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THE JUDICIAL REACTION TO KELO

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INTRODUCTION

THE JUDICIAL REACTION TO *KELO*

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INTRODUCTION

Kelo v. City of New London was one of the most controversial decisions in Supreme Court history.¹ The 2005 case ruled that the Fifth Amendment, which permits condemnations only for “public use,” allows governments to condemn private property for transfer to other private parties in order to promote “economic development.”² *Kelo* triggered an unprecedented political backlash. Surveys showed that some eighty percent of the public opposed the decision, which was also denounced by politicians and activists from across the political spectrum.³ Forty-three states and the federal government enacted legislation intended to curb economic development takings; this is probably the broadest legislative reaction ever generated by any Supreme Court ruling.⁴

In addition to the better-known legislative reaction, *Kelo* was also followed by extensive additional property rights litigation in both federal and state courts. In the aftermath of *Kelo*, several state supreme courts addressed the question of whether its deferential approach to economic development takings also applied under their state constitutional public use clauses. Both federal and state courts have sought to interpret *Kelo*’s statement that “pretextual” takings are an exception to the decision’s generally ultra-deferential approach.⁵ Finally, several important recent state court decisions considered the implications of *Kelo* for condemnations of “blighted” property.⁶

Unlike the legislative reaction, which has now been extensively analyzed by several scholars,⁷ there is no comprehensive analysis

¹ 545 U.S. 469 (2005).

² *Id.* at 489–90.

³ Ilya Somin, *The Limits of Backlash: Assessing the Political Response to Kelo*, 93 MINN. L. REV. 2100, 2109 (2009).

⁴ *Id.* at 2102.

⁵ See *Kelo*, 545 U.S. at 478 (noting that government is not “allowed to take property under the mere pretext of a public purpose, when its actual purpose was to bestow a private benefit.”).

⁶ See cases cited *infra* note 13–14.

⁷ The most comprehensive analysis is my own article on the subject. See Somin, *supra* note 3, at 2101–02. For other discussions, see, e.g., Janice Nadler et al., *Government Takings of Private Property*, in PUBLIC OPINION AND CONSTITUTIONAL CONTROVERSY 286, 287 (Nathaniel Persily et al. eds., 2008); Edward J. López et al., *Pass a Law, Any Law, State Legislative Responses to the Kelo Backlash*, 5 REV. LAW & ECON. 101 (2009), available at <http://www.bepress.com/rle/vol5/iss1/art5/>; Andrew Morriss, *Symbol or Substance? An Empirical Assessment of State Responses to Kelo*, 17 SUP. CT. ECON. REV. 237 (2009); James W. Ely, Jr., *Post-Kelo Reform: Is the Glass Half-*

of the judicial reaction to *Kelo*.⁸ This is unfortunate because state and federal judges are likely to continue to play an important role in addressing public use issues. Although all but seven states have enacted post-*Kelo* reform laws, the majority of these are weak, providing little or no meaningful protection for property owners.⁹ In many states, the fate of property rights still rests in large part in judicial hands.

This article tries to fill the gap in the literature by analyzing the state and federal judicial aftermath of *Kelo*. With a few important exceptions, I conclude that state courts have not reacted to *Kelo* by adopting similarly permissive approaches to public use issues. To the contrary, three state supreme courts have explicitly repudiated *Kelo* as a guide to their state constitutions.¹⁰ Other recent state supreme court decisions have imposed constraints on takings that go beyond *Kelo* even if they have not completely rejected the *Kelo* approach.¹¹

By contrast, federal and state courts have been all over the map in their efforts to apply *Kelo*'s restrictions on "pretextual" takings. There is no consensus in sight on this crucial issue. It may be that none will develop unless and until the Supreme Court decides another case in this field.

Part I of this article briefly summarizes *Kelo* and its holding. In Part II, I consider state constitutional interpretations of "public use" in the aftermath of *Kelo*. Most of these cases have

Full or Half-Empty?, 17 SUP. CT. ECON. REV. 127 (2009); Timothy Sandefur, *The "Backlash" So Far: Will Americans Get Meaningful Eminent Domain Reform?*, 2006 MICH. ST. L. REV. 709 (2006); Lynn Blais, *Urban Revitalization in the Post-Kelo Era*, 34 Fordham Urban L.J. 657 (2007).

⁸ Daniel B. Kelly has published an excellent analysis of judicial interpretations of *Kelo*'s anti-pretextual taking rule. Kelly, however, does not consider the other issues raised in post-*Kelo* litigation. See generally Daniel Kelly, *Pretextual Takings: Of Private Developers, Local Governments, and Impermissible Favoritism*, 17 SUP. CT. ECON. REV. 173 (2009).

⁹ Somin, *supra* note 3, at 2120.

¹⁰ See *City of Norwood v. Horney*, 853 N.E.2d 1115, 1136 (Ohio 2006) (holding that "economic development" alone does not justify condemnation); *Bd. of Cnty. Comm'rs of Muskogee Cnty. v. Lowery*, 136 P.3d 639, 650–51 (Okla. 2006) (holding that "economic development" is not a "public purpose" under the Oklahoma state constitution, and rejecting *Kelo* as a guide to interpretation of Oklahoma's state constitution); *Benson v. State*, 710 N.W.2d 131, 146 (S.D. 2006) (concluding that the South Dakota constitution gives property owners broader protection than *Kelo*).

¹¹ See cases cited *infra* note 13–15.

repudiated *Kelo*, either banning economic development takings outright or significantly constraining them.¹² Two state supreme courts—Rhode Island and Maryland—have also restricted so-called “quick take” condemnations, which governments use to condemn property under streamlined procedures that give owners few procedural rights.¹³ Two recent decisions by the New York Court of Appeals are significant exceptions to this trend. New York’s highest court has continued to give wide scope for even the most questionable condemnations.¹⁴

Overall, the trend of post-*Kelo* state public use decisions seems to be in the direction of greater restriction. It is difficult to say, however, whether these developments are a reaction against *Kelo* or merely a continuation of preexisting trends under which state courts had been tightening up scrutiny of public use standards for several years prior to *Kelo*.

Part III considers judicial interpretations of *Kelo*’s “pretext” standard. This is the one area where *Kelo* might potentially permit nontrivial public use constraints on condemnation. State and federal courts have not been able to come to any kind of consensus on what qualifies as a “pretextual” taking. Nevertheless, several state supreme courts, as well as the highest court of the District of Columbia, have concluded that the pretext standard has at least some bite, even though they disagree as to the proper mode of applying it.¹⁵ A 2006 federal district court decision reached a similar conclusion.¹⁶ By contrast, the federal Court of Appeals for the Second Circuit, in a decision written by future Supreme Court Justice Sonia Sotomayor, concluded that *Kelo* permits even an extremely blatant case of favoritism for

¹² See cases cited *supra* note 10.

¹³ See *Mayor of Baltimore v. Valsamaki*, 916 A.2d 324, 356 (Md. 2007); *Sapero v. Mayor of Baltimore*, 920 A.2d 1061, 1079–80 (Md. 2007); *R.I. Econ. Dev. Corp. v. The Parking Co.*, 892 A.2d 87, 102 (R.I. 2006).

¹⁴ See *Kaur v. N.Y. State Urban Dev. Corp.*, 933 N.E.2d 721, 731–732 (N.Y. 2010), *cert. denied*, 2010 WL 3712673, at *1 (U.S. Dec. 13, 2010) (No. 10-402); *Goldstein v. N.Y. State Urban Dev. Corp.*, 921 N.E.2d 164, 170–72 (N.Y. 2009).

¹⁵ See *New England Estates v. Town of Branford*, 988 A.2d 229, 253 n.28 (Conn. 2010) (ruling that *Kelo* does not authorize “bad faith” takings); *Cnty. of Hawai’i v. C&J Coupe Family Ltd. P’ship*, 198 P.3d 615, 642–43 (Haw. 2008); *Middletown Twp. v. Lands of Stone*, 939 A.2d 331, 337–38 (Pa. 2007); *Parking Co.*, 892 A.2d at 102–03; *Franco v. Nat’l Capital Revitalization Corp.*, 930 A.2d 160, 172–74 (D.C. 2007).

¹⁶ See *MHC Financing v. City of San Rafael*, No. C 00-3785 VRW, 2006 WL 3507937, at *14 (N.D. Cal. Dec. 5, 2006) (ruling that *Kelo* requires “a careful and extensive inquiry” into the question of whether a private-to-private taking was actually adopted for the purpose of benefiting a private party).

private interests.¹⁷

The question of what counts as a “pretextual” taking under *Kelo* is unlikely to be definitively resolved any time soon unless the Supreme Court itself chooses to revisit the issue.

The conclusion briefly summarizes post-*Kelo* judicial trends and considers implications for the future. Overall, state judges have not given *Kelo* a very favorable reception. This, however, may well be a continuation of preexisting trends, rather than a consequence of the *Kelo* backlash. The next important wave of post-*Kelo* eminent domain decisions may involve state judicial interpretations of the many post-*Kelo* reforms adopted by state legislatures. As yet, there has been surprisingly little action on this front.

I. THE *KELO* DECISION¹⁸

Kelo originated from the condemnation of ten residences and five other properties as part of a 2000 development plan in New London, Connecticut.¹⁹ Planners intended to transfer the property to private developers for the stated purpose of promoting economic growth in the area.²⁰ None of the condemned tracts were alleged to be “blighted or otherwise in poor condition.”²¹ The key state and federal constitutional question arising in the case was whether a taking that transferred property from one private owner to another qualifies as a “public use” under the Fifth Amendment and Connecticut’s state constitutional Public Use Clause. The Connecticut Supreme Court upheld the *Kelo* takings against both state and federal constitutional challenges in a 4–3

¹⁷ *Didden v. Vill. of Port Chester*, 173 F. App’x. 931, 933 (2d Cir. 2006). I analyzed this case extensively in my testimony before the Senate Judiciary Committee at the time of Justice Sotomayor’s confirmation hearings. See *Confirmation Hearing on the Nomination of Hon. Sonia Sotomayor, to be an Assoc. Justice of the Supreme Court of the U.S.: Before the S. Comm. on the Judiciary*, 111th Cong. 1338 (2009) (testimony of Ilya Somin, Professor of Law, George Mason University) [hereinafter *Somin Senate Testimony*].

¹⁸ This section is in part adapted from Somin, *supra* note 3, at 2107–10. For a more detailed discussion of the legal reasoning of *Kelo*, see Ilya Somin, *Controlling the Grasping Hand: Economic Development Takings After Kelo*, 15 S. CT. ECON. REV. 183, 227–44 (2007) [hereinafter Somin, *Grasping Hand*].

¹⁹ *Kelo v. City of New London*, 545 U.S. 469, 475 (2005).

