Kelo v. City of New London: Its Ironic Impact on Takings Authority

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I. Introduction

THE UNITED STATES SUPREME COURT'S 2005 decision in *Kelo v. City of New London*[1] brought eminent domain takings to the fore as a controversial sociolegal issue of twenty-first-century America. Historically, eminent domain has been used, for instance, to refurbish blighted areas,[2] reconfigure skewed housing markets,[3] and revitalize stagnant economies.[4] Yet, as the most critical eminent domain case in the United States in recent decades, *Kelo* has sparked mixed and often heated responses by legal scholars, media, the public, and the judiciary itself.

In *Kelo*, five of the Court's nine justices voted to uphold the 2004 decision of the Connecticut Supreme Court that permitted the City of New London (hereinafter "City") to use eminent domain for the purpose of economic development.[5] *Kelo* addresses the "important question of when eminent domain may constitutionally be used to take property for projects that are not publicly owned and operated facilities."[6] Central to the case, then, is the constitutionality of takings that transfer property between private owners for economic development purposes.[7] The Takings Clause of the Fifth Amendment to the United States Constitution, the majority concluded, permits the

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1. 546 U.S. 469 (2005).
2. Berman v. Parker, 348 U.S. 26 (1954).
3. Haw. Hous. Auth. v. Midkiff, 467 U.S. 229 (1984).
4. *Kelo*, 546 U.S. at 469.
5. *Id.*
6. DWIGHT H. MERRIAM & MARY MASSARON ROSS, EMINENT DOMAIN USE AND ABUSE: *KELO* IN CONTEXT xvii (2006).
7. Herein "economic development purposes" include increasing tax revenues and the employment rate. There can also be economic development strategies that fall within the scope of takings authority, though it is debatable whether the Court upheld types of takings other than the first two.

City's taking.[8] This conclusion rested on two considerations: first, whether the taking satisfies the requirements of the Public Use Clause of the Fifth Amendment; and second, whether the Court should defer to City's determination of the fitness of this plan under the Court's understanding of public use.[9]

Congressional legislation in recent months provides a fitting occasion to examine the net effect of *Kelo* on economic development takings authority.[10] But there are also enduringly important reasons for such inquiry. The heated public response to *Kelo* over the past several years brings into sharp relief America's historical and current debate over property rights. It also raises important questions about the balance between community benefits and individual rights in society and the appropriate role of the state in helping to facilitate this balance. *Kelo* speaks to manifold social issues: those in law (e.g., legal ownership and eminent domain authority); political theory (e.g., legislative versus judicial power); economics (e.g., economic development and property rights, especially those in the housing market); demography (e.g., the decision's potential to affect minorities disproportionately); and poverty relief (the decision's potential to harm the impecunious disproportionately).[11] These issues are inextricably bound to the issue of takings. Peering through the lens of *Kelo* provides ample opportunity to consider them.

The "*Kelo* question" will be the focal point of this analysis: has *Kelo* actually decreased economic development takings authority? This Article first addresses the federal decision; second, it briefly comments on a representative sample of state and federal policy responses; and finally, it explores the long-term, net effect of *Kelo* on takings authority. Thus, this Article seeks to answer *three* questions: (1) has *Kelo*—as a legal decision—increased takings authority; (2) has the public policy response to *Kelo* decreased takings authority; and (3) has the net effect of *Kelo*—namely the two above effects taken

8. *Kelo*, 546 U.S. at 469.

9. *Id.*

10. *See* H.R. REP. No. 112-401 (2012), *available at* http://www.gpo.gov/fdsys/pkg/CRPT-112hrpt401/pdf/CRPT-112hrpt401.pdf; *see also, e.g.*, Audrey Hudson, *Big Private Property Victory: House Bill Would Reverse Kelo Decision*, HUM. EVENTS, Mar. 5, 2012, at 10 (discussing 2012 House Bill intended to overturn *Kelo*); Correy Stephenson, *House Passes Bill to Reverse 'Kelo' Supreme Court Ruling*, LAW. USA, Mar. 7, 2012 (discussing H.R. 1433, the Private Property Rights Protection Act).

11. *See* Eric L. Silkwood, *The Downlow on Kelo: How an Expansive Interpretation of the Public Use Clause Has Opened the Floodgates for Eminent Domain Abuse*, 109 W. VA. L. REV. 493, 519-524 (2007).

together—actually resulted in a reduction in economic development takings authority?

The hypothesis this Article will test is that *Kelo* has engendered a net reduction in economic development takings authority. Although the decision itself increased such authority,[12] the state and federal policy responses to *Kelo* are so vigorous and wide-ranging that, together, they more than offset any increase in economic development takings authority.[13] This Article concludes that the *Kelo* question, then, should be answered in the affirmative—ironically, *Kelo* has yielded a more restrictive takings environment.

It bears noting that some scholars have argued that, due to state policy responses,[14] *Kelo* will ultimately lead to a reduction in economic development takings authority.[15] This article sets forth a more comprehensive picture, with a wider review of a variety of scholarly perspectives on the *Kelo* question, than is present in most works of *Kelo* scholarship to date.

II. *Kelo:* Law and Facts

Kelo was legally contentious even before reaching the highest Court.[16] This section will discuss legal and factual background relevant to the first level of the *Kelo* inquiry—whether *Kelo*, as a legal decision, expanded economic development takings authority.

A. *Takings Law*

The Takings Clause of the Fifth Amendment to the Constitution places two limitations on eminent domain takings authority—the taking must

12. *See infra* Part III. Some might argue that *Kelo* does not *increase* or *advance* redevelopment takings; it merely reaffirmed what *Berman v. Parker* had already approved.

13. *See infra* Part IV.

14. *See, e.g.*, Marc Mihaly & Turner Smith, *Kelo's Trail: A Survey of State and Federal Legislative and Judicial Activity Five Years Later*, 38 ECOLOGY L.Q. 703 (2011) (summarizing judicial and legislative changes in eminent domain law after *Kelo*).

15. *See, e.g.*, Douglas W. Dahl, II, *Kelo v. City of New London, Connecticut: Are Private Property Rights Really in Danger?*, 29 AM. J. TRIAL ADVOC. 443 (2005) (discussing the increase in protection afforded to private property owners after *Kelo*); *see also* Thomas W. Merrill & Henry E. Smith, *The Morality of Property*, 48 WM. & MARY L. REV. 1849, 1880 (2007) (predicting that the "public backlash" to *Kelo*, when translated into the actions of legislators, local public officials, and state and lower federal courts, will probably have a greater impact on the future use of eminent domain than the Court's decision in *Kelo*).

16. Kelo v. City of New London, 843 A.2d 500 (Conn. 2004). Prior to the five-to-four federal level decision, the Connecticut Supreme Court upheld the City's taking in a four-to-three decision.

be for a public use and the government must pay the property owner just compensation.[17] Yet, in what basic philosophy is takings law grounded?

> There is such a thing as the "public," as distinct from the ensemble of private property owners, and this public has some claims that rank higher than the claims flowing from ownership, however uncontested and long-standing those claims may be. Under certain conditions (specified in practice by applying the terms "public use" and "just compensation" to particular circumstances), even a government that possesses limited powers and is dedicated to principles of liberty may legitimately act on behalf of the public to override rights of private ownership.[18]

Hence, even a relatively small government dedicated to preserving property rights can legitimately conduct certain types of takings for the public good. *Kelo*, then, inquires as to these limits.

The dispute-specific issue in *Kelo* is "whether the city's proposed disposition of [petitioner's] property qualifies as a 'public use' within the meaning of the Takings Clause."[19] The broader principle-specific question of *Kelo* is: "[a]re economic development takings constitutional" if the taken property will ultimately be transferred to a private party or parties?[20]

It is important to understand *Kelo* in the domestic and international legal contexts in which it was adjudicated. "Every sovereign government enjoys the power of eminent domain—the power to take property without the consent of the owner in return for payment of just compensation."[21] Of course, different sovereigns recognize different justifications as legitimate grounds for takings. In this regard, pre-*Kelo:*

> the Court deferred to a government's rationale for invoking eminent domain only when it fell into one of three categories: (1) the government itself acquired property that it maintained for the public, (2) the property taken would be regulated as a common carrier and available for public use, or (3) the taking fell within the government's legitimate police powers to eradicate social harms.[22]

17. U.S. CONST. amend. V, cl. 5; *see* David A. Dana, *The Law and Expressive Meaning of Condemning the Poor After Kelo*, 101 NW. U. L. REV. 365, 367 (2007).

18. *See* William A. Galston, *Why the New Liberalism Isn't All That New, and Why the Old Liberalism Isn't What We Thought It Was*, 24 SOC. PHIL. & POL'Y 289, 297 (2007).

19. *Kelo*, 545 U.S. at 472.

20. *Id.* at 498.

21. Merrill & Smith, *supra* note 15, at 1879.

22. *See* Sharon A. Rose, *Kelo v. City of New London: A Perspective on Economic Freedoms*, 40 U.C. DAVIS L. REV. 1997, 2019 (2007).

Kelo fits within this overall framework for takings law and eminent domain practice. It addresses the legality of one particular type of taking—that for economic development.[23] An economic development taking "can be understood to refer to a taking in which property is acquired by eminent domain and then retransferred to a private commercial entity, in the expectation that this will lead to more jobs or higher tax revenues for the community in question."[24] Whether economic development carried out by private parties meets the public use requirement of the Takings Clause depends specifically on how state and federal courts define "public use."[25]

B. *The Facts of* Kelo

In *Kelo*, the City claimed it had ample constitutional authority to use eminent domain in order to increase both tax revenues and the employment rate, both public uses.[26] To attain these benefits, the City enabled "a private redevelopment group"[27] to plan and construct a development that would yield "90,000 square feet of office space."[28] Some landowners resisted and challenged the City's taking of their property because their properties (i) were not located within the public use areas of the proposed development;[29] (ii) were not blighted;[30] and that therefore taking their properties did not serve a legitimate public use.[31]

In response to the Court's decision, a general public perception emerged: a perception that *Kelo* threatened private property rights, particularly those of impoverished, minority, and other traditionally at-risk groups.[32] Other scholars viewed *Kelo* as an unacceptable private party transfer—that is, a taking from one private property owner to solely benefit another.[33]

23. Merrill & Smith, *supra* note 15, at 1880.
24. *Id.*
25. *See* Elizabeth. F. Gallagher, *Breaking New Ground: Using Eminent Domain for Economic Development*, 73 FORDHAM L. REV. 1837, 1839 (2005).
26. *Kelo*, 545 U.S. at 483.
27. Silkwood, *supra* note 11, at 513.
28. David L. Breau, *Justice Thomas' Kelo Dissent, or, "History as a Grab Bag of Principles"*, 38 MCGEORGE L. REV. 373, 390 (2007).
29. Here, the argument defers to a narrow interpretation of "Public Use" as literally "use by the public." As discussed in more depth in this Article, this and the proper level of Court deference to the legislature were the two key issues under dispute in *Kelo*.
30. Silkwood, *supra* note 11, at 514.
31. Marc L. Roark, *The Constitution as Idea: Describing—Defining—Deciding in Kelo*, 43 CAL. W. L. REV. 363, 367 (2007).
32. *See* Galston, *supra* note 18, at 297.
33. Merrill & Smith, *supra* note 15, at 1884 (emphasis original).

C. *Precedent*

The line of cases most relevant to *Kelo* begins in the 1920s with *Block v. Hirsh*.[34] *Block* held a rent control law constitutional as an exercise of the state's police power.[35] Then, twice in the latter half of the twentieth century, the Supreme Court decided landmark Public Use cases. In *Berman*, it legitimized the use of eminent domain for blight refurbishment, including takings of non-blighted property to accomplish this end.[36] In *Midkiff* the Court legitimized the use of eminent domain for reconfiguring a land market, viewing the market as oligarchical and therefore antithetical to the public interest.[37]

These cases are best understood not only on their own terms but also as they relate to one another: *Berman* "laid the groundwork and foundation for the *Midkiff* and *Kelo* Courts to expand the term ["Public Use"] even further."[38] However, the relationship between blight takings and economic development takings is incongruous: "[a]lthough all or virtually all blight condemnations can readily be recharacterized as economic development condemnations, the converse is not true: some economic development condemnations cannot readily be recharacterized as blight removal condemnations."[39] This analysis bears a key implication for the response to *Kelo*—banning all economic development takings would not by definition mean banning all blight takings.

