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## Time to Make Lemonade from the Lemons of the Kelo Case Commentary Essays

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## Essay

### Time to Make Lemonade from the Lemons of the *Kelo* Case

DWIGHT MERRIAM

*The decision in Kelo v. New London only addressed the constitutionality of the eminent domain process used to take Susette Kelo's home. Given the four corners of the case as presented to the Court, there was no consideration of alternatives to eminent domain and of the equity issues inherent in eminent domain. In responding to the essay by Horton and Levesque the author looks to ways to enable development and redevelopment through means less coercive than eminent domain and more respectful of private property rights and the unique and personal situations of those whose properties are targeted. The author, noting the almost unbridled power of government in eminent domain takings and the relative weakness of condemnees, offers suggestions to improve equity and to allocate the true costs of direct takings. This Essay serves as a roadmap for reform.*

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# Time to Make Lemonade from the Lemons of the *Kelo* Case

DWIGHT MERRIAM\*

## I. INTRODUCTION

This commentary on Horton and Levesque had the potential to be the shortest ever. On first reading I thought I might agree with nearly all they had to say. They are, for the most part, spot on in describing the facts and the litigation. The denouement, cleverly preserved for future use with the four words (precedent, federalism, compensation, democracy) Horton planted at the end of oral argument, is enlightening and entertaining, and perpetuates the ability to argue the case long after the red light on the lectern went dark. Witness here, more than a decade later, Horton continues on in print.

It is what Horton and Levesque do not say that is of interest.<sup>1</sup> They describe the jurisprudence in a way that makes one think that, if a movie were to be made about eminent domain, the *Berman-Midkiff-Kelo*<sup>2</sup> refrain would make a good sequel to Bill Murray's *Groundhog Day*.<sup>3</sup> As Horton and Levesque claim, *Kelo* "is the correct decision based on the facts of the case in the existing precedents . . . . Everyone should slow down, take a deep breath, and conclude that the sky is not falling."<sup>4</sup>

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<sup>1</sup> It is probably nothing more than the innocent narrowness of their perspective. As psychologist Abraham Maslow said, "I suppose it is tempting, if the only tool you have is a hammer, to treat everything as if it were a nail." ABRAHAM MASLOW, *THE PSYCHOLOGY OF SCIENCE* (1966). This is probably based on philosopher Abraham Kaplan's statement: "Give a small boy a hammer, and he will find that everything he encounters needs pounding." ABRAHAM KAPLAN, *THE CONDUCT OF INQUIRY* (1964). Horton and Levesque are among the most highly regarded appellate lawyers. They are not urban planners, elected councilmembers, people whose homes are taken for redevelopment, developers, or financiers.

<sup>2</sup> *Berman v. Parker*, 348 U.S. 26 (1954); *Hawaii Hous. Auth. v. Midkiff*, 467 U.S. 229 (1984); *Kelo v. City of New London*, 545 U.S. 469 (2005).

<sup>3</sup> *GROUNDHOG DAY* (Columbia Pictures 1993).

<sup>4</sup> Wesley W. Horton & Brendon P. Levesque, *Kelo Is Not Dred Scott*, 48 *CONN. L. REV.* 1405, 1425 (2016).

This is familiar territory for me, because I have studied property rights and the *Kelo* case, co-authoring a book on the former<sup>5</sup> and shortly after the decision, co-editing a book on the latter.<sup>6</sup> I did not represent any of the parties in the case, but I did follow the build-up in the practice and jurisprudence of eminent domain long before there was even a vision for the Fort Trumbull development. I see missed opportunities in the decision and its aftermath for planners; public officials; federal, state, and local government; and the courts to improve the process of public land assembly for the benefit of all the stakeholders. Eminent domain need not be a zero sum game. At the very least it can be kinder and gentler. As a practitioner observing the real world impacts of the *Kelo* decision in the decade since, I am struck by how we have failed to learn much from the losses suffered on all sides in this case and in the countless others like it, large and small, all over this country.

Let us consider what Horton and Levesque did not say in describing what those four words bring to the discussion of this case specifically and eminent domain generally.

## II. THE PRELUDE (“PRECEDENT”)

### A. *The Law*

The prelude to *Kelo* is in the case law and practice of eminent domain over many decades preceding it, and in what was and was not done in the Fort Trumbull redevelopment itself. “Precedent” is the first of Horton’s four words.<sup>7</sup> *Kelo* did not change the law and is consistent with the precedent of *Berman* and *Midkiff*.<sup>8</sup> Agreed. But as the aphorism “two wrongs don’t make a right” might instruct us, the consensus that no new law was created in *Kelo* leaves us nowhere. Horton and Levesque are correct in observing that *Berman* was broad in its language.<sup>9</sup> In *Berman* the plaintiffs’ perfectly good, non-blighted department store was wiped out in the name of redevelopment.<sup>10</sup> *Berman* should leave us asking, as so many still do, how far governmental land assembly should be allowed to go in taking properties that are not themselves in need of redevelopment but can contribute to the assemblage value or be transformed into more lucrative

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<sup>5</sup> R. MELTZ ET AL., *THE TAKINGS ISSUE* (1999).

<sup>6</sup> *EMINENT DOMAIN USE AND ABUSE: KELO IN CONTEXT* (Dwight H. Merriam & Mary Massaron Ross eds., 2005). Mary Massaron Ross and I had the most fun in interviewing Wesley Horton and Scott Bullock, who argued for *Kelo*. Our conversation became a chapter in the book and relates some interesting back-stories. *See id.* at 291–320.

<sup>7</sup> Horton & Levesque, *supra* note 4, at 1414.

<sup>8</sup> *Id.* at 1414–16.

<sup>9</sup> *Id.* at 1415.

<sup>10</sup> *Berman v. Parker*, 348 U.S. 26, 30–31 (1954).

uses in the fashion of a Motel 6 giving way to a Ritz Carlton.<sup>11</sup>

*Midkiff, sui generis* perhaps given its unique facts coming from the state which is the only former monarchy to join the union,<sup>12</sup> probably does go even further than *Berman*, as Horton and Levesque say.<sup>13</sup> The idea was to enable the breakup of the landowner oligopoly that was the consequence of the feudal land system under the monarchy. The eminent domain program of *Midkiff* did not succeed in doing what it was intended to do. It made things worse by incorporating into the purchase of a home the entire value of the fee interest in the underlying land, rather than enabling a purchaser to buy just the improvements and pay a monthly rent on the land.<sup>14</sup> It has created a higher barrier to the entry into homeownership, rather than facilitating it. *Midkiff* should make us ask whether we ought to consider, and if so to what extent, the expectation of success before the government is allowed to unleash its extraordinary power of eminent domain to seize private property. The standard as to the probability of success in the post-*Kelo* world, reiterating precedent, is that government has no obligation to demonstrate to any degree that a redevelopment project will succeed. Government does not even have to mouth the words. The trial record in *Kelo* includes the admission by the developer that there was essentially no market for building in the area.<sup>15</sup>

## B. *The Process*

What Horton and Levesque do not address is the process itself and what could have and should have been done differently. This is the precedent of the public policy and process of deciding when and how to use eminent domain that has been perpetuated post-*Kelo*. It deserves close scrutiny and should not be accepted simply because that has been the way that business was always done, apparently ratified by *Kelo*. For some backstory, read Jeff Benedict's somewhat one-sided book, *Little Pink*

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<sup>11</sup> For a succinct criticism of the decision, see Amy Lavine, *Urban Renewal and the Story of Berman v. Parker*, 42 URBAN LAW. 287 (2009).

