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## Essay

### *Kelo* and the Constitutional Revolution that Wasn't

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*Wesley Horton and Brendon Levesque are right that public outrage over Kelo has overshadowed the real facts of the New London plan, and that the decision only affirmed well-established precedent. But while the facts were on New London's side, those facts were harder to translate to the public sympathy than the story of the white, female plaintiffs effectively publicized by the Institute for Justice in the case. Kelo is also not Dred Scott in even more ways than Horton and Levesque state. Unlike Scott v. Sandford, Kelo preserved the rights of individuals to challenge taking of their homes and receive compensation for the same. For lead plaintiff Susette Kelo, this right to compensation resulted in a pay-out of about four times the value of her little pink house. And while Scott v. Sandford helped trigger a constitutional revolution, Kelo remains good law, and the state legal response to it is more show than substance.*

*Although I agree with the authors on the big picture, I suggest caution on their proposal for curbing eminent domain abuse. The scrutiny for pretext they propose was established well before Kelo, but some of the factors they suggest would discourage public-private partnerships that may more effectively achieve public goals. While judges must police governments for bias and favoritism, having inexpert judges make decisions that are better left to planning experts and the public process will not achieve this end.*

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# *Kelo* and the Constitutional Revolution that Wasn't

BETHANY BERGER\*

## I. INTRODUCTION

I am delighted to have the chance to comment on Wesley Horton and Brendon Levesque's excellent article. I agree with them that the facts of the Fort Trumbull plan have gotten lost in the public reaction to the case, and that *Kelo* only affirmed well-established law. I also wholeheartedly agree that focus on economic development takings may divert attention from the real problems of eminent domain abuse. As the authors write, "the bigger picture is condemnation in general, and private economic development is only a part of it."<sup>1</sup> Here, I emphasize a few things not discussed in their article, and sound a word of caution about their proposed solution.

First, although facts matter, so does selling those facts to the public. Although the facts here favored New London, many things—from the appeal of individual plaintiffs over governments to the race and gender of these specific plaintiffs—made it far easier for the public to be swayed by the plaintiffs.

Second, *Kelo* was not *Dred Scott* in even more ways than the authors state. By eleven years after the Court's decision in *Scott v. Sandford*,<sup>2</sup> it had catalyzed a revolution in American history and had been decisively abrogated by constitutional amendment. The decision itself denigrated all individual rights of African Americans and the power of Congress to protect them. *Kelo v. New London*,<sup>3</sup> in contrast, is still good constitutional law, the significance of the state response to it has been exaggerated, and the case itself is fading from the public imagination. More importantly, the decision leaves property owners with substantial rights (leading to a \$442,000 payout for Susette Kelo<sup>4</sup>), while the reverse would have left impoverished cities with fewer means to compete with wealthier suburbs, and placed the burden of eminent domain on those with the least power to

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<sup>1</sup> Wesley W. Horton & Brendon P. Levesque, *Kelo Is Not Dred Scott*, 48 CONN. L. REV. 1405, 1427 (2016).

<sup>2</sup> *Scott v. Sandford*, 60 U.S. 393 (1857).

<sup>3</sup> 545 U.S. 469 (2005).

<sup>4</sup> George Lefcoe, *Jeff Benedict's Little Pink House: The Back Story of the Kelo Case*, 42 CONN. L. REV. 925, 954–55 (2010) (reviewing Jeff Benedict's account of the events leading up to the Supreme Court's decision in *Kelo*).

fight it.

Third, I point out some dangers in the authors' proposal for closer scrutiny for pretext. I agree that courts should scrutinize takings to determine if they are a mere pretext for benefiting a private party, but this was clear before the *Kelo* decision. And while most of the factors the authors suggest are useful in this inquiry, some will undermine the benefits of public-private partnerships in development, and contribute to clumsy attempts by the judiciary to second-guess land planners. Thus, I worry that the specifics of their proposal may encourage courts to play a role for which they are not qualified, and may cause more harm than benefit for social welfare.

That said, I also want to particularly thank Wes Horton for his work on this case and his generosity in sharing his insights regarding it. Far from being *Dred Scott*, the *Kelo* case is part of his long and distinguished history of using the law to protect individual rights and the public interest.

