Introduction to the *Yale Journal on Regulation* Symposium on the Twentieth Anniversary of *Kelo v. City of New London*

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We are pleased to introduce this Symposium on the twentieth anniversary of the United States Supreme Court's ruling in *Kelo v. City of New London*.[1] *Kelo* is an extremely important ruling, significant both for its doctrinal effects and also for the strong political reaction it generated. Both the doctrinal debate and the political reverberations persist to this day. The twentieth anniversary of the Court's ruling is a fitting time to consider both.

Kelo held that the Fifth Amendment requirement that takings must be for a "public use" does not bar the employment of eminent domain to take homes for privately owned "economic development."[2] The Court's majority endorsed a broad definition of "public use" that included almost anything that might benefit the public.[3] The close 5-4 decision reinvigorated a longstanding debate between proponents of the "narrow" and "broad" views of "public use."[4] The former view holds that a public use exists only if the condemned property is used for a publicly owned facility, or transferred to a private owner that has a legal duty to serve the entire public (as in the case of a common carrier or public utility). The latter equates public use with public benefit and holds that one exists virtually anytime the condemned property is used for a purpose that might benefit the public in some way.[5]

Prior to *Kelo*, many assumed that debate had been definitively resolved in favor of the broad view by decisions such as *Berman v. Parker*,[6] and *Hawaii Housing Authority v. Midkiff*,[7] even though some state supreme courts continued to follow the narrow view or something resembling it under their state

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1. 545 U.S. 469 (2005).
2. *See id.* at 477-85.
3. *Id.*
4. For an overview of the debate and its history, see ILYA SOMIN, THE GRASPING HAND: KELO V. CITY OF NEW LONDON AND THE LIMITS OF EMINENT DOMAIN ch. 2 (rev. ed. 2016).
5. For a more detailed summary of the two views, see *id.* at 35-36.
6. 348 U.S. 26 (1954).
7. 467 U.S. 229 (1984).

constitutions, and some property-rights advocates still defended that approach.[8] *Kelo* shattered the seeming consensus on "public use" among jurists and legal commentators, and the debate it kicked off continues. Four current Supreme Court justices have expressed interest in overruling or revisiting *Kelo*, and it is possible that might happen in coming years.[9]

Kelo also generated a massive political reaction, with polls showing overwhelming public opposition to the ruling, and a record forty-five states enacting eminent-domain reform legislation in response.[10] No other Supreme Court decision has generated so much state legislation in response to it. Multiple state courts rejected *Kelo* as a guide to the interpretation of their state constitutions.[11] State courts and lower federal courts have also struggled to define what qualifies as a "pretextual" taking, one where the official rationale is a pretext for a scheme to benefit a private party.[12] *Kelo* held that pretextual takings violate the Public Use Clause, even as it mandated broad deference to the government otherwise.[13] At least five different approaches to defining pretext have emerged in lower courts since 2005.[14]

Debate over and analysis of the political and judicial reaction to *Kelo* continues to the present day, much like debate over the decision itself. The present Symposium includes contributions to both discussions. The papers in this Symposium were first presented at a conference at Yale Law School hosted on February 20 and 21, 2025. February 20 happened to also be the twentieth anniversary of *Kelo*'s oral argument. Conference papers were organized into four separate panels. In this Symposium issue, articles are published in the order in which they were presented at the conference.

The Symposium begins with reflections by the attorneys who litigated the *Kelo* case in the U.S. Supreme Court. Dana Berliner and Scott Bullock represented Susette Kelo and the other Fort Trumbull residents who joined Kelo in her suit. Bullock and Berliner look back on the trial and the friendships they developed with the *Kelo* plaintiffs. They also recount for readers what happened *after Kelo* was decided—the political backlash against eminent domain.[15]

Wesley Horton represented the city of New London and the other *Kelo* defendants, and his reflections teach readers valuable lessons about appellate

8. *See* SOMIN, *supra* note 4, at 60-61 (noting persistence of this kind of dissent).

9. *See* Ilya Somin, *Three Supreme Court Justices Signal Willingness to Reconsider* Kelo v. City of New London, REASON, (July 3, 2021, 12:30 AM), https://reason.com/volokh/2021/07/03/three-supreme-court-justices-signal-willingness-to-reconsider-kelo-v-city-of-new-london [https://perma.cc/B9JH-8HBW] (noting three justices who expressed such interest in 2021, and Justice Samuel Alito, who had done so earlier).