²⁰ *Id.* at 473–75.

²¹ *Id.* at 475.

decision concluding that “economic development” is indeed a public use.²²

In a closely divided 5–4 ruling, the U.S. Supreme Court, upheld the economic development rationale of the New London takings, and mandated broad judicial deference to government decision making on public use issues.²³ Justice John Paul Stevens’ majority opinion defended a “policy of deference to legislative judgments in this field.”²⁴ The Court rejected the property owners’ argument that the transfer of their property to private developers rather than to a public body required any heightened degree of judicial scrutiny.²⁵ It also refused to require the city to provide any evidence that the takings were likely to actually achieve the claimed economic benefits that provided their justification in the first place.²⁶ On all these points, the *Kelo* majority emphasized that courts should not “second-guess the City’s considered judgments about the efficacy of [the] development plan.”²⁷

Despite this result, *Kelo* may have actually represented a slight tightening of judicial scrutiny relative to earlier cases such as *Hawaii Housing Authority v. Midkiff*, which held 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”²⁸ Moreover, the fact that four Justices not only dissented, but actually concluded that the economic development rationale should be categorically forbidden, shows that the judicial landscape on public use had changed.²⁹ Justices Sandra Day O’Connor and Clarence Thomas both wrote extremely forceful dissents chiding the majority for gutting the Public Use Clause.³⁰ A fifth justice, Anthony Kennedy, signed on

²² *Kelo v. City of New London*, 843 A.2d 500, 528 (Conn. 2004), *aff’d*, 545 U.S. 469 (2005).

²³ *Kelo*, 545 U.S. at 483–84.

²⁴ *Id.* at 480.

²⁵ *Id.* at 487–88.

²⁶ *Id.* at 488.

²⁷ *Id.*

²⁸ *Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229, 241 (1984).

²⁹ *Kelo*, 545 U.S. at 505 (O’Connor, J., dissenting); *id.* at 519–22 (Thomas, J., dissenting).

³⁰ *See id.* at 494 (O’Connor, J., dissenting) (claiming that “all private property is now vulnerable to being taken and transferred to another private owner, so long as it might be upgraded”); *see also id.* at 523 (Thomas, J., dissenting) (criticizing the majority for allowing “boundless use of the eminent domain power”).

to the majority opinion, but also wrote a concurrence emphasizing that heightened scrutiny should be applied in cases where there is evidence that a condemnation was undertaken as a result of “impermissible favoritism” toward a private party.³¹ Overall, the close 5–4 split was a marked change from the unanimity the court displayed in earlier decisions that gave the government nearly unlimited discretion to condemn property for almost any reason.³²

Finally, the majority opinion ruled that the government is still not “allowed to take property under the mere pretext of a public purpose, when its actual purpose was to bestow a private benefit.”³³ As discussed in Part III, this aspect of *Kelo* has generated considerable litigation.

II. PUBLIC USE AFTER *KELO*

In the wake of *Kelo*, several state supreme courts considered the issue of whether economic development takings were permissible under their own state constitutions. Other courts considered closely related public use takings involving “blight” and “quick take” condemnations.

A. State Decisions Rejecting *Kelo*-style Economic Development Takings

Two state supreme courts—Ohio and Oklahoma—have directly addressed the question of whether their state constitutions permit *Kelo*-style economic development takings.³⁴ Both explicitly rejected *Kelo* and ruled that their state constitutions forbid economic development takings.³⁵ The Ohio Supreme Court’s

³¹ *Id.* at 493 (Kennedy, J., concurring).

³² See *Midkiff*, 467 U.S. at 241 (concluding that a public use was any objective “rationally related to a conceivable public purpose”); *Berman v. Parker*, 348 U.S. 26, 32 (1954) (ruling that the legislature has “well-nigh conclusive” discretion in determining what counts as a public use); see also Somin, *Grasping Hand*, *supra* note 18, at 224–25 (discussing these two cases in greater detail).

³³ *Kelo*, 545 U.S. at 478.

³⁴ See cases cited *infra* note 35.

³⁵ *City of Norwood v. Horney*, 853 N.E.2d 1115, 1141 (Ohio 2006) (holding that “economic development” alone does not justify condemnation); *Bd. of Cnty. Comm’rs of Muskogee Cnty. v. Lowery*, 136 P.3d 639, 653–54 (Okla. 2006) (holding that “economic development” is not a “public purpose” under the

opinion in *Norwood v. Horney* explicitly criticized *Kelo* and other decisions upholding economic development takings for adopting “an artificial judicial deference to the state’s determination that there was sufficient public use.”³⁶ The Ohio court favorably cited Justice Sandra Day O’Connor’s *Kelo* dissent, which rebuked the majority for reducing the public use requirement to “hortatory fluff.”³⁷ It ruled that the views of the “dissenting justices of the United States Supreme Court in *Kelo* are better models for interpreting Section 19, Article I of Ohio’s Constitution” than those of the majority.³⁸ The Oklahoma Supreme Court similarly rejected *Kelo* as a guide to its state Constitutional Public Use Clause.³⁹

In *Benson v. State*, the Supreme Court of South Dakota also rejected *Kelo*’s interpretation of public use, albeit in a case that did not address the specific issue of economic development takings.⁴⁰ The court concluded that the view that “public use” requires actual use of the condemned property by the government or the general public “accords” better with the text and original meaning of the phrase than *Kelo*’s equation of “public use” with “public purpose” or public benefit.⁴¹ The South Dakota court’s requirement of government ownership or “actual use” by the general public necessarily precludes *Kelo*-style economic development takings that transfer condemned property to a private owner with no legal obligation allowing public access.⁴² For that reason, *Benson* effectively ruled that economic development takings are forbidden by the South Dakota State Constitution.

State decisions adopting stricter public use standards than *Kelo* are not inherently inconsistent with *Kelo* itself. Justice

Oklahoma State Constitution, and rejecting *Kelo* as a guide to interpretation of Oklahoma’s State Constitution).

³⁶ *Norwood*, 853 N.E.2d at 1136.

³⁷ *Id.* at 1137 (quoting *Kelo*, 545 U.S. at 498 (O’Connor, J., dissenting)).

³⁸ *Id.* at 1141.

³⁹ *Lowery*, 136 P.3d at 651.

⁴⁰ 710 N.W.2d 131, 146 (S.D. 2006) (concluding that the South Dakota Constitution gives property owners broader protection than *Kelo*).

⁴¹ *Id.* (noting that “[t]he reasons which incline us to this view are, first, that it accords with the primary and more commonly understood meaning of the words; second, it accords with the general practice in regard to taking private property for public use in vogue when the phrase was first brought into use in the earlier Constitutions; third, it is the only view which gives the words any force as a limitation or renders them capable of any definite and practical application.”).

⁴² *See id.*

Stevens' majority opinion explicitly "emphasize[d] that nothing in our opinion precludes any State from placing further restrictions on its exercise of the takings power."⁴³ Some scholars have defended *Kelo* on the "federalist" ground that states should be free to tailor their public use standards to diverse local conditions.⁴⁴ Nonetheless, state court decisions refusing to apply the *Kelo* standard represent at least a partial repudiation of the federal Supreme Court's approach, in so far as they reject the latter's view that courts should broadly defer to the government's determination of what counts as a public use.

Moreover, at least two of these three state court decisions repudiating *Kelo* did not rely on variations in local conditions or other factors peculiar to their states as justifications for rejecting its approach. The state supreme court justices in these cases seem to be rejecting *Kelo* on general rather than state-specific principles. As discussed above, the Ohio court rejected the *Kelo* approach on the general ground that it gives too much deference to the government; South Dakota's rejected it as a textually implausible reading of the term "public use."⁴⁵ The Oklahoma decision does not repudiate *Kelo* as clearly as the others, because it relied in large part on differences between the wording of the Oklahoma and federal public use clauses: "While the Takings Clause of the U.S. Constitution provides 'nor shall private property be taken for public use without just compensation,' the Oklahoma Constitution places further restrictions by expressly stating '[n]o private property shall be taken or damaged for private use, with or without compensation.'"⁴⁶

⁴³ *Kelo v. City of New London*, 545 U.S. 469, 489 (2005).

⁴⁴ See, e.g., Robert Ellickson, *Federalism and Kelo: A Question for Richard Epstein*, 44 TULSA L. REV. 751, 762 (2009); see also Rick Hills, *How Federalism Inevitably Trumps Takings Doctrine—And a Good Thing, Too*, PRAWFSBLAWG (Dec. 20, 2010, 3:40 PM), <http://prawfsblawg.blogs.com/prawfsblawg/2010/06/how-federalism-inevitably-trumps-takings-doctrine-1.html>. For criticism of such arguments, see Somin, *Grasping Hand*, *supra* note 18, at 221–23; Ilya Somin, *Federalism and Judicial Enforcement of Constitutional Property Rights*, VOLOKH CONSPIRACY (Dec. 20, 2010, 3:08 PM), <http://volokh.com/2010/06/20/federalism-and-judicial-enforcement-of-constitutional-property-rights/>; Ilya Somin, *Federalism and Property Rights*, U. CHI. LEGAL FORUM (forthcoming 2011) (symposium on Governance and Power).

⁴⁵ See *City of Norwood v. Horney*, 853 N.E.2d 1115, 1136–47 (Ohio 2006); *Benson*, 710 N.W.2d at 146.

⁴⁶ *Bd. of Cnty. Comm'rs of Muskogee Cnty. v. Lowery*, 136 P.3d 639, 652 (Okla. 2006) (quoting OKLA. CONST. art. 2, § 23).

*B. State Supreme Court Cases Invalidating “Quick Take”
Condemnations*

Two state supreme courts—Maryland and Rhode Island—have severely constrained “quick take” condemnations in the aftermath of *Kelo*.⁴⁷ These cases do not directly address the issue raised in *Kelo* itself. But all three decisions discuss *Kelo* and place important constraints on the scope of their state public uses clauses.⁴⁸

Quick take condemnation laws allow local governments to take property under streamlined procedures that give landowners little time and opportunity to contest the taking of their land. Under the Rhode Island statute, “the condemning authority obtains title and may take possession of property merely by filing a declaration of condemnation and satisfying the court that its estimate of compensation is just.”⁴⁹ The Maryland procedure is similar.⁵⁰

In *Rhode Island Economic Development Corp. v. The Parking Company*, the Rhode Island Supreme Court ruled that a quick take condemnation was unconstitutional in a case where the condemning authority sought to use the procedure to “gain control of [a garage] at a discounted price” rather than achieve the stated public purpose of increasing parking for the public.⁵¹ The court ruled that the claimed public purpose could not be achieved by the taking because it would not actually create any additional parking spaces; nor would it achieve the additional goal of promoting the local economy.⁵²

The Rhode Island court asserted that its decision was consistent with *Kelo* because the *Kelo* taking involved a “comprehensive and thorough economic development plan,” while its own case did not.⁵³ However, the Rhode Island taking arose as part of an effort to develop and expand parking near a public

⁴⁷ See *Mayor of Baltimore v. Valsamaki*, 916 A.2d 324, 356 (Md. 2007); *Sapero v. Mayor of Baltimore*, 920 A.2d 1061, 1080 (Md. 2007); *R.I. Econ. Dev. Corp. v. The Parking Co.*, 892 A.2d 87, 107–08 (R.I. 2006).

