Eminent Domain, Corruption, and the Constitution: *Kelo v. City of New London* at Twenty

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The power of eminent domain is an inherent attribute of sovereignty, not a power granted by the federal or any state constitution. There are significant constitutional constraints on exercises of the eminent-domain powers, however, most notably the requirement contained in the Takings Clause that private property shall not "be taken for public use, without just compensation." Delineating the boundaries of the eminent-domain power has proven a formidable challenge for courts, scholars, and others, due in part to the sparseness and indeterminacy of the relevant constitutional text and history.

In this Article, I examine how an understanding of the founding generation's vision of a new nation free of old-world "corruption" sheds light on the limits of the power of eminent domain. In the late eighteenth century, Americans employed the term "corruption" broadly to denote the use of government power to promote private interests at the expense of the general welfare. "Corruption," in short, denoted not just "quid pro quo" exchanges, such as outright bribery of public officials, but also the systemic societal rot that results from abuses of the public trust.

This history offers a clear lesson for the contours of the power of eminent domain. 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.

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Introduction

The power of eminent domain is an inherent attribute of sovereignty, as distinct from a power bestowed by the federal or any state constitution.[1] There are, however, significant constitutional constraints on the exercise of eminent-domain powers. Most prominent is the requirement contained in the Takings Clause of the Fifth Amendment of the United States Constitution that private property shall not "be taken for public use, without just compensation."[2] Delineating the boundaries of the power of eminent domain has proven a formidable challenge for courts, scholars, and others,[3] in no small measure due to the sparseness and indeterminacy of the relevant constitutional text and history.[4]

In 2005, in *Kelo v. City of New London*,[5] the United States Supreme Court had the chance to clarify the constitutional contours of the eminent-domain power. That did not happen, for Justice John Paul Stevens, writing for a bare majority of five, produced (by his own later admission) a muddled opinion.[6] In *Kelo*, the Court addressed whether the City of New London's seizure of fifteen homes pursuant to an economic-development scheme was for "public use." The Court's answer was "yes," but it declined to explain precisely why. Instead, the Court contented itself with flagging a number of factors as possibly relevant to its determination that the city's property condemnations passed constitutional muster.[7]

1. *See* PennEast Pipeline Co. v. New Jersey, 594 U.S. 482, 489, (2021) ("When the Constitution and Bill of Rights were ratified, they did not include the words 'eminent domain.'"); Boom Co. v. Patterson, 98 U.S. 403, 406 (1879) (characterizing the eminent-domain power as "an attribute of sovereignty" that "requires no constitutional recognition"); *see also* Kohl v. United States, 91 U.S. 367, 371-72 (1875) ("The right [of eminent domain] is the offspring of political necessity; and it is inseparable from sovereignty, unless denied to it by its fundamental law.").

2. U.S. CONST. amend. V.

3. *See* ILYA SOMIN, THE GRASPING HAND: KELO V. CITY OF NEW LONDON & THE LIMITS OF EMINENT DOMAIN 35-72 (2015).

4. *See* Julia D. Mahoney, *Kelo's Legacy: Eminent Domain and the Future of Property Rights*, 2005 SUP. CT. REV. 103, 123-25 (2006).

5. 545 U.S. 469 (2005).

6. JOHN PAUL STEVENS, THE MAKING OF A JUSTICE: REFLECTIONS ON MY FIRST 94 YEARS 431-43 (2019).

7. *See* Mahoney, *supra* note 4, at 116-17 (noting that "the Court's opinion examines in detail both the content of the [New London] redevelopment plan and the circumstances of its creation" without providing "any serious analysis of why the considerations it discusses matter, the weights they carry, or what other sources of information might be relevant to an assessment of constitutionality").

One factor that weighed in New London's favor was the Court's skepticism about the accusations of corruption that had dogged the city's controversial economic-development plan. These accusations stemmed, in large measure, from the well-publicized involvement of pharmaceutical giant Pfizer in the plan's design.[8] To the *Kelo* majority, the absence of an explicit benefit under the plan to Pfizer—or any other identifiable entity—constituted near-dispositive evidence that New London had not crossed the constitutional red line of taking the property of one private party for the sole purpose of transferring it to another.[9]

Kelo provoked a furious response from the public,[10] which in turn fueled an avalanche of reforms, mostly in the form of state laws and state constitutional amendments.[11] But many of these reforms lack substantial teeth. Not surprisingly, eminent-domain controversies have continued to rage in the two decades since *Kelo*. To date, though, the Court has declined to grant certiorari in any case that looks like a plausible vehicle for revisiting or overruling *Kelo*.[12]

In this Article, I suggest that an understanding of the Founding generation's vision of a new nation free of old world "corruption" can shed light on questions relating to the constitutional limits on eminent-domain powers. In brief, I explain that the Founding generation had a more expansive understanding of corruption than the Court evinced in *Kelo*.[13] In the late eighteenth century, Americans employed the term "corruption" broadly to denote the use of government power to promote private interests at the expense of the general welfare.[14] "Corruption," in short, conveyed not just the standard venal corruption of "quid pro quo" exchanges, including bribery of public officials and vote buying,[15] but also the systemic societal rot that results from abuses of the public trust.[16] As economic-

8. *See* SOMIN, *supra* note 3, at 15-16, 122.

