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Putting Kelo in Perspective Commentary Essays

Ilya Somin

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Essay

Putting *Kelo* in Perspective

ILYA SOMIN

Kelo v. City of New London was in line with precedent, and within the “mainstream” of legal thought. But that is not enough to justify it. Like many of the Supreme Court’s worst decisions, it highlights the ways in which the mainstream can go disastrously wrong. Going forward, the best way to rectify Kelo’s errors is to overrule it completely, rather than rely on half-measures, such as building on Justice Anthony Kennedy’s hard to interpret concurring opinion.

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Putting *Kelo* in Perspective

ILYA SOMIN*

I. INTRODUCTION

More than ten years after it was decided, *Kelo v. City of New London* remains one of the modern Supreme Court's most controversial rulings.¹ Although the Fifth Amendment only allows the taking of property for a "public use,"² the Court ruled that it was permissible for the government to condemn private property for transfer to another private owner in order to promote "economic development."³ The government was not even required to prove that the promised development was actually likely to materialize.⁴

The Court's decision produced a massive political backlash, with over 80 percent of the public opposing the ruling.⁵ The debate generated by *Kelo* also undermined the previous seeming consensus in favor of an extremely broad definition of "public use" that, like the *Kelo* majority, held that virtually any potential public benefit qualifies.⁶ Although the Court ruled in favor of the government, it did so by a narrow 5-4 majority, over strong dissents by Justices Sandra Day O'Connor and Clarence Thomas, which helped legitimize the case for a narrow definition of "public use" in the eyes of the legal community.

Wesley Horton played an important role in the *Kelo* story as the lawyer who successfully represented the City of New London before the Supreme Court. His essay for this symposium, coauthored with Brendon Levesque, is a valuable contribution to the ongoing debate over the decision, and public use doctrine more generally. I am also personally grateful to Mr. Horton for his generosity in offering his insights and recollections about the case while I was in the process of writing my recently published book *The Grasping Hand: Kelo v. City of New London and the Limits of Eminent Domain*. His assistance was both generous and extremely useful. It is all the more admirable because he offered it despite knowing that we

* Professor of Law, George Mason University. For helpful suggestions and comments, I would like to thank Wesley Horton and the editors of the *Connecticut Law Review*.

¹ 545 U.S. 469 (2005).

² U.S. CONST. amend. V ("[N]or shall private property be taken for public use, without just compensation.").

³ *Kelo*, 545 U.S. at 489-90.

⁴ *Id.* at 488-89.

⁵ ILYA SOMIN, *THE GRASPING HAND: KELO V. CITY OF NEW LONDON AND THE LIMITS OF EMINENT DOMAIN* 135-64 (2015).

⁶ *See id.* at 112-34.

have very different views about the case.

In this Essay, I assess Horton and Levesque's analysis of several key aspects of *Kelo*. I agree with them that the *Kelo* decision was based on at least somewhat plausible reasoning that had significant support in mainstream legal thought and Supreme Court precedent. We also agree that it was less outrageous than the notorious *Dred Scott* case.⁷ However, as I explain in Part II, Horton and Levesque greatly underrate the weaknesses of the *Kelo* ruling and the broad definition of "public use" it endorses.

Part III explains why Horton and Levesque are wrong to assume that their reform proposal building on Justice Anthony Kennedy's concurring opinion in *Kelo* offers a better way to prevent eminent domain abuse than simply overruling the decision.

Finally, Part IV notes some aspects of the *Kelo* story that Horton and Levesque downplay in their essay, which is too rosy in its appraisal of both the prospects for the success of the *Kelo* condemnations, and of the political forces behind them. The flaws of the *Kelo* takings exemplify, albeit in somewhat extreme form, the shortcomings of economic development and blight condemnations generally.

II. ASSESSING *KELO*

On one important point, Horton and Levesque, and I are largely in agreement. As they correctly point out, *Kelo* is "a part of the legal mainstream because it gives a reasonable and long-accepted reading of the Fifth Amendment."⁸ *Kelo*'s broad interpretation of "public use" is similar to that adopted by the Supreme Court in the 1954 case of *Berman v. Parker*,⁹ and reaffirmed in *Hawaii Housing Authority v. Midkiff*.¹⁰ Indeed, in some ways, *Kelo* was slightly less deferential to the government than these earlier precedents were.¹¹ For example, *Kelo* does not reiterate *Midkiff*'s statement that the public use requirement is satisfied so long as "the exercise of the eminent domain power is rationally related to a conceivable public purpose."¹²

However, "reasonable and long-accepted" and "part of the legal mainstream" is not the equivalent of correct or logically sound reasoning. Many of the Supreme Court's worst decisions were based on reasoning

⁷ *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857), *superseded by constitutional amendment*, U.S. CONST. amend. XIV.

⁸ Wesley W. Horton & Brendon P. Levesque, *Kelo Is Not Dred Scott*, 48 CONN. L. REV. 1405, 1408 (2016).

⁹ 348 U.S. 26 (1954).

¹⁰ 467 U.S. 229 (1984).

¹¹ See SOMIN, *supra* note 5, at 113–14 (describing this aspect of *Kelo*).