⁴⁸ *Valsamaki*, 916 A.2d at 336, 356; *Sapero*, 920 A.2d at 1080; *Parking Co.*, 892 A.2d at 104.

⁴⁹ *Parking Co.*, 892 A.2d at 99.

⁵⁰ See *Valsamaki*, 916 A.2d at 327 n.1 (quoting BLACK’S LAW DICTIONARY 310 (8th ed. 2004)).

⁵¹ *Parking Co.*, 892 A.2d at 107.

⁵² *Id.* at 105–06.

⁵³ *Id.* at 106.

airport.⁵⁴ It was therefore also adopted as part of a planning process. Moreover, the *Kelo* Court emphasized that judges should not “second-guess” condemning authorities’ “considered judgments about the efficacy of [a] development plan” or about whether or not condemnation was needed to achieve the plan’s goals.⁵⁵ The Rhode Island court’s willingness to question the efficacy of the quick take condemnation is at the very least in tension with the *Kelo* approach. Finally, *Parking Company* emphasized that “[i]f a legislature should say that a certain taking was for a public use, that would not make it so; for such a rule would enable a legislature to conclude the question of constitutionality by its own declaration.”⁵⁶ In the court’s view, “a legislative declaration of public use is instructive, and entitled to deference, but not conclusive.”⁵⁷ This contrasts with the U.S. Supreme Court’s statement in *Berman v. Parker* indicating that the legislature has “well-nigh conclusive” discretion in defining what counts as a public use.⁵⁸ Overall, it is difficult to avoid concluding that the Rhode Island decision’s approach to public use is significantly less deferential than that of the federal Supreme Court in *Kelo* and *Berman*.

Although it addressed a “quick take” condemnation, *Parking Company* ultimately relied on reasoning that applies more broadly to any takings where the claimed public use is unlikely to be achieved and may be a pretext for other motives.⁵⁹ These sorts of problems, however, are likely to be especially common with quick take condemnations, whereby definition there is less time for careful planning and assessment of the likely effects of resorting to eminent domain.

The Maryland decision, *Mayor of Baltimore v. Valsamaki*, also constrains quick take condemnations in a way that seems less deferential than *Kelo*. It invalidated the quick take condemnation in question because “the City failed to provide sufficient reasons for its *immediate* possession of and title to the

⁵⁴ *Id.* at 92–94.

⁵⁵ *Kelo v. City of New London*, 545 U.S. 469, 488–89 (2005).

⁵⁶ *Parking Co.*, 892 A.2d at 101 (quoting *In re R.I. Suburban Ry. Co.* 48 A. 590, 591 (R.I. 1901)).

⁵⁷ *Id.*

⁵⁸ *Berman v. Parker*, 348 U.S. 26, 32 (1954).

⁵⁹ See *infra* Part III for a discussion of pretextual takings.

subject Property.”⁶⁰ Proof of the need for “immediate” possession of the land in question was, the court concluded, required under Maryland’s state constitution and statutory law.⁶¹ The Maryland Court of Appeals reiterated this requirement in a very similar case decided one year later.⁶² As in the Rhode Island case, the Maryland Court of Appeals claimed that its ruling was consistent with *Kelo* because the taking in question was not the result of “comprehensive” planning.⁶³

However, the *Valsamaki* condemnation, like that in *Kelo*, was in fact part of a redevelopment plan, even if the connection between the taking and the plan was somewhat vague given that the City of Baltimore claimed only that the taking would advance the goals of the plan by facilitating “business expansion.”⁶⁴ And, as discussed above, *Kelo* forbade courts from second-guessing the efficacy of the proposed plan or the need for the condemnation of individual properties to achieve its goals. Thus, the Maryland Supreme Court’s willingness to closely scrutinize the necessity for the quick take condemnation under the plan represents a degree of “second guessing” that *Kelo* might not permit.

C. Blight Takings

In many ways, “blight” condemnations are far more important than the pure “economic development” condemnations upheld by the Supreme Court in *Kelo*. Since World War II, hundreds of thousands of Americans, mostly poor and minorities, have been forcibly displaced by blight or urban renewal takings.⁶⁵ This impact likely far outstrips any inflicted by economic development takings.

For property rights advocates in the wake of *Kelo*, blight takings pose two interrelated challenges. First, many states define blight so broadly that virtually any property that government officials might want to take for “economic

⁶⁰ Mayor of Baltimore v. Valsamaki, 916 A.2d 324, 356 (Md. 2007) (emphasis in original).

⁶¹ *Id.*

⁶² Sapero v. Mayor of Baltimore City, 920 A.2d 1061, 1072 (Md. 2007).

⁶³ *Valsamaki*, 916 A.2d at 352.

⁶⁴ *Id.* at 328–30.

⁶⁵ See Somin, *Grasping Hand*, *supra* note 18, at 268; Wendell E. Pritchett, *The “Public Menace” of Blight: Urban Renewal and the Private Uses of Eminent Domain*, 21 YALE L. & POL’Y REV. 1, 33–34 (2003).

development” can also be designated as “blighted.”⁶⁶ Many of the post-*Kelo* reform laws enacted by state governments are likely to be ineffective because, even though they forbid “economic development” condemnations, they leave in place extraordinarily broad definitions of blight.⁶⁷ For example, state courts have ruled that such unlikely areas as Times Square in New York City and downtown Las Vegas are blighted, thereby justifying condemnations that transferred property to the *New York Times* and politically influential casino owners.⁶⁸ Second, even condemnations undertaken in genuinely “blighted” areas often cause great harm to poor and minority residents and small businesses who end up being forcibly displaced, often receiving compensation that falls far short of fully offsetting their losses.⁶⁹

1. Decisions Constraining the Scope of Blight Condemnations

Since *Kelo*, very little has been done by state courts to constrain takings in areas that are clearly “blighted” in the lay sense of the term. But several post-*Kelo* state blight decisions addressed the issue of overbroad definitions of what counts as blight. In the *Norwood* case, already discussed above, the Supreme Court of Ohio made clear that its ban on economic development takings also applies to overbroad blight condemnations.⁷⁰ *Norwood* invalidated an effort to condemn property that had been declared blighted because it was located in a “deteriorating area,” a standard that the Ohio court rejected because it would enable virtually any area to be declared blighted: “[t]o permit a taking of private property based solely on a finding that the property is deteriorating or in danger of deteriorating would grant an impermissible, unfettered power to

⁶⁶ See Colin Gordon, *Blighting the Way: Urban Renewal, Economic Development, and the Elusive Definition of Blight*, 31 FORDHAM URB. L.J. 305, 320–21 (2004); Ilya Somin, *Blight Sweet Blight*, LEGAL TIMES, Aug. 14, 2006, at 42.

⁶⁷ See Somin, *supra* note 3, at 2120.

⁶⁸ City of Las Vegas Downtown Redev. Agency v. Pappas, 76 P.3d 1, 13–14 (Nev. 2003); W. 41st St. Realty v. N.Y. State Urban Dev. Corp., 744 N.Y.S.2d 121, 124–25 (App. Div. 2002).

⁶⁹ Somin, *Grasping Hand*, *supra* note 18, at 267–70; Pritchett, *supra* note 65, at 44–47.

⁷⁰ City of Norwood v. Horney, 853 N.E. 2d 1115, 1146–47 (Ohio 2006).

the government to appropriate.”⁷¹

In *Gallenthin Realty Development, Inc. v. Borough of Paulsboro*, the New Jersey Supreme Court invalidated a taking where open land had been defined as “blighted” because it was not “fully productive.”⁷² The court ruled that, under New Jersey’s state constitution, a blight taking required evidence of “deterioration or stagnation that has a decadent effect on surrounding property.”⁷³ *Gallenthin* is significant because it curtails one of the less appreciated dangers of allowing economic development takings: the possibility that developers and other interest groups might use them to take over property devoted to natural amenities, such as parks or privately managed wildlife refuges.⁷⁴

A Pennsylvania appellate court likewise interpreted its state’s blight law, which at the time allowed condemnation of “economically undesirable” land uses as “blighted,” to permit only condemnation of property that had been put to “an actual, objectively negative use . . . rather than merely a use relatively less profitable than another.”⁷⁵ It repudiated the idea that Pennsylvania law allows the use of “blight” designations to authorize takings that are “purely [for] ‘economic development.’”⁷⁶ Unlike *Norwood* and *Gallenthin*, the Pennsylvania decision was purely statutory in nature and did not hold that overbroad blight takings violate the state constitution. At the same time, it does use the takings upheld in *Kelo* as an example of the kind that are not permitted under Pennsylvania state law.⁷⁷

⁷¹ *Id.* at 1146.

⁷² *Gallenthin Realty Dev., Inc. v. Borough of Paulsboro*, 924 A.2d 447, 460 (N.J. 2007).

⁷³ *Id.*

⁷⁴ For a discussion of this problem, see Ilya Somin & Jonathan Adler, *The Green Costs of Kelo: Economic Development Takings and Environmental Protection*, 84 WASH. U. L. REV. 623, 641–52 (2006).

⁷⁵ *In re Condemnation by Redevelopment Auth.*, 962 A.2d 1257, 1263 (Pa. Commw. Ct. 2008). These cases were apparently litigated under Pennsylvania’s broader pre-*Kelo* definition of blight, which has since been displaced by a narrower one enacted in its post-*Kelo* reform law. See Somin, *supra* note 3 at 2141–42 (describing the new law).

⁷⁶ *In re Redevelopment Auth.*, 962 A.2d at 1263.

