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BY EMINENT DOMAIN OR SOME OTHER NAME: A TRIBAL PERSPECTIVE ON TAKING LAND

Stacy L. Leeds*

Private Property . . . is a Creature of Society, and is subject to the Calls of that Society, whenever its Necessities shall require it, even to its last Farthing.

Benjamin Franklin¹

I. INTRODUCTION

Throughout the United States there is a backlash to recent eminent domain decisions.² People are dismayed their government has the power to force landowners to surrender their property so that a new owner can utilize the land for a different, arguably better use. This shockwave of vulnerability extends to landowners and legislatures from all political spectrums.³ Moreover, it is hard to find a demographic group within the United States that is not outraged by recent eminent domain developments,⁴ except American Indians.⁵

* Associate Professor of Law and Director, Tribal Law and Government Center, University of Kansas School of Law; Justice, Cherokee Nation Judicial Appeals Tribunal (Supreme Court). I would like to thank the University of Tulsa *Law Review* editors and staff for their hard work on this symposium issue. I would also like to extend my sincere gratitude to University of Kansas law students Mark Dodd, Benjamin Lowenthal, and William Reynolds for their diligent research assistance, and to the University of Kansas for continued support of faculty scholarship.

1. John F. Beggs, Student Author, *The Theoretical Foundations of the Takings Clause and the Utilization of Historical Conceptions of Property in the Ecological Age*, 6 *Fordham Envtl. L.J.* 867, 892 (1995) (citing Benjamin Franklin, *Queries and Remarks: Respecting Alterations in the Constitution of Pennsylvania*, in *The Writings of Benjamin Franklin* vol. 10, 59 (Albert Henry Smyth ed., Macmillan Co. 1907)).

2. Bruce Moyer, *Court's Decision Provokes Property Rights Backlash*, 52 *Fed. Law.* 10 (Sept. 2005).

3. See *id.* (describing a "firestorm of protest" by members of Congress and in state capitals across the country). Recently, House Representative Maxine Waters, a democrat from California remarked, "'The taking of private property for private use, in my estimation, is unconstitutional. It's un-American, and it's not to be tolerated. . . . This is not a partisan issue.'" Greg Simmons, *Bipartisan Support for Eminent Domain Reform*, <http://www.foxnews.com/story/0,2933,169926,00.html> (Sept. 20, 2005).

4. Many efforts to limit the reach of eminent domain have been initiated on the national, state, and local level. Silla Brush, *Real Angry Over Real Estate: Why a Recent Supreme Court Ruling Has Lots of Homeowners Hot Under the Collar*, *U.S. News & World Rpt.* 34 (Oct. 10, 2005). Nationally, the House of Representatives passed a nonbinding resolution criticizing the *Kelo v. City of New London*, 125 S. Ct. 2655 (2005), decision within a week of the ruling. *Brush, supra* (citing H.R. Res. 340, 109th Cong. (June 30, 2005)). The Senate has several proposed bills, including one by Texas Senator John Cornyn, that would limit federal funds to projects that use *Kelo*-like eminent domain for economic development projects. *Id.* (citing Sen. 1313, 109th Cong. (June 27, 2005)).

5. Others have made similar observations. Several postings to Internet web-boards and blogs make references to the wholesale takings of Indian lands as an irony to current eminent domain debates. For example, one website went as far as awarding a poetry prize for a poem entitled *Eminent Domain*, by John

For centuries, American Indians have seen their lands taken by federal and state governments without consent, and at times, without compensation.⁶ Some Indian land takings have fallen squarely within the exercise of eminent domain powers,⁷ but takings have routinely occurred under other theories that provide no legal remedy.⁸ In both situations, the underlying rationale for the taking was the belief that Indians were not using the land as efficiently as another owner would.⁹ In short, the “public good” necessitated the taking of land from the Indians, so the land could be redistributed to others who would make better use of the land. From these experiences, American Indians have long been confronted with the reality that no matter what legal interest one holds in property, those ownership interests are always subject to divestiture by the government, whether tribal, state, or federal.¹⁰

Parker. Creative-Poems, *Featured Poem Award*, <http://www.creative-poems.com/poem.php?id=157905> (Aug. 14, 2005).

6. *E.g. Tee-Hit-Ton Indians v. U.S.*, 348 U.S. 272, 288–91 (1955) (holding unavailable compensation for lands where the United States did not recognize aboriginal title); *Sioux Tribe of Indians v. U.S.*, 316 U.S. 317, 331 (1942) (holding federal government owes no compensation for taking of lands that were set aside for Indians pursuant to an executive order); *Lone Wolf v. Hitchcock*, 187 U.S. 553, 567 (1903) (holding compensation for tribal government for lands allotted to individuals was a political question and unreviewable by the Supreme Court because Congress had plenary power to redistribute lands). *See also* Michael M. McPherson, *Trustees of Hawaiian Affairs v. Yamasaki and the Native Hawaiian Claim: Too Much of Nothing*, 21 *Envtl. L.* 453, 481 (1991) (noting Native Hawaiians received no compensation).

Even with treaty guarantees to the contrary, Indian lands were taken and not subject to review. The only recourse was to pursue compensation after the fact in the Court of Claims. Scott C. Hall, *The Indian Law Canons of Construction v. The Chevron Doctrine: Congressional Intent and the Unambiguous Answer to the Ambiguous Problem*, 37 *Conn. L. Rev.* 495, 508 (2005). The Indian Claims Commission Act of 1946 established a commission to adjudicate takings claims and allows tribes to seek compensation. 25 U.S.C. §§ 70–70v (2000). However, there is no remedy for return or exchange of lands. *Id.* Monetary compensation is the only remedy the United States allows. *Id.*

7. *See generally Cherokee Nation v. S. Kan. Ry. Co.*, 135 U.S. 641 (1890) (holding the federal government may exercise and delegate power of eminent domain over Cherokee fee simple lands within a Cherokee reservation and without tribal consent).

The Federal Power Act also authorizes eminent domain over Indian lands held in fee simple by an Indian tribe for purposes of utilities. 16 U.S.C. §§ 836, 836a (2000). *See Fed. Power Commn. v. Tuscarora Indian Nation*, 362 U.S. 99 (1960).

8. For a discussion of various theories for taking Indian land see *infra* pages 60–67.

9. Juan F. Perea, *A Brief History of Race and the U.S.-Mexican Border: Tracing the Trajectories of Conquest*, 51 *UCLA L. Rev.* 283, 292–93 (2003) (noting that in both the Mexican and Indian contexts, one rationale for dispossession of lands was the belief that Anglos could use the lands better and more productively); Judith V. Royster, *Mineral Development in Indian Country: The Evolution of Tribal Control Over Mineral Resources*, 29 *Tulsa L.J.* 541, 553 (1994) (noting that during allotment, Congress made policy decisions based on what they deemed was the most “efficient and wise use of Indian lands”); Dennis Wiedman, *The Miami Circle: Teacher of Respect for Nature, People, History, and Place*, 13 *St. Thomas L. Rev.* 269, 274 (2000) (noting one rationale for taking of Indian lands based on lack of use or the notion that the lands were empty).

10. While this article focuses primarily on federal action, there are many instances where state governments have targeted Indian lands for taking. *E.g. Cass County Jt. Water Resource Dist. v. 1.43 Acres of Land in Highland Township*, 643 N.W.2d 685, 687–89 (D.N.D. 2002) (upholding North Dakota eminent domain over fee lands owned by the Turtle Mountain Chippewa tribe); *see* Todd Miller, *Easements on Tribal Sovereignty*, 26 *Am. Indian L. Rev.* 105 (2001) (mentioning that state eminent domain powers can not be used to acquire lands held in trust by the federal government for the benefit of tribes or individual Indians); Robert B. Porter, *Building A New Longhouse: The Case for Government Reform within the Six Nations of the Haudenosaunee*, 46 *Buff. L. Rev.* 805, 873 (1998) (noting that beginning in 1971, New York acted in bad faith toward Indian land by eminent domain power, even though the power had long been denied by federal law; and that states cannot take Indian land (citing *Seneca Nation of Indians v. N.Y.*, 397 F. Supp. 685, 686 (W.D.N.Y. 1975) (holding the state had no power to apply state law to lands within Indian reservation))); Sheree R. Weisz, Student Author, *Constitutional Law—Federal Indian Law: The Erosion of Tribal Sovereignty*

There are interesting parallels to be drawn from the American Indian experience in land takings. This article reveals how federal actions have divested American Indians of vast land holdings using much of the same political and theoretical framework of today's eminent domain debate.¹¹ Noting that tribal governments, like their state and federal counterparts, have inherent sovereign powers, this article encourages tribes to exercise *their* eminent domain powers in order to reacquire and consolidate their land base. In conclusion, this article notes the mainstream backlash to eminent domain power has little to do with changes in the law. Eminent domain has, however, started affecting a different class of people.

II. EMINENT DOMAIN GENERALLY

Within the United States, the federal government has constitutional authority to seize private lands for public use provided the landowner is compensated.¹² The various states within the federal union also exercise the power of eminent domain pursuant to state constitutional provisions.¹³

The power of eminent domain can be traced back to Roman law,¹⁴ and was a well-established concept long before the American Revolution.¹⁵ But with the advent of the United States, there was a change in terms of how people viewed the power of the sovereign against the individual's right to property:¹⁶ the expectation of individual rights to property increased significantly. Governmental seizure of individual property, even

as the Protection of the Nonintercourse Act Continues to be Redefined More Narrowly, 80 N.D. L. Rev. 205 (2004) (discussing state power of eminent domain of fee simple lands owned by tribes); see also Jessica A. Shoemaker, Student Author, *Like Snow in the Spring Time: Allotment, Fractionation, and the Indian Land Tenure Problem*, 2003 Wis. L. Rev. 729, 744-45 (2003) (discussing how the "continual taking of Indian lands under eminent domain" by both state and federal governments leads to a negative land base result even when there have been programs to increase tribal land bases through repurchase programs).

11. Tribal lands have been taken by eminent domain powers in several contexts. However, this article focuses on large-scale federal policies that have divested tribes of property on the basis of theories beyond eminent domain.

12. The Fifth Amendment of the U.S. Constitution provides "[no] private property be taken for public use, without just compensation." Eminent domain was recognized as an appropriate governmental power at common law. See e.g. *Kohl v. U.S.*, 91 U.S. 367, 372 (1875).

13. Some state constitutions explicitly grant the state the power of eminent domain. E.g. Cal. Const. art. I, § 19.

14. Timothy Sandefur, *A Natural Rights Perspective on Eminent Domain in California: A Rationale for Meaningful Judicial Scrutiny of "Public Use"*, 32 Sw. U. L. Rev. 569, 571-75, 571 n. 11 (2003) (noting that the public use limitation on governmental taking dates back to the Twelve Tables of Roman law: "No privileges, or statutes, shall be enacted in favor of private persons, to the injury of others contrary to the law common to all citizens, and which individuals, no matter of what rank, have a right to make use of." (internal quotation marks omitted)).

15. Matthew P. Harrington, *"Public Use" and the Original Understanding of the So-Called "Takings" Clause*, 53 Hastings L.J. 1245, 1252-53 (2002) (noting that prior to the American Revolution the power of eminent domain was well entrenched but was not limited by the public use doctrine).

