Arguing *Kelo* Then and Now

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Kelo v. City of New London *was the quintessential public-interest case, featuring a cutting-edge legal issue, determined plaintiffs, and clear abuses of government power. Twenty years later, some of its most important lessons remain underexplored. We see the importance of political power in private-development takings through the fact that the government spared a well-connected property owner from eminent domain—the Italian Dramatic Club—while insisting on destruction at all costs for others. The ensuing backlash, with forty-seven states changing their laws in response to the decision, demonstrates the widespread disapproval of the cavalier way that local governments used eminent domain and disregarded its effects on the lives of ordinary people. With the Supreme Court having an originalist majority, now is a good time for the Court to reconsider* Kelo *and revive constitutional limits on the eminent-domain power.*

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At the time the Court took up *Kelo*,[1] we and our organization, the Institute for Justice (IJ), were involved in a major campaign to challenge eminent-domain abuse—where the power is used not for traditional public uses, like a road or a public building or utility, but for private economic development, taking land from private owner *A* to hand over to private owner *B*. In fact, during the time we litigated *Kelo*, we had numerous other eminent-domain cases underway—from Pittsburgh, Pennsylvania, to Canton, Mississippi, from Ohio to Arizona. This rush of litigation and our determination to change the law on eminent domain was sparked by our first eminent-domain case, where we successfully represented Vera Coking in her fight to keep her home from a taking by the Casino Reinvestment Development Authority so it could be handed over to Trump Plaza Hotel and Casino in Atlantic City, New Jersey.[2]

As we litigated these cases, we used all the other tools of public-interest law—communications, research, and grassroots activism—to shine a public spotlight on these abuses. And it was working. For instance, one year to the day before the Supreme Court granted certiorari in *Kelo*, the TV program *60 Minutes* aired a blistering piece on eminent domain for private development with the legendary Mike Wallace highlighting three instances of it throughout the country.[3]

So *Kelo* was just one piece of a larger initiative we had underway to challenge eminent domain for private use and to fundamentally change the law in this area. But even from the beginning, we knew *Kelo* was special. It had all the elements of an ideal public-interest case.

First, it had a cutting-edge legal issue and an aspect of eminent-domain law that we were intent on challenging. We had several cases challenging the abuse of blight/redevelopment statutes, but *Kelo* was a case that tackled pure economic development. The City and the private development corporation to which the City delegated its eminent-domain power—the New London Development Corporation (NLDC)—were relying on an extremely broad Connecticut statute that authorized eminent domain simply for the purpose of spurring economic development, increasing the tax base, and expanding private employment.[4] This was a vision of eminent domain without limitation and one we thought was uniquely vulnerable to challenge.

Second, we had a group of principled, determined, and sympathetic homeowners who were willing to stand up and fight. We saw that working-class grit and determination from our earliest meetings with Susette Kelo and her neighbors. Our meetings with the property owners and their community

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

2. *See* Casino Reinvestment Dev. Auth. v. Banin, 727 A.2d 102, 106-09 (N.J. Super. Ct. Law Div. 1998).

3. 60 MINUTES: *Eminent Domain* (CBS television broadcast, aired Sep. 28, 2003), https://www.paramountplus.com/shows/video/u8HZGKHEO4nbyUcbnsXjjsZ8V60vGO7Z [https://perma.cc/9SH7-DUXL].

4. *See* CONN. GEN. STAT. § 8-132 (2009).

supporters almost always took place in Susette's soon-to-be-iconic little pink house.

Rounding out the makings of an ideal public-interest case, we had outrageous abuses of power by the city and the NLDC. For instance, during the course of the litigation, as soon as the NLDC obtained a home in Fort Trumbull, it immediately tore it down, leaving the neighborhood looking like a war zone and sending a not-subtle message to the remaining homeowners that their homes would be next. It also didn't hurt our efforts to highlight the abuses underway in Fort Trumbull to the broader public that the NLDC was headed by an arrogant and out-of-control local college president who publicly admitted that she was willing to sacrifice some (i.e., the Fort Trumbull property owners) in the name of the greater good.[5]

In looking back on the Supreme Court's decision from twenty years out, we are often asked whether there was anything we would have done differently. From where the Court stood during that time, we cannot think of an alternative approach that would have changed the minds of the five Justices that ruled against us.

Anytime one argues before any court, including the U.S. Supreme Court, it is essential to have a theme, a point that captures the case in its essence and that one returns to as an anchor in both the briefs and at argument. Our theme in *Kelo* was that even though the Court had interpreted the public-use provision broadly for the past fifty years, if the Court were to sign off on this expansion, there would be no real limits to eminent domain under the Takings Clause of the Fifth Amendment.