⁷⁷ *Id.*

2. New York Decisions Upholding a Virtually Unlimited Definition of Blight⁷⁸

The two most high-profile blight cases in recent years are *Kaur v. New York State Urban Development Corp.* and *Goldstein v. New York State Urban Development Corp.*,⁷⁹ both decided by the New York Court of Appeals, that state's highest court. Both decisions upheld the constitutional validity of extremely broad definitions of blight, and also endorsed *Kelo's* highly deferential approach to public use issues. More problematically, both also upheld blight condemnations despite considerable evidence of political corruption in the blight designation process.⁸⁰

In *Goldstein*, the court upheld a major condemnation as part of the Atlantic Yards development project. The Empire State Development Corporation (ESDC), a state government agency, took a large area for the purpose of transferring it to a firm owned by politically influential developer Bruce Ratner, who sought to use it primarily to build high-income housing and a new stadium for the New Jersey Nets professional basketball team, which he at the time owned.⁸¹ The court concluded that the property in question could be condemned as "blighted" and blight alleviation is a "public use" recognized by the New York

⁷⁸ For a more detailed discussion of *Kaur* and *Goldstein*, see Ilya Somin, *Let there be Blight: Blight Condemnations in New York After Goldstein and Kaur*, 38 FORDHAM URBAN L.J. (forthcoming 2011) (symposium on eminent domain in New York). Some of the material in this section is adopted from that article, as is a portion of the discussion of these cases in Part III.E below. For other academic commentary on the two cases, see Amy Lavine & Norman Oder, *Urban Redevelopment Policy, Judicial Deference to Unaccountable Agencies, and Reality in Brooklyn's Atlantic Yards Project*, 42 URB. LAW. 287 (2010) (discussing *Goldstein*); Keith Hirokawa & Patricia Salkin, *Can Urban University Expansion and Sustainable Development Co-Exist? A Case Study in Progress on Columbia University*, 37 FORDHAM URB. L.J. 637, 684–89 (2010) (discussing the *Kaur* condemnations).

⁷⁹ *Kaur v. N.Y. State Urban Dev. Corp.*, 933 N.E.2d 721 (N.Y. 2010), *cert. denied*, 2010 WL 3712673, at *1 (U.S. Dec. 13, 2010) (No. 10-402); *Goldstein v. N.Y. State Urban Dev. Corp.*, 921 N.E.2d 164 (N.Y. 2009).

⁸⁰ See *Kaur*, 933 N.E.2d at 724, 731–32; *Goldstein*, 921 N.E.2d at 170–71.

⁸¹ *Goldstein*, 921 N.E.2d at 166 (noting that only about one-third of the over 5,300 housing units to be constructed would be affordable for middle or low-income residents); see also *In re Develop Don't Destroy (Brooklyn)*, 874 N.Y.S.2d 414, 424 (App. Div. 2009) (holding the construction of the basketball stadium was a permissible "public purpose").

Constitution, thanks to a constitutional amendment allowing the condemnation of slum areas.⁸² The property, however, was very far from being a slum of any kind, and much of it is actually middle class housing located in a reasonably well-off neighborhood.⁸³

The property owners conceded that some property in the area was blighted, but not any of that which was to be condemned.⁸⁴ Indeed, the opinion itself notes that the Atlantic Yards area “do[es] not begin to approach in severity the dire circumstances of urban slum dwelling” that led to the enactment of the blight amendment in 1938.⁸⁵ To get around this problem, the Court held that “blight” alleviation is “not limited to ‘slums’ as that term was formerly applied, and that, among other things, economic underdevelopment and stagnation are also threats to the public sufficient to make their removal cognizable as a public purpose.”⁸⁶

Obviously, virtually any area occasionally suffers from “economic underdevelopment” or “stagnation” and therefore could potentially be condemned under this rationale. Moreover, even under this expansive definition of blight, the decision states that courts can only strike down a condemnation if “there is no room for reasonable difference of opinion as to whether an area is blighted.”⁸⁷ With respect to any neighborhood, there is nearly always “room for reasonable difference of opinion” as to whether the area is “underdeveloped” relative to some possible alternative uses of the land in question.

Defining blight this broadly and then deferring to the government’s determination of whether such “blight” actually exists comes close to reading the public use restriction out of the state constitution. It is unlikely that the New York State constitutional amendment allowing condemnation of “substandard and insanitary areas” was originally understood to

⁸² See N.Y. CONST. art. XVIII, § 1; *Goldstein*, 921 N.E.2d at 170–71.

⁸³ For accounts of the area and its characteristics, see NEIL DEMAUSE & JOANNA CAGAN, *FIELD OF SCHEMES: HOW THE GREAT STADIUM SWINDLE TURNS PUBLIC MONEY INTO PRIVATE PROFIT* 279–80 (2008) (noting that the area in question was “prime Brooklyn real estate” at the nexus of several “booming neighborhoods”); see also Damon Root, *When Public Power is Used for Private Gain*, REASON, Oct. 8, 2009, available at <http://reason.com/archives/2009/10/08/when-public-power-is-used-for>.

⁸⁴ *Goldstein*, 921 N.E.2d at 189–90 (Smith, J., dissenting).

⁸⁵ *Id.* at 171.

⁸⁶ *Id.* at 172 (quoting *Yonkers v. Cmty. Dev. Agency v. Morris*, 335 N.E.2d 327, 331 (N.Y. 1975)).

⁸⁷ *Id.*

mean that virtually any area could be declared blighted and condemned.⁸⁸

Goldstein went beyond merely adopting an extremely broad definition of blight. It also chose to overlook extensive evidence indicating that the blight study commissioned by the Empire State Development Corporation was heavily biased and deliberately rigged to reach a predetermined conclusion.⁸⁹ As Judge Robert Smith pointed out in his dissenting opinion, the original rationale for the condemnation was “economic development—job creation and the bringing of a professional basketball team to Brooklyn.”⁹⁰ Apparently, “nothing was said about ‘blight’ by the sponsors of the project until 2005” when the ESDC realized that a blight determination might be needed for legal reasons.⁹¹ Moreover, the decision to condemn the property had already been made and the firm conducting the blight study knew what outcome the condemning authorities sought. The firm was also hired and paid by Ratner himself.⁹² Perhaps for that reason, the firm’s report strained to find evidence of blight, counting minor flaws such as “weeds,” “graffiti,” and “underutilization.”⁹³

The majority also failed to consider the relevance of evidence showing that Ratner himself had created much of the “blight” used to justify the condemnation.⁹⁴ By the time the study was conducted in 2005, “Ratner had already acquired many of the properties he wanted (thanks to eminent domain) and left them empty, thus *creating* much of the unsightly neglect he now cites in support of his project.”⁹⁵ Other parts of the area may have fallen into disrepair in part because “Ratner’s plan to acquire the

⁸⁸ N.Y. CONST. art. XVIII, § 1 (this is the provision of the constitution that authorizes blight condemnations). For a discussion of the original meaning of Article XVIII, see Somin, *Let the Be Blight*, *supra* note 78.

⁸⁹ See Ilya Somin, *New York High Court Upholds Columbia University Takings*, THE VOLOKH CONSPIRACY (June 24 2010, 5:44 PM), <http://volokh.com/2010/06/24new-york-high-court-upholds-columbia-university-takings/>.

⁹⁰ *Goldstein*, 921 N.E.2d at 189 (Smith, J., dissenting).

⁹¹ *Id.*

⁹² *Id.* at 166 (majority decision).

⁹³ Root, *supra* note 83 (quoting the firm’s report): Lavine & Oder, *supra* note 78, at 298–299.

⁹⁴ *Id.*; see *Goldstein*, 921 N.E.2d at 189 (Smith, J., dissenting).

⁹⁵ Root, *supra* note 83.

properties and demolish the buildings had been public knowledge for years when the blight study was conducted,” and owners therefore had no reason to invest in their upkeep.⁹⁶

Ratner and the ESDC disputed some of these claims.⁹⁷ The key point, however, is that the majority refused to even consider their possible relevance, and concluded that the takings were permissible even if the allegations against the developer and the condemning authority were correct, so long as there was room for “reasonable difference of opinion” over the presence or absence of blight.⁹⁸ As the majority explained:

It may be that the bar has now been set too low—that what will now pass as ‘blight,’ as that expression has come to be understood and used by political appointees to public corporations relying upon studies paid for by developers, should not be permitted to constitute a predicate for the invasion of property rights and the razing of homes and businesses. But any such limitation upon the sovereign power of eminent domain as it has come to be defined in the urban renewal context is a matter for the Legislature, not the courts.⁹⁹

Kaur featured a combination of the same three elements as *Goldstein*: a broad definition of blight, a possibly rigged blight study, and the likelihood that much of the “blight” used to justify the condemnations in question was actually caused by the beneficiaries of the proposed taking. The *Kaur* takings arose from an effort by Columbia University to acquire property for expansion in the Manhattanville neighborhood in Harlem in New York City.¹⁰⁰

Unusually, the *Kaur* taking had been invalidated in a close 3–2 decision by one of New York’s intermediate appellate court, the Appellate Division, First Department.¹⁰¹ In *Kaur*, as in *Goldstein*, there was little evidence of actual blight. Indeed, the Appellate Division concluded that there was “no evidence whatsoever that Manhattanville was blighted prior to Columbia gaining control over the vast majority of property therein.”¹⁰² The Empire State

⁹⁶ *Goldstein*, 921 N.E.2d at 190 (Smith, J., dissenting).

⁹⁷ See Brief for Respondent at 25–34, *Goldstein v. N.Y. State Urban Dev. Corp.*, 921 N.E.2d 164 (N.Y. 2009), (No. 2009-0178), 2009 WL 3810844.

⁹⁸ *Goldstein*, 921 N.E.2d at 172.

⁹⁹ *Id.*

¹⁰⁰ *Kaur v. N.Y. State Urban Dev. Corp.*, 933 N.E.2d 721, 724 (N.Y. 2010), *cert. denied*, 2010 WL 3712673, at *1 (U.S. Dec. 13, 2010) (No. 10-402).

¹⁰¹ *Kaur v. N.Y. State Urban Dev. Corp.*, 892 N.Y.S.2d 8, 28 (App. Div. 2009), *rev’d*, 933 N.E.2d at 721, *cert. denied*, 2010 WL 3712673 at *1.

¹⁰² *Id.* at 20.

Development Corporation only ordered a blight study after Columbia had already acquired most of the property in the area and therefore “gained control over the very properties that would form the basis for a subsequent blight study.”¹⁰³ When Columbia presented the agency with a plan to use eminent domain to acquire the remaining property and use it for Columbia’s “sole benefit,” a blight study was commissioned from Allee King Rosen & Fleming, Inc. (AKRF), a firm employed by Columbia on an earlier phase of the same project.¹⁰⁴ AKRF was also the firm employed by Ratner in the Atlantic Yards case.¹⁰⁵

AKRF was instructed by the ESDC to use a methodology “biased in Columbia’s favor,” that allowed blight to be proven by the presence of minor defects such as “unpainted block walls or loose awning supports.”¹⁰⁶ As the Appellate Division concluded, “[v]irtually every neighborhood in the five boroughs will yield similar instances of disrepair that can be captured in close-up technicolor.”¹⁰⁷ Moreover, most of the alleged blight that was found by AKRF was located on property owned by Columbia itself, and possibly allowed to develop in order to justify a blight finding.¹⁰⁸

The Appellate Division thereby concluded that the area could not be considered blighted, and also ruled that the blight findings were an unconstitutional “pretextual” taking, since the allegedly

¹⁰³ *Id.*

¹⁰⁴ *Id.* at 19–21.