9. *Kelo*, 545 U.S. at 478 & n.6.

10. *See* Eric Claeys, *Land Assembly, Public Use, and Reciprocity of Advantage Regulation*, 43 YALE J. ON REGUL. 98, 100 (2025); Julia D. Mahoney, *Commentary on Kelo v. City of New London*, *in* FEMINIST JUDGMENTS: REWRITTEN PROPERTY OPINIONS 179, 179-80 (Eloisa C. Rodriguez-Dod & Elena Maria Marty-Nelson eds., 2022).

11. *See* Gerald S. Dickinson, *Takings Federalization*, 100 DENV. L. REV. 679, 688-89 (2023); John Dinan, *State Constitutional Amendment Processes and the Safeguards of American Federalism*, 115 PENN ST. L. REV. 1007, 1013-15 (2011); Andrew P. Morriss, *Symbol or Substance: An Empirical Assessment of State Responses to* Kelo, 17 SUP. CT. ECON. REV. 237, 238-44 (2009).

12. *See, e.g.*, Bowers Dev. LLC v. Oneida Cnty. Indus. Dev. Agency, 145 S. Ct. 1428, 1428 (2024) (mem.); Brinkmann v. Town of Southold, 145 S. Ct. 428, 428 (2024) (mem.) (noting votes of Justices Thomas, Gorsuch, and Kavanaugh to grant certiorari); Eychaner v. City of Chicago, 141 S. Ct. 2422, 2422 (2021) (mem.).

13. *See* ZEPHYR TEACHOUT, CORRUPTION IN AMERICA: FROM BEN FRANKLIN'S SNUFF BOX TO CITIZENS UNITED 4 (2014); Zephyr Teachout, *The Anti-Corruption Principle*, 94 CORN. L. REV. 341, 348-52 (2009).

14. *See* John Joseph Wallis, *The Concept of Systematic Corruption in American History*, *in* CORRUPTION AND REFORM: LESSONS FROM AMERICA'S ECONOMIC HISTORY 23, 24-25 (Edward Glaeser & Claudia Goldin eds., 2006).

15. *See* Michael D. Gilbert & Deborah Hellman, *Political Corruption*, *in* THE OXFORD HANDBOOK OF AMERICAN ELECTION LAW 407, 407 (Eugene D. Mazo ed., 2024).

16. *See* Wallis, *supra* note 14, at 23-24; *see also* Paula Baker, Mary Berry, Daniel Czitrom, Barbara Hahn, James Kloppenberg, Naomi Lamoreaux & David Witwer, *Interchange: Corruption Has a History*, 105 J. AM. HIST. 912, 916 (2019) ("A society is systematically corrupt when the elites in control of the government are able to award valuable privileges to consolidate their power.").

historian John Joseph Wallis sums up: "Manipulating the economy for political ends is systematic corruption" and in the "the late eighteenth and early nineteenth centuries Americans were fixated on systematic corruption as the nation's primary political problem."[17]

In recent years, the Founding Era focus on—indeed, obsession with—the specter of corruption has taken on a new resonance. Interestingly, the issue of systematic corruption faded from view starting in the early to mid-nineteenth century with the emergence of state laws and constitutional provisions, including general-incorporation laws, that mandated a more "general access" society.[18] But since roughly the turn of the current century, political discourse in the United States has increasingly featured claims about elite dominance and special privilege that echo Founding Era anxieties.[19] Across the political spectrum, voters express suspicions that the system is being "rigged" against them by the powerful and that the United States is becoming a more limited-access society.[20] Eminent domain is a hot spot in struggles over what distinguishes the legitimate exercise of government power from its abuse.

This Article proceeds as follows. Part I describes the economic-development plan at issue in *Kelo* and the widespread suspicions of corruption triggered by its design and implementation. Part II details how the Court in *Kelo* was at least somewhat alert to the possibility of venal corruption. In Part III, I turn to Founding Era conceptions of corruption and explain how the *Kelo* Court ignored systematic corruption.

