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Essay

Kelo Is Not *Dred Scott*

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The almost universal adverse reaction—politically and legally—to Kelo v. New London *is both wrong because* Kelo *is well within the legal mainstream, and misguided because it diverts attention from the real problem of eminent domain abuse.*

Far from encouraging such abuse, Kelo*, which faithfully follows existing precedents in condemnation law, actually points the way to a more muscular judicial review of government claims of public purpose in all takings cases. Focusing instead on reversing* Kelo*, its critics risk throwing out the good public purpose takings for promising economic development plans that happen to be carried out privately, while leaving untouched the bad public purpose takings for boondoggles that happen to be carried out by the government.*

ESSAY CONTENTS

Kelo Is Not *Dred Scott*

WESLEY W. HORTON & BRENDON P. LEVESQUE*

I. INTRODUCTION

I, Horton, argued *Kelo v. New London*[1] before the United States Supreme Court in 2005 on behalf of the defendants. I, Levesque, cheered him on as an associate and now a partner in the firm. Together we have since watched our firm's legal victory picked apart on the left as well as on the right.[2] We have watched Justice John Paul Stevens, the author of the 5-4 majority opinion affirming the 4-3 decision of the Connecticut Supreme Court, apologize in a speech for a part of his legal reasoning and note sheepishly that states do not have to follow *Kelo* as a matter of state law.[3] We have watched Justice Richard Palmer, a justice in the Connecticut majority, apologize personally to Mrs. Kelo at an annual meeting of the Connecticut Supreme Court Historical Society.[4] And we have watched Justice Antonin Scalia fulminate in a speech[5] about the *Kelo* decision being on par with *Dred Scott v. Sandford*.[6] To cap things off, we have watched everyone remark that ten years after the defendants got the green light from the U.S. Supreme Court, they have yet to go through the intersection.[7]

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* Principals, Horton, Shields & Knox, P.C., Hartford. Thanks to Charles Modzelewski and Elizabeth Donald for their research assistance.

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

[2] *See* Adam Liptak, *Case Won on Appeal (to Public)*, N.Y. TIMES (July 30, 2006), http://www.nytimes.com/2006/07/30/weekinreview/30liptak.html?_r=0 [https://perma.cc/8QDX-9V97] (discussing the bipartisan outrage that followed the *Kelo* decision).

[3] John Paul Stevens, *Kelo, Popularity and Substantive Due Process*, 63 ALA. L. REV. 941, 946 (2011). Although Justice Stevens stands by the result and most of the reasoning in *Kelo*, he explains that he cited 100-year-old U.S. Supreme Court cases purportedly construing the public use clause of the Fifth Amendment concerning state condemnations when in fact the cases construed only the due process clause of the Fourteenth Amendment. See, for example, *Chicago Burlington & Quincy R.R. Co. v. Chicago*, 166 U.S. 226 (1897), which was cited in Justice Stevens's opinion, but did not mention the Fifth Amendment.

[4] Whether he was apologizing for his vote or for the ordeal Mrs. Kelo went through is subject to dispute. *See* Jeff Benedict, *Apology Adds an Epilogue To* Kelo *Case*, HARTFORD COURANT (Sept. 18, 2011), http://articles.courant.com/2011-09-18/news/hc-op-justice-palmer-apology-20110918_1_kelo-case-little-pink-house-book-editor [https://perma.cc/W8E5-F7R3] (describing Justice Palmer's encounter with Susette Kelo).

[5] Justice Antonin Scalia, Keynote Address at the Illinois Institute of Technology Chicago-Kent College of Law (Oct. 18, 2011).

[6] Dred Scott v. Sandford, 60 U.S. 393 (1856).

[7] *See, e.g.*, *Seized Property Sits Vacant Nine Years After Landmark* Kelo *Eminent Domain Case*, FOX NEWS (Mar. 20, 2014), www.foxnews.com/politics/2014/03/20/seized-property-sits-vacant-nine-

We write for two reasons. First, we will show that *Kelo* is not an aberration. It is a part of the legal mainstream because it gives a reasonable and long-accepted reading of the Fifth Amendment.[8] Second, we believe the *Kelo* detractors, in their intense focus on private economic development plans, are overlooking what they really should be attacking, which is eminent domain abuse in general. If the detractors would stop focusing on overruling *Kelo*, they would see that *Kelo* can help them on this broader issue. We therefore conclude with our own proposal, based on Justice Kennedy's solo concurring opinion,[9] for building on *Kelo* rather than rejecting it.

II. *KELO* WAS PROPERLY DECIDED

Facts matter. In their briefs to the U.S. Supreme Court, the parties did not contest the following facts:[10]

The City of New London is geographically tiny. It occupies only 5.79 square miles at the junction of the Thames River and Long Island Sound in Southeastern Connecticut.[11] Go a mile east or west of downtown and you will be out of town. New London was once a center of the whaling industry and later a manufacturing hub.[12] However, New London has suffered through decades of economic decline—including an unemployment rate close to double that of the rest of the state, a shrinking population, a dearth of new home and business construction, and the departure of one of the region's principal employers, which caused the State of Connecticut Office of Planning and Management to designate New London a "distressed municipality."[13]

So the first important fact is: New London was in economic distress with few options for development.

Faced with this untenable economic situation, the New London Development Corporation (NLDC) planned a development project for the city's Fort Trumbull peninsula.[14] The NLDC is a statutory, non-stock, non-profit development corporation with a volunteer board and no independent power of eminent domain.[15] Under Connecticut law, a city may designate

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years-after-landmark-eminant-domain-case/ [https://perma.cc/A2NX-REPH] (stating property involved in *Kelo* case has yet to be developed almost ten years after decision).

[8] The last twelve words of which state, "nor shall private property be taken for public use, without just compensation." U.S. CONST. amend V.

[9] Kelo v. City of New London, 545 U.S. 469, 490, 493 (2005) (Kennedy, J., concurring).

[10] The facts are taken directly from the following sources: Brief of Respondents at 1–9, *Kelo*, 545 U.S. 469 (2005) (No. 04-108); Brief of Petitioners at 1–7, *Kelo*, 545 U.S. 469 (2005) (No. 04-108).

[11] Brief of Respondents at 1, *Kelo*, 545 U.S. 469 (No. 04-108).

[12] *Id.*

[13] *Id.*

[14] *Id.*

[15] *Id.*

such a corporation to act as its development agent for an economic development project.[16] A city may then authorize the development corporation to acquire real property through eminent domain in the project area in the city's name.[17]

So the second important fact is: the development project was prepared by a non-profit organization acting as the agent of the city.

In January 1998, Connecticut's State Bond Commission authorized $5.35 million in bonds to support planning activities, limited property acquisition, and authorized a further $10 million in bonds towards the creation of Fort Trumbull State Park.[18]

So the third important fact is: the state participated in funding the development project.