¹² *Midkiff*, 467 U.S. at 241.

that, at the time, was long-accepted and within the mainstream. They include such cases as *Bowers v. Hardwick*,¹³ *Plessy v. Ferguson*,¹⁴ and *Buck v. Bell*,¹⁵ all of which had strong mainstream support at the time they were decided, and were consistent with longstanding precedent and practice. Even *Dred Scott*, which Horton and Levesque strive mightily to differentiate from *Kelo*, was also based on theories that enjoyed considerable mainstream support in the 1850s.¹⁶ Historically, most of the Supreme Court's worst decisions were not rulings that departed from the then-dominant mainstream, but rather cases where the mainstream itself went wrong. So it is with *Kelo* and the earlier public use precedents it relies on.

The massive negative reaction to *Kelo* led the late Justice Antonin Scalia to compare it to *Dred Scott*. Both cases, he claimed, are decisions where the Court made "mistakes of political judgment, of estimating how far . . . it could stretch beyond the text of the constitution without provoking overwhelming public criticism and resistance."¹⁷ Still, Horton and Levesque are surely right to conclude that the former is not as bad as the latter, if only because eminent domain abuse is a far lesser evil than *Dred Scott's* expansion of slavery and denial of citizenship to even free blacks. In one important respect, however, the Supreme Court's adoption of a broad definition of public use has actually exceeded the harm caused by *Dred Scott*, simply because it has lasted far longer.

Dred Scott was only in force for a few years before it was overruled by the Thirteenth and Fourteenth Amendments. Even before that it helped cause the outbreak of the Civil War, which led to the Emancipation Proclamation and helped undermine the very evil that Chief Justice Roger Taney had sought to preserve. By contrast, the Supreme Court's adoption of an ultra-broad definition of "public use" in the 1950s helped set the stage for blight and economic development takings that have forcibly displaced hundreds of thousands of people.¹⁸ While the political and judicial backlash generated by *Kelo* has helped curb such abuses,¹⁹ they are far from eliminated, and may not definitively end until *Kelo* and *Berman v. Parker* follow *Dred Scott* into the ash heap of history.

Other than citing its "mainstream" nature and consistency with

¹³ 478 U.S. 186 (1986).

¹⁴ 163 U.S. 537 (1896).

¹⁵ 274 U.S. 200 (1927).

¹⁶ See MARK A. GRABER, *DRED SCOTT AND THE PROBLEM OF CONSTITUTIONAL EVIL* 126–29 (2006) (documenting this point in great).

¹⁷ Abdon M. Pallasch, *Scalia Offers Ruling: Deep Dish v. Thin Crust*, CHI. SUN-TIMES (Oct. 18, 2011), <http://www.suntimes.com/news/politics/8286260-418/scalia-offers-ruling-deep-dish-v-thin-crust.html> [http://perma.cc/V2PN-LC5T].

¹⁸ See SOMIN, *supra* note 5, at 73–111.

¹⁹ See *id.* at 73–111, 181–203 (describing the political backlash to *Kelo*, and its limitations).

precedent, Horton and Levesque offer very little in the way of justification for *Kelo*. In particular, they almost completely neglect the extensive evidence that the broad definition of “public use” endorsed by the majority is inconsistent with leading versions of both originalism and “living constitution” theory. As explained more fully in my recent book about *Kelo*,²⁰ the original meaning of “public use” better fits a narrow definition of the term, under which takings must be limited to the condemnation of property for government-owned projects, or for private entities that have a legal duty to serve the entire public, such as public utilities. The narrow definition best fits the available evidence from both 1791, when the Fifth Amendment was first adopted as part of the Bill of Rights,²¹ and 1868, when it became “incorporated” against state governments under the Fourteenth Amendment.²²

The narrow definition is also supported by leading versions of “living constitution” theory, most notably “representation-reinforcement,” which holds that the power of judicial review should be used to protect the poor, minorities, and other politically weak groups that cannot fend for themselves in the political process.²³ The victims of eminent domain for private projects—who include hundreds of thousands of people—are overwhelming poor, politically weak, racial and ethnic minorities, or all three simultaneously.²⁴

Kelo also has major flaws that cut across specific approaches to constitutional theory. Most notably, its logic contains a deep internal contradiction:²⁵ on the one hand, the majority recognizes that property owners have a constitutional right that protects their land from condemnation for a purely “private” use.²⁶ But it then defers to the government in determining what qualifies as a sufficiently “public” project under the Public Use Clause.²⁷ By so doing, the Court effectively put the definition of the rights protected by the Public Use Clause at the mercy of the very government officials it is supposed to protect us against. It is much like appointing a committee of foxes to guard the chicken coop.

No other part of the Bill of Rights gets this sort of treatment. As Justice Thomas emphasizes in his *Kelo* dissent, the Court is willing to second-guess legislative judgments “when the issue is . . . whether government may search a home” under the Fourth Amendment, yet it is unwilling to

²⁰ For a detailed discussion of the relevant arguments and evidence, see *id.* at 35–72.

²¹ SOMIN, *supra* note 5, at 36–43, 61–63.

²² *Id.* at 43.

²³ *Id.* at 100–02. The best-known defense of the theory is JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980).