## II. FACTS MATTER—BUT SO DOES SELLING THEM TO THE PUBLIC

As Horton and Levesque write, facts matter, and most of them supported New London. When the city proposed the plan, New London was suffering.<sup>5</sup> Divided into small, individually-owned parcels, it needed land assembly to develop anything new.<sup>6</sup> Fort Trumbull, meanwhile, was a derelict, post-industrial brownfield. The U.S. Navy's sound lab, which had occupied a third of Fort Trumbull's 90 acres, abandoned the site in 1996.<sup>7</sup> What was left included a junkyard, a railroad stockyard, oil storage terminals, and car repair businesses.<sup>8</sup> Fort Trumbull also housed a regional sewage treatment plant.<sup>9</sup> The plant had never been capped, and it smelled.<sup>10</sup> The area had worn-out electrical and sewer services, few sidewalks, and no public access to the Thames River.<sup>11</sup> The redevelopment, in contrast, would build on the city's unique maritime history, a history that has

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<sup>5</sup> *Kelo*, 545 U.S. at 473.

<sup>6</sup> See Bethany Berger, Wesley Horton, Thomas J. Londregan & Clark Neily, *Selected Proceedings of the Twentieth Annual Thomas R. Gallivan Jr. Conference—Kelo: A Decade Later*, 47 CONN. L. REV. 1433, 1437 (2015) [hereinafter *Kelo—A Decade Later*] (remarks of Thomas Londregan).

<sup>7</sup> *Id.* at 1438.

<sup>8</sup> *Id.* at 1439.

<sup>9</sup> *Id.* at 1438.

<sup>10</sup> *Id.*; ILYA SOMIN, *THE GRASPING HAND: KELO V. CITY OF NEW LONDON & THE LIMITS OF EMINENT DOMAIN* 15 (2015) (noting that the sewage plant “periodically emitted a terrible odor that annoyed many residents”).

<sup>11</sup> See *Kelo—A Decade Later*, *supra* note 6, at 1439 (describing the infrastructure needs of the Fort Trumbull area prior to the taking).

recently created an economic and cultural “renaissance” in New London.<sup>12</sup>

Few people wanted to be in Fort Trumbull in the late 1990s. Eighty percent of commercial properties were vacant, as were twenty percent of residential properties.<sup>13</sup> Eighty-eight percent of the structures were in poor to fair condition, with only twelve percent in average condition.<sup>14</sup> Susette Kelo’s house—next to that smelly sewage treatment plant—had been vacant for years until she purchased it in 1997, on the eve of the redevelopment plan.<sup>15</sup> The vast majority of the Fort Trumbull landowners—owning 100 of 115 parcels in the redevelopment plan—sold to the city without complaint.<sup>16</sup> The nine holdouts owned only .76 acres<sup>17</sup>—less than one percent of the redevelopment area.

So these nine individuals were standing in the way of a development that would help a troubled city remediate a brownfield and escape an economic crisis. They were protesting government use of eminent domain that, as Horton and Levesque write, the Supreme Court had approved for fifty years, and likely longer.<sup>18</sup> Both facts and precedent were on New London’s side. But although New London won the legal battle (albeit by a narrow 5-4 margin), it completely lost the public relations war. If facts matter, why did that happen?

One reason is that the New London lawyers were only fighting the legal fight, but the plaintiffs’ lawyers were fighting a media war from the beginning. The Institute for Justice, which represented the plaintiffs, considers the public narrative before it even takes a case.<sup>19</sup> Their attorneys came armed with press releases and staged public protests with their plaintiffs. A search of Lexis and Westlaw’s newspaper databases between 1998 and 2001 reveals no articles on the Fort Trumbull fight before the

<sup>12</sup> Ellen Albanese, *New London’s Renaissance*, BOS. GLOBE (Aug. 9, 2014), <http://www.boston.globe.com/lifestyle/travel/2014/08/09/new-london-renaissance/hQgGW62PzAewAgpzsB1wMJ/story.html> [https://perma.cc/UUX8-GPYF].

<sup>13</sup> Kelo—*A Decade Later*, *supra* note 6, at 1440.

<sup>14</sup> *Id.* For a good summary of facts supporting each sides’ perspectives on the case, see Lefcoe, *supra* note 4.

<sup>15</sup> *The Kelo House (1890)*, HISTORIC BUILDINGS OF CONN. (Mar. 20, 2009), <http://historicbuildingset.com/?p=1550> [https://perma.cc/DG5Z-M4PK].