In April 1998, the New London City Council gave its initial approval for the NLDC to prepare an economic development plan for a ninety-acre section of Fort Trumbull, which included the areas in which the petitioners owned properties.[19] A mandatory environmental evaluation, which started two months later, was completed in November.[20] Following state and regional approval, the NLDC then began formulating the specifics of the plan which divided the ninety acres into seven parcels:

Parcel 1: A waterfront hotel and conference center, marinas for visiting boats and commercial vessels, and a public walkway along the waterfront.

Parcel 2: Eighty new residential properties organized in a planned urban-style neighborhood.

Parcel 3: 90,000 square feet of high technology research and development office space and parking with direct vehicular access from outside the plan area.

Parcel 4: Divided into two subparcels—4A, providing park support and marina support, including parking and retail services; and 4B, including a renovated marina for both recreational and commercial boating. In addition, the public walkway would continue through Parcel 4B.

Parcels 5-7: More office and commercial uses.[21]

So the fourth important fact is: a very detailed plan was prepared by NLDC.

As owner of the land in the development area, the NLDC was to lease the land to private developers for $1 per year.[22] After the plan was adopted,

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[16] *Id.*
[17] *Id.*
[18] *Id.* at 3.
[19] *Id.* at 4.
[20] *Id.* at 5–6.
[21] *Id.* at 6–7.
[22] Brief for Petitioners at 6, Kelo v. City of New London, 545 U.S. 469 (2005) (No. 04-108).

the NLDC negotiated a 99-year lease with developer Corcoran Jennison for parcels 1, 2, and 3 to develop projects and further lease them to tenants in its sole discretion.[23]

So the fifth important fact is: the development plan was adopted *before* the private developer was even chosen.

Pursuant to the Fort Trumbull Municipal Development Plan (Plan), Section 9.0, the NLDC or other eligible entity designated by the City of New London was to be held responsible for administering the Plan, subject to the terms and conditions of that Plan.[24] Any amendments to the Plan were contingent on acceptance and approval. Section 5.2.2 of the Plan states that zoning amendments sought by the developer must be accepted by the state and the development agency and approved by the New London Planning and Zoning Commission in accordance with zoning provisions and site plan review requirements.

So the sixth important fact is: the private developer actually had to follow the plan unless he was able to get proposed changes approved by multitudes of government bodies.

Early in 2000, the NLDC board adopted the development plan, the New London City Council approved it and authorized the NLDC to acquire the necessary properties, and the state approved the plan.[25] The 90 acres contained approximately 115 properties, virtually guaranteeing that there would be some holdouts.[26] In fact, the NLDC acquired only 100 of the properties without litigation.[27]

So the seventh important fact is: there was a holdout issue.

Meanwhile, in February 1998, one month after the state bonding decision, Pfizer, Inc., announced its plan to build a $300 million global research facility in New London on a site adjacent to the Fort Trumbull peninsula.[28] Construction began in April 1999 and was almost completed by the time the petitioners' properties were condemned in November 2000.[29] Pfizer staff began moving in early in 2001.[30]

So the eighth important fact is: without drawn-out litigation, the plan might actually have succeeded!

The *Kelo* plaintiffs owned fifteen properties, comprising a total of 0.76 acre.[31] Four properties owned by three of the petitioners were located in

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[23] *Id.*

[24] *Kelo*, 545 U.S. at 475.

[25] Brief for Respondents at 9, *Kelo*, 545 U.S. 469 (No. 04-108).

[26] *Id.*

[27] *Kelo*, 545 U.S. at 475.

[28] Brief for Respondents at 3, *Kelo*, 545 U.S. 469 (No. 04-108).

[29] *Id.*

[30] *Id.*

[31] *Id.* at 7.

Parcel 3.[32] Eleven properties owned by the remaining six petitioners, including Mrs. Kelo, were located in Parcel 4A.[33] In October 2000, after months of unsuccessful negotiations with the plaintiffs, the NLDC moved to acquire their properties by eminent domain and placed a sum in escrow with the court clerk as just compensation.[34] The NLDC, as owner of all ninety acres in the project area, would lease portions of that property to private developers.[35]

The plaintiffs immediately sued to stop the condemnation, alleging that the exercise of eminent domain violated various Connecticut statutory provisions as well as the U.S. and Connecticut Constitutions.[36]

Following a seven-day non-jury trial in 2001, Judge Thomas Corradino of the New London Superior Court issued a lengthy Memorandum of Decision which granted permanent injunctive relief in favor of the six petitioners on Parcel 4A on the ground that the need for them was too speculative while upholding the taking of the properties of the three Petitioners on Parcel 3.[37]

An appeal by the plaintiffs and a cross appeal by the defendants to the Connecticut Supreme Court followed. On March 9, 2004, in a 4-3 decision, the court affirmed the trial court on Parcel 3, but reversed it on Parcel 4A, holding that none of the challenged condemnations violated the U.S. Constitution or any of the state law provisions claimed by the plaintiffs.[38] All seven justices agreed that economic development was a legitimate public use under the U.S. Constitution, but the three dissenters would have applied a very strict test for such a condemnation.[39]

After the Connecticut Supreme Court denied the plaintiffs' motion for rehearing, they filed a Petition for a Writ of Certiorari with the United States Supreme Court. On September 28, 2004, the Court granted certiorari.

Our law firm, Horton, Shields & Knox, P.C., represented the city and

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[32] *Id.*

[33] *Id.*

[34] *Id.* at 9. *Kelo* did not concern the amount of the just compensation. After the U.S. Supreme Court decided the case, all parties resolved the just compensation issue without further court proceedings.

[35] *Id.*

[36] Kelo v. City of New London, No. 557229, 2002 WL 500238, at *1 (Conn. Super. Ct. 2002), *aff'd in part*, *rev'd in part*, 843 A.2d 500 (Conn. 2004), *aff'd*, 545 U.S. 469 (2005).

[37] *Id.* at *112.

[38] Kelo v. City of New London, 843 A.2d 500, 574 (Conn. 2004), *aff'd*, 545 U.S. at 490 (2005). The court also held that any state constitutional issue independent of the federal issue was not properly briefed. *Id.* at 521 n.29.

[39] The dissent, authored by Justice Peter Zarella, would have required the condemnor to prove, by clear and convincing evidence, that the economic plan was not just a field of dreams, in other words, that "the anticipated public benefit will be realized." *Id.* at 596 (Zarella, J., concurring in part and dissenting in part). That test seems almost impossible to satisfy because it is difficult to imagine how an urban planner can ever predict the future by clear and convincing evidence.

the NLDC before the U.S. Supreme Court.[40] The plaintiffs were represented by the Institute for Justice.[41] Being the petitioners, they filed their brief first. They did not attack previous Supreme Court decisions that had allowed condemnation to break up a land oligopoly so that tenants could buy their individual parcels,[42] or to eliminate blight in an area even if doing so required taking property that was not blighted.[43] Rather, the petitioners claimed condemnation of nonblighted property in a nonblighted area for economic development was going too far.[44] They also raised, but did not emphasize, the stricter test that would have been applied by the dissenters in the Connecticut Supreme Court.[45]

Because of the plaintiffs' briefing decisions, when it came time to write our brief, we decided to emphasize how much the facts of our case were similar to the facts of previous Supreme Court decisions.[46] Facts are what decide most cases and probably decided *Kelo*. So we emphasized facts. Our then partner, Daniel Krisch, who wrote the brief, also prepared a lengthy appendix with sizeable excerpts from the plan. To summarize, the crucial facts were that New London was economically depressed, the city was not going to benefit some specific private party (the developer had not even been chosen when the plan was adopted), there was an open democratic process, the plan was comprehensive and long-range, and it would complement state parks and private development going on next door.[47]

The oral argument was scheduled for February 27, 2005. Ironically, while legal commentators and judges will tell you that the briefs are far more important than the oral argument, since *Kelo* was decided we have heard not one word about the parties' briefs,[48] but we have heard thousands of words about two things Horton did at the oral argument, the first with much aforethought, the second with none whatsoever.