I. Corruption in New London?

A. Revitalizing a Moribund City

By the late twentieth century, the once-prosperous coastal city of New London had fallen on hard times. Beset by a dearth of job opportunities, a

17. Wallis, *supra* note 14, at 25; *see also* BERNARD BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION, at xxiv-xxv (Fiftieth anniversary ed. 2017) (explaining that the American Revolution's "spokesmen" directed "their attention to corruption abroad and the acute political dangers they faced at home, and concluded that perpetuation of the freedom they had known required, at whatever cost, the destruction of the political and constitutional system that had hitherto governed them"); GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787, at 414 (1969) (detailing how Americans in the 1780s "saw their country stricken by a serious sickness" and feared that "political decay" threatened the "success of the republican experiment itself").

18. *See* Naomi Lamoreaux & John Joseph Wallis, *Economic Crisis, General Laws, and the Mid-Nineteenth Century Transformation of American Political Economy*, 41 J. EARLY REPUBLIC 403, 403-04 (2021); Steven G. Calabresi & Larissa C. Leibowitz, *Monopolies and the Constitution: A History of Crony Capitalism*, 36 HARV. J.L. & PUB. POL'Y 983, 1077-80 (2013).

19. *See* Julia D. Mahoney, Cedar Point Nursery *and the End of the New Deal Settlement*, 11 BRIGHAM-KANNER PROP. RTS. J. 43, 45 (2022) (detailing contemporary "well-justified concerns about the outsize influence of elites" with "its attendant worries that those who lack power to defend themselves in the political and administrative arenas are vulnerable to 'redistribution up'").

20. *See generally* DOUGLASS C. NORTH, JOHN JOSEPH WALLIS & BARRY R. WEINGAST, VIOLENCE AND SOCIAL ORDERS: A CONCEPTUAL FRAMEWORK FOR INTERPRETING RECORDED HUMAN HISTORY (2012) (distinguishing "open access" societies governed by rules of uniform application from ones in which elites ration access to social, political, and economic opportunity).

shrinking population, and crumbling infrastructure, New London was classified as a "distressed municipality" by the state of Connecticut and identified as a prime candidate for redevelopment.[21] In 1997, the New London Development Corporation (NLDC), a nonprofit corporation set up in 1978 as a vehicle for promoting economic growth, was entrusted with taking the lead on crafting a scheme to revitalize the city.[22]

Things soon turned sketchy. In early 1998, the pharmaceutical giant Pfizer reached a deal to construct a research operation on a waterfront lot in New London that abutted the Fort Trumbull peninsula, an area containing numerous lower-middle-class homes and small businesses.[23] As part of that deal, the city and state agreed that ninety acres of land in the Fort Trumbull neighborhood would be acquired and made available for various uses, including upmarket residences, designed to complement the planned Pfizer facility.[24] Skeptics (quickly) noticed that the new head of the NLDC, Claire Gaudiani, happened to be married to a Pfizer executive. While Pfizer did not intend to own or occupy any of the Fort Trumbull acreage, its involvement aroused fears that government power was about to be wielded not to further the common good but to benefit well-connected insiders.

New London's city council approved the economic-development plan in January 2000 and authorized the acquisition of property in Fort Trumbull through purchase or eminent domain. While most of the property owners in the area slated for redevelopment negotiated sale agreements with the government, nine (who owned fifteen homes among them) opted to fight in court to stop the condemnation of their properties. The nine homeowners presented several arguments, including that the condemnation of their holdings was not for "public use" and thus constituted an unlawful taking under the Fifth Amendment.[25] A partial win at the trial-court level was followed by a loss before the Supreme Court of Connecticut, which expressed the view that "an economic development plan that the appropriate legislative authority rationally has determined will promote significant municipal economic development constitutes a valid public use for the eminent-domain power."[26]

B. The Legal Background

Notwithstanding the *Kelo* plaintiffs' loss, the Connecticut Supreme Court's disposition of the case was not all bad for the plaintiffs. Three of the seven justices took pains to argue that courts should accord "no deference" to

21. *See* Mahoney, *supra* note 4, at 107.

22. *See id.* at 107-08; SOMIN, *supra* note 3, at 15.

23. *Urban Development: Putting the New Back in New London*, ECONOMIST (June 11, 1998), https://www.economist.com/united-states/1998/06/11/putting-the-new-back-in-new-london [https://perma.cc/8QL2-7PE2].

24. SOMIN, *supra* note 3, at 15-16.

25. *See* Mahoney, *supra* note 4, at 109.