<sup>12</sup> Prior to joining the United States as a territory under an American governor and, eventually, a state, Hawaii was a monarchy. See JAMES L. HALEY, CAPTIVE PARADISE: A HISTORY OF HAWAII, at xix (2014) (showing the kings and queens of Hawaii).

<sup>13</sup> Horton & Levesque, *supra* note 4, at 1416.

<sup>14</sup> See J. GORDON HYLTON ET AL., PROPERTY LAW AND THE PUBLIC INTEREST: CASES AND MATERIALS 221 (2d ed. 2003) (discussing social redistribution as a public use: "Both *Midkiff* and *Berman v. Parker* are examples of social redistribution. In *Midkiff*, title to land was taken from its owners and transferred to Lessees . . . Title transfers have occurred under this statute upheld in *Midkiff*, but housing costs have increased because homeowners must now pay for a full title rather than monthly rental under a lease. Note that Justice O'Connor acknowledged the act might not be successful in achieving its intended goals.").

<sup>15</sup> "The trial court relied on testimony that 'market conditions do not justify construction of new commercial space . . . on a speculative basis.'" *Kelo v. City of New London*, 843 A.2d 500, 598 (Conn. 2004) (Zarella, J., concurring in part and dissenting in part), *aff'd*, 545 U.S. at 490 (2005).

*House*.<sup>16</sup> The take-away from his account is that Susette Kelo and her neighbors, some of whom, when you learn their stories, you will find even more sympathetic than Kelo, is that they were treated poorly in the process.<sup>17</sup> The next media play for this case is the upcoming movie in which Catherine Keener portrays Susette Kelo.<sup>18</sup> The *Kelo* case just keeps on giving.<sup>19</sup>

### III. WHY THE HURRY?

If you follow the history of the Fort Trumbull redevelopment process, you will sense that there was great urgency to acquire and clear the property that drove the process.<sup>20</sup> Why? In part, the real estate market was strong and the redevelopment authority had a capable developer waiting in the wings.<sup>21</sup> The other factor is a phenomenon of redevelopment generally: the almost obsessive-compulsive urge to own, control, clear, and make

<sup>16</sup> JEFF BENEDICT, *LITTLE PINK HOUSE: A TRUE STORY OF DEFIANCE AND COURAGE* (2009); see also Dahlia Lithwick, *Driven Out*, N.Y. TIMES (Mar. 12, 2009), [http://www.nytimes.com/2009/03/15/books/review/Lithwick-t.html?\\_r=0](http://www.nytimes.com/2009/03/15/books/review/Lithwick-t.html?_r=0) [<https://perma.cc/TW6G-S8ZH>] (“The investigative reporter Jeff Benedict has decided to cast Kelo in the style of Julia Roberts as Erin Brockovich. But this comes at some journalistic cost: by the time he’s finished introducing us to his protagonist (who ‘had a body that defied the fact that she had delivered five children. Her fiery red hair ran all the way down to her waist’), he risks having written the world’s first bodice-ripper about the takings clause.”).

<sup>17</sup> BENEDICT, *supra* note 16.

<sup>18</sup> Brian Hallenbeck, ‘*Pink House*’ Author Ticked at Casting of Movie’s Lead Role, THE DAY (Sept. 17, 2015, 4:41 PM), <http://www.theday.com/article/20150917/NWS01/150919356> [<https://perma.cc/W9SQ-64X4>]; see also Ilya Somin, *Forthcoming Film About Kelo v. City of New London*, WASH. POST (June 23, 2014), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/06/23/a-forthcoming-documentary-on-kelo-v-city-of-new-london/> [<https://perma.cc/9AC8-KDFL>]. The film’s producers, Ted Balaker and Courtney Balaker, are making it in collaboration with the Institute for Justice, which represented Kelo, and they had this to say in an op-ed piece in USA Today:

The Constitution once limited how governments could use eminent domain, but post-*Kelo*, that’s no longer the case. Officials routinely lock arms with corporations or billionaires to forcibly transfer property from one private owner to another, not for public use, but for private gain. . . . How to tame the ugly spirit of eminent domain abuse and cronyism? We suggest turning to a force mightier than politics: culture. We are producing a feature film based on Kelo’s historic saga, and we hope to achieve some of the impact garnered by *Erin Brockovich*, another underdog film about a real-life working-class woman.

*Id.*

<sup>19</sup> A video embedded in a report on the upcoming movie is interesting because not only is the landmark Thames River mispronounced, a local oddity for sure, but more importantly the interviewee director Courtney Balaker mistakenly believes a finding of blight was required. Nick Gillespie & Alexis Garcia, *Kelo Decision Coming to Big Screen in Little Pink House*, REASON.COM (July 27, 2015), <http://reason.com/reasontv/2015/07/27/kelo-decision-little-pink-house> [<https://perma.cc/2HSD-LQ2L>].

<sup>20</sup> See Ted Mann, *A ‘Wrong Turn’: From Giddy Optimism to Stunning Disappointment*, THE DAY (Nov. 11, 2009, 2:06 AM), <http://www.theday.com/article/20091111/BIZ02/311119888> [<https://perma.cc/SK2Y-3L7H>] (discussing the history of the Fort Trumbull development process).

<sup>21</sup> YALE URBAN DESIGN WORKSHOP, FORT TRUMBULL VISION 15 (2011).

shovel-ready now, right now, any redevelopment site, with four corners, neat and square.<sup>22</sup> The current interest in new urbanism, mixed use, and retention of the historic fabric,<sup>23</sup> all militate against the 1960's ethic of "slash and burn" redevelopment.<sup>24</sup>

What was striking to me as I followed the development of the case was not the treatment of Susette Kelo so much as that of Wilhelmina Dery.<sup>25</sup> She was among the nine residents and investment owners of the fifteen homes that were petitioners in the case. She lived in a house on Walbach Street that her family had owned for more than 100 years.<sup>26</sup> She was born there, in that house, on February 20, 1918, and in 1946 her husband, Charles, moved into that house when they married.<sup>27</sup> Wilhelmina and Charles Dery's son, also a petitioner, lived next door in a house given to him as a wedding gift.<sup>28</sup> Wilhelmina Dery lived on through the decision of the U.S. Supreme Court but died on March 13, 2006, nine months after the Court's decision, in the very room where she was born.<sup>29</sup>

Today, a decade after she died, the site remains undeveloped.<sup>30</sup> We can argue why it is in that condition. Certainly, the Great Recession may have been sufficient to stop the development. But here is the real question—why even at the time of the taking, with a hopeful future, was it necessary to immediately take the fee simple interest of Wilhelmina and Charles Dery? They were in their eighties when their property was taken. Why was it not possible to take just the remainder interest in their property and leave them with a life estate, with the ability to stay on in the house were Wilhelmina had been born, until they both died or decided on their own that they needed to move on? Horton and Levesque say nothing about

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<sup>22</sup> See VIRGINIA LEE BURTON, MIKE MULLIGAN AND HIS STEAM SHOVEL (1939). And look where Mary Anne, the steam shovel, ended up after furiously digging a basement with four corners, neat and square.