First, to the scripted remark. There is a colloquy that the opposition and their supporters have trumpeted in the press and elsewhere ever since it occurred:[49]

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[40] Brief of the Respondents, Kelo v. City of New London, 545 U.S. 469 (2005) (No. 04-108).

[41] Brief of the Petitioners, *Kelo*, 545 U.S. 469 (No. 04-108).

[42] Haw. Hous. Auth. v. Midkiff, 467 U.S. 229, 231–32 (1984).

[43] Berman v. Parker, 348 U.S. 26, 35–36 (1954).

[44] Brief of Petitioners at 26, *Kelo*, 545 U.S. 469 (No. 04-108).

[45] *Id.* at 46–48.

[46] Brief of Respondents at 2–3, *Kelo*, 545 U.S. 469 (No. 04-108).

[47] *Id.* at 1–6.

[48] A recently published book, GUY F. BURNETT, THE SAFEGUARD OF LIBERTY AND PROPERTY: THE SUPREME COURT, *KELO V. NEW LONDON*, AND THE TAKINGS CLAUSE 30–37 (Lexington Books 2015), does discuss the amicus briefs in detail, but says nothing about the parties' briefs.

[49] Bill Mears, *Supreme Court Examines Limits of City's Eminent Domain Powers*, CNN (Feb. 22, 2005 11:47 AM), www.cnn.com/2005/LAW/02/22/scotus.eminent.domain/ [https://perma.cc/N242-XSCK].

> JUSTICE O'CONNOR: For example, Motel 6 and the city thinks, well, if we had a Ritz-Carlton, we would have higher taxes. Now, is that okay?
>
> MR. HORTON: Yes, Your Honor. That would be okay.[50]

Soon after the above colloquy, the following occurred:

> JUSTICE O'CONNOR: So what are these parcels of the people now before us going to be used for?
>
> MR. HORTON: Yes, Your Honor. First of all, it's a long-range plan. If I could have the chart, please, if I may show you Your Honor.
>
> The—we are out on a peninsula here, and here is Pfizer down here, which at the time of the taking was almost completed. They moved in a month afterwards. Up here is an old state—old fort from the 19th century that the state agreed to turn into a state park as part of an overall plan. The overall plan is this whole thing.[51]

Horton had actually been mooted on the Motel 6 hypothetical, even to the use of Motel 6, and when he answered the question "no" in his moot he spent five to ten minutes trying to explain where the line was between proper and improper use of the eminent domain power. By answering "yes," he gave an answer that might have brought a hostile response from one or more of the justices. But the "yes" answer cut off questions about the line and Horton could then turn, when Justice O'Connor inevitably asked about the facts, to a large chart he had brought with him to the oral argument. The chart contained the detailed development plan that had been adopted and approved by the defendants and showed that the plan was nowhere near any line if economic development was ever a justifiable basis for condemnation.[52] In short, the "yes" answer to the Motel 6 hypothetical was a tactical decision, not a manifesto on the defendants' actual intentions.

Second, to the unscripted remark. Each side in oral arguments before the U.S. Supreme Court normally gets thirty minutes—precisely thirty minutes—to present one's case and answer questions, and that was true in

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[50] Transcript of Oral Argument at *20, *Kelo*, 545 U.S. 469 (2005) (No. 04-108), 2005 WL 529436.

[51] *Id.* at *24.

[52] Reporter Dahlia Lithwick posted an entertaining and informative report on the oral argument. *See* Dahlia Lithwick, *Condemn-Nation: This Land Was Your Land, But Now It's My Land*, SLATE (Feb. 22, 2005), http://www.slate.com/articles/news_and_politics/supreme_court_dispatches/2005/02/condemnnation.html [https://perma.cc/L4AY-T2ST] (analyzing the oral argument in *Kelo v. New London*).

Kelo. As Horton knew he was approaching the end of his time, the following occurred:

> MR. HORTON: And so it seems to me the four words I think that this Court should consider—and I'm not going to tell you the four words since my red light is on. Thank you, Your Honor.
>
> JUSTICE O'CONNOR:[53] Mr. Bullock, you have three and a half minutes.
>
> REBUTTAL ARGUMENT BY SCOTT G. BULLOCK ON BEHALF OF THE PETITIONERS
>
> JUSTICE KENNEDY: Mr. Bullock, do you know those four words?
>
> MR. BULLOCK: I wish I did. I could respond to it if I—if I actually did.[54]

Had the red light not come on until ten seconds later, the justices would have learned that the four words were "precedent," "federalism," "compensation," and "democracy." We shall return to these words shortly.

The decision was released on June 23, 2005.[55] The vote was 5-4, with Justice Stevens writing the majority opinion holding that condemnation of property to increase the tax base and revitalize an economically distressed city was a "public use" within the meaning of the Fifth Amendment.[56] Justice Kennedy was the fifth vote; he also wrote a concurring opinion that was more nuanced and fact-oriented than the majority opinion.[57] Justice O'Connor wrote the principal dissent for four justices, distinguishing *Berman* and *Midkiff*.[58] Justice Thomas joined her dissent, but also wrote a separate solo dissent attacking the line of cases *Berman* relied on going back to the 1890s.[59]

Kelo has elicited a public uproar that would make Chicken Little proud. But the sky did not fall on Chicken Little and it will not fall on the American people. Horton's four words explain why.

The main word is "precedent." *Kelo* did not make some great philosophical change in the direction of the Supreme Court. Rather, a decision for the plaintiffs would have done so. In 1954, in a unanimous

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[53] Justice Sandra Day O'Connor was presiding for the first time because Chief Justice William Rehnquist was seriously ill—he would be dead less than six months later—and Justice Stevens, the most senior Associate Justice, had missed his plane flight from his home in Florida. *Id.*

[54] Transcript of Oral Argument at *37, *Kelo*, 545 U.S. 469 (No. 04-108).

[55] *Kelo*, 545 U.S. 469.

[56] *Id.* at 489–90.

[57] *Id.* at 490–93 (Kennedy, J., concurring).

[58] *Id.* at 494, 504–05 (O'Connor, J., dissenting).