Indeed, our opening lines in the *Kelo* argument expressed this theme:

> This case is about whether there are any limits on government's eminent domain power under the public use requirement of the Fifth Amendment. Every home, church or corner store would produce more tax revenue and jobs if it were a Costco, a shopping mall or a private office building. But if that's the justification for the use of eminent domain, then any city can take property anywhere within its borders for any private use that might make more money than what is there now.[6]

Not surprisingly, the justices tested this theme throughout the argument, but especially with the attorney for the city and NLDC, leading to this infamous exchange that occurred between opposing counsel and Justices Antonin Scalia and Sandra Day O'Connor:

5. *Oh, Claire*, HARTFORD COURANT, Feb. 25, 2001 ("'Anything that's working in our great nation,' she said, 'is working because somebody left skin on the sidewalk.'" (quoting Claire Gaudiani)).

6. Transcript of Oral Argument at 3, *Kelo*, 545 U.S. 469 (No. 04-108).

> JUSTICE SCALIA: I just want to take property from people who are paying less taxes and give it to people who are paying more taxes. That would be a public use, wouldn't it?
>
> 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 . . . .[7]

When your opposing side concedes the theme of your entire case, there is not a whole lot more you can do as an advocate to try to persuade a court. But such devastating concessions do not always lead to favorable outcomes.[8] And, in *Kelo*, Justice O'Connor could not find a fifth vote for her desire to impose some limits on eminent domain under the Fifth Amendment.[9] Justice O'Connor did, however, make the Motel 6 / Ritz Carlton example one of the centerpieces of her powerful dissenting opinion in *Kelo*, one of the last opinions she authored on the Court.[10]

Even though we would not have argued the case differently in 2005, if the issue were to be litigated today, we certainly would take a different approach. We would focus much more of our argument on originalism and the meaning of the public-use provision at the time of the Founding and its historical pedigree. While some of the amici in *Kelo* focused on this important aspect of the case, we knew at the time that such an approach was not that important to a majority of the Justices. So, we focused more on precedent and the need to impose at least some outer limits on the eminent-domain power. And we think that was the right call at the time. In the end, only Justice Thomas in his dissent, writing alone, focused on the original understanding of the Takings Clause. Today, Thomas is the only Justice left from the Court that sat for *Kelo*, but his originalist approach carries sway with a majority of the Justices now. We would focus our briefs and argument today to a much greater degree on the history and textual interpretation of Thomas's *Kelo* dissent.

The *Kelo* case was a quintessential public-interest case writ large, but it was also a quintessential eminent-domain case for us as public-interest lawyers.

Litigating the *Kelo* case was a formative experience in both our lives. For one thing, it was an absolutely classic eminent-domain case. The situation was one we saw frequently—an older waterfront neighborhood, a private party throwing its weight around, a fantastical development plan, a close-knit community, elderly residents, and first-time homeowners. The behavior of the city and NLDC also followed unfortunate norms—notices posted on people's doors at Thanksgiving, renters shut out of their homes in the winter, demands

7. *Id*. at 30.

8. *See, e.g.*, Transcript of Oral Argument at 24, Trump v. United States, 603 U.S. 593 (2024) (No. 23-939).

9. *Kelo*, 545 U.S. at 494 (O'Connor, J., dissenting).

10. *Id*. at 503.

(granted) for rapid litigation in the trial court, carving out the politically connected Italian Dramatic Club (IDC). The neighborhood held a candlelight vigil and the mayor (the only member of the city council who supported the Fort Trumbull residents) was carried away by police during a protest.

The two-week trial was intense. The lawyers cajoled each other at 2 AM to stay awake and keep working. Some of the arguments at trial were mind-boggling. We had repeated discussions where the city insisted that it was perfectly reasonable to tear down the *detached* houses and replace them with *attached* houses. Apparently, there was something terribly wrong with detached houses, although we never found out what. Some of the homes were to be replaced by "park support."[11] No two witnesses agreed what that term referred to. Other homes, the city claimed, would be replaced by an office building that the developer testified would not be built. And we secured admissions that, if the city was willing to forego a grass strip, those homes could stay. Why were homes being destroyed for a grass strip? We never really found out.

The city's argument was that it was better to just clear-cut the entire area and that it would be easier to develop that way. It wasn't true in theory—we had a respected planner testify at trial. And it certainly did not prove true in practice. The city never found a developer to do anything with the whole area and eventually had to break it up, sell portions of land at a discount, and provide huge tax breaks to get anyone to develop the land at all.[12] (And that was after twenty years.)

