

Land Use Initiatives to Prevent Childhood Obesity and Potential Obstacles from State Takings Laws

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I. Introduction and Research Overview

As part of the National Policy and Legal Analysis Network to Prevent Childhood Obesity, we have agreed to analyze the possible objections to, and limitations on, potential land use initiatives that might be employed to reverse the trends in childhood obesity in the United States. There are two primary mechanisms by which state and local governments can institute land use initiatives to combat childhood obesity: They can condemn private property to put it to public use in service of this goal, or they can impose use limitations on privately owned property. The first option—relying on the power of eminent domain—may be used to increase the number of public parks or walking and biking trails, for example, or to provide other amenities and services that promote healthy, active lifestyles. The second option—adopting land use restrictions applicable to private property—may be used to limit the number or location of fast-food establishments in vulnerable neighborhoods or to ensure that convenience stores stock healthy food in addition to high-fat, low-nutrient alternatives, among other things.

State and local governments will face limitations from both federal and state law in both contexts. The Fifth Amendment to the U.S. Constitution states: “[N]or shall private property be taken for public use without just compensation.” This prohibition is interpreted in two parts. First, private property may not be taken unless it is for public use.¹ Second, if a land use restriction imposes such a burden on private property that the courts conclude it is the equivalent of a taking, the government must pay just compensation.² In addition, every state imposes its own limitations on the exercise of eminent domain and the regulation of private property. These limitations, contained in state constitutions and statutes, may be more protective of private property than the federal Constitution. They generally take two forms. First, state laws might incorporate a narrower definition of “public use,” such that a legislative objective that satisfies the public use requirement of the federal Constitution would be invalid under state law. Second, state law might require compensation for land use restrictions that would not be considered takings under the federal Constitution. Thus, proponents of land use initiatives to combat childhood obesity must be aware of the constitutional and statutory limits in the state in which they hope to act to ensure that their proposals will not be invalidated under strict public use requirements nor implicate compensation obligations under liberal regulatory takings laws.

The purpose of our overall project is to guide the reader through the jurisprudence of eminent domain and regulatory takings at both the federal and state levels. Thus, our analysis will be guided by two principal divisions: (1) the division between limitations imposed at the federal level versus the state level; and (2) the division between the legal limitations imposed on the use of the power of eminent domain and those that require compensation for validly enacted land use restrictions. This division will produce three papers: one that analyzes the federal limitations on land use restrictions, one that analyzes the federal restrictions on the use of eminent domain, and one that analyzes the general landscape of state constitutional and statutory limitations on land use restrictions and the use of eminent domain.

¹ See, e.g., *Kelo v. City of New London*, 545 U.S. 469 (2005).

² See, e.g., *Pa. Coal v. Mahon*, 438 U.S. 104 (1978).

In this paper we explore and analyze the state constitutional and statutory takings landscape. In particular, we examine the state limitations on the use of eminent domain to prevent childhood obesity, and as well as state laws that require compensation for validly adopted land use restrictions.

II. Federal versus State Takings-Based Limitations in General

State and local governments interested in adopting land use initiatives to prevent childhood obesity will face limitations in both federal and state laws. The federal limitations stem from the operation of the Fifth Amendment to the U.S. Constitution, which states: “[N]or shall private property be taken for public use without just compensation.” This amendment has been interpreted as imposing limits on the type of condemnations that are permissible—that is, private property can be condemned only for public use. In addition, the provision has been interpreted to require compensation in cases in which the government imposes regulations on the use of private property that are so restrictive that “in all justice and fairness” the burden “should be borne by the public as a whole.”³

In every state, constitutional provisions and state laws further restrict the taking of private property by the government. As with any constitutional issue addressed to the protection of individual rights and liberties, state constitutions or laws may be more protective of these rights and liberties than is the federal Constitution.⁴ Many states have embraced the power to protect private property owners from the exercise of eminent domain or the imposition of regulatory land use restrictions more rigorously than does the federal government. Thus, any governmental initiatives to prevent childhood obesity using land use restrictions or eminent domain must conform to the strictures of both federal and state takings-based limitations on their general condemnation or regulatory powers.

Initiatives that require a state or local government to actually acquire title to privately owned property can be challenged as invalid exercises of government authority under the Fifth Amendment to the U.S. Constitution, which states: “[N]or shall private property be taken for public use without just compensation.”⁵ As discussed in detail in the federal eminent domain paper,⁶ the U.S. Supreme Court has made clear that the concept of public use is exceptionally broad and its content is best left primarily to the judgment of the legislature.⁷ In addition to federal constitutional limitations on the exercise of eminent domain, most state constitutions have contained similar limiting language since they were adopted. The Texas Constitution, for example, provides that “no person’s property shall be taken, damaged or destroyed for or applied to public use without adequate compensation being made, unless by the consent of such

³ *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

⁴ *See, e.g., PruneYard Shopping Center v. Robins*, 447 U.S. 74, 81 (1980) (recognizing the “sovereign right” of a state to “adopt in its own Constitution individual liberties more expansive than those conferred by the Federal Constitution”); *Cooper v. California*, 386 U.S. 58, 62 (1967) (“Our holding, of course, does not affect the State’s power to adopt higher standards for searches and seizures than required by the Federal Constitution if it chooses to do so.”).

⁵ U.S. CONST. amend. V.

⁶ Promoting Healthy Communities through Land Use Initiatives: Federal Limits on Physical Taking of Property for Public Use, *available at* <http://www.nplanonline.org>.

⁷ *See Kelo v. City of New London*, 545 U.S. 469 (2005).

person.”⁸ These provisions may be, and in many states have been, interpreted to provide more protection to property owners faced with the prospect of an eminent domain action than does the U.S. Constitution.⁹

Moreover, in response to the 2005 *Kelo* decision, a significant majority of states passed legislation or constitutional amendments further limiting the exercise of eminent domain in those states, in particular by restricting the possible uses to which a state or local government might legitimately put condemned property (i.e., what counts as public use).¹⁰ Because these legislative and constitutional reactions to *Kelo* are relatively new, their actual impact on state and local eminent domain initiatives remains largely unexplored—both in court cases and in the scholarly literature. This paper will outline the general principles of these statutory and constitutional reforms, and attempt to provide some guidance regarding their likely application to state and local initiatives to prevent childhood obesity that rely on the use of eminent domain.

However, each exercise of the power of eminent domain comes at a price to the state or local government—namely, just compensation to the private land owner. Accordingly, to successfully stem the rising incidence of childhood obesity, state and local governments may need to employ less costly initiatives that do not entail outright condemnation of private property and the attendant costs of compensation. These initiatives will rely on the regulation of land use by private owners for the promotion of healthy living and eating patterns. While many local governments have broad land use regulatory authority,¹¹ regulations that are overly burdensome—while unlikely to be declared invalid—may be so burdensome that they will be declared takings for which compensation must be paid. In those cases, the initiatives will be as costly as outright condemnation, and therefore may be too costly to implement.