[59] *Id.* at 505, 519–23 (Thomas, J., dissenting).

decision by a court that included Justice Douglas on the left and Justice Frankfurter on the right, *Berman* decided that the Fifth Amendment did not prevent the District of Columbia from condemning Mr. Berman's nonblighted department store in a blighted area because taking it was necessary to prevent blight from returning to the area.[60] And how was taking his property going to prevent that from happening? According to the Court, because of the economic redevelopment that was going to be accomplished by the private developers once all the land was cleared of the existing buildings.[61]

When Horton was asked on a talk show by Tucker Carlson the day of the decision to justify the defendants' position in *Kelo*, he referred to the *Berman* case.[62] Tucker's response was telling: he thought Mr. Berman had had a good case.[63] Maybe so, but that was over fifty years before *Kelo*.

There are four more specific observations about *Berman*. First, *Berman* itself did not come out of the blue. During the oral argument in *Kelo*, in which Justice Scalia seemed to be hostile to *Berman*, Horton suggested the Supreme Court would also have to overrule an opinion by Justice Oliver Wendell Holmes if it was going to overrule *Berman*.[64] Justice Scalia retorted: "It wouldn't be the first of Holmes' decisions to be overruled."[65] In fact, condemning land for economic development was well established in the nineteenth century in several states (including Connecticut) for such economic engines as mills, and many were not required to be open to the general public in the manner of a public carrier.[66] More than that, Holmes had made it clear that by 1906 the train had already left the station on any argument that "public use" was less than "public purpose."[67]

Our second observation about *Berman* is that the language in that case was much broader than its facts. There was sweeping language, for example, about deferring almost entirely to legislative determinations of public use.[68]

Our third observation about *Berman* is that this sweeping language was repeated in *Midkiff*, another unanimous decision.[69] While *Midkiff* had facts

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[60] Berman v. Parker, 348 U.S. 26, 34–36 (1954).

[61] *Id.* at 35.

[62] *Eminent Eviction Debate Over Merits of Eminent Domain Ruling*, NBC NEWS, http://www.nbcnews.com/id/8346024/#.VxJjK032bIU [https://perma.cc/Y8UD-U9BX] (providing a video link and transcript for Horton's appearance with Tucker Carlson).

[63] *Id.*

[64] Transcript of Oral Argument at *35, *Kelo*, 545 U.S. 469 (No. 04-108), 2005 WL 529436; Strickley v. Highland Boy Gold Mining Co., 200 U.S. 527, 530–31 (1906). *Strickley* mentions only the Fourteenth Amendment, however.

[65] Transcript of Oral Argument at *35, *Kelo*, 545 U.S. 469 (No. 04-108), 2005 WL 529436.

[66] *Strickley*, 200 U.S. at 530–31.

[67] *Id.* at 531.

[68] Berman v. Parker, 348 U.S. 26, 35–36 (1954).

[69] Haw. Hous. Auth. v. Midkiff, 467 U.S. 229, 244 (1984).

unique to Hawaii about breaking up a land oligopoly dating back to the time of the Hawaiian monarchy, it was in one way more of a threat to property owners than *Berman*, because the tenants, not the government, paid for the land.[70] This meant that one great disincentive to condemnation—the outrage of the taxpayers who would be footing the bill—did not exist in *Midkiff*.[71] In short, if *Berman* was a bad precedent for the plaintiffs, *Midkiff* was even worse.

Our final observation about *Berman* is that *Midkiff* ironically extols the virtues of following the broad language of *Berman*.[72] Justice O'Connor, who is the public's hero today for her stirring dissent in *Kelo,* wrote *Midkiff*.[73] But her dissent in *Kelo* does the opposite of extolling the virtues of following the broad language of *Berman*: she ignores it.[74] Rather, she distinguishes *Berman* on the ground that it involved a harmful use, namely, the existence of blight.[75] But she made no such comment in *Midkiff*. In any event, the obvious response to this distinction is that Mr. Berman's property was not blighted.[76]

A decision to the contrary in *Kelo* would have encouraged governments to push the envelope on what constitutes blight.[77] That is to say, condemnation for blight is proper; however, if condemnation for economic development is not, governments will focus their economic development plans on areas that are arguably blighted—where the poor and minorities tend to reside—rather than on areas where condemnation makes the most sense for economic development.

Those who think the sky is falling may have read Justice O'Connor's dissent but perhaps they did not read Justice Kennedy's concurrence.[78] His

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[70] *Id.* at 232–33.

[71] *See id.* at 233 (noting that the taking structure involved transferring land back to existing lessees).

[72] *See id.* at 244 (indicating there is no literal requirement that condemned property be used for the general public and that if a state legislature determines there are substantial reasons for a taking, a court must defer that the taking will serve the public use).

[73] *Id.* at 231.

[74] Kelo v. City of New London, 545 U.S. 469, 499–500 (2005).

[75] *Id.* at 500.

[76] We pause to note the difference between Justice O'Connor's dissent, which gets most of the anti-*Kelo* applause, and Justice Thomas's dissent, which until recently received very little attention. Justice O'Connor does not go behind *Berman* and in our view is unable to distinguish *Berman* in any meaningful way. Justice Thomas gets to the heart of the matter and examines and rejects the basis for *Berman* in earlier decisions from the 1890s to the 1920s. Whether one agrees with his opinion or not, at least Justice Thomas's dissent addresses the fact that the majority decision is in line with the Court's precedent. *Id.* at 514–15.

[77] Some would argue that even with the decision going the way it did in *Kelo* that governments are taking property by expanding the definition of blight. *See* Ilya Somin, *Let There Be Blight: Blight Condemnations in New York After* Goldstein *and* Kaur, 38 FORDHAM URB. L.J. 1193, 1200 (2011) (indicating the broad language of blight allows almost any area to be classified as blighted, leading to condemnation).

[78] *Kelo*, 545 U.S. 469, 490 (2005).

concurrence was the fifth vote, and while he joined the majority opinion, he made it clear that his vote depended on the facts of this case.[79] The facts noted included the following:

(1) New London had a comprehensive plan with considerable public and state involvement in the planning process.[80] It was not picking on a few unpopular homeowners[81] or favoring a politically well-connected developer or adjacent property owner.[82] Over 100 properties were involved[83] and the developer had not even been selected when the plan was adopted.[84] The plan involved a mixture of housing and commercial use, as well as a hotel; it also provided for creating a public walkway to the riverfront,[85] raising the land above a flood plain and remediating environmental problems.[86] It was a long-range plan to be implemented in stages.[87]

(2) State law provided elaborate procedural requirements to facilitate judicial review for ensuring that the projected economic benefits were not de minimis and that the process was not being abused.[88] If every condemnor had to jump over the procedural hurdles erected in New London's path, there is very little cause for alarm.

(3) New London had been officially designated by the state as an economically depressed community.[89] Often times, developers are not falling over each other to invest capital in depressed communities—as we have unfortunately seen in New London since 2005.[90] Such communities

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[79] *See id.* at 493 (Kennedy, J., concurring) (noting that "while there may be categories of cases in which the transfers are so suspicious, or the procedures employed so prone to abuse, or the purported benefits . . . so trivial or implausible, that courts should presume an impermissible purpose, no such circumstances are present in this case").