10. For a review of the reaction and resulting legislation, see SOMIN, *supra* note 4, at chs. 5-6.

11. *See id.* at 182-92 (surveying this jurisprudence).

12. *See id.* at 192-202 (discussing alternative approaches).

13. *See* Kelo v. City of New London, 545 U.S. 469, 478 (2005) (stating that the government cannot take property "under the mere pretext of a public purpose, when its actual purpose was to bestow a private benefit").

14. *See* SOMIN, *supra* note 4, at 192-201 (reviewing these in detail).

15. *See* Scott Bullock & Dana Berliner, *Arguing* Kelo *Then and Now*, 43 YALE J. ON REGUL. 9 (2025).

advocacy.[16] In *Kelo*, Horton faced a daunting challenge, one he describes in terms of "biting the bullet." Stripping away the metaphor, the legal interests of New London and the other *Kelo* defendants were in tension with their public-relations interests, and Horton needed to decide which interests to pursue. Legally, the most dangerous line of questions for Horton started with this one: if there was a public use in *Kelo*, could any local government take a small motel and convert it into an upscale resort hotel? If Horton answered "No," he risked losing control of his oral argument and losing his clients' case in the Supreme Court. If he answered "Yes," though, he invited public criticism of his clients. Horton answered "Yes."

Twenty years later, Horton has no regrets. As his article makes clear, he thinks that his answer helped his clients win their Supreme Court case; any other answer would have lost control of the oral argument. But Horton's answer did have public-relations repercussions, not only for his clients but also for all state and local governments that use eminent domain to acquire property for redevelopment. Horton's answer gave Justice O'Connor the most memorable line of her dissent, that after the Court's holding "[n]othing is to prevent the State from replacing any Motel 6 with a Ritz Carlton."[17] And that line, in turn, helped stoke the backlash discussed by Berliner and Bullock.

When *Kelo* resolved what "public use" means in the Fifth Amendment, it settled a question of federal constitutional law. As Horton makes clear in his observations about the Michigan Supreme Court's *Hathcock* decision,[18] however, when the phrase "public use" is used in state eminent-domain clauses, state officials can resolve what that phrase means as a matter of state constitutional law.[19] The second panel at the in-person conference, and the next two articles here, consider the effects of state law and practices on eminent-domain policy.

In her article, Maureen Brady studies eminent-domain clauses in state constitutions and the records of late nineteenth-century state constitutional conventions.[20] Many state constitutions specifically authorize private parties to initiate takings for private uses—whether for private roads, power dams, or irrigation canals. Most of those provisions for public-use takings were adopted in the second half of the nineteenth century. Brady draws two main lessons from those provisions. First, the provisions shed some light on what the phrase "public use" meant to sophisticated late nineteenth-century lawyers. Brady argues that the provisions suggest that the phrase allows for states and local governments to sponsor private-use takings. Second, those same state provisions helped justify a shift in constitutional public-use doctrine that took place at the beginning of the twentieth century. As was noted both by Justice John Paul Stevens (author of the

16. *See* Wesley W. Horton, *Arguing* Kelo, 43 YALE J. ON REGUL. 23 (2025).
17. *Kelo*, 545 U.S. at 503 (O'Connor, J., dissenting).
18. County of Wayne v. Hathcock, 684 N.W.2d 765 (Mich. 2004).
19. *See* Horton, *supra* note 16, at 29.
20. *See* Maureen E. Brady, *Debates over "Public Use" in the State Constitutional Conventions*, 43 YALE J. ON REGUL. 36 (2025).

Kelo Court opinion) and Justice Clarence Thomas (author of a solo dissent),[21] the seeds for *Kelo*'s broad reading of the phrase "public use" were sown in three early twentieth-century cases, all of which authorized private-use condemnations.[22] The shift in those cases, Brady argues, was justified by state constitutional provisions and debates that construed private takings to satisfy state public-use standards.

In his article, Gerald Dickinson proposes that federal courts modify federal public-use law post-*Kelo*, and that they do so by drawing on recent developments in state case law and legislation.[23] After *Kelo*, Dickinson worries, federal public-use law does not adequately protect the interests that homeowners have in preventing condemnation of their homes. In response to *Kelo*, however, many states limited the future use of eminent domain in their jurisdictions by constitutional amendment or by legislation. Federal courts should rely on those developments, Dickinson argues, to strengthen the protections that courts afford to property rights in future federal eminent-domain cases. As the U.S. Supreme Court has drawn on state law to develop federal standards on exactions,[24] so too should it draw on state laws about eminent domain to revise federal public-use law after *Kelo*.