At trial, we painstakingly extracted the story of the role of Pfizer in deciding to remove our clients' neighborhood. One of the witnesses described it as the "10,000-pound gorilla."[13] In the end, though, all the indicia of private benefit and private involvement did not convince any of the courts. Pfizer wasn't going to be the owner of the land taken by eminent domain. Courts felt that the city and state were *trying* to do something worthwhile and ultimately did not want to look farther than that.

One sentiment we shared almost from the beginning of this case is how easily it all could have been avoided. The city and the NLDC had significant land upon which to build new projects. Indeed, the total amount of acres owned by the plaintiffs amounted to just 1.54 acres of a ninety-acre project area.[14] And the municipal development plan called for the area to be a mixed-use project with new office space, a hotel, and new residential property.

A mostly forgotten aspect of the *Kelo* case illustrates not only the fact that a vast majority of the victims of eminent-domain abuse lack political power and connections but also how easily the homes under threat could have been saved

11. Trial Transcript, Vol. I, at 168, Kelo v. City of New London, No. KNL-CV-01-0557299-S, 2002 WL 500238 (Conn. Super. Ct. 2002).

12. John Penney, *Sale of the Last City-Owned Fort Trumbull Parcels to Developer Finalized*, DAY (Nov. 3, 2024) https://theday.com/news/7729/sale-of-the-last-city-owned-fort-trumbull-parcels-to-developer-finalized [https://perma.cc/ZXQ5-YY8Z].

13. Trial Transcript, Vol. II, at 428, *Kelo*, 2002 WL 500238 (No. KNL-CV-01-0557299-S).

14. Petition for Writ of Certiorari at 6, *Kelo*, 545 U.S. 469 (No. 4-108).

and incorporated into the new project. The saga of the IDC in Fort Trumbull captures a path that could have occurred for the *Kelo* property owners if they had some of the same friends in high places.

The IDC stands at the corner of Goshen and Chelsea streets in the Fort Trumbull neighborhood of New London. Built in 1922 by Italian Americans hailing from the Marche region of Italy,[15] the Club has long existed as an exclusive, members-only men's social club. It limits membership to descendants of Italian immigrants from the Marche region. Ironically, like the Kelo House, its stucco facade is painted pink. The IDC hosts monthly dinners to which its members can bring guests. And as an institution of New London's Italian American community, the IDC has long had political significance. Connecticut politicians know the IDC as a "hot spot" for "seeking votes and financial support."[16] One article described it as "a private social club for eastern Connecticut's political elite."[17]

It counted Angelo Santaniello, for example, a longtime judge and former justice of the Connecticut Supreme Court, as a member. It also counted John Rowland, the Governor of Connecticut during the *Kelo* case, as a patron.[18] To this day the IDC hosts political events attended by candidates and elected officials, like a recent fundraiser attended by Senator Richard Blumenthal.[19] It also displays various campaign signs outside the building's front entrance. All in all, Connecticut commentators seem to agree that the IDC has "good political connections."[20]

When the prospect of redevelopment came to Fort Trumbull, the IDC relied on those connections. As the case history sets forth, Pfizer announced in 1998 that it planned to build a large research facility on the Fort Trumbull peninsula. At the same time, the city of New London revitalized the NLDC, a private redevelopment firm, and authorized it to draw up a development plan for all of Fort Trumbull. The NLDC then started buying properties in the neighborhood.[21]

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15. Michael Rocchetti, *Antonio Rocchetti (1880-1957)—The Italian Anarchist Playwright of New London CT*, WE THE ITALIANS (May 4, 2021), https://mail.wetheitalians.com/art-heritage-new-england/antonio-rocchetti-1880-1957-italian-anarchist-playwright-new-london-ct [https://perma.cc/TTZ8-9DBJ].

16. ILYA SOMIN, THE GRASPING HAND: *KELO V. CITY OF NEW LONDON* & THE LIMITS OF EMINENT DOMAIN 23 (2015).

17. Charlotte Allen, *'Kelo' Revisited*, WASH. EXAM'R (Feb. 10, 2014), https://www.washingtonexaminer.com/magazine/343975/kelo-revisited [https://perma.cc/Z9BM-HAJ2].

18. Kelo *Eminent Domain*, INST. FOR JUST., https://ij.org/case/kelo [https://perma.cc/94D3-ZB4E].

19. Image posted by New London Democratic Town Committee, FACEBOOK (Nov. 3, 2023), https://www.face-book.com/photo.php?fbid=726406766188398&set=a.225459616283118&type=3&mibextid=wwX-Ifr&rdid=rwyC8wY8HYrlnafP&share_url=https%3A%2F%2Fwww.face-book.com%2Fshare%2F1YtJriFwjK%2F%3Fmibextid%3DwwXIfr# [https://perma.cc/3EWB-WM8Q].

