

# YIELDING TO THE CONFISCATION OF PUBLIC AND PRIVATE PROPERTY: JUDICIAL DEFERENCE UNDER THE COPYRIGHT AND TAKINGS CLAUSES

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[W]e are not at liberty to second-guess congressional determinations and policy judgments of this order, however debatable or arguably unwise they may be.<sup>1</sup>

– Justice Ruth Bader Ginsburg on the Copyright Clause

Without exception, our cases have defined [“Public Use”] broadly, reflecting our longstanding policy of deference to legislative judgments in this field.<sup>2</sup>

– Justice John Paul Stevens on the Takings Clause

### INTRODUCTION

The Copyright Clause of the U.S. Constitution empowers Congress “[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”<sup>3</sup> The contours of the eminent domain power are set out in the Fifth Amendment: “nor shall private property be taken for public use, without just compensation.”<sup>4</sup> The judiciary approaches government action taken pursuant to these clauses with a respectfully deferential attitude. This Article attempts to determine if judicial deference should be uniform under these clauses by evaluating the institutional competence concerns in two relatively recent Supreme Court decisions. Although there are many types of exercises of eminent domain power and intellectual property power, this Article focuses on the interpretations of “Public Use” for physical takings and the Copyright Clause as applied to copyright extensions.

In *Kelo v. City of New London*, the Supreme Court deferred to a local municipality’s interpretation of “Public Use” under the Takings Clause, and held that economic development constituted a valid taking.<sup>5</sup> In *Eldred v. Ashcroft*,<sup>6</sup> the Supreme Court held constitutional—under a rational basis standard—a twenty-year retroactive and prospective copyright extension. The same Justices decided both cases, but the divergence in these Justices’ views on the applicable level of judicial deference between these two clauses creates an interesting puzzle. For example, Justice John Paul

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1. *Eldred v. Ashcroft*, 537 U.S. 186, 208 (2003).  
2. *Kelo v. City of New London*, 545 U.S. 469, 480 (2005).  
3. U.S. CONST. art. I, § 8, cl. 8.  
4. U.S. CONST. amend. V.  
5. *Kelo*, 545 U.S. at 488–90.  
6. 537 U.S. 186 (2003).

Stevens allows a broad definition of public use and will generously defer to the legislature so long as the action is rationally related to the stated goal. In contrast, Justice Stevens criticized the majority in *Eldred* for essentially letting Congress do whatever they wished with the Copyright Clause.<sup>7</sup> Conversely, the dissenting Justices in *Kelo* worried greatly about misuse of the takings power while those same Justices joined the majority in *Eldred*, which applied a rational basis standard that significantly limited any judicial role in policing the Copyright Clause.<sup>8</sup>

An interesting comparison can be drawn here. Both takings and copyright extensions involve a transfer of property. In takings, government transfers the use of property from private to public ownership. In copyright extensions—and retroactive extensions in particular—the government transfers public property back into the hands of the private owners.<sup>9</sup> In both instances, government defines the actual property interest in the first place. State law defines the private property that the government takes,<sup>10</sup> while the federal government both grants and limits the intellectual-property monopoly right. This Article compares the deference regimes in *Kelo* and *Eldred* to answer one question: Should the judiciary defer to the legislature more generously when it confiscates a private ownership right or when it confiscates a public ownership right? I conclude that judicial deference is far more appropriate in takings than in copyright extensions.

Although *Kelo* and *Eldred* have been the subject of extensive academic debate, few have compared the two. This Article is the first to compare judicial deference and institutional competence concerns between both the Takings and Copyright Clauses, drawing on existing judicial deference and public choice literature.<sup>11</sup> Academic literature generally treats Takings<sup>12</sup> and

7. This is also sometimes referred to as the Intellectual Property Clause. See, e.g., Aziz Z. Huq, *Tiers of Scrutiny in Enumerated Powers Jurisprudence*, 80 U. CHI. L. REV. 575, 609–10 (2013) (arguing that the *Eldred* Court “evinced a capacious deference” to the judgments of Congress).

8. See *infra* Part II.B.

9. See, e.g., David Fagundes, *Property Rhetoric and the Public Domain*, 94 MINN. L. REV. 652, 653 (2010) (“*Eldred*, like *Kelo*, can be understood as approving government confiscation of an ownership right, albeit a confiscation of a public rather than a private entitlement.”); Richard A. Epstein, *The Dubious Constitutionality of the Copyright Term Extension Act*, 36 LOY. L.A. L. REV. 123, 128 (2002) (“[T]he CTEA looks like a massive giveaway of public domain resources for private use.”).

10. See, e.g., Mark Fenster, *The Takings Clause, Version 2005: The Legal Process of Constitutional Property Rights*, 9 U. PA. J. CONST. L. 667, 720 (2007) (“States, and not the Federal Constitution, generally define property and the rights that attach to it.”). This is certainly true for already expired copyrights, but also to retroactive extensions to yet-to-be expired copyrights. The public has a remainder interest in what is only a temporal private intellectual-property right.

11. In particular, this Article draws mainly on the work of the following authors. See generally JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980); James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129

Copyright Clause<sup>13</sup> jurisprudence separately, though one article compares the public backlash—or lack thereof—between these two decisions,<sup>14</sup> and some articles have discussed the effect on government power caused by the interaction between these two clauses.<sup>15</sup> Specifically, I focus on the institutional concerns for physical takings (nonregulatory) and copyright extensions.<sup>16</sup>

Part I provides a brief overview of judicial deference and institutional competence. Part II summarizes *Kelo* and *Eldred* with a focus on the institutional competence arguments in those decisions. Though the Justices made other arguments in their opinions, I omit them as they are not central to the purpose of this Article. Given that the government transfers property with both copyright extensions and takings, this Article is interested in whether there should be a stronger judicial role in policing one transfer as opposed to another. Parts III and IV dissect the political process and institutional capacity arguments that underlie choices of the level of

(1893); Michael J. Gerhardt, *Judging Congress*, 89 B.U. L. REV. 525 (2009); A. Christopher Bryant, *Constitutional Forbearance*, 46 U. RICH. L. REV. 695 (2012); Neal Devins, *Congressional Factfinding and the Scope of Judicial Review: A Preliminary Analysis*, 50 DUKE L.J. 1169 (2001); Huq, *supra* note 7; John O. McGinnis, *The Original Constitution and Its Decline: A Public Choice Perspective*, 21 HARV. J. L. & PUB. POL'Y 195 (1997).

12. See generally Fenster, *supra* note 10; Basil H. Mattingly, *Forum over Substance: The Empty Ritual of Balancing in Regulatory Takings Jurisprudence*, 36 WILLAMETTE L. REV. 695 (2000); Gregory J. Robson, *Kelo v. City of New London: Its Ironic Impact on Takings Authority*, 44 URB. LAW. 865 (2012); Saul Levmore, *Just Compensation and Just Politics*, 22 CONN. L. REV. 285 (1990); Daniel A. Farber, *Public Choice and Just Compensation*, 9 CONST. COMMENT. 279 (1992); Marc Mihaly & Turner Smith, *Kelo's Trail: A Survey of State and Federal Legislative and Judicial Activity Five Years Later*, 38 ECOLOGY L.Q. 703 (2011); Ilya Somin, *What If Kelo v. City of New London Had Gone the Other Way?*, 45 IND. L. REV. 21 (2011).

13. See generally Thomas B. Nachbar, *Intellectual Property and Constitutional Norms*, 104 COLUM. L. REV. 272 (2004) [hereinafter *Intellectual Property*]; William M. Landes & Richard A. Posner, *An Economic Analysis of Copyright Law*, 18 J. LEGAL STUD. 325 (1989); Thomas B. Nachbar, *Judicial Review and the Quest to Keep Copyright Pure*, 2 J. TELECOMM. & HIGH TECH. L. 33 (2003) [hereinafter *Judicial Review*]; Michael H. Davis, *Extending Copyright and the Constitution: "Have I Stayed Too Long?"*, 52 FLA. L. REV. 989 (2000); Marci A. Hamilton, *Copyright Duration Extension and the Dark Heart of Copyright*, 14 CARDOZO ARTS & ENT. L.J. 655 (1996); Dennis S. Karjala, *Judicial Review of Copyright Term Extension Legislation*, 36 LOY. L.A. L. REV. 199 (2002); Lawrence Lessig, *How I Lost the Big One When Eric Eldred's Crusade to Save the Public Domain Reached the Supreme Court, It Needed the Help of A Lawyer, Not A Scholar*, LEGAL AFFAIRS, (Mar./Apr. 2004), [http://www.legalaffairs.org/issues/March-April-2004/story\\_lessig\\_marapr04.msp](http://www.legalaffairs.org/issues/March-April-2004/story_lessig_marapr04.msp).

14. Fagundes, *supra* note 9.

15. See, e.g., Christina Bohannon, *Reclaiming Copyright*, 23 CARDOZO ARTS & ENT. L.J. 567, 626–27 (2006) (describing how the “ratchet effect” of the Takings Clause affects the Copyright Clause).

16. Although governments take a wide range of actions that could be governed under the Copyright Clause or Takings Clause, I focus on these two types to delve deeper rather than broader into institutional competence and deference under these clauses.

deference. Part V responds to potential objections to and wrinkles in this Article's argument. Part VI concludes.

## I. JUDICIAL DEFERENCE AND INSTITUTIONAL COMPETENCE

Judicial deference to other branches of the government in constitutional matters ranges from complete deference to none at all. At the least deferential end of the spectrum lies judicial supremacy, which views constitutional interpretation as the “special preserve of the Judiciary,” and the Judiciary alone.<sup>17</sup> At the most deferential end lies the political question doctrine, which is an “exception to judicial review”<sup>18</sup> where the court will not intervene and instead hold an issue “nonjusticiable.”<sup>19</sup> In between these polar ends, the level of judicial deference to government action varies widely.<sup>20</sup>

Deference recognizes that other branches of government are obligated to and can interpret the Constitution.<sup>21</sup> Therefore, courts should sometimes defer even when they would interpret the Constitution differently from another branch.<sup>22</sup> Deference can be conceptualized as the judiciary “fixing the outside border of reasonable legislative action” under the Constitution.<sup>23</sup> A very deferential level of judicial review can serve an “educative function” that encourages the legislative branch or the public “to develop a sense of constitutional responsibility.”<sup>24</sup>

Deference can be broken down further into two categories. If the interpretation involves a vague, ambiguous, or open-ended wording, one could expect more judicial deference. Controlling *Chevron* deference is an example.<sup>25</sup> Less judicial deference will be found where past interpretations

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17. Robert A. Schapiro, *Judicial Deference and Interpretive Coordinacy in State and Federal Constitutional Law*, 85 CORNELL L. REV. 656, 665 (2000); *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) (“It is emphatically the province and duty of the judicial department to say what the law is.”).

18. Schapiro, *supra* note 17, at 684.

19. *See, e.g., Vieth v. Jubelirer*, 541 U.S. 267, 267 (2004) (“[P]olitical gerrymandering claims are nonjusticiable because no judicially discernible and manageable standards for adjudicating such claims exist.”).

20. Huq, *supra* note 7, at 651–52.

21. Schapiro, *supra* note 17, at 665.

22. *Id.*

23. Thayer, *supra* note 11, at 148.

24. Schapiro, *supra* note 17, at 703; Thayer, *supra* note 11, at 148.

25. *See Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984) (holding that deference to an agency's interpretation of the statute it administers is appropriate when the statute is ambiguous and the agency's construction is permissible); *see also* Schapiro, *supra* note 17, at

leave little room for doubt, or where considerations such as national security are involved.<sup>26</sup> The open-ended term “Public Use” puts the Takings Clause in a category of deference to vagueness, while the Copyright Clause’s prescription of “securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries” garners less deference.<sup>27</sup> I note, however, that the Justices in *Kelo* and *Eldred* do not agree with this categorization.<sup>28</sup>

This Article focuses entirely on one understanding of judicial deference: It is a value judgment that a certain branch—such as Congress or an administrative agency—has superior institutional competence in an interpretative matter.<sup>29</sup> Institutional competence counsels deference when another branch has a relative advantage in interpretation.<sup>30</sup> For example, Congress is generally thought to have an institutional advantage in collecting facts, so courts should defer to its factual determinations.<sup>31</sup> The political accountability of elected officials—as opposed to an unelected judiciary—also counsels in favor of deference because of the institutional capacity of the legislature to sort political issues to favor majoritarian interests.<sup>32</sup>

For the purposes of this Article, I divide institutional competence into political-process concerns and institutional-capacity concerns. When the judiciary leniently defers to a legislative action or determination, the judiciary can be viewed to make a value judgment that: (1) the political process properly functions to sort these problems, identifying the public

681 (discussing *Chevron* deference to agency interpretation when the agency’s organic statute is ambiguous).