In the third panel at the in-person conference, participants discussed the public-use requirement as a doctrinal issue, and they considered different possible reforms to public-use doctrine as it stands after *Kelo*. Eric Claeys argues that private-to-private transfers should *not* be classified as public-use problems, and that neither the narrow use-by-the-public standard nor the broad public-benefit standard focuses constitutional doctrine appropriately on the substantive policy issues presented by private-to-private transfers.[25] Such transfers should instead be classified as "regulatory-takings" problems, Claeys contends, and specifically as "reciprocity-of-advantage" problems. Claeys presents two arguments, one normative and another doctrinal. Normatively, in a rights-based theory of property, a "regulation" is a law that coordinates how different proprietors use their property for the good of them all. Most regulations target noxious or abusive uses of property by some owners, to protect others' equal opportunities to use their own property. But a few regulations coordinate how people use the same resources for their concurrent benefit. Those latter regulations are called reciprocity-of-advantage regulations in federal regulatory-

21. *See Kelo*, 545 U.S. at 479-80, 480 n.9; *id.* at 515-17 (Thomas, J., dissenting).

22. *See* Fallbrook Irrigation Dist. v. Bradley, 164 U.S. 112, 113-14, 160 (1896) (upholding as a public use a condemnation letting an irrigation company install and operate irrigation equipment on servient lots); Clark v. Nash, 198 U.S. 361, 369-70 (1905) (upholding as a public use a condemnation of ditch easements); Strickley v. Highland Boy Gold Mining Co., 200 U.S. 527, 531-32 (1905) (upholding as a public use a condemnation of aerial rights of way for a mining company to move ore on bucket lines from its mine to a town center).

23. *See* Gerald S. Dickinson, *Taking Homes*, 43 YALE J. ON REGUL. 63 (2025).

24. *See, e.g.*, Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 839 (1987); Dolan v. City of Tigard, 512 U.S. 374, 389-91 (1994).

25. *See* Eric R. Claeys, *Assembly, Public Use, and Reciprocity-of-Advantage Regulation*, YALE J. ON REGUL. 98 (2025).

takings cases.[26] Examples include laws that authorize the compulsory unitization of oil and gas rights, laws that authorize the partition of property held in co-tenancy, and laws authorizing the condemnation of riparian land and water rights to generate mill dams. The U.S. Supreme Court relied on the reciprocity-of-advantage model of regulation to consider the first four cases challenging state-sponsored private-to-private transfers of property after the ratification of the Fourteenth Amendment.[27] Normatively, Claeys argues that the reciprocity-of-advantage model outperforms the principles followed in *Kelo*; doctrinally, the four post-Civil War reciprocity-of-advantage cases supply grounds for limiting *Kelo* and other cases construing the public-use requirement broadly.

Richard Epstein also calls for reconsidering *Kelo*, but to do so he relies on principles from contemporary federal administrative law.[28] The Supreme Court's holding in *Kelo* makes public-use doctrine far more deferential to state administrative bodies (local governments and municipal development corporations) than the Court's doctrines on statutory interpretation are to federal administrative agencies. Under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, federal courts were supposed to defer systematically to federal agencies' interpretations of their own enabling statutes.[29] But the Supreme Court overruled *Chevron* in 2024 in *Loper Bright Enterprises v. Raimondo*.[30] The considerations that justified overruling *Chevron* apply with equal force to *Kelo*; in both settings, government abuses of power are at least as threatening as private abuses of right, and judicial standards need to acknowledge the potential for abuse on both sides. *Kelo*'s deferential formula, Epstein concludes, should be replaced with intermediate scrutiny.

Julia Mahoney argues that *Kelo*'s doctrine should be supplemented by an anti-corruption constitutional norm.[31] In the late eighteenth century, Mahoney argues, Americans employed the term "corruption" broadly—to cover not only outright bribery but more generally any use of government power to promote private interests at the expense of the general welfare. For Mahoney, that history offers a clear lesson for the contours of the eminent-domain power and for public-use doctrine post-*Kelo*. It makes sense to be wary not just of property condemnations that benefit specific, identifiable private parties, but also of eminent-domain initiatives that create opportunities for those in power to entrench themselves by selecting future winners.