²⁴ SOMIN, *supra* note 5, at 86–90, 100–02.

²⁵ For a more detailed discussion of this point, see *id.* at 116–18.

²⁶ *Kelo*, 545 U.S. at 477, 482.

²⁷ *Id.* at 483.

question “the infinitely more intrusive step of tearing down . . . homes.”²⁸ There is no reason to single out the Public Use Clause for such ultra-deferential treatment.

Horton and Levesque do not counter any of these points, nor offer much in the way of opposing considerations of their own. They emphasize that *Kelo* is consistent with precedent, which is true. But the precedents supporting it are *Berman* and *Midkiff* — poorly reasoned cases that offer little in the way of justification for adopting an ultrabroad definition of public use. These rulings also occurred during the period when judicial protection for constitutional property rights was at its nadir.²⁹ *Berman*, in particular, was a badly flawed ruling. It authorized a “blight” condemnation that was part of a project that forcibly displaced some 5000 poor African-Americans in Washington, DC at a time when poor blacks had almost no political power in the city and all for the sake of a highly dubious project.³⁰ It also created a precedent that justified similar takings around the country forcibly displacing hundreds of thousands of people.³¹ The reasoning of *Berman* and *Midkiff* is superficial, at best, and does not explain why an ultra-deferential approach to “public use” is justified on either originalist or living constitution grounds. *Berman* simply assumes that this is a field where deference is needed so that cities could benefit from the wisdom of “experts [who] concluded that if the community were to be healthy, if it were not to revert again to a blighted or slum area, as though possessed of a congenital disease, the area must be planned as a whole.”³²

Some might argue that even badly flawed precedents must be followed, so as to promote stability in constitutional decision-making. But, if applied consistently, that approach would require us to condemn many of the Court’s greatest decisions, which overruled or at least went against misguided previous precedent. *Brown v. Board of Education* is just one of many such examples.³³ As a general rule, the case for adhering to flawed precedents in constitutional cases is much weaker than in statutory cases, since the latter can be corrected by new legislation, while only a constitutional amendment can fix misguided constitutional rulings.

²⁸ *Id.* at 518 (Thomas, J., dissenting).

²⁹ For a more detailed discussion of these precedents and their flaws, see SOMIN, *supra* note 5, at 24–25, 86–88.

³⁰ On the effects of *Berman*, see *id.* at 86–87; Amy Lavine, *Urban Renewal and the Story of Berman v. Parker*, 42 URB. LAW. 423, 423–25 (2010).

³¹ SOMIN, *supra* note 5, at 86–87; see also Wendell E. Pritchett, *The ‘Public Menace’ of Blight: Urban Renewal and the Private Uses of Eminent Domain*, 21 YALE L. & POL’Y REV. 1, 5–23 (2003) (explaining the impact of *Berman* on later cases); Amy Lavine, *Urban Renewal and the Story of Berman v. Parker*, 42 URB. LAW. 423, 423–25 (2010) (same).

³² *Berman*, 348 U.S. at 34.

³³ 347 U.S. 483 (1954).

Recognizing this, the Supreme Court has laid out a series of admittedly imprecise standards for determining when constitutional decisions should be overruled.³⁴ *Kelo* fits those standards extremely well, as (to a lesser degree) do *Berman* and *Midkiff*.³⁵

Moreover, as Justice Sandra Day O'Connor emphasizes in her dissenting opinion, *Berman* and *Midkiff* need not have been overruled completely in order to justify striking down "economic development" takings like the one at issue in *Kelo*.³⁶ Instead, their logic could be limited to cases where the government seeks private investment to address a preexisting harm, such as "blight," rather than create some new benefit, as in the case of economic development condemnations.³⁷ This approach—which has been adopted by several state supreme courts interpreting their states' public use clauses, has a number of flaws. But it is far superior to the near-total judicial abdication advocated by the majority.³⁸

At the very least, it could serve as an intermediate step for a Court that might hesitate to immediately overrule longstanding precedent, but is also unwilling to simply leave the rights protected by the Public Use Clause completely at the mercy of state and local governments.³⁹ Over time, a decision striking down economic development takings might be gradually expanded into a more complete restoration of the narrow approach to public use.

In addition to *Berman* and *Midkiff*, Horton and Levesque also cite, as support for their position, early twentieth century cases such as *Strickley v. Highland Boy Gold Mining Co.*⁴⁰ This is the "century" of precedent famously invoked by the *Kelo* majority opinion.⁴¹ Unfortunately, however, these precedents were not actually public use cases at all, but rather cases where the property owners tried to challenge state takings in federal court under the Due Process Clause of the Fourteenth Amendment, at a time when the Court did not yet recognize the incorporation of the Bill of Rights against the states. When applying the Due Process Clause during this period, the Court took a deferential approach to state and local takings (though not as deferential as *Kelo*). But it also made clear that different and tighter standards applied in the rare cases where the Public Use Clause did apply during this era.⁴² In a November 2011 speech delivered after he

³⁴ For a discussion of the relevant standards and how *Kelo* relates to them, see SOMIN, *supra* note 5, at 238–41.

³⁵ *See id.* at 238–41.

³⁶ *Kelo*, 545 U.S. at 499–501 (O'Connor, J., dissenting).

