THE YALE LAW JOURNAL

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Eminent Domain Due Process

ABSTRACT. This Note analyzes the apparent disconnect between eminent domain doctrine and due process doctrine. Following *Kelo*, numerous states have reformed their eminent domain laws in an effort to ensure that the takings power is not abused. Whatever one makes of these legislative reforms, at an absolute minimum, the Due Process Clause should guarantee that landowners receive notice and an opportunity for some sort of judicial determination of the legality of the taking before the land is actually taken. After cataloging existing eminent domain laws, this Note traces the evolution of these laws over time in both the legislatures and the courts. In parallel, this Note analyzes the evolving circumstances driving the judicial perception of eminent domain. Examining these facts, the Note explains why courts have failed to rein in the eminent domain power with procedural protections. After establishing the appropriateness of applying modern due process principles to eminent domain actions, the focus of the inquiry shifts to what procedural due process demands. This colloquy explains what process is due, what the content and form of that process should be, and the likely effects of recognizing due process rights in the eminent domain context.

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INTRODUCTION

In the wake of the Supreme Court's decision in *Kelo v. City of New London*,[1] state legislatures, academics, and activists all expressed their concern for the status of property rights. In the face of the ever impending threat of the government's eminent domain power, *Kelo* seemed to stand for the sweeping proposition that private property could be condemned by a public entity whenever such an action was economically beneficial. A swell of statutes and scholarship quickly followed, suggesting that additional procedures should be put in place to curb potential governmental abuse of the takings power. On the legislative front, many states altered their eminent domain statutes or amended their constitutions to ensure that economic development could not serve as a legitimate basis for exercising the state's eminent domain power.[2] Some commentators proposed that states impose additional transparency requirements to ensure that the processes used to determine whether to exercise the eminent domain power were open to the public.[3] Others suggested that local government actors voluntarily adopt rules to make the exercise of the eminent domain power procedurally more difficult.[4] Still others have argued that regardless of what level of government requires it, additional process is necessary so that the judiciary can provide a check on the use of eminent domain.[5]

Whatever one makes of these legislative reforms and scholarly suggestions to afford greater procedural protections against the use of the eminent domain power, at an absolute minimum, the Due Process Clause should guarantee that

1. 545 U.S. 469 (2005).

2. *See* Amanda W. Goodin, *Rejecting the Return to Blight in Post-*Kelo *State Legislation*, 82 N.Y.U. L. REV. 177, 195 (2007); National Conference of State Legislatures, Eminent Domain 2006 State Legislation, http://www.ncsl.org/?Tabid=17593 (last visited Oct. 4, 2009) (describing the passage of legislation in twenty-eight states by state legislatures circumscribing the government's ability to exercise its eminent domain power in the wake of *Kelo*).

3. *See, e.g.*, Patience A. Crowder, *"Ain't No Sunshine": Examining Informality and State Open Meetings Acts as the Anti-Public Norm in Inner-City Redevelopment Deal Making*, 18 J. AFFORDABLE HOUSING & COMMUNITY DEV. L. 113 (2008) (discussing transparency in making decisions about land use).

4. *See, e.g.*, Christopher Serkin, *Local Property Law: Adjusting the Scale of Property Protection*, 107 COLUM. L. REV. 883, 905 (2007) (outlining various proposals responding to the *Kelo* decision).

5. *See* Kristi M. Burkard, *No More Government Theft of Property! A Call To Return to a Heightened Standard of Review After the United States Supreme Court Decision in* Kelo v. City of New London, 27 HAMLINE J. PUB. L. & POL'Y 115, 150 (2005); Nicole Stelle Garnett, *The Neglected Political Economy of Eminent Domain*, 105 MICH. L. REV. 101, 111 (2006).

landowners receive notice and an opportunity for some sort of hearing on the legality of a taking before land is actually taken. Despite the fact that the Constitution clearly states that property cannot be taken without due process, neither federal nor state case law uniformly recognizes the necessity of applying basic procedural protections in the eminent domain context. This fact has led many state courts to arrive at a conclusion seemingly contrary to the plain text of the Constitution and counterintuitive to modern conceptions of property and procedural rights: due process does not apply to state eminent domain actions.

The troubling implications of this faulty legal conclusion are made plain by a recent eminent domain action in the state of Rhode Island. In 1986, the Rhode Island Department of Transportation (RIDOT) and The Parking Company (TPC) entered into an agreement giving TPC the exclusive rights to operate parking facilities at the T.F. Green International Airport (Green International) in exchange for TPC's construction of a new parking garage (Garage 1).[6] During the 1990s, in response to robust economic growth in the Providence area, RIDOT turned over control of its airport services to a subsidiary of the Rhode Island Economic Development Corporation (EDC), which decided to build a second parking garage at Green International (Garage 2). In response to increased demand for valet parking, EDC and TPC entered into an additional agreement specifying that the lower portions of Garage 1 would be used to provide valet service.

The terrorist attacks of September 11, 2001 occurred shortly after the agreement was implemented. This tragedy significantly affected the air travel industry, including the demand for parking at the nation's airports.[7] In response to declining profits, TPC notified EDC that unless some sort of arrangement could be worked out, TPC would be forced to lower rates at its parking structure, Garage 1, effectively initiating a price war with state-owned Garage 2. When negotiations with TPC about rate-setting broke down, EDC began to consider other actions to address concerns about declining revenues and took steps to attempt to regain profitability. As an initial step, EDC sought to terminate valet parking services being provided by TPC. However, these

6. The agreement also contained a buyout provision that allowed RIDOT to purchase the parking garage that did not come into play in this litigation. *See* R.I. Econ. Dev. Corp. v. Parking Co., 892 A.2d 87, 105 (R.I. 2006).

7. For a discussion of the economic effect of September 11th on the travel industry, see CONG. RESEARCH SERV., THE ECONOMIC EFFECTS OF 9/11: A RETROSPECTIVE ASSESSMENT 4, 30-31 (2002).

negotiations also failed, and the relationship between TPC and EDC began to deteriorate rapidly.[8]

On July 26, 2004, in accordance with Rhode Island law delegating eminent domain authority to EDC, the corporation's chairman issued a declaration of taking of TPC's property interest in Garage 1.[9] In order to effectuate the taking, EDC was required to file a declaration with the county superior court along with documentation explaining the value of the property. As Rhode Island law does not require notice to a property owner whose land is the subject of an eminent domain proceeding, the order condemning Garage 1 was issued without any involvement by TPC or any serious consideration of the appropriateness of that action; the simple act of filing the declaration completed the taking.[10] As a result of this proceeding, TPC was dispossessed of all property rights in Garage 1. The operators of TPC did not become aware of the condemnation of their property until they arrived at the garage the day after the court order was issued to find state employees in control of the facility.

Facing these facts, the Rhode Island Supreme Court was forced to address whether a property owner was entitled to prior notice of an eminent domain condemnation action, and a hearing on whether the taking was for a public use, before being deprived of her property.[11] Though the court held that the EDC's action was inappropriate because it was motivated by increasing revenues and not in pursuit of a legitimate public purpose, in reaching that decision it outlined the relationship between due process guarantees and the state's eminent domain power under Rhode Island law. The court stated that "[t]he right to a prior hearing attaches only to the deprivation of an interest encompassed within the [F]ourteenth [A]mendment. . . . However, the right to a hearing before the taking of private property by eminent domain is not a right encompassed within the [F]ourteenth [A]mendment."[12] Under Rhode

8. For an expanded discussion of the situation surrounding this case, see *Controversy over Airport Parking*, PROVIDENCE J., Sept. 24, 2004, at A3.

9. *See* R.I. GEN. LAWS § 42-64-9 (2006) (outlining the procedures for exercising eminent domain authority under Rhode Island law). The declaration condemned an easement created by contract that granted the TPC exclusive parking rights in Garage 1. *See Parking Co.*, 892 A.2d at 94.

10. Under Rhode Island law, the condemning authority obtains title and may take possession of property merely by filing a declaration of condemnation and satisfying the court that its estimate of compensation is just. Notice to the property owner is not required until after the taking has occurred. R.I. GEN. LAWS § 42-64-9(f) to (g).

11. *Parking Co.*, 892 A.2d at 94.

12. *Id.* at 98 (alteration in original) (quoting Golden Gate Corp. v. Sullivan, 314 A.2d 152, 154 (R.I. 1974)).

Island law, the person whose property is the object of an eminent domain action is not entitled to notice or any meaningful judicial proceeding before the taking of her property occurs.[13]

This Note argues that eminent domain laws like Rhode Island's violate the due process rights of property owners. At a minimum, the constitutional guarantees of the Fifth and Fourteenth Amendments should ensure that property owners receive notice and some judicial determination of the validity of a taking before title to land is actually transferred. Issues beyond the scope of these basic constitutional guarantees can be postponed to sometime after the taking is effectuated without running afoul of due process. In making this argument, the goals of this Note are both descriptive and prescriptive—to describe the current state of the law, how the law came to be as it is, and what shape the law should take moving forward. The discussion begins by cataloging the existing eminent domain law in the fifty states and discussing the status of the procedural protections provided by those laws. This analysis reveals that several states have refused to recognize the application of due process principles to eminent domain actions. The Note then explores the historical relationship between due process and property rights, suggesting how the split between eminent domain and due process doctrine evolved. The flawed relationship of eminent domain and due process is traced from the Founding, through the jurisprudential revolution of the 1970s, to the present day, demonstrating that there is no reason rooted in logic or precedent to fail to provide due process protections in the eminent domain context. After establishing the appropriateness of applying modern due process principles in the eminent domain context, the focus of the inquiry shifts to demonstrate what due process demands. This conversation explains what process is due, what the content and form of that process should be, and what the likely effects of recognizing due process rights in the eminent domain context are. Finally, the possibility that eminent domain enjoys some sort of special historical status

13. The state of Rhode Island is not alone in its recent questionable exercise of eminent domain power. *See* Sw. Ill. Dev. Auth. v. Nat'l City Envtl., L.L.C., 768 N.E.2d 1 (Ill. 2002) (invalidating the exercise of eminent domain authority to acquire land in the name of economic development to build a parking facility to accommodate expansion of a private business after the negotiations between the parties involved in the action broke down). While the actions of the Rhode Island EDC illustrate an extreme example of the use of state eminent domain authority, twenty-one other states, the District of Columbia, and the federal government have active laws that allow for the deprivation of property without affording any prior process. *See infra* app. tbl.2. Additionally, seventeen more states have eminent domain laws that are procedurally deficient in some other way, leaving only twelve states with eminent domain laws providing the full panoply of process rights prior to dispossessing property owners of their property interest. *See infra* app. tbls.1 & 3.

that exempts it from traditional due process analysis is discussed. Even under this formulation of the law, history and tradition favor the provision of prior process.

I. THE CURRENT STATE OF EMINENT DOMAIN LAW

The Supreme Court has never fully defined the due process rights of a property owner faced with an eminent domain action undertaken by a government—local, state, or federal. What little Court precedent there is directly bearing on the subject of eminent domain and procedural rights serves only to confuse the issue.[14] The Court's rulings dealing with the interaction between property rights and due process rights more generally, however, suggest that prior notice and some prior determination of the appropriateness of the state action are warranted prior to a taking.[15] Before exploring the basis of the legal disconnect between eminent domain and due process law at the constitutional level, it is useful to examine the range of existing eminent domain statutes to provide context to the legal analysis to follow. Numerous state eminent domain laws provide full due process rights to landowners whose property is the object of a state-initiated eminent domain action, including personal notice and some form of a pre-condemnation hearing. On the opposite end of the procedural rights spectrum, several states allow the exercise of eminent domain power without any meaningful process—no notice to the property owner and no meaningful judicial proceeding prior to the taking. Several states occupy a middle ground between these two extremes, allowing the exercise of eminent domain authority with some prior process in specific instances. While these divisions become less clear when state case law supplementing the text of eminent domain statutes is taken into account, there remain several states that in certain circumstances allow the transfer of property ex parte without either notice or hearing.

14. *See, e.g.*, Catlin v. United States, 324 U.S. 229, 231-32 (1945) (discussing appellate review of an eminent domain action); Sweet v. Rechel, 159 U.S. 380, 404 (1895) (dealing with when the amount of just compensation must be determined and distributed); Cherokee Nation v. S. Kan. Ry. Co., 135 U.S. 641, 659-60 (1890) (same).

15. *See* Jones v. Flowers, 547 U.S. 220, 223 (2006); United States v. James Daniel Good Real Prop., 510 U.S. 43, 48 (1993); Fuentes v. Shevin, 407 U.S. 67, 80 (1972); Bell v. Burson, 402 U.S. 535, 542 (1971); Goldberg v. Kelly, 397 U.S. 254 (1970); Opp Cotton Mills, Inc. v. Adm'r of the Wage & Hour Div. of the Dep't of Labor, 312 U.S. 126, 152-53 (1941); United States v. Ill. Cent. R.R. Co., 291 U.S. 457, 463 (1934); Londoner v. City of Denver, 210 U.S. 373, 385-86 (1908).

