

## Looking Back Ten Years After *Kelo*

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### INTRODUCTION

For many years, states and municipalities throughout the country routinely used eminent domain for essentially private projects. The idea was that the private party—usually a larger-scale enterprise—would bring more money, more employment, and more tax dollars to the area than the current residents or small businesses provided.<sup>1</sup> There was an industry of consultants willing to

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1. It is hard to choose among the many dismaying stories of eminent domain use in the decades leading up to *Kelo*. Here are a few examples. In 1981, the Michigan Supreme Court upheld taking an entire neighborhood, complete with homes, businesses, a hospital and churches, for an auto plant that was supposed to revitalize Detroit. See *Poletown Neighborhood Council v. City of Detroit*, 304 N.W.2d 455, 459 (Mich. 1981). The project did not live up to its expectations, failed to revitalize Detroit, and probably destroyed more jobs than it created. See Ilya Somin, *Overcoming Poletown: County of Wayne v. Hathcock, Economic Development Takings, and the Future of Public Use*, 2004 MICH. ST. L. REV. 1005, 1016–17. A Texas trial court refused to stay the taking of homes for a shopping mall in Hurst, Texas. See *Texas Judge Clears Way for Expansion of Mall*, N.Y. TIMES, May 24, 1997, <http://www.nytimes.com/1997/05/24/us/texas-judge-clears-way-for-expansion-of-mall.html> [<http://perma.cc/G5TG-WBHW>]. Two of the residents were forced to move while their spouses were in the hospital dying of cancer. See Jennifer Packer, *Fighting for Home; Settlement Allows Mall Expansion, to the Sorrow of Residents*, DALL. MORNING NEWS, July 2, 2000, at 1S. Kansas upheld the taking of homes for a racetrack. See *State ex rel. Tomasic v. Unified Gov't of Wyandotte Cnty./Kan. City*, 962 P.2d 543, 554 (Kan. 1998). The Nevada Supreme Court upheld the condemnation of a commercial building for a casino consortium, relying on both the U.S. and Nevada constitutions. See *City of Las Vegas Downtown Redev. Agency v. Pappas*, 76 P.3d 1, 12 (Nev. 2003), *cert. denied*, 541 U.S. 912 (2004). The lower court opinion explained that the property was demolished after a hearing the owner did not know about and that the study declaring the area blighted had neglected even to survey the block on which the building sat. See *Las Vegas Downtown Redev. Agency v. Pappas*, No. A327519, 1996 WL 34464336 (Nev. Dist. Ct. July 3, 1996); *see also*

conduct studies that would find an area—any area—to be in need of redevelopment. Cities or states could then adopt these studies to justify the use of eminent domain for private projects that had already been planned.<sup>2</sup> Most lawyers thought there was little point in fighting this use of government power. They focused instead on trying to obtain compensation for those who lost their homes or livelihoods to the abuse of eminent domain.

I began working on my first eminent domain case in 1996, and was struck to find that here—most unusually—was a modern issue that constitutional text directly addressed. The Fifth Amendment states, “nor shall private property be taken *for public use* without just compensation.”<sup>3</sup> My initial, inexperienced impression was that this clause meant just what it said. And over the years, my conviction has not changed that this straightforward language indeed indicates an unequivocal truth—that the Constitution prohibits takings for private use.<sup>4</sup>

But on June 23, 2005, the Supreme Court decided *Kelo v. City of New London*.<sup>5</sup> It was a dramatic, 5-4 loss for constitutional rights, with sweeping language that virtually removed federal constitutional protection of private property under the Takings Clause. The Court held that “economic development” satisfied the public-use requirement of the Fifth Amendment.<sup>6</sup> Essentially any development that the local government body could anticipate benefitting the public would qualify as a public use, thus permitting the government to displace the existing owner of a property. In other words,

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Dana Berliner, *Public Power, Private Gain*, INST. FOR JUSTICE (2003), [http://castlecoalition.org/pdf/report/ED\\_report.pdf](http://castlecoalition.org/pdf/report/ED_report.pdf) [<http://perma.cc/YMC6-6RPU>] (cataloguing projects using eminent domain for private development); Dick M. Carpenter & John K. Ross, *Testing O'Connor and Thomas: Does the Use of Eminent Domain Target Poor and Minority Communities?*, 46 URB. STUD. 2447, 2455–56 (2009) (looking at areas targeted for eminent domain between 2003 and 2007 and finding that they were more likely to be poor and minority than surrounding areas).

2. George Lefcoe, *Redevelopment Takings After Kelo: What's Blight Got to Do with It?*, 17 S. CAL. REV. L. & SOC. JUST. 803, 821 (2008) (“Redevelopment agencies choose consultants who ‘know their job is not to determine if there is blight’ but to find blight where the agency wants it to be found.”).
3. U.S. CONST. amend. V (emphasis added).
4. To address two preliminary issues, I note that, first, the Fifth Amendment applies to the states through the Fourteenth Amendment. See *Chi., Burlington & Quincy R.R. Co. v. City of Chicago*, 166 U.S. 226, 235–41 (1897); *Fallbrook Irrigation Dist. v. Bradley*, 164 U.S. 112, 156–58 (1896). Second, the language means that property may be taken only for public use. E.g., *Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229, 245 (1984) (“[T]he Constitution forbids even a compensated taking of property when executed for no reason other than to confer a private benefit . . .”). Despite its somewhat convoluted construction, it does not mean that property may be taken for private use with no compensation. See, e.g., *Kelo v. City of New London*, 545 U.S. 469, 507–08 (2005) (Thomas, J., dissenting).
5. 545 U.S. at 469 (majority opinion).
6. *Id.* at 483–84.

henceforth the federal constitutional protection against private-use takings would be minimal.<sup>7</sup>

Apparently acknowledging that it was withdrawing key federal constitutional protections from the entire population of the United States, the majority opinion suggested that states remained free to restrict the use of eminent domain themselves.<sup>8</sup> In this Essay, I assess the aftermath of this suggestion, the state-level backlash against the *Kelo* decision, and the case's implications for federal constitutional law.