<sup>23</sup> See, e.g., *Principles of Urbanism*, NEW URBANISM, [www.newurbanism.org/newurbanism/principles.html](http://www.newurbanism.org/newurbanism/principles.html) [<https://perma.cc/XBE7-LS92>] (last visited Apr. 16, 2016); CONGRESS FOR NEW URBANISM, [www.cnu.org](http://www.cnu.org) [<https://perma.cc/NXE9-MCP9>] (last visited Apr. 16, 2016).

<sup>24</sup> See, e.g., Sharon Zukin, *Gentrification as Market and Place*, in THE GENTRIFICATION DEBATES: A READER 37, 40 (Japonica Brown-Saracino ed., 2010) ("For a long time, demolition signified improvement.").

<sup>25</sup> *Kelo v. City of New London*, 545 U.S. 469, 494–95 (2005).

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> Lynne Tuchy, *Fort Trumbull Plaintiff Dies*, HARTFORD COURANT (Mar. 15, 2006), [http://articles.courant.com/2006-03-15/news/0603150758\\_1\\_takings-wilhelmina-dery-new-london-s-fort-trumbull](http://articles.courant.com/2006-03-15/news/0603150758_1_takings-wilhelmina-dery-new-london-s-fort-trumbull) [<https://perma.cc/SX77-JCGR>].

<sup>30</sup> Ilya Somin, *The Story Behind Kelo v. City of New London—How an Obscure Takings Case Got to the Supreme Court and Shocked the Nation*, WASH. POST (May 29, 2015), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/05/29/the-story-behind-the-ke-lo-case-how-an-obscure-takings-case-came-to-shock-the-conscience-of-the-nation/> [<https://perma.cc/AKX2-PJKM>].



how we might make the process kinder and gentler for those who might suffer the greatest from having their property taken, suffering in ways that can never be compensated for money alone. For eight years, Wilhelmina lived with the cloud of the eminent domain taking over her head.

Not every building needs to be taken to make every redevelopment work. Remarkably, there was one building, one that was not blighted, that somehow did not become part of any of the area plans, and was not taken. That was the Italian Dramatic Club at 79 Goshen Street in Parcel 3.<sup>31</sup> Early in the week that the case was to be argued in the U.S. Supreme Court, Professor Richard A. Epstein and Professor J. Peter Byrne discussed the case, with Professor Epstein offering this about the Italian Dramatic Club:

This case illustrates the corrupt (or at least monumentally stupid) decisions that local governments can make. Virtually all of the 90 acres are already in public hands. The mess-up with the hotel which was supposed to serve the Pfizer plant has nothing to do with Susette Kelo and company. It reflects an ossified public process that moves so slowly that Pfizer has found other places to house people who use its facility. The park and remediation of an extravagant scale can take place without condemning these homes. The Italian Dramatic Club lies in the middle of this supposed flood plain and yet is spared, while the Brelesky house that abuts it is taken over. . . . Peter, you speak about the need to assemble large contiguous plots of land. But this the City already has with over 90 acres in hand and it can't figure out what to do with them because the local economy doesn't support its grandiose ambitions. Yet when politics intervene, it will craft a convenient exception from the grim urban reaper. Hence the Italian Dramatic Club is spared from condemnation when the Brelesky house that abuts it is not.<sup>32</sup>

If the club could be preserved, and one might ask to what end, why couldn't the Derys be allowed to retain a life estate and have the government only take the remainder interest? And why couldn't the development plan work around some or all of the holdouts and integrate them into the redevelopment plan? The same question might be asked with regard to *Berman's* non-blighted department store: Why could it not have

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<sup>31</sup> Tom Blumer, *Nearly 10 Years Later, Monument to Favoritism in Kelo Ruling Still Stands*, MRC NEWSBUSTERS (Jan. 7, 2009, 4:30 PM), <http://www.newsbusters.org/blogs/tom-blumer/2009/01/07/nearly-10-years-later-monument-favoritism-kelo-ruling-still-stands> [<https://perma.cc/UV3C-PK6L>].

<sup>32</sup> Richard A. Epstein & J. Peter Byrne, *Can Your Town Take Your Home?*, LEGAL AFFAIRS (Feb. 21, 2005), [http://www.legalaffairs.org/webexclusive/debateclub\\_emdom0205.msp](http://www.legalaffairs.org/webexclusive/debateclub_emdom0205.msp) [<https://perma.cc/6S-KJ-GMVB>].

been integrated as part of a mixed-use development instead of destroying it to make way for a monoculture of residential uses?

#### IV. EMPOWERMENT

The sense you get from Benedict's description of the property owners is their relative lack of power in the face of the government's plan. Most property owners have little or no bargaining power against the government. They justifiably feel overpowered, which they are, when the government says it wants and will have their property. Horton admitted as much during oral argument: "The large share of it was [voluntarily sold], but of course, that's because there is always in the background the possibility of being able to condemn it. I mean, that obviously facilitates a lot of voluntary sales."<sup>33</sup> When they do fight, as they did here, they might be accused of causing the project's failure, as Horton and Levesque argue in saying that "without drawn-out litigation the plan might actually have succeeded!"<sup>34</sup>

What to do? Maybe we should experiment with civil *Gideon* protection<sup>35</sup> and provide by statute for the cost of free representation for property owners who cannot otherwise afford a lawyer to represent them in the negotiation and, if necessary, in the litigation of eminent domain takings. Maybe for those who can afford lawyers, there might be an attorney's fees provision in every case, not just those where, as in some states, the property gets an award significantly above that offered by the government.<sup>36</sup> Property owners might have the right to submit their legal costs to the court or be reimbursed by the government if the cases are settled short of trial. Should not the cost of representation of property owners be a part of the public's obligation when there is a forced assembly, with the burden spread over all of the benefitted citizens instead of being borne solely by the private property owners?

More likely of adoption and already proven to be successful is the property rights ombudsman. The ombudsman, an employee of the state, provides information and guidance for private property owners whose

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<sup>33</sup> Transcript of Oral Argument at 34, *Kelo v. City of New London*, 545 U.S. 469 (2005) (No. 04-108).

<sup>34</sup> Horton & Levesque, *supra* note 4, at 1410.

<sup>35</sup> *Gideon v. Wainwright*, 372 U.S. 335 (1963). See generally *Civil Gideon Corner*, PHILADELPHIA BAR ASSOCIATION, <http://www.philadelphiabar.org/page/CivilGideon> [<https://perma.cc/M9U8-VUYZ>] (last visited Mar. 21, 2016) ("The term 'civil Gideon' refers to a growing national movement that has developed to explore strategies to provide legal counsel, as a matter of right and at public expense, to low-income persons in *civil* legal proceedings where basic human needs are at stake, such as those involving shelter and child custody."); John Pollock, *It's All About Justice: Gideon and the Right to Counsel in Civil Cases*, 39 HUM. RTS., no. 4, 2013; *Moving Towards Civil Gideon: 2014 Legal Assistance Partnership Conference*, NEW YORK STATE BAR ASSOCIATION (2014), <https://www.nysba.org/WorkArea/DownloadAsset.aspx?id=51554> [<https://perma.cc/EB6F-EX43>].