16. With the emergence of the United States, the importance of individual property rights increased. See Robert Bejesky, *An Analytical Appraisal of Public Choice Value Shifts for Environmental Protection in the United States & Mexico*, 11 Ind. Intl. & Comp. L. Rev. 251, 264 (2001); J. Gordon Hylton, *Property Rights in John Marshall's Virginia: The Case of Crenshaw and Crenshaw v. Slate River Company*, 33 John Marshall L. Rev. 1175, 1176 (2000).

when compensated, would come to be viewed as “un-American,”¹⁷ unless it was for a clear public use, such as a highway or a public park.

It is argued eminent domain powers, particularly the public use doctrine, have evolved in recent years. Some argue the public use limitation in the takings clause has been severely abused, with sovereigns having a newly recognized power to take private lands for redistribution to other private parties.¹⁸ Critics suggest that present eminent domain powers are inconsistent both textually and ideologically with the framers’ intent.¹⁹

Although the outcomes of recent court decisions might suggest an expansion of eminent domain powers, a review of prior cases reveals that the courts have historically deferred to the legislative and executive policy determinations in takings cases.²⁰ Very rarely have federal courts sided with landowners in takings cases.²¹

Condemnation of privately owned lands for uses such as water projects, roadways, parks and recreation areas, hospitals, and military bases are seldom challenged.²² Once the government takes the land, there is no requirement that the government retain the right to exclude, or that citizens have an unqualified right to access the taken land.

Many of the first eminent domain cases involved a taking of land to make way for railroads.²³ In these cases, the federal government subsequently granted ownership of the taken lands to the railway corporation.²⁴ Critics of recent cases argue that the courts have taken the public use requirement almost out of existence by allowing private land to

17. Many Americans view property as a principled right. See Steve P. Calandrillo, *Eminent Domain Economics: Should “Just Compensation” Be Abolished, and Would “Takings Insurance” Work Instead?* 64 Ohio St. L.J. 451, 468 (2003).

18. See e.g. D. Benjamin Barros, *The Police Power and the Takings Clause*, 58 U. Miami L. Rev. 471, 522 (2004) (arguing the current state of takings law does not violate framers’ intent).

19. See e.g. Nancy K. Kubasek, *Time to Return to a Higher Standard of Scrutiny in Defining Public Use*, 27 Rutgers L. Rec. 3 (2003) (arguing that framers’ intent would not permit current state of takings law).

20. See e.g. *Hsiung v. City & County of Honolulu*, 378 F. Supp. 2d 1258, 1265 (D. Haw. 2005) (“In recent years, the Supreme Court has taken no action that would undermine this long standing authority. Rather, the Court’s latest decisions regarding the power of eminent domain have only bolstered the ‘longstanding policy of deference to legislative judgments in this field.’” (citing *Kelo*, 125 S. Ct. at 2663)); *HTK Mgt., L.L.C. v. Seattle Pop. Monorail Auth.*, 121 P.3d 1166, 1176 (Wash. 2005) (“Since the turn of the century, Washington courts have provided significant deference to legislative determinations of necessity in the context of eminent domain proceedings.”).

21. One case representing the framers’ intent that takings be limited to purely public uses is *Missouri Pacific Railway Company v. Nebraska*, 164 U.S. 403, 417 (1896) (holding that the taking of lands owned by a railroad was unconstitutional because the taking was considered a private function). The decision is frequently cited to suggest that courts have departed from the traditional interpretations of the takings clause. See e.g. *Hall v. City of Santa Barbara*, 797 F.2d 1493 (9th Cir. 1986); *State ex rel. Wabash Ry. Co. v. Pub. Serv. Commn. of Mo.*, 100 S.W.2d 522 (Mo. 1936); *St. v. Pub. Serv. Commn.*, 137 P. 1057 (Wash. 1914).

22. There are reasonable governmental interferences with property ownership to which most people agree. Property owners do not expect an absolute right to exclude. Police, firemen, and other governmental entities have a right to possess or use private property in certain circumstances. Moreover, when a legitimate public purpose for condemnation exists, most property owners do not expect to keep their homes. No matter how unpleasant it may be for the condemnee, few would expect to prevail in litigation that argues a property taken for a road, flood control measure, or hospital is based on illegitimate public purpose. For this reason, most takings claims are challenged on grounds of inadequate compensation.

23. E.g. *Cherokee Nation*, 135 U.S. at 642–43.

24. E.g. *Pacific Railroad Act*, Pub. L. No. 37-120, § 2, 12 Stat. 489 (1862) (providing for grants of land to the railroad companies).

be taken for the private economic benefit of others. This is hardly a new development in the law.²⁵

When railroad companies became new owners of taken land there was little public outcry, perhaps because it happened in isolated instances and in remote areas. Other types of takings claims have also gone seemingly unnoticed by mainstream Americans, despite the large number of people that were impacted. One such category of takings that has failed to enrage mainstream Americans is the taking of lands considered slums or “blighted” areas.

Litigation of the “blight” cases began in the 1950s²⁶ and increased in number with the advent of urban renewal projects. Blight cases involve condemnation of land where the articulated public use is the removal of undesirable or unhealthy living conditions.²⁷ Yet, rarely are these cases initiated for the purpose of actually protecting the unfortunate residents from uninhabitable conditions or improving their standard of living. Instead, often private corporations, working in collaboration with state, federal, and local governments in urban renewal programs, are waiting in the wings to redevelop the land.²⁸

By definition, “blight” is a highly subjective term which easily leads to expansive interpretations.²⁹ Condemnation of property may meet the public use requirement when it is taken for any number of reasons, including building dilapidation, deterioration, age, inadequate ventilation, population overcrowding, arrested economic development, traffic congestion; or where the area is conducive to ill health, juvenile delinquency, or high crime rates.³⁰

In many states, condemnation proceedings may commence as soon as an urban renewal plan has been adopted through a local resolution declaring the need to acquire real property to execute the plan. Challenging these takings has proven difficult. Condemnation for the redevelopment of blighted areas has been repeatedly declared a sufficient public use to validate the taking, even though the condemned land ultimately goes to private entities.³¹ The blight cases allow governments to take private land and redistribute that land to another private entity on the grounds that it is in the public’s best interest. In many cases, these eminent domain actions have resulted in state-sanctioned

25. It is well recognized the sovereign may transfer private property to public ownership—such as for a road, hospital, or a military base. But it is equally well established that the sovereign may transfer private property to private parties, often common carriers, who make the property available for the public’s use—such as with a railroad, a public utility, or a stadium.

26. See *Berman v. Parker*, 348 U.S. 26, 32 (1954). *Berman* is also cited by the *Kelo* Court; it deals with areas that were declared blighted and thus targeted for redevelopment. *Kelo*, 125 S. Ct. at 2663.

27. Ilya Somin, *Overcoming Poletown: County of Wayne v. Hathcock, Economic Development Takings, and the Future of Public Use*, 2004 Mich. St. L. Rev. 1005, 1034 (2004).

28. See *id.* at 1009–19 (discussing how Detroit and General Motors partnered to take land and create a new plant based on an economic development rationale).

29. *Id.* at 1034 (discussing the how the definition of blight has expanded).

30. These are merely examples of how subjective property conditions can be to constitute “blight.” See e.g. *Oklahoma Urban Renewal Neighborhood Redevelopment Act*, Okla. Stat. Ann. tit. 11, §§ 38-101–38-123 (West 1994).

31. See Wendell E. Pritchett, *The “Public Menace” of Blight: Urban Renewal and the Private Uses of Eminent Domain*, 21 Yale L. & Policy Rev. 1 (2003).

redistribution of wealth and property rights.³² Moreover, a disproportionate amount of communities of color and disadvantaged classes fall under statutory definitions of “blight.”³³ As a result, the redistribution typically involves the taking of land belonging to the disadvantaged and transferring it to wealthier individuals and entities, such as private corporations. Only rarely does it work in reverse.

A rare exception, where the property interests of wealthier individuals were taken and redistributed to others, was seen in *Hawaii Housing Authority v. Midkiff*.³⁴ Through land reform legislation, the Hawaii legislature sought a reduction in high concentrations of land ownership as a way to address the state’s sky-rocketing residential real estate market.³⁵ The law would potentially deprive large landholders, typically lands owned by a vast private trusts and estates, from maintaining long-term residential leases to much of their lands.³⁶ The legislation allowed leaseholders to petition a state agency to convert their leasehold interest to fee simple estates.³⁷ Under this process, lessees of the Bishop Estate, the largest private land owner in Hawaii, tried to avail themselves of the legislative conversion.³⁸ Litigation challenging the constitutionality of Hawaii’s legislation followed.³⁹

State action in *Midkiff* was challenged as nothing more than government seizure of private land for redistribution for the private use of another.⁴⁰ The United States Supreme Court upheld the taking, finding that the state’s attempted reduction of land ownership concentration satisfied the public use requirement.⁴¹

Midkiff reinforced the judiciary’s tradition of upholding takings, so long as the exercise of eminent domain is “rationally related”⁴² to a public purpose.⁴³ The Court continued the precedent of deferring to the legislature to define public use.⁴⁴ State courts have been equally deferential to legislative determinations, and have mandated similar transactions where the new property owner is a private entity or individual.⁴⁵

Although the *Midkiff* decision received scrutiny in the academic and legal community for arguably breaking new ground in public use jurisprudence,⁴⁶ there was

32. See e.g. *Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229 (1984); *Berman*, 348 U.S. 26.

33. See Pritchett, *supra* n. 31, at 3–4.

34. 467 U.S. 229 (1984).

35. *Id.* at 232–33.

36. See *Hawaii Land Reform Act*, Haw. Rev. Stat. §§ 516-1–516-186 (1993). See also Mark C. Landry, *The Public Use Requirement in Eminent Domain—A Requiem*, 60 Tul. L. Rev. 419, 420–21 (1985) (providing a full discussion of the legislation at issue in *Midkiff*).

37. Until that point, the legislative act and the power of the Hawaii Housing Authority remained unused by the state for many years.

38. *Midkiff v. Tom*, 483 F. Supp. 62, 65 (D. Haw. 1979).

39. *Id.*

40. *Id.*

41. *Midkiff*, 467 U.S. at 244–45.

42. *Id.* at 241.

43. *Id.* at 242–45.

44. *Id.* at 230–31.

45. See *Hsiung*, 378 F. Supp. 2d 1258; *HTK Mgt., L.L.C.*, 121 P.3d 1166.

46. See e.g. Richard A. Epstein, *Takings: Private Property and the Power of Eminent Domain* 184 (Harv. U. Press 1990); Russell A. Brine, *Containing the Effect of Hawaii Housing Authority v. Midkiff on Takings for Private Industry*, 71 Cornell L. Rev. 428 (1986) (criticizing the *Midkiff* Court’s “public purpose” interpretation).

no serious public outcry. Perhaps there was a lack of sympathy from mainstream Americans for the wealthy landowners of Hawaii. Likewise, in the blight cases, perhaps the average middle-class American failed to identify with the mostly low-income communities of color that had been displaced.

The public reaction to the Supreme Court's recent decision in *Kelo v. City of New London*⁴⁷ is a different matter.⁴⁸ The petitioners in *Kelo* were firmly rooted in a "regular" neighborhood. One petitioner was born in her home back in 1918 and had lived in New London her entire life.⁴⁹ The targeted neighborhood was part of an urban renewal plan, but this neighborhood differed from the typical blight situation because it was neither run-down nor crime ridden.⁵⁰

Nevertheless, the community in *Kelo* was considered a "distressed municipality"⁵¹ based on its economic condition and high unemployment rate.⁵² A private non-profit entity began assisting the local government with economic development planning, and Pfizer Incorporated announced plans to build a research facility in the area, which would

47. 125 S. Ct. 2655 (2005).