Legislative deference is also important in each case. In both *Berman* and *Midkiff*, the Supreme Court showed deference to the state legislature, letting it determine which takings were permissible under the Public Use stipulation of the Takings Clause.[40] In *Block*, the Court showed deference to the District of Columbia legislature.[41] Since the question whether such deference was compelled by precedent has remained arguable, the relevant *Kelo* literature has had to consider whether and to what degree these precedents urged that the Court uphold the decision reached by the Connecticut Supreme Court.

34. 256 U.S. 135 (1921).
35. *Id.*
36. *See* Gallagher, *supra* note 25, at 1843.
37. *Midkiff*, 467 U.S. 229.
38. Silkwood, *supra* note 11, at 503.
39. Dana, *supra* note 17, at 370.
40. *See* Gallagher, *supra* note 25, at 1857.
41. *Block*, 256 U.S. at 154-55.

III. The *Kelo* Question, Part I: Impact of the Federal Decision. Has *Kelo*—as a Legal Case[42]—Increased Takings Authority?

The ultimate concern of this Article is *Kelo's* net effect on economic development takings authority. Nonetheless that effect must first be disentangled, and its immediate and long-term components treated separately. The focus of this section is the immediate effect of the Court's decision on economic development takings authority. *Kelo* likely increased such authority.

Scholarship on whether *Kelo* as a legal decision increased takings authority necessarily includes the arguments by the nine justices of the Court who adjudicated *Kelo*.[43] This includes four opinions: the five-justice majority opinion, Justice Kennedy's concurrence with the majority, the four-justice minority dissent, and Justice Thomas' independent dissent. Constituting a less central but still highly important body of literature are the various non-Court sources on this issue. In what ways have the justices themselves—whose opinions constitute primary source literature—answered the first prong of the *Kelo* question—whether *Kelo* expanded takings authority as a legal matter? In what ways, moreover, have those analyzing the Court's opinions and eminent domain history answered it?[44]

A. *The Court and* Kelo*:* Kelo *Has Not Increased Takings Authority*

Kelo concerns both the related issue of, "the correct meaning of the words 'for public use,' and . . . the extent to which the Court should defer to legislative determinations of whether a particular taking satisfies that substantive standard."[45] With these issues in mind, Justice Stevens, writing on behalf of *Kelo's* majority, presented two historic legal interpretations of the Public Use provision—the narrow and

42. Holding constant, for now, the impact on takings authority of legislation passed in response to *Kelo*.

43. Herein "the Court" is used synonymously with the "the majority" and "the Supreme Court."

44. Prior to entering upon this analysis, one potential source of bias should be emphasized. Case-centered legal sources are likely to surround a controversial issue and take a side. And, *ceteris paribus*, reducing economic development takings authority would likely not be as controversial as increasing such authority. So the analysis below might exaggerate the degree to which *Kelo* confers additional takings authority on states and localities. This fact should be kept in mind when reading scholarship about the effect of *Kelo* on takings authority.

45. *See* Breau, *supra* note 28, at 375 n.27 (conveying a concise though rather opinionated summation of the inter-justice dispute in *Kelo*).

the broad interpretation.[46] The former defines "public use" as "use by the public" and the latter defines "public use" as "use for a public purpose."[47] Stevens asserted that the post-Holmesian Court "repeatedly and consistently rejected [the] narrow test."[48] After characterizing the narrow interpretation as running afoul of precedent, Stevens noted that the taking in *Kelo* served a public purpose and so satisfies the interpretation dictated by precedent.[49] Increased tax revenues, reduced unemployment, and other expected companion benefits collectively benefit the public—therefore, the Court maintained, the taking at issue in *Kelo* serves a "public purpose."[50] The majority believed *Kelo* fit within the *Berman* precedent in that the "the broad language, the broad dictum of the *Berman* case is directly applicable to *Kelo*."[51]

In addition to whether *Kelo* serves a "public purpose" and, if so, whether that purpose constitutes a "public use," *Kelo*'s majority considered whether the case blurs the line between public and private uses of property.[52] The majority found that *Kelo* does blur this line, but the majority gives minimal currency to this concern, positing that the line was already difficult to detect pre-*Kelo*.[53] Moreover, responding to criticism leveled at *Kelo* over the case's alleged private party favoritism, the Court responded that "the government's pursuit of a public purpose will often benefit individual private parties[,]" and that this fact is acceptable.[54] The Court underscores as well that *Berman* and *Midkiff* satisfy the Public Use mandate, despite the fact that each case upheld both public and private benefits.[55]

The majority does not just treat the private-public use distinction. It also weighs in on the general level of deference the Court should accord legislatures that must determine the content and limitations of the Public Use Clause. As the majority points out, the Court's "earliest cases in particular embodied a strong theme of federalism, emphasizing the 'great respect' that we [the Court] owe to state legislatures and state courts in discerning local public needs."[56] Thus, Stevens and

46. *Kelo*, 545 U.S. at 479-80.
47. *Id.*
48. *Id.* at 480.
49. *Id.* at 484.
50. *Id.*
51. *See* MERRIAM & ROSS, *supra* note 6, at 292.
52. *Kelo*, 545 U.S. at 485.
53. *See id.* at 485-86.
54. *Id.* at 485.
55. *Id.* at 485-86.
56. *Id.* at 482.

company assert the proper branch of government for determining whether *Kelo* and other economic development takings serve a public purpose is the legislature. It, and not the judiciary, represents the people and acts on their behalf. Therefore, the majority found that the City's "determination that the area was sufficiently distressed to justify a program of economic rejuvenation is entitled to our deference."[57]

Curiously (and also illuminatingly), in the aftermath of *Kelo*, Justice Stevens asserted, the law compelled an "unwise" outcome in *Kelo*.[58] This frank admission of ideological disapproval of *Kelo* suggests that Stevens was not seeking to decide the case on the basis of a preferred outcome but instead merely sought to uphold precedent. So Stevens and presumably Justices Breyer, Ginsburg, Kennedy, and Souter, who joined his opinion, would argue that the decision simply applied the facts of *Kelo* to the already enunciated principles of eminent domain jurisprudence—that is to say, *Kelo* did not expand takings authority, it merely affirmed long-standing eminent domain decisions.

Although Justice Kennedy's concurrence with the majority opinion is a key part of the *Kelo* scholarship, *Kelo* literature gives it short shrift. Quite apart from the legal merit of his opinion, little explanatory scholarship exists on the symbolic significance of Kennedy's apparently decisive vote as it informs an answer to the *Kelo* question. Kennedy's concurrence anticipates the criticism leveled at the decision for perceived private-party favoritism, and he proposes a rational basis test to keep private party favoritism at bay.[59] Perhaps in tension with the majority opinion, Kennedy's opinion intimates that *Kelo* has increased eminent domain authority.[60] For Kennedy emphasizes that a "court applying rational-basis review under the Public Use Clause *should strike down* a taking that, by a clear showing, is *intended to favor* a particular private party."[61]

Would Kennedy proffer such a strongly worded admonition merely to support court efforts to strike down takings? Or is it at least equally plausible that he provided this warning in order to underscore that more untoward takings well might occur under *Kelo*—suggesting that *Kelo* has increased takings authority? Of course, answering these questions requires a certain undesirable amount of speculation.

57. *Id.* at 483.
58. Eric Rutkow, Comment, *Kelo v. City of New London*, 30 HARV. ENVTL. L. REV. 261, 270 (2006).
59. *Kelo*, 545 U.S. at 491.
60. *Id.*
61. *Id.* (emphasis added).

But concern over a possible increase in takings authority does seem to underpin Kennedy's notion that courts may need to exercise more discretion (ideally, pursuant to his rational basis test) over economic development takings to ensure they are not conducted in manner that would be repugnant to citizen rights.[62] In short, Kennedy's strongly worded opinion suggests that *Kelo* has the potential to encourage undesirable takings, perhaps due to an increase in takings authority itself.

B. *Non-Court Sources Arguing That* Kelo *Has Not Increased Takings Authority*

Many sources in the non-Court literature support the majority's belief that *Kelo* did not increase economic development takings authority but rather recognized an extant level of this authority. These scholars find that "*Kelo* did not sound the demise of the public use provision"[63] and, in fact, that there is "still some life" in the Public Use clause.[64] Others attacked the *Kelo* dissent for overlooking cases in which courts invalidated eminent domain takings chiefly aimed at private gain, even if the public would benefit from them.[65] Evidencing this assertion is the post-*Kelo* California invalidation of an attempted eminent domain condemnation to permit a Costco to expand.[66] It suggests that *Kelo* did not open a floodgate to permit legally unfettered economic development takings.[67] Generally speaking, scholars who believe that *Kelo* did not expand takings authority argue that the majority's interpretation of public use and its high degree of legislative deference serve as adequate checks on takings authority.[68]

Scholars who believe that *Kelo* has not increased takings authority can also find support for their analysis in post-*Kelo* case law as only

62. One particular area for further research on *Kelo* would be a consideration of the underlying impetus for Justice Kennedy's proposed rational basis test for eminent domain takings. An interview with Justice Kennedy could be conducted to this end.

63. David Schultz, *What's Yours Can Be Mine: Are There Any Private Takings After Kelo v. City of New London?*, 24 UCLA J. ENVTL. L. & POL'Y 195, 234 (2006).

64. *Id.* As expounded later, this statement runs afoul of what the minority contended would result from upholding *Kelo*.

65. *See* John. R. Nolon, *The Mighty Myths of Kelo*, 9 GOV'T L. & POL'Y J. 10, 12 (2007).

66. City of San Luis Obispo v. Hanson, No. CV050169, 2010 WL 3222805 (Cal. Ct. App. Aug. 17, 2010).

67. *See* Nolon, *supra* note 65, at 12. This suggestion runs counter to the sentiments of Eric Silkwood, whose article title is self-explanatory: *The Downlow on Kelo: How an Expansive Interpretation of the Public Use Clause Has Opened the Floodgates for Eminent Domain Abuse. See* Silkwood, *supra* note 11.

68. *See* Nolon, *supra* note 65, at 12-13.

five of the several cases citing *Kelo* have actually involved a public use challenge.[69] Hence, if the supposedly deleterious effect of *Kelo* on the Public Use Clause is what is allegedly at issue in post-*Kelo* takings cases, then this effect has been minimally problematic. Indeed, the five cases did not involve the "transfer of non-blighted property to a private party solely for economic development."[70] Over the short term at least it does not appear that the constraints imposed by the "public use" clause were eviscerated by the decision.

C. *Non-Court Scholars Arguing That* Kelo *Has Increased Takings Authority*

Those who believe that Kelo has increased takings authority outnumber those who believe it has not. These frequently vehement opponents contemplate such questions as: is *Kelo actually* "an invitation to corruption"[71] amounting "to no more than thinly veiled theft"[72] in that, in their analysis, it authorizes legislative expropriation of private property at an unprecedented level.[73] In similarly alarmist language, other scholars assert that *Kelo* gives "those who have political power" the authority to "exercise it to punish enemies or force the sale of plum properties to favored friends."[74] Most scholars thus agree that in *Kelo* the Supreme Court did not simply follow eminent domain precedent, but rather expanded upon the holdings of *Berman* and *Midkiff*."[75] Without going into exhaustive detail on the literature on this point, it is worth noting that there is clearly a second group of voices debating the *Kelo* question.[76]

69. *See* Dahl, II, *supra* note 15, at 456.