26. Kelo v. City of New London, 843 A.2d 500, 528 (Conn. 2004).

legislative decisions to seize property for economic development on the issue of whether such takings were for "public use," instead placing "the burden on the taking authority to establish by clear and convincing evidence that the public benefit anticipated in the economic development agreement is reasonably ensured."[27]

The assertion that courts should decline to accord considerable deference to government decisions to condemn property pursuant to eminent domain was key to the *Kelo* plaintiffs' prospects for victory and figured heavily in their arguments before the United States Supreme Court. But this line of argument at first looked like an uphill slog. It is true that for much of United States history, interpreting the cryptic term "public use[]" was a common exercise for courts,[28] so much so that cases on public use had by 1900 generated "a massive body of case law, irreconcilable in its inconsistency, confusing in its detail and defiant of all attempts at classification."[29] Yet by the time *Kelo* was briefed and argued, over fifty years of Supreme Court precedent had established a highly deferential standard of review to apply to constitutional challenges to legislative decisions involving property rights and economic regulation.[30] Put simply, constitutional actors other than judicial ones were charged with the primary oversight of property rights and economic activity.[31] The judiciary was relegated to a minimal role.[32]

In no case had the Court articulated this "ultra-deferential" posture more explicitly than in its unanimous 1954 decision in *Berman v. Parker*.[33] There, Justice William O. Douglas applied toothless review to condemnations undertaken pursuant to the District of Columbia Redevelopment Act of 1945. It was well understood that the exercises of eminent-domain power at issue in *Berman* would destroy entire communities by removing tens of thousands of District of Columbia residents from their homes and forcing the closure of numerous businesses.[34] But the Court in *Berman* paid no attention to the devastating human cost. Nor was the Court swayed by the incisive analysis of Federal District Court Judge E. Barrett Prettyman, who laid out the possible

27. *Id*. at 600-02 (Zarella, J., joined by Sullivan, C.J., and Katz, J., concurring in part and dissenting in part).

28. *See* Eric R. Claeys, *Public Use Limitations and Natural Property Rights*, 2004 MICH. ST. L. REV. 877, 897.

29. This astute observation was made in *The Public Use Limitation on Eminent Domain: An Advance Requiem*, 58 YALE L.J. 599, 605-06 (1949).

30. *See* Mahoney, *supra* note 19, at 43-45.

31. *See* David A. Strauss, *Why Was* Lochner *Wrong?*, 70 U. CHI. L. REV. 373, 375-77 (2003); Laura Weinrib, *Civil Liberties Outside the Courts*, 2014 S. CT. REV. 297, 321-23; *see also* Robert G. McCloskey, *Economic Due Process and the Supreme Court: An Exhumation and Reburial*, 1962 SUP. CT. REV. 34, 40 (noting that the "large gap in the rationale that underlies the structure of modern constitutional law" is the result of the Court's failure to explain "the basis of [its] abnegation" in the area of property and economic regulation).

32. *See* Ann Woolhandler & Julia D. Mahoney, *Federal Courts and Takings Litigation*, 97 NOTRE DAME L. REV. 679, 697 (2022).

33. 348 U.S. 26 (1954).

34. *See* Amy Lavine, *Urban Renewal and the Story of* Berman v. Parker, 42 URB. LAW. 423, 469-75 (2010).

constitutional shortcomings of the redevelopment scheme.[35] Judge Prettyman's careful explication of the disparity between the means and ends of the components of the eminent-domain program, which included a sophisticated discussion of the scope of the police power,[36] was slapped down by the Court with the flat statement that it "is not for the courts to oversee the choice of the boundary line nor to sit in review on the size of a particular project area."[37]

The Court transmitted a near-identical message, albeit in a more measured and polite tone, three decades later in *Hawaii Housing v. Midkiff*.[38] Justice Sandra Day O'Connor, then recently appointed, wrote for a unanimous Court, finding no constitutional infirmity with a state of Hawaii land reform program that orchestrated transfers of property between private owners. Justice O'Connor accepted at face value the Hawaii legislature's claim that a "land oligopoly" had so hobbled the state's real-estate market that the state was justified in stepping in to reconfigure property rights. In the wake of *Midkiff*, many knowledgeable observers declared "the public use limitation" on exercises of the eminent-domain power to be "a dead letter."[39]

II. The Muddle of *Kelo*

Yet the *Kelo* Court sounded a retreat from the "ultra deference" of *Berman* and *Midkiff*. In place of supine judicial review, the Court signaled that the judiciary has more than a cursory role to play in delineating the boundaries of the eminent-domain power.[40] It is interesting to speculate why the Court departed from *Berman* and *Midkiff*. It may be, of course, that precedent, in terms of either outcome or reasoning, does not matter much.[41] Shifts in public opinion may also have affected the Court. In the decades between *Midkiff* and *Kelo*, a stream of media stories detailed the brutal consequence of property condemnations for those who lost their homes and livelihoods due to urban-renewal projects and the establishment of parks in rural America.[42] Also worth considering are developments in the Court's rights jurisprudence, which by the late 1970's and

35. Schneider v. District of Columbia, 117 F. Supp. 705 (D.D.C. 1953).

36. *See* ERIC R. CLAEYS, NATURAL PROPERTY RIGHTS 10 (2025); Richard Epstein, *Public Use in a Post-Kelo World*, 17 SUP. CT. ECON. REV. 151, 167-70 (2009).