As with eminent domain and the public use requirement, there are essentially three sources of regulatory takings law that will determine whether a land use restriction is so burdensome on the private land owner that it constitutes a regulatory taking and thus obligates the government to pay just compensation. And, as with eminent domain, these sources are the U.S. Constitution, state constitutions, and state statutes.

The U.S. Supreme Court has interpreted the Fifth Amendment to limit the extent to which state and local governments (as well as the federal government) can impose on private land owners regulatory burdens that, “in all fairness and justice, should be borne by the public as a whole.”¹²

⁸ TEX. CONST. art. 1, § 17.

⁹ See Thomas Merrill, *The Economics of Public Use*, 72 CORNELL L. REV. 61 (1986).

¹⁰ See Lynn E. Blais, *Urban Revitalization in the Post-Kelo Era*, 34 FORDHAM URB. L.J. 657, 659 n.20 (2006) (listing state initiatives).

¹¹ It is important to remember that the extent of land use regulatory authority delegated to various political subdivisions varies from state to state. In some states, vast expanses of real property are “governed” by political subdivisions with very little regulatory authority. For example, approximately 20 percent of the population of Texas lives in unincorporated areas that have very limited land use regulatory authority. See Texas State Historical Ass’n, Texas Almanac, <http://www.texasalmanac.com/government/local.html>. In such areas, proponents of anti-obesity initiatives will have to rely on other measures or convince the states to delegate regulatory authority to areas that currently lack such authority.

¹² *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

In our federal regulatory takings paper,¹³ we discuss the circumstances in which courts are likely to conclude that land use restrictions aimed at preventing childhood obesity constitute regulatory takings under the federal Constitution. As mentioned above, however, most state constitutions have eminent domain provisions that are similar to, but slightly different from, the Fifth Amendment to the U.S. Constitution. The differences are, again, well illustrated by the Texas Constitution, which prohibits not just the “taking” of private property for public use without just compensation, but also the “damaging” or “destruction” of property for public use without just compensation.¹⁴ These differences may impact the determination of whether a particular land use regulation constitutes a taking for which compensation must be paid. One can imagine, for example, that a land use regulation that does not rise to the level of a taking under the U.S. Constitution may be considered substantial enough to constitute the “damaging” of property under the Texas Constitution.

Finally, in the mid-1990s property rights advocates began a relatively successful campaign for property rights reform. As a consequence, many states adopted statutes and referenda aimed at protecting private property owners from burdensome state and local restrictions on development of private property. The prototypical private property rights protection laws lowered the threshold at which a burden on land use will be considered a taking and offered an array of remedies for statutorily recognized takings. And in many of the states that had not yet adopted such private property protection measures by 2005, the statutory or referenda responses to the *Kelo* decision also included provisions enhancing the regulatory takings protections afforded landowners. In this paper, we evaluate the extent to which state takings clauses differ from the Fifth Amendment, provide a systematic review of property rights protection statutes, and then discuss their likely effect on state and local land use initiatives to combat childhood obesity.

III. Policy Initiatives That Implicate Takings Prohibitions

State and local governments have been contemplating multiple and multifaceted policy initiatives to prevent childhood obesity. Some of these initiatives will implicate the prohibition on taking private property for public use without paying just compensation. Those initiatives can be categorized in two general groups—those that implicate the public use limitations on the exercise of eminent domain and those that implicate the just compensation requirement of the takings clause.

In the first category are those initiatives that require the outright purchase of private property by the government. For example, policy initiatives that promote exercise by increasing the number of parks and playgrounds in a community, increasing access to trails in existing parks, designing streets to promote walking and biking, and designating safe routes to school all might require the government to buy interests in real property to accomplish these goals. Similarly, policy initiatives to increase access to healthy food by promoting grocery store development could rely on the government purchase of real property to be used for a grocery store. Some of these initiatives, such as the provision of additional parks and playgrounds or the development of viable grocery stores, may require the government entity to purchase the entire fee simple from

¹³ Promoting Healthy Communities through Land Use Initiatives: Federal Limits on Regulatory Takings of Property, available at <http://www.nplanonline.org>.

¹⁴ TEX. CONST. art. 1, § 17.

private landowners. Others may be accomplished by purchasing an easement over private property. The various ways in which state courts interpret and apply the public use requirements of their constitutions and statutes will limit the extent to which these policies can be carried out in the different states.

The second, and likely larger, category of proposed policy initiatives contains all those initiatives that rely on land use restrictions to effectuate the anti-obesity goals. These initiatives include regulating the proximity of chain restaurants to schools, banning or placing a moratorium on chain restaurants, limiting the density of chain restaurants, limiting the sale of junk food near schools, requiring certain stores to sell fresh fruit, and requiring that a certain percentage of contiguous floor space in grocery stores be allocated for nutritious products. Land use restrictions such as these are generally valid, but if they impose too significant a burden on individual landowners they will be considered takings for which just compensation must be paid. Sections IV and V below evaluate the general landscape of state law restrictions on the exercise of government authority over private landowners, with a particular focus on the anti-obesity initiatives in each of these two categories—those that rely on eminent domain and those that rely on land use restrictions.

IV. State Limitations on the Exercise of Eminent Domain: The Public Use Requirement in the States

As noted above, the federal Constitution prohibits the exercise of eminent domain unless the condemned property will be put to “public use.” However, as we discuss in the federal eminent domain paper, the U.S. Supreme Court’s 2005 decision in *Kelo v. City of New London* makes clear that the public use requirement imposes very little substantive limitation on the exercise of the power of eminent domain by state and local governments. Rather, the Supreme Court held, the constitutional conception of public use refers broadly to any use that serves a “public purpose” and legislative determinations of public purpose are entitled to substantial deference from courts.

Additional limitations are imposed at the state level in basically two ways: First, many states reject the Court’s insistence that the determination of public purpose is primarily a legislative one and require that state courts undertake an independent analysis of any proposed condemnation to ensure that it comports with the public use requirement. Second, the vast majority of states have defined the public use requirement more narrowly than the federal Constitution does. We discuss each of these additional limitations, and their likely effect on proposed land use initiatives to prevent childhood obesity, in turn below.