³⁷ *Id.* at 500–01.

³⁸ For my detailed assessment of Justice O'Connor's dissent, see SOMIN, *supra* note 5, at 127–31.

³⁹ *Id.* at 130–31.

⁴⁰ 200 U.S. 527 (1906); Horton & Levesque, *supra* note 8, at 1415.

⁴¹ *Kelo*, 545 U.S. at 483.

⁴² *See* SOMIN, *supra* note 5, at 123–26 (discussing this issue in detail).

retired from the Supreme Court, Justice John Paul Stevens, the author of the *Kelo* majority opinion, admitted that he had erred in conflating “substantive due process” and public use precedents, which he called an “embarrassing to acknowledge” mistake;⁴³ Horton and Levesque recognize that *Strickley* (like other cases from this period relied on by the majority) was based on the Fourteenth Amendment. But they do not discuss the implications of this fact for their status as precedents relevant to *Kelo*.⁴⁴

Horton and Levesque briefly refer to the arguments I have made against the *Kelo* decision, but only to suggest that I “implicitly admit . . . that [my] case falls far short of conclusive.”⁴⁵ If by “far short of conclusive” they mean that the evidence I cite does not justify the narrow view of public use with complete certainty, they are correct. But I do emphasize throughout the book that the cumulative evidence for it—on both originalist and living constitution grounds—far outweighs the case for the ultra-deferential approach endorsed in *Kelo*, *Berman*, and *Midkiff*.⁴⁶ Given two imperfect options, judges should choose the one supported by stronger evidence, or at least opt for an intermediate approach, such as Justice O’Connor’s, that does not leave an important constitutional right with virtually no judicial protection.

One can try to justify *Kelo* on the basis of a theory of “Thayerian” deference, which holds that courts should not strike down legislation unless the unconstitutionality of the challenged law is so clear that it is “not open to rational question.”⁴⁷ But, like the doctrine of near-total adherence to precedent, this would require us to bite bullets that few if any defenders of *Kelo* would care to digest. Among other things, it would require us to condemn cases like *Brown v. Board*⁴⁸ and *Loving v. Virginia*,⁴⁹ the 1967 ruling striking down laws banning interracial marriage. Both decisions are subject to at least reasonably plausible counterarguments on originalist and other grounds.⁵⁰

Horton and Levesque also suggest that *Kelo* may not be so bad because

⁴³ See Justice John Paul Stevens, *Kelo, Popularity, and Substantive Due Process*, Albritton Lecture at the University of Alabama School of Law 16 (Nov. 16, 2011), <http://www.supremecourt.gov/publicinfo/speeches/1.pdf> [<https://perma.cc/RD44-FGVQ>]. He continues to believe that he got the decision right, albeit on grounds different from those stated in the opinion. *Id.*

⁴⁴ Horton & Levesque, *supra* note 8, at 1415 n.64.

⁴⁵ *Id.* at 1426 n.145. I should note that I am grateful to Horton and Levesque for calling my book “the best discussion” of the meaning of “public use.” *Id.*

⁴⁶ *E.g.*, SOMIN, *supra* note 5, at 67–68, 72, 99–108.

⁴⁷ This theory dates back to an influential 1893 article by James Bradley Thayer. James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARVARD L. REV. 129, 144 (1893). For a recent history and evaluation of the theory, see Richard A. Posner, *The Rise and Fall of Judicial Self-Restraint*, 100 CALIF. L. REV. 519 (2012).

⁴⁸ 347 U.S. 483 (1954).

⁴⁹ 388 U.S. 1 (1967).

⁵⁰ For these comparisons and citations to relevant evidence, see SOMIN, *supra* note 5, at 69–70.

“[c]ity councilors who vote for an unpopular condemnation are likely to be voted out of office, especially since in the usual situation the taxpayers have to pay for the [condemned] property.”⁵¹ This is part of their general effort to defend *Kelo* on grounds of “federalism” and “democracy.”⁵²

There are two problems with these types of arguments. First, they are based on an unwarranted confidence in the effectiveness of the political process in controlling abusive takings. The long history of harmful blight and economic development takings strongly suggests that such confidence is misplaced. Political accountability did not prevent hundreds of thousands of people from being displaced by blight and economic development takings,⁵³ just as it did not prevent the dubious takings that occurred in the *Kelo* case itself. Until the nationwide publicity generated by *Kelo*, most voters paid little or no attention to the details of takings policy. As a result, officials and interest groups had a free hand to engage in a variety of abusive practices.⁵⁴

The reforms produced by the enormous political backlash against *Kelo* have greatly improved matters in many states. But progress has been uneven, and in many jurisdictions state and local officials remain free to condemn property for almost any reason.⁵⁵

The second flaw in the federalism and democracy justifications for *Kelo* is even more fundamental: the same logic would justify judicial deference to state and local governments with respect to many other rights protected by the Bill of Rights. After all, many such rights often impinge on issues where varying local conditions may be relevant, and where local officials often have greater expertise than federal judges do. And it is always possible to argue that voters might curb abusive behavior.

