concerned about the structural dimensions of lawmaking. At places in his voluminous writings, he has identified himself as a “defender of federalism,” primarily on the ground that the right of an individual or firm to exit from a state tends to limit abuses by state governments.³⁰ In one article he quotes this concise summary of federalism’s virtues that appeared in an opinion of Justice O’Connor:

This federalist structure of joint sovereigns preserves to the people numerous advantages. It assures a decentralized government that will be more sensitive to the diverse needs of a heterogeneous society; it increases opportunity for citizen involvement in democratic processes; it allows for more innovation and experimentation in government; and it makes government more responsive by putting the States in competition for a mobile citizenry.³¹

For the reasons that Justice O’Connor expounds, Americans have benefited greatly from the regulatory competition that federalism engenders. Those who framed the U.S. Constitution wisely decided, for example, to leave the making of real property law, including eminent domain law, largely in the hands of the individual states.

In his analyses of takings law, however, Richard has never given any weight to

27. During the Jim Crow era in the South, the notion of “states’ rights” became a cover for the perpetuation of legally enforced racial segregation. Thanks in considerable part to the Supreme Court’s own efforts to redress the malapportionment of state legislative bodies and dismantle barriers that had limited the participation of black voters, federalism today is a far more viable principle than it was several generations ago. See e.g. *Reynolds v. Sims*, 377 U.S. 533 (1964) (holding that malapportioned districts used to elect Alabama legislators violated the equal protection clause).

28. *Roe v. Wade*, 410 U.S. 113 (1973) (holding unconstitutional a state statute that banned abortion prior to the viability of the fetus).

29. Justices O’Connor, Kennedy, and Souter make the latter argument in their joint opinion in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 854–69 (1992). But cf. Yair Listokin, *Learning Through Policy Variation*, 118 Yale L.J. 480 (2008) (asserting that Burkeans are likely to be too timid about adopting a new policy in a context where the policy could readily be reversed).

30. Richard A. Epstein, *Exit Rights Under Federalism*, 55 L. & Contemp. Probs. 147, 147–49 (1992).

31. Richard A. Epstein, *The Federalism Decisions of Justices Rehnquist and O’Connor: Is Half a Loaf Enough?* 58 Stan. L. Rev. 1793, 1809 (2006) (quoting the opinion of Justice O’Connor in *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991)). Justice O’Connor appended to her concise summary citations to two influential sources: Michael McConnell, *Federalism: Evaluating the Founders’ Design*, 54 U. Chi. L. Rev. 1484, 1491–11 (1987) and Deborah Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 Colum. L. Rev. 1, 3–10 (1988). *Gregory*, 501 U.S. at 458.

issues of federalism.³² And the word *federalism* does not appear in the index of any of the books in which he sets out his most overarching views about the structure of legal entitlements.³³ When there are specific substantive battles to be fought, he tends to push structural questions to the side.

EPSTEIN ON *KELO*

Just after the Supreme Court released its *Kelo* decision in June 2005, Richard published an essay in the *Wall Street Journal* that described the ruling as “truly horrible” and “a new low point in the Supreme Court’s takings jurisprudence.”³⁴ In subsequent commentary he has stuck with this negative assessment.³⁵

Richard’s criticisms of *Kelo* have been nuanced, worthy of a scholar who has spent decades puzzling over eminent domain issues. He does not resort to knee-jerk arguments based on asserted inherent rights of a private landowner to resist most intrusions from would-be government takers. His arguments instead are mostly—arguably exclusively—based on utilitarian considerations. In *Takings* and elsewhere, Richard has recognized that eminent domain can be a useful tool for overcoming holdout problems that otherwise would stymie a wealth-enhancing land assemblage.³⁶