A. Diminished Judicial Deference to Legislative Determinations of Public Use

One of the defining characteristics of federal eminent domain jurisprudence is the extent to which courts must defer to legislative determinations of public purpose. The U.S. Supreme Court has made clear that legislative determinations of public purpose are entitled to extraordinary deference:

Subject to specific constitutional limitations, when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive. In such cases the legislature, not the judiciary, is the main guardian of the public needs to be served by social legislation, whether it be Congress legislating concerning the District of Columbia or the States legislating concerning local affairs. This principle admits of no exception merely because the power of eminent domain is involved.¹⁵

In contrast to the deferential posture required of courts applying the public use clause of the U.S. Constitution, some state courts adopt a more probing scrutiny of legislative determinations of public use under state constitutions.¹⁶ In some states this heightened scrutiny is a result of language in the state constitutions clearly assigning the ultimate authority for determining whether a proposed use of condemned property constitutes a public use to the judiciary, not the legislature. For example, the Washington Constitution states that “[p]rivate property shall not be taken for private use. . . . Whenever an attempt is made to take private property for a use alleged to be public, the question whether the contemplated use be really public shall be a judicial question, and determined as such, without regard to any legislative assertion that the use is public.”¹⁷ Other states have similar directives.¹⁸

The effect of this shift in primary authority to determine the scope of the public use constraint on the power of state and local governments to condemn property for uses intended to prevent childhood obesity is not entirely clear. On the one hand, the shift in authority will mean that merely convincing legislative authorities that a particular use, such as a grocery store that sells health food, will confer a public benefit will not be sufficient to put the public use question to rest. Rather, in states where the judiciary is less deferential to the legislature, initiatives that rely on the exercise of eminent domain must garner legislative approval *and* withstand judicial scrutiny. On the other hand, courts will implement their constitutional responsibility with varying degrees of scrutiny. In Washington, for example, notwithstanding the constitutional directive that courts independently review public use determinations, the Washington Supreme Court has held that “a legislative declaration [of public use] will be accorded great weight.”¹⁹ And, most important, if the substantive reach of the state public use clause is broad, the effect of even probing judicial scrutiny on the validity of initiatives that rely on the exercise of the power of

¹⁵ *Berman v. Parker*, 348 U.S. 26, 32 (1954).

¹⁶ Professor Thomas Merrill first observed this phenomenon in 1986 after surveying state and federal cases in which an exercise of eminent domain was challenged on public use grounds. *See Merrill, supra* note 9. While his survey revealed that federal courts were faithfully adhering to the deferential standard of review articulated in *Berman*, he was surprised to discover that state courts were significantly less deferential in applying their own constitutions’ public use requirement. Indeed, his survey revealed a trend of increasingly close scrutiny of public use claims in successive five-year periods between 1954 and 1984.

¹⁷ WASH. CONST. art. I, § 16.

¹⁸ The constitutions of Arizona, Colorado, and Missouri also contain judicial primacy provisions. *See* ARIZ. CONST. art. II, § 17 (“Whenever an attempt is made to take private property for a use alleged to be public, the question whether the contemplated use be really public shall be a judicial question, and determined as such without regard to any legislative assertion that the use is public.”); COLO. CONST. art. II, § 15 (“[T]he question whether the contemplated use be really public shall be a judicial question, and determined as such without regard to any legislative assertion that the use is public.”); MO. CONST. art. I, § 28 ([W]hen an attempt is made to take private property for a use alleged to be public, the question whether the contemplated use be public shall be judicially determined without regard to any legislative declaration that the use is public.”).

¹⁹ *Des Moines v. Hemenway*, 437 P.2d 171, 174 (Wash. 1968).

eminent domain will be limited. Thus, this shift in primary authority for the interpretation of the public use limitation has very little to say, directly, to the validity of anti-obesity initiatives.

B. The Meaning of Public Use: State Substantive Limitations on the Power of Eminent Domain

The more significant aspect of state limitations on the use of eminent domain arises from the different substantive limitations on scope of the public use requirement. As noted above, the federal Constitution incorporates an expansive conception of the “public use” for which property can be condemned. As the U.S. Supreme Court said in *Berman*:

The concept of the public welfare is broad and inclusive. The values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled.²⁰

States may impose more stringent limitations on the use of eminent domain by restricting the scope of the concept of public use either in the state constitution or by statute. In those states that have done so, initiatives to prevent childhood obesity must satisfy this heightened standard. If they do not, they will be invalidated.

1. Pre-Kelo: Prior State Constitutional Limitations on the Meaning of Public Use

Some state courts have been interpreting their state constitutional public use constraints as more restrictive than that of the U.S. Constitution for years. Indeed, there was an identifiable trend leading up to the *Kelo* decision in which state courts invalidated condemnations that would have survived judicial review under the *Berman* and *Midkiff* standard.²¹ Perhaps the most noteworthy of these cases is *County of Wayne v. Hathcock*,²² in which the Michigan Supreme Court overruled its notorious 1981 decision in *Poletown Neighborhood Council v. City of Detroit*.²³ In *Poletown*, the Michigan Supreme Court upheld Detroit’s plan to condemn large parcels of private property and convey them to General Motors to build an assembly plant.²⁴ *Poletown* is widely thought to be the most extreme judicial accommodation of a legislative determination of public benefit.²⁵ In *County of Wayne v. Hathcock*, the plaintiffs challenged the condemnation of their residential property for the construction of a privately owned 1,300-acre business and technology park that had the dual purpose of removing residential property from the over-flight path of the expanded Wayne County airport and “reinvigorat[ing] the struggling economy of southeastern Michigan.”²⁶ The Michigan Supreme Court recognized that the proposed

²⁰ *Berman v. Parker*, 348 U.S. 26, 33 (1954).

²¹ For a discussion of this phenomenon, see Elizabeth F. Gallagher, Note, *Breaking New Ground: Using Eminent Domain for Economic Development*, 73 *FORDHAM L. REV.* 1837, 1849–53 (2005) (citing state court cases that have applied a stricter substantive standard or heightened scrutiny to the public use inquiry).

²² 684 N.W.2d 765 (Mich. 2004).

²³ 304 N.W.2d 455 (Mich. 1981).

²⁴ *Id.* at 459–60.

²⁵ See Timothy Sandefur, *A Gleeeful Obituary for Poletown Neighborhood Council v. Detroit*, 28 *HARV. J.L. & PUB. POL’Y* 651, 665 (2006).

²⁶ *County of Wayne*, 684 N.W.2d at 769–70.

condemnations were within the statutory authority of the county,²⁷ but held that those statutory provisions were unconstitutional as applied in this case.²⁸ Specifically, the court overruled *Poletown* and expressly held that the desire to create jobs and increase tax revenue does not constitute a public use within the meaning of that term in the state constitution.²⁹

The Michigan Supreme Court's decision in *County of Wayne* does not stand alone. Rather, the court in that case followed the lead of a few other state courts in rejecting proposed condemnations as violations of the state's requirement that the condemned property be put to public use. The courts in these states were reacting to proposed condemnations that shared the following common elements: (1) the government sought to transfer ownership of the condemned property to another private landowner for commercial purposes; and (2) the purported "public purpose" was viewed as a pretextual cover for the primary intent to benefit an identified private commercial entity.³⁰ In particular, the proposed transfer of condemned property to private ownership (often called a "private ownership condemnation") appears to be the trigger for the more searching scrutiny of the public purpose rationale.