26. See, e.g., *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705, 2706 (2010) (illustrating the justiciability of cases involving the contribution of support to U.S.-designated terrorist organizations).

27. U.S. CONST. art. I, § 8, cl. 8.

28. Part II, *infra*, details these opinions, though largely omits the other textual and historical arguments that shed light on this debate.

29. See Thayer, *supra* note 11, at 144–46 (discussing the Court’s history of deference to legislative competence); Gerhardt, *supra* note 11, at 527 (asserting that the public is still unaware of Congress’s ability to interpret the Constitution); see also Devins, *supra* note 11, at 1213 (arguing that “the Justices should craft standards of review that take into account Congress’s interest in getting the facts right . . .”).

30. Schapiro, *supra* note 17, at 699.

31. *Id.* at 699–700.

32. See ELY, *supra* note 11, at 4–5, 106–07 (asserting that the judiciary, which is not “politically responsible in any significant way[,] is telling the people’s elected representatives that they cannot govern as they’d like” during judicial review); see also Thayer, *supra* note 11, at 134–35 (discussing the constitutional argument against judicial review of political actions); Gerhardt, *supra* note 11, at 526 (“[W]e cannot expect Congress to function in the same manner as the other federal branches.”).

preference and acting upon that majority preference instead of a minority interest,<sup>33</sup> and (2) the legislature, as opposed to the judiciary, has the institutional capacity to collect data in order to best choose a course of action designed to serve public preferences.<sup>34</sup> These two considerations are interrelated and are subject to substantial overlap, as in many cases, because if the political process functions well then so too does the exercise of institutional capacity.<sup>35</sup> Despite the overlap, this Article treats the two types of institutional competence considerations separately for ease of sorting and evaluating the deference arguments presented in *Kelo* and *Eldred*.

This Article relies on two premises: First, it makes a conceptual leap for convenience and assumes that the Takings Clause, though it appears in the Bill of Rights, operates no differently from an enumerated power like the Copyright Clause. As Basil Mattingly explained, “[t]he government’s power of eminent domain exists either as an inherent attribute of government or implicitly given to the federal government through the Constitution by the Fifth Amendment.”<sup>36</sup> Even though these clauses appear in two different parts of the Constitution, structural arguments about the level of judicial deference have failed to persuade<sup>37</sup> and do not touch the institutional competence concerns.

It is certainly reasonable to argue that the Copyright Clause is a grant of power while the Takings Clause is a negative limitation. Copyright is one of the enumerated powers.<sup>38</sup> As Thomas Nachbar reluctantly noted, the Copyright Clause actually created a power and was not superfluous text because the original Commerce Clause did not cover intellectual property rights.<sup>39</sup> Unlike an enumerated power, the Takings Clause appears in the Fifth Amendment, surrounded by sharp protections of the individual against

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33. For an application of John Hart Ely’s political-process theory to copyright extensions, see Davis, *supra* note 13, at 1033–34 (arguing for judicial review only when the political process is malfunctioning, and even then to avoid “substantive judgments”); Karjala, *supra* note 13, at 234 (“Once we establish that we have a problem with the political process, the discussion can focus on the role, if any, courts should play in resolving the problem.”).

34. The Court has taken a similar approach to institutional competence in the takings context before. Fenster, *supra* note 10, at 671.

35. See Devins, *supra* note 11, at 1169–72 (discussing the relationship between the legislature and judicial branches and their independent ability to properly engage in fact-finding).

36. Mattingly, *supra* note 12, at 702.

37. Justice Clarence Thomas has made the structural argument that because the Takings Clause appears in the Fifth Amendment, no deference should be afforded to the legislature. No other justice has agreed with him. See *infra* Part II.A.3.

38. U.S. CONST. art. I, § 8.

39. See *Intellectual Property*, *supra* note 13, at 349–50 (arguing that the Commerce Clause is not limited by the Copyright Clause).

government interference.<sup>40</sup> So perhaps less deference should be accorded to Congress when a clause limits rather than empowers. However, another reasonable argument is that *both* clauses simultaneously empower and limit. The Copyright Clause contains two restrictions to the power it creates: (1) Intellectual Property (IP) rights must “promote the Progress of Science and useful Arts”; and (2) IP rights must be of “limited Times.”<sup>41</sup> In addition, the Clause itself designates a power limited to the creation of IP rights.<sup>42</sup>

Similarly, the Takings Clause empowers and limits. The limitations are straightforward—the taking must be for Public Use and just compensation must be paid.<sup>43</sup> But it effectively acts as a grant of power, too. The Takings Clause could be an “inseparable incident” of government;<sup>44</sup> hence it only limits eminent domain. In that case, without the Takings Clause, the constitutionality of any eminent domain power would hinge on its relationship to other enumerated powers or the Necessary and Proper Clause.<sup>45</sup> However, I posit that without the Takings Clause, any federal use of eminent domain would be far more limited because its constitutionality would hinge on the threshold question of its actual existence and also the attendant difficulty of tying it with other enumerated powers. Accordingly, the Public Use requirement effectively acts as a grant of power more than a limitation. Certainly, no one would think that the Constitution created an incidental eminent domain power that allowed for takings for *private* use with or without compensation.<sup>46</sup> Thus, the Takings Clause solidifies the use of a power that would otherwise be questionable or uncertain. The Clause empowers the use of eminent domain while fixing the power’s boundaries, just like the Copyright Clause simultaneously creates and limits.

At any rate, this Article disregards historical, structural, or textual arguments<sup>47</sup> and operates on the premise that the power to take is a power

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40. For example, Justice Thomas makes an argument for judicial supremacy based on this structural argument. *See* Part II.A.3.

41. U.S. CONST. art. I, § 8, cl. 8.

42. *Id.*

43. U.S. CONST. amend. V.

44. *Shoemaker v. United States*, 147 U.S. 282, 296 (1983).

45. U.S. CONST. art. I, § 8, cl. 8.

46. *See infra* note 263 (highlighting arguments from the Court and scholars against purely private takings).

47. There is extensive literature detailing structural, historical, textual, and other types of arguments to argue against copyright extension. *See generally* Paul J. Heald & Suzanna Sherry, *Implied Limits on the Legislative Power: The Intellectual Property Clause as an Absolute Constraint on Congress*, 2000 U. ILL. L. REV. 1119 (2000) (arguing that the language of the Intellectual Property Clause absolutely limits the legislative power of Congress); Dotan Oliar, *Making Sense of the Intellectual Property Clause: Promotion of Progress as a Limitation on Congress’s Intellectual Property Power*, 94 GEO. L.J. 1771 (2006) (asserting that the Framers intended to grant Congress only a

of government, just like the power to create intellectual property. As the Supreme Court has explained, the eminent domain power is an “inseparable incident of independent sovereignty.”<sup>48</sup> Of course, the Justices advanced reasons other than deference in their opinions. Thus, this Article’s focus on institutional competence should not be taken as a representation that institutional competence is the focal point of the Justices’ opinions. The driving reason for this comparison between copyright extensions and eminent domain is that they both involve transfers of property. This Article simply explores whether institutional competence concerns should influence the judicial policing of these government powers.

Second, this Article presumes that the judiciary should play a role in limiting rent-seeking by interest groups in order to ensure governmental action under the Constitution. Therefore, the deferential role of the courts should be designed to minimize legislative capture and maximize public welfare. This is not a novel idea. The various opinions in *Kelo* and *Eldred* touch on the rent-seeking concerns,<sup>49</sup> and the Constitution itself is structured in a way “that encourage[s] the creation of public goods while constraining the danger of expropriation” by interest groups.<sup>50</sup> Although there is not complete agreement on this point,<sup>51</sup> for the purposes of the Article, the goal of limiting rent-seeking should be linked to judicial deference.

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limited power over the Intellectual Property Clause); *but see generally* Paul M. Schwartz & William Michael Treanor, *Eldred and Lochner: Copyright Term Extension and Intellectual Property as Constitutional Property*, 112 *YALE L.J.* 231 (2003) (arguing that the standard of review under the Intellectual Property Clause must be deferential and that recent Court holdings have misinterpreted the clause).

48. *Shoemaker*, 147 U.S. at 296 (1893).

49. *See infra* Part. II; *see also* Fenster, *supra* note 10, at 690–91 (discussing institutional competence concerns as anti-rent-seeking in *Kelo*).

50. McGinnis, *supra* note 11, at 196; *see also* Donald J. Kochan, “Public Use” and the Independent Judiciary: Condemnation in an Interest-Group Perspective, 3 *TEX. REV. L. & POL.* 49, 92 (1998) (“*The Federalist No. 10* by Madison, and *The Federalist* generally, stresses the importance of the Constitution as a mechanism for controlling interest groups.”); Devins, *supra* note 11, at 1213 (“[One] of the principal purposes of judicial review is to guard against special-interest legislation.”). In addition, James Thayer writing in 1893 echoed the anti-rent-seeking view of judicial deference to takings. Thayer, *supra* note 11, at 148–49 n.3 (characterizing the “true view” of judicial deference, as articulated by Judge Cooley, to be that “public purpose belongs to the legislature” and is only void “when the absence of public interest in the purpose for which the funds are to be raised is so clear and palpable as to be perceptible to any mind at first blush”).

51. William M. Landes & Richard A. Posner, *The Independent Judiciary in an Interest-Group Perspective*, 18 *J.L. & ECON.* 875, 893–94 (1975).

## II. *KELO* AND *ELDRED* FROM AN INSTITUTIONAL COMPETENCE PERSPECTIVE

Part I summarizes the various levels of judicial deference advanced by the opinions in *Kelo* and *Eldred*. The relevancy or outcome-determinedness of textual and historical arguments are outside the scope of this Article, and have been extensively covered before.<sup>52</sup> Not all of these opinions rely exclusively or primarily on institutional competence concerns; the centrality of institutional competence to these opinions is debatable. However, to the extent the opinions address institutional competence, this Part covers them and expands on these arguments through the remainder of the Article. I conclude this Part with a chart showing the standards of deference advanced and the political-process and institutional-capacity arguments behind them.

### *A. Institutional Competence and Economic Development Takings*

In *Kelo*, the Court applied a rational basis review to a local municipality's determination that an economic development plan constituted a "Public Use" within the meaning of the Takings Clause.<sup>53</sup> The City of New London suffered from decades of economic decline, so it decided to implement an economic development plan to create jobs and increase revenue.<sup>54</sup> Pursuant to a state statute that expressly authorized an economic development plan as "public use[ ]" and in the "public interest,"<sup>55</sup> the city's development agency designed a plan and purchased properties in the development area.<sup>56</sup> The city then initiated condemnation proceedings to acquire the land from the nine owners unwilling to sell.<sup>57</sup> A split state supreme court upheld the city's action, and the U.S. Supreme Court affirmed. The Justices advanced three types of rational basis deference and one view of judicial supremacy.

#### 1. Justices Stevens's and Kennedy's Rational Basis Standard

Deference to the legislature saturated the majority opinion in *Kelo*, written by Justice Stevens and joined by Justices Anthony Kennedy, David

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52. See *supra* note 47 (highlighting works that focus on historical and structural aspects of the Copyright Clause).

53. *Kelo v. City of New London*, 545 U.S. 469, 492 (2005).

54. *Id.* at 473.

55. CONN. GEN. STAT. § 8-186 (2009).

56. *Kelo*, 545 U.S. at 473.

57. *Id.* at 475.

Souter, Ruth Bader Ginsburg, and Stephen Breyer. At the outset the majority noted that “[w]ithout exception, our cases have defined [public use] broadly, reflecting our longstanding policy of deference to legislative judgments in the field.”<sup>58</sup> Summarizing past precedent, the Court explained that “[f]or more than a century our public use jurisprudence has wisely eschewed rigid formulas and intrusive scrutiny in favor of affording legislatures broad latitude in determining what public needs justify the use of the takings power.”<sup>59</sup> The Court held that the “program of economic rejuvenation is entitled to our deference,” and “[b]ecause that plan unquestionably serve[d] a public purpose, the takings challenged here satisfy the public use requirement.”<sup>60</sup> The Court declined to evaluate the plan on a piecemeal basis because “[o]nce the question of the public purpose has been decided, the amount and character of the land to be taken for the project and the need for a particular tract to complete the integrated plan rests in the discretion of the legislative branch.”<sup>61</sup> However, the Court added one qualification: Deference is proper so long as the public purpose is not a pretext to provide a party with private benefits.<sup>62</sup>

Justice Kennedy wrote a separate concurring opinion stressing the risk of pretextual economic development plans that were actually designed to benefit private parties. Although the “rational-basis standard of review is appropriate,” eminent domain should not be used to benefit private entities “with only incidental or pretextual public benefits.”<sup>63</sup> So, if “[a] court [is] confronted with a plausible accusation of impermissible favoritism to private parties [it] should treat the objection as a serious one.”<sup>64</sup> In order to assess pretext, Justice Kennedy would institute a “presumption” of “impermissible private purpose” and a “presumption of invalidity” for “transfers in which the risk of undetected impermissible favoritism of private parties is [very] acute.”<sup>65</sup> He applauded the state trial court for its “careful and extensive inquiry” into whether the plan was really intended to benefit a private party (Pfizer), and he was confident the trial court correctly determined that it was not.<sup>66</sup>

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58. *Id.* at 480.