To adapt Justice Thomas’ example of the Fourth Amendment, Horton and Levesque’s reasoning might lead us to conclude that we do not need judicial intervention in this field because “[c]ity councilors who vote” to authorize unreasonable searches and seizures “are likely to be voted out of office, especially since in the usual situation the taxpayers have to pay for” the searches.⁵⁶ Such reasoning is no more persuasive with regards to takings than searches and seizures, especially since both tend to target people with little political influence.⁵⁷

Kelo is indeed not as bad as *Dred Scott*, certainly not in every way.

⁵¹ Horton & Levesque, *supra* note 8, at 1425.

⁵² *Id.*

⁵³ See SOMIN, *supra* note 5, at 73–74.

⁵⁴ *Id.*

⁵⁵ For an overview of post-*Kelo* reform efforts and their limitations, see *id.* at 135–80.

⁵⁶ Horton & Levesque, *supra* note 8, at 1425.

⁵⁷ For a more extensive critique of “federalism” rationales for judicial deference on property rights issues, see SOMIN, *supra* note 5, at 118–20, 221–24; Ilya Somin, *Federalism and Property Rights*, 2011 U. OF CHI. LEGAL F. 53.

But it is bad enough to deserve severe criticism, and bad enough that the Supreme Court should overrule it as soon as possible.

III. HORTON AND LEVESQUE'S PROPOSAL FOR REFORM

Despite their general satisfaction with the outcome of *Kelo*, Horton and Levesque nonetheless suggest that there is a need for stronger judicial protection for property rights than that offered by the majority opinion. They present a reform proposal for greater judicial scrutiny of at least some takings, building on Justice Anthony Kennedy's concurring opinion, which they view as a "template" for future reform efforts.⁵⁸ Their idea is both a useful contribution to the debate over these issues and an interesting indication of the impact of *Kelo* on the legal community. It shows that, in the aftermath of the decision, even some experts who are generally sympathetic to the use of eminent domain still recognize the need for stronger safeguards against its abuse.⁵⁹

Kennedy's concurring opinion is ambiguous on some key points, and therefore not easy to interpret.⁶⁰ His most important conclusion is that courts should give less deference to the government in those public use cases where there is "a plausible accusation of impermissible favoritism to private parties."⁶¹ Kennedy is far from clear on the subject of what, exactly, qualifies as "impermissible favoritism," what counts as "plausible" evidence thereof, and exactly how stringent the courts' review of the taking should be in cases where such a "plausible" accusation of favoritism has been raised.

In addition to its lack of clarity, there is another obstacle to building on Kennedy's opinion: because he chose to join the majority opinion as well as write his own separate concurrence, Kennedy's analysis does not count as the controlling opinion in the case, and is not a binding precedent for lower courts.⁶² Making it binding would require a new Supreme Court ruling to that effect, though it might have some persuasive authority for lower courts without that.

Nonetheless, Horton and Levesque propose a 10 factor balancing test for analyzing public use cases, which they see as "implicit" in Kennedy's

⁵⁸ Horton & Levesque, *supra* note 8, at 1418, 1425–27.

⁵⁹ For a discussion of other limited reform proposals produced by experts sympathetic to the outcome in *Kelo*, see SOMIN, *supra* note 5, at 204–31.

⁶⁰ For a discussion of the opinion and the difficulties it poses, see SOMIN, *supra* note 5, at 114–16.

⁶¹ *Kelo*, 545 U.S. at 492 (2005) (Kennedy, J., concurring).

⁶² Had Kennedy concurred in judgment only and refused to join with the majority, his concurrence might have had controlling precedential force under *Marks v. United States*, 430 U.S. 188 (1977). *Marks* held that "[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds." *Id.* at 193 (internal quotation omitted).

own position: “(1) Will a public body own or operate the property? (2) How specific is the stated use? (3) Is it reasonably possible the stated use will actually succeed? (4) Is the stated use clearly a pretext? (5) Does the public gain outweigh any private gain? (6) Is there clearly improper favoritism? (7) Is there clearly improper targeting of a disfavored group? (8) Is the particular property in question on the periphery of the project? (9) Is there a comprehensive plan that any private developer must follow? (10) Were any private beneficiaries known at the time of the vote to condemn?”⁶³

Some of these factors have previously been utilized by state and lower federal courts seeking to determine whether a taking is “pretextual” – the one category of takings that both Kennedy and the *Kelo* majority consider to violate the Public Use Clause.⁶⁴ For example, some lower court decisions interpreting the pretextual takings standard look to the magnitude and distribution of the supposed public benefits, and others consider whether the condemning authority primarily intended to benefit a private party.⁶⁵

Nonetheless, Horton and Levesque’s approach has some notable shortcomings. Most obviously, nothing like this elaborate ten factor test can be discerned in either the text or the original meaning of the Public Use Clause, or even in Supreme Court precedents prior to *Kelo*. Perhaps the test might be justified on some version of living constitution theory. But Horton and Levesque do not explain how. Filling in this gap in their analysis might be a useful exercise for future efforts to build on their proposal, or others like it.