Nor does he categorically oppose the use of eminent domain to help a private business, as opposed, say, to open a new public thoroughfare. In *Kelo*, the New London Development Corporation (NLDC) had previously persuaded the Pfizer Corporation to build a major research facility on the waterfront of the Fort Trumbull area of the city. Thereafter, the NLDC shaped the redevelopment project on the adjoining ninety acres of land largely, although not entirely, to benefit Pfizer.³⁷ The NLDC’s plans called for the construction of facilities, such as a hotel and conference center, that would directly enhance the value of Pfizer’s research complex (and also, according to project advocates, boost the city’s economy and tax base).³⁸ For Richard, a utilitarian, any intent to benefit Pfizer would not necessarily negate the presence of a “public use.” In his *Wall Street Journal* article criticizing *Kelo*, Richard refers to the facts of *Strickley v. Highland Boy Gold Mining Co.*³⁹ There Justice Holmes, writing for a unanimous Court, sustained Utah’s authorization of a mining company to use the power of eminent domain to acquire the rights of a single neighboring owner in order to install an aerial bucket line

32. I am not the first person to make this observation. See Stewart E. Sterk, *The Federalist Dimension of Regulatory Takings Jurisprudence*, 114 *Yale L.J.* 203, 215–17 (2004).

33. I am referring to Epstein, *supra* n. 5, Epstein, *supra* n. 9, and Epstein, *Free Society*, *supra* n. 14.

34. Richard A. Epstein, *Supreme Folly*, 245 *Wall St. J.* A14 (June 27, 2005).

35. Richard A. Epstein, *Supreme Neglect: How to Revive Constitutional Protection for Private Property* 83–87 (Oxford U. Press 2008).

36. See Epstein, *supra* n. 9, at 161–81.

37. Jeff Benedict, *Little Pink House* 107–08, 115–16, 235–38 (Grand C. Publg. 2009) (reporting excerpts from internal Pfizer documents). Justices Stevens and Kennedy, who did not have access to some of the documents that Benedict uncovered, in their *Kelo* opinions stressed the trial judge’s finding that the NLDC’s plans were not primarily motivated to help Pfizer or any other private party. *Kelo*, 545 U.S. at 478, 491–92 (2005). The trial judge plausibly concluded that the NLDC’s plans were less Pfizer-oriented on Parcel 4A, where Ms. Kelo’s house was situated, than on some other parcels. *Kelo v. City of New London*, 2002 WL 500238 at **1, 42 (Conn. Super. Mar. 13, 2002).

38. Benedict, *supra* n. 37, at 115.

39. 200 U.S. 527 (1906).

for transporting ore. The *Strickley* result was justified, wrote Richard, to prevent the “blockade [of a] productive venture” on behalf of an owner of “scrub lands” who was holding out to “demand a huge chunk of the mining profits.”⁴⁰

Ms. Kelo’s claim, Richard asserted, was quite different from that of the condemnee in *Strickley*. He offered four distinctions. First, Ms. Kelo and her fellow claimants were not acting strategically in that they did not want to sell their homes at all. Second, New London’s plan did not appear to him to be a productive venture. The plan had yet to attract any private investors and also was suspiciously vague. The NLDC’s plan, for example, ambiguously designated Ms. Kelo’s block for “park support.” Third, even if the New London venture promised to be productive, the project seemed not to necessitate the acquisition of the holdouts’ houses. As a result, the owners could not obtain great leverage by refusing to sell. Fourth, according to Richard, the “subjective losses” of the New London homeowners would be “enormous” in comparison to those of the owner of the scrublands.⁴¹ (These subjective losses would not be made whole if the homeowners were merely awarded, as just compensation, the market value of their houses.)

Had Richard been persuaded of the efficiency of New London’s plan and had he also regarded Ms. Kelo as having the power to scotch it by holding out, it appears that he would not have wanted the Court to interpret the Public Use Clause to protect her.⁴² Thus in *Takings* and elsewhere he has defended the federal constitutionality of the Mill Acts that enabled early industrialists to place dams across streams, thereby creating millponds that flooded upstream neighbors. At least when the Mill Act in question would require the industrialist to share some of the gains by paying extra compensation to those who lost their lands, Richard has argued that the Public Use Clause should not bar the taking.⁴³ A utilitarian he truly is.