A. State Eminent Domain Statutes

1. Providing Full Process Rights

Under current law, state condemnation of private property using the eminent domain power is often accompanied by full process rights. The usual exercise of the takings power involves the initiation of condemnation proceedings against the property owner. In most states, condemnation litigation bears a striking resemblance to a normal civil judicial proceeding, and in many instances it is governed by similar procedural rules.[16] Under a typical condemnation process providing full procedural rights, the condemning authority begins by determining that a privately owned parcel or group of parcels is needed for a public use. The taking entity commences eminent domain proceedings against the property owner. The property owner is formally served and is then entitled to defend against the taking in the form of a motion to dismiss or similar procedure, and to establish the baseline for compensation. After providing notice to all concerned parties, a court holds a formal adversarial proceeding at which time it decides whether or not the property at issue may be taken.[17] Once a final judgment for the condemnor is entered and just compensation has been paid to the condemnee, title vests in the taking authority.[18] This process often spans a period of several years, the actual taking occurring long after the decision to exercise the takings power.[19] Regardless of whether the ultimate resolution of a conflict between a property owner and a takings authority is "the product of negotiation or litigation, the entire condemnation process [is] often arduous, expensive and time consuming."[20] Though cumbersome, these condemnation procedures serve to fully protect the due process rights of property owners and act as a serious deterrent to eminent domain abuse.[21]

16. *See, e.g.*, OKLA. STAT. ANN. tit. 27, § 2 (West 1997) (outlining eminent domain procedures).

17. *See, e.g.*, ALA. CODE §§ 18-1A-22, -24, -74 (LexisNexis 2007) (requiring a prior offer of compensation to and negotiation with the condemnee, notice, and a full pre-condemnation hearing).

18. *See, e.g.*, 735 ILL. COMP. STAT. ANN. 5/7-123 (West 2003) (outlining eminent domain procedures).

19. 6A NICHOLS ON EMINENT DOMAIN § 24.10[1] (3d ed. 2006).

20. *Id.*

21. For statutory provisions describing typical condemnation procedures, see N.J. STAT. ANN. §§ 20:3-6 to -17 (West 1997); N.Y. EM. DOM. PROC. LAW §§ 301-305 (McKinney 2003); N.C. GEN. STAT. ANN. § 40A-40 (West 2007); 26 PA. CONS. STAT. ANN. §§ 301-310 (West

States also have an alternative expedited mechanism for exercising eminent domain authority. Oftentimes these state actions, though accelerated, offer the procedural protections that one would expect the law to provide a property owner. Twelve states have expedited eminent domain procedures that provide the same type of notice and adversarial process that is received in the course of normal civil litigation.[22] For example, under Alabama law, an action to condemn property may not be maintained over a timely objection by the property owner unless the condemnor has offered to acquire the property by purchase and made reasonable attempts to negotiate a price.[23] If these negotiations fail, then the condemnor must file a complaint in the appropriate court, along with a "legal description" of the property—like a zoning map.[24] Notice of the complaint must be served on the property owner, after which a hearing is held that concludes in the court either granting or refusing the complaint.[25] If the condemnation is approved, a three-judge panel assesses the appropriate damages and compensation, and once that amount has either been deposited with the court or paid to the property owner, title is conveyed to the condemning authority by court order.

2. The Complete Abrogation of Procedural Rights

Twenty-one states and the District of Columbia allow for the exercise of eminent domain authority without any prior notice or pre-condemnation hearing under specific circumstances.[26] The Rhode Island statute used by the Economic Development Corporation in *Parking Co.* is an example of the most egregious form of process abuse perpetrated in the name of the eminent domain power. Under this law, the power of eminent domain is delegated to a quasi-governmental entity such as the EDC. That company has the ability to make independent decisions about condemnation and effectuate these decisions with little or no prior review. In order to exercise eminent domain authority, the EDC must simply file a declaration with the town clerk in the

2000); S.C. CODE ANN. §§ 28-2-220 to -280 (2007); VA. CODE ANN. §§ 25.1-300 to -318 (2006).

22. *See infra* app. tbl.1.

23. ALA. CODE §§ 18-1A-22, -55 (LexisNexis 2007).

24. *Id.* § 18-1A-72.

25. *Id.* § 18-1A-276.

26. *See infra* app. tbl.2. Additionally, while the territories of Guam, Puerto Rico and the Virgin Islands are not specifically discussed in this paper, all three have declaration of takings procedures similar to that of the federal government. *See* GUAM CODE ANN. tit. 21, § 15106 (1993); P.R. LAWS ANN. tit. 32, § 2907 (2004); V.I. CODE ANN. tit. 28, § 415 (1975).

municipality where the property is situated, along with a sworn statement that the property will be put to a public use and an estimation of the necessary compensation. The taking is completed solely by the ex parte act of the filing itself—the title to the property immediately transfers to the state without any involvement by the property owner or any review of the taking's public utility.[27] The statute does require that notice be given to the property owner, but that notice does not need to be provided until *after* the taking is already completed.[28]

3. Steering the Middle Course

Several states have statutes that allow for active judicial consideration of the merits of the exercise of eminent domain authority but fail to provide notice to the condemnee or fall short in some other important way of providing full procedural protections to property owners.[29] In Illinois, for example, a condemnor may file a petition with the court to come into possession of the land in question either immediately upon receiving court approval, or at some time specified in the future.[30] In deciding whether to grant or deny this motion, the court must consider whether or not the eminent domain power was appropriately invoked.[31] Though there is neither a notice requirement under this statute nor an actual adversarial proceeding requirement, the court can provide a layer of protection against bad faith or ill-conceived action by the state as it must make an affirmative finding for the condemnor.

Several other states require notice by statute prior to allowing the exercise of eminent domain authority, but do not specifically afford any form of pre-condemnation judicial process.[32] Under Hawaii law, for example, a taking can be accomplished by a simple filing with the court, but the condemnor must also provide notice to the owner of the property it seeks to condemn.[33] There is no specific judicial proceeding provided for under this statute, but by ensuring notice to the property owner, the statute at least gives the individual the opportunity to attempt to insert herself in the process by seeking an injunction or pursuing some other equitable remedy.

27. R.I. GEN. LAWS § 45-29-3 (1999).

28. R.I. GEN. LAWS § 37-6-15 (1997).

29. *See infra* app. tbl.3.

30. 735 ILL. COMP. STAT. ANN. 30/20-5-5 to -10 (West Supp. 2009).

31. *Id.*

32. *See infra* app. tbl.3.

33. HAW. REV. STAT. § 101-28 (2006).

Providing even more process, some states require both notice to the owner of property that is targeted by an eminent domain action, and provide for at least limited court review of the action's propriety.[34] Under Connecticut law, a designated agency or municipality initiates condemnation proceedings to obtain access to property by filing a statement of compensation with the clerk of courts.[35] At the same time, the condemning authority must provide notice to the property owner.[36] Any person claiming to be aggrieved by the eminent domain action may seek judicial review of its validity, but this review is largely constrained to the amount of compensation deposited, and does not prevent the property from vesting with the takings authority.[37] Though falling short of providing the full panoply of procedural protections, states in this category at least provide some due process to property owners.

B. State Eminent Domain Case Law

The state statutory schemes governing eminent domain procedures are augmented by the decisions of state courts addressing the legal ramifications of the exercise of the takings power. In many scenarios, state case law serves to validate the text of state statutory law not requiring prior notice or pre-condemnation hearings. In the Rhode Island case, *Parking Co.*,[38] the state supreme court stated: "'The right to a hearing before the taking of private property by eminent domain is not a right encompassed within the [F]ourteenth [A]mendment.'"[39] While this decision is very recent, it is based on an understanding of the relationship between eminent domain and due process persistent in Rhode Island courts since the 1970s. In *Golden Gate Corp. v. Sullivan*,[40] the court ruled that not holding a hearing prior to depriving a

34. CONN. GEN. STAT. §§ 8-130 to -132 (2009) (requiring the condemning agency to file a statement of compensation and give notice to property owner, and requiring the court clerk to issue a certificate of taking; any person claiming to be aggrieved by the taking may apply to court for review); FLA. STAT. ANN. §§ 74.031, .041, .051 (West 2004) (allowing authorized parties to file a declaration of taking prior to final judgment; property owner is entitled to a hearing to contest jurisdiction of the court, sufficiency of the pleadings, whether the authority is being properly delegated and exercised, and the amount required to be deposited to effectuate the "quick take").

35. CONN. GEN. STAT. § 8-130.

36. *Id.*

37. *Id.* § 8-132.

38. R.I. Econ. Dev. Corp. v. Parking Co., 892 A.2d 87 (R.I. 2006).

39. *Id.* at 98 (quoting Golden Gate Corp. v. Sullivan, 314 A.2d 152, 154 (R.I. 1974)).

40. 314 A.2d 152.

landowner of her property interest was constitutionally permissible. In doing so, the court stated that "[t]he necessity and expediency of taking private property for public use is a legislative question, and a hearing thereon is not essential to the due process guaranteed in the [F]ourteenth [A]mendment."[41] Courts in states such as Georgia and New Hampshire have also expressly endorsed the denial of due process in eminent domain proceedings using Rhode Island-like rationale.[42]

Though the text of eminent domain statutes in force in many states sidesteps the procedural concerns associated with takings, some state courts provide procedural protections beyond that required by statute. As such, the law in states that do not require notice or a pre-condemnation hearing prior to exercising eminent domain authority is often augmented by state case law making the requirements placed on the condemnor more rigorous. The development of Maryland takings law offers a paradigmatic example of the state courts complementing state law in a way that provides added procedural protections for property rights. In *Sapero v. Mayor of Baltimore*,[43] the Maryland Supreme Court addressed whether the exercise of eminent domain power without a complete pre-condemnation hearing violated due process. Ruling against the City of Baltimore, the court concluded that "[p]rocedural due process protections dictate that, at a minimum, the deprivation of property by adjudication requires that a party receive notice and a reasonable opportunity to be heard consistent with the circumstances of the taking."[44] Despite the fact that this level of process is not explicitly provided by Maryland statutory law, the state court intervened to ensure that due process rights were protected. Maryland courts are not alone in this effort; several other states that fall into the category of providing inadequate procedural protections by statute make up for this deficiency through rights established by case law.[45] State legal

41. *Id.* at 154.

42. *See, e.g.*, Coffee v. Atkinson County, 223 S.E.2d 648 (Ga. 1976) (holding that eminent domain processes outlined in state statutes did not violate due process); City of Keene v. Armento, 651 A.2d 924 (N.H. 1994) (holding that the only condition precedent to acquire land by eminent domain under New Hampshire law was the city council's determination of necessity).

43. 920 A.2d 1061 (Md. 2007).

44. *Id.* at 1078; *see also* Mayor of Baltimore City v. Valsamaki, 916 A.2d 324 (Md. 2007) (holding that a showing of immediate necessity is required to exercise eminent domain authority under Maryland law).

45. *See* Lemon v. Miss. Transp. Comm'n, 735 So. 2d 1013, 1020 (Miss. 1999) ("Three conditions must be met before a post-deprivation remedy will be deemed to satisfy due process. 'The conditions are, first, that the deprivation be unpredictable; second, that predeprivation process be impossible, making any additional safeguard useless; and, third, that the conduct

precedents invoking the Constitution's procedural protections provide strong support for the assertion that the Due Process Clause requires at least some prior procedure involving the property owner before the effectuation of a taking.

Many of the state statutes that provide at least some process prior to finalizing state property confiscation are complemented by state court decisions that have the effect of bringing the state's condemnation laws into full compliance with due process. California eminent domain law, for example, allows the condemning authority to file for an order of possession from the court, resulting in immediate acquisition of the property.[46] In *Israni v. Superior Court*,[47] while ultimately ruling for the condemning authority, the California court recognized what due process requires in an eminent domain action. Citing the Fifth and Fourteenth Amendments, the court stated that property owners have immutable "federal and state constitutional rights to procedural due process, which generally include the right to notice and an opportunity to be heard before a person is deprived of a significant property interest" through the state's invocation of the takings power.[48]

While some state courts have addressed the due process concerns associated with the exercise of eminent domain authority, many courts have not directly addressed the question, leaving the state statutes to stand on their own merits. In Alaska, for example, the state code allows the exercise of eminent domain authority by filing a declaration of taking similar to the Rhode Island statute previously discussed in greater detail.[49] Under the text of the Alaska statute, no notice or pre-condemnation hearing is required prior to effectuating the taking. The limited number of state court decisions dealing

of the state actor be unauthorized.'" (quoting Charbonnet v. Lee, 951 F.2d 638, 642 (5th Cir. 1992))); Cincinnati Gas & Elec. Co. v. Pope, 374 N.E.2d 406, 410 (Ohio 1978) ("[P]rocedural due process . . . requires that the property owner be notified that a petition for appropriation has been filed, and . . . assures the property owner of a due process hearing on the preliminary issues."); Norfolk & W.R.R. Co. v. Sharp, 395 S.E.2d 527, 529 (W. Va. 1990) ("As with every possible deprivation of life, liberty, or property, basic due process protections are mandated. The most fundamental due process protections are notice and an opportunity to be heard.").