37. *Berman*, 348 U.S. at 35.

38. 467 U.S. 229 (1984).

39. Thomas W. Merrill, *Economics of Public Use*, 72 CORN. L. REV. 61, 61 (1986).

40. *See* Mahoney, *supra* note 4, at 115 ("Gone . . . was the robotic deference that had been the hallmark of the Court's eminent-domain jurisprudence for over fifty years.").

41. *See* Frederick Schauer, *Has Precedent Ever Really Mattered in the Supreme Court?*, 24 GA. ST. U. L. REV. 381, 382 (2007).

42. *See, e.g.*, Gary Greenberg, *The Condemned*, MOTHER JONES (2005); Eddie Dean, *Appalachian Trail of Tears*, WASH. CITY PAPER (Feb. 28, 1997), https://washingtoncitypaper.com/article/284125/appalachian-trail-of-tears [https://perma.cc/E3RQ-2CHQ] (stating that "[s]ixty years ago they were evicted from the Blue Ridge to make way for Shenandoah National Park," but "the refugees haven't forgotten their lost mountain homes"); Dave Pierce, *Long Arm of the Law Changed the Poconos Forever*, POCONO REC. (July 11, 2006, 5:31 PM), https://www.poconorecord.com/story/news/2006/07/11/long-arm-government-changed-poconos/36122786007 [https://perma.cc/XR58-ZFJ5].

1980's had come to include property rights,[43] albeit in a "sporadic and inchoate way."[44]

While it is easy to state what *Kelo* does *not* do—forge another link in the *Berman/Midkiff* chain of extreme deference—it is hard to pinpoint with precision what *Kelo* stands for. Justice Stevens's majority opinion is "replete with tension,"[45] mentioning a plethora of factors without providing guidance as to how to weigh them. Prominent in the majority opinion's discussion are *Berman*, *Midkiff*, and other leading precedents,[46] although Justice Stevens distances himself from the *Berman/Midkiff* near total equation of "public use" with plausible public benefit by pointing out—correctly—that "public use" has had variable and indeterminate meanings throughout American history.[47]

The majority opinion also goes into detail about selected aspects of the redevelopment plan and suggests that it may matter that the plan was formulated with public input.[48] The majority further emphasizes voters' capacity to address problems of perceived eminent-domain abuse through participation in the political process.[49]

Most striking for this Article's focus on eminent domain and corruption, the Court in *Kelo* acknowledges that there is an unsavory aspect to an economic-redevelopment plan intended to "capitalize on the arrival" in New London of a major, and thus politically powerful, pharmaceutical firm.[50] The Court, in short, was attuned to and saw fit to address the insinuations that Pfizer's interests, not those of the public at large, provided the impetus for New London's economic-development scheme.

But the Court goes on to pronounce itself satisfied that no mischief was afoot in New London. The Court grounds its reasoning on this point in the dearth of beforehand knowledge of the identities of the private parties who ended up as beneficiaries of the economic-development plan. As was the case with the challenged Hawaii law at issue in *Midkiff*, the Court explains, "the City's development plan was not adopted 'to benefit a particular class of identifiable individuals.'"[51] The *Kelo* majority opinion continues:

> [W]hile the City intends to transfer certain of the parcels to a private developer in a long-term lease—which developer, in turn, is expected to lease the office space and so forth to other private tenants—the identities of those private parties were not known when the plan was adopted. It is, of course, difficult to accuse the

43. *See, e.g.,* Dolan v. City of Tigard, 512 U.S. 374, 384 (1994); Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1027 (1992); Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 831 (1987).

44. Mahoney, *supra* note 4, at 114.

45. *Id*. at 115.

46. Kelo v. City of New London, 545 U.S. 469, 480-83 (2005).

47. *See infra* Part III.

48. *Kelo*, 545 U.S. at 483.

49. *Id*. at 489-90.

50. *Id.* 474.

51. *Id*. at 478 (citing Haw. Hous. Auth. v. Midkiff, 467 U.S. 229, 245 (1984)).