59. *Id.* at 483.

60. *Id.* at 483–84.

61. *Id.* at 489 (quoting *Berman v. Parker*, 348 U.S. 26, 35–36 (1954) (internal quotation marks omitted)).

62. *Id.*

63. *Id.* at 490 (Kennedy, J., concurring).

64. *Id.* at 491.

65. *Id.* at 493.

66. *Id.* at 491.

Justice Stevens, and to a lesser extent Justice Kennedy, justified the generous level of deference accorded to the city based on its institutional capacity to collect information and to design a proper development plan that would aid the distressed municipality. Justice Stevens praised the city for exercising its institutional capacity. The New London Development Corporation (NLDC), a private nonprofit entity specializing in planning economic development for the city, created a development plan that it submitted to the municipality for review.<sup>67</sup> This plan was approved after “[v]arious state agencies studied the project’s economic, environmental, and social ramifications” and “a team of consultants evaluated six alternative development proposals for the area.”<sup>68</sup> The “comprehensive character of the plan, [and] the thorough deliberation that preceded its adoption” led Justice Stevens to conclude that the “plan unquestionably serves a public purpose.”<sup>69</sup> Additionally, he rejected petitioners’ request to impose a “reasonable certainty” of success standard because the judiciary lacked the institutional capacity to make such a prediction: “practical concerns . . . undermine[ ] the use of the ‘substantially advances’ formula in our [ ] takings doctrine” because it “would empower—and might often require—courts to substitute their predictive judgments for those of elected legislatures and expert agencies.”<sup>70</sup> In his concurrence, Justice Kennedy also praised the legislature’s institutional competence in choosing a course of action that would serve the public purpose, noting that the “taking occurred in the context of a comprehensive development plan . . . [and] [t]he city complied with elaborate procedural requirements that facilitate review of the record and inquiry into the city’s purposes.”<sup>71</sup>

In closing, Justice Stevens explained that the political process concern of institutional competence weighed in favor of judicial deference. As “the necessity and wisdom of using eminent domain to promote economic development are certainly matters of legitimate public debate,” the states are able to limit their definitions of “public use” per the public preference.<sup>72</sup> He cited examples of state constitutions and state statutes “that carefully limit[ed] the grounds upon which takings may be exercised.”<sup>73</sup>

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67. *Id.* at 474 (majority opinion).

68. *Id.* at 473 n.2.

69. *Id.* at 484.

70. *Id.* at 487, 488.

71. *Id.* at 493 (Kennedy, J., concurring).

72. *Id.* at 489 (majority opinion).

73. *Id.* at 489 nn.22–23.

## 2. Justice O'Connor's Rational Basis Standard that Categorically Rejects Economic Development Takings

Justice Sandra Day O'Connor, writing a dissenting opinion joined by Chief Justice William Rehnquist and Justices Antonin Scalia and Clarence Thomas, would have adopted a bright-line rule that economic development could not constitute a valid public use. Justice O'Connor reasoned that the majority's opinion eliminated "any distinction between private and public use of property."<sup>74</sup> Economic development would allow any private property to be transferred to another private owner so long as the new owner would put the land to a more valuable use, as "nearly any lawful use of real private property can be said to generate some incidental benefit to the public."<sup>75</sup> Though judicial review should generally be under "an extremely narrow" rational basis standard, the judiciary should not defer to a "purely private" property transfer.<sup>76</sup> But Justice O'Connor would not prohibit all transfers of private property. Rather, purely private transfers would be permissible if the use of the property "inflicted affirmative harm on society" and the taking would "directly achieve[ ] a public benefit."<sup>77</sup>

Justice O'Connor's objections to the level of deference were based more on political-process institutional-competence concerns than institutional capacity. Although Justice O'Connor noted that "courts are ill equipped to evaluate the efficacy of proposed legislative initiatives,"<sup>78</sup> she expressed doubts as to the necessity of taking the petitioners' property. In one parcel designated for office space development, three homes were slated to be destroyed, but the city would retain "a private cultural organization."<sup>79</sup> The other parcel was "slated mysteriously for 'park support.'"<sup>80</sup> However, the risk of a distorted political process appears to have primarily driven her concern to except economic development takings.

Justice O'Connor rejected outright the notion that a functioning political process justified judicial deference. Trusting the states to decide the "appropriate limits on economic development takings" would be "an abdication of [the Court's] responsibility."<sup>81</sup> The political process would fail to properly sort publicly beneficial takings and "the fallout from [the]

74. *Id.* at 494 (O'Connor, J., dissenting).

75. *Id.* at 501.

76. *Id.* at 500 (internal quotation marks omitted).

77. *Id.*

78. *Id.* at 499.

79. *Id.* at 495.

80. *Id.*

81. *Id.* at 504.

decision will not be random.”<sup>82</sup> As “[a]ny property may now be taken for the benefit of another private party,” Justice O’Connor asserted that “[t]he beneficiaries are likely to be those citizens with disproportionate influence and power in the political process, including large corporations and development firms.”<sup>83</sup> The breakdown in the political process would enable the government “to transfer property from those with fewer resources to those with more.”<sup>84</sup> Thus, the judiciary should not defer to economic development takings as a public use because the political process would encourage developers to seek rents and take from the poor and powerless.

### 3. Justice Thomas’s Judicial Supremacy

Finally, Justice Thomas wrote a lone dissent in which he urged the Court to overrule precedent and return to the “original” meaning of public use. He would restrict eminent domain power to situations where “citizens as a whole must actually ‘employ’ the taken property.”<sup>85</sup> As a consequence, the government “may take property only if it actually uses or gives the public a legal right to use the property.”<sup>86</sup>

Justice Thomas would never defer to a legislative interpretation of the public use requirement because “a court owes no deference to a legislature’s judgment concerning the quintessentially legal question of” the Takings Clause.<sup>87</sup> Because the Takings Clause appears in the Fifth Amendment, Justice Thomas reasoned that it was “most implausible that the Framers intended to defer to legislatures as to what satisfies the Public Use Clause, uniquely among all the express provisions of the Bill of Rights.”<sup>88</sup> Just as the Court does not defer to a legislative determination of a reasonable search, the Court should not defer to interpretations of the public use limitation.<sup>89</sup> Even if there was to be any deference, Justice Thomas would apply exacting scrutiny.<sup>90</sup>

Justice Thomas echoed Justice O’Connor’s concerns that judicial deference was unwarranted because the political process would not properly function. The history of urban renewal projects, which

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82. *Id.* at 505.

83. *Id.*

84. *Id.*

85. *Id.* at 508–09 (Thomas, J., dissenting).

86. *Id.* at 521.

87. *Id.* at 517.

88. *Id.* at 517–18.

89. *Id.* at 518.

90. *Id.* at 521–22 (quoting *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938)).

predominantly displaced poor minorities and African Americans, counseled against deference.<sup>91</sup> He predicted that economic development takings “will fall disproportionately on poor communities” that “are not only systematically less likely to put their lands to the highest and best social use, but are also the least politically powerful.”<sup>92</sup> To counteract the broken political process, Justice Thomas would apply strict scrutiny from footnote four of *Carolene Products* for the benefit of the “discrete and insular minorities” that “the Public Use Clause protects.”<sup>93</sup>

The *Kelo* opinion provides four possible levels of deference, which I simplify and summarize in the table that follows:

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91. *Id.* at 522.

92. *Id.* at 521.

93. *Id.* at 521–22 (quoting *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938)).

**Table 1: Levels of Deference in *Kelo v. City of New London***

<b>Justice</b>	<b>Level of Deference</b>	<b>Political-Process Concern</b>	<b>Institutional-Capacity Concern</b>
<b>Stevens</b>	Rational basis and no pretext.	States can choose the appropriate level of takings based on local preference.	States have the tools and administrative agencies to make developments that benefit the public.
<b>Kennedy</b>	Rational basis and “careful and extensive inquiry” <sup>94</sup> into pretext. Presumption of pretext if there is a high risk that it would benefit a private party.	N/A	Same as Justice Stevens.
<b>O’Connor</b>	Rational basis but no economic development takings.	Economic development takings allow powerful private parties to disproportionately influence the political process to the detriment of the poor.	“Courts are ill equipped to evaluate the efficacy of proposed legislative initiatives.” <sup>95</sup>
<b>Thomas</b>	No deference or at the very least <i>Carolene Products</i> n.4; only valid if the public “actually uses” <sup>96</sup> the land.	The poor will be victimized by the political process.	“Public Use” is a legal term and legislatures have no capacity to answer legal questions.

### *B. Institutional Competence and Copyright Extensions*

In 1998 Congress passed the Copyright Term Extension Act (CTEA), which lengthened the duration of all copyrights by twenty years.<sup>97</sup> This extension applied retroactively so that intellectual property with expired

94. *Id.* at 491 (Kennedy, J. concurring).

95. *Id.* at 499 (O’Connor, J. dissenting).

96. *Id.* at 521 (Thomas, J. dissenting).

97. 17 U.S.C. §§ 302–304 (2012).

copyrights in the public domain reentered private ownership.<sup>98</sup> A small group of businesses and individuals who used products or services that built on works in the public domain brought suit challenging the retroactive extension of the copyright term.<sup>99</sup> The Supreme Court, by a 7–2 vote, held that the CTEA was constitutional under the Copyright Clause. Justice Ginsburg wrote the majority opinion, while Justices Stevens and Breyer each filed individual dissents.

### 1. Justice Ginsburg’s “Arguably Unwise” Rational Basis Standard

Justice Ginsburg advanced an extremely deferential standard: “[W]e are not at liberty to second-guess congressional determinations and policy judgments of this order, however debatable or arguably unwise they may be.”<sup>100</sup> The Court “defer[red] substantially to Congress” to evaluate whether the CTEA was “a rational exercise of the legislative authority conferred by the Copyright Clause.”<sup>101</sup> Justice Ginsburg credited multiple “rational” reasons for the CTEA. First, it would match the same copyright protections in Europe, thus providing a greater incentive for authors to disseminate work in the United States.<sup>102</sup> Secondly, it would encourage copyright holders to invest in restoration of existing works. Finally, longer terms were needed because of “demographic, economic, and technological changes.”<sup>103</sup>

Justice Ginsburg relied on institutional-capacity considerations to justify the substantial level of deference to Congress, but she made no mention of the political process. In a footnote responding to Justice Breyer’s dissent, she explained that “[c]alibrating rational economic incentives . . . is a task primarily for Congress, not the courts.”<sup>104</sup> She cited four artists’ statements to Congress about the “belief that the copyright system’s assurance of fair compensation for themselves and their heirs was an incentive to create.”<sup>105</sup> Justice Ginsburg also credited a statement from the Register of Copyrights stating that authors need royalties from existing works to create new ones. The Register cited an example of how Noah

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98. *Eldred v. Ashcroft*, 537 U.S. 186, 196 (2003).

99. *Id.* at 193.

100. *Id.* at 208 (citation omitted).

101. *Id.* at 204.

102. *Id.* at 205–06.

103. *Id.* at 206–07.

104. *Id.* at 207 n.15.

105. *Id.*

Webster supported his family from earnings from copyright royalties while he completed his dictionary.<sup>106</sup>

In summary, Justice Ginsburg characterized the petitioners' plea as boiling down to essentially a policy argument. "Beneath the facade of their inventive constitutional interpretation, petitioners forcefully urge that Congress pursued very bad policy in prescribing the CTEA's long terms."<sup>107</sup> But because of the substantial deference the Court gives Congress, this argument went nowhere.

## 2. Justice Stevens's Rational Basis Standard that Excludes Retroactive Extensions

Justice Stevens disagreed with the Court's "mistaken premise that [it] has virtually no role in reviewing congressional grants of [IP] monopoly privileges."<sup>108</sup> He took issue solely with the retroactive extension.<sup>109</sup> In his view, the "limited Times" requirement "serves the ultimate purpose of promoting the 'Progress of Science and useful Arts.'"<sup>110</sup> Because the Copyright Clause is "both a grant of power and a limitation," the Court must ensure Congress does "not overreach the restraints imposed by the stated constitutional purpose."<sup>111</sup> The retroactive extensions were "unsupported by any consideration of the public interest," and they "frustrate[d] the central purpose of the Clause."<sup>112</sup> Instead of spurring the creation of new intellectual property, the "retroactive extensions" were "a gratuitous transfer of wealth from the public to" private parties and their heirs.<sup>113</sup> Consequently, the CTEA's "retroactive extensions *do not even arguably* serve either of the purposes of the Copyright/Patent Clause."<sup>114</sup>

Justice Stevens used both political-process and institutional-competence considerations to support his lack of deference to Congress. He believed that the political process would not properly represent the interests of the public. Instead, the majority's level of deference "quitclaimed to

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106. *Id.* at 208 n.15.