A few of the factors advocated by Horton and Levesque are mentioned in *Kelo* as possible criteria for analyzing whether a pretextual taking has occurred.⁶⁶ On the other hand, at least five of their criteria are nowhere indicated as possible indicators of pretext by either the *Kelo* majority or Justice Kennedy.⁶⁷ One is even specifically rejected as an appropriate subject for judicial inquiry. Horton and Levesque’s suggestion that courts consider whether it is “reasonably possible [that] the stated use will actually succeed” is at odds with the *Kelo* majority’s stricture that courts

⁶³ Horton & Levesque, *supra* note 8, at 1427.

⁶⁴ For an overview of the many conflicting post-*Kelo* precedents on pretextual takings, which fall into at least five distinctive schools of thought, see SOMIN, *supra* note 5, at 192–200. See also Daniel B. Kelly, *Pretextual Takings: Of Private Developers, Local Governments, and Impermissible Favoritism*, 17 SUP. CT. ECON. REV. 173, 176–77 (2009) (discussing these alternatives in detail).

⁶⁵ See SOMIN, *supra* note 5, at 193–95 (reviewing relevant cases).

⁶⁶ For example, the *Kelo* majority stresses the supposed significance of the extent of the planning behind the taking. 545 U.S. at 469–70. Also, Justice Kennedy emphasizes the importance of the fact that identity of the private developer who would build the project was not known in advance. *Id.* at 491–92 (Kennedy, J., concurring).

⁶⁷ These are their first, second, third, seventh, and eighth criteria.

should not try to “second-guess the [government’s] considered judgments about the efficacy of its development plan”⁶⁸ If this had been a relevant factor, it might well have led to the invalidation of the *Kelo* takings themselves, which were based on a badly flawed plan that predictably failed to pan out. To this day, the condemned property lies empty, used only by a colony of feral cats.⁶⁹

Adopting the Horton-Levesque approach to public use would therefore require significant revisions to *Kelo*, perhaps even to the point of overruling it. It would also require courts to fill in some important gaps in the Horton-Levesque test itself. Most obviously, what should a court do when some factors cut against the taking and others in favor of it? Should some factors in the test be weighed more heavily than others, or should all be considered equally?

Some of the factors raised by Horton and Levesque are also internally ambiguous. For example, it is not clear what qualifies as evidence of “improper favoritism” or “improper targeting of a disfavored group” under their approach. Does it require a conscious intent on the part of the condemning authority, or merely subconscious bias?

Similarly, it is difficult to tell who might qualify as a known private beneficiary of the taking. Some interpret this as referring only to whether the identity of the new owner of the condemned property is known in advance.⁷⁰ But this approach ignores the possibility that a taking might be cooked up in order to benefit a powerful interest group that will not be the new owner, but rather an indirect beneficiary of the new use of the property.⁷¹ This issue arose in the *Kelo* case itself, where Pfizer, Inc., a large and politically influential pharmaceutical firm, played a major role in instigating the takings, even though it was never going to be the new owner of the condemned land, but merely expected to benefit from its new uses.⁷²

On one important point, Horton and Levesque may be right: unlike a ban on private takings for economic development or even a complete restoration of the narrow definition of public use, their approach might potentially give property owners protection against takings of all kinds, not merely those that transfer property to private parties.⁷³ Abusive practices can and do occur even in the case of takings authorized under the narrow view of the Public Use Clause, a problem I discussed in some detail in my

⁶⁸ Horton & Levesque, *supra* note 8, at 1426; *Kelo*, 545 U.S. at 488.

⁶⁹ On the shortcomings of the *Kelo* project, and its tragic outcome, see SOMIN, *supra* note 5, at 235.

⁷⁰ See, e.g., *Carole Media LLC v. New Jersey Transit Corp.*, 550 F.3d 302, 311 (3d Cir. 2008).

⁷¹ See SOMIN, *supra* note 5, at 196.

⁷² On Pfizer’s key role in the takings, see *id.* at 15–17; *infra* part IV.

⁷³ See Horton & Levesque, *supra* note 8, at 1426.

book on *Kelo*.⁷⁴ Even if *Kelo* and *Berman v. Parker* are both reversed, such abuses may remain.

However, that problem is no reason to forego the major gains that would result from banning blight and economic development takings, which would forestall future abuses of the sort that have already victimized many hundreds of thousands of people, and destroyed vast amounts of economic value. Moreover, there are often good reasons for treating takings for publicly owned projects and utilities more favorably than those for private development projects. Among other things, the former are more likely to encounter “holdout” problems that cannot be overcome without resort to coercion.⁷⁵

While the Horton-Levesque approach might protect us against a wider range of takings, it also offers far less security than the restoration of a narrow approach to public use. With respect to the takings it covers, the latter offers complete protection by means of a categorical rule. By contrast, the ten factor test might potentially be applied in ways that are highly deferential to the government, and allow many abusive takings to go forward. Because of the subjective and imprecise nature of many of the standards, judges who believe property rights are unimportant or otherwise unworthy of strong judicial protection could easily apply them in ways that give the government almost as much of a blank check as it gets under *Kelo* and *Berman*.

For originalists, there is also the crucial point that failing to enforce the narrow definition of public use means going against the text and original meaning of the Fifth Amendment. Even if this approach is not the one that has the best policy consequences, it should be preferred over a balancing test with little if any grounding in the original meaning.