## I. ALMOST ENOUGH: THE STATE RESPONSE TO *KELO*

In one sense, states have filled the vacuum of federal constitutional protection amazingly well. In response to *Kelo*, a total of forty-four states changed their laws: Eleven changed their constitutions,<sup>9</sup> while forty enacted a broad range of statutory changes.<sup>10</sup>

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7. In the majority's view, there still may be protection against pretextual takings. *Id.* at 478. Some commentators believe a federal claim may also arise if the condemning agency did not conduct a thorough planning process before taking the property. *See, e.g.,* Daniel S. Hafetz, Note, *Ferretting out Favoritism: Bringing Pretext Claims After Kelo*, 77 *FORDHAM L. REV.* 3095 (2009). Justice Kennedy's concurrence suggests that in another case—although he declined to say what sort of case—a more stringent level of scrutiny with a presumption against the taking might be the proper standard of review. *Kelo*, 545 U.S. at 493 (Kennedy, J., concurring). So it's possible that some federal protection might remain, somehow, even under *Kelo*. I certainly hope so. But it is also clear that the core of constitutional protection against takings for private use has been excised from the Federal Constitution.
  8. *Kelo*, 545 U.S. at 489 (majority opinion) (“We emphasize that nothing in our opinion precludes any State from placing further restrictions on its exercise of the takings power.”).
  9. FLA. CONST. art. X, § 6 (2006); GA. CONST. art. IX, § II, para. V (2006); LA. CONST. art. I, § 4 (2006); MICH. CONST. art. X, § 2 (2006); MISS. CONST. art. 3, § 17A (2012); NEV. CONST. art. 1, § 22 (2008); N.H. CONST. Pt. First, art. 12-a (2006); N.D. CONST. art. I, § 16 (2006); S.C. CONST. art. I, § 13 (2007); TEX. CONST. art. I, § 17 (2009); VA. CONST. art. I, § 11 (2013).
  10. S.B. 68, 2005 Leg., 2d Special Sess. (Ala. 2005), H.B. 654, 2006 Leg., Reg. Sess. (Ala. 2006); H.B. 318, 24th Leg., 2d Sess. (Alaska 2006); S.B. 53, 1206, 1210, 1650, and 1809, 2005-2006 Leg., Reg. Sess. (Cal. 2006), Proposition 99 (Cal. 2009); H.B. 1411, 2006 Gen. Assemb., Reg. Sess. (Cal. 2006); S.B. 167, 2007 Gen. Assemb., Reg. Sess. (Conn. 2007); S.B. 7, 145th Gen. Assemb., Reg. Sess. (Del. 2009); H.B. 1567, 2006 Leg., Reg. Sess. (Fla. 2006); H.B. 1313, 2005-2006 Gen. Assemb., Reg. Sess. (Ga. 2006); H.B. 555, 2006 Leg., Reg. Sess. (Idaho 2006); S.B. 3086, 94th Gen. Assemb., Reg. Sess. (Ill. 2006); H.B. 1010, 114th Gen. Assemb., 2d Reg. Sess. (Ind. 2006); H.F. 2351, 81st Gen. Assemb., Reg. Sess. (Iowa 2006); S.B. 323, 2005-2006 Leg., Reg. Sess. (Kan. 2006); H.B. 508, 2006 Leg., Reg. Sess. (Ky. 2006); L.D. 1870, 122d Leg., 2d Reg. Sess. (Me. 2006); S.B. 3, 2007 Leg., Reg. Sess. (Md. 2007); H.B. 5817, 5818, 5819, 5820, 5821, 93d Leg., Reg. Sess. (Mich. 2006); S.F. 2750, 84th Leg., Reg. Sess. (Minn. 2006); H.B. 1944, 2006 Leg., Reg. Sess. (Mo. 2006); S.B. 41, 363, 56th Leg., Jan. Reg. Sess. (Mont. 2007); L.B. 924, 99th Leg., 2d Sess. (Neb. 2006); A.B. 102, 2009 Leg., 74th Sess. (Nev. 2007); S.B. 287, 2006 Gen. Ct., Reg. Sess. (N.H. 2006); H.B. 393, 2007 Leg., Reg. Sess. (N.M. 2007), S.B. 401, 2007 Leg., Reg. Sess. (N.M. 2007); H.B. 1965, 2005-2006 Gen. Assemb., Reg. Sess. (N.C. 2006); S.B. 2214, 60th Leg. Assemb.,

The bulk of these changes relate to the meaning of “public use” or “public purpose.” Thirty states tightened those definitions to various degrees.<sup>11</sup>