Many of the proposed initiatives to prevent childhood obesity avoid these elements entirely, primarily by avoiding the trigger. For example, initiatives to encourage state and local governments to provide more public parks, walking or biking paths, or other fitness areas do not involve transfer of ownership to other private entities. Condemnation of private property for government ownership to provide public-access infrastructure is the quintessential public use and is unlikely to raise constitutional concerns, even under these narrow interpretations of state constitutional public use clauses. As noted above, the concern animating searching scrutiny under the public use clause is the possibility that local government officials are transferring private property from one owner to another for the economic benefit of one or a few identified private parties. Parks, paths, and other public-access infrastructure simply do not raise these concerns.

Other proposed initiatives, however, may raise red flags under this paradigm. For example, an initiative that seeks to facilitate grocery store development by condemning private property for transfer to another private owner to run a grocery store will likely trigger, at least in some states, more exacting scrutiny of the underlying purpose of the condemnation. The proposed transfer of the condemned property to another private owner may make the condemnation suspect. To be sure, state and local governments can offer a nonpretextual claim to be advancing the health of children with these proposed initiatives. But the mere existence of the trigger is likely to result in that claim being more strictly scrutinized than typical legislative rationales (which are generally subject to the very relaxed rational basis review). Moreover, this justification—the governmental

²⁷ *Id.* at 776.

²⁸ *Id.* at 788.

²⁹ *Id.* at 787.

³⁰ *See, e.g.,* S.E. Ill. Dev. Auth. v. Nat'l City Envtl., 768 N.E.2d 1, 10–11 (Ill. 2002) (invalidating a "quick-take" condemnation of private land for the purpose of expanding the parking lot of an adjacent business upon concluding that "[w]e do not require a bright-line test to find that this taking bestows a purely private benefit and lacks a showing of a supporting legislative purpose"); Casino Reinvestment Dev. Auth. v. Banin, 727 A.2d 102, 111 (N.J. Super. Ct. Law Div. 1998) (rejecting proposed condemnation of private land for transfer to casino developer to hold for future development upon concluding that "the primary interest served here is a private rather than a public one," since the developer was unconstrained in his future uses of the property).

interest in this aspect of the health and safety of its citizens—is relatively new. Most health and safety initiatives are tied to more traditional state and local functions, such as building codes and fire safety. A proposal that invites strict scrutiny of a relatively novel governmental function in the context of competing constitutional rights (i.e., the property rights of the landowner) is bound to result in costly litigation and may be vulnerable to invalidation.

2. *Post-Kelo: The Movement to Limit the Substantive Scope of Public Use*

Unfortunately, policy initiatives that rely on the exercise of eminent domain—particularly private ownership condemnations—to combat childhood obesity will be even more vulnerable in the many states that adopted statutory and constitutional responses to the *Kelo* decision aimed at further limiting the reach of the governmental power of eminent domain. As noted above, in June 2005 the U.S. Supreme Court rejected *Kelo*'s challenge to the City of New London's attempt to condemn her private home and transfer ownership to a developer as part of a comprehensive economic revitalization program. With what might be record response time, public outcry over the decision led very quickly to legislative proposals to limit the use of eminent domain for economic development purposes. By the end of 2005, the legislatures of four states had enacted laws limiting the power of its governing bodies to use eminent domain for economic development,³¹ and the legislature of a fifth had approved a constitutional amendment to appear on the November 2006 ballot.³² The outcry did not dissipate with the passage of time, and by November 2006 (just over one year after the *Kelo* decision) an astonishing thirty-four states had passed legislation or adopted constitutional amendments (or both) restricting the use of eminent domain for economic development purposes. To date, thirty-nine states have adopted some responsive legislation or constitutional amendment.³³ These new laws, to varying degrees and using various mechanisms, limit the eminent domain power of state and local governments. Most of these limitations are targeted with more or less precision to the controversial issue of economic redevelopment condemnations that underlay *Kelo*. In turn, these limitations tend to focus on private ownership condemnations—thereby implicating anti-obesity initiatives that rely on these types of condemnations.

In light of the coherent and sustained public condemnation of *Kelo*, it is not surprising that the legislative responses to the decision are strikingly similar. The two dominant themes of the post-*Kelo* eminent domain legislation are the protection of private landowners from the perceived overreaching of state and local governments by taking private property simply to put it to “better use” by another private landowner and the recognition that some privately owned property is in such bad shape that condemnation—even for use by another private party—is justified. Much of the legislation is aptly named to reflect the first of these two themes. For example, Georgia titled its post-*Kelo* legislation the Landowner's Bill of Rights and Private Property Protection Act. As a result of this focus, virtually every state that has enacted eminent domain reform in the wake of *Kelo* has greatly restricted or entirely prohibited the use of eminent domain to facilitate economic development and/or has prohibited the transfer of condemned property to private actors. To date, twenty-two states either prohibit or greatly restrict private ownership condemnations, and

³¹ H.B. 654, Reg. Sess. (Ala. 2006); S.B. 217, 143d Gen. Assemb. (Del. 2005); S.B. 167, 126th Gen. Assemb. (Ohio 2005); S.B. 7, 79th Leg., 2d Sess. (Tex. 2005).

³² Michigan's amendment, State Proposal 06-4, passed overwhelmingly on November 7, 2006.

³³ For a synopsis of these initiatives, see figure 1. For a complete compilation of these initiatives, see the appendix.

twenty-six states prohibit or greatly restrict the use of eminent domain for economic development projects. Less commonly, some states have responded to *Kelo* by adopting procedural constraints intended to reduce the use of eminent domain for these purposes.³⁴ Still others adopted moratoria on such uses of eminent domain while their legislatures studied the problem.³⁵ At the same time, however, virtually every state adopting eminent domain restrictions has included one or more exceptions to these restrictions, primarily for condemnations aimed at reducing or eliminating blight.³⁶ In some states, the restrictions on private ownership condemnations will pose a challenge to state and local governments seeking to use their powers of eminent domain to transfer property to private owners to provide healthy food and exercise options to local communities.

a. Limitations on the Uses of Condemned Property

The particular mechanics of limiting the use of eminent domain for economic development purposes or transfer to private parties vary among the states. Most of the states employ language that specifically outlaws the use of eminent domain for these purposes. For example, S.B. 68 in Alabama states that “[n]otwithstanding any other provision of law, a municipality or county may not condemn property for the purposes of private retail, office, commercial, industrial, or residential development; or primarily for enhancement of tax revenue; or for transfer to a person, nongovernmental entity, public-private partnership, corporation, or other business entity.”³⁷ Similarly, S.B. 323 in Kansas prohibits the “taking of private property by eminent domain for the purpose of selling, leasing or otherwise transferring such property to any private entity.”³⁸