But even for living constitutionalists, the narrow definition of public use might be more appealing than the Horton-Levesque theory. The former—unlike the latter—categorically bans a set of takings that have historically victimized the poor and politically weak. Moreover, living constitutionalists can potentially have their cake and eat it too: they could adopt the original meaning of public use in so far as it bans private takings for blight and economic development, and *also* apply the Horton-Levesque test (or some other balancing test) to traditional public use takings. This hybrid model could potentially combine the best of both worlds: banning private-to-private takings, while also at least partly curbing the abuse of traditional public use takings.

I end my discussion of this issue on a point of agreement: Horton and Levesque are surely right that “[t]he bigger picture is condemnation in

⁷⁴ SOMIN, *supra* note 5, at 225–31.

⁷⁵ *See id.* at 90–94 (discussing this issue in detail).

general, and private economic development is only a part of it.”⁷⁶ But economic development takings (and the closely related blight takings) are an important part of that bigger picture. Completely eliminating them would be a major step in the right direction. For that, the Court needs to overrule *Kelo* and—eventually—*Berman v. Parker*.

IV. THE LESSONS OF NEW LONDON

For most Americans, the primary significance of the *Kelo* decision resides not in the specific takings it upheld, but in the broader constitutional principles at issue. Nonetheless, like Horton and Levesque, I believe that the specific facts of the case are important for a fuller understanding of its history. However, I take a less optimistic view than they do of the story behind the New London takings, and its implications for economic development condemnations generally.

Horton and Levesque understandably emphasize points that make the New London takings seem justifiable, such as the fact that the officials who made the decision to condemn genuinely believed that it would promote economic growth, that the city was facing economic problems, and that the New London Development Corporation—the private entity that conducted the takings on behalf of the City—put together a detailed development plan.⁷⁷ All of this is true. But Horton and Levesque also omit or downplay crucial facts that cut the other way.

Most notably, they overlook the serious flaws in the plan that were evident from early on. As emphasized by the 2002 trial court decision, which invalidated 11 of the 15 planned condemnations, the NLDC had no clear plan for how to use the property, and the prospects of successfully completing the project were dubious at best.⁷⁸ In a prescient dissenting opinion in the Connecticut Supreme Court, Justice Peter Zarella likewise pointed out that the NLDC plan was seriously flawed.⁷⁹ As he emphasized, at the time of the condemnations, “there was no signed development agreement providing for the future exploitation of the condemned property,” a circumstance that greatly reduced the chances of actually producing any economic development, and made it “impossible to

⁷⁶ Horton & Levesque, *supra* note 8, at 1427.

⁷⁷ *Id.* at 1408–10.

⁷⁸ See *Kelo v. City of New London*, 2002 Conn. Super. LEXIS 789, at *229, *231 (2002) (noting that the NLDC development plan’s projected uses for the area were “so vague, shifting, and noncommittal” that the City could not prove that its condemnation was actually necessary to pursue the objectives of the development plan).

⁷⁹ *Kelo v. City of New London*, 843 A.2d 500, 578–79 (2004) (Zarella, J. dissenting), *aff’d*, 545 U.S. 469 (2005).

determine whether future development of the area primarily will benefit the public or even benefit the public at all.”⁸⁰

From early on, critics pointed out that the NLDC plan had serious shortcomings, which cast grave doubt on its prospects for success.⁸¹ Despite Horton and Levesque’s claims to the contrary, it is highly unlikely that “without drawn-out litigation the plan might actually have succeeded.”⁸² To the contrary, the litigation merely revealed shortcomings that were already present. It was not the fault of the courts or of the resisting homeowners that the plan ultimately collapsed.

Horton and Levesque also err in emphasizing the “holdout problems” that supposedly justified the use of eminent domain.⁸³ It is true that there were holdout problems in the sense that the NLDC could not have acquired all of the property it wanted without resorting to coercion. But it is *not* true that there was a holdout problem in the sense that they actually needed to acquire every single property in order to carry out an effective redevelopment plan. Virtually all the facilities specifically envisioned by the NLDC could have been built without forcing out resisting property owners who did not wish to sell.⁸⁴ In an amicus brief focusing on this issue, prominent University of Chicago Law School takings scholar Richard Epstein pointed out that “holdouts [were] a complete nonproblem” in Fort Trumbull because property already owned by the government in the area was more than large enough to contain all the new facilities envisioned in the plan.⁸⁵

NLDC and Pfizer leaders, however, believed that all of the homes and businesses in the neighborhood had to be destroyed for what were essentially aesthetic reasons. For example, NLDC President Claire Gaudiani stated that they had to be eliminated because otherwise they would have looked “ugly and dumb.”⁸⁶ Her husband, David Burnett, a high-ranking Pfizer employee, told a reporter that the houses had to be destroyed because “Pfizer wants a nice place to operate,” and “we don’t want to be surrounded by tenements.”⁸⁷

This brings us to Pfizer’s crucial role in the condemnations. Horton and Levesque note Pfizer’s role only to point out that the condemnations were undertaken in conjunction with Pfizer’s construction of a

⁸⁰ *Kelo*, 843 A.2d 500, 596 (Conn. 2004) (Zarella, J., dissenting), *aff’d*, 545 U.S. 469 (2005).