THE FOOLISHNESS OF NEW LONDON’S FORT TRUMBULL PROJECT

I wholly endorse Richard’s conclusion that the New London Development Corporation was not justified in using eminent domain powers to take Ms. Kelo’s house. In the United States, most city multiblock urban redevelopment projects involving total clearance, as the NLDC’s project at Fort Trumbull initially did, have turned out poorly.⁴⁴ Cities typically undertake these sorts of ventures solely because a higher-level government has offered financial support that civic leaders find irresistible. The many failed urban renewal projects of the 1950s and 1960s, for example, arose out of large federal grants-in-aid. Absent fiscal inducements from the State of Connecticut, New

40. Epstein, *supra* n. 34.

41. Writing two years later, Richard put special stress on the third and fourth of these reasons: “So the best approach here is to accept the constitutional tradeoff that allows the taking only when the loss in subjective value is small and the locational necessities are great.” Epstein, *supra* n. 35, at 85.

42. *Id.* at 83–86; see also Epstein, *Free Society*, *supra* n. 14, at 239–46 (arguing that the use of eminent domain powers may be justified to overcome “serious” holdout problems, and generally praising condemnations pursuant to the Mill Acts).

43. *Id.* at 240–41; Epstein, *supra* n. 9, at 170–75.

44. See Robert C. Ellickson & Vicki L. Been, *Land Use Controls: Cases and Materials* 830–31, 840–42 (3d ed., Aspen Publishers 2005) (citing sources supporting this proposition).

London would never have embarked on a ninety-acre clearance project at Fort Trumbull. Connecticut Governor John Rowland and his staff actually initiated the provision of this aid, which ultimately totaled more than \$70 million, to prompt the City of New London to revivify the NLDC.⁴⁵

Why are municipal pork-barrel projects so commonly the outgrowth of imprudent federal or state spending? When funding comes from above, many local taxpayers (some of the closest monitors of city hall) turn from opposition to support. And politicians at all levels of government tend to relish bricks-and-mortar projects. These undertakings provide opportunities to cut ribbons and, more importantly, award valuable contracts. Governor Rowland well understood that construction projects can prove to be personally helpful. The contractors and other intermediaries involved in these projects commonly reciprocate by making campaign contributions or other gifts. In 2005, the year of the *Kelo* decision, Rowland was sentenced to prison for having received free improvements to his vacation cottage (albeit not from a New London contractor).⁴⁶

The NLDC's plans for the Fort Trumbull project had numerous flaws. First, the undertaking was indefensibly large. By the end of the twentieth century, Hartford, New Haven, and other aging cities in New England rarely were designating for redevelopment an area as large as ninety acres (10-to-12 ordinary city blocks). Second, as mentioned, the NLDC's original plans called for total clearance of all structures in the project area. This bulldozer style of urban renewal, which tends to rob a city of its historic heritage, is distinctly passé.⁴⁷ Third, none of the key facilities included in the plans—namely a National Coast Guard Museum, and a hotel and conference center to complement Pfizer's facility—inherently required a site greater than 5-to-10 acres. A patient private land developer can assemble a site of that size without having to resort to the use of eminent domain. Both the Disney Corporation and Harvard University, for example, have accomplished far larger assemblages by using tactics such as secret buying agents.⁴⁸ Fourth, the NLDC's plan would have situated neither the museum nor the hotel on Parcels 3 and 4A, the blocks where all the *Kelo* holdouts were located.⁴⁹ None of the NLDC's other planned uses—office structures, high-end housing, parking for Fort Trumbull—required consolidated acreage large enough to pose risks of serious holdout problems. Fifth, the NLDC in effect admitted that it could have designed the project around the lands of the *Kelo* holdouts, who among them controlled only 2% of the total ninety acres.⁵⁰ For example, when pressured, the NLDC agreed not to condemn the

45. See Benedict, *supra* n. 36, at 9–11, 17–22, 52–54, 143.

46. William Yardley & Stacey Stowe, *A Condit Rowland Gets a Year for Accepting \$107,000 in Gifts*, 154 N.Y. Times A1 (Mar. 19, 2005).