107. *Id.* at 222.

108. *Id.* at 223 (Stevens, J., dissenting).

109. Justice Stevens also expressed serious doubts that the new term for copyrights violated the "limited Times" prescription. *Id.* at 241 ("Whether the extraordinary length of the grants authorized by the 1998 Act are invalid because they are the functional equivalent of perpetual copyrights is a question that need not be answered in this case . . .").

110. *Id.* at 223.

111. *Id.* (quoting *Graham v. John Deere Co.*, 383 U.S. 1, 5-6 (1966)).

112. *Id.* at 241.

113. *Id.* at 227.

114. *Id.* (emphasis added).

Congress [the Court's] principal responsibility" as it "fail[ed] to protect the public interest in free access to the products of inventive and artistic genius."<sup>115</sup> In addition, Justice Stevens quickly dismissed respondent's principal argument that these retroactive extensions would encourage owners to restore old works.<sup>116</sup> Any original expression during the restoration would be protected by a new copyright anyway, and it was no different than reading the Copyright Clause to take works out of the public domain to give one private party a monopoly over restoration.<sup>117</sup> Hence, basic logic undermined any congressional institutional capacity to decide that a retroactive extension would be beneficial.

### 3. Justice Breyer's Rational Basis-Plus Standard

Justice Breyer would review both retroactive and prospective copyright extensions under a type of rational basis standard but still hold both extensions unconstitutional. Because the CTEA involved the regulation of expression and the interrelation of the Copyright Clause to the First Amendment, "what may count as rational where economic regulation is at issue is not necessarily rational where we focus on expression."<sup>118</sup> Justice Breyer articulated a three-factor rational relation test where the CTEA would be unconstitutional "(1) if the significant benefits that it bestows are private, not public; (2) if it threatens seriously to undermine the expressive values that the Copyright Clause embodies; and (3) if it cannot find justification in any significant Clause-related objective."<sup>119</sup>

The CTEA failed all three requirements. The twenty-year extension benefited private parties at the expense of the public because it would "transfer several billion extra royalty dollars to holders of existing copyrights" that had already earned billions of dollars.<sup>120</sup> The literal financial cost and the cost of a shrunken public domain would be borne out

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115. *Id.* at 242.

116. *Id.*

117. *Id.* at 239–40.

118. *Id.* at 244–45 (Breyer, J., dissenting). Justice Breyer cited to cases that involved a kind of rational basis-plus review. *Id.* (citing *Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 446–50 (1985); *Plyer v. Doe*, 457 U.S. 202, 223–24 (1982); *Dept. of Agric. v. Moreno*, 413 U.S. 528, 534–38 (1973)); see generally Robert C. Farrell, *Successful Rational Basis Claims in the Supreme Court from the 1971 Term Through Romer v. Evans*, 32 IND. L. REV. 357 (1999) (examining Supreme Court cases that have struck down laws under a rational basis test).

119. *Eldred*, 537 U.S. at 245.

120. *Id.* at 249.

by the public. There would also be an enormous cost on the public to obtain permissions to use copyrighted material.<sup>121</sup>

No copyright-related benefit could justify the CTEA. The added twenty years would “not act as an economic spur encouraging authors to create new works”<sup>122</sup> because any author only has a 2% chance of creating a copyrighted work that would retain commercial value after fifty-five years, and the discounted present value of receiving royalties far in the future is only an amount of cents.<sup>123</sup> In addition, the new copyright term had 99.8% of the value of a perpetual copyright, which would be hard to reconcile with the Clause’s “limited Times” requirement.<sup>124</sup> In conclusion, Justice Breyer explained that “the incentive-related numbers [were] far too small for Congress to have concluded rationally, even with respect to new works, that the extension’s economic-incentive effect could justify the serious expression-related harms.”<sup>125</sup> He also gleaned a pretextual purpose from statements in the congressional record that “refer[red] frequently to the assistance the statute will bring the entertainment industry, particularly through the promotion of exports.”<sup>126</sup>

Justice Breyer also touched on the institutional-capacity concerns. Although he “share[d] the Court’s initial concern, about intrusion upon the decisionmaking authority of Congress,” the evidence was too compelling that the CTEA did not advance the objectives of the Copyright Clause.<sup>127</sup> He did explain that the Court was not “well suited” to decide what the appropriate length of the copyright should be, but merely that it was easy to decide that this extension went “too far.”<sup>128</sup> The overwhelming evidence showed a private benefit at public cost, and “in respect to existing works, the serious public harm and the virtually nonexistent public benefit could not be more clear.”<sup>129</sup>

The following table summarizes the levels of deference advanced in *Eldred* and the institutional-competence concerns behind them:

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121. *Id.* at 250–53. Justice Breyer included an extensive Appendix at the end of the opinion detailing the economic science behind his calculations. *Id.* at 267–68.

122. *Id.* at 254.

123. *Id.*

124. *Id.* at 255–56.

125. *Id.* at 257.

126. *Id.* at 262.

127. *Id.* at 264.

128. *Id.* at 264–65.

129. *Id.* at 266.

**Table 2: Level of Deference in *Eldred v. Ashcroft***

Justice	Level of Deference	Political-Process Concern	Institutional-Capacity Concern
<b>Ginsburg</b>	Rational basis.	N/A	Congress, rather than the Court, can 'calibrate rational incentives' to decide copyright policy.
<b>Stevens</b>	Rational basis + exception for retroactive extensions.	The Court must protect the public because the political process will not.	Simple logic undermines Congress's finding on retroactive extensions.
<b>Breyer</b>	Rational basis that more-searchingly examines if there are public instead of private benefits.	No specific discussion, although citations to congressional record that legislation would favor the entertainment industry reflects doubt.	Courts may not be able to properly delineate the contours of copyright law, but they do have the capacity to evaluate future retroactive and prospective extensions.

### III. POLITICAL-PROCESS INSTITUTIONAL-COMPETENCE CONCERNS

The majority in *Kelo* justified its deferential approach to state-level interpretations of the public use requirement in part by its trust and reliance that the political process functioned properly.<sup>130</sup> In contrast, the dissenting opinions focused on the breakdown in the political processes that judicial deference to economic development takings would have—whereby powerful and wealthy private interests could single out the poor and helpless.<sup>131</sup> However, in *Eldred*, the majority did not even mention political-process concerns. The same Justices that dissented based on a perceived breakdown in the political process in economic development takings also joined an opinion that ignored political-process concerns in copyright extensions. This inconsistency raises the question: Do political-

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130. See *supra* Part II.A.1.

131. See *infra* Parts II.A.2–3.

process concerns justify a more deferential approach to takings or copyright extensions? To sort through this puzzle, this Part explores the political-process and institutional-competency justifications in both takings and copyright extension process. With the benefit of hindsight, this Article examines the political reactions to *Kelo* and *Eldred* and also analyzes the political process behind takings and copyright extensions.

### A. The Takings Political Process

Political-process concerns animated the various opinions in *Kelo*. For Justice Stevens, writing for the majority, local democratic processes would ensure that takings law reflected people's preferences.<sup>132</sup> However, the separate dissenting opinions written by Justices O'Connor and Thomas stressed that economic development takings would favor wealthy interest groups over the poor; therefore the political process itself would neither protect the interests of the vulnerable nor of the public.<sup>133</sup> Even Justice Kennedy worried about purely private transfers distorting the political process in his concurrence.<sup>134</sup> After closer examination of the arguments, this Article concludes that we should more likely expect the political process to function properly in takings than in copyright. This is due to potential opposition to eminent domain resulting from disconnect between concepts of "just compensation" and full compensation.

#### 1. Justice Stevens's Confidence in Takings Reformation after *Kelo* Appears Fairly Accurate

Justice Stevens's justification for a high level of deference in *Kelo* relied in part on the trust of state political processes. If voters want to limit or restrict the local government's exercise of eminent domain, political tools enable them to do so.<sup>135</sup> His confidence in the political process to respond to the electorate appears fairly accurate.

*Kelo* was accompanied by "intens[e] . . . public outcry" that "produced a welter of political, legislative, and judicial reactions."<sup>136</sup> Nearly 80% of the U.S. public opposed the outcome in *Kelo*, in what has been deemed

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132. *Kelo*, 545 U.S. at 482–83.

133. *Id.* at 505 (O'Connor, J., dissenting); *id.* at 522 (Thomas, J., dissenting).

134. *Id.* at 491 (Kennedy, J., concurring).

135. Thayer, *supra* note 11, at 134–35.

136. Mihaly & Smith, *supra* note 12, at 707; *see also* Fagundes, *supra* note 9, at 655–56 (discussing the significant public "outrage" over *Kelo*).

“probably the broadest legislative reaction ever generated by any Supreme Court ruling.”<sup>137</sup>

Post-*Kelo*, the public and legislative representatives worked to curtail the perceived harms of the decision.<sup>138</sup> At least forty states enacted legislation to limit state takings authority.<sup>139</sup> The diversity of responses suggests influences by divergent preferences of property owners in various jurisdictions. Some states enacted strong limitations, eliminating economic development takings and narrowing takings because of “‘blight.’”<sup>140</sup> Other states enacted only “‘cosmetic’” measures, which were due to the successful efforts of the benefitters of redevelopment, including urban minorities and mayors, low-income housing advocates, and developers.<sup>141</sup> Federal law, on the other hand, has remained largely unchanged. In 2005, the House passed a bill limiting domain and restricting funding for federal takings projects that would respond to land use.<sup>142</sup> However, the Senate did not pass it.<sup>143</sup>

These legislative developments suggest that states have been responsive. I cannot make this conclusion solely based on hindsight empirics: Certain changes were only “symbolic”<sup>144</sup> and the limited reach of some of the backlash may reflect “the success of [interest groups’] quiet lobbying efforts.”<sup>145</sup> For example, Ilya Somin argues that the public’s “rational ignorance” about takings can help explain “why so many of the new reform laws were ineffective.”<sup>146</sup> She rationalized that “[i]nterest groups and politicians exploited the public’s inability to tell the difference between genuine and purely cosmetic reforms[ ]. . . .”<sup>147</sup> However, exploitation of rational ignorance can only explain so much. For example, in the three states with the strongest post-*Kelo* limitations—Florida, South Dakota, and Michigan<sup>148</sup>—there does not seem to be a plausible reason to

137. Somin, *supra* note 12, at 25–26 (citing Ilya Somin, *The Limits of Backlash: Assessing the Response to Kelo*, 93 MINN. L. REV. 2100, 2101–02 (2009)).

138. Robson, *supra* note 12, at 887.

139. Mihaly & Smith, *supra* note 12, at 707 (estimating forty states); *see also* Somin, *supra* note 12, at 21–25 (discussing the “numerous new reform laws” passed in response to the “massive political backlash” to *Kelo*).

140. Mihaly & Smith, *supra* note 12, at 708.

141. *Id.* (quoting Edward J. Erlner, *In Kelo’s Wake*, HILLSDALE COLL. FREE MKT. FORUM 13 (2008)).

142. *Id.* at 724–25.

143. *Id.* at 724.

144. Somin, *supra* note 12, at 21.

145. Mihaly & Smith, *supra* note 12, at 729.

146. Somin, *supra* note 12, at 23.

147. *Id.*

148. Mihaly & Smith, *supra* note 12, at 708.

consider that interest groups in those states are uniquely less able or less interested in stopping opposition to economic development than in other states. Indeed, the differences between the strict and non-strict states could merely reflect their local population's preferences given that land use is an "intensely local" issue.<sup>149</sup>

Empirical studies may not give us a clear answer. Rather, an understanding of the opposition to eminent domain and how it affects the political process may adequately explain the lack of need for judicial intervention. Political opposition organized by groups that oppose any eminent domain plan can be significant and powerful. This could counteract the rent-seeking or disproportionate power of groups who desire to implement a plan with only pretextual public benefits. Moreover, the high level of political salience of this issue puts pressure on legislatures to perform well when authorizing these plans.<sup>150</sup>

## 2. The "Just Compensation" Safeguard

Theoretically, because of "just compensation," there should not be much opposition to takings since they will be cost-justified. The just compensation requirement should theoretically make property owners indifferent to a taking because they receive fair market value.<sup>151</sup> It should also make the government internalize the cost of the project, ensuring only cost-efficient projects.<sup>152</sup> And from an economic efficiency standpoint, the compensation requirement is not even needed. As Judge Posner points out, if the government plans to take private property without compensation, then the property owner will invest resources into persuading the government not to take the property or to persuade a court to grant an injunction.<sup>153</sup> This would ensure only cost-efficient projects because the property owner would spend resources to prevent a taking up to the actual amount she values her

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149. *Id.* at 728; see also Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416, 416–18, 420, 424 (1956) ("The consumer-voter moves to the community that satisfies his preference pattern.").