¹⁰⁵ *Kaur*, 933 N.E.2d at 726 n.6 (the firm AKRF was not named in the *Goldstein* opinion); see *Goldstein v. N.Y. State Urban Dev. Corp.*, 921 N.E. 164, 166–67 (N.Y. 2009).

¹⁰⁶ *Kaur*, 892 N.Y.S.2d at 22. Later, another firm was hired to conduct an independent blight study, but it was required to use “the same flawed methodology.” *Id.*; see Damon Root, *Holding Justice Kennedy to His Word: Why the Supreme Court Must Put a Stop to Columbia University’s Eminent Domain Abuse*, REASON, Sept. 29, 2010, available at <http://reason.com/archives/2010/09/29/holding-justice-kennedy-to-his> (providing more details on the biases and flaws in the blight study); see also Damon Root, *College Cheats*, N.Y. POST, Feb. 16, 2009 [hereinafter Root, *College Cheats*], available at http://www.nypost.com/p/news/opinion/opedcolumnists/item_oZsTv770SurIHI5f5BJlQO;jsessionid=DD25B89035A1B3D03970A76560585183.

¹⁰⁷ *Kaur*, 892 N.Y.S.2d at 22.

¹⁰⁸ See Root, *College Cheats*, *supra* note 106 (noting “that Columbia already owned 76 percent” of the land in the area at the time of the study and that “the university refused to perform basic and necessary repairs—thereby both pushing tenants out of Columbia-owned buildings and manufacturing the ugly conditions that later advanced the school’s real-estate interests”).

rigged blight study showed that the blight rationale was a mere pretext for a scheme to benefit Columbia.¹⁰⁹

The New York Court of Appeals unanimously reversed the Appellate Division's decision, relying primarily on the extremely broad definition of blight upheld in *Goldstein* just a few months earlier.¹¹⁰ It refused to consider most of the evidence that the AKRF study deliberately used biased methodology, noting only that AKRF's objectivity was not compromised merely "because Columbia had previously engaged AKRF" to produce its development plan for the area.¹¹¹ The court also noted that AKRF's findings were confirmed by a study conducted by a different firm, Earth Tech,¹¹² but did not consider the relevance of the fact that that firm was also required to use the same biased methodology as AKRF. The court also emphasized that a third firm, Urbitran, had conducted a study finding "blight" in the area prior to AKRF's, thereby calling into question the Appellate Division's finding that there was no evidence of blight prior to the acquisition of most of the area by Columbia.¹¹³ However, the court did not dispute the Appellate Division's finding that the ESDC had not in fact relied on the Urbitran study in making its decision to condemn the property, and had in fact commissioned the AKRF study because ESDC staff doubted the adequacy of the Urbitran findings.¹¹⁴

Overall, both *Goldstein* and *Kaur* upheld takings under an extremely broad definition of blight. More unusually, both decisions refused to give more than perfunctory consideration to the strong evidence that the new private owners of the condemned property had rigged "blight" studies in their favor and were themselves responsible for a substantial proportion of the alleged blight those studies found.

Taken together, *Goldstein* and *Kelo* make it virtually impossible to challenge blight condemnations in New York. As Justice Catterson of the Appellate Division recently explained:

¹⁰⁹ *Kaur*, 892 N.Y.S.2d at 30, 32 (Richter, J., concurring).

¹¹⁰ *Kaur*, 933 N.E.2d at 733. Judge Smith, the sole dissenter in *Goldstein*, concurred in *Kaur* only because of the force of the earlier precedent. *Id.* at 737 (Smith, J., concurring).

¹¹¹ *Id.* at 732.

¹¹² *Id.*

¹¹³ *Id.* at 733.

¹¹⁴ *Kaur*, 892 N.Y.S.2d at 12–13, 21. The Court of Appeals incorrectly stated that the First Department had ignored the Urbitran study. *Kaur*, 933 N.E.2d at 733.

“Unfortunately for the rights of citizens . . . the recent rulings of the Court of Appeals . . . have made plain that there is no longer any judicial oversight of eminent domain proceedings.”¹¹⁵ This may be a slight exaggeration, but not by much. The two cases are striking exceptions to the general post-*Kelo* pattern of stronger judicial scrutiny of public use issues.

D. Was the Judicial Reaction Caused by the Political Backlash Against Kelo?

The generally negative nature of the state judicial reaction to *Kelo* leads one to ask whether state courts acted as they did because of the strong political backlash against *Kelo*. Historically, court decisions have often been influenced by public opinion and the political climate.¹¹⁶

It may well be, however, that the post-*Kelo* state court decisions were largely continuations of a preexisting trend towards stronger judicial scrutiny of public use issues. In the ten years prior to *Kelo*, four state supreme courts—Illinois, Michigan, Montana, and South Carolina—held that their state constitutions forbade economic development takings that transfer property to private parties.¹¹⁷ The best-known of these decisions was the Michigan Supreme Court’s 2004 ruling in *County of Wayne v. Hathcock*,¹¹⁸ which overruled that court’s notorious 1981 decision in *Poletown Neighborhood Council v. City of Detroit*. *Poletown* had upheld an economic development taking that forcibly

¹¹⁵ *Uptown Holdings, LLC v. City of N. Y.*, 908 N.Y.S.2d 657, 660–61 (App. Div. 2010).

¹¹⁶ See generally BARRY FRIEDMAN, *THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION* (2009) (discussing the extensive influence of public opinion on the U.S. Supreme Court).

¹¹⁷ See *Sw. Ill. Dev. Auth. v. Nat’l City Env’tl., L.L.C.*, 768 N.E.2d 1, 9, 11 (Ill. 2002) (holding that a “contribu[tion] to positive economic growth in the region” is not a public use justifying condemnation); *Cnty. of Wayne v. Hathcock*, 684 N.W.2d 765, 770, 778 (Mich. 2004) (invalidating economic development takings under the Michigan Constitution); *City of Bozeman v. Vaniman*, 898 P.2d 1208, 1214 (Mont. 1995) (holding that a condemnation that transfers property to a private business is unconstitutional unless the transfer to the business is insignificant and incidental to a public project); *Ga. Dep’t of Transp. v. Jasper Cnty.*, 586 S.E.2d 853, 856 (S.C. 2003) (holding that even a substantial “projected economic benefit . . . cannot justify a condemnation.”).

¹¹⁸ *Hathcock*, 684 N.W.2d at 778.

displaced some 4,000 Detroit residents in order to transfer their land to General Motors to build a new auto factory.¹¹⁹ With the exception of the Connecticut Supreme Court's closely divided ruling in *Kelo* itself, only one state supreme court—North Dakota—had upheld the economic development rationale during that time.¹²⁰

This pre-*Kelo* state judicial trend was part of a broader intellectual and political trend towards greater skepticism of eminent domain and appreciation of the value of property rights beginning in the 1980s and 1990s.¹²¹

It is difficult to say whether the *Kelo* backlash accelerated the preexisting judicial trend, or merely continued it. Because we only have a small sample size of cases (four state supreme court decisions striking down economic development takings in the decade prior to *Kelo* and three since then), it is impossible to tell the difference between a flat trend line and a slight acceleration. What can reasonably be said is that state judicial decisions have not seen the same sudden upsurge of restrictions on takings that occurred in the political arena. There, forty-three states passed new laws in less than five years, after a decade in which most saw few or no comparable reforms.¹²² By contrast, recent judicial developments seem to be a continuation or, at most, a modest acceleration of a preexisting trend.

There are two key factors in the difference between the legislative and judicial reactions. Unlike state legislatures and public opinion, state courts had been on a path towards gradually stronger enforcement of public use restrictions on takings for years prior to *Kelo*. They therefore did not need to make a radical

¹¹⁹ *Poletown Neighborhood Council v. City of Detroit*, 304 N.W.2d 455, 457, 459 (Mich. 1981), *overruled by* 684 N.W.2d 765 (Mich. 2004). For a detailed analysis of *Poletown* and *Hathcock*, see Ilya Somin, *Overcoming Poletown: County of Wayne v. Hathcock, Economic Development Takings, and the Future of Public Use*, 2004 MICH. ST. L. REV. 1005 *passim* (2004).

¹²⁰ See *City of Jamestown v. Leever's Supermarkets, Inc.*, 552 N.W. 2d 365, 374 (N.D. 1996) (concluding that economic development takings will be upheld so long as the "primary object" of the taking is "economic welfare").

¹²¹ See, e.g., Nancie G. Marzulla, *The Property Rights Movement: How it Began and Where it is Headed*, in LAND RIGHTS: THE 1990S' PROPERTY RIGHTS REBELLION 1, 13–19 (Bruce Yandle ed., 1995); JAMES W. ELY, JR., THE GUARDIAN OF EVERY OTHER RIGHT: A CONSTITUTIONAL HISTORY OF PROPERTY RIGHTS 155–70 (3d ed. 2008) (describing increased support for property rights during this period).

¹²² Only one state, Utah, enacted legislation banning economic development takings in the decade prior to *Kelo*. Somin, *supra* note 3, at 2120 n.81.

change of course in order to to move in a more restrictive direction. On the other hand, the greater insulation of state courts from public opinion also reduced their incentive to make major symbolic gestures towards appeasing public opinion. Even in states where judges are chosen by electoral processes, judicial elections are less competitive and less visible to voters than those for the state legislature and the governorship.¹²³

While the judicial reaction to *Kelo* was less dramatic and sweeping than the political reaction, it may turn out to have greater long-term staying power. A July 2009 survey conducted by scholars at Columbia and Harvard University found that some eighty-one percent of Americans still oppose the use of eminent domain to transfer property to private parties for economic development.¹²⁴ This result is similar to that found by polls conducted in the immediate aftermath of *Kelo* four years earlier.¹²⁵ But the 2009 study found that only forty-two percent recalled that the Supreme Court had upheld the constitutionality of such takings, while fourteen percent believed that it had struck them down, and the rest said they did not know.¹²⁶

This suggests that public attention to eminent domain issues is beginning to tail off. As a general rule voters are “rationally ignorant,” and have little incentive to pay close attention to policy issues. Even in the years immediately following *Kelo*, voter ignorance helped facilitate the passage of many reform laws that did little or nothing to actually constrain economic development takings.¹²⁷ Since then, the public has moved on to other issues, such as the Obama healthcare legislation, the failing economy, and the financial crisis that helped cause it. Thus, the political backlash against *Kelo* has been gradually fading. By contrast, the trend towards greater judicial skepticism of eminent domain may well continue.