48. Many states have proposed legislation or initiated studies on restrictions to their eminent domain statutes with Alabama, Delaware, and Texas legislators having already passed bills. Brush, *supra* n. 4, at 34. Responses vary greatly between states, and even within the same state. For example, Oklahoma statutes limit condemnation of private property for actual use by the public for projects like roads, schools, and parks. Dan Batchelor, *No Need to Fix What Isn't Broken*, *The Oklahoman* 13A (Oklahoma City, Okla.) (Sept. 30, 2005). It also includes condemnation for utilities that provide public services and for removing blight when property conditions are harmful to the public. *Id.* This has caused some to say that *Kelo* has no effect in Oklahoma because its statutes already restrict condemnation for economic development. *See id.*; *After Kelo: Drive Targets 'Takings' Decision*, *The Oklahoman* 10A (Oklahoma City, Okla.) (Sept. 22, 2005). But this has not stopped a petition drive to change the state constitution as well as several task forces that are studying the ruling to see if future legislative action is necessary. *Id.*

Similarly, in 2004 the Michigan Supreme Court held the use of eminent domain, like that used in *Kelo*, is not constitutional in their state. *Property: Lawmakers, Voters Should Adopt Amendment to Limit Takings*, *Lancing St. J.* 8A (Sept. 22, 2005) [hereinafter *Property*]. At least seven other states had laws in opposition to *Kelo* when it was decided. *Lawmakers: Trump Kelo—State, Federal Laws Needed to Preserve Property Rights*, *Worcester Telegram & Gaz.* A10 (Sept. 23, 2005). In Michigan, like many other states, the legislature is considering a constitutional amendment despite *Kelo* having no effect in the state, because many do not want to rely on a Court ruling that can be overturned. *See Property, supra.* They want a constitutional amendment that is not easily overturned. *Id.*

Ohio legislation is possibly the most creative. Senate Bill 167 would put a two-year moratorium on state agencies and local governments' ability to use eminent domain. *News Briefs: Eminent Domain Bill Vote Tuesday*, *Cincinnati Enquirer* 1C (Oct. 2, 2005). The bill also creates a task force to study what changes should be made in the future. *Id.*

Local governments in Connecticut have taken two stark positions. The Town Council in Trumbull introduced a resolution modeled after one already passed in Milford that would require a two-thirds majority vote of the Council for the use of eminent domain for public projects including new schools or roads and never for another's private use or development. Bill Cummings, *Protecting Land Often Tough Fight: Recent Ruling Indicates Courts Favoring Seizure*, *Connecticut Post* A1 (Oct. 2, 2005). But towns like Bridgeport and Stamford support *Kelo*'s use of eminent domain, arguing it is the only way to acquire land for redevelopment in urban areas, an issue that rural or suburban areas like Milford do not have to deal with since they do not lack available property. *Id.*

The City Council of Encinitas, California, is considering a proposal that any transfer of private property over to another private individual using eminent domain must pass a two-thirds vote in a regular election. Amitai Etzoni, *States to the Rescue*, 181 N.J. L.J. 27 (Sept. 26, 2005).

49. *Kelo*, 125 S. Ct. at 2660 (referring to Petitioner Wilhelmina Dery).

50. *Id.* at 2659–60. New London did not claim that the petitioners' well-maintained homes are the source of any social harm. *See id.* at 2660.

51. *Id.* at 2658 (internal quotation marks omitted).

52. *Id.* 2658–59.

require more land.⁵³ When the landowners refused voluntarily to sell their homes, condemnations proceedings were initiated.⁵⁴ The U.S. Supreme Court upheld the taking as a valid public use of promoting economic development.⁵⁵

An unparalleled public outrage followed the Court's decision. The mainstream American public sympathized with the petitioners because they could identify with them. If the government can force the sale of,⁵⁶ or simply seize this neighborhood, nobody's home is safe.⁵⁷

The *Kelo* decision is not, as many commentators have suggested, a departure from precedent in eminent domain law. Instead, it affirms a long history of judicial deference to the policy decisions of state and federal legislatures. Perhaps *Kelo* is most important because it extends the same feelings of vulnerability to mainstream America that have long permeated other groups of people. Perhaps the expectancy of private property owners has likely been misplaced all along. When resources are limited, federal and state governments have always determined one land use to be superior to another. These policy decisions have long resulted in taking of land from the inefficient use, followed by transfers of property interests, to the most efficient user.

Now that land resources in urban and suburban neighborhoods are depleting, mainstream Americans are finally being affected. Where was the outrage when American Indian lands were taken to make way for new settlers, or when inner-city apartment buildings were taken for office buildings and parking garages?

Is it that the perceived abundance of lands in the United States has given a false sense of security to mainstream American landowners? What if the expectations of individual property ownership, which are rooted deeply in the American gestalt, have been flawed from the start? Maybe the fee simple owner should have always expected that their land could be taken away to make way for a better use.

III. PROPERTY LAW MYTHS: EXPLAINING THE "UN-AMERICAN" TAKING TO THE LANDLESS INDIAN

Property rights debates invoke strong passions from all perspectives. But the present debate, and accompanying resistance against eminent domain powers, is largely an outgrowth of commonly held myths about property law within the United States. Present-day rhetoric tells us that it is frankly "un-American" for the government to take private property from one person and redistribute the land to another. One principle that

53. *Kelo*, 125 S. Ct. at 2659.

54. *Id.* at 2660.

55. *Id.* at 2668.

56. The most common avenue for "taking" land is when the government practically forces a property owner to sell their lands with the threat of condemnation. *Taking Land: Compulsory Purchase and Regulation in Asian-Pacific Countries* 349-75, 349 (Tsuyoshi Kotaka & David L. Callies eds., U. Haw. Press 2002) ("The use of compulsory purchase of private land is common throughout national, state, and local government jurisdictions in the United States." (emphasis added)) [hereinafter *Taking Land*].

57. Landowners feel vulnerable after the *Kelo* decision because it conflicts with their expectations about their own property. The public use requirement's basic conflict is between protecting private property rights while ensuring that all property be used in a manner most consistent with the public good. Intertwined in the conflict is what persons expect from their ownership rights. After the *Kelo* decision, many property owners do not know what to reasonably expect in terms of governmental interference with their property rights.

allegedly distinguishes the United States from the rest of the world is the high priority placed on individual rights, the most sacred of which are property rights.⁵⁸

The irony of this story is that it is told, and whole-heartedly believed, by the very people whose individual ownership interests necessarily originated from the dispossession of another land owner, the American Indian. The history of federal Indian policy is replete with examples of land taken from one owner and redistributed to another who will presumably make better use of the land.⁵⁹

In some areas of the United States, every single tract of land was previously owned, less than a century ago, by a tribal government or individual tribal citizen.⁶⁰ The reason these lands are now owned by non-Indians is simple: the United States took the lands from the Indians and redistributed them to non-Indians. The present owners, resting on a very short chain of title, are often the same people who profess the “un-Americanism” of current takings law.⁶¹

While takings of Indian land are innumerable and immeasurable, the following section will detail four examples of federal action involving all three branches of the government that lead to the dispossession of Indian lands to make way of non-Indian ownership. The similarities between these actions and the present day eminent domain debate are stunning. Each scenario involves (1) a governmental taking of property interest, (2) without the consent of the owner, (3) on the basis that the present owner is not using the land efficiently, followed by (4) a redistribution of lands to a private party that will put the land to a presumptively better use.

A. Doctrine of Discovery

When Europeans arrived in the Western hemisphere they discovered a pre-existing property owner.⁶² Although Europeans viewed Indians as inferior non-Christian

58. James S. Burling, *The Theory of Property and Why it Matters*, SJ051 ALI-ABA 491, 505–07 (2004).

59. See *infra* pages 60–67 (discussing the takings of Indian land under federal law).

60. For example, the eastern half of Oklahoma, including the Tulsa metropolitan area was owned in fee simple by one of five tribes prior to statehood. The Five Tribes, Cherokee, Chickasaw, Seminole, Creek, and Choctaw, received fee patents to the land in Indian Territory that eventually became eastern Oklahoma. See *Choctaw Nation v. Okla.*, 397 U.S. 620, 634–35 (1970). The tribal lands of these tribes were eventually allotted pursuant to tribally specific allotment agreements. See e.g. *Agreement with the Choctaw and Chickasaw* (July 1, 1902), 32 Stat. 641. Individual land ownership was only possible because of the allotment process, which the tribes resisted to no avail. Tribes were opposed to allotment and initially refused to negotiate an allotment agreement with the United States. Angie Debo, *And Still the Waters Run: The Betrayal of the Five Civilized Tribes* 32–35 (Princeton U. Press 1991). Only after allotment was complete could lands be alienated to non-Indians. Title searches in Eastern Oklahoma reveal a chain of title back to one of the Five Tribes following the allotment agreements. D. Faith Orłowski & Robbie Emery Burke, *Oklahoma Indian Titles*, 29 Tulsa L.J. 361, 362–67 (1993).

61. In December 2005, a citizen’s group called “Oklahomans in Action” collected 170,000 signatures from Oklahomans who want to reign in the state government’s eminent domain powers. Associated Press, *Petition Filed to Reign in Government Right to Eminent Domain*, The Oklahoman (Oklahoma City, Okla.) (Dec. 12, 2005) (available at <http://www.kctv.com/Global/story.asp?S=4270730>). In light of the circumstances surrounding the Five Tribes, see *supra* n. 60, these homeowners also derive their title from lands taken away from the tribes during the allotment process.

62. See *Johnson v. M’Intosh*, 21 U.S. 543, 574 (1823) (“[Indians] were admitted to be the rightful occupants of the soil, with a legal as well as just claim to retain possession of it, and to use it according to their own discretion.”).

beings,⁶³ international law recognized that Indians had property interests that could not simply be ignored.⁶⁴ International law's "discovery doctrine"⁶⁵ governed the relations between European powers, and allowed them to recognize and acquire Indian lands.⁶⁶ Lands could either be purchased, or acquired, as the spoils of a "just war."⁶⁷ However, it was impermissible, under international law, for a European power to simply declare ownership over Indian lands without the consent or knowledge of the tribe.⁶⁸

Moreover, early treaties between European powers and Indian tribes reflected that the Indians owned the land.⁶⁹ European powers were grantees who acquired their property interest through treaty negotiations in exchange for valuable consideration.⁷⁰ The very terms of these treaties recognized that the Indians, as the grantor, had the power to cede, transfer, or convey their lands.⁷¹

When one European power succeeded a previous sovereign, as did the United States after the American Revolution, title or ownership to all lands within the boundaries claimed did not automatically pass to the new sovereign.⁷² To the contrary, a successor-in-interest sovereign merely obtained the right, to the exclusion of other European powers, to purchase or otherwise acquire lands from the Indians.⁷³ Yet, the doctrine of discovery merely governed the relationships between competing European sovereigns.⁷⁴

The United States operated under this international approach early on. The new United States recognized Indian ownership of lands, even entering into treaties to obtain

63. *See id.* at 573 ("The potentates of the old world found no difficulty in convincing themselves that they made ample compensation to the inhabitants of the new, by bestowing on them civilization and Christianity, in exchange for unlimited independence.").