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- Reg. Sess. (N.D. 2007); S.B. 167, 126th Gen. Assemb., Reg. Sess. (Ohio 2005), S.B. 7, 127th Gen. Assemb., Reg. Sess. (Ohio 2007); Ballot Measure 39 (Or. 2006) (voter initiative); H.B. 2054, 2005-2006 Gen. Assemb., Reg. Sess. (Penn. 2006), S.B. 881, 2005-2006 Gen. Assemb., Reg. Sess. (Penn. 2006); S.B. 2728A, 2008 Gen. Assemb., Jan. Sess. (R.I. 2008); H.B. 1080, 2006 Leg., 81st Sess. (S.D. 2006); H.B. 3450, 3700, 104th Gen. Assemb., Reg. Sess. (Tenn. 2006), S.B. 3296, 104th Gen. Assemb., Reg. Sess. (Tenn. 2006); H.B. 1495, 80th Leg., Reg. Sess. (Tex. 2007), S.B. 7, 79th Leg., 2d Called. Sess. (Tex. 2005); H.B. 365, 2007 Leg., Gen. Sess. (Utah 2007), S.B. 117, 2006 Leg., Gen. Sess. (Utah 2006); S.B. 246, 2005-2006 Gen. Assemb., Reg. Sess. (Vt. 2006); H.B. 2954, 2007 Gen. Assemb., Reg. Sess. (Va. 2007), S.B. 781, 1296, 2007 Gen. Assemb., Reg. Sess. (Va. 2007); H.B. 1458, 2007-2008 Leg., Reg. Sess. (Wash. 2007); H.B. 4048, 2006 Leg., Reg. Sess. (W. Va. 2006); A.B. 657, 2005-2006 Leg., Reg. Sess. (Wis. 2006); H.B. 124, 2007 Leg., Gen. Sess. (Wyo. 2007).
11. LA. CONST. art. I, § 4 (only allowing takings for narrowly defined public purposes, prohibiting takings for “predominant[ly]” private use, for transfers to private entities, or solely economic development, and restricting sale and lease of property for thirty years); MICH. CONST. art. X, § 2 (excluding economic development and tax revenue enhancement from definition of public use); N.D. CONST. art. I, § 16 (2006) (economic development is not a public use); S.C. CONST. art. I, § 13 (2007) (restricting takings for economic development); ALA. CODE § 11-47-170(b) (2015) (municipalities and counties cannot condemn property for private development or “primarily” to increase tax revenue); *id.* § 11-80-1(b) (same); ALASKA STAT. ANN. § 09.55.240 (West 2015) (listing permissible public uses and prohibits transfer of condemned property to private persons for economic development without legislative authorization or without other limited exceptions); ARIZ. REV. STAT. ANN. §12-1111 (2015) (listing permissible public uses, none of which include economic development); COLO. REV. STAT. ANN. 38-1-101(1)(b)(I) (West 2015) (“[P]ublic use’ shall not include the taking of private property for transfer to a private entity for the purpose of economic development or enhancement of tax revenue.”); GA. CODE ANN. § 22-1-1(9) (West 2015) (narrowly defining public use and excluding “economic development” from the definition); IDAHO CODE ANN. § 7-701A (West 2015) (prohibiting takings for economic development and private use); 735 ILL. COMP. STAT. ANN. 30/5-5-5 (West 2015) (placing limits and conditions on acquired property being in private ownership or control); IND. CODE ANN. § 32-24-4.5-1 (West 2015) (requiring property to be used for thirty years for public use, narrowly defining public use, and excluding economic development); IOWA CODE ANN. §§ 6A.21, .22 (West 2015) (prohibiting taking of property for private use without owner’s consent); KAN. STAT. ANN. § 26-501a (West 2014) (prohibiting takings for the purpose of selling, leasing, or otherwise transferring to a private entity with some exceptions); *id.* §26-501b (allowing taking for economic development if expressly authorized by the legislature and if the legislature “consider[s] requiring compensation of at least 200% of fair market value to property owners”); KY. REV. STAT. ANN. § 416.675 (West 2015) (narrowly defining public use and prohibiting takings for economic development); ME. REV. STAT. ANN. tit. 1, § 816 (2015) (generally prohibiting takings for economic development, increases in tax revenue, or transfers to private parties); MINN. STAT. ANN. § 117.012 (West 2015) (“Eminent domain may only be used for a public use or public purpose.”); MO. ANN. STAT. § 523.271 (West 2015) (prohibiting takings solely for economic development); MONT. CODE ANN. § 70-30-102 (West 2015) (listing permissible public uses and excluding takings solely for economic development); NEV. REV. STAT. ANN. § 37.010 (West 2015) (listing permissible public uses, greatly restricting transfers to private parties, and placing burden on the condemnor to prove public use); N.H. REV. STAT. ANN. 162-K:2.IX-a (2015) (narrowly defining public use and excluding economic development); N.M. STAT. ANN. § 3-18-10 (West 2015) (providing that municipalities can only take property for

Twenty-five states changed their definitions of “blight,” requiring a closer connection between the taking and the protection of public health or safety, and diminishing the government’s ability to designate large areas as blighted based on the condition of a few properties.<sup>12</sup> Eleven states gave prior owners a

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short list of public uses); N.D. CENT. CODE ANN. § 32-15-01 (West 2015) (same); OR. REV. STAT. ANN. § 35.385 (West 2015) (requiring that condemned property be used for a public purpose for at least a reasonable amount of time); 26 PA. CONS. STAT. ANN. § 204 (West 2015) (*limiting circumstances in which property can be used for economic development*); S.D. CODIFIED LAWS § 11-7-22.1 (2014) (*prohibiting takings for the primary purpose of increased tax revenue*); TENN. CODE ANN. § 29-17-102 (West 2015) (limiting takings for economic development); TEX. GOV’T CODE ANN. § 2206.001 (West 2015) (same); VA. CODE ANN. (West 2014) § 1-219.1 (narrowly defining public use, excluding economic development from the definition, and preventing taking of surplus property); WIS. STAT. ANN. § 32.03 (6)(b) (West 2015) (generally prohibiting takings when the condemnor “intends to convey or lease the acquired property to a private entity”); WYO. STAT. ANN. § 1-26-801 (West 2014) (“[P]ublic purpose’ means the possession, occupation and enjoyment of the land by a public entity.”).