46. CAL. CIV. PROC. CODE § 1255.410 (West 2007) (stating that at the time of, or after, filing, a plaintiff can file ex parte for an order of possession, and the court will make an order authorizing taking if condemnor authorized and appropriate).

47. 106 Cal. Rptr. 2d 48 (Ct. App. 2001).

48. *Id.* at 57; *see also* City of Los Angeles v. Chadwick, 285 Cal. Rptr. 191 (Ct. App. 1991).

49. ALASKA STAT. § 09.55.420 (1994) (stating that "[w]here a proceeding is instituted under AS 09.55.240 - 09.55.460 by the state, it may file a declaration of taking with the complaint or at any time after the filing of the complaint, but before judgment" and thereby take title to the property).

with this statute have served to either reinforce the text or clarify the execution of paying just compensation.[50] Though state case law has done much of the work necessary to implement procedural protections in the eminent domain context in some states, there are still several states that allow the ex parte transfer of property by state action with no prior process involving the property owner.

II. THE EVOLVING RELATIONSHIP OF EMINENT DOMAIN AND DUE PROCESS

Due process protections are used by courts to protect all sorts of property interests—interests in employment,[51] benefits,[52] and licenses.[53] Yet, surprisingly, courts have not uniformly decided, and the Supreme Court has never definitively addressed, what due process demands when a state initiates an eminent domain action. Part III of this Note will discuss why due process clearly applies to eminent domain actions and exactly what form that process should take, but first it is useful to understand how the law developed into its current state. This Part explores the legal-historical explanations for the current state of the law in an attempt to explain why some courts do not apply due process principles in the eminent domain context and why the Supreme Court has never squarely addressed the issue.

A. The Early History of Eminent Domain

Taking property by eminent domain without providing significant prior process is a relatively recent legal development. In fact, there was originally some doubt as to whether or not the federal government could exercise the power of eminent domain at all. Just after the Founding, it was argued that the federal government was one of defined delegated powers and that eminent

50. Only a handful of cases have made it to Alaska's highest court dealing with ALASKA STAT. § 09.55.420 (1994). In *Arco Pipeline Co. v. 3.60 Acres, More or Less*, for example, the Alaska Supreme Court stated that "title passes immediately upon filing and deposit—at which time, under AS 09.55.440, the property is deemed to be 'condemned and taken for the use of the plaintiff.'" 539 P.2d 64, 70 (Alaska 1975) (quoting ALASKA STAT. § 09.55.440).

51. *See, e.g.*, Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 538 (1985) (discussing the application of due process to interests in state employment).

52. *See, e.g.*, Goldberg v. Kelly, 397 U.S. 254 (1970) (discussing the application of due process to state-provided benefits).

53. *See, e.g.*, Bell v. Burson, 402 U.S. 535 (1971) (finding that drivers' licenses are property protected by due process).

domain was not one of the powers specifically enumerated in the Constitution.[54] While this conflict was eventually resolved in favor of the federal government, for almost a century following the Founding, eminent domain actions undertaken by both federal and state governments were conducted on a mostly ad hoc basis. The government would bring a civil suit like any other in state or federal court when attempting to take possession of land.[55] Moreover, when the federal government sought to obtain land, it often did so by arranging for the states to exercise their eminent domain power on the federal government's behalf.[56]

Congress did not pass a statute authorizing the use of eminent domain more generally until 1867 when it did so to aid in the development of national cemeteries following the Civil War.[57] This statute was followed by a more sweeping declaration of federal eminent domain authority in 1888 that increased the scope of legitimate objects of the takings power, but still required a process that mirrored conventional civil litigation.[58]

Following the enactment of these broader statutes, the first major constitutional challenge to the exercise of *statutorily* established eminent domain authority was raised by a set of cases in the early 1890s. The first of these challenges, *Cherokee Nation v. Southern Kansas Railway Co.*, asked at what point during a government taking of private property compensation had to be paid to the property owner.[59] The Supreme Court held that payment did not have to be delivered prior to governmental acquisition of property under the Fifth Amendment.[60] In issuing that holding, the Court stated that a property "owner is entitled to reasonable, certain and adequate provision for obtaining compensation before his occupancy is disturbed," but actual compensation need not be paid prior to transfer.[61] Reaffirming its holding in *Cherokee*, the Supreme Court held just five years later in *Sweet v. Rechel* that so long as

54. 1 NICHOLS ON EMINENT DOMAIN § 1.24 (3d ed. 2007).

55. *See, e.g.*, Custiss v. Georgetown & Alexandria Tpk. Co., 10 U.S. (6 Cranch) 233 (1810) (demonstrating the form of an early eminent domain action).

56. For a long time, states often exercised eminent domain power to seize lands on behalf of the federal government. *See, e.g.*, Gilmer v. Lime Point, 18 Cal. 229 (1861) (condemning land by a proceeding in California state court and under a state law for a United States fortification); Burt v. Merchants' Ins. Co., 106 Mass. 356 (1871) (taking land under a state law as a site for a post office and subtreasury building on behalf of the federal government).

57. 1 Rev. Stat. 943 §§ 4870-4872 (1878) (repealed 1973).

58. Act of Aug. 1, 1888, ch. 728, 25 Stat. 357.

59. 135 U.S. 641 (1890).

60. *Id.* at 658.

61. *Id.* at 659.

"adequate provision be made for compensation," it was unnecessary to actually compensate the owner of the condemned property prior to completing the taking.[62]

B. The Declaration of Taking Act and the Catlin *Case*

Following the Court's rulings in *Cherokee* and *Sweet*, adversarial process with appropriate notice prior to allowing a taking to occur remained the norm. At the beginning of the twentieth century, there was no statutory or case law allowing a state or the federal government to take possession of private property through the use of the eminent domain power without prior process. The government did not necessarily have to pay the property owner prior to taking possession of the land, but the taking authority was required to invoke an adversarial judicial process to obtain title to the condemned property.[63] In 1931, however, the federal government created a method allowing for the "stream-lined" exercise of eminent domain authority.[64] Passing the Declaration of Taking Act, Congress sought to "expedite the construction of public buildings and works . . . by enabling possession and title of sites to be taken in advance of final judgment in proceedings for the acquisition thereof under the power of eminent domain."[65]

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62. 159 U.S. 380, 400 (1895). This rule was slightly modified by *Walker v. City of Hutchinson*, 352 U.S. 112 (1956), which held that due process requires that an owner whose property is taken for public use must be given a hearing in order to determine just compensation at some point during the process, but not necessarily prior to possession. *See also* Bailey v. Anderson, 326 U.S. 203 (1945) (holding due process does not require condemnation prior to occupation so long as the owner of the condemned property has the opportunity to be heard at some point in the proceedings as to the value of the land taken); Bragg v. Weaver, 251 U.S. 57 (1919) (stating that due process requires that the determination of compensation for a taking entails the opportunity to be heard for the owner of the condemned property). Neither *Cherokee* nor *Sweet* addressed how much or what type of process the government owed property owners when attempting to take their land.

63. NICHOLS, *supra* note 19, § 27.01.

64. Declaration of Taking Act, ch. 307, 46 Stat. 1421 (1931) (codified as amended at 40 U.S.C. § 3114 (2006)). The Declaration of Taking Act was modeled on a statute passed two years earlier by Congress to allow the expedited exercise of eminent domain in the District of Columbia. H.R. REP. NO. 71-2086, at 2 (1930) (stating that the Declaration of Taking Act was modeled on the Act of Mar. 1, 1929, ch. 416, 45 Stat. 1415 (repealed by Act of Dec. 23, 1963, Pub. L. No. 88-247, § 21(b), 77 Stat. 627)).

65. 46 Stat. at 1421. Over the next three decades, many of the states followed the example set by the federal government. Some states, such as Georgia, followed directly on the coattails of Congress, passing new eminent domain legislation in the early 1930s. GA. CODE ANN. § 32-3-6 (2009) (originally enacted in 1933) (allowing the filing of a declaration of taking along with estimated compensation for property). Several other states, such as Alaska,

1. Challenging the Taking Act

The first Supreme Court opinion addressing a challenge to the federal expedited takings statute—*Catlin v. United States*—may be largely responsible for the uncertain status of due process in eminent domain law today.[66] In *Catlin*, the Court stated that "in condemnation proceedings appellate review may be had only upon an order or judgment disposing of the whole case, and adjudicating all rights, including ownership and just compensation, as well as the right to take the property."[67] While this holding does not directly implicate the process that must occur prior to a taking, it does tether compensation to other legal issues. Since *Cherokee* and *Sweet* stand for the proposition that property can transfer without payment of compensation, a maximalist reading of *Cherokee*, *Sweet*, and *Catlin* suggests that property can transfer from a private property owner to the government without some form of final judgment on *any* issue.

The idea that a condemnation case is not final for purposes of appeal until all issues are resolved, including compensation, seems counterintuitive in the context of a procedure that allows possession to transfer before compensation is determined. This notion raises the specter of irreparable harm—harm in the face of which due process protections are most necessary and appropriate. Supporting this intuition, *Catlin* stated that the Declaration of Taking Act does not "deprive the owner of all opportunity to challenge the validity of the taking for departure from the statutory limits" and that the exercise of eminent domain under the auspices of this statute was subject to the requirements of the Fifth Amendment.[68] While this judicial statement does not mandate when

waited for several years before expanding the scope of state eminent domain powers, but ultimately adopted the same language used in the federal Declaration of Taking Act, directly incorporating it into their state codes and citing the same reasons that moved the federal government to act. The Attorney General Opinion accompanying the enactment of the Alaska Declaration of Taking Act enacted in 1960, ALASKA STAT. § 09.55.420 (2008), states that the state statute is expressly modeled on the federal corollary. *See also* Greater Anchorage Area Borough v. 10 Acres More or Less in the SW 1/4 NE 1/4 SE 1/4, Sec. 6, T12N, R3W, S.M., 563 P.2d 269, 272 (Alaska 1977) (discussing the reasons that the Alaska eminent domain statute was enacted). Today, thirty-eight states, the District of Columbia, and the federal government have some form of expedited eminent domain authority allowing abbreviated process to result in the transfer of property under certain circumstances. *See infra* app. tbls.2 & 3.

66. 324 U.S. 229 (1945).

67. *Id.* at 233.

68. *Id.* at 240. It is possible that the Court recognized the somewhat problematic nature of this holding as demonstrated through its conclusion that while the property holder may not be able to challenge the action via an interlocutory appeal, once the government exercises its

the process afforded to the property owner should be given, it does clearly state that the provision of process is necessary. Thus, the conflicting principles announced in *Catlin* left state courts seemingly free to choose their own theory of due process as it applies to eminent domain. And *Catlin* may be the driving force behind the current state of the law—despite the fact that it in no way justifies positions like that taken by Rhode Island.[69]

2. *Disposing of the* Catlin *Problem*

It is easy to see how lower courts might have interpreted the language of the *Catlin* decision as implying that property owners do not have a right to the final determination of the legality of a taking before title passes, indicating by extension that no due process right to notice or a prior hearing on the legality of the condemnation exists. Whether or not this interpretation of *Catlin* is correct, accepting its legal premise as true does not eliminate the possibility of a pre-condemnation challenge to an eminent domain action's legality.

One way around the broad interpretation of *Catlin*'s holding is to distinguish between two specific property owner reactions to a condemnation action by the government: (1) undertaking an offensive action to enjoin the government from taking private property, and (2) defending against the assertion of eminent domain authority by the government actor. A sweeping reading of *Catlin* is problematic for the defensive—but not the offensive—condemnee responses to a state takings action.[70] One offensive strategy that a

eminent domain authority under the Declaration of Takings Act, it becomes "irrevocably committed to pay" for the property owner's loss. *Id*. at 242.

69. Furthermore, the procedural barriers to appeal erected by *Catlin* may account for the absence of Supreme Court precedent on the intersection of due process and eminent domain doctrine.