<sup>36</sup> See, e.g., N.Y. EM. DOM. PROC. LAW § 701 (Consol. 2016).

property is proposed to be taken. They provide some empowerment for the private property owners. Regrettably, they have been little used. Utah, Missouri, and Virginia appear to be the only states with eminent domain or property rights ombudsmen.<sup>37</sup> Connecticut had one for a few years but it was eliminated, ostensibly for budget reasons.<sup>38</sup>

Utah's program<sup>39</sup> is exemplary. The state's description reads:

The Office of the Property Rights Ombudsman protects the property rights of the citizens of Utah. The Office helps citizens and government agencies understand and comply with property rights laws, resolves property rights disputes, and advocates for fairness and balance when private rights conflict with public needs.<sup>40</sup>

Neither the Utah nor Missouri ombudsmen appear to be on short leashes.<sup>41</sup> For example, on a page with photographs of many fine looking single-family homes, the Missouri ombudsman says:

Do you think your home is safe from eminent domain abuse?  
So did these Missouri homeowners. These are just a few

<sup>37</sup> STATE OF MISSOURI, OFFICE OF THE OMBUDSMAN FOR PROPERTY RIGHTS (last visited Mar. 21, 2016); Press Release, Virginia Department of Transportation, VDOT Announces Establishment of Ombudsman Function to Assist Public with Right of Way Transactions (June 24, 2014) (on file with author).

<sup>38</sup> *Annual Report 2007–2008*, OFFICE OF OMBUDSMAN FOR PROPERTY RIGHTS, [http://www.ct.gov/pro/lib/pro/documents/annual\\_report\\_2007-08.pdf](http://www.ct.gov/pro/lib/pro/documents/annual_report_2007-08.pdf) [https://perma.cc/SZZ3-DDH5] (last visited Mar. 21, 2016); *Annual Report 2008–2009*, OFFICE OF OMBUDSMAN FOR PROPERTY RIGHTS, [http://www.ct.gov/pro/lib/pro/documents/annual\\_report\\_2008-09.pdf](http://www.ct.gov/pro/lib/pro/documents/annual_report_2008-09.pdf) [https://perma.cc/2KWT-4MSC] (last visited Mar. 21, 2016); *Connecticut Office of Ombudsman for Property Rights Closes*, OWNER'S COUNSEL OF AMERICA (Sept. 10, 2009), <http://www.ownerscounsel.com/connecticut-office-of-ombudsman-for-property-rights-closes/> [https://perma.cc/4E5T-QA96]. There was a mediation process as well. *Process of Mediation of Disputes Between Property Owners and Public Agencies Concerning the Use of Eminent Domain or Related Relocation Assistance*, OFFICE OF OMBUDSMAN FOR PROPERTY RIGHTS, [http://www.ct.gov/sots/lib/sots/regulations/title\\_48/052.pdf](http://www.ct.gov/sots/lib/sots/regulations/title_48/052.pdf) [https://perma.cc/DFC6-QCQ6] (last visited Mar. 21, 2016).

<sup>39</sup> UTAH DEP'T OF COMMERCE OFFICE OF THE PROPERTY RIGHTS OMBUDSMAN, WELCOME TO THE PROPERTY RIGHTS OMBUDSMAN UTAH DEP'T OF COMMERCE (last visited Mar. 21, 2016), <http://propertyrights.utah.gov/> [https://perma.cc/ZRM3-YEME].

<sup>40</sup> *Id.*

<sup>41</sup> Virginia's is within its Department of Transportation and it is unclear how independently it operates. *Right of Way Ombudsman Charter*, VIRGINIA DEPARTMENT OF TRANSPORTATION ASSURANCE AND COMPLIANCE OFFICE (2014), [http://www.virginiadot.org/business/resources/Right\\_of\\_Way\\_Ombudsman\\_Charter\\_061114.pdf](http://www.virginiadot.org/business/resources/Right_of_Way_Ombudsman_Charter_061114.pdf) [https://perma.cc/B29W-RZAZ]. Missouri's law does not allow the ombudsman to give legal advice: "The office of public counsel shall create an office of ombudsman for property rights by appointing a person to the position of ombudsman. The ombudsman shall assist citizens by providing guidance, which shall not constitute legal advice, to individuals seeking information regarding the condemnation process and procedures. The ombudsman shall document the use of eminent domain within the state and any issues associated with its use and shall submit a report to the general assembly on January 1, 2008, and on such date each year thereafter." MO. ANN. STAT. § 523.277 (2016).

examples of the many homes that are considered part of a “blighted” area in an attempt by condemning authorities to strip these homeowners of their property rights in order to build strip malls.<sup>42</sup>

Utah law requires that any agency intending to use eminent domain to acquire private property provide the property owner with certain disclosures,<sup>43</sup> all of which can be found in a 46-page document, “Your Guide to Just Compensation: What to Do When The Government Wants to Acquire Land” promulgated by the Utah Office of the Property Rights Ombudsman.<sup>44</sup> Those disclosures are laid out in twenty-seven paragraphs,<sup>45</sup> including the right to fair market value,<sup>46</sup> access to public documents,<sup>47</sup> open meetings,<sup>48</sup> disclosure of other property owners whose property is being taken,<sup>49</sup> a statement of the public purpose for the taking,<sup>50</sup> and the right to accompany the agency’s appraiser during his or her inspection of the property and to talk to that appraiser before the value is determined.<sup>51</sup> In addition, homeowners have a right to receive a copy of the appraisal.<sup>52</sup> A second appraisal may be provided at the agency’s expense if the property owner has requested mediation through the office of the property rights ombudsman and the mediator or arbitrator in the matter makes the determination that such an appraisal is reasonably necessary to resolve the issue of just compensation.<sup>53</sup> The Utah law allows supplemental damages beyond fair market value for improvements on the property that contribute to the value and to have the agency provide a replacement dwelling, including an obligation to pay additional compensation where the just compensation offered is insufficient to pay for an appropriate replacement.<sup>54</sup>

Craig Call, Utah’s first property rights ombudsman, offered an insider’s, first-person perspective on how this has worked in Utah.<sup>55</sup> The

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<sup>42</sup> *Blighted Missouri*, OFFICE OF THE OMBUDSMAN FOR PROPERTY RIGHTS, <https://eminentdomain.mo.gov/blighted.htm> [<https://perma.cc/RA55-8HPU>] (last visited Mar. 21, 2016).

<sup>43</sup> UTAH CODE ANN. § 78B-6-505 (2016).

<sup>44</sup> *Your Guide to Just Compensation*, STATE OF UTAH OFFICE OF THE PROPERTY RIGHTS OMBUDSMAN (2011), <https://utahpropertyrights.files.wordpress.com/2013/05/your-guide-to-just-comp-nov-2011.pdf> [<https://perma.cc/EJE6-96L3>].

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> UTAH CODE ANN. § 78B-6-511 (2016).

<sup>55</sup> Craig M. Call, *Speech from the Eighth Annual New York Conference on Private Property*

short version is that it has worked very well to bring the parties to settlement and avoid litigation. With the ombudsman and new techniques for alternative dispute resolution, the Utah Department of Transportation reports that litigation has been reduced 75%.<sup>56</sup> That is not a typographic error – a 75% reduction in litigation. The budget is small, just \$150,000 year in 2004,<sup>57</sup> and the office even has the power to pay for independent appraisals.<sup>58</sup> A state that does not have a property rights ombudsman is pennywise and pound-foolish.