12. LA. CONST. art. I, § 4 (requiring that blighted property cause health and safety problem to be subject to condemnation); MICH. CONST. art. X, § 2 (requiring blight to be determined on a property-by-property basis, requiring clear and convincing evidence for this determination, and imposing a tighter definition of blight); S.C. CONST. art. I, § 13 (requiring that blighted property must be danger to public health or safety); ALA. CODE §24-2-2 (2015) (replacing power to acquire blighted “areas” with power to acquire blighted “property”); ARIZ. REV. STAT. ANN. § 12-1132 (2015) (requiring clear and convincing evidence of blight); CAL. HEALTH & SAFETY CODE § 33333.2, .4 (West 2015) (increasing documentation requirements for blight and narrowing definitions of physical and economic blight); COLO. REV. STAT. ANN. 38-1-101(2)(b) (West 2015) (requiring clear and convincing evidence of blight); FLA. STAT. ANN. § 73.014 (West 2015) (prohibiting the use of eminent domain to eliminate blight); GA. CODE ANN. § 22-1-1(1) (West 2015) (requiring blight to be determined on a property-by-property basis and imposing stricter requirements for health and safety problems); IDAHO CODE ANN. § 7-701A (West 2015) (requiring clear and convincing evidence of blight, imposing stricter requirements for health and safety problems, and requiring blight to be determined on a property-by-property basis); IND. CODE ANN. § 32-24-4.5-7 (West 2015) (altering the definition of blight and instituting procedural safeguards); IOWA CODE ANN. § 6A.22 (West 2015) (altering blight definitions; allowing the condemnation of nonblighted properties in urban renewal area only if seventy-five percent of individual properties in area are blighted); KAN. STAT. ANN. § 26-501b(e) (West 2015) (requiring blight to be determined on a property-by-property basis); MINN. STAT. ANN. §117.027 (West 2015) (allowing properties to be condemned only where there is danger to public health or safety; allowing non-blighted properties in blighted area to be condemned only if there are no feasible alternatives); MO. ANN. STAT. § 523.274 (West 2015) (requiring blight to be determined on a property-by-property basis; stating that agricultural land cannot be blighted); MONT. CODE ANN. § 7-15-4206 (2) (limiting criteria for finding blight); N.H. REV. STAT. ANN. § 205: 1-b (2015) (requiring blight to be determined on a property-by-property basis and that blight must cause danger to public health and safety); N.M. STAT. ANN. §§ 3-18-10, 3-60A-10 (West 2015) (prohibiting eminent domain for blight elimination, except irregular platting in one area of the state; allowing that blighted structures may be required to be repaired or demolished); N.C. GEN. STAT. ANN. § 160A-503(2a) (West 2015) (requiring blight to be determined on a property-by-property basis); OHIO REV. CODE ANN. §1.08 (West 2015) (defining blighted area to require seventy percent blighted properties); 26 PA. CONS. STAT. ANN. § 205 (West 2015) (instituting expirations for blight designations and tighter definitions of blight); TEX.

right of first refusal to repurchase property that has not been used for the purpose for which it was condemned or that is later sold by the condemnor.<sup>13</sup> Nine states changed the burden of proof in eminent domain cases, either by requiring the government to prove public use or by removing deference from the government's assertions.<sup>14</sup> And two states prohibited transferring condemned property to private parties for any reason, at least for ten years.<sup>15</sup>

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GOV'T CODE ANN. § 2206.001(b-1) (West 2015) (stating that property may be taken for economic development only if the primary purpose is blight elimination); VA. CODE ANN. § 1-219.1 (West 2015) (requiring blight to be determined on a property-by-property basis and that blight must be danger to public health and safety); W. VA. CODE ANN. § 16-18-6a (West 2015) (requiring blight to be determined on a property-by-property basis); WIS. STAT. ANN. § 32.03 (West 2015) (requiring that residential blight designations be made on property-by-property basis).