[80] *Id.* at 473.

[81] *See id.* at 475 (noting that there were no "allegation[s] that any of the[] properties [were] blighted or otherwise in poor condition . . . they were condemned only because they happened to be located only in the development area").

[82] *See* Kelo v. City of New London, 843 A.2d 500, 510 (Conn. 2004), *aff'd*, 545 U.S. at 490 (2005) (noting that negotiations between the development corporation and the developer were still ongoing at the time of the original trial).

[83] *Kelo*, 545 U.S. at 474.

[84] *See Kelo*, 843 A.2d at 510 (noting that negotiations between the development corporation and the developer were still ongoing at the time of the original trial).

[85] *Kelo*, 545 U.S. at 474.

[86] *See Projects: Fort Trumbull*, RENAISSANCE CITY DEV. ASS'N, http://www.rcda.co/fort-trumbull2/ [https://perma.cc/L4XD-2JBC] (last visited Mar. 26, 2016) (describing a portion of the project's purpose to address chronic flooding).

[87] *See id.* (noting that all improvements were completed by 2008 but that three blocks of improvement remain).

[88] *See Kelo*, 545 U.S. at 493 (Kennedy, J., concurring) (noting that "[t]he city complied with [these] elaborate procedural requirements").

[89] *Id.* at 473.

[90] *See, e.g.*, Ilya Somin, *New Economic Development May Be Coming to the Neighborhood Where* Kelo v. City of New London *Occurred—But Not the Condemned Property Itself*, WASH. POST (Mar.

need more legal tools to succeed than more prosperous ones.

(4) While the Court did not focus on this point, the private developer would not own the property, but rather, the non-profit NLDC, the agent of the city, would.[91] True, the developer would have a long-term lease,[92] but if the complaint of the *Kelo* critics is that this property would be developed by a private corporation, would they be happier if the City of New London itself took the lease as the developer? And what would their legal argument be?

While Justice Kennedy did not directly say so, his concurrence was implicitly promoting the rational-basis-with-a-bite test of *City of Cleburne v. Cleburne Living Center*.[93] That is to say, judges should look for warning signs—suspicion of improper influence, backroom dealings, discrimination, vague or hasty planning—that should force them to take a closer look. But to Justice Kennedy, there were no such warning signs in New London.[94]

Looking to the future, we predict that Justice Kennedy's concurrence provides the template for which state action will or will not be vulnerable to a Takings Clause claim. As we discuss in Part III of this Essay, we also think his concurrence *should* be the template for the future. But whether the majority or Justice Kennedy's opinion is, or will be, the state of the law, we fail to see what is so shocking about the *Kelo* decision. Those who are so upset with it remind us of Captain Louis Reynaud's outburst in *Casablanca:* "I'm shocked, shocked to find that gambling is going on in here!"[95] Moreover, one must wonder what the response would be to *Kelo* now if the plan went forward and New London entered an age of prosperity. It is easy to be a Monday morning quarterback.

Let us now turn our focus to the other three words: federalism, compensation, and democracy. First, "federalism." The people who complain the loudest about *Kelo* are often the very people who extol the virtues of federalism. They often say, and justly so, that the U.S. Supreme Court is not the fount of all wisdom and the state courts should be allowed

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23, 2015), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/03/23/new-economic-development-may-be-coming-to-the-neighborhood-where-kelo-v-city-of-new-london-occurred-but-not-the-condemned-property-itsef [https://perma.cc/Q7BA-B9RE] (noting that condemned property remains empty as of 2015).

[91] Kelo v. City of New London, 843 A.2d 500, 510 (Conn. 2004), *aff'd*, 545 U.S. at 469.

[92] *Id*.

[93] *See* City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 442–47 (1985) (describing a number of reasons why the mentally retarded are not provided the level of heightened scrutiny a quasi-suspect classification would afford them, but also describing a heightened rational-basis review of the same class).

[94] *Kelo*, 545 U.S. at 493 (Kennedy, J., concurring).

[95] CASABLANCA (Warner Brothers 1943).

to experiment in different ways of addressing important legal issues.[96]

Condemnation is a perfect area to allow federalism to work its ways. The lower federal courts have been involved only rarely in this area, and after the U.S. Supreme Court's decision one week before *Kelo* in *San Remo Hotel v. City and County of San Francisco*,[97] they will be involved even more rarely.[98] The state courts have developed a robust jurisprudence on the public use doctrine. Some have distinguished between use and purpose;[99] some, like the three dissenting justices on the Connecticut Supreme Court, would impose a higher standard of review for economic development cases.[100] Many home and business owners have succeeded in state court; no one suggests such review has been perfunctory. The sky will not fall if litigation is generally concluded by the decision of a state's highest court.[101]

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[96] *See, e.g.*, Robert C. Ellickson, *Federalism and* Kelo*: A Question for Richard Epstein*, 44 TULSA L. REV. 751, 762 (2009) (arguing that, although portions of *Kelo* were rightly decided, the Supreme Court should not be "on the front lines of efforts to curb government excess[]" because several other institutions, including elected officials of the state, are better suited to the task).

[97] San Remo Hotel L.P. v. City & Cnty. of S.F., 545 U.S. 323 (2005).

[98] In *San Remo Hotel*, the Supreme Court reviewed whether there should be an exception to the full faith and credit rule to provide a federal forum for litigants who wish to advance federal takings claims that remain unripe until a state court decision denies them just compensation. *Id.* at 326–27. The Court, in affirming a classic Catch-22 decision of the Ninth Circuit, decided that no exception should be made where the state court, in ruling on the just compensation claim, also rules on the federal takings claim. *Id.* at 347–48. Justice Stevens, in writing the majority opinion, notes the obvious, that "most of the cases in our takings jurisprudence, including nearly all of the cases on which petitioners rely, came to us on writs of certiorari from state courts of last resort." *Id.* at 347 (citations omitted).

The federal courts will still be involved when a federal taking is involved, as it was this past year concerning raisins. Horne v. Dep't of Agric., 135 S. Ct. 2419 (2015) (noting that the appellants in an eminent domain case were "both raisin growers").

[99] *See, e.g.*, Gohld Realty Co. v. City of Hartford, 104 A.2d 365, 369 (Conn. 1954) ("Whether the *purpose* for which a statute authorizes the condemnation of property constitutes a public *use* is, in the end, a judicial question to be resolved by the courts." (emphasis added)).

[100] Kelo v. City of New London, 843 A.2d 500, 602 (Conn. 2004) (Zarella, J., concurring in part and dissenting in part), *aff'd*, 545 U.S. 469 (2005).

[101] This very point about federalism was emphasized by Justice Stevens in his 2011 speech. *See* Stevens, *supra* note 3, at 951 (describing the view that, consistent with the majority in *Kelo*, states have broad discretion to determine when their eminent domain power may be used).