#### V. COURT'S FAILURE TO PROVIDE ANY GUIDES OR STANDARDS

Horton and Levesque end their discussion of the first of the four words by noting Justice Kennedy's concurring opinion with what is as close to any real guidance on what standards must characterize the process in order for it to be defensible.<sup>59</sup> The most that one can glean from the concurrence is that there must be a plan, an adequate process, and the ability to vote the elected officials who make eminent domain decisions out of office at some later time.<sup>60</sup>

In perpetuating the precedential status quo, the Court did nothing to provide guidance for better decision-making. Everyone affected by eminent domain deserves better. The Court passed up an opportunity to adopt the clear thinking of the Michigan Supreme Court in *Wayne County v. Hathcock*, where that court overturned its 1981 "Poletown" ruling and held that a "public use" must be for just that, a use by the public such as a park, an airport, or a highway.<sup>61</sup>

In 1981, the Michigan Supreme Court upheld the city of Detroit's condemnation of a substantial area of private, largely residential property to be conveyed to General Motors Corporation to construct an automobile

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*Rights*, PROP. RTS. FOUND. OF AM. (2004), <http://prfamerica.org/speeches/8th/UtahPropRtsOmbudsman.html> [<https://perma.cc/KBG9-KJ7H>].

<sup>56</sup> Craig M. Call, *Resolving Land Use and Impact Fee Disputes: Utah's Innovative Ombudsman Program*, A.B.A., [http://www.americanbar.org/content/dam/aba/events/real\\_property\\_trust\\_estate/annual\\_meeting/2011/materials/annual\\_rpte\\_2011\\_property\\_rights\\_call\\_utah\\_ombudsman\\_program.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/events/real_property_trust_estate/annual_meeting/2011/materials/annual_rpte_2011_property_rights_call_utah_ombudsman_program.authcheckdam.pdf) [<https://perma.cc/P9BK-3F7Z>] (last visited Mar. 21, 2016); Leonard Gilroy, *States Should Establish Ombudsmen to Protect Private Property Rights*, REASON FOUND. (Apr. 17, 2008), <http://reason.org/news/show/states-should-establish-ombudsmen> [<https://perma.cc/372Y-KQSR>]; *Ombudsman Act*, AM. LEGIS. EXCHANGE COUNCIL, <http://www.alec.org/model-policy/ombudsman-act/> [<https://perma.cc/79F5-5HRV>] (last visited Mar. 21, 2016).

<sup>57</sup> Call, *supra* note 55.

<sup>58</sup> *Id.*

<sup>59</sup> Horton & Levesque, *supra* note 4, at 1418.

<sup>60</sup> *Kelo v. City of New London*, 545 U.S. 469, 492 (2005).

<sup>61</sup> *County of Wayne v. Hathcock*, 684 N.W.2d 765, 770 (Mich. 2004); Patricia E. Salkin, *Zoning and Land Use Planning: Michigan Supreme Court Overturns Eminent Domain Case*, 33 REAL ESTATE L.J. 478 (2005).

assembly plant in *Poletown Neighborhood Council v. Detroit*.<sup>62</sup> The Court said: “The power of eminent domain is to be used in this instance primarily to accomplish the essential public purposes of alleviating unemployment and revitalizing the economic base of the community. The benefit to a private interest is merely incidental.”<sup>63</sup> The takings included over 1,000 properties, and the homes of 3,438 people.<sup>64</sup>

*Hathcock* arose out of the County Airport renovation in which Wayne County had invested about \$2 billion and was then faced with problems related to increased aircraft noise.<sup>65</sup> The county started buying up land using among other funds \$21 million provided by the Federal Aviation Administration, acquiring about 500 acres in many parcels near the airport.<sup>66</sup> Some of the parcels were not connected with any others.<sup>67</sup> Because the county was required to use the federal funds for economic development it proposed a business and technology park as part of the airport project.<sup>68</sup> The site for the proposed business and technology park was large, some 1,300 acres.<sup>69</sup> To get that much land the county started buying up more property totaling another 500 acres.<sup>70</sup> The county came up short, however, in terms of getting a sufficiently contiguous land

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<sup>62</sup> *Poletown Neighborhood Council v. Detroit*, 304 N.W.2d 455, 457 (Mich. 1981), *overruled by Hathcock*, 684 N.W.2d 765.

<sup>63</sup> *Id.* at 459. The court had noted, “We are persuaded the terms [public use and public purpose] have been used interchangeably in Michigan statutes and decisions in an effort to describe the protean concept of public benefit.” *Id.* at 457. Professor John Mogk of Wayne State University describes *Poletown* as a success:

The city acquired land for General Motors in Detroit’s declining Poletown neighborhood through eminent domain in the 1980s to build a \$2 billion auto-assembly plant that today is the largest operating industrial facility in the city and one of GM’s flagship plants. It has provided 3,000 jobs in the community and 15,000 additional allied jobs in parts and service industries for more than three decades, and generated hundreds of millions of dollars of property and income-tax revenue, more than accomplishing its economic purpose.

John E. Mogk, *Eminent Domain’s Poletown Success*, WALL ST. J. (Aug. 5, 2015), <http://www.wsj.com/articles/eminent-domains-poletown-success-1438726651> [<https://perma.cc/NC64-8MF6>]. *But see* Timothy Sandefur, *A Gleeeful Obituary for Poletown Neighborhood Council v. Detroit*, 28 HARV. J.L. & PUB. POL’Y 651 (2005) (arguing that overturning *Poletown* “vindicate[d] an important legal principle to protect people from what the founding fathers called ‘the mischiefs of faction’” (citing THE FEDERALIST NO. 10 (James Madison))).

<sup>64</sup> *See* Wendell E. Pritchett, *The “Public Menace” of Blight: Urban Renewal and the Private Uses of Eminent Domain*, 21 YALE L. & POL’Y REV. 1, 48 (2003); Stephen Jones, Note, *Trumping Eminent Domain Law: An Argument for Strict Scrutiny Analysis Under the Public Use Requirement of the Fifth Amendment*, 50 SYRACUSE L. REV. 285, 295 (2000).

<sup>65</sup> *Hathcock*, 684 N.W.2d at 770.

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> *Id.* at 771.

assemblage, so it begin a formal process of eminent domain, negotiating voluntary sales from twenty-seven of the property owners, leaving 19 to be acquired by eminent domain.<sup>71</sup> Those takings were challenged as not being for a public purpose.<sup>72</sup> The trial and appellate courts upheld the use of eminent domain for this assemblage, finding precedent in the *Poletown* decision.<sup>73</sup>

In reversing *Poletown*, the Michigan Supreme Court acknowledged that its state constitution did not preclude the transfer of property taken by eminent domain to a private entity but that such transfer was not permissible if it was for a private use.<sup>74</sup> And it is here that the Hathcock decision is instructive of the analysis that the U.S. Supreme Court could have followed in *Kelo* and which would have provided far better guidance than what was offered and what Horton and Levesque can fabricate out of Kennedy's concurrence.

The Michigan court first held that Wayne County was authorized to exercise the power of eminent domain and that this particular exercise was within the county's powers.<sup>75</sup>

A transition from a declining rustbelt economy to a growing, technology-driven economy would, no doubt, promote prosperity and general welfare. Consequently, the county's goal of drawing commerce to metropolitan Detroit and its environs by converting the subject properties to a state-of-the-art technology and business park is within this definition of a "public purpose."<sup>76</sup>

The court also found it was "necessary"<sup>77</sup> and "for the use or benefit of the public"<sup>78</sup> under the state's statutes.