Claeys, Epstein, and Mahoney all argue (in different ways) that *Kelo* makes federal public-use doctrine weaker and more deferential than it should be under

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26. *See e.g.*, Jackman v. Rosenbaum Co., 260 U.S. 22, 30 (1922) (using this language).

27. *See* Head v. Amoskeag Mfg. Co., 113 U.S. 9, 24-26 (1885); Wurts v. Hoagland, 114 U.S. 606, 614 (1885); Fallbrook Irrigation Dist. v. Bradley, 164 U.S. 112, 163 (1896); Ohio Oil Co. v. Indiana, 177 U.S. 190, 210 (1900).

28. *See* Richard A. Epstein, Kelo *At the Crossroads of Constitutional and Administrative Law*, 43 YALE J. ON REGUL. 130 (2025).

29. 467 U.S. 837, 842-45 (1984).

30. 603 U.S. 369, 412-13 (2024).

31. *See* Julia D. Mahoney, *Eminent Domain, Corruption, and the Constitution:* Kelo v. City of New London *at Twenty*, 43 YALE J. ON REGUL. 158 (2025).

the Public Use Clause of the Fifth Amendment. In contrast, Thomas Merrill argues in his article that the phrase "for public use" does not impose any restriction on the kinds of condemnations or transfers that governments may order with the power of eminent domain.[32] Merrill analyzes when and why constitutional limitations on eminent domain do not require governments to pay just compensation, focusing on the private-purpose limitation on eminent domain at issue in *Kelo v. City of New London*. Under current doctrine, a government neither takes property, nor is required to pay just compensation, if the government action enforces limitations that inhere in limitations on the proprietor's title under background principles of state law. Merrill proposes a different reading of the Fifth Amendment. The phrase "taken for public use," Merrill argues, does not limit the scope of constitutional takings. Instead, it specifies when just compensation is required, without regard to whether the government is proceeding by a formal exercise of eminent domain or otherwise. Compensation is required when, but only when, private property is taken to be used as a building block in some project authorized by public authority. Conversely, however, Merrill argues that when a proposed taking seems to be for a so-called private use, the Fifth Amendment imposes no limitations on the taking or its intended purpose. The political process is more than up to the task, Merrill suggests, of prescribing additional limits on the uses of eminent domain that so-called "homevoters" find disturbing.

Kelo is relevant to a wide variety of contemporary land-use policy debates, and those implications were explored in the last panel at the in-person conference. In their article, Vicki Been and Yun-chien Chang study *Kelo*'s potential in contemporary debates about urban homelessness.[33] Been and Chang's article takes up issues raised by the Supreme Court's recent decision in *City of Grants Pass v. Johnson*, which held that a municipality does not violate the Eighth Amendment prohibition on cruel and unusual punishment when it prohibits camping on public property and sleeping overnight in public parks.[34] *Grants Pass* makes it easier for municipalities to drive homeless persons out of their jurisdictions, Been and Chang worry, and the Fair Housing Act and other housing laws make it more expensive for municipalities to build shelters or housing for the homeless. Been and Chang argue that the Public Use Clause should be interpreted to allow jurisdictions to use the eminent-domain power to address holdouts, including those whose behavior is endogenously created or aided by the legal system. Allowing local governments to use the eminent-domain power to acquire land for homeless shelters or housing alleviates market deadlock. Eminent domain would also help municipalities deal with owners who Been and Chang call "hold-inclined."[35] These owners would be inclined to sell

32. *See* Thomas W. Merrill, *The Meaning of "Taken for Public Use"*, 43 YALE J. ON REGUL. 171 (2025).

33. *See* Vicki Been & Yun-chien Chang, *From* Kelo *to* Grants Pass v. Johnson*: Public Use for Housing for the Homeless*, 43 YALE J. ON REGUL. 197 (2025).

34. 603 U.S. 520, 541-61 (2024).

35. Been & Chang, *supra* note 33, at 202.

their land if they knew it would be used for necessary but disfavored purposes like emergency shelters for the homeless, but they refuse to sell their land voluntarily because of concerns about damaging their reputation in their community. This proposal is well within the eminent-domain power as construed in *Kelo*, Been and Chang argue, and they warn against narrow constructions of the power to avoid hampering governments' ability to solve pressing contemporary issues like the homelessness crisis.