64. *See id.* at 574 ("In the establishment of these relations, the rights of the original inhabitants were, in no instance, entirely disregarded; but were necessarily, to a considerable extent, impaired.").

65. *Cohen's Handbook of Federal Indian Law* 970–71 (Neil Jessup Newton et al. eds., 2005 ed., LexisNexis 2005)

66. *See generally id.* at § 1.02[1] (discussing the evolution of international law).

67. *Id.* at 16 ("In the 1960s, the Crown affirmed that land could not be claimed without Indian consent or after a just war against them." (footnote omitted)).

68. *Id.* at 14. Principles of Victoria continue to dominate discourse, *id.*:

(1) that Indian peoples had both property rights and the power of a sovereign in their land; (2) that Indian lands could only be acquired with tribal consent or after a just war against them; and (3) that acquisition of Indian lands was solely a governmental matter, not to be left to individual colonists.

69. For example, the European powers did not simply declare themselves owners of the lands. They negotiated land transactions with tribal leaders. In the *Land Grant from the Ottawa and Chippewa of May 15, 1786*, the tribe conveyed lands to the British crown. Vine Deloria, Jr. & Raymond J. DeMallie, *Documents of American Indian Diplomacy: Treaties, Agreements, and Conventions, 1775–1979* vol. 1, 119–20 (U. Okla. Press 1999).

70. S. James Anaya & Robert A. Williams, Jr., *The Protection of Indigenous Peoples' Rights over Lands and Natural Resources Under the Inter-American Human Rights System*, 14 Harv. Human Rights J. 33, 68 (2001) ("Through the practice of treaty-making, the United States recognized Indian land and resource rights in traditional lands.").

71. In the *Land Grant from the Ottawa and Chippewa of May 15, 1786*, the Indian Chiefs, with consent of their nations, convey lands to European powers using the following language: "given, granted, enfeoffed, alienated & confirmed & by these Presents do give, grant & enfeoff, alien & confirm unto His Majesty George the Third, King of Great Britain, France & Ireland . . . a certain tract or parcel of Land . . ." Deloria, Jr. & DeMallie, *supra* n. 69, at 119. This is the same type of language used to convey property interest in deeds.

72. *See Cohen's Handbook of Federal Indian Law*, *supra* n. 65 at 970–71.

73. *Id.*

74. *Id.*

Indian permission for federal troops to cross Indian lands.⁷⁵ Other treaties involved the outright purchase of lands from the tribes.⁷⁶

Eventually, ownership conflicts arose over lands that were previously acquired from the Indian tribes. In *Johnson v. M'Intosh*,⁷⁷ a group claimed ownership in lands that were originally purchased directly from an Indian tribe.⁷⁸ The United States had subsequently acquired the same lands from the same tribe via an armistice treaty.⁷⁹ The individual's property interest clearly preceded the interest acquired by the United States.⁸⁰

When asked to determine the status of the disputed land, the U.S. Supreme Court transformed, and ultimately diminished the property interests of all Indian tribes. Rather than recognizing that tribes, as the original owners of the lands, had the power to grant fee simple title to an individual or another sovereign, the Court simply reclassified the tribe's original property interest. The Court ruled the only property interest held by tribes was a right of occupancy, which was subject to extinguishment by the federal government only.⁸¹

The Court's action, though not an exercise of eminent domain, nonetheless constitutes a taking of a property interest. By judicial action, the federal government took a property interest away from the original owner by simply declaring that the original owner never held absolute title in the first place.⁸² The Court never mentioned that both grantees, the individuals and the United States, clearly thought the Indian grantors had the full power to convey title. Simply put, the Court refused to recognize that the tribe ever owned a full property interest.

The Court's decision in *M'Intosh*, while devastating to Indians, also violated international law.⁸³ To justify the departure from precedent, the Court rationalized the

75. *E.g. Treaty with the Delawares, 1778* (Sept. 17, 1778), 7 Stat. 13. In Article III of the Treaty, the Delaware Indians promised to allow American troops Delaware lands during the American Revolution. *Id.*

76. *E.g. Treaty with the Creeks* (Aug. 7, 1790), 7 Stat. 35. In Article IV of the Treaty, the land boundaries to be purchased are set out along with annual payments for the tribe to "release, quit claim, relinquish and cede, all the land" in a particular area. *Id.*

77. 21 U.S. 543 (1823).

78. *Id.* at 543.

79. *Id.* at 562–63.

80. *Id.* at 562.

81. *Id.* at 562–63. From the federal government's perspective, extinguishment of Indian title does not constitute eminent domain. See *Shoshone Tribe of Indians v. U.S.*, 299 U.S. 476 (1937) (involving tribal suit to recover damages for appropriation of lands where the United States took lands for settlement of another Indian tribe). In *Shoshone Tribe of Indians*, the Shoshones argued the jurisdictional act, creating a court of claims, is an exercise of eminent domain based on the language that the final decree of the court "shall be in full settlement of all damages, if any, committed by the Government of the United States and shall annul and cancel all claim, right, and title of the Shoshone Indians in and to such money, lands, or other property." *Id.* at 493 (internal quotation marks omitted). The Court stated that it is not eminent domain, because it does not require the Shoshone to sue at all. *Id.* Moreover, the failure to sue or prosecute the suit, leaves liabilities as they were before the act was passed. *Id.* "The sovereign power is not exercised to extinguished titles or other interests against the will of tribal occupants by force of eminent domain." *Id.*

82. In doing so, the Supreme Court recognized its own power to take Indian property interests without just compensation by refusing to recognize the land belonged to Indians. See Rachel San Kronowitz et al., Student Authors, *Toward Consent and Cooperation: Reconsidering the Political Status of Indian Nations*, 22 Harv. Civ. Rights-Civ. Libs. L. Rev. 507, 534 (1987).

83. See Robert A. Williams, Jr., *Columbus's Legacy: Law as an Instrument of Racial Discrimination Against Indigenous Peoples' Rights of Self-Determination*, 8 Ariz. J. Intl. & Comp. L. 51 (1991).

decision on the myth that Indians did not use the land efficiently and should therefore not be permitted to own the land. Justice Marshall wrote:

We will not enter into the controversy, whether agriculturists, merchants, and manufacturers, have a right, on abstract principles, to expel hunters from the territory they possess, or to contract their limits.

But the tribes of Indians inhabiting this country were fierce savages, . . . whose subsistence was drawn chiefly from the forest. To leave them in possession of their country, was to leave the country a wilderness.⁸⁴

Several scholars have pointed out that Justice Marshall's stereotypical view of all Indian land uses, and all Indians, is not supported by the evidence.⁸⁵ Many tribes, particularly the eastern tribes that would have had the most contact with colonial United States, were landed agrarian societies with elaborate property law systems.⁸⁶

Nonetheless, the Court's perception, whether disingenuous or not, that Indians' land uses were less efficient and therefore inferior to non-Indians' land uses, served as partial justification for dispossession. *M'Intosh* paved the way for westward expansion by making it easier for the federal government to acquire Indian lands and redistribute those lands to non-Indian settlers. "Indian title" was unilaterally diminished by judicial interpretation to nothing more than a right of occupancy, which could be extinguished by the federal government without tribal consent.⁸⁷ Therefore, the chain of title for most lands in the United States begins with the extinguishment of Indian title, followed by subsequent redistribution from the federal government to an individual non-Indian.

B. *Indian Removal*

Although original Indian title after *M'Intosh* was considered merely a right of occupancy, full Indian ownership in lands was affirmatively recognized by the federal government in many treaties.⁸⁸ When lands guaranteed by treaty were subsequently taken by the federal government, tribes were entitled to compensation based on the value of the land at the time of the taking.⁸⁹

That tribes received just compensation in some instances does not soften the effect, from the tribal perspective, of repeated actions by the federal government to invoke a

84. *M'Intosh*, 21 U.S. at 588–90.

85. See e.g. Joshua L. Seifert, *The Myth of Johnson v. M'Intosh*, 52 UCLA L. Rev. 289 (2004); Williams, Jr., *supra* n. 83.

86. See Kenneth H. Bobroff, *Retelling Allotment: Indian Property Rights and the Myth of Common Ownership*, 54 Vand. L. Rev. 1559, 1573–74 (2001) (describing Indian property systems in New England recognizing exclusive rights in land and discussing agricultural uses). The Iroquois tribes, which had a long history of contact with colonial Americans, "long recognized exclusive property rights in agricultural fields and homes." *Id.* at 1578.

87. See *M'Intosh*, 21 U.S. 543 (interpreting the nature of Indian property rights as a right of occupancy, but not absolute title).

88. For example, recognized title was acquired in the Treaty with the Sioux Indians, (Apr. 29, 1868), 15 Stat. 635, at Fort Laramie.

89. In contemporary takings claims, market value at the time of the taking, plus interest, is the preferred method of compensation. See *U.S. v. Sioux Nation of Indians*, 448 U.S. 371 (1980).

large scale compulsory purchase system⁹⁰ for the purpose of removing Indians from lands wanted for non-Indian settlement.⁹¹

The most common story of dispossession of Indian lands is likely the Cherokee Trail of Tears, a forced removal of the Cherokee people from their lands in the southeastern United States to lands within present-day northeastern Oklahoma.⁹² But the Cherokee story is one of literally thousands of stories of tribes being relocated to new lands to make way for non-Indian settlements.⁹³

The Indian Removal Act of 1830⁹⁴ codified the federal policy of relocating Indians to less desirable lands in the west to make way for non-Indian settlement. Making the case for Indian removal, President Andrew Jackson noted that non-Indians had long pressured tribes to retreat to other lands.⁹⁵ President Jackson promised this type of dispossession would not happen again:

The pledge of the United States has been given by Congress that the country destined for the residence of this people shall be forever "secured and guaranteed to them." A country west of Missouri and Arkansas has been assigned to them, into which the white settlements are not to be pushed. . . . A barrier has thus been raised for their protection against the encroachment of our citizens.⁹⁶

Once Indian removal became federal policy, it was simply not an option for tribes to retain their homelands. Instead, tribes could voluntarily sell their land to the federal government via treaty or be forcibly removed without compensation.⁹⁷

In this context, tribes faced a similar decision as the landowners in *Kelo*. They could voluntarily accept the offers made for purchase of their lands, or the lands would be taken by the government. The difference of course, is that there were no judicial remedies available to the tribes should they decline the offer of purchase. The federal Indian removal policy was fortified by the military's physical seizure of homes and physical ouster of individual objectors.⁹⁸

90. See *supra* n. 57 and accompanying text.

91. Among the varied motivations for Indian removal, "[t]he strongest pressure came from the land hunger of the whites." Francis Paul Prucha, *The Great Father: The United States Government and the American Indians* 70 (abr. ed., U. Neb. Press 1986). Another element leading to the dispossession of Indian lands in Georgia was the discovery of gold within the Cherokee Nation in 1829. *Id.*

92. See generally Vine Deloria, Jr., & Clifford M. Lytle, *American Indians, American Justice* 7, 33 (U. Tex. Press 1983) (discussing the Cherokee Trail of Tears).

93. Prucha, *supra* n. 91, at 90–92. Early movements of the Indians were accomplished, by and large, without war. "The notable exception was the Black Hawk War of 1832, a military conflict that in its small way was as embarrassing to the Jackson administration as the Seminole War." *Id.* at 90.