> government of having taken *A*'s property to benefit the private interests of *B when the identity of B was unknown*.[52]

In referring to the constitutional impermissibility of taking *A*'s property to "benefit the private interests of *B*," the Court invokes Justice Samuel Chase's 1798 opinion in *Calder v. Bull*, in which Chase included "a law that takes property from *A*. and gives it to *B*." on a list of powers it is "against all reason and justice for a people to entrust a legislature with."[53] Yet there is nothing in Justice Chase's formulation that necessitates that the precise identity of "*B*." be known at the time of the government action. The perils of corruption surely extend to situations where the recipients of ill-gotten gains are to be identified at some future date.[54]

In his *Kelo* concurrence, Justice Kennedy echoes the majority opinion's analysis. Justice Kennedy's opinion is important because he provided the crucial fifth vote to make up the *Kelo* majority.[55] Kennedy, too, sees grave danger in "transfers intended to confer benefits on particular, favored private entities, and with only incidental or pretextual public benefits," which he states "are forbidden by the Public Use Clause."[56] Echoing Justice Stevens, Kennedy pronounces himself reassured by the fact that most of the private beneficiaries of the economic-development plan were unknown prior to the "substantial commitment" of public funds to the economic-development project.[57] Kennedy also places weight on the trial court's determination that nothing in the record indicates that the motivation of the economic-development plan was to aid "particular" private entities and that all the Connecticut Supreme Court Justices—even the three who concurred and dissented in part—agreed with this conclusion.[58]

To anyone steeped in writings on corruption and good government from the Founding Era, the *Kelo* Court's emphasis on the lack of *already specified* private beneficiaries of the New London economic-development plan poses a puzzle. That is because the corruption that concerned the Founding generation extends far beyond the favoritism to known entities that Justices Stevens and Kennedy focus on. It is to that semi-forgotten world that I now turn.

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52. *Id*. at 478 n.6 (emphasis added).

53. 3 U.S. 386, 388 (1798) (Chase, J.) (emphasis added).

54. *See infra* Part III.

55. *Cf.* Richard A. Posner, *Foreword: A Political Court*, 119 HARV. L. REV. 31, 95 (2005) (explaining how a separate opinion by a Justice casting the "essential fifth vote" sows uncertainty about "whether the majority opinion or the concurring opinion" is the better predictor of the Court's future behavior in similar cases).

56. *Kelo,* 545 U.S. at 490 (Kennedy, J., concurring).

57. *Id*. at 491-92.

58. *Id*. at 492.

III. The American Founding and Systematic Corruption

In the early 1770s, the British Empire's North American colonies had achieved an extraordinarily high level of economic prosperity. Indeed, in the estimations of some leading economic historians, the thirteen colonies that were to make up the new United States of America were, collectively, "a world leader in income per capita."[59] America was very rich, and with its high literacy rates, rapidly growing population, and room to expand, it had every expectation of becoming even richer.

Yet for all the wealth of the American colonies, dissatisfaction among its inhabitants—including many of its most prosperous and powerful ones—with British Empire rule was at a fever pitch. Americans were increasingly convinced that their rulers were scheming to reduce them to a state of servility and dependency through what the Declaration of Independence was to term "a long string of abuses and usurpations."[60] Writings of the time, particularly pamphlets and newspapers, are full of admonitions about the encroaching tyranny of the corrupt British Empire.[61] Sermons, too, disseminated the message that "venality and corruption" could prove "most fatal to a free state."[62]

To modern ears, the rhetoric of the revolutionary era may seem extreme—even unhinged. But in their complaints about their British overlords the colonists were on solid ground. As historian Joel Mokyr documents, corruption did in fact run rampant in eighteenth-century Britain, with numerous "well-remunerated sinecures in government that required no work" as well as "direct pensions and grants paid by the government to well-placed individuals."[63]

The "corruption" that so alarmed the colonists was not just the standard bad acts of bribery of public officials, sales of government offices, and the like, although the colonists were of course concerned about those sorts of abuses too. Of greatest concern was the systematic corruption that resulted from government officials and their allies serving as gatekeepers and using public power to ration economic privilege, with the understanding that such actions are an effective means of entrenching corrupt regimes.[64] Such subordinations of the common

59. *See* Peter H. Lindert & Jeffrey D. Williamson, *American Colonial Incomes, 1650-1774*, 69 J. ECON. HIST. 54, 55 (2016).

60. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

61. *See* BAILYN, *supra* note 17, at xxiv-xxv; John Adams, To the Inhabitants of the Colony of Massachusetts-Bay (Jan. 23, 1775), *reprinted by* NAT'L ARCHIVES: FOUNDERS ONLINE, https://founders.archives.gov/documents/Adams/06-02-02-0072-0002 [https://perma.cc/JTE3-Q56U].

62. Samuel Cooke, *A Sermon Preached in Cambridge, May 30, 1770 in the Audience of His Honor Thomas Hutchinson, Esq.*, *in* AMERICAN SERMONS: THE PILGRIMS TO MARTIN LUTHER KING, JR. 468, 474 (Michael Warner ed., 1999).