13. LA. CONST. art. I, § 4 H.(1) (providing a right of first refusal if the government tries to sell or lease property after holding it for less than thirty years); NEV. CONST. art. 1, § 22(6) (allowing owner to repurchase if property is not used in five years); ALA. CODE § 11-47-170(c) (2015) (requiring that if the condemnor seeks to sell property, the original owner be given the opportunity to repurchase); CONN. GEN. STAT ANN. §§ 8-127a(4)(b), 8-193(b)(1) (West 2015) (requiring that if the condemnor seeks to sell property, the original owner be given the opportunity to repurchase); FLA. STAT. ANN. § 73.013(1)(f)(2) (West 2015) (giving the property owner the right to repurchase property if it has not been used within ten years); GA. CODE ANN. § 22-1-2(c)(1) (West 2015) (allowing the property owner to apply to repurchase property if it has not been used within five years); MINN. STAT. ANN. § 117.226(a) (West 2015) (requiring that if the condemnor seeks to sell property, the original owner be given the opportunity to repurchase); OR. REV. STAT. ANN. § 35.385 (West 2015) (providing a right of repurchase if property is not used for public purpose within a reasonable time); S.D. CODIFIED LAWS § 11-7-22.2 (2014) (giving the property owner the right of first refusal to repurchase property if it has not been used within seven years); VA. CODE ANN. § 25.1-108 (West 2-15) (allowing the property owner to repurchase property if it has not been used and is declared surplus); WYO. STAT. ANN. § 1-26-801(d) (West 2015) (allowing the property owner to seek to repurchase property if it has not been used within ten years).
14. MICH. CONST. art. X, § 2 (placing on the government the burden of proof by preponderance of the evidence to show public use and by clear and convincing evidence to show blight); VA. CONST. art. I, § 11 (placing on the government the burden of proving public use, with no deference given); ARIZ. REV. STAT. ANN. § 12-1132 (2015) (defining public use to be a question for the judiciary; requiring the government to show blight by clear and convincing evidence); COLO. REV. STAT. ANN. 38-1-101 (West 2015) (placing on the government the burden of proof by preponderance of the evidence to show public use and by clear and convincing evidence to show blight); GA. CODE ANN. § 22-1-2 (West 2015) (placing the burden on the condemnor to prove public use); MONT. CODE ANN. § 70-30-111 (West 2014) (placing on the government the burden of proof by preponderance of the evidence to show that public interest requires the taking); NEV. REV. STAT. ANN. § 37.010 (West 2014) (placing the burden on the condemnor to prove public use); OHIO REV. CODE ANN. § 163.09 (West 2015) (placing on the government the burden of proof by preponderance of evidence to show that the taking is necessary and for public use); W. VA. CODE ANN. § 16-18-6a (West 2015) (placing on the government the burden to show property is blighted).
15. MISS. CONST. art. 3, § 17A (prohibiting the transfer of property to a private party for ten years); FLA. STAT. ANN. § 73.013 (West 2015) (same).

In three of the six remaining states without constitutional or legislative change, the high courts increased protections against takings for private use.<sup>16</sup> High courts in seven states with statutory changes also imposed additional protections.<sup>17</sup> Thus, in the aftermath of *Kelo*, a grand total of forty-seven states increased protection against takings for private use.

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16. See *Gallenthin Realty Dev., Inc. v. Borough of Paulsboro*, 924 A.2d 447 (N.J. 2007) (limiting the use of “in need of redevelopment” designations and holding that the New Jersey Constitution only permitted eminent domain for redevelopment when an area had serious blighting conditions); *Bd. of Cnty. Comm’rs v. Lowery*, 136 P.3d 639, 650-52 (Okla. 2006) (holding that economic development is not a public use under the Oklahoma Constitution). The third state, Hawaii, has seen mixed results in court. *Compare* *Cnty. of Haw. v. C&J Coupe Family Ltd. P’ship (Coupe I)*, 198 P.3d 615, 636-54 (Haw. 2008) (requiring serious factual evaluation by the trial court of the condemnee’s claim that a taking was pretextual), *with* *Cnty. of Haw. v. C&J Coupe Family Ltd. P’Ship (Coupe II)*, 242 P.3d 1136, 1146-58 (Haw. 2010) (affirming a lower court finding of no pretext on remand from *Coupe I*). Although New Jersey did eventually pass a statute purporting to increase eminent domain protections, it does not in fact increase protections in any way, and therefore I do not count it as one of the 44 states making statutory or constitutional improvements. See 2013 N.J. Laws ch. 159 (amending N.J. STAT. ANN. § 40A:12A-5 to -15 to impose less stringent conditions for use of eminent domain than required by *Gallenthin*); see also John K. Ross, *New Jersey Enacts Ponderous, Self-Negating Eminent Domain “Reform”*, REASON (Sept. 14, 2013, 3:30 PM), <http://www.reason.com/blog/2013/09/14/new-jersey-enacts-ponderous-self-negatin> [<http://perma.cc/5ZLR-6R4J>].
17. See *Mayor & City Council of Balt. v. Valsamaki*, 916 A.2d 324 (Md. 2007) (holding that the condemnor bears the burden of proof in showing “immediate need” for a quick-take procedure and noting sparse evidence of public use); *Sapero v. Mayor & City Council of Balt.*, 920 A.2d 1061 (Md. 2007) (insisting on serious conditions to justify quick-take); *State ex rel. Seabaugh v. Dolan*, 398 S.W.3d 472, 481-82 (Mo. 2013) (holding that a taking was for economic development and thus impermissible under a post-*Kelo* statute); *Centene Plaza Redev. Corp. v. Mint Props.*, 225 S.W.3d 431, 433-35 (Mo. 2007) (finding a lack of substantial evidence for a blight finding); *City of Norwood v. Horney*, 853 N.E.2d 1115, 1142 (Ohio 2006) (holding that economic development is not a public use under the Ohio Constitution and also constitutionally limiting the use of redevelopment designations); *In re Opening a Private Road for the Benefit of O’Reilly*, 5 A.3d 246, 259 (Pa. 2010) (remanding a petition to condemn a private road for consideration of whether the public is the primary and paramount beneficiary as required for a taking); *Middletown Twp. v. Lands of Stone*, 939 A.2d 331, 337-40 (Pa. 2007) (finding a claim of taking for open space to be pretextual); *Reading Area Water Auth. v. Schuylkill River Greenway Ass’n*, 100 A.3d 572, 579-84 (Pa. 2014) (rejecting a proposed taking of a drainage easement as unnecessary to the public); *R.I. Econ. Dev. Corp. v. The Parking Co.*, 892 A.2d 87, 104-06 (R.I. 2006) (holding that a taking of a parking lot lease simply to avoid unfavorable lease terms violated the constitution); *Benson v. State*, 710 N.W.2d 131, 145-46 (S.D. 2006) (stating that the “use by the public test” under the South Dakota Constitution provides more protection than the United States Constitution), *cert. denied*, 548 U.S. 905 (2006); *Utah Dep’t of Transp. v. Carlson*, 332 P.3d 900, 905-08 (Utah 2014) (reversing and remanding for a determination of whether an excess taking violated the constitution).