94. *Indian Removal Act*, Pub. L. No. 21-148, 4 Stat. 411 (1830).

95. Andrew Jackson, Annual Message to Congress, *Indian Removal*, (Dec. 8, 1829), in *Documents of United States Indian Policy* 48 (Francis Paul Prucha ed., 3d ed., U. Neb. Press 2000) ("Our ancestors found them the uncontrolled possessors of these vast regions. By persuasion and force they have been made to retire from river to river and from mountain to mountain.").

96. Andrew Jackson, Annual Message to Congress, *Indian Removal*, (Dec. 7, 1835), in *Documents of United States Indian Policy*, *supra* n. 95, at 71–72.

97. The president is given the power to remove Indians west of the Mississippi river "as he may judge necessary." *Indian Removal Act*, *supra* n. 94. An example where a tribe refused to leave and then were physically ousted was the Black Hawk War. See *supra* n. 93.

98. Angie Debo, *A History of the Indians of the United States* 124 (U. Okla. Press 1970).

C. Allotment

After the tribes' forced relocation to new lands, new treaties once again recognized Indian property ownership in the lands.⁹⁹ Typically, the tribal government was recognized as being the beneficial owner, sometimes in fee simple absolute.¹⁰⁰ The tribal government controlled the land use of individual tribal citizens, and internal property transactions were governed by tribal law.¹⁰¹

Many tribes held their lands in common in a contiguous land base where non-Indian ownership of lands was prohibited.¹⁰² It was the preference of the federal government that the tribal government, not individual Indians, owned the land.¹⁰³ If further land cessions were acquired from the Indians, it was much easier to have a single transaction with the tribal government, than to recognize, as a matter of federal law, that individual Indians had property rights.¹⁰⁴ Moreover, where tribal law unequivocally recognized and protected individual property interests, the federal government ignored them.¹⁰⁵ In a few short decades, the federal government began making deals with tribal governments for further land cessions.¹⁰⁶ Many of the negotiations led to land cessions by one tribe to make room for the forced relocation of yet another tribe.¹⁰⁷

The continued need for Indian land for non-Indian settlement soon necessitated a new federal Indian policy. The new federal policy was set forth in the General Allotment Act of 1887.¹⁰⁸ One of the reasons for the new policy was, once again, the inefficiency of Indian land use. Indians were viewed as making inefficient use of their land because they allegedly did not promote or permit individual ownership of land. Like Justice Marshall's stereotypical commentary on Indian land use in *M'Intosh*, allotment's myth of common ownership has been refuted by many scholars.¹⁰⁹ Even

99. See e.g. *Treaty with the Choctaws: A Treaty of Perpetual Friendship, Cession and Limits* (Sept. 27, 1830), 7 Stat. 333 [hereinafter *Treaty with the Choctaws*]. Article II discusses Choctaw title to the new lands in Indian Territory, which were patented in fee simple. *Id.* See *Choctaw Nation*, 397 U.S. at 625 (holding that lands conveyed in 1830 retained fee title).

100. See e.g. *Treaty with the Choctaws*, *supra* n. 99.

101. Stacy L. Leeds, *The Burning of Blackacre: A Step Toward Reclaiming Tribal Property Law*, 10 Kan. J.L. & Pub. Policy 491, 493–96 (2000) (describing Cherokee laws between 1808 and 1898).

102. Non-Indian encroachment was prohibited by federal law and coupled with the promise to the Indians of federal ouster of trespassers. *Treaty with the Choctaws*, *supra* n. 99, at art. XII.

103. See *id.*

104. That tribal governments, and not individual Indians, owned the land, made subsequent land cessions in post-United States Civil War treaties easier. Many tribes lost additional land base as a result of their perceived participation with the Confederacy during the Civil War. *Treaty with the Creek Indians* (June 14, 1866), 14 Stat. 785. In the Preamble, the fact that the Creek Nation had entered a treaty with the Confederacy was grounds for further land cessions. *Id.* If the lands were held by individual Creek citizens, the federal government could not have acquired the land cessions with such ease.

105. *Id.*

106. See e.g. *Treaty with the Sauk & Foxes, 1867*, at art. I (Feb. 18, 1867), 15 Stat. 495 (dealing with land cessions of existing reservation); *id.* at art. VI (creating new reservation within the existing Cherokee reservation); *Treaty with the Choctaw and Chickasaw, 1866*, at arts. XXX–XXXI (Apr. 28, 1866), 14 Stat. 769 (providing provisions for Kansas Indians to remove into lands previously held by other Indian tribes).

107. See e.g. *Treaty with the Creek Indians*, *supra* n. 104, at art. III. The United States sought Creek lands to relocate other Indians and freedmen. *Id.*

108. Pub. L. No. 49-119, 24 Stat. 388 (1887) (repealed by Pub. L. No. 106-462, § 106(a)(1), 114 Stat. 2007 (2000)).

109. See e.g. Bobroff, *supra* n. 86; Leeds, *supra* n. 101.

tribes in areas such as the Great Plains and the Pacific Northwest, who primarily relied on hunting and fishing economies, recognized individual property rights.¹¹⁰ Tribal recognition of individual property rights became even more entrenched as their land became scarce within the confines of small reservation boundaries.¹¹¹

The proponents of the allotment thought it was in the best interest of the tribes to abandon all forms of common ownership in favor of individual property rights.¹¹² It was believed, or at least stated, that common tribal ownership was stagnating any chance for economic or social development in Indian country.¹¹³

The allotment policy was firmly rooted in the notion that farming and other agricultural pursuits were the best uses for land.¹¹⁴ Common lands should be divided into individual parcels so the individual Indian could become a farmer with the incentive to work harder and make the most profit from the land.¹¹⁵ The policy, of course, ignored that many individual Indians had been farmers for many generations and that those Indian agriculturalists held individual title, under tribal law, to lands they had already improved.¹¹⁶

The federal government ordered all tribal lands to be allotted to individual Indians, with or without the consent of the tribes or the individual Indians.¹¹⁷ In order to effectuate the transaction, the federal government typically took lands out of the ownership of the tribal government and redistributed those lands as the United States saw fit. As a procedural matter, this transaction was sometimes completed by forcing the tribal government to deed the lands directly to individual Indians,¹¹⁸ and in these instances, the United States, as the middleman, was not a party to the actual conveyance.¹¹⁹

The tribal governments were never compensated for the loss of ownership, even when the transactions violated express treaty guarantees. The federal action of allotting lands without tribal consent, and in express violation of treaty guarantees, was unsuccessfully challenged in the federal courts. In *Lone Wolf v. Hitchcock*,¹²⁰ the Court upheld the authority of Congress to allot lands without tribal consent, even if the action

110. Bobroff, *supra* n. 86, at 1589–94.

111. See Leeds, *supra* n. 101, at 493 (discussing how tribal laws were sometimes reactionary to limited resources, and increased encroachment by outside settlers).

112. *Americanizing the American Indians: Writings by the "Friends of the Indian" 1880–1900*, at 83–86 (Francis Paul Prucha ed., Harv. U. Press 1973).

113. *Id.* at 84.

114. *Id.*

115. *Id.*

116. Bobroff, *supra* n. 86, at 1586.

117. 24 Stat. 388. The Act was confirmed by *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903). See generally Symposium, *Lone Wolf v. Hitchcock: One Hundred Years Later*, 38 Tulsa L. Rev. 1 (2002) [hereinafter *Lone Wolf Symposium*].

118. Allotment was often effectuated pursuant to an allotment agreement with a particular tribe, but the agreements do not represent the willing consent of the tribes. Tribes vehemently opposed allotment and only participated in allotment agreements to exercise some control over a process they could not stop.

119. The Cherokee Nation allotment deeds are from the Cherokee Nation to the individual. The United States is not part of the chain of title. The 1902 Agreement mentions the "Secretary of the Interior shall furnish the principal chief with blank patents" for the conveyances. Pub. L. No. 57-241, § 58, 32 Stat. 716 (1902).

120. 187 U.S. 553 (1903). See also *Cherokee Nation v. Hitchcock*, 187 U.S. 294 (1902) (holding the federal government has full administrative power of tribal lands, including the power to change the status of the land).

violated treaty provisions.¹²¹ Further, the tribal governments were not entitled to compensation because the transaction was viewed not as a taking, but as an appropriate exercise of federal administrative power of tribal property,¹²² even when the tribe owned the lands in fee simple absolute.

In effect, the action of Congress now complained of was but an exercise of such power, a mere change in the form of investment of Indian tribal property, the property of those who . . . were in substantial effect the wards of the government. We must presume that Congress acted in perfect good faith in the dealings with the Indians . . . and that the legislative branch of the government exercised its best judgment in the premises.¹²³

The allotment of tribal lands eventually led to the loss of most of the land that was still under tribal control at the end of the late nineteenth century. Ninety percent of the land owned by Indians at the time of European contact had already been taken before the allotment process ever began.¹²⁴

The loss of land continued, and rapidly increased, following allotment.¹²⁵ One reason for rapid loss of land is that once the lands were parceled out to individual Indians, those lands were no longer under the watchful protection of either the federal government or the tribal government. Individual lands were freely alienable and could be acquired by state eminent domain, or by adverse possession.¹²⁶ The lands became subject to state debtor-creditor laws and forced sales for failure to pay state taxes.¹²⁷ Prior to allotment, only the federal government could acquire Indian lands.¹²⁸ After allotment, Indian lands could be acquired through private transactions like any other piece of land. The land transactions that followed almost always resulted in the land passing, once and for all, to non-Indians.¹²⁹

D. *Surplus Lands*

As part of the allotment process, tribal lands were divided into individual parcels and conveyed to individual Indians. If there were any remaining lands within a tribe's territory after the allotments were redistributed to individual tribal citizens, the "surplus" lands were deeded to white settlers as homesteads.¹³⁰ These lands were deemed "surplus" because it was presumed the tribe did not need the land, or implicitly, that the tribe would not make good use of the lands. If a future tribal use for the lands could be

121. 187 U.S. at 568.

122. See generally Blue Clark, Lone Wolf v. Hitchcock: *Treaty Rights and Indian Law at the End of the Nineteenth Century* 67–76 (U. Neb. Press 1994) (discussing the Supreme Court's decision in detail).

123. 187 U.S. at 568.

124. Bobroff, *supra* n. 86, at 1560.

125. See *id.* at 1561.

126. Section 5 of the General Allotment Act provides the United States shall issue to the allottee a patent in fee which is "free of all charge or incumbrance whatsoever." 24 Stat. 288, at § 5 (This language is also repeated in 25 U.S.C. § 348 (1988)). Once lands become freely alienable, they can be acquired in the same fashion as any other fee lands within a state.

127. Title 26, section 348 of the United States Code has been interpreted to open allotted lands to state taxation once they become alienable. *County of Yakima v. Confederated Tribes & Bands of Yakima Indian Nation*, 502 U.S. 251, 263, 263 n. 3 (1992).

128. See *Trade and Intercourse Act*, Pub. L. No. 7-13, 2 Stat. 139 (1802).

129. Bobroff, *supra* n. 86, at 1611.

130. See Pub. L. No. 53-290, 28 Stat. 286 (1894).

contemplated, there were other people who could make better uses of the land: the white settlers who the federal government had previously promised to keep away from Indian land.