<sup>16</sup> *Kelo v. City of New London*, 545 U.S. 469, 474–75 (2005) (stating that area contained 115 parcels and the plaintiff owned fifteen).

<sup>17</sup> Horton & Levesque, *supra* note 1, at 1410.

<sup>18</sup> *Id.* at 1414–18; see also *Hawaii Hous. Auth. v. Midkiff*, 467 U.S. 229, 229–30 (1984) (upholding an act permitting the condemnation and transfer of a lessor’s property to the lessee for just compensation); *Berman v. Parker*, 348 U.S. 26, 26 (1954) (upholding a congressional act allowing the government to condemn property in D.C. for redevelopment); *Strickley v. Highland Boy Gold Mining Co.*, 200 U.S. 527, 527 (1906) (affirming the use of eminent domain to permit a mining company to run transportation lines over private property).

<sup>19</sup> See Lefcoe, *supra* note 4, at 931 (“[W]hen Chip Mellor founded IJ [Institute for Justice] in 1991, ‘he developed a simple formula for selecting cases: (1) sympathetic clients; (2) outrageous facts; and (3) evil villains.’”) (citation omitted).

Institute got involved,<sup>20</sup> and several praising Pfizer, Connecticut College President Claire Gaudani, and the New London Development Corporation for revitalizing New London and rescuing a decrepit brownfield.<sup>21</sup> As soon as the Institute for Justice filed suit, however, the stories about the bravery of the plaintiffs and the villainy of Pfizer, Gaudani, and the NLDC began.<sup>22</sup> The case proved the maxim that “[c]ommunication is now central to management of modern litigation.”<sup>23</sup>

But even had New London’s attorneys armed themselves for the media war, they would likely have lost. Narratives about governments trying to do things to help people collectively are always less immediate than those about the individuals themselves. Everyone could see themselves in the homeowner plaintiffs. It was harder to see themselves in New London.

And distinctive facts about these plaintiffs made them particularly resonant. The Institute for Justice made sure to highlight these. The lawyers broke alphabetic order and placed Susette Kelo—with her little pink house, fiery red hair, and quote-worthy conviction—first in the list of nine plaintiffs. The gender of the two most prominent plaintiffs, Kelo and Wilhemina Dery, may have been significant as well. Women have often provided the public face of property rights protests<sup>24</sup> and may well be more

<sup>20</sup> *The Hartford Courant* had only one article about opposition to takings connected with the Pfizer plant, but that was about widening a road outside Fort Trumbull to lead to the plant. Charles Stannard, *Deadline Nears in Race to Save Historic Houses*, HARTFORD COURANT (May 26, 2000), [http://articles.courant.com/2000-05-26/news/0005260702\\_1\\_development-plan-howard-street-road-improvements](http://articles.courant.com/2000-05-26/news/0005260702_1_development-plan-howard-street-road-improvements) [<https://perma.cc/3Q2Y-U3BQ>].

<sup>21</sup> See, e.g., Jon G. Auerbach, *Pfizer Revives Connecticut ‘Brownfield’: Research Campus to Be Built on Contaminated Urban Site*, WALL ST. J., Feb. 4, 1998, at A2 (“Drug giant Pfizer Inc. is giving depressed New London, Conn., a shot in the arm.”); Tom Condon, *My Kind of Town: New London Prized its Streets, its Characters and Sense of Humor. Progress Almost Ruined it*, HARTFORD COURANT (Aug. 2, 1998), [http://articles.courant.com/1998-08-02/news/9808110145\\_1\\_pequot-avenue-pool-hall-arcade](http://articles.courant.com/1998-08-02/news/9808110145_1_pequot-avenue-pool-hall-arcade) [<https://perma.cc/M65J-SGC4>] (“New London hit the municipal jackpot. Pfizer Inc. announced it would build a \$150 million research campus on a vacant stretch of waterfront a mile from downtown . . . .”); Michele Jacklin, *Cranes Are Everywhere in New London*, HARTFORD COURANT (Sept. 22, 1999), [http://articles.courant.com/1999-09-22/news/9909220547\\_1\\_cranes-pfizer-connecticut-college](http://articles.courant.com/1999-09-22/news/9909220547_1_cranes-pfizer-connecticut-college) [<https://perma.cc/6AW4-ASXU>] (“Clearly, both Connecticut College . . . and Pfizer are acutely aware that the vitality and strength of their institutions largely depend on the vitality and strength of the city they reside in.”).