70. *Id.*

71. Steve Forbes, *Fact and Comment: Jettisoning Justices' Injustice*, FORBES (Dec. 12, 2005, 12:00 AM), http://www.forbes.com/forbes/2005/1212/033.html.

72. Walter Block, *Coase and Kelo: Ominous Parallels and Reply to Lott on Rothbard on Coase*, 27 WHITTIER L. REV. 997, 997 (2006).

73. *See id.*

74. Forbes, *supra* note 71.

75. *See, e.g.*, Brett Talley, *Recent Development: The Supreme Court of the United States, 2004 Term: Restraining Eminent Domain through Just Compensation: Kelo v. City of New London*, 29 HARV. J.L. & PUB. POL'Y 759, 759 (2006).

76. *Kelo* has been characterized as one of two cases that have incited "the greatest public outrage" since 1980. *See* Dana, *supra* note 17, at 366. The other is *Poletown Neighborhood Council v. City of Detroit*, discussed later in this Article. *Id.* F. James Sensenbrenner Jr., Chairman of the Senate Judiciary Committee, has even characterized *Kelo* as the "Dred Scott of the 21st Century." Elisabeth Sperow, *Perspective on Kelo v. City of New London: The Kelo Legacy: Political Accountability, Not Legislation, Is the Cure*, 38 MCGEORGE L. REV. 405, 415 (2007) (quoting Sensenbrenner, Jr.).

D. *The* Kelo *Court Minority:* Kelo *Has Increased Takings Authority*

The impassioned four-justice minority addresses with zeal *Kelo*'s impact on takings authority. Its broad-sweeping criticism of the decision suggests that the decision reached may have expanded takings authority. The *Kelo* dissent declaims that *Kelo* is not only a signal departure from precedent but also a precarious one at that.[77] It has an aberrantly alarmist tone and pulls few punches in its criticism of the majority opinion. "The specter of condemnation *now* hangs over all property. Nothing is to prevent the State from replacing any Motel 6 with a Ritz-Carlton, any home with a shopping mall, or any farm with a factory. . . . *Today* nearly all real property is susceptible to condemnation on the Court's theory."[78] The minority's use of the words "now" and "today" in the above quotations depicts this point. Prior to the day on which the Court decided *Kelo*, there existed a certain level of takings authority; however, *Kelo*, the words imply, unacceptably increased this authority.[79] It provided states and localities with a newly minted, heightened legal discretion over property, enabling state expropriation for the purposes of increasing taxes or reducing unemployment.[80] How did the majority engender this novel outcome? "The Court today," says the minority opinion, "significantly expand[ed] the meaning of public use."[81]

The minority emphasizes two ways in which the majority supposedly increased takings authority by expanding precedent. First, the minority claimed that the majority overlooked a key point—*Kelo*'s facts challenged the equation of the Public Use requirement with "the scope of a sovereign's police powers," but *Berman's* and *Midkiff's* did not.[82] The *Kelo* minority, on the other hand, actually tries to modify language from *Berman* and *Midkiff*, considering it insufficiently narrow for the adjudication of *Kelo* and factually selfsame cases.[83] Second, *Kelo* strays from precedent, increasing takings authority by "abandon[ing] th[e] long-held, basic limitation on government power" that the government cannot take property from Party A and give it to Party B, against *Calder v. Bull*'s centuries-old admonition.[84]

77. *Kelo*, 545 U.S. at 501.
78. *Id.* at 503-04 (emphasis added).
79. *See id.*
80. This is an understanding gleaned from reading these statements in the context of the minority opinion.
81. *Kelo*, 545 U.S. at 501.
82. *Id.* Contra to *Kelo*, *Midkiff* directly supports this claim. *See id.*
83. *See id.* at 500.
84. *Id.* at 494; *see* Calder v. Bull, 3 U.S. 386, 388 (1798).

The minority viewed this alleged expansion as the wrongheaded result of an erroneous interpretation of both the Public Use Clause and the degree to which the law compels courts to defer to legislatures on the meaning of public use.[85] The minority, save Justice Thomas, views a broad interpretation of the Takings Clause as the correct precedent under *Berman* and *Midkiff*.[86] Nevertheless, if the question whether to accept a broad construction of the Takings Clause is the discrete-level (i.e., yes-no) question to which both sides respond similarly, then to what extent takings authority should be recognized under *Kelo* is the continuous-level (i.e., matter-of-degree) question to which both sides respond differently. The minority argues that the majority recognizes too much authority under *Kelo*.[87]

That takings authority expands or contracts concomitantly with the conceptual boundaries of "public use" is a plausible argument to which the minority would seem to agree. The minority argues that the majority has expanded the Public Use Clause. For,

> to reason, as the Court does, that the incidental public benefits resulting from the subsequent ordinary use of private property render economic development takings "for public use" is to wash out any distinction between private and public use of property—and thereby effectively to delete the words "for public use" from the Takings Clause of the Fifth Amendment.[88]

Under *Kelo*, if "nearly any lawful use of real private property . . . generate[s] some incidental benefit to the public," and if "predicted (or even guaranteed) positive side-effects are enough to render [property] transfer from one private party to another constitutional, then the words 'for public use' do not realistically exclude *any* takings."[89] Thus, the minority finds that under the majority opinion, the words 'for public use' "do not exert any constraint on the eminent domain power."[90] What is the result in the minority's view? It is that the Justice Stevens-led majority has extracted[91] much meaning—perhaps even nullified—the Public Use Clause.[92]

85. *Kelo*, 545 U.S. at 499-500.
86. *See id.* at 514-15.
87. *See id.* at 503-04.
88. *Id.* at 494.
89. *Id.* at 501.
90. *Id.*
91. If one believes meaning was "extracted" from a legal phrase, this presupposes that the phrase has had not an unchanging but a stable meaning (at least over the short run). Whether such meaning actually exists, however, is an interpretive question beyond the scope of this Article.
92. *See Kelo*, 545 U.S. at 502-04.

The minority also laments the majority's deference to the City's legislature on the meaning of "Public Use." It is the Court's province and not the legislature's, they assert, to determine what is a public use and, at least in some cases, what are acceptable economic development strategies.[93] Legal scholars support the minority's position and argue that "[the applicable] precedent was more malleable than majority opinion would suggest."[94] Although the minority claims that its opinion gives sufficient, even "considerable deference to legislatures' determinations about what governmental activities will advantage the public," it nevertheless notes that "were the political branches the sole arbiters of the public-private distinction, the Public Use Clause would amount to little more than hortatory fluff."[95]

Justice Thomas' dissent played a unique role in *Kelo*, as his was "probably the most radical of the four opinions in *Kelo*."[96] Thomas "advocated a return to the historic 'physical use' standard."[97] Notwithstanding the fact that several scholars have since called into question this and other arguments set forth by Thomas in *Kelo* (discussed later),[98] the Justice's opinion deserves attention as a key source in the *Kelo* literature. Thomas' dissent focuses largely on the methodological differences he has with the eight other justices. The other members of the minority would likely distinguish their opinion from Thomas' primarily on the ground that they do not call for a reversion to the nineteenth-century literal interpretation of "public use" as use by the public.[99]

Thomas deploys originalist analytics to support many arguments in his dissent.[100] He views *Kelo* as an expansive precedent. In contrast to

93. *See id.* at 497.

94. Rutkow, *supra* note 58, at 277.

95. *Kelo*, 545 U.S. at 497.

96. *See* Breau, *supra* note 28, at 373.

97. *See* John G. Sprankling, *Perspectives on Kelo v. City of New London: Introduction: The Impact of Kelo v. City of New London on Eminent Domain*, 38 MCGEORGE L. REV. 369, 370 (2007).

98. In *Justice Thomas' Kelo Dissent, or, 'History as a Grab Bag of Principles,'* Breau provides an insightful treatment of Thomas' opinion, calling into question the quality of Thomas' historical research. *See* Breau, *supra* note 28.

99. *See Kelo*, 545 U.S. at 500.

100. Questions regarding the methodological validity of originalism are generally outside the scope of this Article. David L. Breau, however, underscores an important qualification to Thomas' dissent in *Kelo*—

> running through Thomas' *Kelo* dissent is the widely-held assumption that the Founders' primary goal in creating the Constitution was to protect individuals' absolute property rights against government interference. But many Founders subscribed to republican ideals too, which emphasized the elevation of the public

the minority opinion, however, he emphasizes that *Kelo* is the latest in a "line of unreasoned cases wholly divorced from the text, history, and structure of our founding document. . . ."[101] Herein lies the main methodological divide between Thomas and remaining members of the minority: Thomas repudiates the *Kelo* holding as the latest historical iteration of a continuous string of backward precedent, whereas the other dissenters reject it as backward in and of itself.[102]

Thomas strongly believes that the level of deference the majority gives the applicable governing body far exceeds the separation of powers set forth in the Constitution:

> [t]here is no justification, however, for affording almost insurmountable deference to legislative conclusions that a use serves a "public use." To begin with, a court owes no deference to a legislature's judgment concerning the quintessentially legal question of whether the government owns, or the public has a legal right to use, the taken property.[103]

Thomas bemoans the majority's unwillingness to articulate to legislatures the basic contours of the Public Use Clause, and emphasizes powerfully that, "[t]hough citizens are safe from the government in their homes, the homes themselves are not."[104] Unlike fellow members of the minority, however, Thomas views *Kelo* as constituting an abdication of Court responsibility for maintaining within the Constitution's language some modicum of meaning in keeping with the Framers' original intent:[105]

> [o]nce one accepts, as the Court at least nominally does, that the Public Use Clause is a limit on the eminent domain power of the Federal government and the States, there is no justification for the almost complete deference it grants to legislatures as to what satisfies it.[106]

The language of the minority opinion echoes this point but shows comparatively little concern for the intent of the Framers in constructing

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good over the private interest as critical to the survival of the republican form of government.

Breau, *supra* note 28, at 403.

101. *Kelo*, 545 U.S. at 523.

102. For more on the debate over originalism, see Dana, *supra* note 17, at 367-68 (citing scholarship on each side of the debate over the original meaning of the Public Use Clause).

103. *Kelo*, 545 U.S. at 517.

104. *Id.* at 518.

105. His focus on the Founders' intent in writing the Fifth Amendment Takings Clause (specifically the Public Use clause) marks Justice Thomas as unique among "yes" answerers to the *Kelo* question. This fact is described in more depth below. *See infra* notes 110-13 and accompanying text.

106. *Kelo*, 545 U.S. at 518.

the Public Use Clause. Nor does it support a reversion to pre-twentieth-century precedent. Instead, it focuses more on the here and now, emphasizing theoretical difficulties of economic development takings and the problematic outcomes they would affect in practice. For instance, in the four-justice minority opinion, the justices commented that "the trouble with economic development takings is that private benefit and incidental public benefit are, by definition, merged and mutually reinforcing."[107] The practical outcome of this theoretical problem, then, is that private party favoritism under the *Kelo* precedent would be difficult to keep at bay.

More emphatically than the minority does, Thomas emphasizes that the Court's standard of deference to the legislature in eminent domain cases for economic development purposes "encourages" holders of political power to "victimize the weak."[108] All told, the above statements suggest that Thomas considers *Kelo* to be an expansive precedent and a harbinger of future injustice.

That Thomas' consideration of *Kelo* through the Framers' apparent intent in drafting the Public Use Clause positions him uniquely among the justices is unmistakable. Thomas makes manifest his unique method of legal analysis, saying that *Kelo* gives not "the slightest nod to its original meaning."[109] His use of originalism in this context makes him unique among the nine justices, including the originalist, Justice Scalia. Thomas submits that the entire string of precedents should be overturned. Why? In his view, not a single case in this arena respects the true and original meaning of "public use." Thomas' analysis of the word "use" in "public use" furnishes a specific example of his originalist method. By determining what "use" means elsewhere in the Constitution, he believes one can appreciate what its intended meaning is in this context. "The Constitution twice employs the word 'use' outside of the Public Use Clause," each time meaning "used by."[110] This emphasis on the alleged original meaning of "use" sits in stark contrast to that of the majority. "The Framers would have used some such broader term if they had meant the Public Use Clause to have a similarly sweeping scope," he urges.[111] On this ground for Thomas, *Berman, Midkiff*, and *Kelo* all "fatally undermine the

107. *Id.* at 502.
108. *Id.* at 522.
109. *Id.* at 506.
110. *Id.* at 509.
111. *Id.*

doctrinal foundations" of the Public Use Clause.[112] And even if other justices would agree on this point, Thomas is unique among the four members of the minority in his vociferous exhortation that the Court should act on this doctrinal divergence and reverse the entire line of precedent in this arena.