63. JOEL MOKYR, THE ENLIGHTENED ECONOMY: AN ECONOMIC HISTORY OF BRITAIN 1700-1850, at 424 (2009). Mokyr notes that "these practices came under fire in the late eighteenth century," resulting in significant reforms in the 1780s, and that the "disastrous War of American Independence may have been a catalyst" for these changes. *Id*.

64. *See* WOOD, *supra* note 17, at 32-33 (explaining that "[w]hen the American Whigs described the English nation and government as eaten away by 'corruption,' they were in fact using a technical term of political science, rooted in writings of classical antiquity, made famous by Machiavelli, developed by

good to private interests often took the form of grants of special privileges, including monopolies.[65]

In the aftermath of the Revolutionary War, the young United States suffered severe growing pains. Mired in severe economic recession in the early 1780s, the nation struggled under the burden of the large debts incurred in its fight for independence.[66] In addition, Americans were struggling with hard questions of constitutional design, as the inadequacies of the Articles of Confederation and Perpetual Union, adopted by Congress in 1777 but not approved by all thirteen states (as required for effectiveness) until 1781, became increasingly evident.[67] A constitutional convention was convened in Philadelphia in 1787 to consider amendments to the Articles. What emerged was a new instrument, which was duly submitted to constitutional conventions in the states for ratification.

To some eyes, what transpired in Philadelphia was nothing less than a "coup."[68] A powerful group of political and economic elites, or so the narrative goes, was gravely alarmed by what they saw as "excess democracy" in state legislatures that led to ill-advised tax and debt-relief measures as well as inflationary issuances of paper money. Fearing avulsive changes to property and contract rights, the rich and powerful took swift action to protect their own interests.[69]

This line of thought is not entirely without merit. The historical record demonstrates that worries about post-Revolution state-legislative actions with radical redistributive motives and effects served as a major impetus for the 1787 Constitutional Convention. But there is much more to the story. Records of the deliberations at the convention, accounts of the ratification debates, and other Founding Era materials indicate the Framers were engaged not in a coup to seize power from the people but in the challenging project of long-term institutional design to break free from oligarchy and corruption.

Indeed, corruption and its perils are front and center in the records of the Philadelphia Convention, with numerous references to delegates' "fear of corruption with its classical republican symptoms of dependency, cabal,

the classical republicans of seventeenth-century England, and carried into the eighteenth century"); Lisa Hill, *Adam Smith and the Theme of Corruption*, 68 REV. POL. 636, 636 (2006) (noting that at the end of the eighteenth century in the Atlantic world, "corruption" had a broad meaning, referring "to the general health of the body politic").

65. *See* Calabresi & Leibowitz, *supra* note 18, at 984-85.

66. *See* Edmund W. Kitch & Julia D. Mahoney, *Restructuring United States Government Debt: Private Rights, Public Values, and the Constitution*, 2019 MICH. ST. L. REV. 1283, 1292-95.

67. *See* Sonia Mittal, Jack N. Rakove, & Barry R. Weingast, *The Constitutional Choices of 1787 and Their Consequences*, *in* FOUNDING CHOICES: AMERICAN ECONOMIC POLICY IN THE 1790S 25, 30-33 (Douglas A. Irwin & Richard Sylla eds., 2010).

68. *See generally* MICHAEL J. KLARMAN: THE FRAMERS' COUP: THE MAKING OF THE UNITED STATES CONSTITUTION (2016) (arguing that the implementation of the Constitution expanded the political influence of a small, well-organized group at the expense of ordinary Americans).

69. *See id.* at 73-125.

patronage, unwarranted influence, and bribery."[70] James Madison, the Constitution's principal architect, consistently displayed a keen awareness of the threat that corrupt elites posed to the young republic.[71] And the Constitution hammered out in Philadelphia and submitted to the people for approval is in crucial respects an "anti-oligarchy" constitution.[72] Central to the Framers' constitutional design are "core principles" of Enlightenment economic thought.[73] These include the encouragement of free trade—both domestic and foreign—and security of contract and property rights.[74]

That property rights under the Constitution are secure does not mean that they are sclerotic. State governments exercise their police powers to promote the public welfare,[75] although of course the limits of these powers have been much disputed over the course of the nation's history.[76] The federal government also wields considerable powers over the content of property rights, not least through its authority to regulate interstate commerce. And government at all levels—federal, state, and local—adjust property rights through their exercises of eminent-domain power.