<sup>22</sup> Carrie Budoff, *A Battle Against Eminent Domain: Gritty Dispute in New London*, HARTFORD COURANT (Jan. 1, 2001), [http://articles.courant.com/2001-01-01/news/0101010379\\_1\\_susette-kelo-fort-trumbull-battle-against-eminent-domain](http://articles.courant.com/2001-01-01/news/0101010379_1_susette-kelo-fort-trumbull-battle-against-eminent-domain) [<https://perma.cc/H2Y6-ZQSB>] (quoting Gaudiani as referring to the houses at issue as “‘slum’ houses”).

<sup>23</sup> JAMES F. HAGGERTY, IN THE COURT OF PUBLIC OPINION: WINNING YOUR CASE WITH PUBLIC RELATIONS xxii (2003).

<sup>24</sup> See, e.g., *Dolan v. City of Tigard*, 512 U.S. 374, 394–96 (1994) (establishing new restrictions on exactions; female plaintiff); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 439, 441 (1982) (establishing new per se rule for physical invasions; female plaintiff); Richard Roesler, *Voters Consider Property Measures; Washington, Idaho Initiatives Modeled After Oregon Law*, SPOKESMAN REV., Oct. 8, 2006, at A1 (describing role of “poster grandma” Dorothy English in securing passage of Oregon ballot initiative requiring compensation for regulatory restrictions); Laura

compelling as the hapless defenders of the hearth against a grasping state.

All of the plaintiffs shared some characteristics that made them especially easy to sell to the media and public. First, they were all white, unlike the inner city owners who are more often the victims of urban renewal efforts.<sup>25</sup> Their houses, moreover, were single-family detached buildings on the beach, so they looked like places where suburban and rural voters could imagine themselves.<sup>26</sup> The plaintiffs were tailor-made to appeal to a wide swath of Americans.

Contrast the reaction to the bulldozing a few years ago of a predominantly African American neighborhood in a historic district in New Orleans to make room for parking and commercial space around a new privatized Medical Center.<sup>27</sup> While there were only a few holdouts in Fort Trumbull, in New Orleans the state had to use its eminent domain power to acquire 42% of the properties.<sup>28</sup> Nevertheless, the media and public attention was nothing like what greeted the Fort Trumbull dispute. In fact, while the project was pending, Louisiana voters approved a partial loosening of its post-*Kelo* restrictions on eminent domain.<sup>29</sup> The Institute for Justice, significantly, did not get involved.

In short, the facts may have favored New London, but the photos and sound bites favored the plaintiffs. The result was a widespread outrage that, by the summer of 2005, had critics comparing *Kelo v. New London* to *Scott v. Sandford*.<sup>30</sup> Nevertheless . . .

Oppenheimer, *The Monday Profile: The Man Behind Measure 37: David Hunnicutt: Populist Lawyer Reigns in Aftermath of Land Use Reversal*, OREGONIAN, Dec. 20, 2004, at A1 (stating that property rights activist was kidded about the effect of “Hunnicutt’s widows” as public faces of property fights).

<sup>25</sup> Wendell E. Pritchett, *The “Public Menace” of Blight: Urban Renewal and the Private Uses of Eminent Domain*, 21 YALE L. & POL’Y REV. 1, 3, 6 (2003) (arguing that “blight” was invented to target these communities, which were its primary targets).

<sup>26</sup> Cf. Wendell E. Pritchett, *Beyond Kelo: Thinking About Urban Development in the 21st Century*, 22 GA. ST. U. L. REV. 895, 909 (2006) (attributing public reaction to fact that suburban property owners of inner ring suburbs are now experiencing eminent domain).

<sup>27</sup> Roberta Brandes Gratz, *Why Was New Orleans’s Charity Hospital Allowed to Die?*, THE NATION (Apr. 27, 2011), <http://www.thenation.com/article/why-was-new-orleans-charity-hospital-allowed-die/> [<https://perma.cc/X2V2-FSAP>]; Christopher Tidmore, *Historic Black Neighborhood to Be Sacrificed in New Orleans*, L.A. SENTINEL (Dec. 11, 2008), <https://lasentinel.net/historic-black-neighborhood-to-be-sacrificed-in-new-orleans.html> [<https://perma.cc/6KNW-BPYG>].