150. Gerhardt, *supra* note 11, at 533–34.

151. Levmore, *supra* note 12, at 309–10.

152. *Id.* at 310 ("[B]y paying the market value of what it takes or destroys, [governmental bodies] will be more likely to resist projects that fail a cost-benefit test.").

153. MAXWELL L. STEARNS & TODD J. ZYWICKI, PUBLIC CHOICE CONCEPTS AND APPLICATIONS IN LAW 64–65 (2009).

land. Only if the government values it at least as much as the homeowner would the takings project go forward.<sup>154</sup>

However, from a public choice perspective,<sup>155</sup> the compensation requirement prevents wasteful rent-seeking.<sup>156</sup> Instead of a property owner investing resources to stop the government from taking property without compensation, the government simply pays fair market value, which is the efficient outcome.<sup>157</sup> Therefore, private property owners should always be compensated for their loss.<sup>158</sup> In addition, the just compensation requirement could be viewed as protecting the more politically powerless from unfair confiscations of their property. Saul Levmore posits that individuals who do not regularly participate in the political process are at risk of a “ganging up” by majoritarian preferences or powerful interest groups, so the compensation requirement makes government internalize the costs.<sup>159</sup>

The property owners as taxpayers also subsidize the takings of their own property, so functionally, taxes could be viewed as eminent domain “insurance premiums.”<sup>160</sup> Thus, the just compensation requirement creates insurance to compensate for the risk of anyone’s property being taken. In fact, at closer inspection, the public choice literature<sup>161</sup> that deems this an insurance premium may miss out on the economic gain the taking *itself* has for the property owner. Instead of an insurance premium, the portion for which any property owner’s own taxes subsidize the taking are actually payments for the benefits the project gives to the individual.<sup>162</sup> Given that the compensation requirement ensures efficient outcomes and should make

154. To illustrate, imagine the homeowner values the property at \$100. She will invest resources up to \$100 to prevent her home from being taken without compensation. The government will not go through with the taking unless it considers the property equal to \$100 or more.

155. See Farber, *supra* note 12, at 281 (offering an overview of just compensation from a public-choice perspective).

156. STEARNS & ZYWICKI, *supra* note 153, at 65–66.

157. *Id.* But see Farber, *supra* note 12, at 293–94 (arguing that without compensation, rent-seeking and government spending would actually be reduced).

158. See Fenster, *supra* note 10, at 695 (“The ‘just compensation’ clause requires that the property owner be made whole to compensate fairly for [the property owner’s] loss.”).

159. Levmore, *supra* note 12, at 309–11.

160. Farber, *supra* note 12, at 283.

161. Lawrence Blume and Daniel Rubinfeld originated the insurance premium idea. See Lawrence Blume & Daniel L. Rubinfeld, *Compensation for Takings: An Economic Analysis*, 72 CAL. L. REV. 569, 584–95 (1984).

162. To illustrate, imagine a homeowner is paid just compensation of \$100 to make space for a new road. The homeowner contributes \$10 to pay for the taking through taxes, but ends up benefitting from the new road by a similar amount.

whole the individuals whose property is confiscated, the eminent domain power should not be so controversial.

Despite this compensation safeguard, however, *Kelo* and similar confiscations of private property engender substantial opposition.<sup>163</sup> If the “central theme” of takings law is to protect minorities,<sup>164</sup> one must consider whether the dissenting Justices in *Kelo* had a valid point that economic development takings would favor powerful interest groups.

### 3. The “Uncompensated Increment” and Property Rhetoric Ensures the Healthy Function of the Political Process

To argue for the healthy function of the political process, this section combines arguments from three articles. Daniel Farber argues that opposition to takings can be politically powerful.<sup>165</sup> His argument for the *elimination* of the “just compensation” requirement provides a convincing insight into the political process function. In addition, David Fagundes’s analysis of property rhetoric complements the argument that those opposed to takings can be politically powerful.<sup>166</sup> Farber’s argument for making takings uncompensated combined with research by Lee Anne Fennell on the “uncompensated increment”<sup>167</sup> creates a convincing account of a well-functioning political process that merits generous judicial deference. Powerful political opposition by even a few property owners to ill-conceived or interest group pet projects should be expected because takings are inherently *uncompensated*.

Farber argues that if takings were uncompensated, rent-seeking for inefficient projects would actually decrease: “A rule that flatly prohibited compensation would create a powerful lobby against government projects and would therefore tend to limit the number of inefficient projects.”<sup>168</sup> Unlike taxpayers who are a large and diffuse group that bear the costs of the compensation requirement, a small group of property owners could

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163. See *infra* Part III.A.3.

164. Levmore, *supra* note 12, at 309; see also *id.* at 319–20 (explaining that “the availability of compensation even when politics could be substituted for markets . . . does not undermine the search for unprotected minorities as part of a large theory of takings law”).

165. Farber, *supra* note 12, at 289–90 (arguing that small “special interest groups” have a substantial influence on the political process).

166. Fagundes, *supra* note 9, at 661.

167. See Lee Anne Fennell, *Taking Eminent Domain Apart*, 2004 MICH. ST. L. REV. 957, 958–59 (2004).

168. Farber, *supra* note 12, at 292.

effectively organize in most cases to oppose these projects.<sup>169</sup> Property owners share a community and geography so they can easily form identifiable and powerful minority groups.<sup>170</sup> They are also “attractive ‘customers’” to political parties and individual politicians—the repeat players in the political process.<sup>171</sup> While just compensation “buy[s] off the group otherwise most likely to bring costs forcefully to the attention of the legislators,” without compensation, politicians would face strong opposition by property owners about to incur substantial losses.<sup>172</sup>

Fagundes’s research on the public reaction to *Kelo* also provides another reason to expect that opposition to takings can be potent—property rhetoric. The idea of property has a “powerful hold” on the public.<sup>173</sup> It has an instinctive connection to “notions of both personal identity and the inviolability of ownership,” and physical takings of property without the owners’ consent are susceptible to “inflam[ing] the public consciousness.”<sup>174</sup> Therefore, those who oppose takings can employ the powerful emotional tool of property rhetoric, using concepts of possession and ownership to empower social movements against the exercise of eminent domain.<sup>175</sup> Combining Farber’s and Fagundes’s analyses demonstrates that opposition to takings should be strong in the political process due to the ease of organization and the powerful tool of property rhetoric.

Farber’s prescription for removing the compensation requirement overlooks that takings are always partially uncompensated. Therefore we should generally expect substantial opposition to takings even with just compensation. Landowners are not completely compensated even if “just compensation,” paid as fair market value, is accurately calculated.<sup>176</sup> Fennell terms the difference between fair market value and actual compensation the “uncompensated increment.”<sup>177</sup> The uncompensated

169. *Id.* at 292–93 (“Taxpayers are an extremely large, diffuse group. History provides little reason to think they will be a powerful political force in resisting small increases in government spending.”).

170. *Id.* at 289.

171. *Id.* at 289 & n.35 (citing Bruce A. Ackerman, *Beyond Carolene Products*, 98 HARV. L. REV. 713, 723–34 (1985)).

172. *Id.* at 293.

173. Fagundes, *supra* note 9, at 655.

174. *Id.* at 655–56.

175. *See id.* at 656 (“That property can generate such emotional power also shows how much mileage a social movement can gain by couching its aims in terms of protecting possession and ownership.”).

176. Fennell, *supra* note 167, at 962.

177. *Id.* at 958.

increment is made up of three elements: (1) the property owner's subjective value in excess of market value; (2) the chance to gain a surplus from the trade; and (3) the owner's autonomy to choose when to sell.<sup>178</sup> Consequently, a property owner "suffers from a double whammy" from a taking—the loss of both the subjective value and a chance to share in the gain from the property's transfer.<sup>179</sup>

Depending on the size of the uncompensated increment, we should expect homeowners to mobilize in opposition to the takings plan. Farber predicted opposition if the plan did not include any compensation.<sup>180</sup> The surplus from an uncompensated increment goes to the government or to a private party, meaning that takings can attract rent-seeking behavior.<sup>181</sup> But Farber's observations about removing just compensation in order to organize opposition to wasteful takings actually apply even with fair market-value payments.<sup>182</sup> Taken together, both the uncompensated increment-created incentives and discrete minority-structural mechanisms exist to enable those opposed to eminent domain projects to join in and be part of the political process.<sup>183</sup> And this political process counsels for respectful judicial deference to the legislative determination of public use.

A well-functioning political process can justify judicial deference.<sup>184</sup> A strong public debate can identify if a takings project is for the public.<sup>185</sup> Whether the legislative body determines that a taking is a public use depends on the extent to which the private property owners are paid for the

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178. *Id.* at 958–59. Autonomy can be viewed as an option to wait and choose to sell after seeing conditions unfold, or it may depend on "what it means to own property" at a deeper level. *Id.* at 966–67.

179. *Id.* at 965–66. The uncompensated increment is analogous to the endowment effect described by behavioral economists. See Daniel Kahneman, Jack L. Knetsch & Richard H. Thaler, *Experimental Tests of the Endowment Effect and the Coase Theorem*, 98 J. POL. ECON. 1325, 1345 (1990) (explaining that the endowment effect occurs when land is acquired and owners are reluctant to divest themselves of their asset).

180. See Farber, *supra* note 12, at 292 (predicting that a rule flatly prohibiting compensation would create a lobby of landowners that could kill many projects).

181. Fennell, *supra* note 167, at 964–65.

182. In fact, at least having partial compensation arguably would lessen the cost of political involvement, which could prove burdensome on the public. See Robson, *supra* note 12, at 907–08 (arguing that too much reliance on the political process "would foist upon citizens the unreasonable expectation that they should somehow greatly increase the extent of their political engagement to well beyond what it is today").

183. Of course, political opposition to a bad takings plan that really only benefits interest-seeking groups should not always be expected to fail. But, on the whole, potential opposition should serve as a deterrent to truly private takings.

184. See *supra* Part I.

185. See *infra* note 260.

uncompensated increment.<sup>186</sup> Fennell argues, “[a] taking is not for a public use unless the entire taking, including the uncompensated increment, is susceptible of being justly compensated . . . .”<sup>187</sup> The larger the uncompensated increment, the greater the opposition. If the uncompensated increment is too great, then the proposed taking may fail in the political process. However, if the uncompensated increment is more or less compensated by the entire taking, one should expect that the political process accurately sorted the problem.

To illustrate the intersection of Farber’s and Fennell’s research, let’s take a stylized version of the taking in *Kelo*, where most property owners agreed to sell and only a few chose not to. Ten parcels were required for the project; eight sold and two did not. Fair market value for each parcel was \$100; the uncompensated increment for each was \$15. The city only ended up paying \$1,000 to the parcel owners while the total uncompensated increment was \$150. So, in order to eliminate the uncompensated increment, the present value of the expected project’s gains should be at least \$1,150. If the present value of the takings project does not actually compensate each owner, then the owners would mobilize to oppose the uncompensated takings.

This reasoning does not change if the uncompensated increment varies among homeowners, as subjective value itself varies. Perhaps eight parcel owners are indifferent, and two owners have a combined premium of \$75 over market value. The expected value of the taking benefits each homeowner only \$15, so together they lose \$45 by selling their parcels (\$275 minus \$230). Together, the owners with subjective value would invest up to \$45 in order to convince the other parcel owners to oppose the takings. As the other parcel owners are technically indifferent to keeping or selling their homes,<sup>188</sup> whether the two owners succeed depends on interest group or other opposition. If the side proposing the taking has more at stake than an additional \$45 to invest to combat the opposition, the parcel owners would likely lose. But this opposition at least ensures that the taking is cost-efficient because the potential gain for the proponents must be at least the value of this \$45.<sup>189</sup> To the extent the powerful proponents overwhelm the

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186. See Fennell, *supra* note 167, at 959 (“I suggest that the validity of an exercise of eminent domain requires evaluating the appropriation of this uncompensated increment in light of several considerations . . . .”).

187. *Id.* at 1003.

188. If they sell, they get \$100 in fair market value plus \$15 in expected benefits flowing from the development project, which compensates them for the uncompensated increment.