In their article, Ronit Levine-Schnur and Gary Wagner analyze empirical data relevant to *Kelo*'s holding.[36] Levine-Schnur and Wagner gather a dataset of all expropriations in New York City over twenty-nine years. After *Kelo* was handed down, Levine-Schnur and Wagner find a ninety percent decrease in takings for economic development in New York City, despite the absence of restrictive post-*Kelo* legislation in the state of New York. This finding demonstrates (contrary to conventional wisdom) that public opposition alone was sufficient to deter new takings, even without formal legal constraints like the legislation enacted in many states to prevent future economic-development takings. Simultaneously, Levine-Schnur and Wagner also find no measurable benefits from economic-development takings—no significant increases in employment, business-establishment growth, or positive spillover effects to adjacent areas.[37] That finding suggests that economic-development takings fail to produce the spillover benefits that the *Kelo* Court assumed they would. Levine-Schnur and Wagner argue that, in eminent-domain disputes, courts should focus on fostering public debate on eminent-domain policy and on enforcing procedural safeguards ensuring that economic projections are evidence-based. Overturning *Kelo* would unnecessarily constrain local democratic processes, Levine-Schnur and Wagner warn, when procedural reforms could more effectively address the underlying concerns.

In his article, Ilya Somin draws parallels between *Kelo*-style economic-development takings and exclusionary zoning.[38] "Exclusionary zoning" refers to regulatory restrictions on the types of housing that can be built in a given area, and it was upheld against constitutional challenge in the 1926 Supreme Court case of *Village of Euclid v. Ambler Realty*.[39] Exclusionary zoning is a major factor in the housing crisis currently besetting the United States; it has increased housing costs, prevented millions of people from "moving to opportunity," and impaired economic growth and innovation.[40] Somin compares the constitutional arguments for and against economic-development takings and exclusionary zoning. Both practices have been upheld from constitutional challenge by court opinions (*Kelo* and *Berman* for economic-development takings, and *Euclid* for

36. Ronit Levine-Schnur & Gary A. Wagner, *Evaluation of* Kelo's *Political and Economic Impact: Theory and Evidence*, 43 YALE J. ON REGUL. 219 (2025).

37. *Id.* at 226-27.

38. Ilya Somin, *Public Use, Exclusionary Zoning, and Democracy*, 43 YALE J. ON REGUL. 239 (2025).

39. 272 U.S. 365 (1926).

40. *See* Somin, *supra* note 38, at 240 & n.5.

exclusionary zoning) that prefer deferential approaches consistent with Progressive Era and New Deal Era skepticism of property rights.

Somin argues that such deference is wrong, partly on originalist grounds.[41] In addition, he argues that deference has greatly harmed the poor and disadvantaged, particularly racial minorities, and that stronger judicial review could actually further "representation-reinforcement" by empowering them to "vote with their feet."[42]

Somin also suggests that there are synergies between judicial enforcement of public-use limitations on eminent domain and enforcement of restrictions on exclusionary zoning.[43] In both fields, strong judicial review can empower people to live where they wish. Striking down exclusionary zoning would make it harder for local governments to keep people out; reversing *Kelo* would make it harder for local governments to expel those already living in the area. Somin closes by drawing lessons from political debates about economic development for the ongoing debate about exclusionary zoning. *Kelo* showed how litigation can be effectively combined with political action, and zoning reformers can learn lessons from *Kelo*'s aftermath.

We hope you enjoy the articles that follow. *Kelo* remains a a highly controversial case two decades after it was handed down. The February 2025 conference and this Symposium issue confirm as much, and we are very happy with how both turned out. We thank the lawyers and scholars who contributed to the conference and to this Symposium. We thank the *Yale Journal on Regulation* for publishing the articles that follow in this Symposium, and Nashely Alvarez, Jackson Dellinger, Ashley Mehra, and all of the other editors and staff members who have provided sterling editing. We thank Devin Froseth for all of his invaluable work in helping to put the Symposium together. We are most grateful to Dean Heather Gerken, the Yale Law School, and the Oscar M. Ruebhausen Fund for hosting the conference and Symposium, and for providing generous logistical and financial support. We hope that this Symposium provokes readers to reflect further on *Kelo*—its background, the case itself, and its contemporary implications.

41. *Id.* at 242-46.
42. *Id.* at 246-50.
43. *Id.* at 250-52.