70. While the rule announced in the Supreme Court's decision in *Catlin* with respect to the appealability of condemnation actions may be somewhat muddled, the guidelines with respect to the appealability of the denial of injunctive relief more generally are clear: a denial of injunctive relief is a general exception to the final judgment rule prohibiting interlocutory appeals. *See* 28 U.S.C. § 1292(a)(1) (2006) (stating that courts of appeals may review lower court orders "granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions"). With this in mind, property owners whose land is the object of eminent domain efforts could bring a separate due process challenge in the form of a counterclaim seeking injunctive relief for failure to provide notice or a proper hearing on legality under a § 1983 or *Bivens* theory. This would provide a way to get an immediate appeal of the legality of the taking without having to wait for a final judgment in the eminent domain action, including a final determination of compensation. So, even if *Catlin* bars an act in defense of an eminent domain action per an interlocutory appeal prior to a final judgment, it does not bar appeal of the denial of an offensive action undertaken seeking an injunction. This argument raises questions about *Williamson* exhaustion, which

party could pursue to prevent the transfer of property would be to seek an injunction enjoining the transfer. This type of offensive maneuver could also take the shape of a § 1983 action against the state official(s) responsible for the harm to an individual's property interest.[71] Several courts have recognized the applicability of § 1983 in the takings context. The Seventh Circuit, for instance, held that a § 1983 action was a proper vehicle through which to raise a Fifth Amendment public use challenge in federal court.[72] Similarly, in response to a federal eminent domain action, a property owner could potentially bring a *Bivens* action against the responsible parties, seeking an injunction pending a determination of the appropriateness of the undertaking.[73]

Additionally, whatever technical procedural problems might be presented by *Catlin* may have been resolved by a case decided just a few years later. The collateral order doctrine, announced by the Court in *Cohen v. Beneficial Industrial Loan Corp.*, provides that certain orders entered during the course of a trial determining important rights of the parties are appealable even though such orders do not conclude the case.[74] Under the collateral order doctrine, the courts of appeal may consider only issues of law and may not entertain disputes raising genuine issues of material fact. This seems to squarely address

bars a § 1983 action if a property owner has not exhausted other available remedies under state law. Williamson County Reg'l Planning Comm'n v. Hamilton Bank, 473 U.S. 172, 194 n.13 (1985) ("The nature of the constitutional [protection from deprivation of property] . . . requires that a property owner utilize procedures for obtaining compensation before bringing a § 1983 action."). It seems, however, that a property owner has exhausted their available remedies once they lose in the first instance on a defensive claim in an eminent domain action, as *Catlin* forbids appeal. To the extent this is the case, allowing § 1983 actions in the quick take context would not conflict with the principle of *Williamson* exhaustion.

71. *See* 42 U.S.C. § 1983 (2006). Section 1983 states:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proceeding . . . .

Id.

72. Daniels v. Area Plan Comm'n, 306 F.3d 445 (7th Cir. 2002) (analyzing the appropriateness of a § 1983 action when a county takes private property subject to a residential use restrictive covenant and authorizes its use for commercial development).

73. Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1971) (allowing suits to be brought against federal agents for a violation of constitutional rights). For a discussion of *Bivens* actions in the takings context, see *Leading Cases*, 121 HARV. L. REV. 185 (2007).

74. 337 U.S. 541, 546-47 (1949).

the issues presented by the *Catlin* case. When a party presents a challenge to the legality of a taking based on whether it is for a public use or under a due process theory, these are issues of law that would fall under the *Cohen* collateral order rule. Reading *Cohen* in this manner does not conflict with *Cherokee* and *Sweet* as compensation challenges involve factual questions that fall outside this exception to finality requirements. Whatever barriers to challenging eminent domain actions *Catlin* may have erected were seemingly torn down by the development of the collateral order doctrine just a few years later.

C. The Due Process Revolution

Though *Catlin* may have unwittingly created problems for the relationship between eminent domain and due process, those tensions should have been resolved during the due process revolution of the 1970s.[75] In the 1972 case *Fuentes v. Shevin*,[76] the Court addressed the question of whether constitutional due process requires a pre-confiscation hearing in actions involving the replevin of personal property under state statutes.[77] The Court held the state statutes in question unconstitutional due to their failure to provide pre-confiscation hearings. In doing so, the Court made a statement embodying its new understanding of due process in the property context:

> The right to a prior hearing has long been recognized by this Court under the Fourteenth and Fifth Amendments. Although the Court has held that due process tolerates variances in the *form* of a hearing "appropriate to the nature of the case," and "depending upon the importance of the interests involved and the nature of the subsequent proceedings [if any]," the Court has traditionally insisted that, whatever its form, opportunity for that hearing must be provided *before* the deprivation at issue takes effect. "That the hearing required by due process is subject to waiver, and is not fixed in form does not affect its

75. *See generally* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 1627-72 (2d ed. 1988) (discussing evolving conceptions of due process).

76. 407 U.S. 67 (1972).

77. In *Fuentes*, there were two state statutes at issue. The Florida replevin statute guaranteed a hearing *after* the goods in question had been seized. The Pennsylvania statute allowed a hearing after the goods were seized, but placed the burden for initiating the proceedings on the property owner. *Id.* at 80.

> root requirement that an individual be given an opportunity for a hearing *before* he is deprived of any significant property interest . . . ."[78]

While the *Fuentes* principle has not been applied to eminent domain proceedings at the Supreme Court level, lower courts addressed its application in the realm of takings law promptly after the case was decided. In 1972, a Texas eminent domain statute was challenged under *Fuentes* because of its authorization of summary possession of condemned property without any notice to the property owner or a pre-condemnation hearing.[79] In *Joiner v. City of Dallas*,[80] the Northern District of Texas refused to apply the *Fuentes* standard to state eminent domain law. Instead, the Texas court concluded that there was a long history and tradition dictating what process an eminent domain action required and that the Texas statute met that standard.[81] The Texas court concluded that all due process required with respect to eminent domain proceedings was some type of hearing at some point in the condemnation process, not necessarily before the condemnation had occurred.[82]

The First Circuit also promptly addressed the application of the due process standards outlined in *Fuentes* to eminent domain proceedings. In *Vazza v. Campbell*,[83] the owner of a condemned parcel of property brought suit

78. *Id.* at 82 (first alteration in original) (second emphasis added) (citations omitted) (quoting Boddie v. Connecticut, 401 U.S. 371, 378 (1971); Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 313 (1950)) (citing Bell v. Burson, 402 U.S. 535, 542 (1971) (standing for the proposition that an opportunity to be heard must be afforded prior to the deprivation of a property interest); Wisconsin v. Constantineau, 400 U.S. 433, 437 (1971) (same); Goldberg v. Kelly, 397 U.S. 254 (1970) (same); Opp Cotton Mills, Inc. v. Adm'r of the Wage & Hour Div. of the Dep't of Labor, 312 U.S. 126, 152-53 (1941) (same); United States v. Ill. Cent. R.R. Co., 291 U.S. 457, 463 (1934) (same); Londoner v. City of Denver, 210 U.S. 373, 385-86 (1908) (same)).

79. Joiner v. City of Dallas, 380 F. Supp. 754, 765, 771 (N.D. Tex. 1974), *aff'd*, 419 U.S. 1042. Only Justices White and Powell were interested in setting the case for oral argument, as the Supreme Court affirmed the judgment without hearing the case.

80. *Id.*

81. In reaching its decision, the district court noted:

> It may well be that the minimum standards of due process approved as constitutional in earlier eminent domain cases [are] no longer adequate to protect property owners. Perhaps the time has come for the Court to overrule Bragg v. Weaver, Sweet v. Rechel, and the numerous other cases we have cited. It is, however, beyond the power of this court to refuse the clear mandates of the Supreme Court.

Id. at 773 (citations omitted).

82. *Id.* at 773-74.

83. 520 F.2d 848 (1st Cir. 1975).

challenging the constitutionality of a statutory scheme that required, within sixty days after a taking, payment of a reasonable amount of compensation for the condemned land pending the outcome of a trial on the land's value. The appellant claimed that there was no meaningful process under the law affording him the opportunity to demonstrate that the government payment was substantially less than the value of the property and that other proceedings that could potentially rectify that fact could be significantly delayed. Citing the Texas *Joiner* decision in support, the First Circuit refused to apply the *Fuentes* rationale and instead deferred to what it considered a long history and precedent establishing what process is necessary in eminent domain actions.[84]

Just a few short years after *Fuentes*, *Joiner* and *Vazza* were decided, the Supreme Court wrote the opinion in what has become the most lasting and vibrant contribution of the due process revolution: *Mathews v. Eldridge*.[85] While holding that an evidentiary hearing was not necessary prior to the government termination of Social Security benefits, the Court also announced the test that serves as the backbone for most property-related procedural sufficiency inquiries to the present day. In assessing the process required before a deprivation of property occurs, *Mathews* requires balancing the (1) private interest involved; (2) the risk of erroneous deprivation of the property; (3) the probable value of any additional process; and (4) the government interest, including fiscal and administrative burdens acquired by the provision of additional process.[86]

D. Modern Property and Due Process Rulings

The logic of *Mathews* was not immediately incorporated into conventional property jurisprudence, but the Court's decisions since the 1970s explicitly recognize the appropriateness of applying *Mathews* when the taking of private property is at issue. The Court's holding in *Logan v. Zimmerman* provides particularly relevant guidance with respect to the process required prior to a deprivation of private property.[87] In *Logan* the Court concluded that a pre-deprivation rather than a post-deprivation hearing should be required whenever a property interest is disturbed by a state government in accordance

84. *Id.* at 850 ("Until the Supreme Court directs otherwise, we still continue to measure eminent domain proceedings against this standard rather than against the procedural requirements of such cases as Fuentes v. Shevin, which deal with fundamentally different issues." (citation omitted)).

85. 424 U.S. 319 (1976).

86. *Id.* at 335.

87. 455 U.S. 422 (1982).

with an existing set of procedures.[88] In reaching this decision, the Court recognized that a state's interest in destroying a property right through relatively informal procedures, where there was an alternative formal procedure in place, was minimal—the state-designed system should be capable of accommodating the interests of the property owner in such a case. Under this rationale, states should be able to alter their eminent domain procedures such that the due process rights of property holders are appropriately protected without seriously impugning state interests.

The Court's 1993 decision in *United States v. James Daniel Good Real Property* provides additional constitutional support for recognizing the applicability of due process rights in eminent domain proceedings.[89] This case dealt with the requirements for seizing real property incident to a criminal plea bargain. As a result of Good's guilty plea to drug charges, the government took action to bring about the forfeiture of his home. After the government obtained a seizure warrant in federal court and took possession of the property, Good filed suit alleging a deprivation of his property rights without due process. The district court and the Ninth Circuit both held for the government. The Supreme Court, however, reversed these decisions, and in doing so recognized the sanctity of property rights under the Constitution. In its holding, the Court stated that its "precedents establish the general rule that individuals must receive notice and an opportunity to be heard before the Government deprives them of property."[90] Writing for the Court, Justice Kennedy elaborated on that holding:

> The right to prior notice and a hearing is central to the Constitution's command of due process. "The purpose of this requirement is not only to ensure abstract fair play to the individual. Its purpose, more particularly, is to protect his use and possession of property from arbitrary encroachment—to minimize substantively unfair or mistaken deprivations of property . . . ."[91]

The Court also explicitly stated in *Good* that *Mathews* provides the appropriate calculus with which to solve property-based due process problems. While the Court concluded that in some cases narrow "exceptions to the general rule requiring predeprivation notice and hearing[s]" may be warranted, those exemptions are only appropriate in "extraordinary situations

88. *Id.* at 436.

89. 510 U.S. 43 (1993).

90. *Id.* at 48.

91. *Id.* at 53 (alteration in original) (quoting Fuentes v. Shevin, 407 U.S. 67, 80-81 (1972)).

where some valid governmental interest is at stake that justifies postponing the hearing until after the event."[92] The intuition of *Good* was recently reaffirmed by *Jones v. Flowers*,[93] when the Court held that the state is required to take additional reasonable steps to contact a property owner before selling his property when notice by mail is ineffective. Citing *Mullane v. Central Hanover Bank & Trust Co.*—the seminal case on what sort of notice due process requires—the Court stated that "[b]efore a State may take property . . . the Due Process Clause of the Fourteenth Amendment requires the government to provide the owner 'notice and opportunity for hearing appropriate to the nature of the case.'"[94]

Recent Supreme Court jurisprudence also clears up any ambiguity about whether due process even *applies* when the government decides to exercise its takings power. The Court has held that due process does not apply every time the government acts, but this is only the case when the government action involved does not actually affect a property right.[95] While state courts such as Rhode Island's seem confused on this point, the text of the Fifth Amendment is quite clear on the matter: 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."[96] Nowhere are due process rights seemingly more appropriate than in the context of property deprivation. And whatever confusion there may have been in the state and lower federal courts about this point, the Supreme Court's recent decision in *Lingle v. Chevron* clears up the textually obvious proposition that due process applies to takings actions.[97]

Before *Lingle*, while the issue had not been overtly addressed by the Supreme Court, some lower federal courts had concluded that "due process, however ill-defined, does not extend to circumstances already addressed by other constitutional provisions."[98] This misunderstanding of the law likely further contributed to the current disconnect between due process and eminent domain. Under this faulty logic, takings are only subject to the public use and just compensation prong of the Fifth Amendment and not the due process prong. *Lingle* debunked this textual myth, making it clear that the analytical

92. *Id.*

93. 547 U.S. 220 (2006).

94. *Id.* at 223.

95. *See* Goldberg v. Kelly, 397 U.S. 254 (1970).

96. U.S. CONST. amend. V.

97. 544 U.S. 528 (2005).