White homesteaders acquired sixty-million acres of the Indian land through this federally sanctioned program.¹³¹ Although tribes received some compensation for the surplus lands, their consent was irrelevant.¹³² The tribes were required to cede their lands to the United States, the surplus lands were typically returned to the public domain, and homestead deeds to non-Indian private landowners followed.¹³³

The redistribution of surplus lands provides the best analogy from the many examples in federal Indian law to the current eminent domain debate in light of *Kelo*. The surplus lands example clearly involves the governmental taking of property over the landowner's objection for the purpose of redistributing those lands to a private party. In the *Kelo* context, the legislative determination deemed commercial and economic development land use as superior to individual residential property. The surplus lands, though a less deliberative process, presumed non-Indian settlement would lead to more efficient land use than continued Indian ownership.

IV. THE LEGACY OF ALLOTMENT

Today, the allotted lands that remain under Indian control are highly fractionated with multiple co-owners sharing the same parcel of land deeded to a common ancestor.¹³⁴ The allotment process, that provided for disposal of surplus lands did not provide for subsequent generations: "The lands were not, of course, surplus. The formula used—160 acres for the head of the family, eighty acres for older children and wives, and forty acres for minor children, did not look even five years down the road to the future of the tribe."¹³⁵ Conventional wisdom presumed that allotment would be the end of the Indian problem, and there would eventually be no more Indians or Indian tribes.¹³⁶ The allotment process would prepare the Indians for ultimate United States citizenship and full inclusion into the American melting pot.¹³⁷ When that did not happen, the practical problems with allotment were quickly revealed, and those problems are exasperated with each passing generation. "If an adult man were capable of supporting his family on 160 acres, did that mean that his eighteen-year-old son could do so on eighty acres, and a decade later his twelve-year-old, now twenty-two, on forty

131. *Felix S. Cohen's Handbook of Federal Indian Law* 138 (Rennard Strickland et al. eds., 1982 ed., Michie 1982).

132. See *Lone Wolf*, 187 U.S. 553; see also *Lone Wolf Symposium*, *supra* n. 117.

133. See Jessica A. Shoemaker, *Like Snow in the Spring Time: Allotment, Fractionation, and the Indian Land Tenure Problem*, 2003 Wis. L. Rev. 729, 744 (2003).

134. See *Hodel v. Irving*, 481 U.S. 704, 713 (1987).

135. Vine Deloria, Jr., *Reserving to Themselves: Treaties and the Powers of Indian Tribes*, 38 Ariz. L. Rev. 963, 978 (1996).

136. Some allotment acts even attempted to dissolve the tribal government or certain branches within the tribal government. E.g. Pub. L. No. 56-676, § 46, 31 Stat. 861 (1901) ("The tribal government of the Creek Nation shall not continue longer than March fourth, nineteen hundred and six, subject to such further legislation as Congress may deem proper.")

137. United States citizenship and inclusion was tied to the Indian's acceptance of allotted lands. Allotment meant that tribal members would lose their tribal citizenship and become citizens of the United States. Prucha, *supra* n. 91, at 260.

acres?"¹³⁸ When an original allottee dies, their property interest will pass, in intestate succession,¹³⁹ equally to all their children. With each generation, the number of co-owners increases, yet the tribal land base can never expand because it is locked into a finite number of parcels. As the number of co-owners increase, the property interest of each co-owner is diminished, and the more difficult it becomes to make efficient use of the land.¹⁴⁰

Congress has recognized that highly fractionated allotments preclude any meaningful economic development in Indian country.¹⁴¹ The allotment process that was premised on maximizing the efficiency of Indian land use has rendered most Indian land useless. There are multiple examples that illustrate the problem of fractionated ownership in Indian country, but the most famous description follows:

Tract 1305 is 40 acres and produces \$1,080 in income annually. It is valued at \$8,000. It has 439 owners, one-third of whom receive less than \$.05 in annual rent and two-thirds of whom receive less than \$1. . . . The common denominator used to compute fractional interests in the property is 3,394,923,840,000. The smallest heir receives \$.01 every 177 years. . . . The administrative costs of handling this tract are estimated by the Bureau of Indian Affairs at \$17,560 annually.¹⁴²

In attempt redress this legacy of allotment, Congress passed the Indian Lands Consolidation Act ("ILCA"),¹⁴³ which included a forced escheat provision where small fractional property interest, such as the example above, would revert to the tribal government.¹⁴⁴ The forced escheat provision only applied to lands that had an economic yield of less than one-hundred dollars per year.¹⁴⁵

When challenged by individual Indian property owners, the U.S. Supreme Court struck down the ILCA as an unconstitutional taking of individual property without just compensation.¹⁴⁶ The problem with the ILCA was not a lack of public use, but a lack of compensation for property interests taken.

In response, Congress amended the ILCA by extending the time period over which economic viability of the subject lands would be gauged.¹⁴⁷ Congress's second pass at the ILCA was stricken by the Court on the same grounds.¹⁴⁸ Another amendment to the ILCA has now been enacted in hopes of reducing fractionated property interests.¹⁴⁹

138. Deloria, *supra* n. 135, at 978.

139. Many Indian people, like their non-Indian counterparts, die intestate.

140. See generally Stacy L. Leeds, *Borrowing from Blackacre: Expanding Tribal Land Bases through the Creation of Future Interests and Joint Tenancies*, 80 N.D. L. Rev. 827 (2004).

141. One of the reasons for consolidating land bases was to make them more economically viable. Sen. Rpt. 98-632 (Sept. 24, 1984) (reprinted in 1984 U.S.C.A.N. 5470) (evidencing the first attempt to correct the problem).

142. *Irving*, 481 U.S. at 713. See also Michael A. Heller, *The Tragedy of the Anticommons: Property in the Transition from Marx to Markets*, 111 Harv. L. Rev. 621, 685-87 (1998); Leeds, *supra* n. 101, at 496.

143. 25 U.S.C. §§ 2201-2210 (1988).

144. *Id.*

145. *Id.*

146. *Irving*, 481 U.S. at 716-18.

147. See *Indian Land Consolidation Act, Amendment*, Sen. Rpt. 98-632 (reprinted in 1984 U.S.C.A.N. 5470).

148. *Babbitt v. Youpee*, 519 U.S. 234, 240-43 (1997).

149. See Pub. L. No. 102-238, § 3, 105 Stat. 1908, 1908-09 (1991).

The ILCA sought to take some property interest and redistribute those lands back to the tribal government, so that tribal lands could be consolidated towards increased efficiency. Rather than have the federal government pass this type of law for redistribution of land, perhaps an exercise of tribal eminent domain power would be the best avenue to address arrested economic development in tribal communities.

The unilateral actions of the federal government created the need for tribal communities to become creative in re-establishing land base through land consolidation and acquisitions. But do tribes want to follow in the footsteps of the federal government in the exercise of these powers?

V. TRIBAL POWERS OF EMINENT DOMAIN

In recent years, some tribes have considered exercising eminent domain powers in the same manner as their federal, state, and local governmental counterparts. Tribal codes and constitutions have been amended to provide for the power to acquire lands within their political and territorial boundaries without the consent of the individual landowners.¹⁵⁰ In some instances, tribes and local state officials have teamed up to

150. For example, the Sisseton-Wahpeton Sioux Tribe provides for condemnation of trust or restricted lands within their jurisdiction:

The Sisseton-Wahpeton Sioux Tribe shall have authority pursuant to this Chapter and in accordance with Section 8 of the Act of October 19, 1984, 98 Stat[.] 2411 (P.L. 98-513), to condemn trust or restricted land within the original exterior boundaries of the Lake Traverse Reservation, as described in Article III of the Treaty of February 19, 1867, 15 Stat. 505, for public uses, including the elimination of fractional heirship interests in such land, the consolidation of tribal interests in land and the development of tribal agriculture.

National Tribal Resource Center, *Sisseton-Wahpeton Sioux Tribe: Chapter 47 Condemnation of Trust or Restricted Land Under Power of Eminent Domain* § 47-01-01, http://www.tribalresourcecenter.org/ccfolder/sisseton_wahpeton_codeoflaw47.htm (accessed Oct. 30, 2005).

Section 47-02-01 provides for condemnation proceedings to be initiated by the tribe in tribal court for just compensation to be made for the property, and allows a jury to make that determination. Moreover, the jury determination requires a verdict of five-sixths of the jury as to the compensation. *Id.* at § 47-18-01. Section 47-09-01 notes that the United States is not an indispensable party but that the federal government does have the right to intervene in the proceedings.

The Eastern Band of Cherokee Indians Code allows power within the reservation when the Council deems it appropriate for a public purpose. National Tribal Justice Resource Center, *The Cherokee Code*, at § 40-1, <http://tribalresourcecenter.org/ccfolder/eccodech40eminent.htm> (accessed Aug. 24, 2005). The Tribal Council initiates by passing a resolution. *Id.* Compensation is provided for in Section 40-2. *Id.* at § 40-2. The courts will determine the value by a jury of six tribal members. *Id.* at § 40-3.

Although the Constitution was rejected, a proposed draft language to the Eastern Cherokee Constitution purported to take the power one step further, and apply it to all lands within the reservation. Article XIII entitled "Real Property" stated:

The Council shall enact a comprehensive Property Code establishing a Land Office and governing a system of property for all lands within the Territory. The Property Code shall include provisions governing the issuance of patents in fee or any lesser interest, the establishment of a Registry, eminent domain, the recordation of patents, deeds, wills, trusts, leases, gifts, mortgages, liens, and other writings used to memorialize transactions of property interests, and land use and zoning. All property within the Territory, by whomever held, shall be deemed to have originated in a patent issues pursuant to the sovereign authority of the Band and such interests shall be recorded in the Land Office.

Richard Monette, Conference Presentation, *Preserving Our Sovereignty* (Miami, Fla., Feb. 10–12, 2005) (copy on file with author).

exercise the power of eminent domain collectively.¹⁵¹ In these instances, states have acquired lands by condemning private lands and then redistributing the lands to tribal governments.¹⁵² When the tribal government converts the land to commercial uses, the tribe then shares revenues with the state governments.¹⁵³

Noting the controversy over eminent domain powers throughout the United States, the following section explores whether tribes have historically exercised the power in the past and whether tribes retain the power to acquire or re-acquire lands from private individuals.

VI. HISTORICAL TRIBAL EMINENT DOMAIN

Tribal nations are diverse in their history, culture, language, and legal traditions. It goes without saying that it is impossible to declare a monolithic “traditional” tribal viewpoint on whether tribal governments, prior to contact with Europeans, exercised the power of eminent domain or some equivalent.

Additionally, it goes without saying that Indians had a system of law for determining property rights prior to the day Columbus arrived on what are now North American shores.¹⁵⁴ It is inconceivable that the millions of people that populated the continent prior to European contact were aimlessly moving about with no norms, customs, or laws.

Prior to contact with Europeans, Indians recognized property rights, made conveyances of land, regulated trade, and exercised the full gamut of jurisdiction. But did they exercise the power of eminent domain, or an equivalent sovereign power, at that time?

Those tribes that truly practiced common ownership of lands, of which they have long been accused, exercised the highest form of governmental power. The permanent exclusion of private rights for the good of all citizens embodies a public use doctrine that far exceeds the eminent domain model. The tribal government, through the people, has pre-determined that all lands shall be used for the public good only, and there is no room for the recognition of private individual rights.