<sup>28</sup> Jared E. Munster, *They Took My Bedroom: A Case Study of Eminent Domain in New Orleans* 228 (Dec. 15, 2012) (unpublished Ph.D. dissertation, University of New Orleans).

<sup>29</sup> See John Lovett, *Tragedy or Triumph in Post-Katrina New Orleans? Reflections on Possession, Dispossession, Demographic Change, and Affordable Housing*, 23 J. AFFORDABLE HOUSING & CMTY. DEV. L. 289, 291 (2015).

<sup>30</sup> 60 U.S. 393 (1857). See Gwen Moritz, *An Eminently Debatable Issue: Lawyers Digest Practical Applications of Supreme Court’s Kelo Ruling*, HIGHBEAM RES.: ARK. BUS. (Aug. 1, 2005), <https://www.highbeam.com/doc/1G1-135247755.html> [<https://perma.cc/322F-UJJ5>] (“Few rulings by the U.S. Supreme Court are so momentous that their names enter the public conscience. *Kelo v. New London* seems to have the potential to join *Roe v. Wade*, *Miranda*, *Dred Scott* and *Brown v. Board of Education*.”); Mike Allen & Charles Babington, *House Votes to Undercut High Court on Property*;

### III. *KELO* IS REALLY, REALLY NOT *DRED SCOTT*

Despite the comparisons, *Kelo v. New London* is not *Dred Scott* in even more ways than Horton and Levesque discuss. It is now eleven years since the Supreme Court decided *Kelo v. New London*, and five years since the late Justice Scalia (after comparing the decision to *Dred Scott*) declared, “I do not think that the *Kelo* opinion is long for this world.”<sup>31</sup> By this time in the history of *Scott v. Sandford*,<sup>32</sup> the decision set the terms of the 1860 presidential election, contributing to Abraham Lincoln’s victory.<sup>33</sup> It was part of the propaganda leading to the Civil War in 1862.<sup>34</sup> And by 1868, the nation had deliberately abrogated the decision in the first clause of the Fourteenth Amendment.<sup>35</sup>

*Kelo* has had little impact on the law in comparison. It is still valid on the federal level. Even the state response has been exaggerated. Some cite the forty-seven states that enacted laws responding to *Kelo* to indicate just how wrong *Kelo* was,<sup>36</sup> and even Horton and Levesque call the state response “overwhelming.”<sup>37</sup> Scholars who have studied the content of these laws, however, generally conclude that most of them did not meaningfully restrict eminent domain.<sup>38</sup> One pair of property rights attorneys even declares that for most of these statutes, “the facade of reform is empty, and citizens are no better off than they were on the day *Kelo* was decided.”<sup>39</sup>

*Kelo* is also fading from the American political imagination. When I

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*Federal Funds Tied to Eminent Domain*, WASH. POST, July 1, 2005, at A1 (quoting House Representative James Sensenbrenner as saying decision “has the potential of becoming the *Dred Scott* decision of the 21st century.”).

<sup>31</sup> Debora Cassens Weiss, *Scalia Lumps Kelo Decision with Dred Scott and Roe v. Wade*, ABA J. (Oct. 19, 2011, 1:05 PM), [http://www.abajournal.com/news/article/scalia\\_lumps\\_kelo\\_decision\\_with\\_dred\\_scott\\_and\\_roe\\_v\\_wade/](http://www.abajournal.com/news/article/scalia_lumps_kelo_decision_with_dred_scott_and_roe_v_wade/) [https://perma.cc/F79U-Y56R].

<sup>32</sup> 60 U.S. 393 (1857).

<sup>33</sup> See *The Political Quadrille. Music by Dred Scott*, LIBR. OF CONGRESS PRINTS & PHOTOGRAPHS DIVISION (1860), <https://www.loc.gov/pictures/item/2008661605/> [https://perma.cc/CEF9-2WFV] (depicting Dred Scott playing the music to which the candidates dance in the 1860 presidential race).

<sup>34</sup> Austin Allen, *An Exaggerated Legacy: Dred Scott and Substantive Due Process*, in *THE DRED SCOTT CASE: HISTORICAL AND CONTEMPORARY PERSPECTIVES ON RACE AND LAW* 92 (David Thomas Konig, Paul Finkelman, & Christopher Alan Bracey eds., 2010).