The hostile legislative response to *Kelo* was overwhelming: forty-five states attempted to curtail the power of eminent domain.[102] The judicial response has been less hostile.

Common sense dictates that after the U.S. Supreme Court has handed down an important constitutional ruling, that state courts, interpreting their own constitutions, would follow suit. For example, after the U.S. Supreme Court decided *Berman v. Parker*,[103] holding that private property could be taken for a public purpose with just compensation paid,[104] thirty-four state supreme courts followed suit.[105]

If, as has been posited by many, *Kelo* is truly one of the most despised decisions in U.S. Supreme Court history, one would assume that a majority of state supreme courts would have rejected the holding of *Kelo* and concluded that their state constitutions offer protections that exceed those offered by the federal constitution. That has not been the trend, however.

While two courts have expressly rejected *Kelo*,[106] others have just modified it, while still others have even adopted it.[107] The reasons the courts have given, however, are not consistent. Moreover, a number of state courts have either adhered to *Kelo*, or have heeded the advice in the *Kelo* majority and implemented additional protections for the citizens of their respective states. This latter approach, however, is not a repudiation of *Kelo*, but a more careful shaping of *Kelo* to fit the individualized needs of the particular state.

Kelo was decided a few months before the Ohio Supreme Court heard oral argument in *City of Norwood v. Horney*.[108] As in *Kelo*, the question in *Norwood* was whether a municipality could take unblighted property solely for economic development.[109] The court stressed that "Ohio has always considered the right of property to be a fundamental right" and that "the bundle of venerable rights associated with property is strongly protected in the Ohio Constitution and must be trod upon lightly, no matter how great the weight of other forces."[110] In concluding that the taking did not satisfy

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[102] Ilya Somin, *The Political and Judicial Reaction to* Kelo, WASH. POST (June 4, 2015), http://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/06/04/the-political-and-judicial-reaction-to-kelo [https://perma.cc/X2XJ-T8CL].

[103] 348 U.S. 26 (1954).

[104] *Id.* at 36.

[105] INST. FOR JUSTICE, FIVE YEARS AFTER *KELO*: THE SWEEPING BACKLASH AGAINST ONE OF THE SUPREME COURT'S MOST-DESPISED DECISIONS (2010), http://ij.org/wp-content/uploads/2015/08/kelo5year_ann-white_paper.pdf [http://web.archive.org/save/_embed/http://ij.org/wp-content/uploads/2015/08/kelo5year_ann-white_paper.pdf].

[106] Norwood v. Horney, 853 N.E.2d 1115 (Ohio 2006); Bd. of Cnty. Comm'r of Muskogee Cnty. v. Lowery, 136 P.3d 639 (Okla. 2006).

[107] *E.g.*, City of Chicago v. Eychaner, 26 N.E.3d 501 (Ill. App. Ct. 2015).

[108] 853 N.E.2d 1115 (2006).

[109] *Id.* at 1122–23.

[110] *Id.* at 1129 (citations omitted).

the Ohio Constitution, the court discussed two important issues. First, the property in question was determined not to be blighted, and second, the contemplated use of the property was dependent on a private party.[111] In the end, based on concerns over governmental decision-making, the *Norwood* court severely curtailed judicial deference in the context of takings.[112]

In Oklahoma, the state supreme court rejected *Kelo* by relying on the express language of "Oklahoma's own special constitutional eminent domain provisions, Art. 2, §§ 23 & 24 of the Oklahoma Constitution, which we conclude provide private property protection to Oklahoma citizens beyond that which is afforded them by the Fifth Amendment to the U.S. Constitution."[113] The Oklahoma Constitution states "[n]o private property shall be taken or damaged for private use, with or without just compensation."[114] Based on the linguistic difference between the state and federal takings clause, the court concluded that allowing economic use to qualify as a public use would "blur the line between 'public' and 'private' so as to render our constitutional limitations on the power of eminent domain a nullity."[115] The question of what the Connecticut Supreme Court would have done under our state constitution remains unanswered. There was no question that the taking was for the benefit of a private entity.[116] A third state, South Dakota, although not directly on point, effectively repudiated the holding of *Kelo*.[117]

Other courts have not rejected *Kelo* completely, rather they have modified it instead. The authors agree with Ilya Somin that these decisions "are not inherently inconsistent with *Kelo* itself."[118] In fact, those decisions simply follow *Kelo's* admonition "that nothing in our opinion precludes any State from placing further restrictions on its exercise of the takings power."[119] The majority's point is a nod to the fact that each state has the authority to offer more protection to its citizens than the protection offered

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[111] *Id.* at 1136, 1139.

[112] *See id.* at 1136–39 ("Though narrow in scope, judicial review is not meaningless in an eminent-domain case. To the contrary, 'defining the parameters of the power of eminent domain is a judicial function.'").

[113] Bd. of Cnty. Comm'r of Muskogee Cnty. v. Lowery, 136 P.3d 639, 651 (Okla. 2006).

[114] OK. CONST. art. 2, § 23; *Lowery*, 136 P.3d at 652 (emphasis in original). The Federal takings clause provides, "nor shall private property be taken for public use, without just compensation." U.S. CONST. amend. V.

[115] *Lowery*, 136 P.3d at 652.

[116] *See* Kelo v. City of New London, 545 U.S. 469, 473 (2005) (explaining that the private pharmaceutical company, Pfizer, intended to revitalize New London in an effort to help the city grow).

[117] *See* Benson v. State, 710 N.W.2d 131, 146 (S.D. 2006) (explaining that South Dakota imposes stricter standards than are required at the federal level, providing "landowners more protection against the taking of their property").

[118] Ilya Somin, *The Judicial Reaction to* Kelo, 4 ALB. GOV'T L. REV. 1, 8 (2011).

[119] *Kelo*, 545 U.S. at 489.

by our federal constitution. The advantage to the Court's decision is that it should keep these state matters out of the hands of federal judges and in the hands of state court judges who are best fit to determine issues of state public policy.

The most recent state appellate court decision on this matter affirmed the holding of *Kelo*.[120] In *Eychaner*, the city took the plaintiff's property through the power of eminent domain and transferred it to the Blommer Chocolate Company.[121] The plaintiff argued that the city could not use its eminent domain power to condemn property in the name of economic redevelopment, if the property was in a conservation area.[122] The court disagreed, holding that the taking was proper as it "unquestionably serves a public purpose of preventing blight, promoting economic revitalization, and protecting existing industry."[123] The court did remand the matter for a new hearing on just compensation.

In addition to Illinois, two cases from the New York Court of Appeals endorse *Kelo's* broad view of "public use." Both decisions were predicated upon blight and both of them involved massive development projects involving private developers. The project in the first case, *Goldstein v. New York State Urban Development Corp.*,[124] included the construction of a new sports arena for the National Basketball Association Nets franchise.[125] The Nets were moving to Brooklyn from New Jersey.[126]

The second case, *Kaur v. New York State Urban Development Corp.*,[127] revolved around the Columbia University Educational Mixed Use Development Land Use Improvement and Civic Project.[128] The project contemplated the construction of a new urban campus for Columbia University in the West Harlem neighborhood of Manhattan.[129]

The Court of Appeals affirmed the takings in both cases. Although *Kelo* itself is not mentioned in the majority opinion of *Goldstein* and only once in the dissenting opinion, the decision clearly follows *Kelo*.