However, it is doubtful that many tribes practiced common ownership in the purest form.¹⁵⁵ The tribal government either owned the land, or the exercised usufructuary rights over specific territories.¹⁵⁶ It is well documented that conflicts were occurring between tribes prior to European contact and thereafter, in order to establish supremacy

151. See Indianz.com, *Tribe Teams Up With County on Eminent Domain Push*, <http://www.indianz.com/News/2005/010220.asp> (accessed Sept. 9, 2005).

152. See *State Taking Properties to Give to Senecas: Eminent Domain Process Is Under Way in Niagara Falls, Angering Land Owners*, <http://www.syracuse.com/news/poststandard/index.ssf?/base/news-0/112245390335650.xml&coll=1> (July 27, 2005).

153. *Id.*

154. Indianz.com, *State Asserts Eminent Domain on Behalf of Tribe*, <http://www.Indianz.com/News/2005/009533.asp> (July 28, 2005).

155. Bobroff, *supra* n. 86, at 1571–96 (detailing pre-colonial Indian property schemes from diverse geographic areas).

156. *Id.*

over and ownership in land.¹⁵⁷ The myth of “wandering hordes”¹⁵⁸ of people attaching no value to property is one told by non-Indians seeking to seize Indian land or otherwise disregard Indian claims to land.¹⁵⁹

Contrary to the prevailing myths, most tribes had some form of recognized private ownership in land, if not an elaborate property law scheme.¹⁶⁰ The Pueblos of the Southwest, the tribes of the southeastern United States, and the Iroquois were well known for having elaborate property schemes.¹⁶¹

Some of these tribal property law schemes protected individual property, and arguably protected private rights to a greater extent than the United States or their European predecessors. In previous works, I have suggested the Cherokee Nation, one of the tribes noted for an elaborate property law system of recognized individual property rights, did not traditionally provide for the governmental authority of eminent domain.¹⁶² In the Cherokee system, individuals had protected property interest to surface rights and improvements, with the tribal government holding the underlying estate in common for the people. Although the Cherokee government did not expressly reserve to itself constitutional authority to take individual property for public use or otherwise,¹⁶³

157. See e.g. *Lower Sioux Indian Community in Minn. v. U.S.*, 163 Ct. Cl. 329, 333–34 (1963) (bracket and ellipses in original):

The Treaty of August 19, 1825, commonly called the “Treaty of Prairie des Chiens” or “Prairie du Chien,” was the result of continuous warfare among the tribes of the Upper Mississippi region. The warring tribes were assembled at Prairie des Chiens and a treaty was entered into establishing boundaries among them in an attempt to remove the cause of their hostilities. The preamble of the treaty clearly bears this out:

The United States of America have seen with much regret, that wars have for many years been carried on between [the different tribes who were parties to the treaty] ***. In order, therefore, to promote peace among these tribes, and to establish boundaries among them ***, and thereby to remove all causes of future difficulty, the United States have invited [the different tribes who were parties to the treaty] *** to assemble together, and in a spirit of mutual conciliation to accomplish these objects ***.

Thus it can be seen that the purpose of the treaty was to promote peace by establishing boundaries among the tribes “*** and thereby to remove all causes of future difficulty ***.”

158. *Cherokee Nation v. Ga.*, 30 U.S. 1, 27 (1831). As part of his concurrence, Justice Johnson, *id.* at 27–28, noted:

But I think it very clear that the constitution neither speaks of them as states or foreign states, but as just what they were, Indian tribes; an anomaly unknown to the books that treat of states, and which the law of nations would regard as nothing more than wandering hordes, held together only by ties of blood and habit, and having neither laws or government, beyond what is required in a savage state.

159. Seifert, *supra* n. 85, at 325–28.

160. Bobroff, *supra* n. 86, at 1571–96.

161. *Id.*

162. E.g. Leeds, *supra* n. 101, at 498 (“The idea of governmental taking by the Cherokee government, I must admit, is not a concept supported by early sources of Cherokee law.”).

163. As evidence of this, see the Cherokee Constitution, art. I, in *The Constitution and Laws of the Cherokee Nation: Passed at Tal-Le-Quah, Cherokee Nation, 1839*, at 5–6 (Gales & Seaton 1840) (emphasis in original), stating:

Sec. 1. The boundary of the Cherokee Nation shall be that described in the treaty of 1833 between the United States and Western Cherokees, subject to such extension as may be made in the adjustment of the unfinished business with the United States.

Sec. 2. The lands of the Cherokee nation shall remain common property; but the improvements made thereon, and in the possession of the citizens . . . respectively who made, or may rightfully be

nothing in the early Cherokee laws would have precluded the tribal government from passing a law to exercise the power of eminent domain if the tribal legislature found it necessary. Nonetheless, there is no indication that legislation to this effect was ever passed.¹⁶⁴

In comparing the possibilities for eminent domain under tribal law in the historic sense, it appears that tribes would have fallen somewhere on the spectrum between those governments who control all land use, and therefore had no need for express eminent domain authority, to those tribes who valued private property to the extent they would never exercise eminent domain powers.

The range of tribal individual property rights in contrast to sovereign eminent domain powers is consistent with the range of divergent laws in a current survey of international law. There are countries in which the government is the sole property owner with no need to exercise eminent domain,¹⁶⁵ and those countries where the power, if exercised, is more constrained than the current United States system.¹⁶⁶ The same diversity of viewpoints would have existed at traditional tribal law.

VII. CONTEMPORARY TRIBAL EMINENT DOMAIN POWERS

Contemporary tribal governments have exercised eminent domain powers for various purposes. Some tribal codes expressly authorize the tribal legislature or executive branch to invoke the power when needed.¹⁶⁷ At least one tribal court has upheld tribal landowners' challenges to the exercise of tribal eminent domain.

in possession of them: *Provided*, That the citizens of the Nation possessing exclusive and indefeasible right to their improvements, as expressed in this article, shall possess no right or power to dispose of their improvements, in any manner whatever, to the United States, individual States, or to individual citizens thereof; and that, whenever any citizen shall remove with his effects out of the limits of this Nation, and become a citizen of any other Government, all his rights and privileges as a citizen of this Nation shall cease: *Provided, nevertheless*, That the National Council shall have power to re-admit, by law, to all the rights of citizenship, any such person or persons who may, at any time, desire to return to the Nation, on memorializing the National Council for such readmission.

164. Condemnation proceedings could very well be found upon review of Cherokee case law between 1839 and 1898. However, the Cherokee Nation's official governmental records and judicial opinions were seized by the Dawes Commission during allotment and are currently housed in the Oklahoma Historical Society, outside the custody of the Cherokee judiciary. The judicial opinions have never been published; remarks with respect to eminent domain are based on review of constitutional and statutory laws exclusively.

165. For instance, all lands in Cuba were nationalized in 1961. Edward Yates, *Central Planning Meets the Neighborhood: Land-Use Law and Environmental Impact Assessment in Cuba*, 16 Tul. Envtl. L.J. 653, 658 (2003). In Mozambique, ultimate ownership of lands rests with the state. Kendall Burr, *The Evolution of the International Law of Alienability: The 1997 Land Law of Mozambique as a Case Study*, 43 Colum. J. Transnatl. L. 961, 961-62 (2005).

166. Consider the example of New Zealand. Takings in New Zealand are highly regulated; there are numerous checks and balances required for a public purpose. *Taking Land*, *supra* n. 56, at 255-56. All takings must go through the Environment Court, and it appears to be more like actual public use than the American system that would allow an automatic conveyance to a third party. *Id.* at 255.

The compensation is better than the United States system: "The taking of land is not viewed in New Zealand as an invasion of a person's rights so much as a regulation of land use permitting compensation to those who are deprived in the interests of the broader society." *Id.* The compensation goes beyond the market value provided in the United States. The compensation can be in the form of "monetary compensation or by transfer of other property to the displaced parties." *Id.* "It is also intended to cover the costs incurred in the process as well as to provide a small sum for loss of employment." *Id.*

167. See *supra* n. 150 (discussing tribal codes and constitutional provisions).

The Navajo Nation case *Dennison v. Tucson Gas and Electric Co.*,¹⁶⁸ involved a taking of private land for a right of way.¹⁶⁹ The Navajo Supreme Court ruled that the taking violated Navajo law based on procedural grounds and due process considerations.¹⁷⁰ The question of whether the Navajo Nation had the power to take lands by eminent domain was answered in the affirmative:

Eminent Domain is the power of any sovereign to take or to authorize the taking of any property within its jurisdiction for public use without the consent of the owner. It is an inherent power and authority which is essential to the existence of all governments.

Therefore, as in this case, the sovereign (the Navajo Tribal Government), has the power and the authority to take or to authorize the taking of the Dennison property, all or part of it, without their consent. Plaintiffs' consent to the granting of the right-of-way is totally unnecessary.¹⁷¹

In *Dennison*, the Court noted that limitations on tribal eminent domain powers are found in the Indian Civil Rights Act of 1968 ("ICRA").¹⁷² Section 1302(5)(8) of the ICRA states that "[n]o Indian tribe in exercising the powers of self-government shall: . . . take any private property for public use without just compensation."¹⁷³ The Navajo Bill of Rights,¹⁷⁴ contained similar limitations on the Navajo Nation.

The Navajo courts provided an historical account of tribal takings law:

Furthermore, under the customary division of governmental powers into three (3) branches, executive, legislative, and judicial, the right to authorize the exercise of Eminent Domain is wholly legislative (Navajo Tribal Council) and there can be no taking of private property for public use against the will of the owner [without] direct authority from the legislative body (Navajo Tribal Council) and then the taking must be only in the manner as prescribed by the legislative body (Navajo Tribal Council).

In 1960, the Navajo Tribal Council vested the exercise of the Eminent Domain power of the Navajo Nation in the Executive Branch of the Navajo Government, and provided by law the exact manner and the procedure to be followed in its execution or use.¹⁷⁵

Under Navajo law, the tribal administrative agency is charged with estimating probable damages, and an offer is made to the landowner.¹⁷⁶ If the landowner refuses to accept the compensation offered, condemnation proceedings may follow.¹⁷⁷

In *Dennison*, the proper procedures were not followed and the exercise of eminent domain was deemed illegal.¹⁷⁸ However, the power of the Navajo government to exercise eminent domain powers is recognized by the Navajo courts.

168. 1 Navajo 95 (Navajo 1974) (available at National Tribal Justice Resource, *Dennison v. Tucson Gas & Elec. Co.*, <http://www.tribalresourcecenter.org/opinions/opfolder/1974.NANN.0000002.htm> (accessed Nov. 11, 2005)).

169. *Id.* at ¶ 16.

170. *Id.* at ¶ 72.

171. *Id.* at ¶¶ 30–31.

172. *Id.* at ¶ 37 (citing 25 U.S.C. §§ 1301–1303 (2000)).

173. *Dennison*, 1 Navajo at ¶¶ 38–39.

174. Navajo Nation Code tit. 9, §§ 1, 5, 8 (Equity 1995).

175. *Dennison*, 1 Navajo at ¶¶ 44–45 (citation omitted).

176. *Id.* at ¶¶ 49–54.

177. *Id.* at ¶ 56.