<sup>35</sup> See U.S. CONST. amend. XIV, § 1, cl. 1 (“All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.”).

<sup>36</sup> See Dana Berliner, *Looking Back Ten Years After Kelo*, 125 YALE L.J. F. 82, 89 (2015), <http://www.yalelawjournal.org/forum/looking-back-ten-years-after-kelo> [https://perma.cc/E6MA-8TQQ].

<sup>37</sup> Horton & Levesque, *supra* note 1, at 1420.

<sup>38</sup> SOMIN, *supra* note 10, at 141–42 (2015); Marc Mihaly & Turner Smith, *Kelo’s Trail: A Survey of State and Federal Legislative and Judicial Activity Five Years Later*, 38 ECOLOGY L.Q. 703, 703 (2011).

<sup>39</sup> Nicholas M. Gieseler & Steven Geoffrey Gieseler, *Strict Scrutiny and Eminent Domain After Kelo*, 25 J. LAND USE & ENVTL. L. 191, 210 (2010).



speak to students entering law school, some have heard of the decision, some haven't, and none have the kind of visceral reaction that was almost universal several years ago. Donald Trump, moreover, became the Republican presidential nominee even though, as *Newsweek* reminded voters in July 2015, he was behind an egregious taking for economic development.<sup>40</sup> In the 1990s, at the request of Trump's Atlantic City casino, the city authorized the bulldozing of several homes and businesses to create parking and open space around the Trump Casino Hotel.<sup>41</sup> In contrast to the facts Horton and Levesque bring out regarding the New London plan, the private party (the Trump casino) was clear from the get go, and there were almost no restrictions on how the casino could use the land.<sup>42</sup> Well before *Kelo*, the New Jersey courts struck down this blatant giveaway to a private entity.<sup>43</sup> Yet Trump has garnered the most votes in the Republican primary, running in part on a campaign decrying government abuse of the little guy.

Of course *Kelo* still has some political impact. In 2015, when I organized a conference on the aftermath of *Kelo*, at least one city planner said it would be too politically risky for her to participate. Connecticut urban development lawyers tell me that cities are now much more reluctant to use eminent domain for economic development. The result is that some developments don't happen, and those that do happen more slowly and expensively than they would have otherwise. But this fading memory is far from the political revolution that reversed *Dred Scott*.

Perhaps the most important difference between *Scott v. Sandford* and *Kelo v. New London* is what the decisions mean for the least well off in our society. *Scott* held that an African-American could never be a citizen, could not invoke federal jurisdiction to seek his freedom, and that Congress could not even limit the states in which slavery was allowed.<sup>44</sup> Those whose properties are taken by eminent domain, in contrast, have a constitutional right to compensation, as well as substantial procedural rights to have those takings scrutinized. In this case, Susette Kelo was able to translate her resistance into a \$442,000 payoff for a house that she had paid \$53,000 for in 1997, and that was appraised at \$100,000 in 2000.<sup>45</sup>

More important, a different result in *Kelo* would have

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<sup>40</sup> Daniel Bier, *Remember When Trump Tried to Bulldoze a Widow's Home to Make a Parking Lot for Limos?*, NEWSWEEK (July 21, 2015, 3:00 PM), <http://www.newsweek.com/remember-when-trump-tried-bulldoze-widows-home-make-parking-lot-limos-355932> [https://perma.cc/4X9W-LX83].

<sup>41</sup> *Id.*

<sup>42</sup> *Casino Reinvestment Dev. Auth. v. Banin*, 727 A.2d 102, 106 (N.J. Super. 1998) (invalidating taking); see also *Kelo v. City of New London*, 545 U.S. 469, 477 (2005) (declaring condemnations invalid if they are "for the purpose of conferring a private benefit on a particular private party").

<sup>43</sup> *Banin*, 727 A.2d at 110 (holding that taking would serve a private, not public, function).

<sup>44</sup> *Scott v. Sandford*, 60 U.S. 393, 406, 432 (1857).