20. Tom Condon, *New Movie Will Revive Painful Lesson in How Not to Redevelop a City*, CT MIRROR (Apr. 2, 2018), https://ctmirror.org/2018/04/02/new-movie-will-revive-painful-lesson-not-redevelop-city [https://perma.cc/G89W-8AV5].

21. Plaintiffs' Post-Trial Brief at 2, Kelo v. City of New London, No. KNL-CV-01-0557299-S, 2002 WL 500238 (Conn. Super. Ct. 2002), Dkt. No. 14200.

Property owners in Fort Trumbull began to hear of plans to take the properties of unwilling sellers through eminent domain—with the goal of razing the entire neighborhood for redevelopment.

One of the people hearing that talk was Aldo Valentini, the president of the IDC. Valentini talked to Jay Levin, an attorney and former legislator associated with the development, about the threat of eminent domain. Levin in turn discussed the issue with several Connecticut officials across multiple agencies. In February of 1998, Levin reported to Valentini that it was "widely and completely known that the Italian Dramatic Club [was] not to be touched by anyone."[22] Every arm of the state government—"from the Governor through [the Department of Economic and Community Development] (DECD) through [the Department of Environmental Protection] (DEP) through [the Department of Transportation] (DOT)"—had "an absolute complete understanding" that the IDC was off-limits.[23] "Anyone who says otherwise," Levin wrote in a memo to Valentini, "is lying to a member of the Club and I will confront that person personally who is spreading that rumor."[24]

That understanding funneled down to the NLDC. James Mahoney, the NLDC's executive director, testified that as early as 1998 the Development Corporation knew that taking the IDC's property would have "political ramifications."[25] Taking every property in Fort Trumbull would involve taking many long-standing businesses and residential homes. But when asked if any other properties in Fort Trumbull posed political problems for the city or the redevelopment plan, Mahoney responded none, except perhaps the neighborhood's Hispanic church.[26] The NLDC's director of real-estate acquisition would similarly testify that taking the IDC would be "politically sensitive."[27]

With that knowledge, the NLDC avoided the IDC's property in the early days of the project. NLDC president Claire Gaudiani later testified that the NLDC did not attempt to buy the IDC despite purchasing many other properties.[28] As the NLDC finished its plan for Fort Trumbull, however, the IDC again faced condemnation. The private developers consulting with the NLDC preferred that all of Fort Trumbull be razed. The NLDC's finished plan had the IDC building as a part of so-called Parcel 3, along with several nearby residential homes, four of which were part of the Kelo case. All of Parcel 3 was slated for forced acquisition and demolition—and the plan called for an office building and

22. Memorandum from Jay B. Levin to Aldo Valentini (Feb. 23, 1998) (on file with authors). Jay Levin wrote an affidavit for the case and did not attend the trial. The court did not enter the affidavit into evidence. Affidavit of Jay B. Levin, Esq. (July 19, 2001) (on file with authors).

23. Memorandum from Jay B. Levin to Aldo Valentini, *supra* note 22.

24. *Id.*

25. Trial Transcript, Vol. V, at 132, *Kelo*, 2002 WL 500238 (No. KNL-CV-01-0557299-S).

26. *Id.* at 132-33.

27. Trial Transcript, Vol. II, *supra* note 13, at 215.

28. *Id.* at 238.

road to be built over the IDC's property.[29] In January of 2000, New London formally adopted this redevelopment plan and granted the NLDC the power of eminent domain to carry it out.

With the threat of losing its property looming, IDC leadership requested a special meeting with the major players of the redevelopment. On June 23, 2000, IDC president Aldo Valentini, attorney Jay Levin, and Justice Angelo Santaniello met at the IDC building.[30] With them were representatives of the redevelopment: NLDC president Claire Gaudiani, NLDC directors David Goebel and Damon Hemmerdinger, and Pfizer executive George Milne. The IDC's contingent expressed that they wanted the Club to be spared from condemnation and remain in its existing location. Valentini and Levin "stressed that the IDC is an important part of the cultural heritage of the area and symbolic of the community."[31] Levin argued on behalf of the IDC that "it would be easier to move the portion of the road planned" to be built over the IDC's property rather than forcing the IDC to move to a different location—effectively accommodating a single property owner's wishes.[32]

The development officials discussed whether this could work. The NLDC had already been investigating whether the IDC or any of the nearby homes might be spared from condemnation without ruining the plan. A few days after meeting with the IDC, Pfizer executive George Milne talked to John Rowland, the Governor of Connecticut, about the Club's situation.[33] By contrast, none of the homeowners in *Kelo* were invited to any sort of special meeting with redevelopment officials to discuss the possibility of sparing their homes.[34] The homeowners were invited only to public hearings to which everyone was invited.