## II. THE PROBLEMS THAT REMAIN: *KELO*'S SURVIVING IMPACT ON PROPERTY PROTECTION AND FEDERAL CONSTITUTIONAL LAW

Even after the overwhelming state response to *Kelo*, two significant problems remain. The first is obvious—*nearly* every state provided greater protection against private takings. Some did not. Although forty-seven is a high number, that still means that, in three states (Arkansas, Massachusetts, and New York), the District of Columbia, and the U.S. territories, citizens are left with only the non-protection offered by the Supreme Court.

In jurisdictions with no statutory, constitutional, or judicial reform, courts allow the use of eminent domain for, seemingly, any private use. Since *Kelo*, the use of eminent domain in New York has been by far the worst. It sounds like a parody of takings horror stories. According to the New York Courts, all of the following were valid public purposes for eminent domain: private development around a sports stadium,<sup>18</sup> the expansion of Columbia University,<sup>19</sup> the replacement of a CVS with a Walgreens,<sup>20</sup> and the enhancement of a golf course.<sup>21</sup> The District of Columbia, which is subject only to federal constitutional restrictions, has used eminent domain for an ill-conceived shopping mall; it has taken almost a decade to land an anchor tenant.<sup>22</sup> The Supreme Court of Guam approved the taking of private land for

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18. See *Goldstein v. Pataki*, 516 F.3d 50, 55-60 (2d Cir. 2008) (finding public use despite a private purpose behind the Brooklyn Nets project while ignoring or excluding all evidence that the public purposes would not be realized), *cert. denied*, 554 U.S. 930 (2008); *Goldstein v. N.Y. State Urban Dev. Corp.*, 921 N.E.2d 164, 170-71 (N.Y. 2009) (upholding the use of eminent domain to make way for the Brooklyn Nets basketball arena).
  19. See *Kaur v. N.Y. State Urban Dev. Corp.*, 933 N.E.2d 721, 730-32 (N.Y. 2010) (upholding the expropriation of small business owners' properties for a private university's expansion campus), *cert. denied sub nom. Tuck-It-Away, Inc. v. N.Y. State Urban Dev. Corp.*, 131 S. Ct. 822 (2010).
  20. See *Didden v. Vill. of Port Chester*, 173 Fed. App'x 931, 933 (2d Cir. 2006) (developer demanded \$800,000 in exchange for not condemning property; when the owner refused, condemnation papers were filed the following day), *cert. denied*, 549 U.S. 1166 (2007); see also Press Release, Inst. for Justice, U.S. Supreme Court Declines to Hear Eminent Domain Extortion Case (Jan. 16, 2007), <http://www.ij.org/didden-latest-release> [<http://perma.cc/AT8F-YE9Y>] (discussing the case).
  21. See *Rocky Point Realty, LLC v. Town of Brookhaven*, 828 N.Y.S.2d 197, 199 (App. Div. 2007) (holding, upon no factual development whatsoever, that "the Town's stated purpose for the proposed condemnation[,] to enhance the use of the golf course" was rationally related to a conceivable public purpose); see also *GM Components Holdings, LLC v. Town of Lockport Indus. Dev. Agency*, 977 N.Y.S.2d 836, 839 (App. Div. 2013) (permitting the condemnation of ninety-one acres to build an industrial park).
  22. See *Franco v. District of Columbia*, 39 A.3d 890, 895 (D.C. 2012) (finding there did not need to be "a reasonable certainty that the expected public benefits will actually accrue"); Michael Neibauer, *Done Deal: Wal-Mart Signs Lease to Anchor Skyland Town Center*, WASH. BUS. J., Dec. 23, 2014, [http://www.bizjournals.com/washington/breaking\\_ground/2014/12/done-deal-wal-mart-signs-lease-to-anchor-skyland.html](http://www.bizjournals.com/washington/breaking_ground/2014/12/done-deal-wal-mart-signs-lease-to-anchor-skyland.html) [<http://perma.cc/98E7-2KWH>].

the benefit of the Mayor of a Guamanian city.<sup>23</sup> And a few of the states with statutory reforms have even seen court decisions weaken those protections.<sup>24</sup>

Even among the many states that made changes, every state did something different. No two states adopted the same legal changes. While homeowners in New Hampshire cannot have their property condemned for private use, homeowners in New Jersey might or might not be protected—they would probably spend five years litigating the legality of the taking—and homeowners in New York are completely out of luck. Highly varied and uneven protections might be interesting as a matter of social policy experimentation,<sup>25</sup> but they are no way to deal with the protection of constitutional rights.