<sup>45</sup> Lefcoe, *supra* note 4, at 954–55.

disproportionately hurt those who already have the least power in our society. Land assembly for economic development in cities is necessary precisely to help troubled cities, like New London, deserted by white flight to the suburbs and jobs overseas, and trying to provide employment and services for the people left behind. The dissenters in *Kelo* suggested that such municipalities could only take properties that were themselves blighted,<sup>46</sup> and a number of states responded to *Kelo* by limiting economic development takings to blighted properties.<sup>47</sup> “Blight,” however, is more likely to be found for properties whose owners are poor and non-white. One scholar even argues that the concept of “blight” was invented to target communities of color in eminent domain projects.<sup>48</sup> Limiting eminent domain to blight means reserving it for those who already have less political clout to fight it.<sup>49</sup> The decision in *Kelo*, in contrast, means that cities can try to create economic development to help those who cannot flee to the suburbs, and need not target their worst-off residents in doing so.

#### IV. THE LIMITING PROPOSAL: SCRUTINY FOR PRETEXT

Finally, after convincingly arguing that *Kelo* is really not *Dred Scott*, and perhaps to show that they are not any more in favor of eminent domain abuse than the Institute for Justice, the authors propose a test to create greater scrutiny of eminent domain actions.<sup>50</sup> They argue that courts should “look more carefully at *all* condemnations with Justice Kennedy’s eye to see whether they qualify as a public use,” and name a number of factors they think should be included in this inquiry.<sup>51</sup> I agree with the authors that takings should be scrutinized for pretext. I am not sure, however, that the scrutiny they propose is either useful or necessary.

At the outset, *Kelo* was not the case that “for the first time . . .

<sup>46</sup> See *Kelo*, 545 U.S. at 498–501 (O’Connor, J., dissenting) (internal citations omitted) (arguing that a property must be designated as blighted before it can be acquired by eminent domain for private use).

<sup>47</sup> See, e.g., ALA. CODE §§ 24-2-2, 24-3-2 (2016); CAL. HEALTH & SAFETY CODE § 33030 (West 2011); IOWA CODE ANN. § 6A.22 (West 2015); MO. ANN. STAT. § 523.271 (West 2016); WIS. STAT. ANN. § 32.03(6) (West 2015); *Gallenthin Realty Dev., Inc. v. Borough of Paulsboro*, 924 A.2d 447, 464 (N.J. 2007) (invalidating a designation of a property for eminent domain taking solely because it was “in need of development”); *City of Norwood v. Horney*, 853 N.E.2d 1115, 1145–46 (Ohio 2006) (“[W]e hold that government does not have the authority to appropriate private property based on mere belief, supposition, or speculation that the property may pose such a threat [to the public health, safety, or general welfare] in the future.”).

<sup>48</sup> Pritchett, *supra* note 25, at 3 (arguing that “blight” was invented to target these communities).

<sup>49</sup> David A. Dana, *The Law and Expressive Meaning of Condemning the Poor After Kelo*, 101 NW. U. L. REV. 365, 379–80 (2007).

<sup>50</sup> Horton & Levesque, *supra* note 1, at 1426.

<sup>51</sup> *Id.*

mentioned the possibility of voiding a pretextual taking.”<sup>52</sup> *Hawaii Housing Authority v. Midkiff*<sup>53</sup> did this expressly, noting that Hawaii agreed that “the Constitution forbids even a compensated taking of property when executed for no reason other than to confer a private benefit on a particular private party” and that “[a] purely private taking could not withstand the scrutiny of the public use requirement.”<sup>54</sup> Indeed, the much maligned *Poletown* case, in which the Michigan Supreme Court upheld condemnations so that General Motors could build a factory in Detroit, agreed that “[w]here, as here, the condemnation power is exercised in a way that benefits specific and identifiable private interests, a court inspects with heightened scrutiny the claim that the public interest is the predominant interest being advanced.”<sup>55</sup>

So scrutiny for pretext is not new or controversial. Potentially more troublesome are the factors the authors propose. It should be noted that these are all simply “factors” and the authors would not require invalidation of a condemnation because one or the other factor is lacking. In fact, the authors specifically reject bright-line tests, noting that “[b]right lines are easy to apply, but are apt to permit some bad things and prohibit some good things.”<sup>56</sup> What follows, therefore, is less a critique of the authors than a word of caution for courts and legislatures applying such scrutiny in the future.