But NLDC officials engaged in numerous negotiations with the IDC over whether it could stay. NLDC director David Goebel would testify that the eventual decision to save the IDC came after their June meeting, and Goebel implied that other factors supported the NLDC's actions.[35] And save the IDC they did. Damon Hemmerdinger stated that NLDC officials "worked very hard" to see if the road planned to be built over the IDC "could be aligned to clear" the building.[36] They altered the plan to allow the new road to "thread[] the needle" between the IDC and another building—the new road being so close to the other building that Hemmerdinger was unsure whether the new plan complied with city land-use requirements.[37] Jay Levin's proposed solution to redevelopment officials at their June meeting ended up serving as the solution the NLDC adopted.

29. Trial Transcript, Vol. I, *supra* note 11, at 169.
30. *Id.* at 178-79; Affidavit of Jay B. Levin, Esq., *supra* note 22, at 2.
31. Affidavit of Jay B. Levin, Esq., *supra* note 22, at 2.
32. *Id.*
33. Trial Transcript, Vol. II, *supra* note 13, at 185, 193-94.
34. *Id.* at 210.
35. Trial Transcript, Vol. I, *supra* note 11, at 179.
36. Trial Transcript, Vol. II, *supra* note 13, at 202-03.
37. *Id.*

Once the NLDC figured out a way to save the IDC, they amended the redevelopment plan to keep it. This created the unusual situation in which Parcel 3 would feature a membership club despite the terms of the redevelopment plan only permitting office uses in that area.[38] Regardless, the NLDC moved forward. In October of 2000, it voted to exercise eminent domain over the remaining unsold properties in Fort Trumbull—except for the IDC. The IDC would remain in place, and its owners would retain title to the property. Every nearby home would nonetheless be taken. This included Thelma Brelesky and Byron Athenian's house, located directly behind the IDC, and houses owned by the Cristofaro family and Richard Beyer, also located in Parcel 3 (along with the other properties at issue in so-called Parcel 4A).[39]

NLDC officials would offer purported reasons for excluding the IDC from demolition but not nearby homes. In a letter to a state agency, David Goebel claimed that three considerations justified exempting the IDC.[40] First, under the new road plan for Fort Trumbull, the IDC building would front a street, while the nearby homes would not. (Never mind that many of the homes would only lack street frontage because the NLDC planned to demolish the street in front of them.)[41] Second, the IDC building would be level with the road under the new grading plan, while the nearby homes would not be. (Never mind that the grading plan was adjusted to fit the IDC's property after officials decided to keep it.)[42] And third, the IDC building stood at the corner of a development parcel, rather than the middle, making it less of an obstacle to new development. (Never mind that several nearby homes were just as much at the "corner of a development parcel" as the IDC.)[43]

On their own terms, the NLDC's purported reasons did not make sense. Donald Aubrey worked as an engineer for New London at the time of the redevelopment. He would testify that "it was clear . . . that the plans were drawn around the presumption that all of the land would be taken" and that the planning officials "could freely lay out what improvements they wanted to lay out."[44] From this starting point, the NLDC could have saved the residential homes in Parcel 3 just as easily as the IDC if it had wanted to. In Aubrey's words, it was "a matter of choices" that could have been "done either way."[45] Nothing seems to explain the IDC's survival, then, more than its political pull.

At some point during discussions between redevelopment officials and the IDC, the NLDC sent the Club a letter. The letter promised that the NLDC would

38. Plaintiffs' Reply Brief and Response to the Court's Questions at 67, *Kelo*, No. KNL-CV-01-0557299-S, 2002 WL 500238 (Conn. Super. Ct. 2002), Dkt. No. 15000.

39. Plaintiffs' Post-Trial Brief, *supra* note 21, at 11.

40. Letter from David M. Goebel, Chief Operating Officer, New London Dev. Corp., to Rita Zangari, Deputy Comm'r, Dep't of Econ. & Cmty. Dev. (Oct. 12, 2000) (on file with authors).

41. Reply Brief of the Plaintiffs-Appellants at 38, Kelo v. City of New London, 843 A.2d 500 (Conn. 2004) (No. 16742).

42. *Id.*

43. *Id.*

44. Trial Transcript, Vol V, *supra* note 25, at 18.

45. *Id.* at 75.

never ask the IDC to move. IDC leadership framed this letter and hung it on the wall of their building.[46] A developer involved in the Fort Trumbull redevelopment described this move as the IDC saying: "If you renege on that commitment and ask us to move, we will withdraw our support for the project and actively obstruct the [plan]."[47] And the NLDC did not renege on its promise. It went ahead with its development plan, taking and razing the remaining unsold properties in Fort Trumbull. This included the homes in Parcel 3 that surrounded the IDC—but not the IDC itself. It still stands today, hosting the same dinners and political fundraisers, but now surrounded by empty, overgrown fields.