Although many scholars disagree with Thomas' views and method in *Kelo*, one should be exposed to both sides of this methodological debate to best understand *Kelo*. Some scholars find curious the level of confidence with which Thomas claims to have discovered the original intent behind the Public Use Clause.[113] As one such scholar writes, "at least as much historical and textual evidence exits to support the view that the Framers intended the government to be able to take private property for public purposes such as economic development."[114]

One methodological criticism leveled at Thomas's approach is the questionable nature of Thomas' application of an 1888 treatise drafted by John Lewis to the 1791 Public Use Clause for the purpose of apprehending the meaning of "Public Use."[115] Even though "Lewis readily admits that the position he takes is *not* compelled by the text, history, or precedent, Thomas dispenses with such qualifications" without ample justification.[116] Indeed, "Thomas appears to have taken many of the arguments in his dissent directly from the Claremont Institute's brief without applying enough scrutiny to its misleading version of history."[117]

Moreover, another problem with Thomas's legal analysis is that social changes occur unpredictably and eminent domain law evolves within the changing social environment.[118] Thus, whereas "nineteenth-century courts interpreted the Public Use Clause as requiring the government or the public to physically use the property being taken,"

112. *Id.* at 515.

113. For example, David L. Breau notes that "Justice Thomas' understanding of the Public Use Clause's original meaning is merely one possible meaning that the Framers may have had in mind." Breau, *supra* note 28, at 375.

114. *Id.* Breau states "[i]t is doubtful if those words were meant as a substantive limitation at all." *Id.*

115. *Id.* at 377 (noting that "[p]utting aside the relevance of a treatise published in 1888 for determining the 'original meaning' of an amendment drafted in 1791, Thomas emphasizes Lewis' definition of 'use' as 'employ' while [curiously] ignoring broader terms such as 'enjoy'.").

116. *Id.* at 378 (emphasis added).

117. *Id.* at 396. The Claremont Institute is a conservative think-tank based in Claremont, California that submitted an amicus brief to the Court in *Kelo*. Breau, *supra* note 28, at 395. It was the only brief that solely discussed the question of the original meaning of the public use clause. *Id.*

118. *See* Sprankling, *supra* note 97, at 369.

the twentieth century included "new social and economic challenges" whose changing nature in some ways was responsible for the changing nature of legal interpretation.[119] The dramatic growth of suburbia following World War II led to a proliferation of inter-city slums,[120] which is why legislatures sought to revitalize these unhealthy neighborhoods via urban redevelopment.[121]

Berman thus "signaled the Supreme Court's shift to a new standard for defining 'public use'" that upheld the legality of takings aimed at refurbishing blighted areas.[122] Thomas' originalist bent militates against this legal interpretive change as a matter of principle. More generally, the Court's eminent domain precedent exhibits a departure from a literal interpretation of the "public use" limitation.[123] One risk of a Thomasian adjudicatory approach, then, is that of not properly attending to social changes unpredicted by the original framers of that law, such as that at issue in *Kelo*.

Another sticking point when it comes to accepting Thomas' mode of argument is that one must "accept his initial conclusion that words should be consistently defined every time they are used [in the Constitution]" before concluding that the Court's inconsistent interpretation of the same words is *per se* unacceptable.[124] Indeed,

> the first seventy-one years of our country saw different legal definitions of the word 'person': it could mean all people, black and white, male and female (such as in criminal law); all white people (such as in constitutional law); or all white male people (such as in the voting public).[125]

No doubt there exists much merit in laws whose language has enduring meaning, at least insofar as the enduring quality of this meaning helps foster social stability. Even so, such concerns as that above suggest that social or other factors can militate against or even override the benefit of consistent interpretation.

Though controversial, Thomas' interpretive *modus operandi* in his dissent is illuminating. Both it and the minority opinion provide a window into Court concern over the impact of *Kelo* on takings authority. Understanding both dissents, moreover, prepares one to understand the origins of the ideational strength of the anti-*Kelo* public policy response.

119. *Id.* Here, this Article follows Sprankling's lead in discussing the relevant social history of eminent domain precedent.
120. *See id.*
121. *See id.*
122. *Id.*
123. Rose, *supra* note 22, at 2006.
124. Roark, *supra* note 31, at 380.
125. *Id.*

In summary, *Kelo* as a decision apparently increased economic development takings authority. First, *Kelo* explicitly recognized the legality of takings for economic development purposes. This recognition came in the form of a clearer enunciation of a previously less clear legal rule (if not a new type of rule itself). Second, *Kelo* may not have simply recognized a greater extent of takings authority; it may have expanded that authority in a qualitative sense as well.

At this point, a word on the argument of this article is in order. This section analyzed the Court's opinion, concurring opinion, and dissents in *Kelo* as well as non-Court scholarship claiming that the *Kelo* decision did not by itself increase takings authority. The key consideration here, however, is that *if Kelo* did not actually increase takings authority, then it is even *easier* to conclude that *Kelo's* net effect (including the public policy response it engendered) has been a reduction in such authority. That is indeed the conclusion of this article. For if *Kelo* had no effect on economic development takings authority, then even the slightest reduction in that authority by legislatures would effect a net reduction in takings authority.

IV. The *Kelo* Question, Part II: The Public Policy Response to *Kelo*

The previous section of this article arrived at one main conclusion: as a legal decision, *Kelo* likely expanded (or at least did not narrow) takings authority. This section will examine the opinions of selected experts—scholars with particular expertise on takings law[126]—and the legislative land use policy changes of certain states and Congress in response to *Kelo* as representative of the long–term effect of *Kelo.*

If *Kelo* engendered a net increase in takings authority across the United States from a legal perspective, how can it be true that *Kelo's* ultimate effect was to decrease takings authority? This section sets out to show that in response to the *Kelo* decision, the state and federal responses to *Kelo* have dramatically constrained takings authority. Therefore, *Kelo* has ultimately had the ironic effect of reducing takings authority.

126. These experts are cited below. To give proper credit to their scholarship, the author has largely followed their lead in terms of substance and organization when it comes to summarizing the policy responses of the states selected below, but attempts to further the literature by providing individual contributions and analyzing the import thereof in terms of the *Kelo* question.

A. *Non-Court Sources Answer: Why the Strong Policy Response to* Kelo*?*

Frequently, the reach and force of law are best understood through the lens of those who respond to it.[127] This section overviews the scholarly response to *Kelo*, in particular the views of many non-Court scholars who believe *Kelo* increased takings authority. The scholarly response is illustrative of the perceived increase in takings authority espoused through *Kelo* and it is that perception that has fueled a vigorous policy response to *Kelo*.

One line of criticism leveled at the *Kelo* decision follows an originalist bent. If the Fifth Amendment's intent was to "deal[] specifically with the issue of potential government abuse,[128] by failing to address the Amendment's meaning," the Court undermined "the Founders' intent to protect a free society by preserving property rights."[129] Under this analysis, the majority opinion in *Kelo* dispensed with the intent of the Fifth Amendment:

> the majority had expanded the meaning of public use so far as to deprive it of limiting force by holding that the sovereign authority may take property currently in ordinary, innocuous use and give it over to other uses by other private parties, so long as there is some overall public benefit.[130]

This analysis does not, of course, give proper credit to the discrete issue in *Kelo*—the only public uses incontestably approved by *Kelo* are for increasing tax revenues and employment rate.[131] The eviscera-tion of the Fifth Amendment's protection may not be as extreme as some scholars insisted it was in the wake of the decision.

Another criticism that legal scholars leveled at the majority's opinion is that it affords a City's governing body too much deference in "public use" determinations. Such deference would warrant further action; for "if the court is determined to persist in granting great deference to the public use determinations of legislatures, the Court should reexamine just compensation, lest the Fifth Amendment Takings

127. Here the word "act" is meant to implicitly include the word "argue."
128. Rose, *supra* note 22, at 2023.
129. *Id.*
130. Galston, *supra* note 18, at 298. Of course, use of the word "innocuous" is debatable here.
131. Presumably, increasing the employment rate and increasing the actual number of employed persons in a given municipality are equally legitimate reasons for committing a taking under the authority upheld in *Kelo*. Yet, since employment rate is a relative measure while number employed is an actual number, a meticulous analysis can take for granted neither that these measures are the same nor, therefore, that *Kelo* applies in exactly the same way to each.

Clause cease to deter improper uses of eminent domain."[132] Some scholars insisted that in the wake of the perceived expansion in takings authority, economic development takings ought to be banned altogether.[133] Without a check on using eminent domain for economic development projects, there are "grave risks of unfairness, inefficiency, and abuse."[134] Rather than contend with such serious threats, legislatures and courts ought to proscribe, not just limit, economic development takings. So doing would be "the only way to mitigate" the "inefficiency, unfairness, capture, and abuse" of post-*Kelo* economic development takings.[135]

At an even more basic and yet more inflammatory level, commentators quickly identified a change ushered in by Kelo. As but one example of this alarmist language, *The Economist* pointed out *Kelo*'s apparently ominous effect of having increased takings authority: "Americans *used* to believe that their constitution protected private property"—that is, prior to *Kelo*.[136] Or, in the words of another commentator, "[t]he Supreme Court has left homeowners in a state of uncertainty."[137] Insofar as the public saw *Kelo* as emboldening developers (or "men with the bulldozers"[138]), it served to shift the public's attention to eminent domain—and the court of public opinion did not view the decision favorably.[139] In the *Kelo* aftermath, therefore, it was only natural that the people and their legislative representatives largely bemoaned this perceived increase in takings authority provided by the Court.[140]

Citizen and legislator insistence on the need to respond to *Kelo* appears to reflect "a general demand to preserve property rule protection for core property rights," and this demand itself "reflects deep-seated moral as well as legal assumptions about the sanctity of property."[141] With such a fundamental right at stake, an incendiary response naturally followed to the claim that "the Supreme Court held in *Kelo v. City of New London* that a family home could be condemned and

132. Talley, *supra* note 75, at 760.
133. Charles E. Cohen, *Eminent Domain after Kelo v. City of New London: An Argument for Banning Economic Development Takings*, 29 HARV. J. L. & PUB. POL'Y 491, 550 (2006).
134. *Id.*
135. *See id.* at 543-44.
136. *Hands Off Our Homes*, THE ECONOMIST, Aug. 20, 2005, at 71.
137. Rutkow, *supra* note 58, at 279.
138. *Hands Off Our Homes, supra* note 136.
139. *Id.*
140. *Id.*
141. Merrill & Smith, *supra* note 15, at 1890.

then conveyed to a private enterprise as part of an economic redevelopment project."[142] In the end, this ardent, chiefly one-sided response to *Kelo* derived from a public perception that economic development takings constitute "taking from the innocent" and foster "distributional injustice."[143]

Citizen frustration at this perceived increase in takings authority also derives from a more individualized basic fear for their homes and a concern for social justice. The minority gives expression to this concern:

> [t]he fallout from this decision will not be random. The beneficiaries are likely to be those citizens with disproportionate influence and power in the political process, including large corporations and development firms. As for the victims, the government now has license to transfer property from those with fewer resources to those with more.[144]

Other scholars, however, emphasize some of the potential benefits of the decision. For example, economic development can, in certain situations, promote environmental sustainability since *Kelo:*

> gives government a powerful tool to redevelop inner cities, especially in brownfield sites where developers are wary of undertaking the unnecessary risk of landowners holding out and complicating the projects. It also potentially opens the door for mega-stores like Wal-Mart to move into urban areas with the promise of increased tax bases and new jobs, taking whole neighborhoods in the process.[145]

Judge Richard Posner, too, takes a fairly even-handed view. Although Posner warns against certain uses of eminent domain authority, much of his literature acknowledges a benefit of eminent domain under *Kelo:* that it can help deal with the so-called holdout problem, whereby a small number of property owners are unwilling to relinquish their property to the government at a cost proximate to market value.[146] Yet, even Posner finds fault in the decision in that he does not believe the Court properly weighed the economic welfare effect on the private property owners whose property was at issue.[147] By

142. Sprankling, *supra* note 97, at 369; *see also* Merrill & Smith, *supra* note 15, at 1880 (noting that *Kelo* "elicited *unprecedented* public opposition to the idea of takings of private property for economic development").