But the government's power to seize property through the use of eminent domain, although necessary for effective government, carries grave dangers. For the government to command the respect and allegiance of the polity, it must act for the common good and resist subversion from narrow, private interests. In *Kelo*, the Court was, rightly, alert to the possibility that the eminent-domain power had been deployed at the instigation of Pfizer and other private entities

70. James D. Savage, *Corruption and Virtue at the Constitutional Convention*, 56 J. POL. 174, 181 (1994) ("Where the delegates were often equivocal about the presence of virtue and its political effect, there was near unanimous agreement that corruption was to be avoided, that its presence in the political system produced a degenerative effect, and that the new Constitution was designed in part to insulate the political system from corruption.").

71. *See* CAMILA VERGARA, SYSTEMIC CORRUPTION: CONSTITUTIONAL IDEAS FOR AN ANTI-OLIGARCHIC REPUBLIC 91 (2020) ("Even if he feared the tyranny of the majority the most, Madison knew corruption could also come from the elites who are supposed to protect liberty.").

72. JOSEPH FISHKIN & WILLIAM E. FORBATH, THE ANTI-OLIGARCHY CONSTITUTION: RECONSTRUCTING THE ECONOMIC FOUNDATIONS OF AMERICAN DEMOCRACY 49 (2022) ("[V]iewing the framing through the lens of 'counterrevolution' risks obscuring the broad accommodations made for popular anti-oligarchic sentiments during the drafting and ratification processes.").

73. *See* Renee Lettow Lerner, *Enlightenment Economics and the Framing of the United States Constitution*, 35 HARV. J.L. & PUB. POL'Y. 37, 46 (2012).

74. *Id*. (noting that "in some clauses," including the Takings Clause, "these principles are explicit," while in others "the Framers allocated powers and arranged procedures to further these principles indirectly"); *see also* Michael W. McConnell, *Contract Rights and Property Rights: A Case Study in the Relationship Between Individual Liberties and Constitutional Structure*, 76 CALIF. L. REV. 267, 270 (1988) (arguing that the federal constitutional structure promotes economic growth by insulating property rights from "popular upheavals"); Woolhandler & Mahoney, *supra* note 32, at 684 ("The Constitution of 1787 manifests the Framers' desire to protect interests in property and contract in various provisions, including in its provision for federal courts.").

75. *See generally* DANIEL B. RODRIGUEZ, GOOD GOVERNING: THE POLICE POWER IN THE AMERICAN STATES (2024) (tracing the origins of the state police power).

76. *See* JOHN W. COMPTON, THE EVANGELICAL ORIGINS OF THE LIVING CONSTITUTION 2 (2014) (analyzing the "tension between nineteenth-century mores and Founding-era constitutional commitments" and arguing that "this tension was perhaps the most important force shaping American constitutional development in the period between the Founding and the 1930s"); RODRIGUEZ, *supra* note 75, at 84-95.

seeking to secure benefits. After all, for private parties who are indifferent or hostile to the public welfare, such a strategy makes sense.[77]

While guarding against the abuse of the eminent-domain power by known actors is no easy task, those who wish to prevent bad actors from hijacking government power at least have the advantage of being able to spot them with relative ease. With systematic corruption, matters are more complex.

What the *Kelo* Court ignored is that the New London revitalization plan empowered decision makers to choose winners at a later date. The *Kelo* Court's blind spot on this issue underscores a sobering truth: the indicia of systematic corruption will often be subtle and harder to detect than those of standard corruption. In the eminent-domain context, the beneficiaries of a systematically corrupt scheme will generally be invisible because they will not yet have been selected. And that may, of course, be the objective of the architects of some eminent-domain schemes, particularly ones justified on economic-development grounds. Special privileges are created to be distributed later at the discretion of those in power with an eye toward shoring up their authority.

With respect to the contours and uses of eminent-domain power, there is a clear lesson to be drawn. 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.

Conclusion

In this Article, I have suggested that a grasp of the term "corruption" as understood in the Founding Era can shed light on today's eminent-domain controversies. In particular, I have drawn attention to how the United States Constitution was designed to address problems of systematic corruption as well as venal corruption. In *Kelo*, the Court was alert to the prospect of venal corruption in the New London redevelopment plan but ignored the possibility of systematic corruption. In considering the next steps for eminent-domain doctrine and practice, it makes sense to take account of the dangers of all forms of corruption.

77. *See* Daniel B. Kelly, *The "Public Use" Requirement in Eminent Domain Law: A Rationale Based on Secret Purchases and Private Influence,* 92 CORN. L. REV. 1, 34-36 (2006) (explaining that "because private parties can use eminent domain to obtain a relatively concentrated benefit, these parties have an incentive to use inordinate influence to achieve their private objectives through condemnations" and further observing that such private parties often have repeat business before the government, giving them advantages in navigating process requirements).