> The argument reduces to this: that the State Constitution has from its inception, in recognition of the fundamental right to

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[120] City of Chicago v. Eychaner, 26 N.E.3d 501, 520 (Ill. App. Ct. 2015).

[121] *Id.* at 504. We commend the court for its use of four maps in its decision because the maps made an understanding of the background significantly easier.

[122] *Id.* at 504–05.

[123] *Id.* at 520.

[124] 921 N.E.2d 164 (N.Y. 2009).

[125] *Id.* at 166.

[126] *See id.* at 165–66 (explaining that the state used its eminent domain powers to "take certain privately owned properties located in downtown Brooklyn for inclusion in a 22-acre mixed-use development").

[127] 933 N.E.2d 721 (N.Y. 2010).

[128] *Id*. at 724.

[129] *Id.* at 725.

> privately own property, strictly limited the availability of condemnation to situations in which the property to be condemned will actually be made available for public use, and that, with only limited exceptions prompted by emergent public necessity, the State Constitution's Takings Clause, unlike its federal counterpart, has been consistently understood literally to permit a taking of private property only for "public use," and not simply to accomplish a public purpose.
>
> Even if this gloss on this State's takings laws and jurisprudence were correct—and it is not—it is indisputable that the removal of urban blight is a proper, and, indeed, constitutionally sanctioned, predicate for the exercise of the power of eminent domain.[130]

Kaur in turn relies in large part on *Goldstein*.

Goldstein and *Kaur* share some similarities. First, they both involved enormous private developments. Second, the developments appeared likely to provide a large financial benefit for a private entity while also providing a considerable benefit for the public at large. While the Nets arena likely stimulated the economy and provided additional jobs for the local community, the Columbia campus would provide similar economic and employment benefits in addition to providing educational and research opportunities to the community.[131]

Third, both of the takings were predicated upon findings of blight, and in both cases there were questions surrounding these findings. The Court of Appeals, however, was unwilling to conclude that the blight findings were wrong even while it discussed some evidence of possible impropriety.[132]

The court's response was quite deferential to the findings in the respective blight reports. Essentially, the court concluded that the findings

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[130] *Goldstein*, 921 N.E.2d at 170–71 (footnote omitted).

[131] *See Kaur*, 933 N.E.2d at 734 ("[T]he purpose of the Project is unquestionably to promote education and academic research while providing public benefits to the local community. Indeed, the advancement of higher education is the quintessential example of a 'civic purpose.'" (citation omitted)); Josh Hoffman, Note, *Raze the Dead: Urban Blight, Private Universities, and the Path Towards Revitalization*, 74 U. PITT. L. REV. 85, 86 (2012) ("Private universities often serve as the bedrock of our urban neighborhoods; they provide jobs, culture, innovation, and an assortment of trickle-down economic benefits." (footnote omitted)); *see also* Joseph N. Boyce, *Campus Movement: Marquette University Leads Urban Revival of Blighted Environs --- In Milwaukee, School Resists Urge to Wall Itself in from Crime and Decay --- Meeting Skeptical Neighbors*, WALL ST. J., Feb. 1, 1994, at A1 (describing Marquette University's efforts to improve the surrounding neighborhood).

[132] *Kaur*, 933 N.E.2d at 732 ("Simply put, petitioners' argument that ESDC acted in 'bad faith' or pretextually is unsubstantiated by the record."); *Goldstein*, 921 N.E.2d at 172 ("It is quite possible to differ with ESDC's findings that the blocks in question are affected by numerous conditions indicative of blight, but any such difference would not, on this record, . . . amount to more than another reasonable view of the matter . . . .").

would stand if reasonable minds could disagree on the issue.[133] In the authors' opinion, it appears that the perceived potential benefits to the public outweighed any concern over the findings regarding blight and that the decisions therefore are correct.

As noted, the authors are of the opinion that *Kelo* does not need to be overruled and that any concerns regarding the blight findings in these cases could be addressed by building in some additional protections as envisioned by *Kelo*. Query whether an application of the authors' proposed test[134] would have resulted in a different outcome in these cases.[135]

Although Hawaii also follows the analytical framework of *Kelo*, *County of Hawaii v. C & J Coupe Family Ltd. P'ship*[136] raises a broader point. The question in *Coupe* was how to determine what constitutes a pretextual taking under *Kelo*.[137] Pretextual taking claims will likely make up a large part of takings litigation in the future, and the point is that, consistent with *Kelo*, states are free to fashion additional protections in order to avoid pretextual takings.

The bottom line is: federalism is alive and well after *Kelo*. Those who extol the virtues of federalism elsewhere should be praising *Kelo.*

Next, "compensation." A contrary decision in *Kelo* would have encouraged expanded use of a government's regulatory powers. The U.S. Supreme Court's decision in *Lingle v. Chevron U.S.A. Inc.*,[138] holding that inverse condemnation claims do not require the government to prove that its regulation of private property substantially advances legitimate state interests, is sufficient encouragement in that direction.[139]

There is quite a large body of law on how far governments can go in regulating the use of private property before it becomes an inverse condemnation. In 1922, the Court ruled in *Pennsylvania Coal Co. v. Mahon*[140] that the characterization of a regulatory act as a taking is dependent on the amount of diminution in the value of a property.[141] The

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[133] *See Goldstein*, 921 N.E.2d at 172 (noting that a difference in opinion was not enough to "furnish a ground to afford petitioners relief").

[134] *See infra* Part III (proposing a more flexible rule, instead of a bright line approach, to better work with the *Kelo* decision).

[135] The factors supporting the court's decisions in *Goldstein* and *Kaur* would make a persuasive argument under the authors' proposed test. The stated uses were very specific in both cases. Moreover, it was clear that the stated uses were likely to occur. The public benefit was likely to outweigh the private benefit, especially with respect to the Columbia site, which had the added benefit of the furtherance of education. *See Kaur*, 933 N.E.2d at 734 ("Indeed, the advancement of higher education is the quintessential example of a 'civic purpose.'" (citation omitted)).

[136] 198 P.3d 615, 642 (Haw. 2008).

[137] *Id.* at 620.

[138] 544 U.S. 528 (2005).

[139] *Id.* at 532.

[140] 260 U.S. 393 (1922).

[141] *Id.* at 413.

Court in *Lucas v. South Carolina Coastal Council*[142] cited *Pennsylvania Coal* in deciding that regulation preventing complete economic beneficial use of land constitutes a taking, except when the proscribed use is prohibited under nuisance law.[143] *Lucas* certainly leaves a lot of room for governments at all levels to restrict the use of land severely in the name of the public welfare without being required to pay anything to the property owner. At least *Kelo* requires just compensation.