In ultimately determining that the proposed condemnations were not "for public use" under the Michigan constitution,<sup>79</sup> the court found that it should apply what is the "common understanding" of the term, quoting Justice Cooley: "[The] Constitution is made for the people and by the people. The interpretation that should be given it is that which reasonable minds, the great mass of the people themselves, would give it."<sup>80</sup>

What followed next in the analysis and the decision is a remarkable

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<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> *Id.* at 787.

<sup>75</sup> *Id.* at 776.

<sup>76</sup> *Id.*

<sup>77</sup> *Id.* at 777.

<sup>78</sup> *Id.* at 778.

<sup>79</sup> *Id.* at 781.

<sup>80</sup> *Id.* at 779 (emphasis omitted) (quoting *In re Proposal C*, 185 N.W.2d 9 (Mich. 1971)).

road map for eminent domain decision-making where the property is ultimately turned over to a private entity for redevelopment. The court described its challenge as one of finding “the area between these poles” – the permissible condemnation of private property ultimately conveyed to a private entity for a public use and that which is ultimately conveyed to a private entity for private use.<sup>81</sup>

First, the court noted the precedent in Michigan to the conveyance to a private entity must be one of “public necessity of the extreme sort otherwise impracticable,”<sup>82</sup> citing a prior decision describing “those enterprises generating public benefit whose very existence depends on the use of land that can be assembled only by the coordination central government alone is capable of achieving” and including “highways, roads, canals, and other instrumentalities.”<sup>83</sup>

This notion of the necessity of collective action to acquire property for the “instrumentalities of commerce” would not necessarily preclude the acquisition of the properties at Fort Trumbull, but would require a demonstration that it was absolutely necessary to carry out the public purpose.

The second requirement that the court noted as necessary where condemned property is transferred to a private entity is that there be some continuing public oversight, some involvement or control by the public.<sup>84</sup> This too would not have been a problem at Fort Trumbull if the acquired property were subject to long-term or perpetual covenants and easements with a reverter back to the government in the event that the private developer failed to use the property for a public use.<sup>85</sup> Indeed, the increasing use of public-private partnerships enables government to stay involved as a partner with private entities managing and controlling the use of the land that is acquired while insuring continuing dedication to public use. Remember, ownership, even control, is not necessarily the same as use.

Finally, the Michigan court found that it was permissible to transfer property to a private entity when the land acquired was itself a matter of public concern, as would be the case for the removal of blighted properties that are a hazard to the public's health and safety.<sup>86</sup> The ultimate transfer of the land acquired under these conditions to a private entity is incidental to

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<sup>81</sup> *Id.* at 781.

<sup>82</sup> *Id.* (quoting *Poletown Neighborhood Council v. City of Detroit*, 304 N.W.2d 455, 478 (Mich. 1981) (Ryan, J., dissenting)).

<sup>83</sup> *Id.* (quoting *Poletown*, 304 N.W.2d at 478 (Ryan, J., dissenting)).

<sup>84</sup> *Id.* at 782.

<sup>85</sup> *See id.* at 784 (describing how no formal mechanisms existed to ensure that the Pinnacle Project benefited the public). Had some mechanism existed, the court would have ruled differently on this element.

<sup>86</sup> *Id.* at 782–83.



the removal of the blight.<sup>87</sup>

The Michigan Supreme Court essentially adopted Justice Ryan's dissenting opinion in the *Poletown* case in summarizing its three-part test as follows:<sup>88</sup>

The foregoing indicates that the transfer of condemned property to a private entity, seen through the eyes of an individual sophisticated in the law at the time of ratification of our 1963 Constitution, would be appropriate in one of three contexts: (1) where "public necessity of the extreme sort" requires collective action; (2) where the property remains subject to public oversight after transfer to a private entity; and (3) where the property is selected because of "facts of independent public significance," rather than the interests of the private entity to which the property is eventually transferred.<sup>89</sup>

The proposed business and technology park failed this three-part test. First, there was ample opportunity for a similar development in the area.<sup>90</sup> Second, there was no public oversight.<sup>91</sup> Third, the acquisition of the land, in and of itself, did not serve the public good because there was no "independent public significance" such as the elimination of a hazard that would support the use of the eminent domain power.<sup>92</sup>

The *Hathcock* decision came down on July 30, 2004, just eleven months before the U.S. Supreme Court's decision in *Kelo*.<sup>93</sup> How much better the *Kelo* decision would have been had a similar thorough, thoughtful analysis been followed and more definitive guidance given to decision makers. Would the Fort Trumbull project still have been held to be for a public purpose? No one should dismiss *Hathcock* by saying that it is a state court decision interpreting state statutes and a state constitution.<sup>94</sup>

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<sup>87</sup> *Id.* at 783.

<sup>88</sup> *Id.* at 781 (citing *Poletown*, 304 N.W.2d at 478–80 (Ryan, J., dissenting)).

<sup>89</sup> *Id.* at 783.

<sup>90</sup> *Id.* at 783–84.

<sup>91</sup> *Id.* at 784.

<sup>92</sup> *Id.*

<sup>93</sup> *Id.* at 765; *Kelo v. City of New London*, 545 U.S. 469 (2005).

<sup>94</sup> In 2015, the Michigan Supreme Court compared *Kelo* and *Hathcock*, noting the more protective Michigan constitution:

Compare, for example, *Kelo v. New London* . . . with *Wayne Co. v. Hathcock* . . . . *Kelo* held that the requirement of U.S. Const., Ams. V and IX that eminent domain be exercised for a "public use" was satisfied when the city sought to condemn property and transfer it to private entities upon a showing that the transfer would create an economic benefit to the community; essentially, the government can "take" private property when the taking advanced a "public purpose." In contrast, *Hathcock* held that the requirement of Const. 1963, art. 10, § 2 that eminent domain be

That is not the point. *Hathcock* is simply a good example of an in-depth, carefully articulated analysis, something the U.S. Supreme Court did not do.

## VI. ANOTHER ALTERNATIVE—LAND ASSEMBLY

The principal argument for eminent domain for redevelopment is that it is absolutely necessary when private parties are unable to assemble sufficient contiguous land to make an economic project.<sup>95</sup> Horton and Levesque do not mention private land assembly, sometimes called land readjustment, as an alternative to eminent domain. Remarkably absent from all of the reaction to *Kelo* has been any initiative to develop the law in this country to facilitate private land assembly. In other countries, among them Germany, Japan, South Korea, Taiwan, the Netherlands, and Australia, there are “land readjustment” systems enabling entrepreneurs, developers, and groups of property owners to come together, to assemble land.<sup>96</sup> In doing so, they can capture the assemblage value that is not compensable when property is taken by public eminent domain and monetize it when they sell the assemblage to a developer or participate in some capacity such as limited partners, stockholders, or members of a corporation.<sup>97</sup> If there are holdouts, their properties can be taken. Generally, the process begins with the individual property owners approving the land readjustment plan and then giving up their properties.<sup>98</sup>

One knowledgeable commentator has advocated a process of land assembly that begins with assembling the landowners, working with them to find the shared goals and objectives and developing an approach that is a true public-private partnership.<sup>99</sup> A variation on this concept is the

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exercised for “public use” was violated when the county sought to condemn property and transfer it to private entities in order to facilitate economic development. We explained that the public-use requirement forbids the forced transfer of private property to a private entity for a private use and held that economic benefit to a community, without more, did not constitute a “public use,” even though it could be construed as a “public purpose.”

Aft *Michigan v. Michigan*, 866 N.W.2d 782, 794 n.9 (Mich. 2015) (citations omitted).