143. Sprankling, *supra* note 97, at 369.

144. *Kelo*, 545 U.S. at 472. As stated above, Justice Thomas' dissent places even greater emphasis on this concern.

145. *See* Rutkow, *supra* note 58, at 278.

146. Richard Posner, *The Kelo Case, Public Use, and Eminent Domain*, THE BECKER-POSNER BLOG (June 26, 2005, 9:09 PM), http://www.becker-posner-blog.com/2005/06/the-kelo-case-public-use-and-eminent-domain—posner-comment.html. Recall that Kelo and neighbors were holdouts whose property the City targeted for a taking.

147. *See id.*

not focusing on the private property owners whose homes were at risk, the Court may have indirectly endorsed a standard of undercompensation for those whose property is taken without consent.[148] In summary, after the public recognized a perceived threat posed by *Kelo*—private property arguably being illegitimately put to "public use" through economic development—the foundation for the public policy backlash had been laid.

B. *Some Basics of the State Legislative Responses*

Given the public outcry over *Kelo*, it is unsurprising that the state and federal policy responses to *Kelo* have been so sweeping. After all, [t]he real place to ensure the appropriate use of eminent domain is the political arena."[149] The significant legislative backlash to *Kelo* at both the national and subnational levels originated in the perceived need to limit the effect of the ruling.[150] Post-*Kelo*, the people and their legislative representatives have sought to curtail what they perceive as *Kelo's* precarious effects. This section briefly details the legislative response to *Kelo*, first at the state and then at the federal level.

A preliminary observation is warranted. First, implicit in the perceived need by legislatures to respond to *Kelo* is the notion that many legislatures believed that *Kelo* increased economic development takings authority. Second, it is not easy to disentangle whether the people, their legislative representatives, or both groups believe that *Kelo* poses a significant risk to property owners. Finally, even if *Kelo* substantially increased economic development takings authority, the *Kelo* decision and any resultant increase in takings authority clearly do not exist in a vacuum. Legislation counteracting *Kelo* could in theory—and, by now, has in practice—undercut the decision's authority. Here one observes the push-pull nature of practical politics in relation to the Court's jurisprudence: *Kelo's* short- and long-term impacts on takings bear it out.

After *Kelo*, many citizens, legal scholars, and legislators underscored that eminent domain—at least in certain contexts—should be proscribed or otherwise limited in order to give legislators and

148. *See* Cohen, *supra* note 133, at 541.

149. *See* Sperow, *supra* note 76, at 426.

150. *See* Jeffrey B. Mullan, *My Land is Your Land: Re-examining Massachusetts Eminent Domain Law in Light of Kelo v. City of New London*, 50 BOSTON BAR J. 18, 20-21 (2006).

scholars needed time to consider revisions to eminent domain law.[151] In what ways could concerned states respond to *Kelo*? Here federalism enters the equation. The United States' system of federalism governs the legislative options available to states, constituting a type of "dual sovereignty" whereby states possess legal autonomy so long as their laws comport with binding federal-level laws.[152] States may adopt different eminent domain regimes if and only if state laws remain consistent with the requirements of federal law.[153] Therefore, in the context of eminent domain, "to be constitutional, a state or local government's condemnations must pass muster under *both* the federal constitution and that of the state in which the property in question is located."[154] In other words, the sphere of individual rights expands and contracts as the interpretation of federal and state laws alters over time in the weight it places on securing these rights.[155]

It also should be noted at the outset that the *Kelo* decision does not affect all state eminent domain laws. For example, the Kentucky Legislative Research Commission's text on the implications of *Kelo* for the state asserts, "[t]he *Kelo* decision did not directly impact Kentucky law. Although states cannot afford citizens less protection of their rights than required by the federal constitution, they are free to provide greater protection, and Kentucky does so."[156]

151. *See* Rose, *supra* note 22, at 2037 (noting that in the post-*Kelo* takings climate, "the future of American prosperity and economic freedom depends upon" the Court's ability "to remedy its misstep in *Kelo*"). Rose's words speak to many of the concerns prompting citizen support of state legislation aimed at reducing post-*Kelo* takings authority.

152. *See* Scott P. Ledet, Comment, *The Kelo Effect: Eminent Domain and Property Rights in Louisiana*, 67 LA. L. REV. 171, 182 (2006).

153. Carol J. Miller & Stanley A. Leasure, *Post-Kelo Determination of Public Use and Eminent Domain in Economic Development Under Arkansas Law*, 59 ARK. L. REV. 43, 74 (2006); *see* William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 491, 495 (1977). Supreme Court Justice William Brennan summarized this relationship that obtains under federalism: protection of individual rights is carried out by federal law—the "floor" of such protections, and by state law—the "ceiling."

154. *See* Dana, *supra* note 17, at 367.

155. This is the author's own view. Justice Brennan's analogy focuses on verticality and hence two-dimensionality. The idea of expansion and contraction of rights enables them to be conceptualized as having a three-dimensional shape rather than the two-dimensional one apparently implicit in Brennan's floor-ceiling analogy. Thus the contours of the rights are perhaps more easily envisioned under the expansion-contraction model of rights.

156. KARA DANIEL & NADEZA NIKOLAVA, IMPLICATIONS OF THE U.S. SUPREME COURT'S KELO DECISION FOR THE USE OF EMINENT DOMAIN IN KENTUCKY. LEGISLATIVE RESEARCH REPORT NO. 330, v (2005). This quotation calls to mind the floor-ceiling analogy Justice Brennan once employed to describe the federal law-state law relationship obtaining under federalism. *See supra* note 153. Moreover, that this text was written and

However, many states, unlike Kentucky, did respond legislatively and these legislative responses to *Kelo* may be categorized into "five major categories of reactive legislation: (1) authorization for a public use; (2) restriction of use to blighted properties; (3) enhanced public notice, hearing, and negotiation criteria; (4) local government approval; and (5) prohibiting eminent domain for specific purposes."[157]

C. *State Legislative Reform*

Even before the decision, three states passed legislation that limited takings authority in anticipation of *Kelo* being ruled in favor of the City.[158] More legislation quickly followed. Congress and twenty-one states responded statutorily to *Kelo* within one month of the decision; and Alabama, Delaware, and Texas did so within three months of the case.[159] Reflective of the gravity and scope of citizens' concerns over *Kelo*, all but three states passed eminent domain measures within one year of *Kelo*.[160]

The first set or "wave"[161] of post-*Kelo* legislation focused on prohibiting the use of eminent domain for purely economic development.[162] In the "second wave" of such legislation, "the question of 'blight' is more often addressed.[163] As the first wave spanned from 2005 through the start of 2006, and the second started during the 2006 legislative session and ended in June 2006, it is an open question whether there has been a third "wave" of post-*Kelo* legislation in the

published is a telling reflection of many state legislatures' impressions of *Kelo*. Why would a state legislature author a book on *Kelo* if both it and its citizenry thought the case would have but a negligible effect on legal—and therefore social—precedent? More likely than not because the legislature views *Kelo* as an expansive precedent.

157. Randy J. Bates, II, *What's the Use? The Court Takes a Stance on the Public Use Doctrine in Kelo v. City of New London*, 57 MERCER L. REV. 689, 711-12 (2006) (internal citations omitted). Similarly, Elisabeth Sperow provides a five-fold classification of state legislative responses to *Kelo:* "(1) prohibiting the use of eminent domain for economic development; (2) narrowly defining public use; (3) limiting eminent domain to blighted properties; (4) increasing the procedural requirements involved in exercising eminent domain; and (5) creating committees or taskforces to study the issue." *See* Sperow, *supra* note 76, at 419.

158. Anastasia C. Sheffler-Wood, *Where Do We Go From Here? States Revise Eminent Domain Legislation in Response to Kelo*, 79 TEMPLE L. REV. 617, 625 (2006).

159. *Id.* at 625.

160. Sperow, *supra* note 76, at 418.

161. Other scholars have used the term "wave" in describing different classes of post-*Kelo* legislation. *See, e.g.*, Edward J. Lopez & Sasha M. Totah, *Kelo and Its Discontents: The Worst (or Best?) Thing to Happen to Property Rights*, 11 THE INDEP. REV. 397, 410 (2007). Here this paper employs their useful distinction.

162. *See, e.g., id.* (discussing Missouri's legislative response to *Kelo*).

163. Dana, *supra* note 17, at 375.

intervening years.[164] The states selected for the brief analysis below constitute an illuminating sample: they share similar concerns over post-*Kelo* takings law—those described above—but vary in the policy responses they implement to guard against possible post-*Kelo* takings abuses. Perhaps most importantly, the policy response as a whole reveals that a threshold level of anti-*Kelo* public opinion existed that enabled legislators to respond. For such legislation would not pass without such popular and emotion-laden opinion. As a necessary condition of post-*Kelo* takings reform, this public opinion proved responsible for the irony of *Kelo*: that a case which likely increased takings authority ultimately engendered a policy climate that reduced that authority below its pre-*Kelo* level.

1. STATE TAKINGS LAW REFORMS: ANTICIPATING *KELO*

In light of the basic climate and structure of state policy responses to *Kelo*, this section first briefly considers[165] certain state reforms undertaken in anticipation of *Kelo*. Utah, Nevada and Oregon each immunized themselves prospectively from what was perceived as the *Kelo* decision's potentially perilous reach. Proactive legislation was each state's medicine against the abuse found in wrongfully taking land from a private party and transferring the land to another private party.[166]

Approximately three months before the Court announced the decision in *Kelo*, Utah enacted a redevelopment statute that limited the permissible uses of eminent domain for redevelopment and set forth criteria that any proposed redevelopment must satisfy to gain approval from the State Board of Education.[167] This bill assuaged fears that tax dollars would be spent on redevelopment projects rather than schools and other such recipient institutions of tax revenue, and arose out of stern opposition in the Utah legislature to redevelopment projects like that in *Kelo*.[168]

164. *Id.* For a systematic presentation of state responses according to their degree of effectiveness, see Ilya Somin, *The Limits of Backlash: Assessing the Political Response to Kelo*, 93 MINN. L. REV. 2100, 2114-37 (2009).

165. More exhaustive summaries of the legislative reform passed in Utah, Nevada and Oregon—as well as in many other states—exist elsewhere and this article is not intended to offer a complete survey of those reforms. For a more complete summary, see Sheffler-Wood, *supra* note 158.

166. *Id.* at 629.

167. *Id.* at 626.

168. *Id.* at 627.