Finally, "democracy." Decisions about the public welfare generally should be made in the democratic process at the local level, as local officials are best suited to be the arbiters of their own public policy. This is why we have zoning regulations and land use agencies to enforce them. The public welfare, as determined by the democratic process, may demand that private property be condemned for a road, a park, or a housing project to be owned by a public agency or to be owned by a private party if the property is blighted. It is not a big step from there to condemn private property for economic development in a struggling community when the plan itself has been decided upon in the democratic process and is enforceable on any private developer, as it was in *Kelo*. And even if it is a big step, the answer would not be to say economic development can never be a public use; the answer would be to create some variation on Justice Zarella's field of dreams dissent in the Connecticut Supreme Court.[144]

City councilors who vote for an unpopular condemnation are likely to be voted out of office, especially since in the usual situation the taxpayers have to pay for the property condemned. The decision in New London was made after long and public discussions. It was not a cozy backroom deal with a developer out to make a financial killing.

This brings us back to where we began. *Kelo* is not *Dred Scott.* It is the correct decision based on the facts of the case and the existing precedents. If an unpopular minority is being targeted or a particular property owner or developer is being improperly favored, the courts still exist to provide a remedy. No judge or justice at any level thought any of this was happening in *Kelo*. Everyone should slow down, take a deep breath, and conclude that the sky is not falling.

III. JUSTICE KENNEDY'S TEST SHOULD BE CLARIFIED AND APPLY TO ALL CONDEMNATIONS

Kelo has turned into an obsession for its opponents, who would draw a bright line in overruling the decision. That bright line would ban as a

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[142] 505 U.S. 1003 (1992).

[143] *Id.* at 1017–18, 1030–31 (citations omitted).

[144] *See supra* note 39 (noting the importance of knowing whether the public benefit will be served, as well as the complexity of asserting that with certainty).

violation of the Fifth Amendment public use clause condemnations transferring property to a private developer for economic development. Never mind that the U.S. Supreme Court has several times in the past 110 years unanimously read "public use" to mean "public purpose." Never mind that fifty-one years before *Kelo* the Court had expressly approved transferring property to a private developer for noneconomic development of a blighted area. Never mind that the historic case for construing "public use" much more narrowly is not exactly overwhelming.[145] For its opponents, *Kelo* is simply an outrage because of the suffering it has caused the condemnees, because condemnation for private economic development often fails to accomplish its goals, and because the potential for improper developer influence or favoritism is great.

Like all obsessions, the anti-*Kelo* obsession distorts one's perspective. The passionate complaints about *Kelo* apply in some degree to all condemnations. So here is our proposal for a constructive response to *Kelo*: reject a bright line approach that automatically delineates a public road or a bridge to nowhere as a public use and automatically delineates private economic development as not; rather, look more carefully at *all* condemnations with Justice Kennedy's eye to see whether they qualify as a public use. In doing so, a proposal for a public road may in fact more easily meet Kennedy's test than a private economic development plan. Of course, applying a balancing test requires more work by a judge than applying a bright line. But Kennedy's test, unlike a bright line, may possibly kill a publicly owned and operated boondoggle (such as, perhaps, a sports stadium). It may also save a privately owned development plan that a judge finds has a reasonable chance to succeed in reviving a dying city. The anti-*Kelo* bright line would kill the latter and save the former. We would rather kill the former and save the latter.

Justice Kennedy's test, of course, is not well developed in his concurring opinion.[146] So we take the liberty to fill in his rational-basis-with-a-bite test. Here are the factors we find implicit in his concurrence: (1) Will a public body own or operate the property? (2) How specific is the stated use? (3) Is it reasonably possible the stated use will actually succeed? (4) Is the stated use clearly a pretext? (5) Does the public gain outweigh any private gain? (6) Is there clearly improper favoritism? (7) Is

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[145] The best discussion of the subject is in ILYA SOMIN, THE GRASPING HAND: *KELO V. CITY OF NEW LONDON* & THE LIMITS OF EMINENT DOMAIN (2015). Somin is very hostile to *Kelo*. He makes the best case he can for "public use" not to mean "public purpose," but even he implicitly admits that his case falls far short of conclusive. *Id.* at 72.

[146] Ilya Somin is pessimistic that Kennedy's concurrence means very much. *See id.* at 114–16 (discussing Justice Kennedy's concurrence and stating "[t]he long term significance of Kennedy's opinion is highly conjectural"). Guy F. Burnett is less pessimistic. *See* BURNETT, *supra* note 48, at 74 ("[Justice Kennedy's] concurring opinion brought up a valuable idea which was present in the dissenting opinion in the Connecticut Supreme Court as well as the oral argument." (footnote omitted)).

there clearly improper targeting of a disfavored group? (8) Is the particular property in question on the periphery of the project? (9) Is there a comprehensive plan that any private developer must follow? (10) Were any private beneficiaries known at the time of the vote to condemn? Had this test been applied in the 1960s, we might not see quite so many roads to nowhere that exist in Connecticut and around the country.

To some extent our elaboration of the Kennedy test is suggested in the *Kelo* majority decision itself. That is why we urge the critics to work with *Kelo*, rather than try to overrule it. Before *Kelo*, there was essentially no test at all: thanks to *Berman* and *Midkiff* the government had virtual *carte blanche* because the boundary of "public use" was essentially coextensive with the boundary of the police power. The only expansion of governmental powers *Kelo* permitted was to apply the police power to a private economic development plan for a non-blighted area. On the other hand, *Kelo* for the first time at least hinted at curbing governmental power over condemnations in three aspects: (1) the "anything goes" rational basis test was not repeated, (2) the Court specifically mentioned the importance of a comprehensive plan, and (3) it also mentioned the possibility of voiding a pretextual taking. As we have already noted, Justice Kennedy's fifth vote in *Kelo* suggests additional possible restrictions, such as using the rational-basis-with-a-bite test and applying a presumption of favoritism in certain cases.

A test that applies to *all* condemnations makes much more sense than a bright line test that disqualifies all private economic development condemnations. In the New London plan itself, minor changes might have affected which side of the bright line the plan was on. For example, the actual plan had the property owned by a non-profit entity, but leased the property for ninety-nine years to a private developer to carry out the plan.[147] Suppose the owner was New London itself? Suppose the lease was for twenty years? Suppose New London actually operated the project? The answer to these questions would be relevant to a decision, but they should not be conclusive.

So people should stop comparing *Kelo* to dreadful decisions and look at the bigger picture. The bigger picture is condemnation in general, and private economic development is only a part of it. Bright lines are easy to apply but are apt to permit some bad things and prohibit some good things. Rather than imposing easy bright lines, it is better to endure the hard work of the nuanced test that Justice Kennedy's concurrence suggests and the majority opinion itself encourages, if only we would resolve to build on *Kelo* rather than destroy it.

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[147] *See* Kelo v. City of New London, 545 U.S. 469, 476 n.4 (2005) ("[T]he NLDC was negotiating a 99-year lease with Corcoran Jennison, a developer selected from a group of applicants.").