If the city, state, and NLDC had spent even a sliver of the time finding a similar solution for the fifteen homes owned by the plaintiffs in *Kelo* as it did for the IDC, the Supreme Court's decision in *Kelo* never would have occurred and perhaps the Fort Trumbull development project might have had some degree of success rather than becoming a colossal failure. In fact, after the trial court handed down its initial decision in *Kelo*, there was at least some movement toward making this a reality.

The trial judge in *Kelo* issued a split decision. It struck down the condemnations on Parcel 4A (where Susette's house was located along with ten other properties) because it was slated for something called "park support,"[48] and no one at the trial could even define what that meant. Moreover, there were no plans at all for anything to be built on Parcel 4A, so the judge found it impossible to determine whether the takings would be for a public use or were necessary to accomplish it. In contrast, even though the plans were extremely speculative, and we demonstrated at trial that there was no current market for new office space in New London, the trial judge upheld the condemnations of the four homes on Parcel 3 because there was at least some plan for the parcel.

So, after that split decision, there were discussions between IJ, the NLDC, and the city about moving the homes from Parcel 3 over to Parcel 4A and creating a housing cluster or village of the pre-existing homes in the neighborhood. It was actually an excellent idea and would have been fully in keeping with one of the more popular approaches to redevelopment today—infill projects.[49] In contrast, the Fort Trumbull plan was a throwback to the failed urban-renewal policies of the 50s and 60s, where whole neighborhoods were clear-cut and destroyed with the faint hope that something else would spring up to replace them. As a result of those policies, thousands of families were displaced, and much history was thrown away in the process. Communities were no longer rooted and were often

46. Letter from David M. Goebel to Rita Zangari, *supra* note 40.

47. *Id.*

48. Trial Transcript, Vol. I, *supra* note 11, at 168.

49. Infill development refers to developing underutilized land in existing neighborhoods, like vacant lots, rather than redeveloping the entire neighborhood. Trial Transcript, Vol. II, *supra* note 13, at 70; *see also* David Listokin, Carole C. Walker, Reid Ewing, Matt Cuddy, Alan Cander, Matthew Camp, Jennifer Senick, Henry Ney & Ralph Orlando, *Infill Development Standards and Policy Guide*, CTR. FOR URB. POL'Y 9 (Apr. 2007), https://nj.gov/dca/codes/publications/other/2006_6_rev2007_4_infill_dev_stds.pdf [https://perma.cc/Q9ZA-97YC] (describing infill development).

left with large portions of barren lots and fields. Many urban planners, inspired by the work of urbanist pioneer, Jane Jacobs, recognized how deeply flawed these programs were and started to advocate for projects that allowed for new construction and buildings while preserving existing residences and businesses and the buildings they occupy to lend a sense of community, history, and authenticity to a new project.

This could have been the path for Fort Trumbull. The Fort Trumbull property owners were very open to it. But the negotiations fell apart because the NLDC refused to make the housing village a part of the redevelopment plan for Parcel 4A (as it had for the IDC on Parcel 3) or even to repeal the authorization for the use of eminent domain for that section of the plan. So, if a developer or the NLDC would have devised some use for the parcel now or in the future, the homeowners would have once again faced a protracted and highly disruptive eminent-domain fight. The eminent-domain sword would remain over their heads indefinitely. Not surprisingly, they refused that Hobson's choice.

So, alas, the NLDC and the city refused to compromise on Parcel 4A, and the case continued on up to the Connecticut Supreme Court and ultimately to the U.S. Supreme Court. And, then, twenty years of failed attempts to spur economic development on the Fort Trumbull peninsula ensued.

And so, it went up. The Connecticut Supreme Court split 4-3.[50] The U.S. Supreme Court split 5-4.[51] New London blithely and successfully asserted its power to use eminent domain even if its only chance of success on its own terms was to benefit another private party so much that there would be some spillover effect on the local economy; even if the project was doomed to fail; even if the only reason the city was doing it in the first place was to benefit a politically favored private party.[52]

And then things went a little crazy. The first phone call IJ received, shortly after the decision came down, was from Maxine Waters, a Democratic Representative from California. Shortly thereafter, we got a call from John Cornyn, a Republican Senator from Texas. Although they did not frequently work together, the two members of Congress issued a joint statement decrying the *Kelo* decision.

The next few months saw a flood of calls from state congresspeople, senators, and governors' offices. We spent the next two years responding to requests for help with legislative reform. Five IJ lawyers split up the states and then spent months researching the law of each state and providing legislative testimony and comment.