98. Armendariz v. Penman, 75 F.3d 1311, 1325 (9th Cir. 1996).

and legal-historical separation of takings and due process jurisprudence results in the creation of two legitimate claims in the face of a taking: a due process claim and a takings claim. *Lingle* stands for the proposition that the fact that compensation is offered does not preclude a property owner from challenging the legality of the property deprivation under a due process theory:

> [S]uch an inquiry is logically *prior to and distinct from* the question whether a regulation effects a taking, for the Takings Clause presupposes that the government has acted in pursuit of a valid public purpose . . . . Conversely, if a government action is found to be impermissible—for instance because it fails to meet the "public use" requirement or . . . violate[s] due process—that is the end of the inquiry. No amount of compensation can authorize such action.[99]

Lingle eliminates whatever ambiguity there might have been about whether or not a government takings action may be subject to a due process-based challenge.

III. MODERN DUE PROCESS AND EMINENT DOMAIN

While Supreme Court authority lines up in support of providing full due process protections in the eminent domain context, there is an absence of affirmative case law stating that fact. Had initial due process-based challenges to eminent domain power been rooted in *Mathews* rather than *Fuentes*, the legal landscape of eminent domain doctrine in the states might have traveled along a different trajectory. But the timing of key Supreme Court cases defining the contours of modern due process may have adversely affected the development of eminent domain law. After the Supreme Court's 1972 decision in *Fuentes*,[100] numerous state supreme courts examined challenges to state eminent domain laws based on due process claims. The decisions issued in two of these cases already discussed, *Joiner* and *Vazza*, had an immediate and significant influence on how state and federal courts approached these issues, creating an accepted legal path for analysis relating to challenges to eminent domain authority under a due process theory.[101] In *Washington Metro Area Transit Authority v. One Parcel of Land*,[102] the Fourth Circuit cited both *Joiner* and *Vazza* in

99. *Lingle*, 544 U.S. at 543 (emphasis added).

100. *Fuentes v. Shevin*, 407 U.S. 67 (1972).

101. *See* Vazza v. Campbell, 520 F.2d 848 (1st Cir. 1975); Joiner v. City of Dallas, 380 F. Supp. 754 (N.D. Tex. 1974), *aff'd*, 419 U.S. 1042.

102. 706 F.2d 1312 (4th Cir. 1983).

dismissing challenges to the delegation of eminent domain condemning authority to a private entity. The District of Rhode Island cited *Joiner* in issuing a holding that "landowners have no due process right to notice and a hearing . . . to determine the need for condemnation" in a state eminent domain action.[103] In *City of Lakeland v. Bunch*,[104] the Florida Supreme Court held that a trial court adjudicating a challenge to Florida's eminent domain statute erred in relying on *Fuentes*, and that no hearing is required before a taking occurs so long as there is an opportunity for the original property owner to be heard at some point in the process. The Supreme Court of Louisiana reached a similar decision in the 1977 case *State ex rel. Department of Highways v. Olinkraft, Inc.*,[105] holding that due process requirements are met in eminent domain proceedings because the state law governing takings provides for a hearing within ten days after the taking. As these cases illustrate, *Joiner* and *Vazza* have been repeatedly relied upon by courts addressing the procedural requirements for constitutionality in the execution of eminent domain authority. *Mathews v. Eldrige* was not decided until 1976—four years after *Fuentes*, two years after *Joiner*, and one year after *Vazza*.[106]

103. Tenn. Gas Pipeline Co. v. 104 Acres of Land More or Less, 749 F. Supp. 427, 430 (D.R.I. 1990).

104. 293 So. 2d 66 (Fla. 1974).

105. 350 So. 2d 865 (La. 1977).

106. At least to some, the thesis advanced in this Note—that the Constitution requires some form of prior process before the government can take property—seems obvious. This assertion practically begs the question why courts have not recognized this seemingly obvious proposition. Beyond the case-related reasons already discussed in Section II.B., there are many possible explanations for this glaring constitutional gap. First, the path dependence of the law—the fact that some early influential cases were decided with reference to *Fuentes* rather than *Mathews*—provides one explanation.

Second, while courts struggled to define the relationship between due process and property rights over the last two centuries, state governments passed laws responding to their states' needs. Paralleling the legal developments that have led to the current confusion about the appropriate interaction of due process and eminent domain law are various factual realities that might do some of the work in explaining the current state of affairs. The timing of the two spurts of legislative action that did the lion's share of labor in creating modern eminent domain statutes may provide some insight. As discussed in the previous sections of the Note, the federal government was the first mover in creating "more efficient" eminent domain statutes with the enactment of the Declaration of Taking Act in 1931. Pub. L. No. 71-736, 46 Stat. 1421 (codified as amended at 40 U.S.C. § 3114 (2006)). This Act came just a few years after the start of the Great Depression, commonly identified as October 29, 1929. *See generally* ELLIOT A. ROSEN, ROOSEVELT, THE GREAT DEPRESSION, AND THE ECONOMICS OF RECOVERY 151-71 (2005) (discussing the beginning of the Great Depression). Several states followed suit by enacting eminent domain statutes with reduced procedural protections between 1932 and 1935. *See, e.g.*, GA. CODE ANN. § 32-3-6 (2009) (originally enacted in 1933)

In the post-*Mathews* universe, the basic purpose of procedural due process is to protect against irreparable injury to basic entitlements caused by lawless government action. In the context of property, procedural due process requires that four issues be addressed. First, due process is only necessary in the context of a state action. Second, when there is a state action due process rights are only implicated when a property or liberty interest is at stake. Third, deprivation of that property interest must be threatened. If all of these requirements are met, the question then is what process is due.[107] Since eminent domain clearly involves a state action that threatens to deprive an individual of a property interest, the only remaining inquiry is what due process demands when that property interest is threatened.

A. What Process Is Due

As was overtly recognized by the Court in *Good*,[108] and even more recently in *Flowers*,[109] *Mathews v. Eldridge* provides the appropriate lens through which to view all challenges to a government deprivation of property. In assessing the

(allowing the filing of a declaration of taking along with estimated compensation for property). The Great Depression was a financial catastrophe of such magnitude that it gave policymakers a reason to extend their power in a way that may have lessened courts' willingness and ability to invalidate state and federal rehabilitative legislation such as the Declaration of Taking Act.

The next spurt of state creation of eminent domain authority with decreased procedural protections followed directly on the heels of President Eisenhower's signing of the Federal Aid Highway Act on June 29, 1956. Pub. L. No. 84-627, 70 Stat. 374 (codified as amended at 23 U.S.C. § 103(b)). Under this statute, federal aid was provided to states for the construction of state highways as part of a planned national transportation system. After a state submitted a plan that met with Department of Transportation approval, it received federal financing to undertake the project. In order to formulate plans that would comply with federal guidelines, it is possible that existing property rights had to be expropriated in the name of the efficient completion of construction projects. Historical accounts of the politics and policy of the construction of the interstate highway system report that the endeavor was "characterized by a massive exercise of the power of eminent domain." Nicole Stelle Garnett, *The Public-Use Question as a Takings Problem*, 71 GEO. WASH. L. REV. 934, 952 (2003). This construction of the history of takings law coincides with the scholarly portrayal of eminent domain, which argues that the public use requirement of the Fifth Amendment tends to collapse during times of political and fiscal exigency. *See* Wendell E. Pritchett, *The "Public Menace" of Blight: Urban Renewal and the Private Uses of Eminent Domain*, 21 YALE L. & POL'Y REV. 1 (2003).

107. *See* Mathews v. Eldridge, 424 U.S. 319, 335 (1976) (outlining the test for what process is due when due process rights apply).

108. United States v. James Daniel Good Real Prop., 510 U.S. 43, 53 (1993).

109. Jones v. Flowers, 547 U.S. 220, 223 (2006).

process required before a deprivation of property occurs, *Mathews* requires balancing the (1) private interest involved; (2) the risk of erroneous deprivation of the property; (3) the probable value of any additional process; and (4) the government interest including fiscal and administrative burdens acquired by the provision of additional process.[110] Applying this analysis, the factors weigh heavily in favor of providing a pre-condemnation hearing before allowing the exercise of eminent domain authority. The sanctity of a citizen's possession of property is a cherished constitutional right, the arbitrary deprivation of which is quite significant on both a legal and personal level.[111] As courts and scholars alike have repeatedly recognized, "[t]he rights related to property, i.e., to acquire, use, enjoy, and dispose of property . . . are among the most revered in our law and traditions. Indeed, property rights are integral aspects of our theory of democracy and notions of liberty."[112] The Supreme Court's opinions dealing with the deprivation of property, such as *Walker*, *Fuentes*, *Good*, and *Flowers*, have repeatedly reaffirmed this intuition. The significance of the private interests at stake in eminent domain proceedings demand the provision of prior judicial process.

Additionally, the risk of erroneous deprivation is seemingly high when eminent domain is used. Conservative estimates report that from the period of 1998 to 2002, as many as two thousand condemnation actions per year were initiated against private property owners.[113] To the extent that states continue

110. 424 U.S. at 35.

111. Individuals often have a large amount of utility tied up in their ownership of property, both in terms of monetary investment and self actualization. *See* Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957 (1982).

112. City of Norwood v. Horney, 853 N.E.2d 1115, 1128 (Ohio 2006); *see also* ROBERT MELTZ, DWIGHT H. MERRIAM & RICHARD M. FRANK, THE TAKINGS ISSUE: CONSTITUTIONAL LIMITS ON LAND-USE CONTROL AND ENVIRONMENTAL REGULATION 10 (1999); BERNARD H. SIEGAN, PROPERTY AND FREEDOM: THE CONSTITUTION, THE COURTS, AND LAND-USE REGULATION 14-18 (1997); Charles Fels et al., Special Project, *The Private Use of Public Power: The Private University and the Power of Eminent Domain*, 27 VAND. L. REV. 681, 683 n.1 (1974).

113. DANA BERLINER, INSTITUTE FOR JUSTICE, PUBLIC POWER, PRIVATE GAIN: A FIVE-YEAR, STATE-BY-STATE REPORT EXAMINING THE ABUSE OF EMINENT DOMAIN (2003) (stating that at least 10,282 condemnation actions were threatened or initiated against private property owners for economic development purposes between January 1, 1998 and December 31, 2002). Unfortunately, the exact number of eminent domain actions initiated annually is unknown, and the economic development takings accounted for by the Institute for Justice constitute an extremely low percentage of total eminent domain actions. *Id.* For a discussion of the difficulty in assessing the frequency of eminent domain action at the state level, see U.S. GOV'T ACCOUNTABILITY OFFICE, EMINENT DOMAIN: INFORMATION ABOUT ITS USES AND EFFECT ON PROPERTY OWNERS AND COMMUNITIES IS LIMITED 13 (2006) ("[T]he lack of state data on the use of eminent domain may result from multiple authorities in a state having the power to invoke eminent domain and states not having central repositories to collect such

to delegate their eminent domain authority to economic development corporations with the goal of profit maximization, there are likely to be many more judicial proceedings similar in content to *Rhode Island Economic Development Corp. v. Parking Co*. Furthermore, this risk of erroneous deprivation is multiplied by the recent expansion of the public use doctrine in *Kelo* to include economic development. Providing additional procedure in the form of a pre-condemnation hearing will decrease the likelihood of the frivolous exercise of eminent domain authority while at the same time providing an additional layer of protection to property owners against the taking of their land.

Moreover, property owners would significantly benefit from prior process in eminent domain actions. The erroneous deprivation of property causes irreparable harm to property owners by both abrogating their constitutional rights and destroying their property interests. In extreme cases, erroneously undertaken eminent domain actions result in the irreversible destruction of physical property. When a property owner's land is taken, the owner suffers an irreparable injury—whatever subjective value the landowner placed on the ownership of the condemned land is destroyed. Providing prior process respects these truths and appropriately cabins the government's ability to coerce property transfer.

In this vein, there are a number of discrete issues that can be addressed at a pre-condemnation hearing in order to ex ante validate the exercise of government eminent domain power and provide warranted protection to individual property rights.[114] At a minimum, prior process can prevent the most egregious exercises of eminent domain authority. The recent state supreme court cases *Rhode Island Economic Development Corp. v. Parking Co.*,[115] *Southwestern Illinois Development Authority v. National City Environmental, L.L.C.*[116] (*SWIDA*), and *Centene Plaza Redevelopment Corp. v. Mint Properties*[117]

data. . . . [S]ince states grant eminent domain authorities to local governments, which may further delegate this authority to a designee, such as a development authority, many entities have the power to invoke eminent domain. . . . For instance, according to information provided by the Virginia legislative research office, at least 40 different types of authorities can invoke eminent domain, including school board districts that can use it to acquire any property necessary for public school purposes.").

114. *See infra* Section III.B. for a further discussion of the issues that can be disposed of at a pre-condemnation hearing.

115. 892 A.2d 87 (R.I. 2006) (invalidating a transfer of property interest in a parking garage).