Like Utah's, Nevada's legislative response to *Kelo* was prospective in nature. In enacting two pieces of legislation on June 14 and June 17, 2005, shortly before the *Kelo* decision, Nevada sought to "mandate written offers, good faith negotiation, fair appraisals, just compensation, and significant blight in order to take private property."[169] Controversial takings in Washoe County and Las Vegas, moreover, raised awareness in Nevada about the gravity of eminent domain and its potential to harm certain citizens disproportionately while helping others.[170]

2. STATE TAKINGS LAW REFORM: RESPONDING TO *KELO*

If states made serious efforts to preempt what they thought would be the detrimental effects of *Kelo*, state responses to the Court's actual decision were all the more one-sided. We now turn briefly to three representative responses.

a. Texas

Texas furnishes a great example of a state responding directly to *Kelo*. The Texas Legislature responded to *Kelo* by passing S.B. 7, a measure that "attempts to restrict the eminent domain powers of the state and public entities" by granting "statutory authority to steer the judiciary away from upholding takings that provide an excessive benefit to private parties."[171]

S.B. 7 amended the Texas Government Code in three ways. First, it proscribed government or private entities from consummating private property takings (1) that confer a private benefit on a private party using the property; (2) that are taken for "public use" in order to benefit private parties; or (3) whose purpose is economic development.[172] There is a crucial exception to the latter element, however. It is that municipal community development, urban renewal, and the elimination of "harm on society" owing to blight or slum conditions, all provide a legal ground for taking private property under the takings power.[173] Indeed, though they limited the permissible uses of eminent

169. *Id.* at 630.
170. *Id.* at 630.
171. Adrianne Archer, Comment, *Restricting Kelo: Will Redefining "Blight" In Senate Bill 7 Be The Light At The End of The Tunnel?*, 37 ST. MARY'S L.J. 795, 842 (2006).
172. *Id.* at 830 (citing TEX. GOV'T CODE ANN. § 2206.001(b)(1)-(3) (West Supp. 2005)).
173. *Id.*

domain, Texas legislators nonetheless sought "to enable localities to improve blighted areas."[174]

The desire of Texas legislators not to circumscribe takings authority other than that at issue in *Kelo* bears note. If Texas enacted takings reform beyond the scope of that under discussion in *Kelo*, it would suggest that *Kelo* merely enabled legislators to enact reforms for which they lacked the needed political leverage pre-*Kelo*. Yet economic development taking reform was the concern in post-*Kelo* Texas. Hence it would seem that public opinion—and not political opportunism—was chiefly responsible for such reform. And insofar as policy responses by other states focused on economic development takings reform, it would seem public opinion was so responsible there too. Nonetheless, blight exceptions may still result in eminent domain abuse, because "[t]hroughout America, blight classifications have been cast upon many properties in order to carry out economic development projects; namely when the properties are far from being blighted."[175]

b. Idaho

In response to *Kelo*, the Idaho legislature passed a bill circumscribing the scope of permissible takings in order to "to provide limitations on eminent domain for private parties, urban renewal or economic development purposes and to provide for review at judicial proceedings involving the exercise of the power of eminent domain."[176] Barring exceptions for, *inter alia*, the welfare, health, and safety of Idahoans, Idaho Code Section 7-701A expressly proscribes eminent domain takings "[f]or the purpose of promoting or effectuating economic development."[177] It also disallows takings "[f]or any alleged public use which is merely a pretext for the transfer of the condemned property or any interest in that property to a private party."[178] Therefore, in Idaho, it appears that either the citizens desired narrowly focused reforms or that political leaders did not suffer from that incorrigible disease that is most at home in the political profession and is known, of course, as opportunism.

174. Sheffler-Wood, *supra* note 158, at 633.

175. Archer, *supra* note 171 at 842.

176. Kimberly M. Watt, Comment, *Eminent Domain, Regulatory Takings, and Legislative Responses in the Post-Kelo Northwest*, 43 IDAHO L. REV. 539, 577 (2007).

177. IDAHO CODE ANN. § 7-701A(2)(b) (2006). Such "exceptions," however, would seem not to be takings as they fall within the police power. *See id.* § 7-701A(2)(b)(ii) 1-3.

178. *Id.* § 7-701A(2)(a).

This legislative response to *Kelo* apparently sought to avoid the alleged takings impropriety visited on the outraged property owners like Susette Kelo, an impropriety that is said to run counter to Justice Salmon Chase's admonition in *Calder v. Bull* against any "law that takes property from A.[sic] and gives it to B."[179] Idaho's statutory response also renders eminent domain proceedings reviewable at the discretion of the courts, elevating judicial deference at the expense of legislative deference.[180]

c. Florida

Post-*Kelo*, the Florida legislature passed HB 1567, a bill limiting eminent domain use, chiefly, in two ways.[181] First, HB 1567 limits the "use of eminent domain law by restricting some transfers of land to certain persons and private entities."[182] Thus, as in Idaho, so in Florida. Second, HB 1567 "provides that the elimination of a slum or blighted area does not meet the state constitutional requirement that the taking be for a public purpose."[183] So Florida's response to *Kelo* revamped takings law regarding blight classifications and espoused a narrower reading of "public use" than the Court adopted in *Kelo*. Florida's legislative response did not, therefore, simply address economic development takings; rather, it went a step further and constrained takings meant to eliminate blight.

The second limitation described above calls to mind the floor-ceiling analogy famously advanced by Justice William Brennan to describe federalism: federal law sets the floor or minimum enforced guarantee of individual rights protection, and state law sets the ceiling or maximum enforced guarantee of individual rights protection.[184] Although *Berman* legitimized the use of eminent domain for blight refurbishment, Florida put in place a fairly low ceiling on the permissibility of eminent domain for that purpose, adopting a stricter standard post-*Kelo*. Notwithstanding *Kelo's* focus on private-to-private transfers for economic development, the case provided the Florida legislature with the political leverage necessary to enact legislative reforms, namely, a key qualification to how the judiciary should

179. *Calder*, 3 U.S. at 388; *see also* Watt, *supra* note 176, at 577 (discussing this famous statement by Justice Chase).

180. Watt, *supra* note 176, at 578.

181. William P. Keith, *Recent Developments*, 22 J. LAND USE & ENVTL. L. 139, 156 (2006).

182. *Id.*

183. *Id.*

184. *See* Brennan, Jr., *supra* note 153.

interpret "public use." As in so many other states, without *Kelo*, it would be unsurprising if there were no such reform in Florida. Ironically, then, economic development takings authority could, in states with eminent domain regimes similar to Florida's, be even broader were it not for *Kelo*!

d. A Final Word on the State Response

The latticework of variously constituted post-*Kelo* takings law restrictions owes to one common concern: that *Kelo* increased takings authority and so put citizens at risk. This perceived risk, which bears disproportionately on homeowners, minorities, and the impecunious, is responsible for the state policy responses in general including those described above. State policy responses to *Kelo* are each in different degrees (1) products of public opinion coalescing against *Kelo* or (2) political opportunism playing out post-*Kelo*. One can safely infer that the people or at least their elected officials thought they would stand to benefit by passing anti-*Kelo* laws. The common thread here, however, is that *Kelo* ironically incentivized citizens and legislators to enact legal reforms that more than offset its effects on takings authority. The take-home point of the above analysis of state policy responses to *Kelo* is that these responses have substantially diminished takings authority.[185]

D. *The Federal Policy Response*

Another indicator of public sentiment following *Kelo* was the response by the United States House of Representatives. As a microcosm of the highly one-sided public and scholarly backlash to *Kelo*, the House voted 365 to 33 to adopt House Resolution 340 (2005).[186] H.R. 340 criticized the decision in *Kelo* and admonished state and local governments not to "construe *Kelo* as justification to abuse the power of eminent domain."[187] The bill served as a response to protests from citizens and congresspersons of varied ideational stripes.[188] Representative Phil Gingrey (R-GA) sponsored the bill,[189] but bipartisan disapproval of *Kelo* found strong expression when conservative Speaker of the House Tom DeLay (R-TX) teamed up with liberal representative Maxine Waters (D-CA) in support of House Resolution 340.[190]

185. *See* Sperow, *supra* note 76, at 380.
186. *Id.* at 415.
187. *Id.* (quoting H.R. Res. 340, 109th Cong. (2005)).
188. *See id.*
189. Lopez & Totah, *supra* note 161, at 405.
190. Sperow, *supra* note 76, at 415.

The sheer number of bills introduced in Congress not long after *Kelo* that sought to rein in eminent domain authority—fourteen—is illuminating.[191] One bill succeeded in statutorily embodying the public's anti-*Kelo* sentiment, coming "in the form of an amendment restricting the use of funds in an appropriations bill."[192] In short, "Congress used one of its most powerful weapons, the power of the purse, to restrict the ability of several federal agencies to use federal funding in *Kelo*-type situations where the property is going to be used by other private parties for economic development."[193] House Resolution 3058, a bill that "approved funding for the Departments of Transportation, Treasury, and Housing and Urban Development, the Judiciary, the District of Columbia, and other independent agencies for fiscal year 2006"[194] states "[p]ublic use shall not be construed to include economic development that primarily benefits private entities."[195] Through this Resolution, the House had thus exercised its control over federal expenditures and emphasized that these could not benefit private developers.

On the Senate side, though neither of the two notable bills that were introduced made it through the Senate Judiciary Committee,[196] both bear reference. The first bill was H.R. 4128, the Private Property Rights Protection Act of 2005. The second was Senate Bill 1313, the Protection of Homes, Small Businesses and Private Property Act of 2005. Each bill would, essentially, have prevented states from receiving federal funds for the purpose of economic development via eminent domain, but each suffered from being overly broad in scope.[197] Thus, legal scholars conclude that either bill would have deterred "states from using the eminent domain power in ways that may be necessary for the public good."[198]

The 110th Congress proposed two bills a little over one year after *Kelo* that sought to guard against potential post-*Kelo* abuses. The Private Property Protection Act would have prevented federal funding from supporting projects enabled by eminent domain that were not for a public purpose or for a public use in the sense enunciated in

191. *Id.* at 415-16.
192. *Id.* at 416.
193. *Id.*
194. *Id.*
195. *Id.* (quoting H.R. Res. 3058, 109th Cong. (2005))
196. *Id.* at 415.
197. *Id.* at 417.
198. *Id.*

the bill.[199] The Strengthening the Ownership of Private Property Act, introduced in February 2007, proposed to limit private party takings transfers to particular cases such as national emergencies.[200] Although few measures ultimately were adopted, in proposing fourteen total bills within two years of *Kelo*, Congress quickly brought to the fore the anti-*Kelo* bent of public opinion following the case.

E. *A Word on the Local Level Response*

Beyond the state and federal realms of takings policy, the local-level post-*Kelo* policy activity bears some consideration. *Kelo* has been responsible for substantial changes in economic development takings law in major cities such as Memphis, San Jose, and Los Angeles.[201] It is important to emphasize that anti-*Kelo* sentiment has not just incentivized state and federal actors to propose anti-takings legislation to curtail takings authority; it has affected the behavior of local politicians as well.

This may be motivated by the need to maintain a modicum of respect among their constituents in the midst of the vehement reaction to the *Kelo* decision. As with state congresspersons, local political leaders "would risk negative publicity and voter unease in resorting to eminent-domain proceedings for economic-development projects."[202] Accordingly, "many local officials have shied away from eminent domain" and some local officials—like Councilwoman Liz Wade of Riviera Beach, California—have "pledged never to use it except as a last resort."[203] Although what constitutes a "last resort" is debatable, it is clear that local actors are also under pressure not to use takings authority as it was used in *Kelo* if their hope is to remain in office beyond the current term.

F. *The Anti-*Kelo *Response: The Theory Behind the Policy*

What in theory accounts for the one-sided public response to *Kelo*? Part of the answer here owes to the abstract concept of public use:

> [p]ublic use is much more pliable and susceptible as an abstract concept than as a concretely defined term. I can feel a road, see it, and therefore gain experiential knowledge that it is in front of me. The "public use" that the Court defines exists outside of such empirical datums–it is to a certain degree elusive, which makes it more adaptable.[204]

199. *Id.*
200. *Id.*
201. Lopez & Totah, *supra* note 161, at 411.
202. *Id.* at 405.
203. *Id.*
204. Roark, *supra* note 31, at 379.