The backlash was profound. As one of the authors discussed in her 2015 *Yale Law Journal Forum* article, eleven states changed their constitutions.[53]

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50. Kelo v. City of New London, 843 A.2d 500, 508 (Conn. 2004).

51. Kelo v. City of New London, 545 U.S. 469, 469 (2005).

52. *Id.*

53. Dana Berliner, *Looking Back Ten Years After* Kelo, 125 YALE L.J.F. 82, 83-86 (2015); *see also* FLA. CONST. art. X, § 6 (2006) (prohibiting the conveyance of real property taken via eminent domain

Forty-two states changed their statutes.[54] Eleven state high courts either explicitly rejected *Kelo* or limited the reach of their public-use clauses.[55] Substantively, these changes restricted eminent domain in a few ways:

- Thirty states tightened their definition of public use or public purpose, narrowing it to prevent eminent domain for private projects.[56] Many states added a provision stating that economic development was not a public use under the state constitution.[57]
- Twenty-five states changed their definitions of "blight," which is often a basis for eminent domain in urban areas.[58] New laws linked blight to actually dangerous conditions, instead of nebulous criteria like "inadequate planning," or made it impossible to designate an area based on a minority of properties.[59]
- Eleven states gave prior owners a right of first refusal to repurchase property that had not been used for the purpose for which it was condemned or that was later sold by the condemnor.[60]
- Nine states changed the burden of proof in eminent-domain cases, either by requiring the government to prove public use or by removing deference to the government's assertions.[61]

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to private parties except under laws enacted by a three-fifths majority of each house of the legislature); GA. CONST. art. IX, § II, para. V (2006) (requiring exercises of eminent domain by unelected bodies to first be approved by elected officials); LA. CONST. art. I, § 4 (2006) (prohibiting the taking of property for the predominant use of a private party or outright transfer to a private party; excluding economic development from public-purpose determinations); MICH. CONST. art. X, § 2 (2006) (defining "public use" to exclude takings from one private party to another for the purpose of economic development or increasing tax revenues); MISS. CONST. art. 3, § 17A (2012) (prohibiting most transfers of real property taken via eminent domain to other private parties for ten years after the taking occurs); NEV. CONST. art. 1, § 22 (2008) (prohibiting the transfer of any interest in property taken via eminent domain to other private parties); N.H. CONST. Pt. First, art. 12-a (2006) (prohibiting the transfer of property taken via eminent domain to private parties if taken for the purpose of private development or use); N.D. CONST. art. I, § 16 (2006) (excluding economic development from the definition of "public use" and "public purpose" and prohibiting the exercise of eminent domain for the use or ownership of private parties in most cases); S.C. CONST. art. I, § 13 (2007) (prohibiting the exercise of eminent domain for the purpose of economic development); TEX. CONST. art. I, § 17 (2009) (requiring takings to be for the primary purpose of "ownership, use and enjoyment of the property" by the public); VA. CONST. art. I, § 11 (2013) (excluding from the definition of "public use" any taking for the primary purpose of private gain or economic development).

54. Berliner, *supra* note 53, at 84 n.10; *see also* LA. REV. STAT. 30 § 1108 (clarifying the rights of landowners in eminent-domain cases); S.C. CODE ANN. REGS. § 28-2-10 (narrowing the scope of public use and just compensation under the state constitution and amending judicial procedures in eminent-domain actions).

55. Berliner, *supra* note 53, at 87 n.14; *see also* PKO Ventures, LLC v. Norfolk Redevelopment & Hous. Auth., 747 S.E.2d 826, 830 (Va. 2013) (holding that a statute that imposed the Virginia Constitution's meaning of "public uses" on redevelopment authorities prohibited the taking of non-blighted properties within blighted areas).

56. Berliner, *supra* note 53, at 85-86 n.11.

57. *Id.*

58. *Id.* at 86-87 n.12.

59. *Id.*

60. *Id.* at 87 n.13.

61. *Id.* at 87 n.14.

- And two states prohibited transferring condemned property to private parties for at least ten years.[62]

In the end, only three states saw no improvements at all, either legislative or judicial.

Why was the backlash so extreme? Of course, there were many factors, but we think the two most significant were (1) the fundamental unfairness of private transfers and (2) the frequent abuse of power by condemnors.

Property is intensely personal. For most people, it's home and family. For many, it is also what they do for a living and how they support their family. It's often a defining feature of people's lives. Losing one's home or business can be catastrophic and, even when it isn't, deeply disruptive and upsetting. It's something that most people can grudgingly tolerate, if they feel it is justified. But going through that for someone else's benefit, because your city thinks that person or business is more important than you and yours, strikes a very deep chord of opposition.