116. 768 N.E.2d 1 (Ill. 2002) (invalidating an eminent domain action that resulted in the transfer of property from an automobile recycling facility to a racetrack so that the racetrack could expand its parking lot).

demonstrate this principle. As the Rhode Island Supreme Court ultimately found in *Parking Co.*, there was absolutely no colorable public use justification for the state's invocation of eminent domain authority to seize a competing parking garage at Providence's airport.[118] In cases where the state makes a meritless public use claim, even limited prior judicial review will prevent the needless encroachment of property rights. Similarly, even a very superficial review of a state's condemnation action can prevent the pretextual use of eminent domain to transfer property from one private entity to another. As the Illinois Supreme Court recognized in *SWIDA*, there was no possible way to characterize the transfer of property at issue in that case as anything other than an impermissible state-forced private transfer. The Missouri Supreme Court recently ruled that a state redevelopment corporation's condemnation action based on a finding of blight was unwarranted.[119] In that case, the state of Missouri had granted condemnation authority to a private company, Centene Plaza Redevelopment Corporation. After negotiations with several property owners broke down, Centene exercised the state's eminent domain authority to condemn the property necessary to complete its redevelopment project, claiming the targeted property was blighted. Citing a complete and utter lack of the characteristics classically associated with blight, the Missouri high court invalidated Centene's action.[120] In cases like *Parking Co.*, *SWIDA*, and *Centene*, prior judicial scrutiny would help "to minimize substantively unfair or mistaken deprivations of property."[121]

The potential pecuniary costs to the government of providing additional pre-condemnation process are not significant enough to trump the value of this additional process to property owners. There is certainly a cost involved with delaying whatever project a governmental entity might seek to pursue under eminent domain authority, and the associated downstream costs that such a hiatus would accrue. In terms of the cost of actually providing the process, however, that added expense likely comes out in a wash. The exercise of eminent domain power is often contested and results in litigation. Moving the process for resolving these disputes from post-condemnation to pre-condemnation would not significantly increase the judicial administrative costs beyond the infinitesimal opportunity costs of utilizing those resources at

117. 225 S.W.3d 431 (Mo. 2007) (en banc) (per curiam) (finding that there was no social liability or blight warranting condemnation).

118. 892 A.2d at 103-04.

119. *Centene*, 225 S.W.3d at 432.

120. *Id.*

121. United States v. James Daniel Good Real Prop., 510 U.S. 43, 53 (1993) (quoting Fuentes v. Shevin, 407 U.S. 67, 81 (1972)).

an earlier time. Additionally, adjudicating the contested issues up front will prevent the government, or government contractor, from continuing to allocate resources to a project that is ultimately doomed to be invalidated in a future judicial proceeding.

The government's administrative and policy interests in having a strong eminent domain authority also fall short of trumping the interests of property owners in prior process under most circumstances. Though the government has a significant interest in the efficient exercise of eminent domain, that interest can almost always be realized even if some form of additional process is provided to property owners. Added process in no way prevents the attainment of valid state objectives; it simply applies scrutiny to those objectives before the taking is effectuated.

The primary instance in which the government might have an interest in exercising eminent domain authority that would outweigh the interests of a property owner would be in the face of an emergency.[122] This type of scenario, however, does not weigh against the application of due process in the eminent domain context, as emergencies generally allow for the circumvention of the constitutional requirement to honor procedural rights. The government has a long recognized right to seize, and even destroy, private property absent an eminent domain action under certain exigent circumstances.[123] This important

122. Carol L. Zeiner, *Establishing a Leasehold Through Eminent Domain: A Slippery Slope Made More Treacherous by* Kelo, 56 CATH. U. L. REV. 503, 523 n.123 (2007) ("[G]overnment may have only a temporary need for facilities to provide short-term . . . disaster relief efforts following natural disasters. In such situations, extended negotiations with a prospective landlord could delay the delivery of services for which there is immediate need. Brief negotiations followed by quick take condemnation if allowed by state law . . . may prove to be the most expeditious means for government to obtain possession of facilities needed immediately for relief services.").

123. *See, e.g.*, United States v. Caltex, Inc., 344 U.S. 149, 153-54 (1952) (quoting United States v. Pac. R.R., 120 U.S. 227, 234 (1887)) ("The destruction or injury of private property in battle, or in the bombardment of cities and towns, and in many other ways in . . . war, [is] borne by the sufferers alone, as one of its consequences. Whatever would embarrass or impede the advance of the enemy, as the breaking up of roads, or the burning of bridges, or would cripple and defeat him, as destroying his means of subsistence, [are] lawfully ordered by the commanding general. Indeed, it [is] his imperative duty to direct their destruction. The necessities of the war call[] for and justif[y] this. The safety of the state in such cases overrides all considerations of private loss."); Lawton v. Steele, 152 U.S. 133, 136 (1894) (holding that the state is authorized to engage in the "demolition of [personal property] such as [is] in the path of a conflagration" in accordance with its police powers). In the absence of some caveat allowing eminent domain property condemnation in certain exigent circumstances, the government could still act in true emergencies to destroy property rights and then compensate the owner whose interest was affected, if such compensation was indeed warranted. Allowing for a codified exception to the process requirements that

interest is not vitiated by applying due process principles to eminent domain actions.

Just as a pre-condemnation hearing is appropriate in light of an exercise of eminent domain authority, notice to the individual property owner is also required. The Supreme Court has already held in the context of eminent domain proceedings under federal law that where a landowner is a resident of the state in which the condemned land is situated, and his name and address are known to the condemnor, notice by publication alone does not measure up to the quality of notice required by the Due Process Clause of the Fifth Amendment.[124] Also, the Court has definitively stated that the appropriate test for measuring the adequacy of notice with respect to a deprivation of property under any circumstance is the reasonableness test outlined in *Mullane v. Central Hanover Bank & Trust Co*.[125] *Mullane* demands that when the government takes property, "notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections" is required.[126] In a potentially time-sensitive case involving the permanent loss of property through government action, personal notice is the only method that meets the *Mullane* requirement.

B. The Content of Due Process

Assuming that the *Mathews* analysis requires a pre-condemnation hearing prior to the exercise of eminent domain authority—as this Note argues—the question remains as to what issues should be adjudicated in this proceeding and what specific form that proceeding should take. At a minimum, the issue of whether or not eminent domain is being initiated for a public use should be disposed of prior to allowing the taking to occur. Courts have long deemed themselves constitutionally competent to adjudicate questions of public use in the takings context. In the 1930 decision, *Cincinnati v. Vester*,[127] the Court stated that "[i]t is well established that . . . the question [of] what is a public use is a judicial one."[128] While the Court may have arguably strayed from this

accompany a deprivation of property would likely result in reducing the efficacy of any change brought about by altering the current law.

124. *See* Walker v. City of Hutchinson, 352 U.S. 112 (1956); *see also* Greene v. Lindsey, 456 U.S. 444 (1982) (holding that posting an eviction notice on an apartment door in a public housing unit is insufficient to meet due process standard).

125. Dusenberry v. United States, 534 U.S. 161, 167-68 (2002).

126. 339 U.S. 306, 314 (1950).

127. 281 U.S. 439 (1930).

128. *Id.* at 446.

interpretation of its role for a brief period in the 1950s,[129] *Kelo* contains language indicating that the Court has reassumed the mantle of deciding public use questions: "This Court's authority . . . extends . . . to determining whether . . . proposed condemnations are for a 'public use' within the meaning of the Fifth Amendment to the Federal Constitution."[130] Numerous state courts have also determined that they should play a primary role in restricting the use of the power of eminent domain to those undertakings that benefit the general public.[131] Making a determination with respect to the public utility of an eminent domain action prior to allowing completion of the taking would prevent a condemnor from taking "property under the mere pretext of a public purpose, when its actual purpose was to bestow a private benefit."[132] As courts have the authority to decide whether or not an eminent domain action is executed for a public use, they should have the opportunity to do so before the taking occurs and potentially causes irreparable harm.

Additionally, depending on the content of the law being invoked, a pre-condemnation hearing could be used to determine whether it was *necessary* to invoke a specific type of eminent domain power. Many state laws require a determination of necessity prior to exercising eminent domain authority with certain procedural shortcuts.[133] In most cases, this determination is made unilaterally by the condemning authority without any mechanism for the condemnee to challenge this determination prior to the taking. The Supreme Court has expressed a strong preference for as-applied constitutional challenges, which, in the eminent domain context, might require a showing

129. *See* Berman v. Parker, 348 U.S. 26, 35-36 (1954) ("It is not for the courts to oversee the choice of the boundary line nor to sit in review on the size of a particular project area. Once the question of the public purpose has been decided, the amount and character of land to be taken for the project and the need for a particular tract to complete the integrated plan rests in the discretion of the legislative branch.").

130. Kelo v. City of New London, 545 U.S. 469, 489-90 (2005).

131. *See, e.g.*, County of Wayne v. Hathcock, 684 N.W.2d 765, 779 (Mich. 2004) (stating that courts have a primary role in confining takings to those legitimately undertaken for a public use).

132. *Kelo*, 545 U.S. at 478; *see also id.* at 491 (Kennedy, J., concurring) ("A court applying rational-basis review under the Public Use Clause should strike down a taking that, by a clear showing, is intended to favor a particular private party, with only incidental or pretextual public benefits . . . .").

133. *See, e.g.*, 735 ILL. COMP. STAT. ANN. 5/7-103 (West 1993) (mandating that a hearing is held where the condemnor seeking to utilize eminent domain authority must prove his right to the taking as well as the necessity of invoking the statute; the condemnee, while having only limited involvement, is permitted to participate in the proceedings); Mayor of Baltimore v. Valsamaki, 916 A.2d 324 (Md. 2007) (holding that a showing of immediate necessity is required to exercise expedited eminent domain authority under Maryland law).

that the resort to expedited eminent domain powers was necessary to the success of a particular project.[134] Mandating a hearing prior to allowing the taking of property would allow these issues to be addressed in a timely manner.

A pre-condemnation proceeding could also be used to ensure that the power to exercise eminent domain authority has been appropriately delegated. As was the case in *Parking Co.*, many states delegate their takings power to quasi-public economic development corporations and in some cases to entirely private entities. Several of the legislative acts delegating state takings powers have been deemed illegitimate by the courts. The supreme court of Pennsylvania, for example, has invalidated state agreements delegating eminent domain authority to a private redeveloper whose services were acquired by the state.[135] Under the invalid agreement, the redeveloper's prior written consent was required before the state could exercise its takings power. In holding that this agreement violated state constitutional principles, the court announced that in many situations the state's eminent domain power "may not be delegated by agreement or contract."[136] Providing prior process will help to ensure that ill-conceived state relationships are not perpetuated to the detriment of private property interests.

While issues related to just compensation could also be addressed prior to condemnation, if a court deems that the taking is for a public use and appropriately executed, these issues could most likely be disposed of post-condemnation. Commentators who have addressed the just compensation aspect of takings law have recognized that in states utilizing expedited eminent domain procedures, "the passage of time between the appropriation of the land and the determination of compensation presents additional problems" in terms of determining recompense.[137] This problem, however, can be easily accounted

134. Nicole Stelle Garnett, *Planning as Public Use 2*, 34 ECOLOGY L.Q. 443, 454 (2007); *see* United States v. Salerno, 481 U.S. 739, 745 (1987) ("A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid.").

135. *In re* Condemnation of 110 Washington St., 767 A.2d 1154 (Pa. 2001).

136. *Id.* at 1159; *see also* Contributors to Pa. Hosp. v. City of Phila., 245 U.S. 20, 23 (1917) ("[T]he States cannot by virtue of the contract clause be held to have divested themselves by contract of the right to exert their governmental authority in matters which from their very nature so concern that authority that to restrain its exercise by contract would be a renunciation of power to legislate for the preservation of society or to secure the performance of essential governmental duties.").

137. Alan T. Ackerman & Darius W. Dynkowski, *The Relevance of Rezoning and Comparable Sales Occurring After the Date of Taking*, *in* CURRENT CONDEMNATION LAW: TAKINGS, COMPENSATION, AND BENEFITS 193, 193 (Alan T. Ackerman & Darius W. Dynkowski eds., 2d ed. 2006).

for by granting interest on the ultimate amount awarded to the individual deprived of her property when the final determination of just compensation is made.[138] There is no similarly simple mechanism available for compensating a landowner whose property interest is destroyed for a nonpublic use, by an illegitimate agent, or unnecessarily. As such, the exact amount of just compensation to be paid for an exercise of eminent domain power does not need to be addressed at a pre-condemnation hearing—a conclusion consistent with Supreme Court precedent.