The concept of public use is therefore susceptible to varying interpretations by lawyers and laypersons.[205] When evaluating the appropriateness of the *Kelo* decision the public seems to have relied (rightly or wrongly) on its intuitive conceptions of justice. As evidenced by the many anti-*Kelo* legislative responses, the public overwhelmingly felt that *Kelo* visited an injustice upon the plaintiff under the Court's allegedly unjust interpretation of public use.

Curiously, however, neither a sense of justice beyond the individual, to wit, that which is just for the community, nor an allegiance to the force of legal precedent, seem from the scholarship to have pervaded this public response.[206] In short, questions of just social policy and just legal decision-making were overlooked.

The polity excusably underemphasized the fact that *Kelo* was at least not an incontestably clear departure from precedent. Teleologically, the law serves society, not society law. Thus, arguing that legal precedent compelled *Kelo*'s holding and so the public should not openly and freely engage *Kelo* on its political and not merely legal merits puts the cart before the horse. So doing makes citizens in a small but important way not self-governing but subservient to governmental authority. Fortunately, the public *did* embrace a holistic conception of justice in its response to *Kelo*, and this response did not tear at the fabric of a healthy democracy but rather upheld it. Thus it is not only understandable but also justifiable that the public has given less currency to legal precedent than did the Court.

Quite apart from this fact, however, the public seems to have unduly underemphasized in this holistic response the first sense of justice mentioned above—communal justice. Here, misallocated empathy seems to have fueled a disproportionately one-sided response to *Kelo*. Home and property owners across America seemed far more willing in the wake of *Kelo* to put themselves in the shoes of Susette Kelo than in the shoes of those unemployed or otherwise disadvantaged citizens. Many of these citizens would, perhaps, stand to benefit from the City's taking and the subsequent economic development.

All of this is not to say that home and property owners were unjustified in their willingness to commiserate with Kelo and neighbors. It is rather to say that it was easier for property owners and other citizens

205. *Id.*

206. Here the present Article does not speak to the small group of lawyers, scholars, and the like against *Kelo*, but to the public as constituting laypersons by and large.

to account for the costs[207] imposed on Susette Kelo by the decision, than for the less tangible costs of a loss of social welfare and individual utility that many New Londoners could have endured were *Kelo* decided the other way. In short, the public was aware of the serious harm Ms. Kelo had to endure. But perhaps the public was unable to fully appreciate the benefits of the other City residents, whom the takings aimed to help by increasing the City's employment rate and tax revenues.[208] Many scholars have taken a philosophical tack when attempting to explain this relatively one-sided public response to *Kelo* by emphasizing the distinction between rules of individual conduct, which are often nonconsequentialist, and rules of social organization, which are often consequentialist.[209] This distinction underscores a key confusion that so often motivates anti-takings sentiment. Although the right to own property is no doubt one of the most important rights that exist, it does not *obviously* warrant the setting aside of most or all other social goals. The goal of ensuring the public welfare, for which the government acts as a guarantor, at times may plausibly override in importance the preferences of a given homeowner confronted by a proposed eminent domain taking. Many public highways, presumably, would not have been built were this not the case.

Although opponents of *Kelo* may allege that it failed adequately to respect the near-sacrosanct right of ownership, an often overlooked philosophical fact is that one's property right can be and legitimately is subject to certain consequentialist social policies, one of which is eminent domain.[210] Recall that "every sovereign government enjoys the power of eminent domain—the power to take property without the consent of the owner in return for payment of just compensation."[211] Given this fact, either every sovereign government wrongfully

207. Including and especially non-monetary costs.

208. This point is not to say *Kelo* was decided correctly or not in either its legal or its normative sense (with the normative sense being extralegal by definition). The point is just that the public discounted the collective benefits, in my view, that well may accrue under *Kelo*. These benefits might just as well not justify the decision as justify it; what matters in this argument, however, is getting accurate information *before* making any sort of judgment as to what that information means. The public may have injudiciously condemned *Kelo* before considering its potential positive import for the community.

209. *See* Galston, *supra* note 18, at 300 (summarizing Richard Epstein et al., *Coercion vs. Consent: A Reason Debate on How to Think about Liberty*, REASON.COM, http://www.reason.com/0403/fe.ra.coercion.shtml (last visited May 23, 2012)).

210. Epstein et al., *Coercion vs. Consent: A Reason Debate on How to Think about Liberty*, REASON.COM, http://www.reason.com/0403/fe.ra.coercion.shtml (last visited September 21, 2012).

211. Merrill & Smith, *supra* note 15, at 1879.

takes citizen property in return for just compensation or, more likely, it is not true that private property rights can never acceptably be abridged. While anti-*Kelo* scholarship and public sentiment attacks *Kelo* as an unprecedented usurping of what are felt to be unabridgeable property rights,[212] more sophisticated attacks on *Kelo* acknowledge that property rights are both crucial and yet, at times, legitimately subject to considerations of social welfare that may run at cross-purposes with these rights.

G. *A Word on the State and Federal Judicial Response to* Kelo

Taken together, policy responses to *Kelo* have so substantially restricted takings authority as to negate and indeed reverse the net effect of *Kelo* on takings authority. But state and federal level judicial responses warrant a cursory treatment as well, even though they do not bear as substantially on the central claim of this Article.

Even prior to *Kelo*, two state supreme courts significantly limited economic development takings like those at issue in *Kelo*.[213] This merely strengthens the argument that *Kelo* ultimately, both through legislative changes and judicial responses, has on the whole reduced takings authority.[214] On the federal side, "as of April 2007, five court opinions had followed the *Kelo* ruling, twenty-five opinions had cited it, and two opinions had distinguished their cases from *Kelo*. No case criticized or declined to follow *Kelo*."[215] The direction in which the federal courts will take *Kelo* remains to be seen; however, that is all the more reason why state and federal legislation—such as that analyzed above—deserves center stage when considering whether *Kelo*, in its net effect, has expanded or constricted takings authority.[216]

H. *Suggested Policy for Concerned States*

Taken together, the serious stakes in *Kelo* for property owners, for certain demographic groups, and for communities, adumbrated that a vigorous policy response would soon be at hand. This section proposes

212. *See, e.g., Hands Off Our Homes, supra* note 136.

213. Sw. Ill. Dev. Auth. v. Nat'l City Envtl., L.L.C., 768 N.E.2d 1 (Ill. 2002); Cnty. of Wayne v. Hathcock, 684 N.W.2d 765 (Mich. 2004).

214. David Dana writes that Illinois and Michigan "read their state constitution as requiring more searching review of economic development condemnations," presumably as more searching vis-à-vis most state constitutions. Dana, *supra* note 17, at 373

215. Sperow, *supra* note 76, at 425 (internal citations omitted). Sperow lists the cases in the accompanying footnotes.

216. *Id.* at 426.

policy strategies that may lend guidance to legislatures seeking to respond judiciously to the still substantial citizen concern over *Kelo*.

As evinced above, policy responses to *Kelo* have varied in nature. Perhaps the most reasonable response for legislatures that seek to minimize a perceived takings threat is to institute a moratorium on takings immediately following a controversial eminent domain ruling like *Kelo*. The primary motivation for this policy would be to allow for circumspect deliberations. Such a moratorium would militate against hasty decision-making about a heated political issue.[217] After all, "state legislatures have been given an open invitation to shape their public use framework but their response must be measured and well-reasoned because the consequences of reactionary legislation may put a stranglehold on state and local governments trying to exercise eminent domain for unanimously accepted public uses."[218]

In short, it is clear that a legislative response to *Kelo* must not be undertaken in haste. Substantial time has elapsed since the decision, so the current concern is not that legislatures and citizens have not had ample time to consider the case but that popular opinion might pressure legislatures to respond too quickly to it or to takings it has legally enabled.

If reform is not pursued in haste, states may find that sweeping reform may not be necessary within their existing regimes. One example of a state falling in this category is Louisiana, which offers an interesting case study.[219] In relevant part, Louisiana's constitution states that it "shall be a judicial question" whether a given purpose for using eminent domain power is public.[220] It further provides that:

> [p]roperty shall not be taken or damaged by the state or its political subdivisions except for public purposes and with just compensation paid to the owner or into court for his benefit. Property shall not be taken or damaged by any private entity authorized by law to expropriate, except for a public and necessary purpose and with just compensation paid to the owner.[221]

217. *See* Jonathan Michels, *Kelo v. City of New London: Is the Response to Curb the Effect of the Supreme Court Decision Going Too Far?*, 37 SETON HALL L. REV. 527, 557 (2007) (commenting that "[T]he most prudent course of action for legislators [post-*Kelo*] that has an innocuous effect is enforcing an eminent domain moratorium. This tool is used to stop the use of eminent domain power by state and local government for a period of time while the legislature has a chance to study and consider its current eminent domain laws and any proposed changes or increased restrictions to those laws.").

218. Joshua U. Galperin, Note, *A Warning to States—Accepting This Invitation May Be Hazardous to Your Health (Safety, and Public Welfare): An Analysis of Post-Kelo Legislative Activity*, 31 VT. L. REV. 663, 664 (2007).

219. *See* Ledet, *supra* note 152.

220. LA. CONST. art. I, § 4(B).

221. *Id.*

Thus, unlike the United States Constitution, the Louisiana Constitution grants quite substantial authority to its courts[222] in the determination of public purpose. In *Kelo*, Justice Stevens emphasized the need to defer to the New London governing body as to the appropriateness of using eminent domain for economic development. The Louisiana Constitution, however, specifically states that the Louisiana judiciary should be free from legislative influence to determine whether a given taking is public or private and necessary or unnecessary.[223] Therefore, takings in Louisiana are not presumptively constitutional just because they are endorsed by the legislature.

This salient difference in extent of legislative deference suggests that a state-level amendment aimed at curbing potential post-*Kelo* abuses "may be unnecessary" or even powerless in Louisiana.[224] Here one observes a crucial fact about state responses to *Kelo*—they must be tailored not only to citizen preferences but also in accordance with existing state law. As such, they may vary substantially in content.

Since the Louisiana Constitution amply distinguishes between public and private takings, with takings turned over to private entities constituting private takings, a taking such as that in *Kelo* would be legally impermissible under Louisiana constitutional law.[225] This unconstitutionality illustrates that fewer types of takings would satisfy the public purpose requirement under Louisiana law than under United States law.[226] However, even with the protections afforded by the Louisiana Constitution, a *Kelo* taking could still pass state constitutional muster in Louisiana if courts, as reviewing bodies, view the developer or other such private organization as "merely acting on behalf of the city."[227] The possibility of such an outcome suggests that judicial discretion over the disposition of eminent domain cases in Louisiana might be so broad as to imperil property rights protections.[228]

Inasmuch as Louisiana's seeming constitutional safeguards may in reality be illusory, a legislative response to *Kelo* in the state may

222. And not its legislature.
223. *See* LA. CONST. art. I, § 4(B); Ledet, *supra* note 152, at 185.
224. *See* Ledet, *supra* note 152, at 184-85.
225. *Id.*
226. Of course, in light of the floor-ceiling federalism analogy employed by Justice Brennan, *no* state can permit more or more types of takings than the United States Constitution permits. Otherwise, the Constitution would lose its essential character (at least with respect to takings law) as a doctrinal vehicle limiting the ability of state law to unacceptably abridge the rights of citizens who are party to a given eminent domain taking.
227. Ledet, *supra* note 152, at 186. In other words, acting in a *public* capacity.
228. *See id.*

still be appropriate. One such response could be to amend the Louisiana Constitution to substitute the word "use" for "purpose," which would reduce the likelihood of eminent domain abuse under such discretion, since theoretically a "public use" is narrower in scope than a "public purpose."[229] Second, Louisiana could look to the dissent in *Poletown Neighborhood Council v. City of Detroit*,[230] which has since become law in Michigan.[231] In *Poletown*, the court applied three criteria for the determination of whether a proposed taking would satisfy Michigan's "public use" provision. The first type of permissible eminent domain taking is where collective action is required if a state is to undertake a publicly necessary land transfer.[232] The second is where government regulation continues indefinitely to ensure that the taken property is used by the public.[233] The third permissible use of takings authority is where there exists an independent public concern without reference to the private interests at stake that warrants the use of eminent domain.[234] Whether or not Louisiana or other similarly situated states choose post-*Kelo* to apply heightened review or accord with the dictates of *Poletown*, Louisiana's high level of judicial deference stands in stark contrast to the level of legislative deference supported by the majority in *Kelo*.