189. See *supra* text accompanying note 154.

opposition, at the very end at least fair market value is awarded.<sup>190</sup> And since the opposition has at their disposal rhetoric to couch their opposition in terms of an idealized notion of property, we should also expect that a \$45 investment in opposition can go much further than a \$45 investment in favor.

At some point, no amount of investment would convince the other members of the public. The parcel owners may fail to convince others that their subjective value is not too extraordinary that it should be compensated; or the public may suspect that these parcel owners are holding out and gaming the system. This Article addresses the hold-out problem later,<sup>191</sup> but for now, the important point of this section is to illustrate a well-functioning political process in takings, driven by the competition of opposing interests.<sup>192</sup>

### *B. The Copyright-Extension Political Process*

The political process of copyright extension does not work as well as with takings. We should generally expect Congress to act more sensibly the greater the political opposition.<sup>193</sup> More is required to prove that legislation actually enhances public welfare. The lack of political opposition to copyright extensions counsels for more judicial policing than in takings.

The *Eldred* decision did not elicit anywhere near the public scorn as *Kelo*. As Fagundes notes, “[o]ne can search in vain for the kind of popular outrage against involuntary government confiscations of property in reaction to *Eldred* that was commonplace in the wake of *Kelo*.”<sup>194</sup> The public did not oppose this legislation, even though there was no compensation for the public domain’s loss. And the breadth of the harm was much greater because the loss by retroactive extensions was borne by the entire public instead of the handful of property owners in *Kelo*.<sup>195</sup>

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190. See Levmore, *supra* note 12, at 319–20 (describing just compensation as a “rule of thumb” to ensure the protection of political losers and the unprotected in takings).

191. See *infra* Part V.B.

192. One could always imagine the political process not functioning accurately in every takings case, but this Article is making general observations. At the very least, just compensation minimizes the loss of those who cannot participate politically.

193. See *supra* text accompanying note 183.

194. Fagundes, *supra* note 9, at 656.

195. *Id.* There has been substantial opposition, however, in academic literature. See, e.g., Lawrence B. Solum, *Congress’s Power to Promote the Progress of Science: Eldred v. Ashcroft*, 36 LOY. L.A. L. REV. 1, 62–78 (2002) (compiling arguments against *Eldred* that were voiced in the law review’s symposium on that topic).

Structure and incentives explain the lack of opposition. Whereas a group of concentrated property owners have multiple tools and advantages to effectively organize, the public has “diffuse interests in preserving shared information” that will be underrepresented.<sup>196</sup> Takings *opponents* have the discrete and insular minority advantage just as copyright *proponents* are a discrete group that can exert power.<sup>197</sup> The direct beneficiaries of copyright extension—holders of expired or soon-to-expire copyright works—have a common interest and the means to lobby and pursue it.<sup>198</sup> However, the extension’s costs are diffuse and spread among a public that cannot effectively evaluate what value might have been created by an additional twenty years to offset the shrunken public domain.<sup>199</sup>

Of course, the burden of copyright extension does not fall evenly, and concentrated groups can oppose copyright extension. But the financial incentive to extend copyrights necessarily outweighs the financial incentive of others to ensure copyright extension. By definition, an expired copyright is public property; thus, the opportunity to use that piece of property would not reap as many material benefits. For example, if a current copyright’s present value is \$1,000, the copyright holder has an incentive to invest up to that same amount to ensure the copyright does not expire.<sup>200</sup> But built into that value is a monopoly premium that cannot be transferred. Without the monopoly, the intellectual property might be worth only \$10 to any individual. As a consequence, the asymmetric financial incentive makes it likely that the opposition will be weaker. The net loss to the public is a shared \$1,000 piece of intellectual property. If the public could overcome problems such as coordination, free-riding, and the ability to more accurately assess the public domain’s value, while also collectively pooling resources, perhaps the political process would ensure that a copyright extension theoretically could be cost-benefit justified.<sup>201</sup> That, however, as with many collective action problems, seems unlikely.

In addition, while property rhetoric helps those opposed to takings, it actually works to the advantage of copyright proponents. Proponents of

196. Fagundes, *supra* note 9, at 690 (characterizing this as a “classic public choice problem”).

197. Ackerman, *supra* note 171, at 726–31.

198. See Karjala, *supra* note 13, at 232–34 (finding that direct beneficiaries of copyright extensions successfully lobbied for favorable rulings during congressional hearings).

199. See *id.* at 233.

200. In fact, proponents of the CTEA uniformly were holders of existing or expired copyrights. See, e.g., Davis, *supra* note 13, at 998 (“[I]t was only retrospective extension that interested Congressional witnesses and lobbyists.”); see also *infra* Part IV.

201. The public would only invest enough resources to stop copyright extension as the expected value of the public domain.

copyright extension used rhetoric that Fagundes terms “property romance.”<sup>202</sup> During congressional debates over the CTEA, proponents used the “romantic” language of property, invoking possession and ownership to elicit an emotional response similar to confiscating real property.<sup>203</sup> Just as property rhetoric is a powerful tool in takings, it is also powerful in copyright.

Thus, the political process of copyright extensions appears weighted strongly to benefit existing copyright holders at the expense of the public. However, those opposed to takings appear to have both the incentives and structural advantages to help accomplish their goals. Therefore, it is surprising that the Justices who worried about the breakdown in the political process in *Kelo* signed onto an opinion that ignored political-process concerns for copyright extensions. There does not seem to be a convincing reason to defer more to a political process that favors private interests against a largely silent public versus deferring to a political process that enables conflicting interests to exert influence.

In the next Part, this Article turns to institutional-capacity concerns. The ability of a branch of government to collect the information needed to choose a public-serving course of action is directly related to the political-process concerns illustrated above. The discussion of institutional-capacity serves two purposes: (1) to reinforce and validate the political-process analysis made above, and (2) to provide an independent reason to calibrate the level of judicial deference differently between takings and copyright extensions.

#### IV. INSTITUTIONAL-CAPACITY COMPETENCE CONCERNS

Judicial deference based on institutional capacity “is premised on the mutually reinforcing beliefs that the lawmaking process is better suited to finding social facts than is adjudication . . . .”<sup>204</sup> The legislative branch has a comparative advantage over the judiciary because of the many tools at its disposal, such as support staff, funds, time, and procedures to collect information.<sup>205</sup> Courts, on the other hand, “are shackled by the temporal and

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202. Fagundes, *supra* note 9, at 662.

203. *Id.* at 664–66. For example, Jack Valenti defended the Motion Picture Association of America’s interest as “just want[ing] to stop private property from being pillaged.” *Id.* at 665.

204. Devins, *supra* note 11, at 1177 (citations omitted); *see also* Fenster, *supra* note 10, at 690 (“Relative institutional competence and authority, coupled with the limits of legal form, dictate judicial deference.”).

205. Devins, *supra* note 11, at 1178.

reactive nature of litigation.”<sup>206</sup> Thus, at first blush, the judiciary should defer to the legislature’s comparative advantage to determine whether a takings plan or a copyright extension are good policies based on findings of fact.<sup>207</sup>

But a good job of fact-finding should not always be presumed. Legislators often act in their self-interest and pursue fact-finding to support a desired legislative outcome.<sup>208</sup> If lawmakers do not care about collecting the necessary facts and just want to “deliver[ ] the goods” to interest groups, then judicial deference based on institutional capacity is flawed.<sup>209</sup> Therefore, deference based on institutional capacity to collect facts to serve the public must be tempered by the realization that the legislative institution may not have adequate incentives to actually do a good job fact-finding.<sup>210</sup>

Just because the legislature has superior institutional capacity, it does not follow that the legislature actually uses this capacity wisely. Congressional performance in collecting facts to serve the public preferences is related directly to political salience of the issue.<sup>211</sup> Significant public scrutiny or opposition will likely increase the attention or care that legislators take.<sup>212</sup> For example, Congress has made “short thrift to fact finding” in certain legislation taken pursuant to the Commerce Clause or the Fourteenth Amendment’s enforcement power. Congress lacked incentives to engage in comprehensive fact-finding because of the lack of interest group or federalism-based opposition to this legislation.<sup>213</sup> Thus, perhaps the Supreme Court’s intervention to curtail some congressional

206. *Id.* at 1180.

207. The line between legal and factual findings is fuzzy and the Court has not been consistent with granting deference. See Eric Berger, *Deference Determinations and Stealth Constitutional Decision Making*, 98 IOWA L. REV. 465, 472–75, 501–05, 520 (2013) (analyzing the Supreme Court’s inconsistencies in granting deference to Congress). For the sake of simplicity, this Article assumes that what constitutes “facts” is straightforward.

208. See Devins, *supra* note 11, at 1182 (discussing the effect of public choice on fact-finding).

209. See *id.* at 1182, 1186 (“Congress’s reputation as a fact finding guru thus appears overstated . . . [I]t may be that the courts do a better job of finding social facts than Congress.”).

210. See Berger, *supra* note 207, at 500 (arguing that courts should “link deference to congressional fact-finding procedures” by “investigating the care and rigor of those procedures to determine whether the resulting fact-findings merit presumptive respect”).

211. Gerhardt, *supra* note 11, at 533–34.

212. *Id.* at 534 (“It is reasonable to assume that members of Congress will work hard on matters on which they believe the public is watching.”).

213. See Devins, *supra* note 11, at 1195–98 (discussing the lack of opposition to the Religious Freedom Restoration Act and the Gun Free School Zones Act and the related lack of congressional fact-finding on these issues).

activity on behalf of federalism is due to the absence of congressional attention to federalism when enacting legislation.<sup>214</sup>

In the previous Part, I explained that incentives and structure make it more likely that the strength of opposition ensures a more properly functioning political process in takings than in copyright extensions. If the political process is well-functioning, we should expect the legislature to take fact-finding seriously. By examining the fact-finding behind the governmental action in *Kelo* and *Eldred*, it appears that the tools of superior institutional capacity more likely will be exercised in takings than in copyright extensions. Consequently, copyright extension warrants less judicial deference to Congress's fact-finding than takings.

Justices Stevens and Kennedy recognized that the City of New London actually exercised the tools of superior institutional capacity. A private nonprofit entity specializing in planning economic development created the development plan.<sup>215</sup> The municipality approved it after "various state agencies studied the project's economic, environmental, and social ramifications" and a team of consultants evaluated six alternative development proposals.<sup>216</sup> In sum, the city approved a comprehensive development plan that complied with substantial procedural requirements, which made it likely that the city was acting with the public purpose in mind.<sup>217</sup>

Justice O'Connor also recognized the extensive fact-finding conducted by the City of New London, but cautioned that the *Kelo* standard of deference would do nothing to ensure that state governments would adequately make a comprehensive takings plan in the future:

[T]here is nothing in the Court's rule or in JUSTICE KENNEDY's gloss on that rule to prohibit property transfers generated with less care, that are less comprehensive, that happen to result from less elaborate process, whose only projected advantage is the

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214. *See id.* at 1213 (arguing that courts should craft higher standards of review in contexts where "there is far less reason to be confident of Congress's ability to incorporate equality or federalism values when legislating"); *see also* Huq, *supra* note 7, at 634–48 (analyzing the Court's interventions on the behalf of federalism).

215. *Kelo v. City of New London*, 545 U.S. 469, 473 (2005).

216. *Id.* at 473 n.2. Not all commentators are satisfied with the Court's care for the fact-finding process of *Kelo*. *See, e.g.*, Fenster, *supra* note 10, at 701 ("The Court demonstrated no more than a cursory concern with the administrative process that led to New London's decision . . .").

217. *Kelo*, 545 U.S. at 493 (Kennedy, J., concurring).

incidence of higher taxes, or that hope to transform an already prosperous city into an even more prosperous one.<sup>218</sup>

However, the strength of the political process greatly weakens the likelihood of executing a future takings plan without comprehensive analysis and thought. States cannot merely declare that an economic development plan will work. They must invest substantial resources into fact-finding in order to overcome the opposition from concentrated groups mobilized by the uncompensated increment using the powerful tool of property rhetoric.<sup>219</sup>

On the other hand, Congress made short shrift of fact-finding to support the CTEA. Justice Ginsburg credited relatively few statements to support Congress's rationality in passing the CTEA, while Justices Stevens and Breyer relied on simple logic to refute the purposes of the CTEA.<sup>220</sup> Although Congress heard from both opponents and proponents of the CTEA, its fact-finding did not connect copyright extensions to the promotion of the public interest. In fact, "[t]here is an embarrassing lack of empirical research on the issue of the *mechanism* by which copyright law furthers the end of the public welfare designated in the Constitution."<sup>221</sup> However, extensive economic analysis existed as to the utter lack of benefits copyright extension would have for the public domain, as detailed in the appendix to Justice Breyer's dissent.<sup>222</sup> Congress did not take seriously this economic evidence, and the CTEA proponents did not respond with thorough studies to refute it.