Allowing definitive compensation determinations to occur after a taking is completed will reduce the hardships presented to the government in providing pre-deprivation process by focusing the legal issues to be adjudicated, lessening concerns about the provision of additional process. While practically useful, separating inquiries about property rights and property value also makes sense as an analytical matter. Once the right to take an individual's property is established, the owner's interest becomes an interest in fungible property (money) and the exact amount the government must pay can be determined after possession transfers. But the nonfungible possessory interest of the property owner, which has at least some subjective value that will not be compensated for, should be formally addressed before the transfer of property is complete. Taking nonfungible property threatens irreparable injury and should not be done until legality is established, which requires notice and hearing. Taking fungible property, such as the cash value of a parcel, necessitates only a post-deprivation hearing because adjustments can be made in the size of the award to correct for delay or error. Comparing the outcomes of property cases involving fungible property interests like *Mathews* (government pecuniary benefits) to cases involving nonfungible possessory interests like *Good* and *Flowers* (real property) confirms the validity of this intuition.

While the severability of the fungible and nonfungible interests in real property outlined above has not been recognized in the eminent domain context, an analytical distinction of this sort is not without precedent in property law more generally. The idea that the interest in owning property and the interest in being compensated for property owned are severable is recognized by the doctrine of equitable conversion.[139] The law of equitable conversion addresses the division of interests that sometimes occurs during the

138. For an overview of the law of just compensation of a government taking, see United States v. 564.54 Acres of Land, 441 U.S. 506, 511 (1979); United States v. New River Collieries Co., 262 U.S. 341, 344 (1923); and DAVID A. DANA & THOMAS W. MERRILL, PROPERTY: TAKINGS 169-90 (2002).

139. 27A AM. JUR. 2D *Equitable Conversion* § 4 (2008).

transfer of real property. In some instances, a property owner may enter a contract to sell land, immediately affecting transfer of the property interest, but not immediately receiving compensation.[140] In a situation of this sort, once the contract of sale is entered into, the seller transfers her property interest while maintaining her pecuniary interest in the property. In terms of risk allocation, if something were to happen to the real property, the buyer's interest in the real property would be destroyed while the seller's interest in compensation would remain. Extending the rationale underlying equitable conversion to eminent domain may be analytically useful when attempting to describe the fungible and nonfungible interests of a property owner whose land is the object of a state condemnation action.

This important point can be viewed slightly differently through the lens of the property/liability rule distinction.[141] Under this view, takings can be described as legally dichotomous, the protection against the taking of private property by the government having two separate prongs resulting in two sets of rights. As a primary matter, a property owner is protected from being deprived of land except in circumstances where public utility demands the abrogation of that right.[142] On a secondary level, once it has been appropriately determined that property must be taken for a public use, the property owner has a right to just compensation for that taking. The latter of these concerns—just compensation—only implicates a liability rule. If an eminent domain action is executed by a lawfully authorized agent for a public use without paying just compensation initially, the property owner can later be made whole by awarding interest on the ultimate amount paid by the taking authority. The determination of the appropriateness of the taking in terms of the authority of the actor or the public utility of the action, however, invokes a property rule. This is the case because this determination reaches to the government's ability to effectively coerce a transfer of property. In the absence of property rule protection for the determination of the legality of the actual physical taking, a coerced transfer of private property by the government that turns out to be unlawful results in irreparable harm to the property owner.

Assuming that some form of pre-condemnation process assessing the validity of a taking is required by the Constitution, it is necessary to evaluate what form that process should take. The Court frequently applies the *Mathews* test to determine what procedures should be employed at a hearing dealing

140. *See, e.g.*, Fidelity Trust Co. v. BVD Assocs., 492 A.2d 180, 186-87 (Conn. 1985) (applying the doctrine of equitable conversion); Coe v. Hays, 614 A.2d 576, 578-80 (Md. 1992) (same).

141. *See* Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1092 (1972).

142. U.S. CONST. amend. V.

with a challenge to the deprivation of rights generally, as well as property rights specifically.[143] As a practical matter, the nature of the process required prior to effectuating a condemnation should be tailored to the nature of the objection to the taking. If the objection is purely legal, it is possible that the matter could be disposed of by paper filings alone, not requiring an oral hearing on the issues involved. In cases where the dispute is more fact-based, however, it is clear that property owners should "have the right to support [their] allegations by argument, however brief: and, if need be, by proof, however informal."[144] This statement does not necessarily translate to a requirement for a full-blown pre-condemnation hearing, but likely at a minimum calls for some form of an administrative hearing involving the condemnee when facts are at issue.

C. The Consequences of Due Process

Though constitutionally compelled, recognizing the due process rights of property owners facing eminent domain actions is not without practical consequences. The most likely result is that fewer eminent domain actions will be successfully undertaken.[145] Requiring pre-condemnation hearings and personal notice in the conduct of eminent domain proceedings increases the transaction costs of these takings, and in turn will likely decrease the frequency of their occurrence. This might be some cause for concern—there are already a number of administrative costs that make the use of eminent domain largely self-regulating.[146] First, legislatures must authorize the delegation or direct exercise of the power of eminent domain. Second, depending on what particular taking is being pursued, "the due process clauses of the [F]ifth and [F]ourteenth [A]mendments, as well as local statutes and rules, impose various

143. *Compare* Goldberg v. Kelly, 397 U.S. 254 (1970) (requiring a formal procedure to terminate welfare benefits), *with* Mathews v. Eldridge, 424 U.S. 319 (1976) (finding that a prior deprivation hearing is not required for termination of social security benefits).

144. Londoner v. City of Denver, 210 U.S. 373, 386 (1908).

145. To the extent that one believes the assertions of entities like the Institute for Justice, this might be a desirable outcome. BERLINER, *supra* note 113 (collecting accounts of economic development takings).

146. Thomas W. Merrill, *The Economics of Public Use*, 72 CORNELL L. REV. 61, 78 (1986). Merrill also argues that in "thin market settings . . . the acquiring party should in fact use eminent domain, so long as the administrative costs are less than the costs of market exchange." *Id.* To the extent that expedited eminent domain procedures are utilized in thin markets, requiring pre-condemnation hearings and personal notice in these scenarios would likely have the same effect regardless of whether the exercise of eminent domain power occurs in a thick or thin market.

procedural requirements upon the exercise of eminent domain."[147] At a minimum, these costs typically entail the resources expended to file a complaint or make a declaration of taking, and to assess the likely amount of just compensation required. In states that do not provide prior process in eminent domain actions, these costs are ex ante much lower than in states that do provide for prior proceedings. When the standards announced in cases like *Mathews* are applied, the "due process costs" of undertaking eminent domain actions increase, potentially resulting in the less frequent, and arguably more cautious, exercise of the takings power.

Providing additional due process prior to a government eminent domain action could also have the effect of narrowing the scope of public use takings. From a policy perspective, when confronted with a public use challenge, courts compare the summed costs of the proposed action, including just compensation, with the aggregated benefits to be realized.[148] Eminent domain actions whose benefits outweigh their costs and that do not suffer from some other sort of inherent flaw—like a forced private transfer—are in most cases recognized as undertaken for a public use.[149] Providing pre-condemnation hearings and notice to the condemnee in the context of eminent domain actions will likely increase the costs of proposed takings, resulting in a corresponding narrowing of acceptable projects that rise to meet the public use requirement of the Fifth Amendment.[150]

IV. AN EXCEPTION TO MODERN DUE PROCESS ANALYSIS

Having shown that due process applies to eminent domain actions and what conventional due process analysis would demand, it is necessary to address the possibility that there is some exception based on history and tradition that dictates an alternative mode of due process analysis in the eminent domain context. While property cases addressing due process concerns such as *Flowers* and *Good* indicate that *Mathews* provides the appropriate framework for analyzing challenges to the abrogation of property rights such as eminent domain actions, some courts have indicated that eminent domain should be examined under a different set of parameters. A

147. *Id.* at 77.

148. Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165, 1175-76 (1967).

149. *Id.*

150. For a discussion of the weaknesses with Michelman's analysis, see Merrill, *supra* note 146, at 72-73.

paradigmatic instance of this occurrence is provided for in the oft-cited, and previously discussed, Texas decision *Joiner v. City of Dallas*.[151] In arriving at its decision, the court refused to apply the *Fuentes* standard to state eminent domain law, concluding that there was a long history and unbroken precedent as to what process an eminent domain action requires, and that the Texas statute met that standard.[152] While the comparison was not overtly made in this case, there are other areas that arguably ought to be subject to modern due process standards that are exempt because of a history or tradition of receiving alternative treatment.

Examples of this constitutional aberration are provided by the jurisprudence related to due process and the invocation of transient jurisdiction as well as due process and the conduct of military courts martial. In the case of what process is required by the invocation of transient jurisdiction, the Supreme Court has stated that *Mathews* does *not* provide the appropriate test. Instead, the analysis should focus on whether the exercise of jurisdiction is "consistent with 'traditional notions of fair play and substantial justice.'"[153] As Justice Scalia stated in *Burnham v. Superior Court*, "[t]he short of the matter is that jurisdiction based on physical presence alone constitutes due process because it is one of the continuing traditions of our legal system that define the due process standard."[154] So, it is possible that eminent domain enjoys some historical exception from modern due process analysis in the same way that transient jurisdiction does.

Similarly, due process challenges related to military courts martial have been exempted from *Mathews* balancing, reviewing courts opting for procedural rights rooted in history and tradition rather than modern legal principles. As the Supreme Court stated in *Solorio v. United States*, "[b]oth in England prior to the American Revolution and in our own national history military trial of soldiers" has been a process apart from other judicial

151. 380 F. Supp. 754 (N.D. Tex. 1974), *aff'd*, 419 U.S. 1042 (affirming without hearing the case).

152. In reaching its decision, the court noted:

> It may well be that the minimum standards of due process approved as constitutional in earlier eminent domain cases [are] no longer adequate to protect property owners. Perhaps the time has come for the Court to overrule Bragg v. Weaver, Sweet v. Rechel, and the numerous other cases we have cited. It is, however, beyond the power of this court to refuse the clear mandates of the Supreme Court.

Id. at 773 (footnote omitted) (citations omitted).

153. Burnham v. Superior Court, 495 U.S. 604, 618 (1990) (quoting Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945)).

154. *Id.* at 619.

proceedings.[155] While these proceedings must coincide with the ethics of fairness and justice, tradition dictates that these values be applied in a different analytical manner than in other legal contexts. Perhaps eminent domain has enjoyed such a unique history in the evolution of American law that it ought to receive a similar exemption.

It does not seem, however, that eminent domain actions should be excused from modern due process standards based on some asserted history or tradition. First, compared to institutions like the military courts martial, which predate the American Revolution,[156] the execution of eminent domain actions through compressed procedures is a relatively recent phenomenon. As discussed in Part II, the first codification of expedited eminent domain power in the United States occurred in 1931 with the federal Declaration of Taking Act.[157] Many state eminent domain statutes were not enacted until the late 1950s or early 1960s, making the idea that there is some type of historic deference to a petrified treatment of these issues even more far-fetched.[158]

The current state of procedural protections from eminent domain abuse in the states cuts against the notion that there is some exception from conventional due process norms based on history and tradition as well. As discussed earlier, the vast majority of the states have procedures that model what due process would require when eminent domain process is used under normal circumstances. The state of the statutory law, then, regardless of the case law related to this issue, supports the application of conventional due process analysis. On a similar note, it is hard to justify creating an exception for eminent domain statutes to the procedural requirements applied to other types of property deprivation based on an asserted tradition when the content of the laws at issue vary in such extreme ways. As discussed in Part I, eminent domain statutes contain a number of different requirements based on the state in which they were created and which governmental entity is exercising the power. Deference cannot be afforded to a tradition that does not exist.

To the extent that the modified due process standards applied to transient jurisdiction and military courts martial are applicable in the eminent domain context, it is likely that many state laws would fall short of comporting "with

155. Solorio v. United States, 483 U.S. 435, 442 (1987) (alteration in original) (quoting O'Callahan v. Parker, 395 U.S. 258, 268 (1969)).

156. *Id.* at 442.

157. Declaration of Taking Act, ch. 307, 46 Stat. 1421 (1931) (codified as amended at 40 U.S.C. § 3114 (2006)).

158. *See, e.g.*, ALASKA STAT. § 09.55.420 (2008) (enacted in 1960 and modeled on the federal Declaration of Taking Act).

'traditional notions of fair play and substantial justice.'"[159] It is hard to believe that property in one state under one set of state laws would be afforded less protection than a similarly situated parcel in another state with different laws. Additionally, assuming that there is some sort of exception to modern due process analysis, the fact that many states provide full process is evidence that whatever the test for due process is in the historical context, full procedural protections are likely required to pass that test. Furthermore, to the extent that property is provided sacrosanct status in proceedings involving replevin and seizure, and given that numerous other individual interests are afforded the full boar of due process protections,[160] it is troubling to provide fewer procedural safeguards for property subject to an eminent domain action.

CONCLUSION

Courts and legislatures should recognize the existing procedural problems in eminent domain law and take affirmative steps to remedy them.[161] With the law in its current state, Margarita Fuentes is entitled to judicial process prior to having her refrigerator repossessed and James Daniel Good's home is protected from seizure incident to a drug prosecution without prior process, but the Parking Lot Company does not get notice or an opportunity to be heard before being deprived of its property though the exercise of eminent domain authority. The courts should not continue to perpetuate this asymmetrical application of property rights.