Other states define the type of projects that can appropriately be classified as public use projects and omit, either expressly or by implication, economic development or transfer to private entities from the list. For example, in H.B. 1313 from Georgia, the legislature approved an amendment to title 36 of the Georgia Code, prescribing that “[a]ny exercise of the power of eminent domain . . . must: (1) be for a public use.”³⁹ H.B. 1313 then defines “public use” by reference to a list of permissible uses and this prohibition: “The public benefit of economic development shall not constitute a public use.”⁴⁰ H.B. 1313 further defines economic development as

any economic activity to increase tax revenue, tax base, or employment or improve general economic health, when the activity does not result in: (A) transfer of the land to public ownership; (B) Transfer of the property to a private entity that is a public utility; (C) Lease of the property to private entities that occupy an incidental area within a public project; or (D) The remedy of blight.⁴¹

³⁴ See, e.g., H.F. 2351, 81st Gen. Assemb. (Iowa 2006) (requiring that the condemning authority establish that a property is blighted by clear and convincing evidence and also imposing additional procedural hurdles to promote administrative transparency).

³⁵ See, e.g., S.B. 167, 126th Gen. Assemb. (Ohio 2005) (imposing a moratorium on the use of eminent domain in areas that were not blighted and creating a task force to study the use of eminent domain in the state).

³⁶ See *infra* note 43 for a list of states including exceptions to their eminent domain reforms.

³⁷ 2006 Ala. Acts 2006-584.

³⁸ 2006 Kan. Sess. Laws 192.

³⁹ 2006 Ga. Laws 444, § 22.

⁴⁰ *Id.* § 3.

⁴¹ *Id.*

Similarly, Tennessee S.B. 3296 contains a provision stating that eminent domain can be exercised only to effectuate a public use and then states that public benefit resulting from private economic development such as increased tax revenue or increased employment does not qualify as a public use.⁴²

The vulnerability of eminent domain–based anti-obesity initiatives to these post-*Kelo* state enactments will necessarily depend on the particular limitation adopted in the relevant state and the particular details of the proposed initiative. Unfortunately, these enactments are so new that state courts have yet to work out the details of their application. We can be relatively certain of some general propositions, however. First, the initiatives that entail private ownership condemnations will be particularly vulnerable in states that have sought to limit the use of eminent domain after *Kelo*. Such initiatives—for example, initiatives to facilitate grocery store development that rely on the condemnation of private property for transfer to another private owner to operate a full-service grocery store—will likely fail in states that prohibit private ownership condemnations. Alabama is one such state. Its post-*Kelo* initiative prohibits the transfer of condemned property to private ownership and/or the exercise of eminent domain “for the purposes of private retail, office, commercial, industrial, or residential development.” In states that have chosen to prohibit condemnations for economic development purposes, such as Tennessee and Georgia, these initiatives may fare better. Again, the challenge will be to convince the courts that the government purpose is not merely to benefit the new landowner or to foster economic development, but to secure the health and safety benefits that flow from enhanced access to healthy food.

b. Exceptions for the Eradication of Blight

Even in those states that prohibit private ownership condemnation and/or condemnation for economic development, there are exceptions that policy advocates may be able to take advantage of to effectuate private ownership condemnations to combat childhood obesity. Of the thirty-four states that have enacted eminent domain reform in the wake of *Kelo*, twenty-three states (more than 60 percent) have explicitly excluded from their prohibitions the exercise of eminent domain intended to address or eradicate blight.⁴³ At the same time, these states have uniformly adopted language limiting the exception in an attempt to preclude the exception from swallowing the rule.

The most common method by which states have limited the scope of the blight exception has been to provide a detailed, specific definition of the term. Alabama, for instance, changed the definition of blight in its post-*Kelo* legislation to narrow the circumstances in which the government can use this classification to justify the exercise of eminent domain.⁴⁴ Before *Kelo*, Alabama Code § 24-2-2(a) stated that property could be condemned as blighted for reasons such

⁴² 2006 Tenn. Pub. Acts 863, § 29-17-102.

⁴³ The states that included exceptions to their eminent domain reform are Alabama, Arizona, Colorado, Georgia, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Michigan, Minnesota, Missouri, North Carolina, Ohio, Oregon, Pennsylvania, South Carolina, Texas, Vermont, West Virginia, and Wisconsin.

⁴⁴ ALA. CODE § 24-2-2(a)(2), (b) (West 2010).

as “excessive land coverage,” “faulty layout,” or “other factors.”⁴⁵ Alabama was the first state to enact legislation in response to *Kelo*, but this version of the state response (S.B. 68) included a blight exception without defining the term “blight.” The next year, Alabama H.B. 654 revisited the issue and established specific and limiting factors that must be established before property can be condemned as blighted.⁴⁶ The new definition includes a precise list of the conditions that a property must meet before it can be condemned as blighted, and these conditions essentially require the property to be neglected, run-down, or unsanitary so as to present a health hazard or otherwise be unfit for human habitation.⁴⁷ Virtually every state that permits a blight exception to its restrictions on the use of eminent domain for economic development has created definitions of blight similar to Alabama’s.⁴⁸

While the definitions of blight differ slightly from state to state, all of the legislation broadly concerns three main factors: (1) lack of structural integrity; (2) presence of a health hazard; and (3) lack of suitability for human habitation. In addition, a few states consider the presence of a high level of crime in deciding whether an area is blighted. For example, in Georgia, “repeated illegal activity” on property is considered to be an indication of blight.⁴⁹ Similarly, in Wisconsin, property can be considered blighted if the crime rate on the property is at least three times as high as the average crime rate in the city in which the property is located.⁵⁰

A few states have adopted heightened new procedural requirements that place a substantial burden on the governmental entity seeking to condemn property in order to eradicate blight.⁵¹ For example, Colorado H.B. 1411 imposes a higher standard of proof on condemnations intended to eliminate blight than is applicable to the use of eminent domain for other purposes.⁵² If a taking is intended to eradicate blight, the condemning authority must show by clear and convincing evidence that the taking is necessary to eradicate blight.⁵³ For all other types of takings, the condemning authority must demonstrate only by a preponderance of the evidence that the taking in question is necessary.⁵⁴ Other states require a parcel-by-parcel determination of blight, precluding the exercise of eminent domain unless a preponderance of the properties in the targeted area satisfy the criteria.⁵⁵ West Virginia prohibits a municipal authority from condemning nonblighted property in a blighted area unless it satisfies several conditions.⁵⁶ In

⁴⁵ *Id.* § 24-2-2(a).

⁴⁶ 2006 Ala. Acts 2006-584 (H.B. 654).