⁸¹ See SOMIN, *supra* note 5, at 29–30, 235 (discussing the plan’s flaws).

⁸² Horton & Levesque, *supra* note 8, at 1410.

⁸³ *Id.*

⁸⁴ SOMIN, *supra* note 5, at 17 (endnote omitted).

⁸⁵ Brief of the Cato Institute as Amicus Curiae in Support of Petitioners at 23, *Kelo v. City of New London*, 545 U.S. 469 (2005).

⁸⁶ SOMIN, *supra* note 5, at 17 (endnote omitted). Other NLDC and Pfizer officials made similar statements. *Id.*

⁸⁷ *Id.* (endnote omitted).

headquarters nearby, which was in fact built.⁸⁸ They stress that the project itself was planned by the NLDC and approved by the City.

This, however, understates the true extent of Pfizer's involvement. Although Pfizer was not scheduled to be the new owner of the condemned property, it did hope to benefit from the upper-income housing and office space that might be built there. For that reason, it played an important part in instigating the takings.

The NLDC itself had close links to Pfizer. As already noted, NLDC President Claire Gaudiani was the wife of a high-ranking Pfizer employee. George Milne, a Pfizer executive, was also a member of the NLDC board, and played an important early role in the project, though he eventually recused himself.⁸⁹ Perhaps more importantly, Pfizer played a major role in lobbying for the condemnations at both the state and local levels and in tailoring the details of the development plan to serve its interests.⁹⁰ James Hicks, executive vice president of a firm that helped develop the NLDC plan, stated that Pfizer was the "10,000 pound gorilla" behind the project.⁹¹

Pfizer's key role in the process does not prove that NLDC and City leaders deliberately sacrificed the public interest in order to benefit a powerful corporation.⁹² I believe they truly thought that they were doing the right thing for the community. Nevertheless, it is hard to believe that their (sincere) views about the public interest were completely uninfluenced by their close ties to Pfizer, or by the firm's extensive lobbying for the project. At the very least, the City should not have allowed the development plan to be produced by an organization whose leaders had such close ties to Pfizer—ties that created a significant potential conflict of interest.

Finally, Horton and Levesque do not mention the extensive campaign of extralegal harassment and intimidation that the NLDC waged against property owners who refused to sell their land "voluntarily." In addition to the threat of eminent domain itself, that campaign included such shenanigans as dumping dirt and debris on their property, breaking into homes, forcibly evicting tenants, and constant late-night phone calls, among other pressure tactics.⁹³

The sad history of the *Kelo* condemnations does not necessarily prove that they were unconstitutional. Many abusive and unjust government

⁸⁸ Horton & Levesque, *supra* note 8, at 1410.

⁸⁹ SOMIN, *supra* note 5, at 15; Lucette Lagnado, *Disconnecticut: Needy New London Saw Cure for Its Ills In Pfizer's Arrival*, WALL ST. J. (Sept. 10, 2002), at A1.

⁹⁰ SOMIN, *supra* note 5, at 15–17.

⁹¹ *Kelo v. City of New London*, 843 A.2d 500, 537 (2004).

⁹² See SOMIN, *supra* note 5, at 17.

⁹³ *Id.* at 20–21.

policies do not violate the Constitution. But the story does shed some light on some of the broader issues at stake in the *Kelo* litigation.

Perhaps most importantly, it highlights the reality that an extensive planning process provides little if any assurance that economic development takings will actually produce public benefits. Neither does it guard against the exertion of undue influence by private interest groups, such as Pfizer. If anything, a long and complex planning process advantages powerful political insiders relative to the politically weak. The former can more easily find ways to influence the plan, and also are more likely to have the resources needed to fight prolonged political and legal battles.⁹⁴ These factors also count against Horton and Levesque's reform proposal, in so far as it relies on the planning process to ferret out possible favoritism and ensure that the condemnations will produce the promised development that supposedly justified the use of eminent domain in the first place.

Finally, the extralegal harassment endured by the property owners and the huge asymmetries of resources between them and NLDC and the City underscore the need for strong legal protections to level the playing field. But for the intervention of the Institute for Justice, the libertarian public interest firm that represented the New London property owners pro bono, they would have had to give up their struggle early on, probably long before it even got to court.⁹⁵

Ideally, those protections should take the form of clear, simple rules barring economic development takings rather than relatively vague standards and balancing tests that fail to provide clear guidance to judges, and could lead to prolonged, expensive litigation. Such legal battles are often beyond the means of poor and lower-middle class owners, whereas the Pfizers and NLDCs of the world can bear the costs far more easily.

V. CONCLUSION

More than a decade after *Kelo*, the debate generated by the decision continues. Horton and Levesque's essay is a valuable contribution to that ongoing discussion. At this point, we are far from reaching a consensus on the proper scope of government power to condemn property and the extent to which courts should intervene to protect property owners against its use. But *Kelo* and the reaction against it have at the very least shifted the parameters of the debate, lending newfound respectability to the idea that the Public Use Clause is more than just a mere fig leaf.

⁹⁴ *Id.* at 121–22, 209–12.

⁹⁵ *Id.* at 25–26.