The importance of addressing this problem promptly is made more salient by the Court's recent decision in *Kelo*. As Justice O'Connor stated in her dissent in that case, under the new construction of public use, "[t]he specter of condemnation hangs over all property. Nothing is to prevent the State from replacing any Motel 6 with a Ritz-Carlton, any home with a shopping mall, or any farm with a factory."[162] Under this expanded reading of the Takings Clause, it is more important than ever before to provide adequate process prior to effectuating a government taking. In the wake of *Kelo*, numerous scholars have argued that additional process or some form of heightened scrutiny is

159. *Burnham*, 495 U.S. at 618 (quoting Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945)).

160. *See* Goldberg v. Kelly, 397 U.S. 254 (1970).

161. *See* Garnett, *supra* note 134, at 454. As Garnett notes, "[m]ost post-*Kelo* public use litigation will take place in state courts, not federal ones." *Id.* State courts should take the lead in correcting the due process deficiencies of their own eminent domain laws.

162. Kelo v. City of New London, 545 U.S. 469, 503 (2005) (O'Connor, J., dissenting) (citations omitted); *see also* BERLINER, *supra* note 113 (collecting accounts of economic development takings).

necessary to protect against the excessive exercise of taking authority by government entities.[163] It seems that a good first step toward providing this additional process is to give condemnees whose property is the object of an eminent domain action the process guaranteed by the Fifth and Fourteenth Amendments.

The nature of the public's relationship with eminent domain is much different now then it was when *Joiner* and *Vazza* were decided, further increasing the necessity of addressing procedural issues associated with government takings. In the middle of the twentieth century, while there were frequent disputes about the amount of just compensation when the takings power was exercised, the utility of the taking was rarely challenged. Eminent domain was not of major concern to the public at large. Today, there is a fairly broad consensus that the takings power needs to be checked. This sentiment has manifested itself in the general population's feelings about *Kelo*: nearly seventy percent of the citizenry disagrees with the decision.[164]

Just as recent rulings and changed circumstances make it more important than ever before to address the necessary process that must be afforded to a property owner, decisions by the Roberts Court other than *Kelo* indicate that a challenge to state eminent domain laws on due process grounds might meet with success. In *Jones v. Flowers*,[165] the Court faced the question of what process was necessary before the government could take an individual's property in the context of a tax sale. The Court held that the state is required to take additional reasonable steps to contact a property owner before selling his property when notice by mail is ineffective. Citing *Mullane*, the Court stated that "[b]efore a State may take property . . . the Due Process Clause of the Fourteenth Amendment requires the government to provide the owner notice and opportunity for hearing appropriate to the nature of the case."[166] It is time for courts to recognize that the application of the process guaranteed in the Fifth and Fourteenth Amendments to eminent domain actions is both appropriate and necessary.

163. *See, e.g.*, Burkard, *supra* note 5, at 149-61 (discussing proposed post-*Kelo* reforms).

164. Ilya Somin, *Is Post-*Kelo *Eminent Domain Reform Bad for the Poor?*, 101 NW. U. L. REV. 1931, 1938 (2007) (citing CTR. FOR ECON. & CIVIC OPINION AT UNIV. OF MASS./LOWELL, THE SAINT INDEX POLL (Oct.-Nov. 2005)). This survey asked the following question: "The U.S. Supreme Court recently ruled that local governments can take homes, business and private property to make way for private economic development if officials believe it would benefit the public. How do you feel about this ruling?" *Id.* at 1938 n.35.

165. 547 U.S. 220 (2006).

166. *Id.* at 223 (citation omitted).

APPENDIX

Table 1.

STATES PROVIDING FULL DUE PROCESS PROTECTIONS

STATE	STATUTORY PROVISIONS	CONTENT OF THE PROCESS
Alabama	ALA. CODE §§ 18-1A-22, -24, -74 (LexisNexis 2007)	requiring prior offer and negotiation, full pre-condemnation hearing, and notice
Idaho	IDAHO CODE ANN. §§ 7-706 to -710 (2004)	requiring prior offer and negotiation, full pre-condemnation hearing, and notice
Indiana	IND. CODE ANN. §§ 32-24-1-3 to -16 (LexisNexis 2002)	requiring prior offer and negotiation, full pre-condemnation hearing, and notice
Iowa	IOWA CODE ANN. §§ 6B.1 to .3 (West 2008)	requiring prior offer and negotiation, full pre-condemnation hearing, and notice
Kansas	KAN. STAT. ANN. §§ 26-501 to -517 (2000)	requiring full pre-condemnation hearing, and notice
Missouri	MO. ANN. STAT. §§ 88.010 to .077 (West 2009)	requiring full pre-condemnation hearing, and notice
Montana	MONT. CODE ANN. §§ 70-30-111, -202 (2009)	requiring prior offer and negotiation, full pre-condemnation hearing, and notice
Nebraska	NEB. REV. STAT. §§ 19-701 to -707 (1984)	requiring public hearings prior to the commencement of any project utilizing eminent domain
New Mexico	N.M. STAT. ANN. §§ 42-2-5, -16 (LexisNexis 2004)	allowing filing for possession under eminent domain authority, but requiring a hearing be held within thirty days of filing, title does not vest until after the hearing
North Dakota	N.D. CENT. CODE §§ 32-15-06.1, 32-15-22 (1996)	requiring prior offer and negotiation, full pre-condemnation hearing, and notice
Oklahoma	OKLA. STAT. ANN. tit. 27, § 2 (West 1997)	requiring prior full pre-condemnation hearing and notice

Wyoming	WYO. R. CIV. P. 71.1	requiring prior full pre-condemnation hearing and notice

Table 2.
STATES COMPLETELY ABROGATING PROCEDURAL PROTECTIONS

STATE	STATUTORY PROVISIONS	CONTENT OF THE PROCESS
Alaska	ALASKA STAT. § 09.55.420 (2008)	containing no overtly stated requirement of notice in most cases; taking accomplished with filing the complaint
Arizona	ARIZ. REV. STAT. ANN. § 12-1155 (2003)	stating that condemnor must apply for a court order in order to come into possession before a final judgment is issued
Arkansas	ARK. CODE ANN. § 27-67-315 (1994)	mandating that after filing a declaration of taking with the court and immediately upon making deposit of amount estimated as value of the property, title shall vest in the taking authority
Colorado	COLO. REV. STAT. § 38-1-105 (2007)	stating that the court may authorize petitioner to take possession of and use the property at issue prior to arriving at a final judgment in the condemnation procedure
District of Columbia	D.C. CODE ANN. § 16-1314 (LexisNexis 2001)	allowing condemning authority to file a declaration of taking signed by the mayor along with estimated compensation, automatically vesting title to the property
Georgia	GA. CODE ANN. § 32-3-6 (2009)	allowing condemning authority to file a declaration of taking with court along with an estimate of the compensation for the property

Kentucky	KY. REV. STAT. ANN. § 76.110 (LexisNexis 1995)	describing procedure by a which a vote by metropolitan sewer district board and subsequent filing of declaration of taking with the clerk of the court along with compensatory sum accomplishes taking
Louisiana	LA. REV. STAT. ANN. § 19:2 (1982)	allowing condemnor to file a declaration of taking with court to issue an order which vests title to property in the condemnor
Maine	ME. REV. STAT. ANN. tit. 35-A, §§ 6501-6510, 6701-6703 (1988)	granting water utilities authority to undertake eminent domain actions through a declaration of takings procedure
Maryland	MD. CODE ANN., REAL PROP. § 12-102 (LexisNexis 2003)	allowing condemnor to take possession prior to final judgment if just compensation paid to condemnee or to the court
Massachusetts	MASS. GEN. LAWS ch. 79, § 1-3 (1980)	conferring power to a board of officers who may adopt an order of taking; title vests in the condemnor upon recording the order of taking
Mississippi	MISS. CODE ANN. § 11-27-85 (1972)	stating that condemnor may apply to the court for immediate transfer, requires approval by judge and payment of at least 85% of the compensation due
Nevada	NEV. REV. STAT. ANN. § 340.160 (LexisNexis 2008)	stating that when taking is incident to a public works project, condemning authority can file a declaration of taking and property vests after deposit of just compensation
New Hampshire	N.H. REV. STAT. ANN. §§ 498-A:3 to :12 (LexisNexis 2009)	providing that a taking can be accomplished by filing a declaration with the office of the board of tax and land appeals
New Mexico	N.M. STAT. ANN. § 42-2-1 (LexisNexis 2004)	allowing taking by declaration if for a public road or state highway

Ohio	OHIO REV. CODE ANN. § 163.06(A) (LexisNexis 2007)	allowing taking by declaration without notice
Rhode Island	R.I. GEN. LAWS § 42-64-9 (2006), R.I. GEN. LAWS § 37-6-14 (1997)	stating that a taking occurs when documents are filed with the office of the recorder of deeds without any type of hearing; notice is required after the taking has occurred
South Dakota	S.D. CODIFIED LAWS § 21-35-25 (2004)	stating that a taking occurs when documents are filed with the office of the recorder of deeds without any type of hearing; notice is required after the taking has occurred
Tennessee	TENN. CODE ANN. § 29-17-503 (Supp. 2008)	stating that a taking occurs when documents are filed with the office of the clerk of court without any type of hearing; notice is required after the taking has occurred
Texas	TEX. TRANSP. CODE ANN. § 203.067 (Vernon Supp. 2009)	stating that a taking occurs when documents are filed with the office of the clerk of court without any type of hearing; notice is required after the taking has occurred
Washington	WASH. REV. CODE ANN. § 8.04.090 (West 2007)	stating that a taking occurs when documents are filed with the office of the clerk of court without any type of hearing; notice is required after the taking has occurred
West Virginia	W. VA. CODE ANN. § 54-2-14a (LexisNexis 2008)	stating that a taking occurs when documents are filed with the office of the recorder of deeds without any type of hearing; notice is required after the taking has occurred

Table 3.
STATES PROVIDING SOME PROCESS PRIOR TO THE TAKING

STATE	STATUTORY PROVISIONS	CONTENT OF THE PROCESS
California	CAL. CIV. PROC. CODE § 1255.410 (West 2007)	allowing that at the time of filing or after, plaintiff can file ex parte for an order of possession; the court will make an order authorizing taking if condemnor is authorized and it is appropriate
Connecticut	CONN. GEN. STAT. §§ 8-129 to -132 (2009)	requiring condemnor to file a statement of compensation and give notice
Florida	Fla. Stat. Ann. §§ 74.031, .041, .051 (West 2004)	establishing an expedited takings procedure but allowing for a challenge to be initiated by the property owner
Hawaii	HAW. REV. STAT. ANN. § 101-28 (LexisNexis 2006)	allowing condemning authority to take by filing a motion with court that it must grant, but notice must be given to the condemnee
Illinois	735 ILL. COMP. STAT. ANN. 30/20-5-5 to -10 (West Supp. 2009)	requiring the initiation of a judicial proceeding to commence a taking, but allowing the condemning authority to obtain title to, and possession of, the property before the proceeding ends on the condemnor's motion
Michigan	MICH. COMP. LAWS ANN. §§ 213.52-57 (West 1998)	requiring notice but putting the burden on property owner to contest the taking else title vests with the taking authority
Minnesota	MINN. STAT. ANN. § 117.042 (West 2005)	allowing comdemnor to apply to the court for an order to transfer the title of the property; condemnor is required to notify the condemnee of intent to possess
New Jersey	N.J. STAT. ANN. § 20:3-17 (West 1997)	specifying that condemnor may obtain title by filing a declaration of taking, but must provide notice

New York	N.Y. EM. DOM. PROC. LAW §§ 402, 501 (McKinney 2003)	requiring notice but not a prior judicial proceeding
North Carolina	N.C. GEN. STAT. § 40A-42 (2007)	allowing a taking without a prior judicial proceeding
Oregon	OR. REV. STAT. §§ 35.275, 35.352 (2009)	requiring notice, but public condemnor may take by filing motion with court prior to final judgment
Pennsylvania	26 PA. CONS. STAT. ANN. § 302 (West 2009)	mandating notice to condemnee, but title vests when declaration of taking is filed
South Carolina	S.C. CODE ANN. § 28-2-230 (2007)	providing that if condemnee refuses offer of compensation issued in a condemnation notice, then condemnor can take by filing declaration and compensation with clerk of court
Utah	UTAH CODE ANN. § 78-34-9 (2002)	requiring condemnor to file a motion with court and give notice to the condemnee prior to taking
Vermont	VT. STAT. ANN. tit. 24, § 3212 (2005)	requiring a hearing prior to taking, but only issue is that of just compensation
Virginia	VA. CODE ANN. §§ 25.1-300 to -318 (2006)	requiring, among other things, that a condemnor file a motion with the court and give notice to the condemnee prior to taking
Wisconsin	WIS. STAT. §§ 32.21 TO .22 (West 2006)	requiring notice but no hearing for "blighted" properties, otherwise governor's approval required for the exercise of emergency condemnation power