47. See Benedict, *supra* n. 36, at 265–66 (recounting an expert's testimony at the *Kelo* trial that only one of the hundred New England redevelopment projects in the previous ten years had called for complete clearance).

48. Daniel B. Kelly, *The "Public Use" Requirement in Eminent Domain Law: A Rationale Based on Secret Purchases and Private Influence*, 92 Cornell L. Rev. 1, 22–24 (2006). The first phase of Harvard's planned Allston campus encompasses some 130 acres. See Lauren Marshall, *Harvard Submits Multi-Decade Master Plan Framework for Allston*, <http://www.allston.harvard.edu/news/IMP%20Press%20Release%20011107.pdf> (last accessed Sept. 28, 2009).

49. Benedict, *supra* n. 36, at 187, 207, 243.

50. *Id.* at 215.

building of the Italian Drama Club, a politically connected organization.⁵¹ And during various negotiations, the NLDC's chosen developer, Corcoran Jennison, offered compromises that would have preserved the holdouts' buildings on Parcel 3.⁵²

There is a facially plausible case for a public clearance project when a city intends to rejigger an obsolete street layout (as Los Angeles did just north of the USC campus) or to clean up abandoned piers and warehouses at a harbor (as Charleston, South Carolina did when it created its Waterfront Park). Because these sorts of assemblages commonly include public lands, a private actor without eminent domain powers cannot accomplish them in the absence of city help. The NLDC in fact did spend a portion of the state-provided funds to upgrade the roads, sewers, and streetlights in the Fort Trumbull project area.⁵³ But few of these expenditures necessitated difficult land assemblages. The trial judge's opinion in *Kelo* microscopically reviewed, for example, the NLDC's plans for improvements to the four streets surrounding Parcel 4A, Ms. Kelo's block.⁵⁴ East Street separates this block from Fort Trumbull State Park, a middling historical and recreational attraction. The NLDC desired to take the homes on Parcel 4A, among other reasons, to provide space for "bus pullovers" at which visitors to the park could disembark. The trial judge concluded, however, that there was no necessity to place these pullovers on Ms. Kelo's side of East Street rather than on the park's side. He asked rhetorically, "[C]an the state refuse to grant an easement of a few feet on state park land to save these homes . . . ?"⁵⁵

The post-*Kelo* history of the Fort Trumbull redevelopment project casts further doubt on its efficiency. The Supreme Court decision enabled the NLDC to complete its acquisitions, which it promptly did. In June 2006, Ms. Kelo, for example, sold her house to the NLDC for \$442,000, retaining the right to move the structure elsewhere.⁵⁶ The NLDC promptly demolished the holdouts' structures, but discovered that there was little immediate market demand for the vacant site created. Corcoran Jennison, since 1999 the NLDC's preferred developer for the most of the Fort Trumbull project, voluntarily relinquished that role in 2008. As of mid-2009, no ground had been broken for a new building anywhere on the ninety-acre site.⁵⁷ In late 2009, Pfizer announced that it would discontinue all operations at its Fort Trumbull complex and seek to sell or lease the facility.⁵⁸

A FEDERALIST PERSPECTIVE ON THE ISSUE IN *KELO*

Richard and I thus agree that New London's Fort Trumbull project was a classic example of municipal abuse of the power of eminent domain. But does it necessarily

51. *Id.* at 65–66, 150–53, 163–64, 175–76.

52. *Id.* at 275, 278–79.

53. *Id.* at 254.

54. *Kelo*, 2002 WL 500238 at **77–89.

55. *Id.* at *87.