This is the second and most significant problem that remains after *Kelo*: the Court set a dangerous precedent for ignoring constitutional protection for individual rights when it seems they are inconvenient to government plans. It is hard to imagine any other area of law in which the Court would say that federal courts will no longer be protecting a right that is explicitly mentioned in the Federal Constitution but suggest that instead the states are free to provide that protection. Do we want the right to free speech, or the right to be free from unreasonable searches and seizures, to vary by state, with some states providing strong protection and others virtually none? Highly varied and uneven protections would certainly allow for an interesting comparison of different policy approaches. But having such variability in the treatment of significant rights would defeat the purpose of having a federal constitution.

For this reason, the Court interprets other federal constitutional provisions as creating a floor below which the government cannot go. Even when states choose to raise that floor, the Federal Constitution still imposes real restraints on government power. We know this because some laws and policies are indeed struck down as a result of those federal restraints.<sup>26</sup> In other areas of

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23. See *Government v. 162.40 Square Meters of Land More or Less*, 2011 Guam 17 ¶¶ 24-25, cert. denied sub nom. *Ilagan v. Ungacta*, 133 S. Ct. 1802 (2013); Damon Root, *Supreme Court Continues to Avoid Eminent Domain Cases Post Kelo*, REASON (Apr. 16, 2013, 12:53 PM), <http://www.reason.com/blog/2013/04/16/supreme-court-continues-to-avoid-eminent> [<http://perma.cc/NS32-TRWB>].

24. See *State v. Kettleston*, 801 N.W.2d 160, 165 (Minn. 2011) (applying deference to a government finding of public use even after statutory amendments); *City of Austin v. Whittington*, 384 S.W.3d 766, 793 (Tex. 2012) (setting aside a jury verdict that a taking was for private use under Texas's new statute).

25. As Justice Brandeis famously suggested, a “state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.” *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

26. See, e.g., *Texas v. Johnson*, 491 U.S. 397 (1989) (holding that the First Amendment to the U.S. Constitution protects the right to desecrate the American flag and striking down a law prohibiting it); *District of Columbia v. Heller*, 554 U.S. 570 (2008) (holding that the Second Amendment to the U.S. Constitution protects an individual's right to possess a firearm for traditional purposes, like self-defense within the home); *Riley v. California*, 134 S. Ct.

constitutional law, the Court does not use the fact that states *can* enact more stringent rules as an excuse to virtually eliminate protection under the Federal Constitution. But when it comes to private takings, the Court is all too eager to pass the responsibility for rights protection (or judicial scrutiny) on to someone else. As Justice Thomas sharply noted in his *Kelo* dissent, federal courts will closely examine the justification for searching a person’s home, but not for taking it away and giving it to a private party.<sup>27</sup>

In removing the floor from the Public Use Clause, *Kelo* presents a prime example of judicial abdication. The Court decided not to exercise its duty to check the executive and legislative branches. Instead, it applied the rational-basis test—essentially, it deferred to New London’s position, despite the Constitution and despite the evidence. As the Court explained in *United States v. Carolene Products*, rational basis review is supposed to apply only to unenumerated rights.<sup>28</sup> Yet the *Kelo* Court applied it to the explicit language in the Fifth Amendment. And just as it ignored that text, it also ignored the evidence adduced at trial. The facts showed not only that the proposed project would not live up to expectations, but that it would not be constructed at all. The developer actually said that there was no market for the project and that it would not build anything.<sup>29</sup> Even under the rational-basis test, the taking could not be said to fulfill a public purpose.

It is a sign of the constitutional damage *Kelo* caused that these two related features of the opinion—blind deference and the refusal to engage with facts—have marked post-*Kelo* jurisprudence. In one of the first cases to follow *Kelo*, the Fifth Circuit held that a condemnation for “economic development” had to be constitutional even though the proposed taking of a family shrimping

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2473 (2014) (unanimously holding that the Fourth Amendment to the U.S. Constitution requires police to obtain a warrant to search a cell phone incident to arrest); *Griffin v. California*, 380 U.S. 609 (1965) (holding that a prosecutor cannot ask a criminal jury to draw an inference of guilt from a defendant’s refusal to testify at his trial, as this would punish the defendant for exercising his Fifth Amendment right against self-incrimination); *Gideon v. Wainwright*, 372 U.S. 335 (1963) (holding that the Sixth Amendment to the U.S. Constitution requires state courts to provide counsel in criminal cases to defendants who are unable to afford their own attorneys); *Loving v. Virginia*, 388 U.S. 1 (1967) (holding that a state law prohibiting interracial marriage was unconstitutional under the Fourteenth Amendment’s due process and equal protection guarantees); *Metro. Life Ins. Co. v. Ward*, 470 U.S. 869 (1985) (finding Alabama’s domestic tax preference statute for insurers unconstitutional as violative of the Fourteenth Amendment Equal Protection Clause).

27. See *Kelo v. City of New London*, 545 U.S. 469, 518 (2005) (Thomas, J., dissenting).
28. See *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 & n.4 (1938). I do not believe rational-basis review is an appropriate or rational form of constitutional analysis for any individual right. The Court certainly should not be expanding its reach even further.
29. Brief of Petitioners at 6, *Kelo v. City of New London*, 545 U.S. 469 (2005) (No. 04-108), [http://www.scotusblog.com/movabletype/archives/IJ\\_NL\\_brief\\_on\\_the\\_Merits.pdf](http://www.scotusblog.com/movabletype/archives/IJ_NL_brief_on_the_Merits.pdf) [<http://perma.cc/X5EV-EYPW>].

business would benefit a single influential family.<sup>30</sup> And while *Kelo* at least emphasized the state legislature's finding that economic development had a public purpose,<sup>31</sup> the Third Circuit later held that economic development remains a public use under the Federal Constitution even when the state legislature expressly forbids condemnation for economic development.<sup>32</sup> Continuing the trend, the Second Circuit—upholding condemnations for private development around a sports stadium—disregarded evidence that the developer had abandoned many of the alleged public purposes for the project almost immediately after it was approved.<sup>33</sup>

*Kelo*'s destructive legacy, particularly for the federal courts, is on full display in these decisions. *Kelo* directs the judiciary to uphold eminent domain no matter what the facts may be. This doctrine is inconsistent not only with the constitutional text but with the rule of law itself.