<sup>95</sup> *E.g.*, *Hathcock*, 684 N.W.2d at 781–82 (describing a hypothetical scenario where the use of eminent domain is necessary to complete public projects).

<sup>96</sup> ROBERT H. NELSON & EILEEN NORCROSS, MERCATUS CENTER, *MOVING PAST KELO: A NEW INSTITUTION FOR LAND ASSEMBLY—COLLECTIVE NEIGHBORHOOD BARGAINING ASSOCIATIONS (CNBAs)*, at 6–10 (2009).

<sup>97</sup> Lynne B. Sagalyn, *Land Assembly, Land Readjustment, and Public-Private Redevelopment*, in *ANALYZING LAND READJUSTMENT: ECONOMICS, LAW, AND COLLECTIVE ACTION* 159, 170 (Yu-Hung Hong & Barrie Needham eds., 2007).

<sup>98</sup> See George W. Liebmann, *Land Readjustment for America: A Proposal for a Statute*, 32 *URB. LAW* 1, 2 (2000) (describing the beginning steps of a land readjustment plan).

<sup>99</sup> Frank Schnidman, *Land Assembly by Assembling People*, 30 *ZONING & PLAN. L. REP.* 1, 3 (2007).

collective neighborhood bargaining association to negotiate for the neighborhood and extract the assemblage value.<sup>100</sup> He identifies George Washington as the first real land readjustment entrepreneur in America in assembling seventeen large farm tracts to create the nation's capital.<sup>101</sup> Washington negotiated an agreement dated March 30, 1791, by which the land owners conveyed with charge portions of their land needed for streets, parks, and similar public uses and sold additional land at \$57 an acre for government buildings and in return they received building lots laid out by the government and apportioned between the private land owners and the Federal government.<sup>102</sup> No eminent domain.<sup>103</sup>

Private land assembly is extremely difficult without enabling legislation to address the issue of holdouts. When successful, the rewards for all the stakeholders can be great, as they were in the New York City 42nd Street Development Project.<sup>104</sup> Many land assembly attempts, however, fail.

Back in the mid-1990s, not far from the University of Connecticut School of Law, there was an attempt by a private land developer working with a group of neighbors across from Westfarms Mall, on the border of West Hartford and Farmington, to assemble the lots in a 1960s era subdivision of split-level homes known as Astronaut Village<sup>105</sup> into a parcel large enough for a retail project. Neighborhood opposition overwhelmed the developer attempting the land assembly. It was an ill-considered attempt but illustrative of the challenges, especially when the initiative comes from outside.<sup>106</sup>

## VII. ASSEMBLAGE

### A. *Kelo's One-Way Street* (“Federalism”)

Horton and Levesque say that “federalism is alive and well after *Kelo*. Those who extol the virtues of federalism elsewhere should be praising

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<sup>100</sup> NELSON & NORCROSS, *supra* note 96, at 1.

<sup>101</sup> Schnidman, *supra* note 99, at 3–4.

<sup>102</sup> *Id.* at 4.

<sup>103</sup> *Id.* at 3–4.

<sup>104</sup> See Sagalyn, *supra* note 97, at 168 (describing that even after many delays and lawsuits, the last phase of condemnation is now complete).

<sup>105</sup> So called because the streets are named after astronauts.

<sup>106</sup> See Daniela Altimari, *Developer Ends Bid to Buy Homes in West Hartford*, HARTFORD COURANT (Sept. 19, 1997), [http://articles.courant.com/1997-09-19/news/9709190503\\_1\\_commercial-sprawl-neighborhood-developer](http://articles.courant.com/1997-09-19/news/9709190503_1_commercial-sprawl-neighborhood-developer) [<https://perma.cc/QP9U-GYWT>] (describing the developers' awareness that the project was a “longshot”); Daniela Altimari, *Astronaut Village Now Small Sea of Tranquility*, HARTFORD COURANT (Aug. 22, 2001), [http://articles.courant.com/2001-08-22/news/0108220171\\_1\\_neighborhood-shopping-mall-target-store](http://articles.courant.com/2001-08-22/news/0108220171_1_neighborhood-shopping-mall-target-store) [<https://perma.cc/C57C-S46D>] (“Most residents vigorously fought the plan, banding together at town meetings and over kitchen tables.”).

*Kelo*.<sup>107</sup> What they ignore is that the *Kelo* decision is blind to some of the good work going on in the states with regard to the issues before the court of what is a public use and what kind of standards and tests the courts should be using. The *Kelo* Court offers very little guidance. Indeed, Horton and Levesque are forced to fall back on Kennedy's concurring opinion and argue that it should be the basis for further development of the law in both the federal and state courts.<sup>108</sup>

*Hathcock* is mentioned just once and that is in the dissenting opinion solely for the purpose of acknowledging that it overturned the *Poletown* decision.<sup>109</sup> As the discussion above of *Hathcock* suggests, there is much that the federal courts, including the High Court, can learn from the states.

Federalism is a two-way street<sup>110</sup> and the failure of the U.S. Supreme Court to recognize the work of the states in its majority opinion is an affront to federalism. The Court could have, and should have, sampled and picked from what the states have done in coping with the sometimes-intractable problems of protecting private property rights while advancing the interests of the general public. That the majority opinion gives the states no good guidance is not a nod to federalism, but as a failure of leadership by the Court.

#### B. *Show Me the Money* ("Compensation")

In talking about the third word, compensation, Horton and Levesque argue that if the government had lost in *Kelo*, it would be encouraged to expand its use of power thereby damaging property rights without having to pay any compensation.<sup>111</sup> They offer nothing in support of that speculation, and it is merely that – speculation. The U.S. Supreme Court has actually limited the more expansive use of regulatory powers, particularly through exactions and conditions on approvals.<sup>112</sup> The Court has strengthened and perhaps even expanded the reach of the Fifth Amendment protections for just compensation by finding that it can be

<sup>107</sup> Horton & Levesque, *supra* note 4, at 1424.

<sup>108</sup> *Id.* at 1425–27.

<sup>109</sup> *Kelo v. City of New London*, 545 U.S. 469, 503 (2005) (O'Connor, J., dissenting).

<sup>110</sup> See *The Roberts Court and Federalism: Minutes from a Convention of the Federalist Society*, 4 N.Y.U. J.L. & LIBERTY 330, 367 (2008) (statement of audience participant); see also David L. Callies, *Kelo v. City of New London: Of Planning, Federalism, and a Switch in Time*, 28 HAW. L. REV. 327, 337 (2006) ("The true 'essence' of federalism is that the States *as States* have legitimate interests which the National Government is bound to respect even though its laws are supreme." (quoting *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 581 (1985) (O'Connor, J., dissenting))).

<sup>111</sup> Horton & Levesque, *supra* note 4, at 1424–25.

<sup>112</sup> See *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586, 2603 (2013) (describing that the exactions tests of *Nollan* and *Dolan* extended to money exactions and are applicable even where the approval is denied because the applicant refuses to accept the condition).

used as an affirmative defense to an enforcement action.<sup>113</sup> Most recently, the Court has granted certiorari in a case involving the so-called relevant parcel,<sup>114</sup> which may prove to be another way by which the Court may expand its protection of private property rights, especially following what seems to be the trend with regard to the relevant parcel issue.<sup>115</sup> No one should fear that private property rights would be endangered as a result of more definitive, and perhaps limiting, rules regarding the use of eminent domain.