¹²³ See Matthew J. Streb, *The Study of Judicial Elections*, in *RUNNING FOR JUDGE: THE RISING POLITICAL, FINANCIAL, AND LEGAL STAKES OF JUDICIAL ELECTIONS* 5–6 (Matthew J. Streb ed., 2007).

¹²⁴ KNOWLEDGE NETWORKS, FIELD REPORT: CONSTITUTIONAL ATTITUDES SURVEY 61 (July 2010) [hereinafter CONSTITUTIONAL ATTITUDES SURVEY] (on file with the author).

¹²⁵ See Somin, *supra* note 3, at 2108–14.

¹²⁶ CONSTITUTIONAL ATTITUDES SURVEY, *supra* note 124, at 66.

¹²⁷ Somin, *supra* note 3, at 2120–30.

III. THE PROBLEM OF PRETEXT

The one area where *Kelo* leaves room for significant judicial scrutiny of public use issues is that of “pretextual takings” where the official rationale for the taking is a pretext “for the purpose of conferring a private benefit on a particular private party.”¹²⁸ Unfortunately, *Kelo* says very little about the question of how to determine whether or not a taking that transfer property to a private party is in fact pretextual.¹²⁹ As one federal district court decision notes, “[a]lthough *Kelo* held that merely pretextual purposes do not satisfy the public use requirement, the *Kelo* majority did not define the term ‘mere pretext’”¹³⁰ To add to the confusion, the *Kelo* majority noted that one possible indication of a pretextual taking is the presence of a “one-to-one transfer of property, executed outside the confines of an integrated development plan.”¹³¹ But *99 Cents Only Stores v. Lancaster Redevelopment Agency*, the federal district court case cited by Stevens as an example of a pure “one-to-one transfer,”¹³² actually struck down a taking that the government justified as necessary to implement a previously established redevelopment plan.¹³³ Justice Kennedy’s concurring opinion also suggested that a taking may be invalidated if it showed “impermissible favoritism” to a private party.¹³⁴ But like the majority opinion, which Kennedy joined, he was extremely unclear as to how to determine what counts as a taking “intended to favor a particular private party.”¹³⁵

In what is by far the most thorough analysis of *Kelo*’s pretext standard, Professor Daniel Kelly identifies four criteria that

¹²⁸ *Kelo v. City of New London*, 545 U.S. 469, 477–78 (noting that government is not “allowed to take property under the mere pretext of a public purpose, when its actual purpose was to bestow a private benefit.”).

¹²⁹ See Kelly, *supra* note 8, at 174 (noting that the Court “failed to provide much guidance” on this issue).

¹³⁰ *Goldstein v. Pataki*, 488 F. Supp. 2d 254, 288 (E.D.N.Y. 2007), *aff’d*, 516 F.3d 50 (2d Cir. 2008).

¹³¹ *Kelo*, 545 U.S. at 487.

¹³² *Id.* at 488 n.17.

¹³³ Somin, *Grasping Hand*, *supra* note 18, at 228–29; see *99 Cents Only Store v. Lancaster Redevelopment Agency*, 237 F. Supp. 2d 1123, 1125 (C.D. Cal. 2001) (noting that the case involves condemnation powers established pursuant to the “Amargosa Redevelopment Plan”).

¹³⁴ *Kelo*, 545 U.S. at 491 (Kennedy, J., concurring).

¹³⁵ *Id.* For analyses of Kennedy’s opinion emphasizing its lack of clarity, see Somin, *Grasping Hand*, *supra* note 18, at 229–31; Kelly, *supra* note 8, at 174–75, 185.

courts use to determine whether a private-to-private taking is pretextual:

1. The magnitude of the public benefit created by the condemnation. If the benefits are large, it seems less likely that they are merely pretextual.
2. The extensiveness of the planning process that led to the taking.
3. Whether or not the identity of the private beneficiary of the taking was known in advance. If the new owner's identity was unknown to officials at the time they decided to use eminent domain, it is hard to conclude that government undertook the condemnation in order to advance his or her interests.
4. The subjective intent of the condemning authorities. Under this approach, courts would investigate the motives of government decision-makers to determine what the true purpose of a taking was.¹³⁶

Since *Kelo*, several state and federal courts have struggled with the problem of how to decide whether a taking is pretextual. All four factors identified by Kelly have played a role.

A. Condemnor Intent

In *Middletown Township v. Lands of Stone*, the Pennsylvania Supreme Court emphasized the subjective intent standard, concluding that courts must look for “the real or fundamental purpose behind a taking . . . the true purpose must primarily benefit the public.”¹³⁷ A very recent decision by the same court reiterated this standard, but also noted that the crucial factor in determining purpose is that “the public must be the primary and paramount beneficiary of the taking.”¹³⁸

¹³⁶ See Kelly, *supra* note 8, at 184–99. Kelly finds fault with the three tests, and proposes an alternative approach of his own fourth criteria. *Id.* at 215–20.

¹³⁷ *Middletown Twp. v. Lands of Stone*, 939 A.2d 331, 337 (Pa. 2007).

¹³⁸ *In re O'Reilly*, 5 A.3d 246, 258 (Pa. 2010).

Similarly, the Hawaii Supreme Court's decision in *County of Hawai'i v. C&J Coupe Family Ltd. Partnership* states that *Kelo* and relevant Hawaii state constitutional law require courts to look for "the actual purpose" of a taking to determine whether the official rationale was a "mere pretext."¹³⁹ A very recent follow-up decision in the same litigation reiterated the purpose-based approach, but also ruled that "the burden of proof" in establishing pretext falls on the property owner and the court refused to adopt a per se rule forbidding as pretextual condemnations where the power of eminent domain is delegated to a private organization.¹⁴⁰ Although it ultimately concluded that the challenged taking was not pretextual at all, the court did engage in detailed scrutiny of the condemning authorities' purpose and planning.¹⁴¹ The Hawaii and Pennsylvania courts differ somewhat in so far as the former does not share Pennsylvania's emphasis on using the distribution of benefits from the taking as an indication of intent. In a recent dictum, the Connecticut Supreme Court has also suggested that focus on motive may be appropriate under *Kelo*, noting that the case does not authorize "bad faith" takings.¹⁴²

Intent was also the focus of several pre-*Kelo* federal cases that invalidated takings on pretext grounds, including the *99 Cents* case favorably cited the *Kelo* Court itself.¹⁴³ Subjective motive was also emphasized by the Appellate Division in the *Kaur* case,

¹³⁹ *Cnty. of Hawai'i v. C&J Coupe Family Ltd. P'ship*, 198 P.3d 615, 642 (Haw. 2008).

¹⁴⁰ *Cnty. Of Hawai'i v. C&J Coupe Family Ltd. P'ship*, 242 P.3d 1136, 1148 (Haw. 2010).

¹⁴¹ *Id.* at 1148–58.

¹⁴² *See New England Estates v. Town of Branford*, 988 A.2d 229, 253 n.28 (Conn. 2010) (ruling that *Kelo* does not authorize "bad faith" takings).

¹⁴³ *See Armendariz v. Penman*, 75 F.3d 1311, 1321 (9th Cir. 1996) (en banc) (invalidating a taking because the official rationale of blight alleviation was a mere pretext for "[a] scheme . . . to deprive the plaintiffs of their property . . . so a shopping-center developer could buy [it] at a lower price."); *Aaron v. Target Corp.*, 269 F. Supp. 2d 1162, 1174–75 (E.D. Mo. 2003), *rev'd on other grounds*, 357 F.3d 768 (8th Cir. 2004) (holding that a property owner was likely to prevail on a claim that a taking ostensibly to alleviate blight was actually intended to serve the interests of the Target Corporation); *99 Cents Only Stores*, 237 F. Supp. 2d 1123, 1129 (holding that "[n]o judicial deference is required . . . where the ostensible public use is demonstrably pretextual" and that the condemnation must be invalidated because "Lancaster's condemnation efforts rest on nothing more than the desire to achieve the naked transfer of property from one private party to another."); *Cottonwood Christian Ctr. v. Cypress Redev. Agency*, 218 F. Supp. 2d 1203, 1229 (C.D. Cal. 2002) ("Courts must look beyond the government's purported public use to determine whether that is the genuine reason or if it is merely pretext.").

which held that condemnations benefiting Columbia University were pretextual under *Kelo* in large part because of evidence that the condemning authority had deliberately rigged a blight study in Columbia's favor.¹⁴⁴ Strangely, the New York Court of Appeals failed to consider the Appellate Division's application of *Kelo* when it overruled the lower court and upheld the taking.¹⁴⁵

B. The Magnitude of Expected Public Benefits

By contrast, the Court of Appeals of the District of Columbia emphasized the magnitude of the public benefits of the taking relative to the private ones that “[i]f the property is being transferred to another private party, and the benefits to the public are only ‘incidental’ or ‘pretextual,’ a ‘pretext’ defense may well succeed.”¹⁴⁶ The court remanded a takings case to the trial court, and instructed lower courts to “focus primarily on [the] benefits the public hopes to realize from the proposed taking.”¹⁴⁷ This approach mirrors an element of Justice Anthony Kennedy's concurring opinion in *Kelo* itself, where Kennedy suggested that a taking might be invalidated if it has “only incidental or pretextual public benefits.”¹⁴⁸ In *MHC Financing Ltd. Partnership v. City of San Rafael*, the federal district for the Northern District of California interpreted *Kelo* as requiring “‘careful and extensive inquiry into whether, in fact, the development plan is of primary benefit to the developer . . . [and] only incidental benefit to the City.’”¹⁴⁹ This language is taken from Justice Kennedy's description of the trial court's efforts in *Kelo* itself. But Kennedy

¹⁴⁴ See *Kaur v. New York State Urban Dev. Corp.*, 892 N.Y.S. 2d 8, 18, 20 (App. Div. 2009), *rev'd*, 933 N.E.2d 721 (N.Y. 2010), *cert. denied*, 2010 WL 3712673, at *1 (U.S. Dec. 13, 2010) (No. 10-402); see also *supra* discussion in Part II.C.2.

¹⁴⁵ See generally, *Kaur*, 933 N.E.2d at 721 (The New York State Court of Appeals never cites to *Kelo*).

¹⁴⁶ *Franco v. Nat'l Capital Revitalization Corp.*, 930 A.2d 160, 173–74 (D.C. 2007). This court is the highest court of the District of Columbia and is the equivalent of a state supreme court. It should not be confused with the federal D.C. Circuit Court of Appeals.

¹⁴⁷ *Id.* at 173.