⁴⁷ *Id.*

⁴⁸ *See supra* note 43; *see, e.g.*, S.B. 3086, 94th Gen. Assemb. (Ill. 2006) (limiting use of eminent domain for private development unless the area is blighted).

⁴⁹ GA. CODE ANN. § 22-1-1(1)(A)(v) (West 2010).

⁵⁰ 2006 Wis. Sess. Laws 233.

⁵¹ Notable among these are Colorado (H.B. 1411), Missouri (H.B. 1944), West Virginia (H.B. 4048), and Wisconsin (A.B. 657).

⁵² H.B. 1411, 65th Gen. Assemb., Reg. Sess. (Colo. 2006).

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *See, e.g.*, H.B. 1944, 93d Gen. Assemb., 2d Reg. Sess. (Mo. 2006) (creating MO. REV. STAT. § 523.274(1): “Where eminent domain authority is based upon a determination that a defined area is blighted, the condemning authority shall individually consider each parcel of property in the defined area with regard to whether the property meets the relevant statutory definition of blight. If the condemning authority finds a preponderance of the defined redevelopment area is blighted, it may proceed with condemnation of any parcels in such area.”).

⁵⁶ W. VA. CODE § 16-18-6a(b).

essence, the city must demonstrate that the redevelopment project cannot proceed without the challenged condemnation and that there is no practical alternative to the condemnation of the blighted property.⁵⁷ Many particular alternatives are enumerated, such as incorporation of the existing property into the redevelopment plan and modification of the redevelopment plan such that the existing property will not be included.⁵⁸ Finally, Wisconsin A.B. 657 requires that before condemning property, the condemning authority must provide (1) a statement of the scope of the redevelopment plan; (2) a legal description of the redevelopment area; (3) the purpose of the condemnation; and (4) a finding that the property is blighted and the reasons for the finding.⁵⁹

Overall, the post-*Kelo* eminent domain statutes overwhelmingly share two characteristics: They limit the use of eminent domain to transfer private property from one owner to another or for economic development purposes, and they make exceptions to that prohibition for the eradication of blight. The impetus for these restrictions was the rise of urban renewal projects that incorporated private ownership condemnations into economic development plans. However, the unambiguous prohibition on private ownership condemnations in many of these reforms will likely impose barriers to the enactment of policy initiatives to combat childhood obesity that seek to condemn private property and transfer ownership to other private entities. In particular, initiatives such as the development of more grocery stores may depend on the transfer of property from one private owner to another. These initiatives are likely to be unlawful in states that have prohibited private ownership condemnations. However, because many of these reforms contain exceptions for private ownership condemnations that seek to eliminate blighted properties, it may be possible to combine childhood obesity initiatives with initiatives to eliminate blight and thereby evade the prohibitions on private ownership condemnations. To the extent that blight contributes to childhood obesity by reducing opportunities for outside active play, combining these initiatives will increase the effectiveness of each.

V. State Limitations on Land Use Regulation: Regulatory Takings in the States

In addition to adopting restrictions on the exercise of eminent domain that exceed those imposed by the U.S. Constitution, most states also provide property owners with protection from burdensome land use restrictions that go beyond those afforded by the U.S. Constitution. Several state constitutions are worded more broadly than the U.S. Constitution, stating that private property shall not be taken *or damaged* for public use without just compensation.⁶⁰ In addition, beginning with the property rights initiatives in the 1990s aimed at perceived overreaching of federal environmental statutes, many states have adopted statutory protections from regulatory burdens imposed on private property owners. More states followed suit in the early twenty-first century in response to the burdens imposed on private property owners by increasingly expansive open space and anti-sprawl regulations. Finally, several states that had not previously adopted property rights initiatives aimed at regulatory burdens included these measures in their post-*Kelo* initiatives.

⁵⁷ *Id.*

⁵⁸ *Id.* § 16-18-6(b)(4)–(8).

⁵⁹ A.B. 657, 2005–2006 Assemb., Biennial Sess. (Wis. 2006) (creating WIS. STAT. § 32.03(6)(c)).

⁶⁰ *See, e.g.*, Alaska (taken or damaged); Arizona (taken or damaged); Arkansas (taken, appropriated, or damaged); California (taken or damaged); Colorado (taken or damaged); Texas (taken or damaged). For a compilation of state constitutional provisions, see the appendix.

Many of the proposed initiatives to prevent childhood obesity rely on land use regulation, in part because these initiatives are less expensive than those that rely on the exercise of eminent domain. If the land use initiatives go “too far,” however, and result in regulatory takings, the state or local government responsible for the initiative will have to compensate the landowner for the taking, and the cost advantage disappears. Proposed policy initiatives that implicate regulatory takings issues are those that seek to regulate (1) the proximity of chain restaurants to schools; (2) the number of chain restaurants in a community; (3) the density of chain restaurants in a community; (4) the proximity of chain restaurants to one another; (5) the display of healthy and junk food in stores located near schools; and (6) the sale of junk food near schools during school hours. The proposed initiatives all have in common their intent to regulate what private landowners can do on their property. In some states and in some circumstances, depending on the content and interpretation of the relevant state constitution and/or property rights protection statute, these policy initiatives may be deemed takings for which compensation must be paid. Moreover, if the policy initiative seeks to require a landowner to discontinue an existing use—that is, for example, to close a chain restaurant that is currently operational—the initiative will be tested under the relevant state’s requirements for prior nonconforming uses. Many states protect a landowner’s right to continue to operate a prior nonconforming use until it is abandoned or otherwise relinquished by the owner. Other states permit the elimination of prior nonconforming uses, but only after the passage of a reasonable amortization period intended to permit the private landowner to recoup his or her investment. This section of the paper examines state regulatory takings laws and their likely impact on proposed initiatives to combat childhood obesity.

A. Liberal State Constitutional Provisions and Regulatory Takings Law

State courts have been much less likely to interpret their constitutions to provide more protection for landowners from burdensome regulations than they have to protect landowners from expansive interpretations of public use. While many state courts had begun to restrict the use of the power of eminent domain under their own constitutions even before the post-*Kelo* landside of statutory and constitutional reforms, most state courts have been content to follow the U.S. Supreme Court’s lead concerning the scope of regulatory takings law. This is somewhat surprising since many state constitutions have different, and arguably more generous, constitutional language detailing what counts as a compensable regulatory taking than does the federal Constitution. In particular, the takings provisions of many state constitutions prohibit both the taking *and* the damaging of private property for public use without just compensation. It would not be illogical for a state court to interpret these provisions as being more protective of private property than the federal prohibition on taking alone, and several state courts have done so.⁶¹ Most state courts, however, have interpreted these potentially more expansive constitutional provisions as coterminous with that of the U.S. Constitution when considering regulatory takings claims, or at least have consistently declined to express the view that they are more expansive and, instead, have applied federal precedents in interpreting the relevant state constitutional provision. Moreover, even in those states in which the courts acknowledge that the state constitution affords potentially greater protections from regulatory burdens than does the federal

⁶¹ See, e.g., *Eherlander v. Dep’t of Transp.*, 797 P.2d 629, 633 (Alaska 1990) (“The inclusion of the term ‘damage’ affords the property owner broader protection than that conferred by the Fifth Amendment to the Federal Constitution.”). For a complete compilation of the constitutional language and the corresponding interpretations, see the appendix.