And then there was the routine abusive behavior. Because condemnors thought they had virtually unlimited power, they were often careless and callous of the lives they were turning upside down. We at IJ observed that, as in New London, notices about impending eminent domain often got served right around the holidays. Eminent domain often was used for projects that didn't live up to their promises or didn't materialize at all.[63] The Cristofaros, one of the New London families, had already lost one home for a project that never came through, and now they have lost two. It's been twenty years in Fort Trumbull. Many imaginary developments have come and gone. With low-cost property and millions in tax breaks, it is possible the latest chosen developer may actually build some apartments on some of the land that was taken. But the twenty years of vacancy place New London's project squarely into the category of projects that didn't happen. In short, governments frequently take property that they don't really need, and they are far less respectful and understanding than they should be. Courts and academics find such considerations beside the point, but they explain a good part of the opposition to the *Kelo* decision.

If so many states have changed their laws, is it even worth overturning *Kelo*? We think so. We have a constitution for a reason. And we passed the Fourteenth Amendment in part to ensure those constitutional protections applied to the states as well. Right now, eminent domain lacks a constitutional floor. Many states offer robust protection against takings for private parties.[64] Some states offer some protection, and a few—particularly New York—offer none.[65]

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62. *Id.* at 87 n.15.

63. *See, e.g.*, Ilya Somin, *Overcoming* Poletown*:* County of Wayne v. Hathcock*, Economic Development Takings, and the Future of Public Use*, 2004 MICH. ST. L. REV. 1005, 1012, 1015-16.

64. *See, e.g.*, FLA. CONST. art. X, § 6 (2006).

65. *See In re* Syracuse Univ. v. Proj. Orange Assocs. Servs. Corp., 71 A.D.3d 1432, 1433 (N.Y. App. Div. 2010) (holding that "virtually any project that may confer upon the public a benefit, utility, or advantage" qualifies as a constitutional public use).

Core rights should not depend on geography, and those who care about rights should not throw up their hands and settle for no federal protection at all.

Moreover, although some states appear, on paper, to have strong protections for property owners, courts sometimes ignore those protections. Both Texas and Louisiana changed their constitutions, and courts still upheld takings that benefited private parties.[66] Both Minnesota and Colorado forbid deference to government assertions of public use, and courts nevertheless apply deference.[67]

Kelo also has engendered quite a bit of confusion among courts. The *Kelo* majority made much of the importance of the planning process.[68] Does that mean that eminent domain that proceeds in a haphazard manner, without thorough planning, violates the Constitution? Some courts have thought so; others not. The majority also implied that pretextual takings are improper, but courts have difficulty determining what counts as a pretext.[69] And the Second Circuit seems to think that pretextual takings are a problem only if they hide a private purpose (as opposed to other improper purposes).[70] Many other courts disagree.[71]

State and local governments still need constitutional boundaries for eminent domain, and owners still need consistent protection from abuse.

The one thing that we would never change was how much time we spent with the owners and in the neighborhood. During the trial, we took breaks by getting a quick meal or drink with the owners. In the few years that followed, we talked to them frequently and worked with them on legislative reforms. Even now, decades later, we remain friends and stay in touch.

It is so easy in law to forget that seemingly esoteric legal terms can have life-changing effects on real people. Even the term "eminent domain" sounds technical; the words don't mean anything in plain English. The *Kelo* case was about law, but it was also very much about the owners: Susette Kelo, the Derys, the Cristofaros, Thelma Brelesky and Byron Athenian, the Guretskys, Richard Beyer, and Bill Von Winkle.

66. 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); St. Bernard Port, Harbor & Terminal Dist. v. Violet Dock Port, Inc., 239 So. 3d 243, 251-52 (La. 2018) (permitting a public port authority to condemn a private port operator's land even if the taking reduced its economic competition).

67. *See* State v. Kettleson, 801 N.W.2d 160, 165 (Minn. 2011) (applying deference to a government finding of public use even after statutory amendments); Carousel Farms Metro. Dist. v. Woodcrest Homes, Inc., 442 P.3d 402, 409 (Colo. 2019) (same).

68. Kelo v. City of New London, 545 U.S. 469, 475-76 (2005).

69. *Id.* at 477.

70. *See* Goldstein v. Pataki, 516 F.3d 50, 60 (2d Cir. 2008) ("Once we discern a valid public use to which the project is rationally related, it makes no difference that the property will be transferred to private developers, for the power of eminent domain is merely the means to the end." (citation omitted)); Brinkmann v. Town of Southold, 96 F.4th 209, 219 (2d Cir. 2024).

71. *See Brinkmann*, 96 F.4th at 219 (Menashi, C.J., dissenting).