56. Benedict, *supra* n. 36, at 374.

57. *Id.* at 377 (assessing the state of the project as of fall 2008); Associated Press, *Eminent Domain Battleground Still Bare*, New Haven Register A3 (Sept. 26, 2009).

58. Associated Press, *Pfizer to Close Site, Move 1,500 Jobs*, New Haven Register C1 (Nov. 10, 2009).

follow that the United States Supreme Court should be on the front lines of efforts to curb these sorts of government excesses?⁵⁹ Richard does not hesitate to assign the Court that role.⁶⁰ I disagree. There are several other, more decentralized, institutions that are better suited to the task. In *Kelo*, these other actors included, most notably, the members of the state judiciary and the elected officials of both the State of Connecticut and the City of New London. Although, as noted, Richard has at times extolled the benefits of federalism, his writings on both takings and the public use issue seldom if ever broach the issue of the division of labor between the state and federal judiciaries.

In my view, state courts, not federal courts, should be centrally responsible for limiting eminent domain abuses by state and local agencies. In *Kelo*, the Supreme Court of Connecticut failed to perform its duties. The Connecticut Superior Court judge who had presided over the *Kelo* trial had held that New London was constitutionally barred, for lack of public necessity, from condemning the lands on Ms. Kelo's block.⁶¹ Instead of affirming that carefully reasoned conclusion, the Supreme Court of Connecticut reversed it by 4–3 vote.⁶² The same majority also dubiously declined to interpret that the “public use” clause of the Connecticut Constitution more strictly than the analogous federal clause.⁶³ Finally, these four justices rejected the dissenters' plausible argument that heightened judicial scrutiny was appropriate in an instance such as *Kelo* where eminent domain powers are being exercised to promote private economic development.⁶⁴ Although the Supreme Court of the United States' decision in *Kelo* ultimately was the one that became the object of public wrath, the Supreme Court of Connecticut, in fact, was the judicial institution that fell down on the job.

Unlike Richard, I conclude, on grounds of federalism, that the Supreme Court of the United States was wise in *Kelo* to refrain from imposing a restrictive set of national rules on cities' use of the power of eminent domain.⁶⁵ A state's eminent domain policies have few effects on residents of neighboring states. When states are left free to shape their own rules of public use and public necessity, competitive federalism is at work.⁶⁶

59. In this essay, all of my arguments concerning the use of eminent domain powers are couched in instrumental terms, just as Richard's arguments usually are. I do not directly appraise the pertinent judicial precedents and the constitutional and statutory texts that a judge would be compelled to discuss. Those legal authorities are assumed to be sufficiently open-textured to permit a judicial interpretation that would give primacy to the federalist values expressed elsewhere in the federal constitution. That the Justices who heard *Kelo* ended up writing four quite different opinions supports the notion that there indeed is room for varying interpretations. See generally *Kelo*, 545 U.S. 469.

60. Epstein, *supra* n. 35, at 8 (“As a matter of first principle, I take the decidedly unpopular view that the takings clause (and other constitutional provisions) commits this nation to a system of strong property rights and limited government.”).

61. *Kelo*, 2002 WL 500238 at *74 (holding that the NLDC had shown the requisite necessity for taking land in Parcel 3, but not in Parcel 4A, where Ms. Kelo's house was situated).

62. *Kelo v. City of New London*, 843 A.2d 500 (Conn. 2004).

63. *Id.* at 521–28.

64. *Id.* at 528–36, 555–56, 568–74. *But cf. id.* at 574–602 (Zarella, J., dissenting). The dissenters were prepared to invalidate the NLDC's takings in both Parcels 3 and 4A. They do not make clear, however, whether they would rest this result on the state public use clause, the federal public use clause, or both. *Id.*

65. I agree with Thomas Merrill that, contrary to its critics, the U.S. Supreme Court's *Kelo* decision actually raises the judicial standard of review under the federal public use clause. See Thomas W. Merrill, *Six Myths About Kelo*, 20 Prob. & Prop. 19, 20–21 (Jan.–Feb. 2006).