Constitution, the courts nonetheless rarely conclude that land use regulations prohibiting a particular use constitute compensable takings.⁶² Thus, unless state courts begin to reinvigorate their interpretations of the additional clauses in their constitutional takings provisions, these additional clauses are unlikely to result in obligations to compensate landowners for land use restrictions that would not constitute compensable takings under the U.S. Constitution. And, because many, if not most, states have adopted property rights initiatives that extend the compensation requirement in limited and specified regulatory circumstances, it seems unlikely that state courts will assume the mantle of property rights protectors through constitutional interpretation.

B. Property Rights Initiatives and Resulting Constraints on Land Use Regulations

While there is some variation among the property rights protection initiatives adopted by the various states to address perceived injustices resulting from regulatory burdens, the initiatives generally include one or more of three general types of provisions: assessment provisions, conflict resolution provisions, and compensation provisions.⁶³

Assessment provisions require some governmental entity—either the entity proposing the regulation or some centralized state entity such as the attorney general—to assess the financial impact that proposed land use regulations will have on private property owners before the regulations can be implemented. The Texas statute is illustrative. Entitled the Private Real Property Rights Preservation Act (PRPRPA),⁶⁴ this statute was enacted to underscore the importance of private property rights in Texas and compel state and local governments to take into account the impact of their land use restrictions on private property owners. Under the Texas PRPRPA, government officials must perform a regulatory takings analysis whenever a covered action is likely to temporarily or permanently restrict the use of private real property that the owner would otherwise have and result in a diminution in the market value of the property by at least 25 percent. The reduction in value is determined by comparing market value with the regulation in effect with that of the property free of the regulation. If the land use restriction is found to diminish property value by more than 25 percent, the property owner may seek rescission of the offending action and compensation for the damages suffered during the period the challenged regulation was in place. While the statute entitles the property owner only to rescission of the burdensome regulation, the regulatory body may choose to pay compensation in lieu of rescission. Because they are essentially procedural in nature, assessment statutes are not likely to pose significant impediments to the adoption of land use initiatives to combat childhood obesity.

Conflict resolution provisions provide a mechanism for aggrieved landowners to negotiate settlements with governmental entities that adopt land use restrictions that burden private

⁶² In Colorado, for example, the Supreme Court has interpreted the constitutional provision as providing more protection for property owners, but “only insofar as it allows recovery to landowners whose land has been damaged by ‘the making of public improvements abutting their lands, but whose lands have not been physically taken by the government.’ . . . Other than this specific additional coverage, this court has interpreted the Colorado takings clause as consistent with the federal clause.” *Animas Valley Sand & Gravel v. Bd. of County Comm’rs*, 38 P.3d 59 (Colo. 2001).

⁶³ These classifications were offered in a slightly different context by Mark E. Sabath in *The Perils of the Property Rights Initiative: Taking Stock of Nevada County’s Measure D*, 28 HARV. ENVTL. L. REV. 249, 254–55 (2004).

⁶⁴ TEX. GOV’T CODE ANN. § 2007.001 (West 2009).

property rights. Florida's Harris Act, for example, imposes a 180-day negotiation period during which landowners must file a claim with the agency adopting the challenged regulation and the agency must make an offer of settlement.⁶⁵ Because they are designed to expedite the resolution of compensation claims, conflict resolution provisions are unlikely to impose substantive burdens on state or local governments seeking to use land use initiatives to combat childhood obesity.

Of all the provisions in state property rights initiatives, the compensation provisions are most likely to interfere with the adoption of land use initiatives to combat childhood obesity. In essence, compensation provisions provide that state and local governments must provide compensation to landowners whenever land use restrictions lower the value of private property by a particular amount, even though the restriction would not constitute a taking under the federal or state constitutions. Most of these provisions adopt a numerical threshold, such as a 25 percent reduction in value. But some, such as Oregon's now superseded Measure 37, require compensation whenever a land use regulation restricts the use of private property and has the effect of reducing the fair market value of that property in any amount. Under Oregon's Measure 37:

If a public entity enacts or enforces a new land use regulation or enforces a land use regulation enacted prior to the effective date of this amendment that restricts the use of private real property or any interest therein and has the effect of reducing the fair market value of the property, or any interest therein, then the owner of the property shall be paid just compensation.⁶⁶

That measure proved too burdensome for local governments, and it has been replaced with Measure 49, which rolled back the remedies available to claimants under Measure 37, and, for future projects, provided limited protections from regulatory takings for residential property or property used for farming or forestry.⁶⁷

Only Florida and Arizona retain expansive statutory protections from regulatory takings. In Arizona, the property rights protection statute requires compensation whenever "the existing rights to use, divide, sell, or possess private real property are reduced by the enactment or applicability of any land use law . . . and such action reduces the fair market values of the property."⁶⁸ Florida's Harris Act requires compensation for any land use restriction that "unfairly affects" or imposes an "inordinate burden" on a private landowner.⁶⁹

To the extent that they obligate state and local governments to compensate landowners for regulatory burdens that would not constitute regulatory takings under the state and federal

⁶⁵ FLA. STAT. ANN. § 70.001 et seq. (West 2010).

⁶⁶ Section 1 of Measure 37 (former OR. REV. STAT. § 197.352 (2005), amended by 2007 Or. Laws ch. 424, § 4, renumbered as OR. REV. STAT. § 195.305 (West 2007)). The adoption of Measure 37 resulted in a flood of claims for compensation. As a result, the voters of Oregon ratified Measure 49, which modifies the remedies available to Measure 37 claimants who filed before the effective date of Measure 49 and limits the property rights protections offered to future claimants. Under Measure 49, private property owners are protected only from new land use regulations that limit residential uses of property or restrict farming or forestry practices. Other land use restrictions, such as commercial limitations, are not covered by the Measure.

⁶⁷ OR. REV. STAT. § 195.305.

⁶⁸ Arizona Private Property Rights Protection Act § 12-1134(A).