When it comes to compensation, again it is what Horton and Levesque do not say that is remarkable. They speak not to the need for better relocation benefits for people who are taken from their homes, for recognizing the loss of business goodwill, or for addressing how we might come to entitle private property owners to be compensated for the assemblage value or at least to be able to participate in part in the economic upside of committing their private properties to the public interest for redevelopment by public or private parties. Sometimes, the justice in just compensation is lacking. They say nothing about the possibility of attorney's fees for private property owners who lose their homes and businesses to the government by eminent domain. They say nothing about reimbursing private property owners for the real expense of defending their rights through appraisers and planners and others who can develop evidence and testify as to value. They say nothing about the need to balance the scales of justice, to empower the private property owner through civil *Gideon* representation and federal and state supported ombudsmen. These are all issues of compensation and even though compensation was not an issue before the Court in *Kelo*, it was the subject of some discussion during oral argument.<sup>116</sup> It is a concern.

Horton and Levesque spend barely half a page on compensation and two thirds of that is devoted to an argument that property owners should be glad that they are not subject to losing their property rights by inverse condemnation because with regulatory takings there is much less chance of

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<sup>113</sup> See *Horne v. Dep't of Agric.*, 133 S. Ct. 2053, 2063 (2013) (explaining that just compensation is due when taking personal property).

<sup>114</sup> See *Murr v. State*, 859 N.W.2d 628 (Wis. 2014), cert. granted, 84 U.S.L.W. 3097 (U.S. 2016) (stating a claim by Petitioners that regulators forced a merger of their two adjoining Wisconsin waterfront properties, hindered development, and failed to properly compensate them for the economic loss they suffered); see also *Lost Tree Village Corp. v. United States*, 787 F.3d 1111, 1119 (Fed. Cir. 2015) (describing the relevant parcel that has been rendered valueless, and holding that a *Lucas* categorical taking had occurred).

<sup>115</sup> *State of Property Rights in America Ten Years After Kelo v. City of New London: Hearing Before the Subcomm. on the Constitution & Civil Justice of the H. Comm. on the Judiciary*, 114th Cong. 1 (2015) (testimony of John M. Groen, Principal Attorney, Pacific Legal Foundation).

<sup>116</sup> Transcript of Oral Argument at 18, 21, 34, 37–38, 40–42, 44, *Kelo v. City of New London*, 545 U.S. 469 (2005) (No. 04-108).

receiving any compensation.<sup>117</sup> That is not a positive argument for eminent domain. That also fails to recognize the fundamental problem we have with inverse condemnation, with both *Lucas*<sup>118</sup> categorical takings and *Penn Central*<sup>119</sup> partial regulatory takings. I believe that any regulatory activity that is in the public interest but has adverse off-site impacts, windfarms and low-level radioactive waste sites for example, should include the creation of a publically-funded trust fund from which owners of economically damaged property may get relief, even for relatively small partial takings. What is lacking in the discourse over both direct takings by eminent domain and indirect takings by inverse condemnation is consideration of who bears the burden and how we might make it more equitable.

### C. *Tyranny by Majority* (“Democracy”)

As I read Horton and Levesque, the majority of people in the community, believing that the interests of “public welfare” will be served, may if they desire take an individual’s private property, pay just compensation, and turn it over to a private developer for economic development, so long as they do so through the “democratic process.” And, if elected public officials make the decision, the public always has a remedy in the right to not reelect them.

The first of those two arguments is empty without standards, and although the authors next turn to pulling Justice Kennedy’s musings up by their bootstraps to make something useful out of them, the fact remains that democracy means nothing without the rule of law and *Kelo* does nothing to advance the rule of law.<sup>120</sup> Horton acknowledged at oral argument: “It seems to me democracy can make good decisions and . . . or bad decisions under the Constitution . . . .”<sup>121</sup>

The second argument, perhaps it can be called “voting the rascals out,” is, to use another trite phrase, “closing the barn door after the horses are out.” Neighborhoods destroyed and families irreparably hurt are not rebuilt and restored at the ballot box.

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<sup>117</sup> Horton & Levesque, *supra* note 4, at 1424–25.

<sup>118</sup> *Lucas v. South Carolina Coastal Comm’n*, 505 U.S. 1003 (1992).

<sup>119</sup> *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104 (1978).

<sup>120</sup> Dana Berliner characterizes the Court’s decision more strongly, and convincingly, claiming that it has “remov[ed] the floor from the Public Use Clause” and that *Kelo* is a “prime example of judicial abdication.” Dana Berliner, *Looking Back Ten Years After Kelo*, 125 *YALE L.J.F.* 82, 91 (2015).

<sup>121</sup> Transcript of Oral Argument at 39, *Kelo*, 545 U.S. 469 (No. 04-108).

D. *A More Robust Examination of the Use of Eminent Domain  
(Transforming Justice Kennedy's Test)*

Horton and Levesque, though recognizing that Justice Kennedy's test is "not well developed,"<sup>122</sup> offer to transform it into a ten-part analysis,<sup>123</sup> which begins to look more like a detailed legislative enactment than a judicial test. To demonstrate how intractable trying to do this will be, take just the first factor: "Will a public body own or operate the property?"<sup>124</sup> In dealing with land assemblage, this really has no meaning. The emergence of public-private partnerships has wiped out any of the bright lines of ownership. It matters not who owns or operates a property so long as there are adequate provisions in place that ensure the assemblage will be used in the public's interest. The same problem is inherent in the factor, "how specific is the state use?"<sup>125</sup> Uses change, sometimes quite rapidly, and frequently before a total plan is implemented. Think of what has happened in the movie theater business, in big box retail, in the conversion of office towers to residential use, in warehouses turned into offices. Land uses today are less permanent and to commit any site, especially a large site, to a particular land use pattern can be damaging.

What is important about this last section is, again, what is not said. We need to focus on how we can assemble parcels of land in the public interest without the use of eminent domain; how we can engage private property owners as joint venturers in that effort; how we can enable private entrepreneurs through land assembly and land readjustment laws to create coalitions of property owners who will voluntarily assemble their land; how we can allow all private property owners to enjoy the upside of land assemblage value enhancements; how we can adequately compensate people who are holdouts and displaced; how we can have a "kinder and gentler" approach to eminent domain with longer time horizons that enable some people to stay on in their homes until they are ready to move on; and how we can empower the small-business owner and single-family homeowner with the legal and consulting help they need to defend their private property rights?

If we do all that, and if we provide more definitive rules of law in constitutional amendments, statutes, and the common law,<sup>126</sup> and we redirect our energies to ways to avoid eminent domain and when it is necessary to use it, to do so in less damaging ways, then we will all be

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<sup>122</sup> Horton & Levesque, *supra* note 4, at 1426.

<sup>123</sup> *Id.* at 1426–27.

<sup>124</sup> *Id.* at 1426.

<sup>125</sup> *Id.*

<sup>126</sup> For a good summary of the response to *Kelo* that may suggest some actions, see Ilya Somin, *The Limits of Backlash: Assessing the Political Response to Kelo*, 93 MINN. L. REV. 2100 (2009).

better off for it.<sup>127</sup>

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<sup>127</sup> As Professor Bethany Berger so aptly puts it: “In the end the decision in *Kelo v. New London* was not a grand victory for the plaintiffs or for New London, for cities or for property owners.” Bethany Berger, *Kelo v. New London: A Decade Later*, 94 *TITLE NEWS* 27, 28 (2015).