No ten-year retrospective on the *Kelo* decision would be complete without noting its aftermath in New London. No building was ever constructed on the site of the condemned homes, or even in the project area more generally<sup>34</sup>—just as the trial evidence had shown would be the case.<sup>35</sup> The project site is now a field of weeds, a home for feral cats, and, occasionally, a dumping ground for storm debris.<sup>36</sup> The original developer disappeared long ago, as have a string of subsequent developers, none of which have been able to finance the project.<sup>37</sup>

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30. See *W. Seafood Co. v. United States*, 202 Fed. App'x 670, 674-75 (5th Cir. 2006). A state trial court later held that the taking violated Texas's post-*Kelo* statute forbidding condemnation for economic development. See Andrew Wheat, *Speak No Evil*, TEX. OBSERVER, Jan. 27, 2011, <http://www.texasobserver.org/speak-no-evil> [<http://perma.cc/M9NK-4QN9>].

31. *Kelo*, 545 U.S. at 476.

32. See *Whittaker v. Cnty. of Lawrence*, 674 F. Supp. 2d 668, 689-90 (W.D. Pa. 2009), *aff'd*, 437 F. App'x 105, 108 (3d Cir. 2001) (holding that taking property to build a "high technology business park," although expressly counter to state law and possibly in bad faith, nonetheless did not violate the federal public use requirement).

33. See *Goldstein v. Pataki*, 516 F.3d 50, 55-65 (2d Cir. 2008), *cert. denied*, 554 U.S. 930 (2008).

34. Alec Torres, *Nine Years After Kelo, the Seized Land is Empty*, NAT'L REV. ONLINE (Feb. 5, 2014, 6:00 PM), <http://www.nationalreview.com/article/370441/nine-years-after-kelo-seized-land-empty-alec-torres> [<http://perma.cc/BY7B-J9JR>].

35. Brief of Petitioners, *supra* note 29, at 6.

36. ILYA SOMIN, *THE GRASPING HAND* 235 (forthcoming 2015) (citing George Lefcoe, *Jeff Benedict's Little Pink House: The Back Story of the Kelo Case*, 42 CONN. L. REV. 925, 936 (2010)); David Collins, *Feral Cats Ignore Eminent Domain*, DAY, Dec. 10, 2008, <http://www.theday.com/article/20081210/DAYARC/312109860> [<http://perma.cc/M5YP-QW73>]; Alex Nunes, *Residents Haul Debris to Fort Trumbull*, DAY, Aug. 30, 2011, <http://www.theday.com/article/20110830/MEDIA0101/110829587> [<http://perma.cc/B8TN-AVFK>].

37. See JEFF BENEDICT, *LITTLE PINK HOUSE* 377 (2009); SOMIN, *supra* note 36, at 235-37; Torres, *supra* note 34 (documenting failed attempts by three separate developers); Kathleen Edgecomb, *Riverbank Construction Found in Default of Fort Trumbull Redevelopment Agreement*, DAY, May 23, 2013, <http://www.theday.com/article/20130523/NWS01/130529798>

The only construction on the site has been some renovation of a building that New London obtained from the federal government. There has been no development at all on any property acquired by eminent domain or under threat of eminent domain.<sup>38</sup> The most recent proposal also would build only on voluntarily-acquired property.<sup>39</sup> Before condemnation, the area was a working-class neighborhood, where people knew their neighbors and where, in many cases, families had lived for generations.<sup>40</sup> Now, it lies empty, as it has for the past nine years.

What, then, are the prospects for future protection against takings for private use? For now, states will continue to be the main fora for legislative reform and constitutional litigation. State legislatures must continue to shore up their statutory and constitutional protections against eminent domain abuse. They must resist the inevitable pull toward greater discretion, toward allowing their governments to use eminent domain to sweeten the deal for private projects. Those states that have taken no legislative action must do so. In states that have a process for citizen initiatives, these can also provide long-lasting protection of rights. And state courts must give full effect to their states' legislative and constitutional reforms and provide the protections that the federal courts have denied.

But the states can only do so much on their own. I remain hopeful that, eventually, the Court will admit its mistake in *Kelo* and restore the protection against private takings that the Federal Constitution requires. Everyone has the right to be free from the threat of having her home or business seized for someone else's benefit, regardless of which state she lives in.

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38. SOMIN, *supra* note 36, at 235.

39. See Colin A. Young, *Fort Trumbull Development Negotiations Slated to Begin Next Week*, DAY, Apr. 22, 2015, <http://www.theday.com/local/20150422/fort-trumbull-development-negotiations-slated-to-begin-next-week> [<http://perma.cc/ZRT7-DHB3>].

40. See, e.g., Kathleen Edgecomb, *'It Still Hurts': Fight to Save Home Scars One Fort Trumbull Family*, DAY, June 23, 2013, <http://www.theday.com/article/20130623/NWS01/306239947> [<http://perma.cc/D3PM-MZ5F>].