66. The immobility of land reduces political pressures on states and cities to treat landowners fairly. When a city has abused a landowner by inflicting either a physical or regulatory taking, the landowner can exit from

It is notable that the Supreme Court's *Kelo* decision triggered a frenzy of legal activity at the state and local levels (some of it largely symbolic).⁶⁷ For example, Rowland's successor as the Governor of Connecticut, Jodi Rell, largely sympathized with Ms. Kelo and the other petitioners. She called for a temporary statewide moratorium on eminent domain actions and set aside a total of \$2.6 million in extra compensation for the New London holdouts.⁶⁸ And, just a few months after *Kelo*, the New London City Council turned against the leadership of the NLDC and forced the resignation of its chief operating officer.⁶⁹

No scholar is more responsible than Richard Epstein himself for the national revulsion at New London's treatment of Ms. Kelo.⁷⁰ As one of the star speakers of an organization that calls itself the Federalist Society, should he not be delighted that the post-*Kelo* legal debate mostly played out within the halls of state and local government?

the abusive relationship only by selling the affected land. But, if the abuse were widely known, exiting in this fashion would not enable the landowner to avoid financial loss because most, if not all, of the cost of the abuse would be negatively capitalized in the sale price. Richard himself has stressed this point. See Epstein, *supra* n. 30, at 154–57.

Nonetheless, states in fact do adopt statutory and constitutional provisions to protect the owners of captive assets from overreaching governments. These stem partly from forces of interstate and interlocal competition. Even a politically connected voter, who herself would have little risk of being a victim of eminent domain abuse, has a stake in the enactment of state and local limits on land takings. When she eventually decided to sell her land, a state's lack of takings protections would result in lower bids from buyers. In addition, virtually all individuals and firms that own land also own other, more mobile, assets that a government typically would not want to lose to a neighboring taxing jurisdiction. For instance, each of the individual petitioners who lost their houses as a result of *Kelo* promptly moved out of the City of New London, vowing never to return. Benedict, *supra* n. 36, at 376. New London, by pursuing the Fort Trumbull project, thus removed from the city's tax base both the petitioners' human capital and also their personal property (such as automobiles, assets on which most Connecticut localities levy property taxes).

67. Accounts of the various post-*Kelo* legal developments include Steven Seidenberg, *Where's the Revolution?* 95 ABA J. 50, 52 (Apr. 2009), and Ilya Somin, *The Limits of Backlash: Assessing the Political Response to Kelo*, 93 Minn. L. Rev. 2100 (2009). Somin persuasively argues that a majority of the legislative responses have been relatively toothless. Nonetheless, even he identifies 16 states where legislative reforms have been "effective." *Id.* at 2114, 2118–19 tbl. 5. Moreover, after the Supreme Court's decision in *Kelo*, state courts in some of the remaining 34 states began to interpret more strictly state constitutional restrictions on municipal use of eminent domain powers. See, e.g. *City of Norwood v. Horney*, 853 N.E.2d 1115, 1122–23, 1136–42 (Ohio 2006); *Board of Co. Commrs. of Muskogee Co. v. Lowery*, 136 P.3d 639, 650–51 (Okla. 2006).

68. Benedict, *supra* n. 36, at 331, 357, 363.

69. *Id.* at 348–51.

70. James Ely concludes that Epstein has had more effect on legal culture than on judicial decisions as such. According to Ely, Epstein has succeeded in reopening debate over the New Deal legacy, and has mounted a strong challenge to Thomas Grey's thesis that the idea of property has "disintegrated." James W. Ely, *Impact of Richard A. Epstein*, 15 Wm. & Mary Bill Rights J. 421 (2006). Richard has been modest about his own contributions: "It is presumptuous for anyone to think that one book or even one career can shift mainstream understanding over an institution as important and complex as property rights. But, gee, is it ever fun to try." Epstein, *supra* n. 8, at 420.