⁶⁹ FLA. STAT. ANN. § 70.001(1).

constitutions, the state property rights provisions will increase the costs of adopting anti-obesity initiatives. However, whether the compensation provisions will apply to anti-obesity measures will vary from state to state because the reach of the property rights initiatives varies from state to state. Some state initiatives apply to all political subdivisions in a state, others to a limited subset of political subdivisions. The Texas initiative, for example, does not apply to land use restrictions adopted by municipal governments. Some state initiatives apply to all regulatory action taken by the covered political subdivisions, others exclude certain types of regulatory actions, such as the denial of a permit. Some state initiatives apply to land use restrictions of any sort, others only to restrictions on residential uses or those imposed on farms or forestry practices.⁷⁰ Many of these property rights initiatives apply only to land use restrictions adopted after the private property owner takes title to the land. Finally, and most perhaps importantly, each initiative contains a list of exceptions to its coverage, such as regulations designed to prevent public nuisances or regulations implementing federal mandates or regulations designed to promote public health and safety.

The relatively common exception to the reach of property rights initiatives for regulations addressing issues of public health and safety may provide a loophole for most anti-obesity initiatives in states that have adopted property rights protection measures. However, for two reasons it is not clear that the exception will be interpreted to encompass anti-obesity measures. First, most property rights protections initiatives include provisions admonishing courts to interpret their reach broadly and their exceptions narrowly. Second, many of the statutes list, as examples of regulations designed to promote public health and safety, such traditional measures as fire safety and building codes. Anti-obesity regulations are not such traditional exercises of the police power, although there is surely an argument to be made that promoting and protecting children's health and welfare is a central and important component of the police power. However, because state courts have not yet interpreted the scope of the health and welfare exceptions, it is difficult to predict whether these arguments will prevail.

Because of the state-by-state variations, it is difficult to make any meaningful generalizations about the impact of the state property rights protection movement on land use initiatives to combat childhood obesity. Rather, precise analysis will require an evaluation of proposed initiatives in light of the particular provisions of the relevant state's regulatory takings initiative. To that end, we include a comprehensive compilation of the various initiatives, including their general provisions, their scope, their exceptions, and brief explanations of any available judicial interpretations in the attached appendix.

C. Prior Nonconforming Uses: Grandfathering and Amortization

The foregoing assumes that the land use restriction being considered would constrain only *future* uses of private property. If a land use initiative proposes to prohibit existing uses of private property, the analysis would be more complicated. In many states, the courts have recognized landowners' rights to continue using their property as they had before a zoning change, at least for some portion of time. These existing uses are called prior nonconforming uses, and many states require that prior nonconforming uses be either grandfathered or amortized when zoning

⁷⁰ See, e.g., Measure 49, OR. REV. STAT. § 195.305.

amendments render them nonconforming. While these requirements may be derived from the state constitution, they are more often traced to “fundamental principles of real property law.”⁷¹

⁷¹ *See, e.g.,* Hooper v. City of St. Paul, 353 N.W.2d 138, 140 (Minn. 1984).

Figure 1. Synopsis of State Post-Kelo Limitations on Eminent Domain

State	Limitation
Alabama	Prohibits the use of eminent domain for the purpose of nongovernmental retail, office, commercial, or industrial development or use, except in blighted areas targeted by a redevelopment or urban revitalization plan.
Alaska	Prohibits private ownership condemnations. Prohibits the exercise of eminent domain over a landowner's personal residence for purposes of developing a recreational facility.
Arizona	Limits the definition of public use; excludes economic development.
California	Prohibits the use of eminent domain for economic redevelopment in nonblighted areas; restricts the definition of blight.
Colorado	Defines public use to exclude economic development.
Connecticut	Prohibits the exercise of eminent domain for the primary purpose of increasing local tax revenues.
Delaware	Requires that the proposed public use for an eminent domain project be defined at least six months in advance in a certified planning document.
Florida	Prohibits private ownership condemnations, with limited exceptions.
Georgia	Limits the definition of public use; excludes economic development.
Idaho	Prohibits private ownership condemnations. Prohibits the use of eminent domain for economic development, with some exceptions.
Illinois	Imposes heightened procedural and substantive limitations on private ownership condemnations.
Indiana	Limits the definition of public use; excludes economic development.

	Requires a finding that a property is a public nuisance, unfit for human habitation or use, or blighted before the government can condemn it.
Iowa	Limits the definition of public use, excluding economic development and privately owned commercial development (with exceptions).
Kansas	Places heightened procedural and substantive restrictions on private ownership condemnations.
Kentucky	Limits private ownership condemnations undertaken for economic development purposes, with some exceptions.
Louisiana	Prohibits private ownership condemnations. Prohibits the use of eminent domain for economic redevelopment, with some exceptions.
Maine	Prohibits private ownership condemnations. Prohibits the use of eminent domain for economic development, with some exceptions.
Michigan	Limits the definition of public use, excluding private ownership condemnations for the purpose of economic development or tax revenue enhancement. Increases the burden of proof in establishing public use.
Minnesota	Limits the definition of public use, excluding economic development.
Missouri	Prohibits the use of eminent domain for economic development, except in cases of blight. Increases the burden on the government to demonstrate blight.

Nebraska	Prohibits the use of eminent domain for economic development, except in cases of blight.
Nevada	Prohibits private ownership condemnations. Puts the burden on the government to establish public use.
New Hampshire	Puts the burden on the government to establish public use. Limits the definition of public use, excluding private ownership condemnations for the purpose of economic development or tax revenue enhancement.
New Mexico	Limits the eminent domain power of municipalities, excluding economic development.
North Carolina	Lists the acceptable uses to which condemned property may be put—does not include economic development or transfer to private owners.
North Dakota	Prohibits private ownership condemnations. Prohibits the use of eminent domain for economic development, with some exceptions.
Ohio	Prohibits the use of eminent domain for economic redevelopment if it involves a private ownership condemnation.
Oregon	Prohibits private ownership condemnation of residential and commercial property, forest property, and farm property.
Pennsylvania	Prohibits private ownership condemnations.
South Carolina	Limits the definition of public use, excluding economic development.
South Dakota	Prohibits private ownership condemnations. Prohibits the use of eminent domain for enhancement of tax revenues.

Tennessee	<p>Prohibits private ownership condemnations.</p> <p>Prohibits the use of eminent domain for economic development, with some exceptions.</p>
Texas	<p>Prohibits the use of eminent domain to confer a private benefit on a particular private party.</p> <p>Prohibits the use of eminent domain for economic redevelopment, with some exceptions.</p>
Utah	Limits the definition of public use.
Vermont	Prohibits the use of eminent domain for economic development, with some exceptions.
Virginia	<p>Limits the definition of public use.</p> <p>Restricts private ownership condemnations.</p>
West Virginia	Prohibits private ownership condemnations for the purpose of economic development, with some exceptions.
Wisconsin	<p>Prohibits private ownership condemnations, except for blighted property.</p> <p>Restricts the definition of blighted property.</p>
Wyoming	Limits the definition of public purpose, excluding private ownership condemnations unless such condemnation is to protect the public health and safety.