¹⁴⁸ *Kelo v. City of New London*, 545 U.S. 469, 490 (2005) (Kennedy, J., concurring).

¹⁴⁹ No. C00-3785VRW, 2006 WL 3507937, at *14 (N.D. Cal. Dec. 5, 2006) (alterations in original) (quoting *Kelo*, 545 U.S. at 491 (Kennedy, J., concurring)).

did not make clear whether such a “careful and extensive inquiry” is actually required. Moreover, the District Court may have erred in relying on Kennedy’s opinion rather than that of the majority, since Kennedy also signed on to the latter, thereby ensuring that it had five votes.¹⁵⁰

C. The Planning Process

The Maryland, Pennsylvania, and Rhode Island courts have also relied on the absence of extensive planning as an indication of a pretextual taking.¹⁵¹ This builds on *Kelo*’s emphasis on the presence of an “integrated development plan” in New London.¹⁵²

D. Whether the Identity of the Beneficiary of the Taking was Known in Advance

Only one post-*Kelo* pretext decision seems to have turned on the fact that the identity of the new private owner was not known in advance by condemning authorities. In *Carole Media LLC v. New Jersey Transit Corp.*, the United States Court of Appeals for the Third Circuit upheld a taking of a firm’s license to post advertisements on public billboards owned by the New Jersey Transit Corporation.¹⁵³ The New Jersey state legislature adopted

¹⁵⁰ The nonbinding nature of Kennedy’s opinion was recognized by the *Franco* court:

We apply the decision of the *Kelo* majority, written by Justice Stevens. Although Justice Kennedy’s concurrence discusses at some length a court’s role when presented with allegations of a pretextual public purpose, that discussion is not the holding of the court. Five justices, including Justice Kennedy, . . . agreed with Justice Stevens’ reasoning, and that opinion is the Court’s holding.

Franco, 930 A.2d at 169 n.8.

¹⁵¹ See *Mayor of Baltimore v. Valsamaki*, 916 A.2d 324, 352–53 (Md. 2007) (noting absence of a clear plan for the use of the condemned property, and contrasting with *Kelo*); *Middletown Twp. v. Lands of Stone*, 939 A.2d 331, 338 (Pa. 2007) (concluding that “evidence of a well-developed plan of proper scope is significant proof that an authorized purpose truly motivates a taking.”); *R.I. Econ. Dev. Corp. v. The Parking Co.*, 892 A.2d 87, 104 (R.I. 2006) (emphasizing that “[t]he City of New London’s exhaustive preparatory efforts that preceded the takings in *Kelo*, stand in stark contrast to [the condemning authority’s] approach in the case before us.”).

¹⁵² Nicole Stelle Garnett, *Planning as Public Use?*, 34 *ECOLOGY L.Q.* 443, 454 (2007) (arguing that planning is the main focus of *Kelo*’s pretext analysis, and suggesting that under *Kelo*, the presence of planning “almost always precludes a finding of pretext”).

¹⁵³ 550 F.3d 302, 311 (3d Cir. 2008).

a policy under which the billboard licenses would be allocated by a competitive bidding process.¹⁵⁴ Although there was some evidence that the new policy was adopted in part because it was likely to favor the interests of a rival firm, All Vision,¹⁵⁵ the court upheld the condemnations largely because “there is no allegation that NJ Transit, at the time it terminated Carole Media's existing licenses, knew the identity of the successful bidder for the long-term licenses at those locations.”¹⁵⁶ As a result of this ignorance, the court ruled that “this case cannot be the textbook private taking involving a naked transfer of property from private party A to B solely for B's private use.”¹⁵⁷

This analysis sidestepped the problem that a taking can be intended to benefit a known private party even if the benefit to that party comes in a form other than receiving ownership of the condemned property. In this case, the benefit to All Vision was that it would receive extensive management fees for organizing the bidding process and managing the billboards until the rights to them were sold to new bidders.¹⁵⁸ This problem highlights an important shortcoming of focusing solely on the benefits to the new private owner in determining whether a taking is pretextual. Other narrow private interests might also benefit and play a decisive role in pushing through the condemnations. This is apparently what happened in the *Kelo* case itself, where the taking occurred in large part because of lobbying by the Pfizer Corporation, a firm that expected to benefit from the condemnation even though it was not expected to actually become the owner of the condemned property.¹⁵⁹

In all of the federal and state post-*Kelo* pretext cases discussed so far except for *Carole Media*, the court either invalidated a taking as pretextual or remanded the case for detailed inquiry into that possibility by the trial court. This suggests an effort to give the pretext standard some real bite. Overall, most courts applying *Kelo* have left open at least some nontrivial possibility

¹⁵⁴ *Id.* at 305–306.

¹⁵⁵ *Id.* at 310–11.

¹⁵⁶ *Id.* at 311.

¹⁵⁷ *Id.*

¹⁵⁸ *Id.* at 310–11.

¹⁵⁹ See Somin, *Grasping Hand*, *supra* note 18, at 237–38.

that a taking could be invalidated as pretextual. The major exceptions to this pattern are two decisions by the United States Court of Appeals for the Second Circuit, and the New York Court of Appeals blight decisions already discussed above.

E. Extreme Deference in the Second Circuit

In two of its decisions, the Second Circuit has taken an extremely deferential approach to pretext issues, falling just short of defining the pretext cause of action out of existence. In *Goldstein v. Pataki*, the Second Circuit considered a challenge to the same Atlantic Yards takings that were later upheld in state court by the New York Court of Appeals.¹⁶⁰ Despite the considerable evidence that the taking was intended to benefit developer Bruce Ratner, who had initiated the project and lobbied for its adoption by the government, the Second Circuit refused to consider either evidence of improper motive or evidence concerning the distribution of benefits from the condemnation.¹⁶¹ So long as a taking is “rationally related to a classic public use,” the court ruled that it is impermissible to “give close scrutiny to the mechanics of a taking . . . as a means to gauge the purity of the motives of various government officials who approved it.”¹⁶² The Second Circuit also rejected claims that the takings should be invalidated because most of the benefits would flow to Ratner or because any benefits to the community might be “dwarf[ed]” by the project’s costs.¹⁶³ Similarly, the court rejected the idea that any significant scrutiny was required because they “acknowledged [the] fact that Ratner was the impetus behind the project, *i.e.*, that he, not a state agency, first conceived of developing Atlantic Yards . . . and that it was his plan for the Project that the [Empire State Development Corporation] eventually adopted without significant modification.”¹⁶⁴ In *Kelo*, both the majority opinion and Justice Kennedy’s concurrence suggested that the fact that the identity of the new private owner was not known in advance reduced the likelihood that the taking was not for a true public purpose.¹⁶⁵

¹⁶⁰ 516 F.3d 50 (2d Cir. 2008); *See supra* Parts II.C.2 for a discussion of the state decision.

¹⁶¹ *Id.* at 55, 62.

¹⁶² *Id.* at 62.

¹⁶³ *Id.* at 58.

¹⁶⁴ *Id.* at 55–56.

¹⁶⁵ *See Kelo v. City of New London*, 545 U.S. 469, 478 n.6 (2005) (noting that

The court did note that their decision “preserve[es] the possibility that a fact pattern may one day arise in which the circumstances of the approval process so greatly undermine the basic legitimacy of the outcome reached that a closer *objective* scrutiny of the justification being offered is required.”¹⁶⁶ But it is difficult to see what those circumstances might be if neither subjective intent, nor the distribution of the projects costs and benefits, nor the presence of an identifiable private beneficiary who played a key role in initiating the taking are enough to trigger such “objective scrutiny.” One possible answer is that heightened scrutiny might be required by the absence of a sufficiently rigorous planning process. But the Second Circuit casts doubt on that option by suggesting that inquiry into “the mechanics of a taking rationally related to a classic public use” is inappropriate.¹⁶⁷

Even more deferential to the government than *Goldstein v. Pataki* was the Second Circuit’s 2006 decision in *Didden v. Village of Port Chester*,¹⁶⁸ decided two years before *Goldstein*. In 1999 the village of Port Chester, New York, established a “redevelopment area,” giving designated developer Gregg Wasser a virtual blank check to condemn property within it.¹⁶⁹ When local property owners Bart Didden and Dominick Bologna sought a permit to build a CVS pharmacy in the area, Wasser demanded “that they must either pay him \$800,000 or give him a 50-percent” partnership interest in the store, threatening to have their land condemned if they refused.¹⁷⁰ They, indeed, refused and a day later the village condemned their property.

In an opinion joined and possibly written by future Supreme Court Justice Sonia Sotomayor,¹⁷¹ the Second Circuit panel

it is “difficult to accuse the government of having taken *A*’s property to benefit the private interests of *B* when the identity of *B* was unknown”); *Id.* at 491–93 (Kennedy, J. concurring).

¹⁶⁶ *Goldstein*, 516 F.3d at 63.

¹⁶⁷ *Id.* The court makes clear that its definition of “classic public use” is extremely broad by noting that private-to-private blight takings and “the creation of affordable housing” qualify. *Id.* at 58.

¹⁶⁸ 173 F. App’x 931 (2d Cir. 2006).

¹⁶⁹ *Id.* at 932.

¹⁷⁰ See *Somin Senate Testimony*, *supra* note 17, at 530, 1338–40. See also *Didden*, 173 F. App’x at 932.

¹⁷¹ *Didden*, 173 F. App’x at 932. The opinion is unsigned and unpublished. But then-Judge Sotomayor was the senior judge on the panel, and the senior

upheld this taking, holding:

[T]o the extent that [the property owners] assert that the *Takings Clause* prevents the State from condemning their property for a private use within a redevelopment district, regardless of whether they have been provided with just compensation, the recent Supreme Court decision in *Kelo v. City of New London*, obliges us to conclude that they have articulated no basis upon which relief can be granted.¹⁷²

The opinion does not even consider the possibility that a pretextual taking might have occurred, despite the fact that the taking likely would not have happened at all but for Didden and Bologna's refusal to give in to Wasser's financial demands. It is difficult to find a more blatant example of pretextual intent.

Even if the relevant standard is the public benefit of the taking rather than subjective intent, *Didden* is still an extremely dubious ruling. There was no plausible public benefit in this case because Wasser's plan for the condemned land was to build a Walgreens pharmacy—virtually identical to Didden and Bologna's plan to build a CVS pharmacy.¹⁷³

The other two factors identified by Professor Kelly also cut against the government. The taking only occurred due to the property owners' rejection of Wasser's financial demands. It is difficult to argue that it was the result of any "comprehensive" or systematic planning process. And an identifiable private beneficiary was clearly present before the decision to use eminent domain was taken; indeed, he instigated that decision.