Congress has the institutional capacity to study whether an extension's benefits outweigh the reduced public domain. However, it did not exercise "its fact finding muscle" by tapping into the resources of the Copyright Office to adequately study the extension's effects.<sup>223</sup> The congressional record had no factual claims about the extension, but rather contained "hypotheses built on hypotheses."<sup>224</sup> No statistical evidence was offered to

218. *Id.* at 504 (O'Connor, J., dissenting).

219. *See supra* Part III.A.

220. *See supra* Part II.B.

221. Hamilton, *supra* note 13, at 656–57 (emphasis in original).

222. *Eldred v. Ashcroft*, 537 U.S. 186, 267–69 (2003) (Breyer, J., dissenting).

223. *See* Hamilton, *supra* note 13, at 657–58 (asserting that the Copyright Office has "years of experience and recordkeeping [that] could be not only a source of guidance on empirical inquiries but also a treasure trove of copyright data.").

224. *Id.* at 657; Karjala, *supra* note 13, at 206–08 (surveying the 1995 and 1997 hearings and finding that "only conclusory testimony of interested parties argued that term extension would lead to new creativity, without meeting any of the economic arguments demonstrating that prospective extension could not increase incentives.").

support the proposition that an extended copyright was needed because of increased life expectancies.<sup>225</sup> Not a single proponent even attempted to demonstrate that international harmonization would benefit the public or anyone else other than current copyright holders.<sup>226</sup> And no CTEA supporter responded to the analysis that the present value of an additional copyright extension to new authors had no economic consequence.<sup>227</sup> No proponents argued that retrospective or prospective extension could meaningfully spur the creation of new works.<sup>228</sup> Instead, witnesses, lobbyists, and members of Congress only wished “to save those immensely profitable sources of present income which were about to be lost.”<sup>229</sup>

The judiciary should be much less deferential to the institutional capacity of Congress to collect facts and design a course of action to help the public in the copyright context. The overwhelming evidence in the congressional record shows that the law’s proponents really wanted more money.<sup>230</sup> Congress “simply [did] not hear[ ] the public’s side of the story.”<sup>231</sup>

It is possible that the political process and fact-finding functions I describe in this and the previous Part are outliers. Perhaps the legislative processes in *Kelo* or *Eldred* do not resemble other eminent domain uses or copyright extensions. But I am more inclined to conclude that they are representative. Opposition to takings will more likely exist than opposition to copyright extensions due to the uncompensated increment and the structural, organizational, and rhetorical tools available to the opposition. With copyright extensions, in contrast, both the incentive to oppose and the tools to do so are lacking. For this reason, it is not surprising that *Eldred* was the first time the Court ever faced a challenge to a copyright extension, even though Congress passed extensions multiple times in the past.

In conclusion, although the courts may not have the same institutional-capacity tools as Congress or state governments to collect facts, the judiciary should not presume that simply the existence of a comparative advantage means actual implementation of the advantage. Due to the

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225. Karjala, *supra* note 13, at 209.

226. *Id.* at 210–12. In addition, the EU policy cited for harmonization only applied to prospective copyright creation. Davis, *supra* note 13, at 1006.

227. Karjala, *supra* note 13, at 214–17; Davis, *supra* note 13, at 1002.

228. Davis, *supra* note 13, at 1034.

229. *Id.*

230. In addition, many of the CTEA’s proponents made campaign contributions to members of the Senate Judiciary Committee and House Judiciary Subcommittee on Courts and Intellectual Property. Karjala, *supra* note 13, at 232.

231. *Id.* at 233.

political-process function described in the previous Part, takings plans will more likely incentivize government to engage in fact-finding while copyright extensions will not. Therefore, judicial deference is far more warranted for the Takings Clause than for the Copyright Clause.

## V. POSSIBLE OBJECTIONS AND WRINKLES

I argue for differing levels of deference in the copyrights and takings contexts. I am not prescribing any particular standard, such as rational basis-plus or heightened scrutiny. Rather, I hope this comparison between *Eldred* and *Kelo* can be illuminating for the discussion of institutional competence and judicial review in the future.

That said, there are possible objections and added wrinkles to the previous Parts' discussions on institutional competence. This Part discusses two wrinkles to the argument: federalism and dissimilar governments, and the takings problem of "driving straight" and hold-outs. It then tackles a possible objection, the supposed "Lochnerization" of Copyright Clause jurisprudence.

### A. *Wrinkle 1: Federalism and Dissimilar Governments*

The reader at this point may be puzzled by this Article's omission of federalism. Lack of judicial deference to congressional action has been increasingly grounded in interventions on the behalf of federalism.<sup>232</sup> In particular, the Court in *United States v. Lopez* intervened to protect states' interests by creating a "noncommercial" carve-out to the exercise of the Commerce Clause;<sup>233</sup> this exception was to prevent Congress from having unlimited "power to regulate," which would undermine the Constitution's system of enumerated powers.<sup>234</sup> This principle was reaffirmed again by the Court only five years later.<sup>235</sup> As noted by others, the worry about undermining the enumerated-powers limitation did not even surface in

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232. This was not always the case. As recently as 1985, the Court disclaimed any role for judicial enforcement of federalism, stating that the political process should protect states' interests. See generally *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 546–47 (1985) (holding that state immunity does not depend on judicial appraisal of whether a governmental function is "integral" or "traditional"); see also Schapiro, *supra* note 17, at 677–79 (discussing the demise of *Garcia*); Huq, *supra* note 7, at 583–611 (discussing federalism concerns for the enumerated powers).

233. *United States v. Lopez*, 514 U.S. 549, 566 (1995).

234. *Id.* at 564–66; Schapiro, *supra* note 17, at 679.

235. See *United States v. Morrison*, 529 US 598, 613 (2000) (holding that Congress's power to regulate through the Commerce Clause did not give it power to regulate noneconomic violent crime).

*Eldred*, even though the Justices that signed onto *Lopez* also joined the *Eldred* majority.<sup>236</sup> Notably, Lawrence Lessig describes his astonishment that the *Lopez* principle, a large part of his argument before the Supreme Court, was not even addressed in *Eldred*.<sup>237</sup>

As this Article does not focus on historical or textual arguments, the debate over a federal government of enumerated powers compared to states with plenary powers does not affect the deference analysis.<sup>238</sup> Similarly, the Court's own inconsistency on federalism and intellectual property does not bear on the inquiry.<sup>239</sup> Perhaps federalism means that there should be a more deferential view of the takings power because it is often conducted by the states acting as local "laboratories for experimentation."<sup>240</sup> On the other hand, because the Fifth Amendment was incorporated to apply to the states, the Court has been invited to limit local action.<sup>241</sup> At any rate, states' rights do not provide a clear answer.

Federalism also raises the question: Why are certain Justices willing to intervene on the behalf of states' rights and unwilling to intervene on behalf of the public? The petitioners in *Eldred* specifically asked this of the Court.<sup>242</sup> This conundrum is especially pronounced if we believe the Madisonian justification for federalism as a means to the end of protecting the public from factions.<sup>243</sup>

There is substantial skepticism and weaknesses with justifying judicial intervention on behalf of federalism.<sup>244</sup> But assuming there is an actual justification to protect states' rights, court intervention on federalism's behalf does not justify judicial intervention on the public's behalf. Thomas Nachbar pointed out that "vigilant judicial review in the federalism context" is justified because Congress could otherwise alter the balance of power set

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236. Huq, *supra* note 7, at 610, 611 & n.180 (citing Schwartz & Treanor, *supra* note 47, at 2360).

237. Lessig, *supra* note 13.

238. See Schapiro, *supra* note 17, at 693–94 & n.231–32 (discussing the connection between heightened judicial deference and states' plenary powers).

239. For example, Huq and Schapiro have pointed out the Court's inconsistency in treating regulation of intellectual property when state regulation is involved. Huq, *supra* note 7, at 610 n.180 (citing Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank, 527 US 627, 640 (1999)); Schapiro, *supra* note 17, at 674–76 (citing Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627, 645–46, 660–61 (Stevens, J., dissenting) (1999)).

240. See *Lopez v. United States*, 514 U.S. 549, 581 (1995) (Kennedy, J., concurring) (arguing that states should be like "laboratories" which the federal government allows to experiment with solutions). *But see Fenster*, *supra* note 10, at 721–22 (asserting a federalist defense of *Kelo*).

241. *Kelo v. City of New London*, 545 U.S. 469, 505–53 (2005) (Thomas, J., dissenting).

242. *Intellectual Property*, *supra* note 13, at 59.

243. THE FEDERALIST NO. 10, at 47 (James Madison) (Yale Univ. ed., 2009).

244. Huq, *supra* note 7, at 626–55.

up by the constitutional order.<sup>245</sup> However, the exercise of the copyright power does not threaten the constitutional order like other congressional powers.<sup>246</sup> Copyright extension only alters the legal rights of private parties instead of altering “the essence of the constitutional framework.”<sup>247</sup> Therefore, the risks associated with unchecked copyright powers are far less a threat to federalism than with other congressional powers.<sup>248</sup>

The type of government body also complicates the institutional competence argument. Intellectual property questions mostly involve Congress, a bicameral body, while takings involve Congress; bicameral and unicameral state or municipal governments; or hybrid combinations of federal-state, federal-city, or state-city takings. A bicameral legislature acts like a supermajoritarian rule, preventing a simple majority from imposing external costs on a slightly smaller minority.<sup>249</sup> Supermajoritarian-like rules, many of which appear in the Constitution, may stop special interest legislation.<sup>250</sup>

However, because of the Seventeenth Amendment,<sup>251</sup> which made both the House and Senate elected by the same constituency, bicameralism’s protections may be overstated.<sup>252</sup> Unlike Congress, state governments can be unicameral, such as Nebraska’s,<sup>253</sup> and municipalities are generally unicameral with a simple majoritarian rule to facilitate rapid legislation.<sup>254</sup> Unicameralism could allow a simple majority to impose rent-seeking legislation and external costs on a minority.<sup>255</sup> Thus, as Levmore alluded, takings law itself may be needed especially in the context of unicameral

245. *Judicial Review*, *supra* note 13, at 59.

246. *Id.*

247. *Id.* at 60.

248. *Id.*; *see also* Schwartz & Treanor, *supra* note 47, at 2373–74 (stating that “[i]ntellectual property legislation such as the CTEA does not encroach upon the authority of a government entity unrepresented in the political process”). I personally am skeptical about judicial interventions for federalism. The point of the exercise is merely to point out that truly valuing federalism does not provide a justification for heightened judicial review of the Copyright Clause.

249. *See* Saul Levmore, *Bicameralism: When Are Two Decisions Better Than One?*, 12 INT’L REV. L. & ECON. 145, 146 (1992).

250. *See* John O. McGinnis & Michael B. Rappaport, *Our Supermajoritarian Constitution*, 80 TEX. L. REV. 703, 737 (2002) (suggesting that supermajoritarian rules limit special interest influence on lawmaking by making laws more difficult to pass).

251. U.S. CONST. amend. XVII.

252. *See, e.g.*, Todd Zywicki, *Repeal the 17th Amendment and Restore the Founder’s Design*, ENGAGE: J. OF THE FEDERALIST SOC’Y PRAC. GROUPS, Sept. 2011, at 88, 89 (arguing that the Seventeenth Amendment eviscerates the benefits of bicameralism).

253. Kim Robak, *The Nebraska Unicameral and Its Lasting Benefits*, 76 NEB. L. REV. 791, 800 (1997).

254. Levmore, *supra* note 249, at 161–62.

255. *Id.* at 161.

legislatures that lack supermajoritarian rules.<sup>256</sup> However, the ease of Tiebout sorting in smaller jurisdictions may eliminate a unicameral legislature's ability to impose external costs,<sup>257</sup> and at the very least, the just compensation requirement makes a majority internalize the external costs of a taking.

Consequently, the general observations about the political process could vary depending on the type of government enacting the legislation. But I do not think this amounts to much. The bicameral system has done nothing to ensure the soundness of intellectual property extensions, as there has simply been insufficient opposition to copyright extensions due to the incentive and structural problems identified. And a unicameral government with a simple majority rule does not necessarily mean that an interest-group proponent is advantaged against the takings opponent. A minority influence is pitted against another powerful minority interest in that context, so the decision rule does not advantage either. If the taking is actually preferred by the majority, instead of majority indifference, the concern of unicameralism shifts from institutional competence to a general evaluation of unicameral, bicameral, and supermajoritarian decision rules. In conclusion, though there are possible variations to the institutional competence analysis based on local government design, the fundamental interest group analysis remains the same.