Arkansas, a state with a strong property rights regime in place pre-*Kelo*,[235] is also an interesting example to study for a particularly appropriate response to *Kelo* by similarly situated states. Unequivocally, the Arkansas Constitution provides that "[t]he right of property is before and higher than any constitutional sanction."[236] Nonetheless, there may yet be three steps that, taken together, will guard more effectively against post-*Kelo* eminent domain abuse. First, the Arkansas Supreme Court should clarify the "threshold question of what constitutes 'public use,'" as included in the state constitution, because legislative deference can pose problems.[237] Second, though Arkansas has a strong property rights regime, in its current form the Arkansas Constitution does not clearly define or limit the government's ability to

229. *Id.* at 189-91.
230. Poletown Neighborhood Council v. City of Detroit, 304 N.W.2d 455, 464-82 (Ryan, J., dissenting)
231. *Hathcock*, 684 N.W.2d at 781.
232. *Poletown*, 304 N.W.2d at 478.
233. *Id.* at 479-80.
234. *Id.* at 480.
235. *See* Miller & Leasure, *supra* note 153, at 89.
236. ARK. CONST. art. 2, § 22.
237. Miller & Leasure, *supra* note 153, at 89.

undertake takings, and undefined legal power can easily become power that a government arbitrarily wields.[238] Therefore, the Arkansas Constitution should be amended so that "public use" may not be interpreted to permit economic development takings.[239] Additionally, legislative "public use" determinations must be subject to judicial scrutiny. Language requiring judicial deference concerning the legality of takings might model that in the constitutions of Arizona, Missouri, Oklahoma, or Washington, each of which requires judicial deference in adjudicating takings questions.[240]

As to a federal level response, commentators posit three classes of federal actions that may help curb eminent domain abuse under *Kelo*. They are (1) constitutional or statutory amendments; (2) acts circumscribing the definition of "public use" or flatly proscribing the use of eminent domain for economic development; and (3) "acts that prohibit or remove federal funds from state or local governments who exercise eminent domain for economic development," all of which have been underway since *Kelo*'s adjudication.[241] These measures can help inform a federal response that would effectively prevent post-*Kelo* takings abuses.

The fact that commentators have suggested viable policy strategies in the wake of *Kelo* further supports the premise that the *Kelo* decision itself increased economic development takings authority. Indeed, it would be tough to conclude otherwise in light of the quick and substantial responses to *Kelo* by the federal legislature and state legislatures.[242] But the *Kelo* literature, while it does not admit of a unanimously agreed-upon categorical answer to the *Kelo* question, points to an affirmative answer to it on the basis of both theory and practice post-*Kelo*. *Kelo*, it seems, has altered America's jurisprudential landscape, whether for better or worse.

The uproar over takings found legal expression in the substantial, on-the-ground reductions in takings authority affected by state and federal legislatures post-*Kelo*. As this section has shown, to whatever extent *Kelo*—as a court decision—has increased takings authority, the policy response to *Kelo* has no doubt more than offset that effect. In short, it engendered a net reduction in economic development takings authority.

238. *Id.*
239. *Id.*
240. *Id.* at 89-90.
241. Dahl, II, *supra* note 15, at 457.
242. *Id.*

I. *Post-*Kelo *Legislative Reform, Minorities, and the Poor*

As with almost every policy solution, there are pluses and minuses to post-*Kelo* reform. For example, the poor might be the population forced to bear the brunt of post-*Kelo* takings, owing to changes in the statutory regimes that "may prevent authorities from using blight condemnations outside the most straightforwardly blighted—invariably, the poorest—areas."[243] Although takings reform as a whole may be viewed positively post-*Kelo*, "[i]n substantial part, this reform movement privileges the stability of middle-class households relative to the stability of poor households and, in so doing, expresses the view that the interests and needs of the poor households are relatively unimportant."[244]

Other scholars specifically disagree with this assertion, however. They conclude that the poor are no worse off than the middle class after post-*Kelo* reform is instituted because most states "either ban both blight and economic development takings or define 'blight' so broadly that even middle class homes could be condemned."[245] Hence, to a similar degree as the poor, the middle class are indeed at substantial risk of incurring post-*Kelo* costs from eminent domain. It is difficult to arrive at a correct analysis on this issue, but legislatures should surely be aware of the potential for takings to harm minority groups disproportionately. They should conduct takings, and introduce takings reform, in an accordingly sensitive manner.

V. *Kelo's* Ironic Impact On Takings Authority

Ever since the Supreme Court handed down its decision in *Kelo*, scholars and the public have been debating *Kelo's* impact—in the short- and long-term—on economic development takings authority. The debate has been heated. The stakes have been high. And *Kelo*'s contentiousness has owed primarily to one fact. It is that, "the question of economic development as public use pits the sacrosanct right of private property owners to be secure in their homes against the need for municipalities to develop in order to benefit the common good."[246] The legal and normative dimensions of this conceptual and real-world tension have proven powerful in their ability to divide judges,

243. Dana, *supra* note 17, at 378.
244. *Id.* at 365.
245. Somin, *supra* note 164, at 1942.
246. Rutkow, *supra* note 58, at 268.

lawyers, scholars, media, and citizens into different ideological and methodological camps. *Kelo* has left its mark, not only on takings authority but also on our country. *Kelo*'s effect on takings authority has been the focus of this Article. Takings can constitute a source of hope for underprivileged citizens or a serious risk for any of a range of citizens. Allowing some simplification, the controversy engendered by *Kelo* fueled public discourse, citizen action, and legislation. All of this ultimately led to a net reduction in economic development takings authority in the United States.[247]

The implications of *Kelo* for Court precedent remain unclear. *Kelo* "may prove to be merely a step in the evolution of the public purpose test" or "may be a transitional case that leads to a new public use standard."[248] Some scholars contend that *Kelo* merely upheld precedent; others counter that *Kelo* altered precedent.[249] Either way, *Kelo* has had a curious effect on takings authority. Even if the case itself expanded the scope of permissible takings, the policy responses it has engendered have more than negated this expansion. For, shortly after the Court adjudicated *Kelo*, the decision resulted in a "public backlash" that "translated into the actions of legislators, local public officials, and state and lower federal courts" that many think "will probably have a greater impact on the future use of eminent domain than the Court's decision in *Kelo*."[250]

As this Article argues, that prediction has now been realized in practice. Taken together, the many state-level restrictions on eminent domain and the federal response have constricted takings authority more than the *Kelo* decision could possibly have expanded this authority. State legislation in response to *Kelo* has by and large narrowed the scope of permissible takings expressed in the case; it has not embraced *Kelo*'s holding. And the numerous states that have revised their eminent domain laws post-*Kelo* are geographically diverse, such that the spirit animating these revisions is fairly representative of the anti-*Kelo* public spirit that has predominated since the case was decided. Legislation and public opinion have not condoned *Kelo* and have effected a concomitant reduction in takings authority. As this Article also has ar-

247. This statement is made with the understanding that this causal chain is not fully accurate but rather aims to illustrate the basic pattern of citizen response to *Kelo*.

248. Sprankling, *supra* note 97, at 371.

249. Taken together, the four *Kelo* opinions constitute what perhaps are the best arguments on each side of the question of whether *Kelo* remains in keeping with or departs from precedent.

250. *See, e.g.* Merrill & Smith, *supra* note 15, at 1880.

gued, further legislative responses by these states or the federal government (e.g., the recent House bill aimed at curbing federal eminent domain power[251]) to *Kelo* should be undertaken in a circumspect way, with an awareness of the challenges and opportunities present in the post-*Kelo* eminent domain climate.

In the final analysis, *Kelo* has had an ironic impact on takings authority. That irony stems from one key fact, that the policy and judicial response to it has been almost one-sidedly aimed at curbing takings authority. Witness that all but a few states have enacted legislation chiefly for that purpose, many of them substantially constricting economic development takings authority.[252] Perhaps the will of the people has prevailed as a check against what, in the court of public opinion, has overwhelmingly proven to be an undesirable legal decision. Either way, however, one thing is clear. *Kelo* has had the ironic effect of setting in motion an overall policy response that, by now, has reduced economic development takings authority below its pre-*Kelo* level. The *Kelo* question can indeed be answered in the affirmative.

251. *See* H.R. REP. NO. 112-401 (concerning the Private Property Rights Protection Act of 2012).

252. Somin, *supra* note 164, at 2115 (citing the number of states enacting post-*Kelo* reforms).

Appendix: Legislative Deference and *Kelo*

Though some feel that citizens are sufficiently able to express their views on eminent domain for economic development by way of the political process,[253] this line of argument is vulnerable to criticism. One can reasonably (though not uncontroversially) assume that voters tend to choose state and national representatives mainly based on the representatives' views on the issues they as voters deem most personally important. But takings impose costs on citizens, especially holdouts. These costs are often profound and their occurrence hard to predict, making it inherently difficult for the political process to account for the preferences of voters harmed by eminent domain. Often it is only when citizens already believe the takings power has been grossly abused that they think to act politically in order to constrain eminent domain authority. And often this is far too late. At this point an aggrieved voter may have sought and not received a legislative remedy and thus may need to call upon the courts for a satisfactory remedy. But one wonders: if the courts defer to the legislature on the meaning of "public use," can the affected person, even if impotent as a voter, really attain satisfactory legal recourse?

It is true that the small proportion of citizens who are involved in the political process outside of the voting booth may be able to get recourse through other political means. But providing an incentive for those with a vested interest in eminent domain—whether legal remedy or other gain—to make such maneuvers favors wealthy and powerful political actors over poorer and weaker political actors. Legislative-centric efforts to curb takings abuses risk favoring firms, for example. Under a court standard of substantial legislative deference on questions involving the constitutionality of takings, firms would likely find both better remedies and better ways to use eminent domain than would indigent citizens. In *Kelo*, one might view Pfizer as such a firm and those who lost their property as the comparatively disadvantaged political actors.

Yet, perhaps in a jurisdiction that embraces legislative deference on takings matters, citizens who disapprove of takings policy can use the political process or freedom of exit as *satisfactory* ways to guard against takings abuses. Absent having political agency vis-à-vis a

253. *See* Gallagher, *supra* note 25, at 1865-70.

given takings issue, those who remain unsatisfied with legislative remedies can "vote with their feet" by moving to a region with takings laws more acceptable to them.[254] On closer inspection, however, claims that one can achieve satisfactory recourse when faced with an untoward taking appear dubious if the institutional vehicle of recourse—whether at the federal, state, or local level—is a system of law and politics that defers too strongly to the legislature on such questions.[255] First, in most cases voting in the political sense cannot adequately account for the risks of takings abuse. Political voting is a proactive measure whereas taking action as a hold-out is a reactive measure. Second, voting with one's feet is an unreasonable expectation for guarding against takings abuses. Citizens live in a city for a number of reasons beyond the desire to be maximally protected against the threat of untoward takings.

Overall, it may be best if citizens could move into and out of neighborhoods, or remain in a given neighborhood, being confident all along that the courts will not condone overly broad takings authority. But a norm of robust court deference to the legislature on takings issues would impede municipalities from realizing this ideal. This norm would then seem incompatible with the general welfare. For it would foist upon citizens the unreasonable expectation that they should somehow greatly increase the extent of their political engagement to well beyond what it is today. In that sense it would be undesirable because infeasible.

254. *Id.* at 1868.

255. This is not to say that the United States' posture of legislative deference on economic development takings questions is necessarily problematic. Rather, it is merely to emphasize how critical it is for citizens to be afforded satisfactory legal or political remedies when subject to untoward takings by their government.