In sum, all four conceivably relevant factors militated in favor of a ruling that a pretextual taking had occurred. Yet, the court completely dismissed that possibility in a short, cursory opinion. To be sure, Wasser contested some of Didden and Bologna's account of the facts.¹⁷⁴ But "[t]he Second Circuit was reviewing the district court's ruling on the Village's motion to have the plaintiffs' case dismissed before going to a jury on the ground that they had no possible legal basis for their suit under the Federal Rule of Civil Procedure 12(b)(6)."¹⁷⁵ When considering such "a motion to dismiss, the facts in the complaint are presumed to be

judge usually drafts such orders.

¹⁷² *Id.* at 933 (citations omitted).

¹⁷³ *Didden v. Vill. of Port Chester*, 304 F. Supp. 2d 548, 553, 556 (S.D.N.Y. 2004). This district court ruling addressed a different issue arising from the same transaction.

¹⁷⁴ *Somin Senate Testimony*, *supra* note 17, at 1337.

¹⁷⁵ *Id.* at 1338.

true, and all reasonable inferences are drawn in the plaintiff's favor."¹⁷⁶ Thus, the panel concluded that Didden and Bologna had no case even if their account of the facts was true.¹⁷⁷ If the panel had believed that the outcome of the case depended on the resolution of disputed factual issues, they should have remanded the case to the district court for a jury trial.

In addition to ruling on the pretext issue, the panel also concluded that Didden and Bologna's claims were time-barred. But they nonetheless explicitly indicated that the plaintiffs' suit should be dismissed "even if Appellants' claims were not time-barred" on the grounds that they were precluded by *Kelo*.¹⁷⁸ Moreover, the court's statute of limitations ruling itself was based on the implicit assumption that there is no such thing as a distinct cause of action for a pretextual taking. The Second Circuit ruled that the property owners "were required to challenge the condemnation of their [land] within three years after its inclusion in a redevelopment area in July 1999."¹⁷⁹ Their property, however, was not condemned at that time and Wasser did not make his extortionate threats until November 2003.¹⁸⁰ Until that point, it was impossible to file a pretextual taking claim for the simple reason that no pretextual taking had occurred or even been threatened.¹⁸¹ The court thereby assumed that one cannot challenge a pretextual taking other than by arguing that the government's officially stated public use was somehow impermissible. This approach, of course, defeats the whole point of a pretext claim, which is based on the assumption that a taking for an otherwise legitimate public use might be unconstitutional if the asserted use is actually a mere pretext.

In the post-*Kelo* jurisprudence on pretextual takings, *Didden* is an extreme outlier because it seems to define the possibility of a pretextual taking out of existence. It ruled that a pretextual taking did not occur despite the fact that almost every relevant fact cuts the other way. In addition, its statute of limitations

¹⁷⁶ E.E.O.C. v. Staten Island Sav. Bank, 207 F.3d 144, 148 (2d Cir. 2000).

¹⁷⁷ See *Somin Senate Testimony*, *supra* note 17, at 1338. It is worth noting that Wasser's version of events does not weaken the case for concluding that a pretextual taking occurred and in some ways strengthens it.

¹⁷⁸ *Didden*, 173 F. App'x at 933.

¹⁷⁹ *Somin Senate Testimony*, *supra* note 17, at 1340.

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

ruling seems to deny that there is any difference between challenging a taking as pretextual and claiming that the government's officially stated public use was impermissible on its face.

Because it was an unpublished opinion, *Didden* has no precedential value. Second Circuit rules forbid citation of unpublished summary orders filed before 2007.¹⁸² It is nonetheless noteworthy as the most extreme post-*Kelo* example of judicial endorsement of a seemingly pretextual taking. It is also notable as a possible window into the thinking of Justice Sotomayor, who now has more influence over constitutional property rights jurisprudence since her appointment to the Supreme Court.

In the *Goldstein* and *Kaur* cases discussed above,¹⁸³ the New York Court of Appeals treated pretext claims much the same way as the Second Circuit did in *Goldstein* and *Didden*. In both cases, the court ignored strong evidence that all four pretext factors cut against the government. Both featured considerable evidence of improper intent, a distribution of benefits strongly favoring the new private owner of the condemned area, a private beneficiary whose identity was known in advance, and a planning process that was often perfunctory and biased in favor of a preconceived decision in favor of condemnation.¹⁸⁴

In *Goldstein*, the majority probably ignored *Kelo*'s pretext standard and the lower court cases interpreting it¹⁸⁵—because the property owners' federal constitutional claims had already been rejected in federal court in *Goldstein v. Pataki*.¹⁸⁶ Nonetheless, the property owners explicitly argued that the blight alleviation rationale for the takings was pretextual under New York's state constitution,¹⁸⁷ and the Court of Appeals might have done well to consider the relevance of recent pretext precedents from other jurisdictions.

¹⁸² 2d Cir. R. 32.1.1(b)(2), available at http://www.ca2.uscourts.gov/clerk/Rules/LR/Local_Rule_32_1_1.htm.

¹⁸³ See *supra* Section II.C.2.

¹⁸⁴ See *id.* (discussing the acknowledged fact that Bruce Ratner and his firm were the known beneficiaries and initiators of the Atlantic Yards condemnation plan).

¹⁸⁵ For further discussion on these cases, see *supra* Part II.C.2.

¹⁸⁶ See *id.*

¹⁸⁷ Brief for Petitioners at 13–15, *Goldstein v. N.Y. State Urban Dev. Corp.*, 921 N.E.2d 164 (N.Y. 2009) (No. 2009-0178).

Much less defensibly, the Court of Appeals also completely ignored *Kelo* and related pretext cases in *Kaur*, despite the fact that the lower court decision striking down the Columbia takings relied heavily on *Kelo*'s pretext analysis.¹⁸⁸ Unlike in *Goldstein*, no federal court had already decided the property owners' Fifth Amendment pretext claims, and the property owners continued to press those arguments in the Court of Appeals. Thus, it is difficult to understand why the *Kaur* court failed to even cite *Kelo*, much less discuss the relevant federal precedents interpreting pretextual takings.

F. The Future of Pretextual Takings Claims

As should be evident from the above survey, there is no consensus among either state or federal judges on the criteria for determining what counts as a pretextual takings claim after *Kelo*. Some decisions emphasize the subjective intentions of condemning authorities, some focus on the magnitude of the expected public benefits of a taking, some on the extent of the planning process, and some on a combination of factors. Each of these approaches to pretextual takings has potential flaws. Focusing on the projected benefits seems to conflict with *Kelo*'s insistence that courts must not "second-guess" the government's weighing of the costs and benefits of a project.¹⁸⁹ Requiring the government to prove that the claimed benefits will actually materialize could undercut *Kelo* even further. If courts instead focus only on projected benefits without considering the likelihood of achieving them, then officials can justify pretextual takings simply by presenting exaggerated claims of public benefit that they know they will not be required to live up to.¹⁹⁰

Inquiry into subjective intentions runs into the well-known difficulties of ascertaining individual motivations.¹⁹¹ In *Kelo*

¹⁸⁸ *Kaur v. N.Y. State Urban Dev. Corp.*, 892 N.Y.S.2d 8, 10–16 (App. Div., 2009), *rev'd*, 933 N.E.2d 721 (N.Y. 2010), *cert. denied*, 2010 WL 3712673, at *1 (U.S. Dec. 13, 2010) (No. 10-402).

¹⁸⁹ *Kelo v. City of New London*, 545 U.S. 469, 488–89 (2005).

¹⁹⁰ See Somin, *Grasping Hand*, *supra* note 18, at 194–95; Kelly, *supra* note 8, at 188–89.

¹⁹¹ See, e.g., *Franco v. Nat'l Capital Revitalization Corp.*, 930 A.2d 160, 173 (D.C. 2007) (noting that "there are formidable barriers to discovering the motives and intentions of individual legislators").

itself, both state and federal courts overlooked strong evidence indicating that the taking had been instigated by the Pfizer Corporation, despite several years of litigation and extensive press coverage.¹⁹² Moreover, it is difficult to decide what to do when the governments' motives are "mixed," as they usually are. In practice, public officials can usually persuade themselves that any taking that advances their political interests and helps an influential constituent that benefits from a taking also advances the public interest.¹⁹³

Finally, relying on a detailed planning process to prevent pretextual takings ignores the possibility that politically influential private interests can "capture" the planning process and bend it to its own purposes. A more extensive planning process is not necessarily less prone to favoritism than one that is less elaborate.¹⁹⁴

For these reasons, even a relatively robust effort to enforce *Kelo's* pretext doctrine by state and lower federal courts is likely to result in only modest protection for property owners. So far, however, most courts that have addressed the matter have at least attempted to enforce a pretext constraint on takings that is not completely deferential to the government. Their efforts to do so have utilized a variety of contradictory approaches to defining pretext. It seems unlikely that any consensus will emerge in this area any time soon, unless the Supreme Court decides to review a case that settles the dispute.

CONCLUSION

In the aftermath of *Kelo*, several important state court decisions have considered whether *Kelo's* deferential approach to public use will also be the rule under their state constitutions. With the notable exception of the New York Court of Appeals, the courts have generally given property owners greater protection than would be allowed under *Kelo*.

Both state and federal courts have tried to interpret the meaning of *Kelo's* statement that pretextual takings are still forbidden by the Constitution. No clear consensus on the

¹⁹² See Somin, *Grasping Hand*, *supra* note 18, at 236–38.

¹⁹³ See *id.* at 236–37; see also Kelly, *supra* note 8, at 198 (discussing the difficulties involved in mixed motive cases).

¹⁹⁴ Somin, *Grasping Hand*, *supra* note 18, at 233–36; Kelly, *supra* note 8, at 191–92.

meaning of pretext has emerged. The next wave of *Kelo*-related litigation is likely to focus on interpretation of the many state eminent domain reform laws and constitutional amendments enacted in the wake of *Kelo*.¹⁹⁵ So far, there have been only a few notable decisions of this kind,¹⁹⁶ probably because most of the reform laws were only recently enacted, and the current economic downturn may have slowed the pace of development projects. In the meantime, both state and federal courts will continue to explore the limits of *Kelo* and the concept of public use.

¹⁹⁵ For a survey, see Somin, *supra* note 3, at 2114–19.

¹⁹⁶ See, e.g., *Centene Plaza Redev. Corp. v. Mint Props.*, 225 S.W.3d 431, 433 (Mo. 2007) (interpreting Missouri's post-*Kelo* reform law's definition of "blighted area"); *New Orleans Redev. Auth. v. Johnson*, 16 So.3d 569, 584 (La. Ct. App. 2009) (holding that Louisiana's reform law allows the condemnation of "blighted property" for transfer to private parties, in an area that had been devastated by Hurricane Katrina).