### *B. Wrinkle 2: The Hold-Out Problem and Driving Straight*

There is another story to be told about *Kelo* and takings in general that this Article has not yet mentioned: the hold-out problem. When I discussed the uncompensated increment, I did not deal with the hold-out component, where a private parcel owner attempts to extract the added value of the property for the future developer. Although this Article focuses on the institutional competence justifications of deference, I include this wrinkle as an added justification for more judicial deference to takings. This potential problem is too important and powerful to omit in a paper on this topic.

If there is a development plan worth \$200, which requires purchasing ten parcels at \$10 each for fair market value, the total purchase price should only be \$100. The \$100 surplus should benefit the developer or the public

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256. See *id.* at 161 n.45 (“At some point a coalition seeking to impose external costs will run up against takings law.”).

257. See *id.* at 161 (explaining that it is difficult to impose external costs when voters can move).

as a whole. If nine parcels were sold at fair market value the one remaining parcel owner could try to hold out and extract up to the entire value of the \$100 surplus from the developer (or the public). Beyond being seemingly unfair, allowing a hold-out can be net-welfare reducing as it can eliminate the incentive or ability to put land to a higher use. Thus, the eminent domain power can eliminate the potential for strategic game playing.<sup>258</sup> Consequently, the judiciary should be sensitive to the possibility that the legal system is being used to reward hold-outs when crafting standards of judicial review.

But rewarding hold-outs is only one part of the problem. Heightened judicial review under the Takings Clause could cause net welfare reduction from a “game of chicken.” Driving straight or swerving arises in the context of a hold-out game. Imagine two people driving their cars straight at each other. The person who loses the game is the one who “swerves” first. As applied to a development project, the hold-out game arises when an individual parcel owner can see that her parcel will be needed for the developer to realize the full gains of the project.<sup>259</sup> The parcel owner can “drive straight” by holding out to try and extract as much money as possible from the developer, and the developer can drive straight by continuing with the project, hoping that eventually the parcel owner will stop holding out and sell at a reasonable price. The parcel owner can “swerve” by selling at less than the full hold-out value, and the developer can swerve by paying off the parcel owner substantially higher than fair-market value. However, if both developer and parcel owner never swerve and just drive straight, the result is a lose-lose situation for all. The developer ends up with a project that is not worth as much as if all parcels had been acquired, while the parcel owner ends up with land that is now valued less because it is surrounded by a development project.<sup>260</sup>

The driving straight/swerving analysis helps to explain *Kelo*.<sup>261</sup> There, the City of New London had already purchased most of the parcels and only a few people remained.<sup>262</sup> If the dissenters had prevailed and stopped the eminent domain, then the game of chicken would have continued. Either the City of New London would swerve, transferring much of the

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258. See 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, 22–23, 41 (2006) (illustrating the hold-out problem involving Disney World).

259. STEARNS & ZYWICKI, *supra* note 153, at 214–24.

260. A helpful illustration would be a house surrounded by a completed strip mall.

261. STEARNS & ZYWICKI, *supra* note 153, at 221.

262. *Kelo v. City of London*, 545 U.S. 469, 475 (2005).

wealth of the development plan to only a few private owners, or the city and the *Kelo* petitioners both would have driven straight. If it was the latter outcome, the city would have ended up with a less effective development plan, and the petitioners would have ended up with greatly devalued homes in a commercial district. Therefore, the specter of a possible hold-out game should give courts pause before invalidating a development plan. The ending stalemate without permitted exercise of the eminent domain power could leave both the public and the private worse off.<sup>263</sup>

### C. Objection: *Lochnerizing the Copyright Clause*

Paul Schwartz and William Treanor have argued that if *Eldred* went the other way, the decision “would have looked like *Lochner*.”<sup>264</sup> Many of the arguments this Article advances for heightened judicial review are based on the rent-seeking risks inherent in copyright extensions. But Schwartz and Treanor likened the rent-seeking arguments in *Eldred* to the rationale behind the despised *Lochner* decision.<sup>265</sup> They argued that “[i]f courts aggressively review economic legislation that seems to favor powerful special interests, they must aggressively review much—and perhaps most—economic legislation.”<sup>266</sup> As a consequence, they argued that the rent-seeking justification for heightened judicial scrutiny under the

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263. The existence of this problem might explain why no governmental practice currently would allow purely private takings—parcel by parcel—instead of a comprehensive development plan. All opinions in *Kelo* cited *Calder v. Bull*, 3 U.S. (3 Dall.) 386 (1798), for the proposition that “the sovereign may not take the property of A for the sole purpose of transferring it to another private party B, even though A is paid just compensation.”; *Kelo*, 545 U.S. at 477, 478 n.5 (citing *Calder*, 3 U.S. (3 Dall.) at 388 (opinion of Chase, J.)); *id.* at 494 (O’Connor, J., dissenting) (citing *Calder*, 3 U.S. (3 Dall.) at 388 (opinion of Chase, J.)); *id.* at 510–11 (Thomas, J., dissenting) (citing *Calder*, 3 U.S. (3 Dall.) at 388 (opinion of Chase, J.)). However, this view has its critics—including another Justice’s opinion in *Calder*. See *Calder*, 3 U.S. (3 Dall.) at 398–99 (opinion of Iredell, J.) (expressing skepticism of notions of law based on “natural justice”). Recently Abraham Bell has supported a private takings rule because both private and public takings allocate property to the preferred owner. See Abraham Bell, *Private Takings*, 76 U. CHI. L. REV. 517, 558 (2009) (arguing that “a private taking power should be granted where (1) the taker is the preferred owner of the property right . . . and (2) strategic difficulties block the efficient or just transfer of property rights in the market place”).

264. Schwartz & Treanor, *supra* note 47, at 2395.

265. *Id.* at 2392; see also David A. Strauss, *Why Was Lochner Wrong?*, 70 U. CHI. L. REV. 373, 373 (2003) (“You have to reject *Lochner* if you want to be in the mainstream of American constitutional law today.”).

266. Schwartz & Treanor, *supra* note 47, at 2407.

Copyright Clause “contains precisely the same flaws that . . . critics find in” the rent-seeking justifications underlying *Lochner*.<sup>267</sup>

However, their argument rings hollow. Political-process and institutional-capacity concerns do not necessarily lead to the judiciary policing all interest-group legislation. Rather, if self-interested legislation is the outcome of a healthy political process—where incentives and structure align to give voice to opposition—then the courts should defer. But when, as with copyright extension, the deck is stacked far in favor of a small group of copyright holders, heightened judicial scrutiny could give voice to an otherwise muted public.<sup>268</sup>

Moreover, Schwartz and Treanor implicitly recognized the harm copyright extension has on the political domain and still want judicial policing. Whereas the Court should not defer to copyright extension’s constitutionality, it should instead “strengthen the public domain” by increased policing of the fair use and parody exceptions to copyright.<sup>269</sup> Though Schwartz and Treanor denounced “aggressive” judicial policing of economic legislation, they still argue for protecting the public domain through a case-by-case expansion of fair use and parody defenses. It is unpersuasive that a comprehensive doctrinal approach to copyright extensions would be “*Lochnerization*” while protecting the public domain through a nonuniform approach somehow is not.

## CONCLUSION

Calibrating deference based on institutional capacity is unavoidably imprecise.<sup>270</sup> There are certainly exceptions to specific takings or intellectual-property legislation<sup>271</sup> that do not have the same political-process or institutional-capacity dynamics as those discussed in this Article. But if the point is to delineate elementary standards of deference for these governmental powers, drawing on generalizations can help reduce the risk of error that the judiciary will misunderstand institutional competence

267. *Id.* at 2409. There is no uniform agreement that *Lochner* was a wrong outcome based on anti-rent-seeking; rather, there are multiple reasons to criticize the decision. See generally Strauss, *supra* note 265 (discussing various criticisms raised against *Lochner*).

268. See STEARNS & ZYWICKI, *supra* note 153, at 64–65 (analyzing *Lochner* under competing views of the decision and interest-group theory).

269. Schwartz and Treanor, *supra* note 47, at 2409.

270. See Schapiro, *supra* note 17, at 701 (explaining that a “general problem with the institutional competence theory is the difficulty of evaluating relevant institutional capabilities”).

271. One exception with intellectual property may be with database services. E-Bay, Lexis, Westlaw, and other powerful interests seek less-protective copyright laws. Schwartz & Treanor, *supra* note 47, at 2405.

concerns in any one case.<sup>272</sup> This Article advocates more deference to takings than to copyright based on institutional competence, although I do not draw precise borders. An examination of proposed deference standards could be helpful.<sup>273</sup>

For takings, Justice Stevens advocated a rational basis standard with an exception for pretext, and Justice Kennedy advocated rational basis with a special emphasis on the risk of pretextual public use projects. I predict no difference in the application of either standard because the power of political opposition will put pressure on governments to ensure the comprehensiveness of a takings plan. Justice O'Connor's rational basis standard that prohibits economic development does not seem optimal. Since "blight" takings would still be permitted, either states would expand their definitions of blight<sup>274</sup> or just be forced to wait until a situation deteriorated into blight. As a consequence, the City of New London's economic development plan would have to wait until the city's distressed condition deteriorated to the point of a slum; only then could it have taken Ms. Kelo's house. Justice Thomas's interpretation of "Public Use" to mean "employ" would only eliminate certain types of use of property, but does not stop the confiscation of it. The consequence is that for comprehensive development plans, cities could decide to turn hold-out property owners' parcels into public parks or parking lots.<sup>275</sup> Cities could at least solve the hold-out game of chicken<sup>276</sup> but could not actually put these parcels to their maximum use.

So, if I were to choose a takings standard of deference, perhaps I would use Justice Kennedy's rational basis with a focus on pretext.<sup>277</sup> Even though it would not result in different outcomes than Justice Stevens's in most cases, Justice Kennedy's standard could at least empower trial courts to detect the unusual situation in which the political process has really broken down.

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272. See Schapiro, *supra* note 17, at 713 (advocating differing levels of deference based on "the relative dangers of potential errors . . .").

273. See *supra* Tables 1 and 2 for simplified standards of review from these cases.

274. See Somin, *supra* note 12, at 30 (explaining that if blight were still permitted, "it is possible that a victory for the property owners under O'Connor's approach would have still given states a free hand to condemn virtually any property simply by defining blight extremely broadly.").

275. Despite Justice O'Connor's and Thomas's professed concern for the poor in their opinions, protecting middle-class neighborhoods from economic development while also preventing blighted areas from being condemned exacerbates inequality. See David A. Dana, *The Law and Expressive Meaning of Condemning the Poor After Kelo*, 101 NW. U. L. REV. 365, 379–80 (2007) (asserting that blight condemnations displace poor minority occupants and replace them with wealthier, non-minority residents).

276. See *supra* Part V.A.

277. *Kelo v. City of London*, 545 U.S. 465, 483–84 (2005).

Justice Ginsburg's deferential rational basis standard in *Eldred* did not have an exception for pretext. Justice Stevens's rational basis standard with an exception for retrospective extensions would have eliminated the substantial incentive for proponents of the CTEA to push for a copyright extension.<sup>278</sup> Justice Breyer's rational basis-plus standard gives more flexibility than Justice Stevens's, so I would be more inclined to adopt it. The lack of any existing, serious empirical fact-finding on the benefits of copyright extensions<sup>279</sup> makes me hesitant on any bright-line rules for any copyright extension. However, a more searching level of deference may help fix what otherwise is a broken political process in order to force Congress to really do its homework.

Deference under the Copyright and Takings Clauses plausibly seems fixed for the future. Supreme Court precedent suggests that the judiciary will not intervene to save those who lose in the political arena in either case. There is good reason to think that generally the strength of opposition to takings will ensure that wasteful or truly rent-seeking plans with little public benefit are eliminated. However, opponents of any future copyright extension face powerful, entrenched interests.

These issues will inevitably surface again. As American cities face new challenges in the twenty-first century, new and creative uses of eminent domain power will be necessary to ensure their continued vitality.<sup>280</sup> When the current copyright terms near expiration, one can expect powerful copyright holders such as Disney or Bob Dylan's wealthy heirs, to again lobby for another retrospective extension.<sup>281</sup> *Kelo* and *Eldred* make it clear that the courts will not intervene. For better or for worse, the political process will decide these issues.

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278. As mentioned earlier, every single proponent of the CTEA wanted retroactive extensions. See *supra* Part IV. Of course, Justice Stevens also intimated that he would have eliminated prospective extensions if he thought the issue was actually presented. See *supra* Part II.B.2.

279. See *supra* Part IV.

280. See Mihaly & Smith, *supra* note 12, at 729 ("We expect that the essence of the redevelopment power will survive and eventually thrive simply because it is necessary. . . . It is difficult to believe that the United States will deprive itself of the tools necessary to ensure the continued vitality of its own great cities.").

281. See Davis, *supra* note 13, at 998 ("The problem, of course, is that this conundrum and unsatisfactory resolution will predictably recur at every new copyright term extension interval.").