First, some of the factors may discourage public-private partnerships in creating economic development. Factor one is “[w]ill a public body own or operate the property?”<sup>57</sup> While the public should be concerned about privatization of essentially public functions, it is also clear that private entities are simply better at many of the operations that lead to economic development. As I ask my students, would you rather go to a mall operated by the government or one operated by a private entity? How about a government versus private cafeteria? As the Supreme Court said in *Berman v. Parker*,<sup>58</sup> “[t]he public end may be as well or better served through an agency of private enterprise than through a department of government—or so the Congress might conclude.”<sup>59</sup> Legislative power to decide whether private ownership will best serve public interest should not be chilled by the search for pretext.

Similarly, the authors cite as a factor “[w]ere any private beneficiaries

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<sup>52</sup> *Id.* at 1427.

<sup>53</sup> 467 U.S. 229 (1984).

<sup>54</sup> *Id.* at 245.

<sup>55</sup> *Poletown Neighborhood Council v. City of Detroit*, 304 N.W.2d 455, 459–60 (Mich. 1981).

<sup>56</sup> *Horton & Levesque*, *supra* note 1, at 1427.

<sup>57</sup> *Id.* at 1426.

<sup>58</sup> 348 U.S. 26, 33–34 (1954).

<sup>59</sup> *Id.*

known at the time of the vote to condemn?”<sup>60</sup> Again, it may well be that a project has a better chance of success if a private beneficiary has already committed to participate in the project. I agree lack of development in Fort Trumbull today is primarily due to the long delay and bad press caused by the litigation, as well as the fact that it placed the project on a collision course with the 2008 recession.<sup>61</sup> But another issue may have been that no private developer was identified before the vote to condemn occurred. Thus the plans were completed and the properties slated for destruction before any private entity had put its money on the line committing to them. Might bringing a private developer in early on have led to a better plan, and a greater commitment to see the project through to completion?

In other places, the authors endorse more scrutiny as to whether the project will succeed, and whether the condemnation is necessary to accomplish the purpose.<sup>62</sup> By asserting that this test should apply to all takings, not just those where private entities will use the property, and that it might have prevented the creation of “road or a bridge to nowhere,” the authors seem to be advocating a general judicial scrutiny of whether a government plan is in fact a good idea.<sup>63</sup> This kind of inquiry was specifically rejected in *Kelo*, *Midkiff*, and *Berman*,<sup>64</sup> and for good reason. It’s not that legislatures are necessarily good planners. Indeed, they are often bad planners—and sometimes really, really bad planners—of roads and public housing projects, just as of economic development projects. But because judges are even worse planners, judicial oversight will not lead to better results, nor will it effectively root out pretext. It will simply subject what is best decided by experts subject to public opinion and scrutiny to the distorting lens of adversarial litigation.

In the end, while I reject aspects of the authors’ proposal I agree with them on the bigger picture. Despite its abuses, eminent domain is

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<sup>60</sup> Horton & Levesque, *supra* note 1, at 1427.

<sup>61</sup> *Kelo—A Decade Later*, *supra* note 6, at 1455 (Londregan remarks).

<sup>62</sup> Horton & Levesque, *supra* note 1, at 1426 (noting also that factor three asks, “[i]s it reasonably possible the stated use will actually succeed?”; and that factor eight asks, “[i]s the particular property in question on the periphery of the project?”; and whether there were early statements that a condemnation would be approved if it had “a reasonable chance to succeed.”).

<sup>63</sup> *Id.*

<sup>64</sup> *Kelo v. City of New London*, 545 U.S. 469, 487–88 (2005) (“Alternatively, petitioners maintain that for takings of this kind we should require a ‘reasonable certainty’ that the expected public health benefits will actually accrue. Such a rule, however, would represent an even greater departure from our precedent.”); *Hawaii Hous. Auth. v. Midkiff*, 467 U.S. 229, 242–43 (1984) (“When the legislature’s purpose is legitimate and its means are not irrational, our cases make clear that empirical debates over the wisdom of takings—no less than debates over the wisdom of other kinds of socioeconomic legislation—are not to be carried out in the federal courts.”); *Berman v. Parker*, 348 U.S. 26, 33 (1954) (“We do not sit to determine whether a particular housing project is or is not desirable . . . It is within the power of the legislature to determine that the community should be beautiful as well as healthy. . . .”).

necessary to achieve the public interest, and bright line restrictions will often undermine goals of public welfare and fairness. The best the law can do is try to give governments the power to act for the public interest without unduly favoring the powerful or burdening the vulnerable. *Kelo*, by allowing troubled cities to try to bolster their economies through comprehensive planning, struck the right balance here.