However, tribes are not exercising the power to acquire lands or reconsolidate land bases in large numbers. Tribal governments are cautious in exercising their inherent powers because numerous federal court cases, in recent years, have negatively impacted tribal sovereign powers.¹⁷⁹

The tribes that expressly authorize eminent domain powers typically restrict the power to lands owned by tribal citizens within the tribe's political and territorial boundaries.¹⁸⁰ While takings by tribal governments include easements for road projects and utilities, the public use doctrine is incorporated to allow for more liberal interpretations.¹⁸¹

As a matter of federal Indian law, tribal takings of private lands will present the question of whether tribes retain eminent domain powers. Eminent domain is usually considered an inherent power of all sovereigns. If the tribal power is ultimately challenged in federal court, the courts will likely look to various textual sources to determine whether the tribal power has somehow been divested.

General principles of federal Indian law state that tribes may exercise inherent governmental powers, so long as those powers have not been voluntarily relinquished by the tribal government or expressly taken away by an act of Congress.¹⁸² In recent years, the federal courts have added a third avenue for possible divestiture of tribal authority: if the federal courts find that the exercise of such power is inconsistent with the tribe's dependent status vis-à-vis the federal government.¹⁸³

178. *Id.* at ¶ 72.

179. Many commentators are less reluctant to conclude that tribes retain eminent domain powers. *See e.g.* Philip P. Frickey, *A Common Law for Our Age of Colonialism: The Judicial Divestiture of Indian Tribal Authority over Nonmembers*, 109 *Yale L.J.* 1, 83 (1999) (describing the recognition of tribal eminent domain powers over fee simple lands within reservation boundaries as an aggressive measure that could be taken by Congress); Philip P. Frickey, *Domesticating Federal Indian Law*, 81 *Minn. L. Rev.* 31, 87 (1996) (suggesting tribes lack eminent domain powers); Ezra Rosser, *This Land is My Land, This Land is Your Land: Markets and Institutions for Economic Development on Native American Land*, 47 *Ariz. L. Rev.* 245, 310 (2005) (mentioning only the possibility of tribal exercise of eminent domain); Victoria Verbyla Sutton, *Divergent But Co-Existent: Local Governments and Tribal Governments Under the Same Constitution*, 31 *Urb. Law.* 47 (1999) (suggesting that tribal governments do not enjoy the power of eminent domain to the same extent that state and local governments do).

Only a few law review articles expressly conclude that tribes retain the power of eminent domain. *E.g.* Kirke Kickingbird, *What's Past is Prologue: The Status and Contemporary Relevance of American Indian Treaties*, 7 *St. Thomas L. Rev.* 603 (1995) (noting that the power of eminent domain is retained by tribes); Leeds, *supra* n. 101 (discussing options for exercise of tribal eminent domain power).

180. Examples include the Sisseton-Wahpeton Sioux Tribe and Eastern Band of Cherokee Indians. *See supra* n. 150 and accompanying text. Each of these limits the power to lands within the reservation boundaries or within the tribe's Indian country.

181. For example, consider the situation of the Eastern Band of Cherokee Indians. *See id.* (discussing the Council's determination of what constitutes "public use").

182. Felix S. Cohen noted in the most recent edition of the leading treatise in the field that

[p]erhaps the most basic principle of all Indian law, supported by a host of decisions, is that those powers lawfully vested in an Indian nation are not, in general, delegated powers granted by express acts of Congress, but rather "inherent powers of a limited sovereignty which has never been extinguished."

Cohen's Handbook of Federal Indian Law, supra n. 65, at 206 (footnote omitted). *See also* Robert N. Clinton, Nell Jessup Newton & Monroe E. Price, *American Indian Law: Cases and Materials* 317–18 (3d ed., Michie 1991) (discussing Cohen's synthesis of the doctrine of inherent sovereignty).

183. *See* Frank Pommersheim, Lara: *A Constitutional Crisis in Indian Law?* 28 *Am. Indian L. Rev.* 299, 304 (2003–2004) (referencing judicial plenary power); Frank Pommersheim, *Coyote Paradox: Some Indian Law Reflections from the Edge of the Prairie*, 31 *Ariz. St. L.J.* 439, 462 (1999).

There is no indication that tribes have voluntarily relinquished their power of eminent domain. Of course, the question turns on a case-by-case evaluation of a particular tribe's history, but few tribes would have voluntarily relinquished their sovereign rights to regulate land use within tribe's own territory.

There is no indication that Congress has divested tribal governments of eminent domain powers through express legislation. In fact, Congress mentioned tribal eminent domain as a retained tribal power in the ICRA.¹⁸⁴ The ICRA provides certain civil rights protections, as a matter of federal law, to all persons, Indian and non-Indian, who come within the jurisdiction of tribal governments.¹⁸⁵ The power of eminent domain is specifically mentioned, and the Act simply requires that tribes who take lands for public use provide just compensation for takings.¹⁸⁶ The ICRA restricts tribal governments to the same extent the Bill of Rights restricts the federal government.¹⁸⁷

The question of judicial implicit divestiture, as a relatively new way tribes could lose governmental powers, is difficult to predict. In recent decisions, the federal courts have tended to restrict the exercise of tribal inherent powers to lands over which the tribe or its members retain the right to exclude.¹⁸⁸ If this trend were extended, in a challenge to the tribal eminent domain powers, the power might be restricted to the taking of lands held by tribal citizens only.

Tribal eminent domain powers will most likely be treated by the federal court like other inherent tribal powers such as sovereign immunity and taxation that are retained, but limited by federal law.¹⁸⁹ Tribes continue to enjoy sovereign immunity, but it is recognized that tribal sovereign immunity can be waived by Congress.¹⁹⁰ Tribes also enjoy taxation powers, but those powers are limited to tribal lands or consensual relationships.¹⁹¹

The Bureau of Indian Affairs ("BIA") has recognized the right of tribal governments to take lands claimed by tribal members for public uses.¹⁹² Professor Richard Monette shared the story of an Indian family who sought the assistance of the BIA when their tribal government attempted to build a helicopter landing pad on lands claimed by the family.¹⁹³ The BIA refused assistance to the tribal citizens noting that

184. 25 U.S.C. §§ 1301–1303 (2000).

185. *Id.* at § 1302.

186. *Id.*

187. Section 1302 of the ICRA states: "No Indian tribe in exercising powers of self-government shall take any private property for a public use without just compensation." 25 U.S.C. § 1302(5). Compare this language with the almost identical language of the takings clause of the United States Constitution: "No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." U.S. Const. amend. V.

188. See e.g. *Atkinson Trading Co. v. Shirley*, 532 U.S. 645 (2001); *Strate v. A-1 Contractors*, 520 U.S. 438 (1997); *Mont. v. U.S.*, 450 U.S. 544 (1981).

189. See *Kiowa Tribe of Okla. v. Mfg. Technologies, Inc.*, 523 U.S. 751, 754 (1998) ("As a matter of federal law, an Indian tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity.").

190. *Kiowa*, 523 U.S. at 753–57; *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 57–58 (1978).

191. *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982).

192. Ltr. from Robert R. McNichols, Bureau of Indian Affairs, Truxton Canon Field Office, to Guy Marshall, Jr. (May 9, 2003) (copy on file with author).

193. Monette, *supra* n. 150.

the tribal use served a “community purpose.”¹⁹⁴ The BIA commented that the tribal power to take lands claimed by the family was “consistent with tribal law and traditions.”¹⁹⁵ The example demonstrates a reluctance, on the part of the BIA, to allow private property interest to restrict the exercise of tribal governmental power.

The Internal Revenue Service (“IRS”) is another federal agency that recognizes eminent domain as a retained tribal power.¹⁹⁶ The IRS Code contains provisions that treat tribal governments like state governments for certain tax purposes.¹⁹⁷ In internal agency reviews of the legislative history of these provisions, the IRS concluded the provisions should apply to an Indian tribal government that exercises inherent sovereign powers.¹⁹⁸ According to the IRS, among those inherent sovereign powers is the power to tax, the power of eminent domain, and police powers, such as control over zoning, police protection, and fire protection.¹⁹⁹

Some state officials have agreed that eminent domain is a sovereign power of modern tribal governments, even in states where tribal powers have otherwise been diminished. For example, a 1985 Attorney General’s Opinion for the state of Nebraska places eminent domain in the same category with tribal tax powers:²⁰⁰

You ask if the Tribe will have additional powers regarding taxation and condemnation as a result of retrocession. The answer would appear to be “no.” . . . Indian tribes retained broad authority in the areas of taxation and eminent domain (i.e., condemnation). . . .

[A]ny exercise of [eminent domain powers of] the Tribe is subject to a number of limitations imposed by federal law, including due process, equal protection and just compensation considerations.²⁰¹

Tribal governments should evaluate whether the exercise of eminent domain powers would be useful, particularly in combating fractionated ownership and land tenure problems that were created without tribal consent. As a retained element of inherent sovereignty, tribes have the same authority to avail themselves of the power as do federal and state governments. But tribes should move forward in policy determinations with the unique insight gained from having similar powers exercised against them. Perhaps tribal governments have the perspective to show the other two sovereigns how to exercise the power in a way that is more respectful of individual rights.

194. Ltr., *supra* n. 192.

195. *Id.* It is important to note that in this example, the land in this particular tribe is held in trust by the United States for the beneficial use of the tribe and the lands were never allotted to individuals.

196. Mark J. Cowan, *Leaving Money on the Table(s): An Examination of Federal Income Tax Policy Towards Indian Tribes*, 6 Fla. Tax Rev. 345, 363 n. 78 (2004) (noting that the three major sovereign powers of tribes, as mentioned in title 26, section 7871 of the U.S. Code, include taxation, eminent domain, and police powers).

197. 26 U.S.C. § 7871(a) (2000).

198. Priv. Ltr. Rul. 2000-29-039 (July 21, 2000).

199. H.R. Conf. Rpt. No. 97-984 at 15 (Dec. 19, 1982).

200. Ltr. from Robert Spire, Atty. Gen. Neb., to James E. Goll, Sen., Neb. Legislator (Mar. 28, 2005) (available at <http://ago.nol.org/local/opinion/?topic=detao;s&id=798>).

201. *Id.*

VIII. CONCLUSION

Over the years, American Indian people have come to view property rights differently from their non-Indian counterparts, but perhaps the *Kelo* decision brings the two groups closer together. The United States has consistently rationalized the taking of Indian lands on the premise that Indians do not make efficient use of land the way non-Indians do. Now the rationale for taking non-Indian lands is similar: land should be placed with the entities that will make the best use of those lands.

Indian people have known for some time that fee simple title is far from absolute. The notion that the government can take land at any time is a foundation of the American Indian experience. The inquiry as to what it is in the best interest of the “public” is an exceedingly broad question. American Indian people have watched their lands transferred to other individuals for centuries.

Are mainstream American families coming to realize what American Indians have known for generations? Eminent domain, and similar theories of land allocation, are rarely discussed when land resources are abundant. But when competing interests eye a particular tract of land, a hierarchy of preferred land uses emerges.

We have finally reached a resource crunch that brings to mainstream communities the truth about governmental power and private property rights. As one of my colleagues has aptly noted, “[i]t seems to violate the spirit of storytelling to declare a story ‘wrong.’”²⁰² But perhaps the American people have simply gotten it wrong, both in their response to *Kelo*, and to their false security in private property rights. The laws governing eminent domain and other governmental powers have not changed, just the people affected.

202. Bobroff, *supra* n. 86, at 1620.

